



**254 Hope v Governor - Vihiga County & 2 others (Constitutional Petition E004 of 2023) [2024] KEHC 4479 (KLR) (30 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4479 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VIHIGA  
CONSTITUTIONAL PETITION E004 OF 2023**

**JN KAMAU, J**

**APRIL 30, 2024**

**IN THE MATTER OF THE ADVERTISEMENT, SHORTLISTING,  
RECOMMENDATION, NOMINATION, VETTING AND  
APPOINTMENT OF ALL CHIEF OFFICERS IN VIHIGA  
IN THE MATTER OF THE ADVERTISEMENT, SHORTLISTING,  
RECOMMENDATION, NOMINATION, VETTING AND  
APPOINTMENT OF THE CHIEF OFFICER OF HEALTH OF VIHIGA  
IN THE MATTER OF THE COUNTY GOVERNMENT ACT  
IN THE MATTER OF VIOLATION OF AND  
THREATENED VIOLATION OF THE LAWS OF KENYA**

**BETWEEN**

**254 HOPE ..... PETITIONER**

**AND**

**GOVERNOR - VIHIGA COUNTY ..... 1<sup>ST</sup> RESPONDENT**

**COUNTY ASSEMBLY OF VIHIGA ..... 2<sup>ND</sup> RESPONDENT**

**COUNTY PUBLIC SERVICE BOARD ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. In its Petition that was dated and filed on 11<sup>th</sup> May 2023, the Petitioner herein sought the court to declare:-
  - a. That the process of shortlisting, interviewing and selecting persons to be recommended to the governor for nomination of persons as Chief Officers in all the departments done by the



Vihiga County Public Service Board violated the Constitution as it was done arbitrarily, without transparency and with no regard to fair competition and merit as a basis for the process.

- b. That the shortlisting for interviews and recommendation by the County Public Service Board of Mrs Mary Susan Anyianda to be Chief Officer for Health in Vihiga County was unlawful because the nominee lacked a mandatory qualification for the position.
  - c. That the initial appointment in acting capacity and the present nomination of the Chief Officer of Health by the Governor of Vihiga was unlawful because the nominee was not qualified to be Chief Officer for Health.
  - d. That the County Assembly violated the Constitution in declining to hear the Petitioner's defence on 4<sup>th</sup> May 2023 for not being incorporated and approving the persons nominated.
  - e. That the entire process of recruitment of all Chief Officers in Vihiga County from the point of shortlisting was fundamentally flawed and was null and void.
  - f. That the County Public Service Board be directed to reconsider all the applications for Chief Officers in Vihiga County, and to conduct fresh shortlisting, interviews and recommendation of persons to the governor for nomination to the County Assembly.
2. The Petitioner's undated Written Submissions were filed on 25<sup>th</sup> August 2023 while those of the 1<sup>st</sup> and 3<sup>rd</sup> Respondent were dated and filed on 14<sup>th</sup> November 2023. The Petitioner also filed a Rejoinder dated 1<sup>st</sup> February 2024 and filed on 6<sup>th</sup> February 2024. The 2<sup>nd</sup> Respondent did not file any Written Submissions. The Judgment herein is therefore based on the said Petitioner's and the 1<sup>st</sup> and 3<sup>rd</sup> Respondents' Written Submissions.

