



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

PETITION NO. E167 OF 2021

(Before Hon. Justice Ocharo Kebira)

SHERIA MTAANI NA

SHADRACK WAMBUIPETITIONER

VERSUS

PUBLIC SERVICE COMMISSION & 2 OTHERS.....RESPONDENT

JUDGMENT

1. This is a petition challenging the constitutionality of the process of employment, and employment of,350 persons by the 1st Respondent to fill in vacant positions in the office of Accountant II within the National Treasury and Planning. The petition was filed by the **Sheria Mtaani Na Shadrack Wambui**, a Non-governmental Organization, that has described its goal and mission as that of assisting the members of the public in accessing procedural and substantive justice through advocacy and/or protection of individual or collective rights of persons living in Kenya and the promotion of constitutionalism, the rule of law and values and principles of good governance (the Petitioner), against the **Public Service Commission**, the **Cabinet Secretary, National Treasury and Planning** and the **Attorney General**, as the 1st, 2nd and 3rd Respondents respectively.

2. The petition is supported by a supporting affidavit sworn by Dorcas Mwae, a director of the Petitioner sworn on the 27th October 2021, and her further affidavit sworn on the 7th November 2021 filed herein pursuant to leave of this Court.

3. The petition dated 27th October 2021, seeks for;

(a) A declaration that the surreptitious employment of the 350 persons from the advertised 250 vacant positions by the 1st Respondent as communicated to the 2nd Respondent vide a letter dated the 23rd September 2021 is unlawful, illegal and unconstitutional for violating Articles 10, 27, 47 and 232 of the Constitution.

(b) A declaration be and is hereby made that the 1st and/or 2nd Respondent's employment or recommendation for employment by the 2nd Respondent vide a letter dated 23rd September 2021 of the 100 persons/accountants in excess of the 250 vacant positions that were advertised in the grade of accountant II without a subsequent advertisement of an additional 100 vacancies is illegal, unlawful and unconstitutional for violating Article 10, 27, 47 and 232 of the Constitution as read together with section 37 of the Public Service Commission Act.

(c) A declaration be and is hereby made that the 1st Respondent's employment or recommendation for employment dated 23rd September 2021 of 350 accountants out of the 250 advertised positions on permanent and pensionable terms as opposed to the three-year contractual period violates Article 232 to the extent that the sudden and surreptitious change of terms amounts to a misrepresentation of information and unaccountable use of administrative power.

(d) A judicial review order of **certiorari** does issue for purpose of quashing the Respondent's and or the 1st Respondent's decision to employ the 350 accountants out of the 250 advertised positions in the grade of accountant II as communicated to the 2nd Respondent vide a letter dated the 23rd September 2020 or any other communication to that effect for being illegal, unlawful and unconstitutional and offending article 10, 27, 47 and 232 of the constitution as read together with section 37 of the Public Service Commission Act.

(e) A judicial review order of **mandamus** does issue against the 1st Respondent compelling it to conduct a thorough recruitment process that include the shortlisting and interviews of successful candidates in order to ensure that the process leading to the employment of 250 accountants is fairly competitive and is based on merit as required under 232 (1) (g) of the Constitution.

(f) Any other relief that the Court will be pleased to grant in the circumstances.

(g) Costs of the petition.

4. The Respondents opposed the petition. Why, and how obtains in the replying affidavits sworn on the 4th November, 2021 by the CEO/secretary (Simon K. Rotich), of the 1st Respondent, and that sworn on the 10th November 2021, by Amos N. Gathecha, Principal Administrative Secretary of the National Treasury.

The Petitioner's case

5. The Petitioner stated that on or about the 23rd February 2021, the 1st Respondent through an advertisement posted on its official website www.publicservice.go.ke, invited the general public to *inter alia* apply and fill the vacancies for the two hundred and fifty (250) posts in the National Treasury and Planning, in the office of Accountant II.

6. According to the Petitioner, the nature of the contract of service for those who were to be successful for the employment was expressly brought forth in the advertisement, a fixed term contract of employment for a period of 3 years.

