



**Awino v Noor; Ethics & Anti-Corruption Commission (Interested Party) (Petition E194 of 2024)  
[2025] KEHC 8988 (KLR) (Constitutional and Human Rights) (26 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 8988 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS**

**PETITION E194 OF 2024**

**LN MUGAMBI, J**

**JUNE 26, 2025**

**BETWEEN**

**FRANCIS AWINO ..... PETITIONER**

**AND**

**ISSACK M. NOOR ..... RESPONDENT**

**AND**

**ETHICS & ANTI-CORRUPTION COMMISSION ..... INTERESTED PARTY**

**RULING**

**Introduction**

1. The Petition herein is dated 12<sup>th</sup> April 2024. The Petitioner alleges that according to the Auditor General Report released in June 2021, there was illegal, unlawful and irregular use of public funds by the Respondent as the Chief Executive Officer of Kenya Leather Development Council (KLDC).
2. Consequently, the Petitioner states that the Respondent is in violation of Article 10, 73 and 232 of *the Constitution* hence is not fit to hold the said office.

**The Preliminary Objection**

3. In answering the Petition, the Respondent filed a Notice of Preliminary Objection dated 28<sup>th</sup> May 2024 on the grounds that:
  - i. The Petition has failed the test of specificity established in the case of *Anarita Karimi vs Republic (No. I) (1979) 1 KLR 154*.
  - ii. The Petition does not disclose any reasonable cause of action against the Respondent.



- iii. The Petition neither raises any constitutional issues nor questions of law or fact for determination.
- iv. The Petition offends the doctrine of constitutional avoidance, is a gross abuse of the court process, and should be struck out in limine.

### **Petitioner and Interested Party's case**

4. There was neither a response nor submissions to the Preliminary Objection that was filed by the Petitioner or the Interested Party either in in the Court file or Court Online Platform (CTS).

### **Parties Submissions**

#### **Respondent's Submissions**

5. In support of the Preliminary Objection, the Respondent through Jamal Bake and Associates filed submissions dated 12<sup>th</sup> September 2024 where the issues were identified as: whether the Petition is competent and whether the preliminary objection is merited.
6. It was submitted that the Preliminary Objection meets the threshold for it does not raise factual issues that require this Court to undertake any further investigations. Reliance was placed in *Mukisa Biscuit Manufacturing Co. Ltd v West-End Distributors Limited*- [1969] EA 696 where it was held thus:

“A preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit ... A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion...”
7. Like dependence was placed in *Brian t/a SB Otieno & Company Advocates v Law Society of Kenya & another* [2023] eKLR.
8. Further submission was made to the effect that the Petition, which solely relies on the observations made in the Auditor General's Report does not meet the test of specificity as established in *Anarita Karimi (supra)* and affirmed by the Court of Appeal in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR. It was contended that the Petitioner does not demonstrate the manner the provisions of *the Constitution* cited were violated by the Respondent.
9. To buttress this point reliance was placed in *Keshava Menon v State of Bombay* [ 1951 ] SCR 228 where it was held that:

“An argument founded on what is claimed to be the spirit of *the Constitution* is always attractive for it has a powerful appeal to sentiment and emotion: but a Court of law has to gather the spirit of *the Constitution* from the language of *the Constitution*. What one may believe or think to be the spirit of *the Constitution* cannot prevail if the language of *the Constitution* does not support that view.”
10. On the second objection, it was pointed out that other than stating what is contained in the Auditor General's Report; there was nothing to plead about the specific wrongdoing on the part of the Respondent.



11. It was contended that Petition also offends the doctrine of constitutional avoidance as there is a process through which the Auditor General's Report must be subjected. Counsel claimed that the Auditor General's final report, in this instance, is to be submitted to the Public Investments Committee (PIC) of the National Assembly for hearings, after which, and with the assistance of the Office of the Auditor-General, the PIC makes recommendations which should be implemented by the entities concerned.
12. Reliance was placed in *Kiriro Wa Ngugi & 19 others v Attorney General & 2 others* [2020] eKLR where it was held that:

“A Court must satisfy itself that the case before it is not caught up by the bar of non-justiciability. The concept of non-justiciability is comprised of three doctrines: Firstly, the Political Question Doctrine; secondly, the Constitutional Avoidance Doctrine; and, thirdly, the Ripeness Doctrine. The doctrines are crosscutting and closely intertwined... The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis.”