### **The Petitioner's Case**

3. Dr Clarence Eboso Mweresa swore two (2) Affidavits in support of the Petitioner's Petition herein. He swore the first affidavit on 11<sup>th</sup> May 2023. The same was filed on even date. He also swore a Supplementary Affidavit on 24<sup>th</sup> May 2023 in response to the 1<sup>st</sup> and 3<sup>rd</sup> Respondents' Replying Affidavits. The same was filed on 31<sup>st</sup> May 2023.
4. The said deponent averred that he was a founding member of the Petitioner herein, which was an organisation that was established by and made up of young professionals drawn from different professional backgrounds and from different regions in the country including residents of Vihiga County whose role was to foster the promotion of good governance.
5. He pointed out that on or about January 2023, the 3<sup>rd</sup> Respondent, published on its website an advertisement for interested persons for positions of Chief Officers to apply. He averred that some of the Petitioner's members applied for jobs and/or positions of Chief Officers in various departments in Vihiga County and were therefore directly affected by any policy decisions that emanated from the County Government of Vihiga.
6. It was the Petitioner's case that some of its members were shortlisted and interviewed. It averred that others, who believed that they had met the mandatory criteria on the advertisements, were not shortlisted. However, they were never given reasons for the rejection of their applications.
7. It asserted that the 3<sup>rd</sup> Respondent never provided the scores for the interviewees or published the reasons or the criteria that was used in shortlisting candidates for interviews or give the criteria that was used for selecting the persons and sending them to the 1<sup>st</sup> Respondent.



8. It contended that its demands for the 3<sup>rd</sup> Respondent to provide minutes of the meetings that agreed on the criteria for applicants, the shortlisting, variation of the qualifications and re-advertisement, if at all that happened, bore no fruit. It said that the 3<sup>rd</sup> Respondent wrote to it on 19<sup>th</sup> April 2023 and declined to provide the information.
9. It stated that the advertisement and criteria for the selection of all County Chief Officers in each of the department was opaque, the same was done without public participation and was arbitrarily arrived at the point of advertisement creating room for gamesmanship.
10. It was its contention that on 10<sup>th</sup> May 2023, the 2<sup>nd</sup> Respondent approved the persons nominated through the aforesaid opaque process and were due for swearing in ceremony immediately. It pointed out that the ramifications of this case on the functioning of the County Government could not be gainsaid as County Chief Officers were the technical heads of County Departments.
11. It added that among the mandatory qualifications the applicants/candidates for position of Chief Officer for Health had to have was a medical degree. On 13<sup>th</sup> February 2023, the 3<sup>rd</sup> Respondent published a list of shortlisted candidates inviting them for interviews. However, the list contained the name of one Mrs Mary Susan Anyienda who did not have the said mandatory qualification as she was a professional teacher specialised in (Nursery School).
12. It contended that the 3<sup>rd</sup> Respondent proceeded to interview the candidates and recommended those who were successful to the 1<sup>st</sup> Respondent for nomination. It stated that to the surprise of the public, the 1<sup>st</sup> Respondent nominated the said Mrs Mary Susan Anyienda to the 2<sup>nd</sup> Respondent for approval.
13. It was emphatic that the nominee for Chief Officer Health was unqualified and that it came to the attention of the public that prior to the recruitment exercise, she had been appointed as Acting Chief Officer despite having been unqualified which was contrary to the *County Governments Act*.
14. William Muriuki Waturu also swore an affidavit on 11<sup>th</sup> May 2023 in support of the Petitioner's case. He averred that he was a co-chair of the Petitioner, a Medical Practitioner in Nyeri County, the Branch Secretary of the Central Branch of the Medical Doctors Union in Kenya and public spirited individual.
15. Through the said deponent, the Petitioner pointed out that a meeting of its leaders was held on 12<sup>th</sup> April 2023 where it resolved to pursue a constitutional infraction that had been raised by its members regarding the process of recruitment of new Chief Officers. It asserted that at the said meeting, it was agreed that one Dr Clarence Eboso Mweresa would lead the prosecution of the matter at the court while the said William Muriuki Waturu would pursue it at the other County offices.
16. The said William Muriuki Waturu reiterated what the said Dr Clarence Eboso Mweresa had deponed in his Supporting and Supplementary Affidavits. Through the said William Muriuki Waturu, the Petitioner averred that it had never received information regarding the recruitment which was required for purposes of accountability and transparency in the Board's performance of its statutory roles and not necessarily for purposes of contesting the suitability of the candidates despite its letters dated 14<sup>th</sup> April 2023 and 24<sup>th</sup> April 2023 that it wrote to the 3<sup>rd</sup> Respondent.
17. It pointed out that on 17<sup>th</sup> April 2023, it wrote a memorandum to the 2<sup>nd</sup> Respondent seeking to stop the approval of the person nominated to be Chief Officer Health to no avail. It was emphatic that to-date, the information had never been supplied.
18. It asserted that on 24<sup>th</sup> April 2023, the 2<sup>nd</sup> Respondent sent it an email inviting it to defend the Petition earlier filed on 4<sup>th</sup> May 2023. It stated that it sent its member, the deponent herein to represent it in



the interview on 5<sup>th</sup> July 2023 but was dismissed for want of the organisation's registration certificate. It was its case that the decision to decline to hear its petition was wrong and ill-intended.

