



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

PETITION NO. 5 OF 2013

**TRUSTED SOCIETY OF HUMAN RIGHTS
ALLIANCE.....PETITIONER**

-VERSUS-

**NAKURU WATER AND SANITATION SERVICES COMPANY.....1ST
RESPONDENT**

ATTORNEY GENERAL.....2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 8th November, 2013)

JUDGMENT

The petitioner is the Trusted Society of Human Rights Alliance. It is a duly registered human rights society and it describes itself as operating within Kenya with the primary mandate of protection of human rights which is closely intertwined with democracy, rule of law and constitutionalism. The petitioner filed the petition on 23.10.2013 through Gordon Ogola, Kipkoech & Company Advocates and prayed for:

- a. **A declaration that the process of shortlisting, interviewing, recruiting and appointment of persons to the positions of GIS officer, Human Resource Manager, Senior Credit Controller and Internal Auditor was opaque, clandestine, riddled with nepotism, tribalism and contrary to Article 10 and 73 of the Constitution of Kenya hence unconstitutional and consequently null and void.**
- b. **A declaration that the actions of the managing director of the respondent contravened Article 10 and 73 of the Constitution of Kenya, and the Public Officers Act of 2003 hence unfit to hold any public office.**
- c. **A declaration that the respondents are escapists and have abdicated their duty to respect and uphold the constitution of Kenya in their administrative actions.**
- d. **The petitioners be paid costs of the petition.**

The petition was supported with the affidavit of Elijah Sikona, the chairman of the petitioner, sworn on 22.10.2013 and the exhibits attached on the affidavit.

The respondents are **Nakuru Water and Sanitation Services Company** and the **Attorney General**. The 2nd respondent did not file opposing documents and did not make any submissions. The 1st respondent appointed Githui & Company Advocates to represent it and filed the replying affidavit of John Cheruiyot, the respondent's managing director, to oppose the petition.

The case was certified urgent and by consent of the parties, was heard on 5.11.2013.

The 1st respondent made public advertisements in the print media inviting applicants for vacancies in its establishment for the offices of GIS analyst, internal audit manager, senior credit control officer and human resource and administration officer. By the letter dated 3.10.2013, the advocates for the petitioner wrote to the 1st respondent a letter addressed to its managing director as follows:

“RE: OPAQUE & SECTARIAN RECRUITMENT

We act for Trusted Society Alliance of Human Rights Alliance whose terse instructions are to write to you tersely as follows:

THAT on the 21st June, 2013; 19th July , 2013; and 5th June, 2013 you advertised for positions of Senior Credit Control Officer; Human Resource and Administration; Internal Audit Manager and GIS Analyst respectively.

THAT apart from the advertisement, the whole process has been shrouded in secrecy, tribalism, nepotism and horse trading at the expense of transparency, accountability, nationalism, meritocracy and public participation.

Our instructions therefore are to demand for the following:

- i. List of all the applicants for each of the four positions and their qualifications.**
- ii. List of applicants who were shortlisted.**
- iii. Mode of notification of the applicants and those who have been shortlisted.**

TAKE NOTICE that our request is based on article 35 of the Constitution and unless you comply with the same within 48 hours of this letter, we shall have no option but to move the court for appropriate reliefs at your own peril as to costs and appurtenant litigation conflagration not to mention the curse of costs.

Yours faithfully,

GORDON OGOLA & ASSOCIATES

SIGNED

Kipkoech b. Ng’etich

Advocate”

The respondent’s managing director replied the above letter by his letter dated 8.10.2013 stating that the recruitment was carried out above board and in accordance with the company’s policy on employment.

The petitioner’s case is that the recruitment process was shrouded in secrecy, nepotism and horse trading and contravened the 1st respondent’s Human Resource Policy and Procedures Manual revised in June, 2012 and prescribing a rigorous, open and competitive recruitment process and not a surreptitious process like the one undertaken by the respondent in the present case. The petitioner’s further case was that, **“...the advertisements were conspicuous and bewitching so that many Kenyans with good qualifications applied but the respondent did not list the applicants as part of a wider scheme to dish out the positions to earmarked and favoured individuals....”**

The petitioner stated that the 1st respondent being a public company whose shares are wholly owned by the defunct Municipal Council of Nakuru and currently the County Government of Nakuru, it was bound by Chapter 6 of the Constitution on leadership and integrity and it was not open for the respondent to hand pick employees.