7. The Petitioner stated that through a letter dated 23rd September 2021, the 1st Respondent's secretary/CEO, DR. Simon Rotich, CBS surreptitiously wrote to the (2nd Respondent), Cabinet Secretary of the National Treasury and Planning communicating a recommendation for appointment of three hundred fifty (350) persons in the grade of Accountant II in the National Treasury on probationary terms of service with effect from the date they assume duties but not later than the 23rd September 2021.

8. The Petitioner asserted that the 1st Respondent's secretive recommendation in the letter of 23rd September 2021 to the (2nd Respondent) National Treasury was not preceded by interviews on suitable persons or a publication of the names of the shortlisted candidates suitable for consideration through a nationwide notice vide a newspaper, radio or any popular mode of communication as is required under law for transparency and accountability of the process.

9. The Petitioner claimed that the 1st Respondent unlawfully recommended 350 persons for employment by the National Treasury and Planning (2nd Respondent) contrary to its advertisement to the general public that mislead, hoodwinked and or duped the public that only 250 positions in the grade of Accountant II were vacant and available for filling.

10. That in an unlawful and unprecedented fashion the 1st Respondent changed the terms of employment of the 350 persons that were recommended for employment to the 2nd Respondent from the three years contract period to permanent and pensionable. This in a manner that is opaque and that leaves an impression that it was premeditated in order to trick the members of the public during the advertisement.

11. It was further alleged that the 1st Respondent conducted the recruitment, under a skewed process that lacked accountability, and that was in violation the national values and principles of governance and those of Public Service as provided under article 10 and 232 of the Constitution.

12. The Petitioner states that the employment of the 100 extra individuals was very likely led to a financial strain on the tax payers and, possible wastage of public resources that were never within the contemplation of the 1st Respondent.

13. The Petitioner took a position that the 1st Respondent's recommendation of 23rd September 2021, resulted to the employment of an additional hundred people without, an advertisement of the existence of such vacancies, interviews or shortlisting of the hundred individuals in total disregard of the employment policies, the statutes under which the Respondents operate.

14. The Petitioner contends that the employment of the 350 is likely to cause loss of unknown colossal amounts of public money in payment of salaries and allowances yet the process of leading to their employment was unconstitutional as it lacked transparency and accountability, and was conducted secretly. That it is necessary therefore that this Court quashes the impugned recommendation of their appointment as communicated by the 1st Respondent's letter dated the 23rd September 2021.

15. The Petitioner contends that the petition is made in the public interest, and for purposes of insulating the Constitution, and the statutes that command open and transparent recruitment processes for the Public Service from violation, to ensure that Kenyans get an equal opportunity for employment within Public Service and that qualified and competent individuals are appointed to join the Public Service.

16. The Petitioner stated that the 1st Respondent's impugned decision, communicated to the 2nd Respondent vide the letter dated 23rd September 2021, in absence of a thorough and prior recruitment process by way of shortlisting of successful candidates and interviews violated the national principles of governance under article 10 and the values and principles of Public Service under article 232 of the Constitution, to wit, accountability for administrative acts, transparency and provision to the public of timely and accurate information, fair competition and merit as the basis of appointment and promotions.

17. The Petitioner further contended that the 1st Respondent's recommendation for employment of a hundred persons in excess of the 250 positions that were advertised was unlawful and illegal for being in violation of the statutory requirement under section 37 (1) of the Public Service Commission Act. The provision requires that where a vacancy in a public service is to be filled, the Commission or authorized officer shall invite applications by advertising the vacancy in the Commission's website, at least in one daily newspaper of national wide coverage, radio and other methods of communication.

18. That the 1st Respondent violated article 47 of the Constitution for it made an arbitrary recommendation of appointment of 350 individuals by the 2nd Respondent, denying other Kenyans/applicants the opportunity to be employed.

19. It was further contended that the 1st Respondent violated the provisions of article 27 of the Constitution, by discriminating against other Kenyans through favoritism for the 350 [three Hundred and fifty] without any lawful justification.

The 1st Respondent's case

20. It was the 1st Respondent's case that it received a letter dated 13th August 2020 from the National Treasury and Planning, seeking for approval to fill vacancies of 250 posts of Account II (CSG II/Job Group J).