### **Analysis and Determination**

13. It is my considered view that the issues that arise for determination are:
  - i. Whether the Notice of Preliminary Objection dated 28<sup>th</sup> May 2024 has met the set threshold of a preliminary objection.
  - ii. Whether the preliminary objection is merited.

### **Whether the Notice of Preliminary Objection dated 28<sup>th</sup> May 2024 has met the set threshold of a preliminary objection.**

14. The threshold of a preliminary objection was set out in the case of *Mukisa Biscuit Manufacturing Co. Ltd* (supra) and later emphasized by the Supreme Court in the *Joho & another v Shahbal & 2 others* [2014] KESC 34 (KLR) as follows:

“(31) To restate the relevant principle from the precedent-setting case, *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors* [1969] EA 696:

“a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration....a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.

15. Discussing its nature in *Dismas Wambola v Cabinet Secretary, Treasury & 5 others* [2017] KEHC 8777 (KLR), the Court noted as follows:

“A preliminary objection must first, raise a point of law based on ascertained facts and not on evidence. Secondly, if the objection is sustained, that should dispose of the matter. A preliminary objection is in the nature of a legal objection not based on the merits or facts of the case, but must be on pure points of law.



It may be noted that preliminary objections are narrow in scope and cannot raise substantive issues raised in the pleadings that may have to be determined by the court after perusal of evidence....”

16. Additionally, the observation in the *Oraro v Mbaja* [2005] KEHC 3182 (KLR) offers significant insight where the Court observed that:

“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration..... A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all facts pleaded by the opposite side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues and this improper practice should stop... The principle is abundantly clear. A “preliminary objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.....”

17. In raising this Preliminary Objection, the Respondent did not introduce any other factual issues to contradict what the Petitioner pleaded. Further, the nature of the legal issues raised touch on the Court’s jurisdiction and if successfully argued, are capable of disposing of the Petition without a merit hearing. I thus find the objection satisfies the threshold of a Preliminary Objection.
18. One of the key contentions is that the Petition does not meet the threshold of a Constitution Petition which demands that a petition should be drawn with reasonable degree of precision by identifying the provisions of *the Constitution* that are alleged to have been infringed and the manner of the infringement. This was affirmed by the Supreme Court in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2015] KESC 15 (KLR) as follows:

“(349) .... Although Article 22(1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in *Anarita Karimi Njeru v. Republic*, [1979] KLR 154: the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such a principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement...”



19. Similarly, the Court of Appeal in *Mumo Matem* (*supra*) stated as thus:

“(42) However, our analysis cannot end at that level of generality. It was the High Court’s observation that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting.” Yet the principle in *Anarita Karimi Njeru* (*supra*) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of *the Constitution* and the overriding objective principle under section 1A and 1B of the *Civil Procedure Act* (Cap 21) and section 3A and 3B of the *Appellate Jurisdiction Act* (Cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in *Anarita Karimi Njeru* (*supra*) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of *Thorp v Holdsworth* (1876) 3 Ch. D. 637 at 639 holds true today:

“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.”

(43) The petition before the High Court referred to Articles 1, 2, 3, 4, 10, 19, 20 and 73 of *the Constitution* in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements. For example, in paragraph 2 of the petition, the 1st respondent averred that the appointing organs ignored concerns touching on the integrity of the appellant. No particulars were enumerated. Further, paragraph 4 of the petition alleged that the Government of Kenya had overthrown *the Constitution*, again, without any particulars. At paragraph 5 of the amended petition, it was alleged that the respondents have no respect for the spirit of *the Constitution* and the rule of law, without any particulars.