The 1st respondent's case is that no applicant in the recruitment process has raised a grievance about the recruitment process. The list of the applicants has been filed in court and it is clear that a preliminary review of the applicants was carried out and those candidates found qualified were shortlisted for the interviews. The persons who were found to meet the criteria were allegedly highlighted in yellow on the list filed in court. The successful candidates were invited for an interview before the relevant panel. After interviews, the candidates were ranked in the order of merit and a final report prepared and signed by the interview panel. The 1st respondent's further case was that the successful candidates were recruited and their letters of appointment dispatched. That accordingly, the 1st respondent's case is that the recruitment process was transparent, above board and not laced with nepotism, horse trading and secrecy as urged for the petitioner. The 1st respondent's further case was that as at the hearing of the petition, the 1st respondent has already hired the successful candidates, the court cannot nullify a process which has already been completed, the allegations of irregular hiring have not been established, the petitioner lacks *locus standi* and is not complaining on behalf of any person.

The petitioner's and the 1st respondent's written submissions were both filed on 05.11.2013. The court has considered the pleadings, the affidavits and exhibits thereto, and the written and oral submissions. The following are the issues and questions for determination:

1. **Whether the petitioner is a person in law with necessary legal capacity to initiate and continue the legal proceedings.**
2. **Whether the petitioner has necessary standing or *locus standi* to initiate and prosecute the petition.**
3. **Whether the court has the jurisdiction to hear and determine the petition.**
4. **What is the law governing recruitment by the 1st respondent?**
5. **Whether the recruitment in the present petition complied with the applicable law.**
6. **Whether the petitioner is entitled to the remedies as prayed for.**

Issue No. 1: Whether the petitioner is a person in law with necessary legal capacity to initiate and continue the legal proceedings

For the 1st respondent, it was submitted that the petitioner is a loose entity, a non-existent person in law registered as a society and therefore, not an artificial person in law. Accordingly, it was submitted that the petition should fail on that account. For the petitioner, it was submitted that the petitioner being an unincorporated person, it was a person in law under Article 260 of the Constitution which defines the word person to include unincorporated associations.

Article 260 of the Constitution states that “**person**” includes a company, association or other body of persons whether incorporated or unincorporated. An association or unincorporated organization is a body which does not enjoy a separate legal entity or personality from the persons who compose it. As such, it was the traditional practice that legal proceedings by or against an unincorporated association was initiated by or against the officials of the association. The court has considered the definition of person in the Constitution and finds that the Constitution recognizes and defines unincorporated associations as persons. Thus, the court holds that the petitioner as an unincorporated person was entitled to file and to prosecute the petition in its name as an association in view of the constitutional definition of person. In any event, the court considers that the chairperson of the petitioner executed the supporting affidavit and there is no doubt that there are genuine natural persons that constitute the petitioner.

Issue No. 2: Whether the petitioner has necessary standing or *locus standi* to initiate and prosecute the petition

During the oral submissions, it was submitted for the respondent that the respondent only objected to the personality of the petitioner to file the petition and not the standing to do so. Standing or *locus standi* as it is known answers the question whether the party before the court is the correct or right party to bring the legal proceedings in issue.

For the petitioner, it was submitted that the petitioner derived its standing from Articles 3, 22, and 258 of the Constitution. To support the petitioner's case, the court was referred to the holding in **Mumo Matemu –Versus- Trusted Society of Human Rights Alliance & 5 others [2013]eKLR**, where the Court of Appeal stated, thus **“Today, by dint of Articles 22 and 258 of the Constitution, any person can institute proceedings under the Bill of Rights, on behalf of another person who cannot act in their own name, or as a member of, or in the interest of a group or class of persons, or in public interest.”**

The petitioner also referred the court to the judgment in **Pricilla Nyokabi Kanyua –Versus- Attorney General and Another [2010] eKLR**, where it was held that accessibility to justice is fundamental to rendering the Constitution legitimate and in that sense, a broad approach to *locus standi* is required to fulfill the Constitutional Court's mandate to uphold the Constitution.

Under Article 22(1), it was submitted that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened. Further, Article 22 (2) (a) and (c) provide that other than a person acting in own right under Article 22(1), court proceedings could be instituted by a person acting as a member of , or in the interest of, a group or class of persons; or a person acting in public interest. It was further submitted that under Article 258 (1), every person has the right to institute court proceedings claiming that the constitution has been contravened or is threatened with contravention. Further, Article 258 (2) (b) and (c) provide that other than a person acting in own right under Article 258(1), court proceedings could be instituted by a person acting as a member of , or in the interest of, a group or class of persons; or a person acting in public interest. The petitioner further submitted that it had *locus standi* because under Article 3(2) of the Constitution, every person has an obligation to respect, uphold and defend the Constitution.