19. In its Supplementary Affidavit that was sworn on 24<sup>th</sup> May 2023 and filed on 31<sup>st</sup> May 2023, the Petitioner denied the averments made by the 3<sup>rd</sup> Respondent and blamed it for failing to respond to its serious allegations of unqualified person, criteria upon which the recruitment of Chief Officers was done and the reasons for the annulment of the 1<sup>st</sup> advertisement.
20. It was emphatic that the provisions of the *Access to Information Act* and *the Constitution* of Kenya not only authorised but also obligated the 3<sup>rd</sup> Respondent to avail the information it had requested for. It challenged the veracity of the minutes adduced as evidence by the 3<sup>rd</sup> Respondent in its entirety.
21. The Petitioner thus urged this court to grant the reliefs it had sought herein.

### **The 1<sup>st</sup> and 3<sup>rd</sup> Respondents' Case**

22. The 1<sup>st</sup> and 3<sup>rd</sup> Respondent filed two (2) Replying Affidavits and a Notice of Preliminary Objection dated 19<sup>th</sup> May 2023 in opposition to the Petition herein on the ground that this court lacked the requisite jurisdiction to entertain the Petitioner's Petition.
23. Amb Franklin Esipila, Chairperson of the 3<sup>rd</sup> Respondent swore an Affidavit on behalf of the 3<sup>rd</sup> Respondent on 19<sup>th</sup> May 2023.
24. It was the 3<sup>rd</sup> Respondent's case that as a Board, it discharged its functions as assigned by law and that in so doing, it strictly adhered to *the Constitution* of Kenya and the law which required it to be transparent and accountable.
25. It confirmed that it received indents from the 1<sup>st</sup> Respondent for appointment of County Chief Officers in the County Government of Vihiga. It advertised the said positions in the print and other media as was required by law and later conducted interviews following long and short listing of the candidates who qualified in accordance with the laid down procedures.
26. It was categorical that at no time did it employ any opaqueness as the Petitioner herein had alleged. It further stated that it received a letter from the Petitioner demanding information concerning the process it was conducting and responded to the same within the limits permissible of the law given. It averred that there was no law authorising it to divulge the nature of the information relating to any candidate as the Petitioner had demanded.
27. It added that it informed the Petitioner that the information would be availed through the 2<sup>nd</sup> Respondent as provided in the relevant law governing approval proceedings for those who had been nominated for appointment.
28. It contended that the advertisement dated 19<sup>th</sup> December 2022 referred to by the Petitioner was erroneous and the same had been pulled down and a right advert replaced being career Notice No 8 vide a letter dated 21<sup>st</sup> December 2022 after a resolution by the Board. It pointed out that the correction was done because the earlier advertisement was discriminatory and a contradiction to Section 45(1)(a) of the *County Governments Act*.
29. It was categorical that the impugned Chief Officer for Health had presented evidence of previous assignment to the Health Services Department for two (2) and a half (1/2) years in an acting capacity and was therefore qualified and was thus recommended because of her experience. It was emphatic that it had fulfilled its mandate as prescribed in the law and could not be faulted.