(44) We wish to reaffirm the principle holding on this question in *Anarita Karimi Njeru* (*supra*). In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1st respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents 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 shortcomings, 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 1<sup>st</sup> respondent.”



20. Reading the present Petition, I see generalities plucked from the Auditor General’s Report that was released in June, 2023 being transmogrified into a Petition that does not plead precisely the real, as opposed to the imaginary, involvement of the Respondent in the actions complained of. The Petition fails thus critical the test established Anarita Karimi Njeru case (supra).
21. Moreover, this Petition cannot in my view survive the justiciability principle. Under this principle, the court is keen not usurp the powers and responsibilities of other constitutional or public bodies and must thus carefully examine if the matter properly falls within its mandate or is a mandate of another constitutional organ or public body given the relevant provisions of *the Constitution*, the statutes or principles established through precedents.
22. It is discernible that the thrust of this Petition is the Respondent’s alleged corrupt practices in regard to the administration of public funds as the CEO of KLDC hence the Petitioner pleads that he has contravened the provisions of Articles 10, 73 and 232 of *the Constitution*.
23. The responsibility to undertake an inquiry as to whether or not one has violated or contravened the provisions on leadership and integrity under Chapter Six of *the Constitution* is a mandate vested on the Ethics and Anti-Corruption Commission and in my view, the intervention of this Court cannot be invoked without giving this particular body charged with both Constitutional and statutory duty of ensuring compliance with Chapter Six the precedence in addressing such issues. Article 79 provides:
- “Parliament shall enact legislation to establish an Independent Ethics and Anti-Corruption Commission, which shall be and have the status and powers of a Commission under Chapter Fifteen, for purposes of ensuring compliance with, and enforcement of, provisions of this Chapter.”
24. The *Leadership and Integrity Act* was thus enacted. Its preamble provides that it is an Act of Parliament to “give effect to, and establish procedures and mechanisms for the effective administration of Chapter Six of *the Constitution* and for connected purposes” equally, under Section 4 (2), gives the responsibility for overseeing the implementation of the Act to the Ethics and Anti-Corruption Commission.
25. Faced with a similar scenario, the Court in William Kabogo v Ferdinand Ndung’u Waititu (supra) held as follows:
- “ 51. The *Leadership and Integrity Act* specifically empowers the Ethics and Anti-Corruption Commission the role to oversee the implementation and enforcement thereof. It is thus incumbent that any person, who feels that the Act has been contravened, ought to move the relevant bodies charged with the mandate under the Act.
52. I must further state that this Court has the general jurisdiction to enforce Chapter Six of *the Constitution* pursuant to Article 165 but such jurisdiction is to be exercised subject to existing and especially derivative statutes, if any. The doctrine of subsidiarity would so dictate and in the instant case the *Leadership and Integrity act*, which was enacted to give effect to Chapter Six of *the Constitution* is the relevant statute. In the present case however, and for the above stated reasons, it would be premature for this Court to exercise its jurisdiction on matters that fall within the jurisdiction of other authorities specifically mandated under the *Leadership and Integrity Act*.”



26. Since the main complaint in this Petition is that the 1st Respondent actions violated the values and principles required of public officers by the Constitution, it follows therefore that pursuant to the Leadership and Integrity Act that was enacted to ensure respect for values and principles of the Constitution by public officers, it is the Ethics and Anti-Corruption Commission that is legally mandated to oversee that public officers comply with the values and principles under Chapter 6 of the Constitution and 232 among others. That should be the primary point where complaints of this nature must be laid and not before this Court.
27. A rush to file Constitutional Petition based on breach of the provisions of Chapter Six without first raising the issues with the body that the Constitution has vested with the mandate in regard to enforcement of Chapter Six, that is, the Ethics and Anti-Corruption Commission is unacceptable for this Court in discharge of its duties is also enjoined to accord deference to coordinate branches of government and public bodies to execute their lawful mandates.
28. For reasons stated in the foregoing, the Petition is struck out. I have considered that the Petition was filed in public interest. I accordingly make no orders as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 26TH JUNE, 2025.**

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**L N MUGAMBI**

**JUDGE**