To support standing under Article 22, the petitioner entitled the petition in the matter of the constitutionally protected rights being Articles 47 on fair administrative action, 41 on labour relations, and 48 on access to justice. The court has perused the body of the petition and the supporting affidavit and finds that the petitioner has not established or even pleaded any material facts or stated evidence that suggest that the 1st respondent has violated or threatened to violate fundamental rights as cited in the petition's title. Accordingly, the court finds that the petitioner has failed to establish standing on account of actual or threatened violation of human rights under Article 22 of the Constitution.

The court has considered the petitioner's claim for standing on account of Articles 3(2) and 258 of the Constitution. The court has taken into account the petition and the supporting affidavit. The petitioner's case is that the 1st respondent has acted in contravention of Articles 10 on national values and principles of governance and Article 73 on responsibilities of leadership. In view of that pleading, the court finds that the petitioner has a valid claim that the constitution has been contravened or is threatened with contravention and accordingly, the court finds that the petitioner has *locus standi* under Article 258 as read with Article 3 of the Constitution.

In making the finding, the court holds that the Constitution establishes distinct and yet overlapping basis for standing. Under Article 22, standing is provided for in proceedings for enforcement of the Bill of Rights and under Article 258 for general enforcement of the Constitution. The court holds that standing under Article 258 subsumes, the standing founded under Article 22 and the standing under the latter accrues only where the goal is enforcement of the Bill of Rights. The court further holds that proceedings under Article 258 are liberal in the sense that the Article permits proceedings commenced and continued irrespective of the form be it petition, ordinary action or any other proceeding. On the other hand, the court's opinion is that Article 22 proceedings are largely governed by the rules made by the Chief Justice under Article 22 (3) of the Constitution. Thus, Article 258 liberally opens the avenues to urge protection of any of the constitutional provisions in any legal proceeding. All the litigant needs to do in Article 258 proceedings is to establish a valid claim that the constitution has been contravened or is threatened with contravention.

Who then is a proper person that can institute court proceedings under Article 258 claiming that the Constitution has been contravened or is threatened with contravention? The Article provides as follows:

“Enforcement of this Constitution

258. (1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by:-

- a. a person acting on behalf of another person who cannot act in their own name;**
- b. a person acting as a member of, or in the interest of, a group or class of persons;**
- c. a person acting in the public interest; or**
- d. an association acting in the interest of one or more of its members.”**

The court has considered the wording of the Article and is of considered opinion that under Sub-Article 258(1) any person can initiate the proceedings to enforce or protect the Constitution provided that the person establishes that he or she is acting in own interest. In such proceedings, the person initiating must show what has traditionally been called **“sufficient interest”** which acts as the sieve to determine the proper party. The person initiating the proceedings must establish actual or threatened injury revolving upon the person’s legal right or interest. Thus, in the opinion of the court, under Sub-Article 258 (1), **“every person”** means a person who can establish **“sufficient interest”**.

On the other hand, a person who cannot establish **“sufficient”** interest can initiate the proceedings to protect or enforce the Constitution under provisions of Sub-Article 258(2). Such a person without sufficient interest will establish standing only and only if the person establishes any of the prescribed conditions namely:

- a. that the person is acting on behalf of another person who cannot act in their own name (such as the traditional incapacities of insanity, age of minority or disabling statutory prescriptions as may for example be suffered by those belaboring under bankruptcy or insolvency);
- b. a person acting as a member of, or in the interest of, a group or class of persons(for example as it happens in the traditional representative suits);
- c. a person acting in public interest (in which event, in the opinion of the court, the person initiating the proceedings must establish the public interest, meaning, in the opinion of the court, that thing in which the general public has stakes as is protected by constitutional provision, executive policy, legislative provision, judicial determination or such other legitimate regulation like international law); or
- d. an association acting in the interest of one or more of its members.

It is the opinion of the court that the foregoing analysis of Article 258 applies to Article 22 of the Constitution which is worded in exactly similar language save that, as already found, Article 22 proceedings would strictly and exclusively relate to enforcement of the Bill of Rights.

Thus, the court holds that Articles 22 and 258 of the Constitution codify the traditional standing rules based on sufficient interest while at the same time expanding and liberalizing standing rules by conferring standing upon those without sufficient interest within an objective sieving system. The provisions do not therefore demolish all the walls of navigating access to courts and which sieving regime, in the opinion of the court, is a necessary safe-guard to fortify due process of the court that insulates proper parties to proceedings and removes persons who invariably would be improper parties in court proceedings. In the opinion of the court, the sieving regime enhances access to the courts and therefore justice by prescribing a simple objective criteria or standard for measuring presence or absence of standing.