21. That subsequently, the 1st Respondent held a meeting on the 3rd February 2021, and after deliberations a minute approving the advertisement for the 250 (Two Hundred and Fifty) vacant posts was passed.

22. The 1st Respondent further stated that on the 23rd February 2021, it proceeded to advertise the vacancies, inviting members of the public to apply for filling of the same.

23. Following the advertisement, the 1st Respondent received applications from members of the public and subsequently conducted interviews through a fair process.

24. The Respondent asserted that a list of shortlisted candidates was published indicating the names of those who were considered for interviews.

25. While in the recruitment process, it received a letter from the 2nd Respondent dated 13th September 2021, requesting for an increase in the recruitment of Accountants II by an additional one hundred (100) from the list of the interviewed candidates. It deliberated on the request and eventually granted the approval.

26. The 1st Respondent contends that it made the appointments in exercise of its constitutional mandate under article 234 (2) (a) which bestows upon it the authority to appoint persons to, hold or, act in the, office within the Public Service.

27. The recruitment of the additional 100 candidates was at the request of the Cabinet Secretary of National Treasury and Planning, in accord with the provisions of section 33 of the Public Service Commission Act.

28. The decision to employ the accountants on a permanent and pensionable basis as opposed to for a fixed term as was advertised, was informed by a circular ref. PSC/ADM/13(18) dated 3rd August 2021 in which the 1st Respondent reviewed its earlier circular which had directed that appointments at that entry level were to be done on contract terms. In effecting the new circular, it was directed that employees appointed at certificate diploma and graduate levels from May 2019 were to have their terms of service converted to permanent and pensionable.

29. That it is upon basis of this premise that the 350 (Three Hundred and Fifty) were appointed on permanent and pensionable terms and not on fixed term contracts as was advertised.

30. The Respondent asserted that contrary to what the Petitioner contends, it duly complied with the provisions of section 37 of the Public Service Commission Act by advertising the vacancy, thus inviting applications from members of the public.

31. According to the 1st Respondent, the recruitment process was open, fair and competitive and thus constitutional and lawful.

The 2nd Respondent's case

32. The 2nd Respondent contends that the petition herein seeks to quash recruitment of 350 Accountants who are not parties to this petition or at all.

33. The 2nd Respondent asserts that he is in charge of the overall administration and management of the Ministry and also responsible for the implementation of policies falling under the Ministry.

34. It is stated that, it wrote a letter dated 13th August 2020 to the Public Commission seeking for approval to fill the vacancies of 250 posts of Accountant II (CSG II/Job Group D). The request was approved.

35. Subsequently, through its letter dated 2nd March, 2021 the 1st Respondent confirmed to the National Treasury that it had advertised for the vacant posts in MyGov Publication of 22nd February, 2021, the Daily Nation Newspaper of 24th February, 2021 and on the Commission's website and the advertisement, was to close on 15th March, 2021.

36. The 2nd Respondent stated that at the request of the 1st Respondent (the Commission), the National Treasury appointed seven (7) officers to assist it in the final selection. This through a letter dated 21st June, 2021.

37. The 1st Respondent shortlisted a total of 1307 candidates out of the total number of 27, 245 applicants and conducted interviews from 24th June, 2021 to 8th July, 2021.

38. The 2nd Respondent stated that through a letter dated 13th September 2021 addressed to the 1st respondent, it made a request for an increase in the recruitment of Accountant II (CSG II) by an additional 100 from the list of applicants that had been interviewed. This was occasioned by the fact that when analysis of the vacant posts at the grade of Accountant II was carried out following the promotion of some Accountants II to Senior Accountant under the succession management program, it was established that 481 vacancies were available.

39. That through its letter dated 23rd September 2021, provided the 2nd Respondent with a list of the 350 successful candidates who were to fill the declared vacancies.

40. The 2nd respondent states that following a letter dated 25th October 2021, by the 1st respondent, the authorized officer of the National Treasury, took action to deploy the officers to duty stations where their services were urgently needed. The officers reported and are discharging their duties.