30. It further stated that in any case, any challenge to the qualifications of a candidate it appointed was a matter reserved for the appellate jurisdiction of the Public Service Commission (PSC) as was provided in Section 77 of the [County Governments Act](#). It was categorical that it was not an issue for ventilation through Constitutional Petitions in courts of law as presented herein.
31. In opposition to the Petitioner herein, Ezekiel Ayiego, County Secretary of Vihiga County and Head of County Public Service swore an Affidavit on behalf of the 1<sup>st</sup> Respondent on 19<sup>th</sup> May 2023. The same was filed on even date.
32. It was the 1<sup>st</sup> Respondent's case that the 3<sup>rd</sup> Respondent was an entity of the County Government responsible for staffing in the County Public Service in accordance with the provisions of the [County Governments Act](#) and that it enjoyed independence in the performance of its functions and was not subject to his control.
33. He admitted having declared vacancies for County Chief Officers in the County Government of Vihiga and notified the 3<sup>rd</sup> Respondent to conduct the process, select and recommend qualified persons for nomination to the 2<sup>nd</sup> Respondent for approval. It asserted that the 3<sup>rd</sup> Respondent conducted the said process and submitted the names of those who qualified and were recommended to him for appointment and in turn he submitted the names of the thirteen (13) nominated persons for appointment to the 2<sup>nd</sup> Respondent for approval in accordance with the relevant provisions of law.
34. He was emphatic that that was done openly through the relevant publication to the media without any opaqueness as had been alleged by the Petitioner. He stated that on 12<sup>th</sup> May 2023, he received notification from the 2<sup>nd</sup> Respondent of the result of the vetting process whereby eleven (11) out of the thirteen (13) nominees were approved for appointment as County Chief Officers. Two (2) of its nominees were rejected.
35. He explained that since he was leaving for an international engagement which would hold him away for sometime and the period within which to make the appointment after receipt of the notification from the 2<sup>nd</sup> Respondent was limited by law to seven (7) days, he promptly appointed the said eleven (11) nominees and swore them to office as County Chief Officers. He was categorical that the officers had already assumed office by the date this Petition and orders herein were brought to his attention on 15<sup>th</sup> May 2015 (sic).
36. He asserted that all he did was to discharge his statutory duty and at no time was he involved in the manner in which the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents played their respective roles in the recruitment process as these entities were independent and not subject to his control. He added that he also did not set the qualifications for appointment of County Chief Officers.
37. He posited that Mary Susan Anyiendah had previously served as County Chief Officer in an acting capacity in the Department of Health Services which could have been the basis for her recommendation by the 3<sup>rd</sup> Respondent to serve in the same department where she attained the required experience.
38. He pointed out that in assigning her in an acting capacity to that department, he did not violate any law as Section 45(5) of the [County Governments Act](#) did not limit his powers to re-assign a County Chief Officer in the manner proposed by the Petitioner herein. He stated that in fact Dr Clarence Eboso Mweresa was a medical officer in the said department of health in the County Government of Vihiga and had served under her without any protest as to her competence in that department.



39. He urged the court to consider the fact that no evidence had been adduced as to the allegations made against the qualification of the said Mary Susan Anyindah and the fact that she was not enjoined in the Petition was a violation of the rules of natural justice.
40. He was categorical that by the appointment and assumption of office by the County Chief Officers, the jurisdiction of this court to maintain the Petition had been lost and the option remaining for the Petitioner was to lodge an appeal to the County Public Service Commission as provided for in Section 77 of the [County Governments Act](#) or seek redress in the Employment and Labour related disputes.
41. He added that the Petitioner could also wait to exhaust his objection to the remaining three (3) County Chief Officers by filing objection at the 2<sup>nd</sup> Respondent when he submitted the names of the nominees for approval.
42. He further pointed out that the said Dr Clarence Eboso Mweresa was an active member of doctors' trade unions together with the said Mr William Muriuki Waturu, a medical practitioner in Nyeri which facts raised constitutional questions as to whether trade unionists should be permitted by courts to dodge the legal requirements for trade unionism through constitutional petitions to advance interests for personal gain. He was emphatic that the Petition herein was an abuse of the court process and urged this court to dismiss the same.