In the present case, the petitioner has established that the 1st respondent is a public body whose recruitment and other employment decisions are regulated by constitutional provisions and therefore, the

recruitment by the respondent is a matter of public interest. It is that public interest in the constitutionally regulated recruitment and employment by the 1st respondent that, in the opinion of the court, confers standing upon the respondent.

Thus, to answer the 2nd issue for determination, the court finds that the petitioner had *locus standi* under Article 258(2) (c) of the Constitution to initiate the present proceedings by filing the petition and prosecuting the proceedings.

Issue No. 3: Whether the court has the jurisdiction to hear and determine the petition

The 1st respondent submitted that there was no employee-employer relationship between the petitioner and the 1st respondent. In absence of such relationship, the court could not exercise jurisdiction and could not therefore hear and determine the petition as it lacked jurisdiction under section 12 of the Industrial Court Act, 2011. In absence of jurisdiction, it was submitted that any determination by the court in the matter would be emptiness, a nullity. The court was referred to the holding in **The Owners of Motor Vessel “Lillian S” –Versus- Caltex Oil Kenya Limited (1989) KLR1**, where *Nyarangi JA* stated, thus **“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 for 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 that it is without jurisdiction.”**

For the claimant, it was submitted that the subject matter of the petition was recruitment which is an element of employment and labour relations. Accordingly, the court had jurisdiction under Article 162 and 165 (3) (d) to hear and determine the case.

Jurisdiction is the authority to decide a case or a dispute in issue. It is founded outside the court or the decision maker but maps out the court’s or decision maker’s internal boundaries. Thus, jurisdiction is given by the Constitution or by statute or the legitimate authority empowered to impose or define jurisdiction. The court upholds the holding in **The Owners of Motor Vessel “Lillian S” –Versus- Caltex Oil Kenya Limited (1989) KLR1** that without jurisdiction, all is void; a nullity. However, in the opinion of this court, one exception exists to that glorified and singular truth. It is the opinion of the court that every court or decision maker has jurisdiction to determine whether it has jurisdiction in any particular case. Thus, in the opinion of the court, the only valid decision that can be made by the court or other decision maker without jurisdiction to determine the substantive dispute in issue is that the court or decision maker lacks the jurisdiction. In that sense, jurisdiction is more times than not a preliminary issue for determination by the court or other decision makers.

However, the issue of jurisdiction like in the instant case may not be obvious and may only be resolved after significant consideration of the issues in dispute. In such instances, the court holds that the issue of jurisdiction ceases to be a preliminary point and it becomes a substantive issue for determination alongside the other substantive issues in dispute. Thus, whether jurisdiction is a substantive or preliminary issue will depend upon whether the circumstances leading to jurisdictional dispute are largely obvious or largely intricate.

The court further holds that in mapping out the boundaries to determine jurisdiction, the court must consider the four crucial traditional elements of jurisdiction namely parties, territory or geographical area, remedies that may issue and subject matter in dispute. The court holds that the authority to decide will relate to the parties, the territory or geographical area of the dispute, the remedies that may issue and the subject matter involved. Depending on the authority to decide as may be conferred, all the four parameters may be pertinent or one or two of them may apply. In the opinion of the court, unless any of the four results into a bar to jurisdiction in the given case or circumstance, presence of any of the four as permitting jurisdiction will be sufficient for the court to assume jurisdiction and proceed to entertain and determine the case at hand.

In the present case, there is no dispute on territorial or the geographical jurisdiction. It is given that constitutionally, this court exercises territorial jurisdiction throughout the Republic of Kenya. The court

finds that on that parameter, the court has jurisdiction in the instant petition.

The second consideration is litigant or party jurisdiction. It has been submitted that the petitioner and the respondent are not in employee-employer relationship and therefore the court lacks jurisdiction under section 12 of the Industrial Court Act, 2011. The section provides as follows:

“12. (1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including—

(a) disputes relating to or arising out of employment between an employer and an employee;

(b) disputes between an employer and a trade union;

(c) disputes between an employers’ organisation and a trade unions organisation;

(d) disputes between trade unions;

(e) disputes between employer organizations;

(f) disputes between an employers’ organisation and a trade union;

(g) disputes between a trade union and a member thereof;

(h) disputes between an employer’s organisation or a federation and a member thereof;

(i) disputes concerning the registration and election of trade union officials; and

(j)disputes relating to the registration and enforcement of collective agreements.

(2) An application, claim or complaint may be lodged with the Court by or against an employee, an employer, a trade union, an employer’s organisation, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose.

(3) In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders—

(i) interim preservation orders including injunctions in cases of urgency;

(ii) a prohibitory order;

(iii) an order for specific performance;

(iv) a declaratory order;

(v) an award of compensation in any circumstances contemplated under this Act or any written law;

(vi) an award of damages in any circumstances contemplated under this Act or any written law;

(vii) an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law; or

(viii) any other appropriate relief as the Court may deem fit to grant.