41. The Respondent contends that the rights of the 350 Accountants under the Constitution would be breached if they were to be dismissed from employment without affording them the opportunity to be heard.

42. Like the 1st Respondent, the 2nd Respondent asserted that in making the appointments, the Commission did, so pursuant to its constitutional mandate under article 234 (2) (a) and section 33 of the Public Service Commission Act. The decision to recruit the Accountants on permanent and pensionable terms was informed by the Commission's circular ref. PSC/ADM/13/(18) dated 3rd August 2021.

43. It was contended that the recruitment of the additional 100 candidates was at the request of the Cabinet Secretary of National Treasury and Planning, and was done duly in line with section 33 of the Public Commission Act.

44. The 2nd Respondent takes a position that the applicant has not demonstrated with precision how its fundamental rights and freedoms under the Constitution have been violated or are threatened to be, and has not put forth any evidence to prove the alleged violation contrary to the principle espoused to in the decision of **Mumo Matema vs Trusted Society of Human Rights Alliance [2013] eKLR** and **Annarita Karimi Njeru [1979] KLR 154**.

45. The 2nd Respondent tied up its case by asserting that this Court does not have jurisdiction to entertain the present petition since the Petitioner's contract of employment with the Respondent does not have statutory underpinning as to render a breach thereof actionable by way of a constitutional petition other than by way of an ordinary suit.

Analysis and Determination

46. At the onset it is imperative to state that from the material placed before me, it can be discerned that a couple of crucial matters relating to the controversy herein are not in contestation namely;

(a) *That on the 23rd February 2021, the 1st Respondent advertised 250 vacancies for Accountant II (CSG II) in the National Treasury and Planning, inviting members of the public to apply and fill the same.*

(b) *That following the advertisement and invitation to apply, thousands of Kenyans applied and shortlisting of applicants was subsequently done.*

(c) *That the advertisement did put forth terms of employment for the position, inter alia that the employment was to be a fixed term contract, for 3 years renewable subject to satisfactory performance of the employees.*

(d) *That later on the 13th September 2021 the 2nd Respondent wrote to the 1st Respondent requesting for an increase in the recruitment of Accountant II (CSG II) by an additional 100.*

(e) *That the 1st Respondent approved the request, consequently a total of 350 Accountants II were recruited for National Treasury and Planning.*

47. From the petition, the Respondent's replying affidavits, the further affidavit by the Petitioner and the respective submissions by the parties herein, I distil the following issues as the issues for determination by this Court:

(i) *Whether this Court is seized with the jurisdiction to entertain the petition in its present nature.*

(ii) *Whether the 350 (Three Hundred and Fifty) Accountants ought to have been enjoined in this petition and if so what is the implication of the failure on the part of the Petitioner to enjoin them.*

(iii) *Whether the recruitment of the 350 Accountants was pursuant to a process that was unconstitutional and unlawful.*

(iv) *What reliefs can this Court grant in the circumstances of this petition.*

(v) Who should bear the costs of this petition?

Whether this Court is seized with jurisdiction to entertain and determine this petition.

48. The 2nd Respondent asserted and his counsel has submitted that this Court does not have the requisite jurisdiction to entertain the Petitioner's petition, owing to the manner it has approached Court. Whenever an issue of jurisdiction is raised, the Court before whom the subject matter is, has to first render itself on the issue, for if it finds that it does not have jurisdiction to deal with the matter, it must there and there lay down its tools and proceed no more to other parts of the matter. In the case of **Prof. Daniel W. Mugendi vs Kenyatta University and 3 others [2013] eKLR** the Court of Appeal stated;

“..... However, it is basic principle in the administration of justice that once an adjudicating body finds that it has no jurisdiction to entertain a given matter, this it must there and there down its tools and proceed no more to the other parts of that matter. See the case of Rafiki Enterprises Limited vs Kings Way Tyres and Gatumart Limited Nairobi Civil Application No. 375 of 1996 [UR] wherein this Court held inter alia that: - “Every Court has a duty to determine whether or not it has jurisdiction in a particular matter”

49. It is upon this premise that this Court must get straight into determining whether it has jurisdiction on account of what the 2nd Respondent has raised. The long and short of the Respondent's objection is that the Petitioner ought to have approached Court by way of an ordinary suit and not a constitutional petition.