### **The 2<sup>nd</sup> Respondent's Case**

43. Although the 2<sup>nd</sup> Respondent did not attend any court proceedings herein, it entered appearance on 24<sup>th</sup> May 2023.
44. Ambaka Kilinga, a Clerk of the 2<sup>nd</sup> Respondent, swore a Replying Affidavit on 25<sup>th</sup> May 2023 on behalf of the 2<sup>nd</sup> Respondent herein. The same was filed on 5<sup>th</sup> June 2023.
45. The 2<sup>nd</sup> Respondent only focused on the memorandum against the nominee for Health Department that the Petitioner submitted on 19<sup>th</sup> April 2023. It was the 2<sup>nd</sup> Respondent's case, that the memorandum could not be heard because the said Mr William Muriuki Waturu who appeared before it on behalf of the Petitioner said that the organisation had not been registered. He invoked Section 7(8) and 7(10) of the Public Appointments (County Assembly Approval) Act and averred that the right procedure was followed.

### **Legal Analysis**

46. Having considered the Petition and the Petitioners' and the 1<sup>st</sup> and 3<sup>rd</sup> Respondent's Written Submissions, it appeared to this court that the preliminary issue that it had to consider before delving into any other issues was whether or not this court had the requisite jurisdiction to entertain the Petition herein.
47. Notably, the 1<sup>st</sup> and 3<sup>rd</sup> Respondent herein raised a Preliminary Objection dated and filed on 19<sup>th</sup> May 2023 seeking orders to strike out the Petitioner's Petition herein together with all its applications pending thereon on grounds that this court lacked the required jurisdiction to entertain the Petition herein and the fact that all except three (3) County Chief Officers had been duly appointed, sworn to the office and had now assumed an employer-employee relationship thereby ousting the jurisdiction of this court.
48. They further stated that the dispute before the court fell out within the appellate jurisdiction of the PSC as provided in Section 77 of the [County Governments Act](#) and Section 85 of the [Public Service Commission Act](#). It contended that the Petition was against the principle of exhaustion in dispute



resolution and violated Section 10 of the Public Appointments (County Assemblies Approvals) Act and Section 87 (2) of the *Public Service Commission Act*.

49. They further stated that the Petitioner's presentation and prosecution was a violation of the mandatory principles of natural justice. They asserted that the same was an abuse of the process of the court.
50. In their Written Submissions, they invoked Section 77(1) and (2) of the County Government Act and Section 85 of the *Public Service Commission Act* and contended that the said provisions mandate the PSC to hear and/or entertain appeals on any decision of the County Public Service Board including recruitment while Section 87 (2) of the *Public Service Commission Act* prohibits a person from filing legal proceedings in any court of law with respect to matters within the jurisdiction of the PSC to hear and determine appeals from County Government Public Service unless the procedure provided for has been exhausted.
51. It was therefore their contention that this court could not hear such an appeal as it had been limited by the two (2) aforesaid Acts. They pointed out that the Petitioner misdirected itself when it submitted that the High Court's jurisdiction could only be limited only by matters reserved for exclusive jurisdiction of the Supreme Court, matters within the jurisdiction of the Employment and Labour Relations Court (ELRC) and Environment and Land Court (ELC) and supervisory jurisdiction over superior courts.
52. They submitted that where there was an alternative remedy provided by an Act of parliament which remedy was effective and applicable to the dispute before the court, then the court was mandated to ensure that the dispute was resolved in accordance with the relevant statute.
53. In that regard, they placed reliance on the case of Independent Electoral and Boundaries Commission & 2 Others Ex-parte Shaileshkumarnata Verbai Patel [2013] eKLR where it was held that it was not only *the Constitution* that could limit/confer jurisdiction of the court but that any other law may by express provision confer or limit that jurisdiction.
54. They argued that although one may argue that the provision of Section 77 (1) of the County Government Act was not mandatory as it uses the word "may" where it said, "may appeal to the Public Service Commission", in the aforementioned case, Odunga J (as he then was) held that the mere fact that an Act used the word "may" rather than "shall" did not necessarily connote that the requirement was not mandatory.
55. They further contended that it was not mandatory that a dispute be an employer-employee relationship dispute for it to be appealed to the PSC as the Petitioner had asserted.
56. They relied on the doctrine of exhaustion and cited the Black's Law Dictionary 10<sup>th</sup> Edition which defined the word, "exhaustion of remedies" as the doctrine which, if an administrative remedy was provided by statute, a claimant had to first seek relief first from the administrative body before judicial relief could be given.
57. In this regard, they placed reliance on the case of William Odhiambo Ramogi & 3 Others vs Attorney General & 4 Others; Muslims for Human Rights & 2 Others (Interested Parties) [2020] eKLR where it was held that the question of exhaustion of administrative remedies arose when a litigant, aggrieved by an agency's action, sought redress from a court of law on action without pursuing available remedies before the agency itself.
58. On its part, the Petitioner argued that the appointment of Chief Officers in question was not appointment by the decision of the 3<sup>rd</sup> Respondent but by the 1<sup>st</sup> Respondent with the approval of the