(4) In proceedings under this Act, the Court may, subject to the rules, make such orders as to costs as the Court considers just.”

The court has considered the provision and finds that under the section, parties to the proceedings before the court are not limited to those in an employee-employer relationship. In particular, under section 12(2) of the Act, any person can bring before the court a case against an employer, employee, a trade union, an employer’s organisation, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law. The court finds that the court has jurisdiction under section 12(2) because the petitioner not being in an employer-employee relationship with the respondent, the respondent has been moved against in its capacity as an employer.

As relates to jurisdiction by subject matter, Article 162(2) (a) of the Constitution and section 12(1) of the Act are elaborate that jurisdiction attaches to this court with respect to disputes relating to employment and labour relations. In the instant case, the dispute is about a recruitment process undertaken by the respondent. The court finds that recruitment is a proper element of employment and therefore the court has jurisdiction in view of that subject matter.

As for jurisdiction based on remedy, the court finds that the petitioner has substantially prayed for declarations which are remedies the court is authorized to make under section 12(3) (iv) of the Act. Thus, the court has jurisdiction on that account.

Further, on jurisdiction by subject matter, the court holds that it is vested with constitutional jurisdiction to protect the Constitution under Article 258 and to enforce the Bill of Rights in disputes relating to employment and labour relations pursuant to provisions of Article 22(3) as read with Article 23 and 165(3) (b) of the Constitution. Thus, Rule 2 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and procedure Rules, 2013 “**High Court**” means the High Court of Kenya established by Article 165 of the Constitution and includes courts with the status of a High Court established under Article 162(2) of the Constitution. Thus, the court upholds its opinion in **Grace Gacheri Muriithi –Versus- Kenya Literature Bureau [2012]eKLR, Industrial Court Cause No. 44 of 2011 at Nairobi**, where it was stated thus, “**Further, sub-Article 165 (5) (b) of the Constitution provides that the High court shall not have jurisdiction in respect of the matters falling within the jurisdiction of the Industrial Court. Thus, in view of the High Court status of the Industrial Court and in view of the provisions of Sub-Article 165 (5) (b) of the Constitution and Subsections 12 (1) and (2) of the Act, the Industrial Court is also vested with the jurisdiction as follows:**

- a) **Unlimited original jurisdiction in disputes relating to employment and labour relations.**
- b) **Jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights provided for in the Constitution of Kenya, 2010, as far as employment and labour relations is concerned, has been denied, violated, infringed or threatened.**
- c) **Jurisdiction to hear appeals from decisions of tribunals of competent jurisdiction in disputes relating to employment and labour relations.**
- d) **Jurisdiction to hear and determine any question respecting the interpretation of the Constitution in employment and labour relations including the determination of:**
 - (i) **the question whether any law is inconsistent with, or is in contravention of the Constitution;**
 - (ii) **the question whether anything said to be done under the authority of the Constitution or of any other law is inconsistent with or is in contravention of the Constitution;**
 - (iii) **any matter relating to constitutional power of state organs in respect of county government and any matter relating to the constitutional relationship between levels of Government; and**

(iv) a question relating to conflict of laws under Article 191 of the Constitution .

The jurisdiction of the Industrial Court is therefore essentially the jurisdiction of the High Court as provided for in Sub- Article 165 (3) of the Constitution and with boundaries limited to the employment and labour relations as amplified in the Industrial Court Act, 2011. However, it is notable that the Constitution removes from the jurisdiction of the Industrial Court one aspect of employment and vests it in the exclusive jurisdiction of the High Court. Under Sub-Article 165 (3) (c), the High Court is vested with the exclusive jurisdiction to hear appeals from a decision of a tribunal appointed under the Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144 of the Constitution (being a decision by a tribunal appointed for removal of the President on grounds of incapacity). Finally, the Industrial Court is vested with the jurisdiction, original or appellate, as may be conferred by any legislation with respect to employment and labour relations matters.”

The court also upholds the opinion of the High Court in the ruling in United States International University (USIU) –Versus- Attorney General and 2 Others [2012] eKLR, where *Majanja J* stated thus, “44. In the final analysis, I would adopt the position of the Constitutional Court of South Africa in Gcaba V Minister of Safety and Security (Supra). The Industrial Court is a specialist court to deal with employment and labour relations matters. By virtue of Article 162(3), section 12 of the Industrial Court Act, 2011 has set out matters within the exclusive domain of that court. Since the Court is of status of High Court, it must have the jurisdiction to enforce labour rights in Article 41 and the jurisdiction to interpret the Constitution and fundamental rights and freedoms is incidental to the exercise of jurisdiction over matters within its exclusive domain. In any matter falling within the provisions of section 12 of the Industrial Act, then the Industrial Court has jurisdiction to enforce not only Article 41 rights but also all fundamental rights ancillary and incidental to the employment and labour relations including interpretation of the Constitution within a matter before it.”