50. Counsel for the Respondents submit that the 350 Accountants were not recruited to hold constitutional office as to render their recruitment thereof actionable by way of a constitutional petition rather than an ordinary suit.

51. In his submission in support of the Respondents' position on the issue of jurisdiction, Counsel has cited a number of decisions *inter alia*, **Ministry of Health and another vs New Clicks SA PTY) Limited & others 2006 [L] JA 311 (CC)** where Nglobo, J. stated at paragraphs 437;

“Whereas here, the Constitution required Parliament to enact legislation to give effect to constitutional rights guaranteed under the Constitution and Parliament enacts such legislation, it will ordinarily be impermissible for a litigant to found a cause of action directly on the Constitution without alleging that the statute in question is deficient in the remedies that it provides. Legislation enacted by Parliament to give effect to a constitutional right out not to be ignored. And where a litigant founds a cause of action on such legislation it is equally impermissible for a court to bypass the legislation and to decide the matter on the basis of the constitutional provision that is being given effect to by the legislation in question.”

52. Counsel submitted that in the case of **Communications Commission of Kenya & others vs Royal Media Services Limited & 5 others [2014] eKLR**, the Supreme Court of Kenya considered the question whether where a legislation has provided a remedy and prescribed a clear procedure for address of particular grievance, a litigant can invoke the provisions of the Constitution for address of such a grievance.

53. The Court stated;

“The Appellants in this case are seeking to invoke “the principle of avoidance” also known as “Constitutional avoidance.” The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis.”

54. He further placed reliance on the holding of the Court of appeal in **Sumayya Athmani Hassan vs Paul Masinde Simidi & another [2019] eKLR**, thus;

“The article 41 rights are enacted in the Employment Act and the Labour Relations Act. The two Acts and the Rules made thereunder provide adequate remedy and orderly enforcement mechanisms. The 1st 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 principle has reinforced by the Supreme Court in Communications Commission case [supra].

In conclusion, we find that the alleged unlawful interdiction and termination of a contract of employment 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 determining the petition. The finding disposes of the entire appeal including the cross-appeal filed by the 2nd Respondents.”

55. Conscious of the fact that the Employment and Labour Relations Court is clothed with jurisdiction to hear and determine constitutional issues as and when they arise from employment and labour relations, I must state that as to whether the principle of constitutional avoidance

is applicable in a matter, a contextual approach should be engaged. The circumstances of the matter as they emerge in the pleadings of the parties in the matter, the reliefs sought and the provisions of the law that the Petitioner places reliance on, thus should be considered.

56. The Petitioner herein is a party who has brought this petition on the standing accorded by Article 258 of the Constitution. He is not alleging that he is an employee in the Public Service. Article 258 of the Constitution provides:

“1. Every person has the right to institute Court proceedings, claiming that this Constitution has been contravened, or is threatened with violation.”

57. This provision exists in appreciation of the fact that in a constitutional democracy like ours, the courts are the ultimate guardians of the constitution.

58. The crux of the Petitioner’s petition is that the 1st and 2nd Respondents in the process of recruiting the 350 Accountants did violate various provisions of the Constitution. In the circumstances of the matter, I am prepared to hold that such an issue can only be agitated through a constitutional petition and not an ordinary suit.

59. In **International Centre for Insect Physiology and Ecology (ICPE) vs Nancy Minaly [2018] eKLR** the Court of Appeal held;

“27. There cannot be any argument that the ELRC clothed with jurisdiction to hear and determine such constitutional issues as and when they arise from employment and labour relations. Any doubts on that jurisdiction were settled in the case of United States International University (USIU) vs Attorney General [2012] eKLR which was upheld by this Court in Daniel N. Mugendi vs Kenyatta University & 3 others. We are not in doubt too, that the relationship between the Appellant and the Respondent was not a private matter between two parties but a public activity intrinsically connected to the operations of the Appellant. With respect, the contention to the contrary by Ms Kilonzo has no substance.”