The court has noted that the same opinion was upheld by the High Court in the Judgment by *Mumbi Ngugi J.* in Anne Nyokabi Muguiyi –Versus- NIC Bank Limited, Petition No. 202 of 2011 thus, “20....I share the view that any matters relating to labour and employment that arise after the establishment of the Industrial Court and the swearing in of the judges of the court, as determined by *Majanja J* in the case of United States International University (USIU) –Versus- Attorney General and Others Petition No. 170 of 2012 fall within the jurisdiction of the Industrial Court, and this court shall have no jurisdiction to hear and determine the matter.”

Taking into account the territory, parties, remedies and subject matter as the crucial elements in mapping out jurisdictional boundaries, the court finds that in the present petition the court has jurisdiction to hear and determine the petition on account of territory, party, remedy and subject matter in issue. Thus to answer the third issue, the court returns a finding that it has the necessary jurisdiction to entertain and determine the petition.

Issue No. 4: What is the law governing recruitment by the 1st respondent?

For the respondent, it was submitted that the respondent made open tendering in recruiting staff in accordance with the Public Procurement and Disposals Act, 2005. In view of the public advertisement, the respondent had acted transparently and above board so that the petition was not justified. For the petitioner, it was submitted that the respondent had breached the national values and principles of governance prescribed in Article 10 and had also breached the provisions of Article 73 of the Constitution. Article 10(2) (c) provides for the values and principles of good governance, integrity, transparency and accountability. Article 73 (2) provides for responsibilities of leadership as follows;

“73. (1) Authority assigned to a State officer—

(a) is a public trust to be exercised in a manner that—

- i. **is consistent with the purposes and objects of this Constitution;**
- ii. **demonstrates respect for the people;**
- iii. **brings honour to the nation and dignity to the office; and**
- iv. **promotes public confidence in the integrity of the office; and**

(b) vests in the State officer the responsibility to serve the people, rather than the power to rule them.

(2) The guiding principles of leadership and integrity include—

- a. **selection on the basis of personal integrity, competence and suitability, or election in free and fair elections;**
- b. **objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism, favouritism, other improper motives or corrupt practices;**
- c. **selfless service based solely on the public interest, demonstrated by—**

(i) honesty in the execution of public duties; and

(ii) the declaration of any personal interest that may conflict with public duties;

(d) accountability to the public for decisions and actions; and

(e) discipline and commitment in service to the people.”

The court has considered the opposing submissions and finds that persons subject to employment through a recruitment process are not subject to procurement process like goods and services in the public procurement and disposal legislation. Indeed, the persons are not goods and services. The persons are employees under the provisions of the Employment Act, 2007 and public officers or prospective public officers under the constitutional provisions. Thus, the court holds that the law governing employment in a public body like the respondent includes the constitutional provisions on employment generally such as Article 41 of the Constitution, the provisions on public service engagement such as those cited for the petitioner (Articles 10 and 73) and more specifically Article 232 of the Constitution on the values and principles of public service and generally the provisions of Chapter 13 of the Constitution on the public service. The court further finds that the general labour legislations such as the Employment Act, 2007 will apply. For a public body such as the respondent, the court holds that the Public Officer Ethics Act, 2003 will specifically apply. The court upholds its opinion in **Robert Muriithi Ndegwa –Versus- Minister for Tourism, Petition No. 41 of 2012 at Nairobi**, where it stated thus, “...Article 232 of the Constitution provides for the values and principles of public service to include:

- a. **high standards of professional ethics;**
- b. **efficient, effective and economic use of resources;**
- c. **responsive, prompt, effective, impartial and equitable provision of services;**
- d. **involvement of the people in the process of policy making;**
- e. **accountability for administrative acts;**
- f. **transparency and provision to the public of timely, accurate information;**
- g. **subject to paragraph (h) and (i), fair competition and merit as the basis of appointments and promotions;**
- h. **representation of Kenya’s diverse communities; and**
- i. **affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service of men and women; the members of all ethnic groups; and persons with disabilities.**

Section 22 of the Public Officer Ethics Act, 2003 provides that public officers shall practice and promote the principle that public officers are selected on the basis of integrity, competence and suitability or elected in fair elections. Thus, by the Constitution and by statute, the standards for undertaking public employment have been determined. In the instant case, the petitioner was recruited competitively and it is not said that he lacks qualifications. The court holds that there would be no suitability or merit in public employment in event of presence of bribery, cronyism, nepotism, tribalism, and in absence of qualifications, competence, competition, integrity and respect for inclusion and diversity....”

To answer the 4th issue for determination, the court finds that the legislation on public procurement and disposal does not apply to the employment procedures by public bodies such as the respondent and that the applicable law includes the constitutional and statutory provisions on public service, employment and labour relations and more specifically the constitutional and statutory provisions cited above as standards for public service employment.

Issue No.5: Whether the recruitment in the present petition complied with the applicable law

For the petitioner, it was submitted that the 1st respondent in undertaking the recruitment in issue contravened the values and principles of good governance, integrity, transparency, accountability, non-discrimination, equality and inclusiveness as enshrined in Article 10 of the Constitution. It was also submitted that the petitioner had contravened Article 73 of the Constitution and the constitutional protection of good labour relations which covered the recruitment process concluding in the appointments.

For the 1st respondent, it was submitted that the petitioners had failed to plead and by evidence establish the constitutional breaches urged in the submissions. The respondent cited the opinion in **Anarita Karimi Njeru –Versus- Republic (1979) KLR 154 at 156**, where the court stated, **“We would however again state that if a person is seeking redress from the High Court or an order which invokes a reference to the Constitution, it is important (if only to ensure that justice is done in his case) that he should set out with reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed.”**

The court has considered the supporting affidavit and at paragraph 10 it states:

“10. THAT the process has denied an equal opportunity to all the applicants as required by the law as the names forwarded by the Managing Director were single handedly picked by him and forced on the board of directors who are equally unable to fathom the provisions of the law.”

The 1st respondent has answered the above paragraph in paragraphs 6,7,8,9, 10, 11 and 12 of replying affidavit to the effect that no applicant in the recruitment process has raised a grievance about the recruitment process. The list of the applicants has been filed in court and it is clear that a preliminary review of the applicants was carried out and those candidates found qualified were shortlisted for the interviews. The persons who were found to meet the criteria were allegedly highlighted in yellow on the list filed in court. The successful candidates were invited for an interview before the relevant panel. After interviews, the candidates were ranked in the order of merit and a final report prepared and signed by the interview panel.

The court has considered the positions taken by both parties.

First, there are no yellow highlights of the successful candidates in the list filed in court.

Second, the 1st respondent’s Human Resource Policy and Procedures Manual provides that for each position advertised, at least three candidates shall be shortlisted and invited for interview by the board, the management or a person appointed by the board of the 1st respondent. The policy is that the board

recruits the heads of department such as the Internal Audit Manager and the Human Resource and Administration Officer in the recruitment challenged in this case. The court has examined exhibit **JC2** on the replying affidavit. It is a decision appointing relevant selection committees. However, the replying affidavit does not refer to any decision by the selection committees on the short-listed candidates as the candidates that are said to have been successful at interviews. No decision of the selection committees or the board has been filed in court by the respondent in that regard.

Thirdly, the court has carefully considered the letters inviting the candidates for interviews. On their face, the letters and particularly those for the two offices of heads of department, they do not show that the invitation was pursuant to a board decision. On the face of the letters, it was an invitation for interview by the managing director in his capacity as such. It is therefore, difficult to find that the board ever directed its mind to the short-listing and subsequent interviews and offers for appointment.

Fourthly, the court has carefully examined the score sheets filed for the respondent as the basis of performance of the candidates at the interviews. The court finds that the scores are mysterious as there were no explanatory notes and criteria applied to measure the performance of candidates. Essentially and in the opinion of the court, the 1st respondent was expected and constitutionally and by legislation obligated to draw an objective short-listing and interviewing instruments that reflected the criteria set out in Articles 73 and 232 on recruitment and appointment, as well as section 22 of the Public Officer Ethics Act, 2003. In the opinion of the court, the instruments were to take into account objective measures that achieve fair competition; merit; integrity; competence; suitability; and inclusion of men and women, the members of diverse ethnic groups, diverse communities and persons with disabilities. The court holds that such objective instruments were within the 1st respondent's discretion to develop yet mandatory to achieve the constitutional and statutory standards of public recruitment, selection, appointment and promotion; without such instruments and evidence of their application it is impossible to establish compliance with the law.

Finally, the court has carefully considered the letters of offer of employment. The letters are not expressed that the employment was being offered pursuant to a decision of the 1st respondent's board. The policy is that the most qualified and suitable candidate is selected and recommended for appointment. The policy is silent on appointing authority and the court holds that in that circumstance, delegation to the managing director to appoint cannot be assumed. The court finds that in this case, the board did not receive the recommendations and did not therefore exercise the relevant authority or power to appoint or offer appointments.