60. With respect, it is not difficult to conclude, that the authorities cited by counsel for the Respondents are distinguishable, and that jurisdictional issue raised by the Respondent has been so raised as a result of a narrow look at the Petitioner’s petition. I decline to find that this Court is not seized with the jurisdiction to entertain the petition.

61. Closely related to this issue of jurisdiction, the Respondent contend that the petition herein does not meet the threshold that has been set in obtaining jurisprudence, regarding petitions alleging violation of the Constitution and or violation of constitutional rights. Counsel for the Respondent argued that a petition should define the dispute to be decided and plead with particularity and reasonable precision on the provisions breached and the nature or manner of the breach alleged or complained of. Counsel placed reliance on the cases of **Mumo Matemo vs Trusted Society of Human Rights**, and **Anarita Karimi** to buttress this submission.

62. In my view the legal position as it is, does not require mathematical or scientific precision. Looking at the petition and the supporting affidavit one is able to see the constitutional provisions that the Petitioner alleges were violated, and an explanation on how it thinks they were, without being forced into the realm of speculation or making inferences. The Petitioner’s petition is in order in terms of content and structure therefore.

63. In the case of **Trusted Society of Human Rights Allicance vs Attorney General and 2 others [2012] eKLR** the Court opined;

“45 We point out that Anarita Karimi Njeri was decided under the old Constitution. The decision in the case now must be reconciled and be brought into consonance with the new Constitution. In our view, the present petition with regard to admissibility of petitions seeking to enforce the Constitution must begin with the provisions of article 159 on the exercise of Judicial authority. Among other things, this article stipulates that;

(a) Justice shall be administered without undue regard to procedural technicalities; and

(e) The purpose and principles of this Constitution shall be protected and promoted.

46. We do not purport to overrule Anarita Karimi Njeri as we think it lays down an important rule of constitutional adjudication; a person claiming constitutional infringement must give sufficient notice of the violation and allow the adversary to adequately prepare her case and to save the Court from embarrassment of adjudicating on issues that are not appropriately phrased as justiciable controversies. However, we are of the opinion that the proper test under the new Constitution is whether a petition as stated raises issues which are so insubstantial and so attenuated that a court of law properly directing itself of the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violations alleged. The test does not demand mathematical precision in drawing constitutional petitions. Neither does it demand talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against the Respondents in a constitutional petition are fashioned in a way that gives notice to the Respondents about the nature of the claims being made so that they can adequately prepare their case.”

(iii) Whether the appointment of the 350 Accountants was a product of an unconstitutional and unlawful process.

64. In order to adequately render itself on this issue this Court shall segment the impugned employment process into two, namely the process leading to the employment of the 250 (two Hundred and fifty Accountants, and that to the additional 100 (one Hundred), and seek to answer the following questions:

(a) Was the appointment of the 250 Accountants lawfully and procedurally done?

(b) Was the appointment of the additional 100 Accountants lawfully and procedurally done?

(c) If the answer to (b) above is in the negative, how does it affect the appointment of the 250 if theirs was lawfully and procedurally done?

65. I fashion the determination of this issue in this manner because from the material placed before this Court one garners the impression that the 100 additional Accountants were picked after interviews, and eventual decision to recruit the 250 (two Hundred and Fifty).

66. Section 37 (1) of the Public Service Commission Act provides:

“Where a vacancy in a public office is to be filled, the Commission or authorized officer shall invite the applications by advertising the vacancy in the Commission’s website. At least one daily newspaper of nationwide coverage, the radio and other modes of communication, so as to reach as wide a population of potential applicants as possible.”

67. The Responds were clear, that in conformity with the provisions of the law, the 1st Respondent placed an advertisement in the **MyGov Publication of 22nd February, 2021, the Daily Nation Newspaper of 24th February, 2021, and the Commission’s Website**. The petitioner did not challenge this, notwithstanding that it had a chance to, through the further affidavit that it filed. This leaves on with an inescapable conclusion that the Respondents’ contention as regards the advertisement was true. The Respondents were too specific as to when, and how the advertisements were done.