In view of the foregoing findings, the court finds that the recruitment in the instant case did not comply with the applicable recruitment law.

Issue No. 5: Whether the petitioner is entitled to the remedies as prayed for

The final issue for determination is whether the petitioner is entitled to the remedies as prayed for. The court makes the following findings:

- a. The petitioner prayed for a declaration that the process of short-listing, interviewing, recruiting and appointment of persons to the positions of GIS officer, human resource manager, senior credit controller and internal auditor was opaque, clandestine, riddled with nepotism, tribalism and contrary to Article 10 and 73 of the Constitution of Kenya hence unconstitutional and consequently null and void. The court has found that the respondent did not comply with the relevant constitutional, statutory and its own policy provisions governing the recruitment and appointments in issue. Accordingly, the court finds that the petitioner is entitled to a declaration that the process of short-listing, interviewing, offer of appointments and appointments was in contravention of the relevant provisions of the constitution, legislation and the 1st respondent's policies as cited in this judgment and therefore null and void.
- b. The petitioner has prayed for a declaration that the actions of the managing director of the respondent contravened Article 10 and 73 of the Constitution of Kenya and the Public Officers Act of 2003 hence unfit to hold any public office. The court has carefully considered this prayer

and finds that it would be unfair for the declaration to issue against the 1st respondent's managing director without his being named as a respondent in the petition and without his being given chance to defend his position. The court considers that one of its cardinal duties to uphold rules of natural justice and in the circumstances of this case and for the reason stated, the court finds that the order as prayed for shall fail.

- c. The respondent has prayed for a declaration that the respondents are escapists and have abdicated their duty to respect and uphold the constitution of Kenya in their administrative actions. The court has found that the 1st respondent was under duty to uphold the relevant constitutional provisions. Accordingly, the court finds that the petitioner is entitled to a declaration that the 1st respondent by itself, its board, its employees or by its agents is obligated to uphold the provisions of Articles 10, 73 and 232 of the constitution in undertaking recruitment, selection, appointment and promotion of its employees.
- d. In view of the findings of the court, the court considers that the respondent shall now undertake the short-listing, interviews, offers for appointment and the appointments for the offices of GIS analyst, internal audit manager, senior credit control officer and human resource and administration officer in strict compliance with the orders of the court.
- e. As the petitioner has substantially succeeded, it is entitled to the costs of the petition.

The court has considered the need to oversee the 1st respondent in its undertaking of the recruitment exercise in issue and in view of the concerns raised in the petition and findings, made in this judgement. Article 232(2) (b) is clear that the values and principles of public service apply to state corporations like the 1st respondent. On the other hand, Article 234 (2) (c) and (d) empower the Public Service Commission to promote the values and principles in Article 10 and 232, and, to investigate, monitor and evaluate the organisation, administration and personnel practices of the public service. The court therefore finds that the Commission is the constitutional institution that should oversee the 1st respondent's compliance with the constitutional values and principles of public recruitment and appointment.

In conclusion, judgment is entered for the petitioner against the 1st respondent for:

1. a declaration that the process of short-listing, interviewing, offering of appointments and appointments by the respondent for vacancies in offices of GIS analyst, internal audit manager, senior credit control officer and human resource and administration officer was in contravention of the relevant provisions of the Constitution, legislation and the 1st respondent's policies as found in this judgment and therefore, null and void;
2. a declaration that the 1st respondent by itself, its board, its employees or by its agents is obligated to uphold the provisions of Articles 10, 73 and 232 of the Constitution in undertaking recruitment, selection, appointment and promotion of its employees;
3. 1st respondent shall undertake the short-listing, interviews, offers for appointment and the appointments for the now vacant offices of GIS analyst, internal audit manager, senior credit control officer and human resource and administration officer in strict compliance with the orders of the court in this judgment so as to complete the process by 15.12.2013 by which date the report of the process shall be filed in court and served upon the petitioner;
4. the Public Service Commission to oversee the 1st respondent's compliance with order 3 above in exercise of the Commission's powers and functions in Article 234 (2) (c) and (d) of the Constitution and for that purpose, the petitioner shall serve upon the Commission's Chairperson this judgment by close of 12.11.2013;
5. the matter to be mentioned on a date convenient to all parties to confirm compliance with the orders; and

6. the 1st respondent to pay costs of the petition.

Signed, dated and delivered in court at **Nakuru** this **Friday, 8th November, 2013.**

BYRAM ONGAYA

JUDGE