68. Considering the number of the applicants that the Respondents asserted were, reasonably one can find no difficulty in stating that the objective for which section 37[1] was crafted and exists was attained, the advertisement reached a wide population of potential applicants.

69. Counsel for the petitioner submitted that the 1st Respondent had a legal obligation to shortlist candidates and publish to the public the names of the shortlisted through a newspaper with a countrywide coverage and or its website. That this with a view of promoting transparency and accountability. He cited section 37[1] of the Public Service Commission Act to buttress this submission.

70. A careful consideration of the entire of section 37 reveals that the same is only intended to cause the Commission to advertise vacancies, providing how, [subsection 1], what shouldn’t happen [subsection 2], the manner [subsection 3] and the contents of the advertisement [subsection 4]. The provision does not have anything to do with the post- advertisement processes like selection. If the legislature intended the provision to apply to the post-advertisement events like shortlisting, nothing could have been easier than it expressly providing so.

71. This Court is therefore not persuaded by counsel’s submission that the provision obligated the 1st Respondent to publish in a newspaper the names of the shortlisted candidates.

72. It was submitted that the 1st Respondent neither shortlisted the candidates nor conducted interviews. Further that the whole recruitment process was a sham and or was surreptitiously conducted. That the list exhibited by the Respondents should not be trusted for it is not clear when the shortlisting was done and published.

73. In an adversarial system as is ours, parties set their agenda in pleadings. It is through their pleadings that one gives notice to the adversary of his or her case. The adversary must get a clear impression of the case he or she is to meet, to enable him or her prepare his or hers. A party cannot therefore be allowed to raise and place reliance on a matter that has not been clearly pleaded. A court cannot found any favourable verdict on the matter, as it will equate condemning the adversary unheard. The adversary can successfully allege unfairness.

74. Having said this, let me state that from the petition, one cannot clearly discern whether the allegation of non-shortlisting, and non-interviews, was one targeted against, the 100 [one hundred], the 250 [two hundred and fifty] or the whole lot of 350 [three hundred and fifty] who were employed. The court cannot therefore make any favourable finding on the petitioner’s allegation.

75. In the upshot, I am unable to find for the petitioner that the employment of the 250 [two hundred and fifty] accountants and the process leading thereto suffered from destituteness in being constitutional and lawful. To add, I am unable to see how the constitutional provisions under the Articles of the Constitution cited by the petitioner were violated in their recruitment.

76. The petitioner argued that the appointment of the additional 100 [one hundred] accountants was not preceded by an advertisement of the vacancies in respect thereof. This contrary to what is contemplated in the Service Commission Act. Its Counsel submitted that the forestated provision was aimed to ensure transparency and a merit-based approach in recruitment of public officers.

77. He further submitted that the one hundred vacancies fell vacant after the advertisement of the 23rd February 2021, and therefore an independent advertisement therefore was necessary. He summed up this submission by stating that since there was non-compliance with a procedure provided by law, the process of recruitment of the 100 [One Hundred] and their recruitment was therefore tainted and ought to be vitiated.

78. To buttress this submission, Counsel placed reliance on the decision in ***Githu Muigai & Another vs Law Society of Kenya & Another [2015]eKLR*** where the Court held;

“In our view, where a statute donates powers to an authority, the authority ought to ensure that the powers that it exercises are

within the four corners of the statute and ought not to extend its powers outside the statute.....’

79. And the holding in the case of *Resley v City Council of Nairobi [2006] EA*, thus:

“In this case there is an apparent disregard of statutory provisions which are of a fundamental nature. The parliament has conferred powers on the public authorities in Kenya and has clearly laid a frame work on how those powers are to be exercised and where the frame work is clear, there is an obligation on the public authority to strictly comply with it to render its decision valid..... The purpose of the court is to ensure that the decision-making process is done fairly and justly to all parties and breaches of statutory provisions cannot be termed as mere technicalities by the Respondent.”

80. The Respondents on the other hand argued that the request by the 2nd Respondent for the approval of the appointment of the 100 [one Hundred] accountants and subsequent approval by the 1st Respondent was in accord with the latter’s statutory authority under Section 33 of the Public Service Commission Act.

81. They further contended that the 100 [One Hundred] were picked from the pool of those who applied, got selected and interviewed for the positions that had been advertised in February 2021.

82. The Petitioner did not place any material before Court from which it can be discerned that the 100 were not picked from the pool herein above mentioned, and that the request by the 2nd Respondent and the approval of the same by the 1st Respondent was done with an aim of assisting some specific individuals to be employed. The Respondents’ position was not therefore rebutted or in any manner shaken.

83. Section 33 of the Service Commission Act provides;

“1. The Commission shall have such powers as may be necessary in the discharge of its functions under Article 234[2][a][ii] of the Constitution.

2. The Commission’s authority under subsection 1 shall be exercised at the request of the authorized officer of the public body to which the appointments need to be made.”

84. The provision and more specifically subsection 1 gives the 1st Respondent unconstrained power, to engage processes, to be innovative and to operate in a manner that will best aid it to fully discharge its constitutional mandate. Reasonably looking at it and giving this matter a wholistic approach, one will not find it difficult to conclude that on the decision not to advertise the 100 [one Hundred] slots and therefore have another fresh recruitment process, but pick appointees from the pool of those that had been interviewed was in accord with the values and principles of public service as espoused under Article 232 of the Constitution and more specifically 232[1][b] and [c] which provide for efficient, effective and economic use of resources, and responsive, prompt, impartial and equitable provision of services.

85. I see the petitioner not arguing that if there were to be a fresh advertisement there were going to be more that the 27,000 Kenyans who were applicants for the position of accountant II, as applicants for the 100 [One Hundred] vacancies. It does not contend that there is a Kenyan who would have applied, but was not able to, because the advertisement was not done.

86. The petitioner contended that the employment of the additional accountants may lead to wastage of a colossal amount of Money that was not budgeted for. With respect this is a bald assertion which apparently flows from speculation. It is not supported by any material. I have not lost sight the fact that the Respondents’ position was that the recruitment of the one Hundred was as a result of a needs consideration. A position that the petitioner has not controverted therefore.

87. In the Circumstances of the matter, I am not convinced that an advertisement for the filling of the additional accounts II, therefore a fresh, selection, interviewing, and recruitment process, was necessary. Consequently, I conclude that the provision of section 37[1] of the Public Service Act were not affronted.

88. Looking at the supporting affidavit, the further affidavit, and the submissions by the petitioner, I again conclude that it has not demonstrated in any specific manner and to the requisite standards that there was violation o of the Constitutional provisions that it alleged to have been.

Whether the Recruitment of the 100 accountants could vitiate that of the 250.

89. The tone of the Petition was to the effect that since the Respondents decided to treat the recruitment of the additional accountants as a process not independent from the one for the 250, then the irregularities that attended the recruitment of the former would go into vitiating the entire recruitment for the entire 350 appointees. I have no doubt that a court of law can buy into the thinking. It will be improper and unfair.

90. With proper pleadings, [which weren’t here], where the 100 [One Hundred] would have been clearly segregated therein, and upon the Court finding that their recruitment was infested with fundamental irregularities serious enough to vitiate the process, the Court would get into the process of separating the grains from the chaff, the tainted from the untainted, and vitiate the recruitment of the beneficiaries of the tainted process, not the entire.

Whether it was necessary that the 350 accountants be enjoined as parties in this matter.

91. The Respondents asserted that the recruited accountants were subsequently deployed and that they are now working in various stations within the Republic. They are therefore in service currently. Allowing the petition would entail causing a termination of their employment. The effect on them would be monumentally prejudicial. In proceedings that would have such an effect on a person, it would not be proper for them to be proceeded with and concluded, without involving that person[s].

92. In Conclusion, I find the petition lacking in merit and it is hereby dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI

THIS 22ND DAY OF DECEMBER, 2021.

OCHARO KEBIRA

JUDGE

DELIVERED IN PRESENCE OF;

MR. WAMBUI SHADRACK FOR THE PETITIONER.

MR. ODUKENYA FOR THE RESPONDENT.