- 2<sup>nd</sup> Respondent and was therefore not within the jurisdiction of the PSC because such appointment was not within the jurisdiction of the 3<sup>rd</sup> Respondent or its delegates.
59. It asserted that the doctrine of exhaustion was to be interpreted restrictively and not liberally and had exceptions in the Kenyan law and that the nuances in this case, the scope of prayers sought, public interest and limitation of the PSC's jurisdictional reach made this court the proper forum for litigation.
60. It relied on the case of Owners of Motor Vessel Lillian S vs Caltex Oil Kenya Ltd [1989] eKLR where it was held that jurisdiction was everything and without it a court had no power to make any one step and the case of Joseph Muthee Kamau & Another vs David Mwangi Githure & Another cited in Civil Appeal 244 of 2010 Phoenix of EA Assurance Company Ltd vs S.M Thiga t/a Newspaper Service (eKLR citation not given where it was held that jurisdiction must exist at the time of filing a suit or latest at the time of commencement of hearing.
61. It cited Article 165 of *the Constitution* of Kenya and submitted that the High Court's jurisdiction was only limited or denied (sic) under *the Constitution* in three (3) instances, namely, matters reserved for the exclusive jurisdiction of the Supreme Court, matters falling within the jurisdiction of the courts contemplated in Article 162(2) and supervisory jurisdiction over superior courts.
62. It pointed out that High Court enjoyed broad jurisdiction with respect to any civil matter involving the interpretation of *the constitution* and supervision of other state organs whereas other superior courts and tribunals enjoyed limited jurisdiction exercisable only as conferred by legislation or by *the Constitution*.
63. It was its contention that the dispute before it was civil in nature involving the interpretation of *the Constitution* to the extent of determination whether something said to have been done by a county organ of state (sic) under authority of *the Constitution* was consistent with *the Constitution* and involved the denial or infringement or rights in the Bill of Rights. It argued that the same were matters squarely under the jurisdiction of the High Court as per Article 165(3) of *the Constitution*.
64. It submitted extensively on the jurisdiction of other courts more specifically, the ELRC. It was its argument that its Petition did not relate to an employer-employee relationship dispute and hence was not a matter within the jurisdiction of the ELRC Court. It was emphatic that having demonstrated that the dispute herein was not an employer-employee dispute, then the same did not fall within the jurisdiction of the PSC as an employment tribunal did not arise (sic).
65. In further invoked Article 234(2)(i) of *the Constitution* of Kenya 2010, Section 77 of the County Government Act, Sections 74,75, 85, 86 and 87 of the *Public Service Commission Act*.
66. In its Rejoinder to the 1<sup>st</sup> and 3<sup>rd</sup> Respondent's submissions, it submitted that in Petition No 007 of 2023 Abidha Nicholus vs The Attorney General & Others (eKLR citation not given), the Supreme Court relooked the doctrine of exhaustion in relation to the High Court, ELC and ELRC and administrative tribunals such as the PSC where it held that in the ordinary course of events, the ELC still had original jurisdiction over the matters that were handled by NEMA unless such jurisdiction was specifically ousted in a constitutionally compliant manner.
67. It was its contention that the original jurisdiction of the High Court over any dispute within its competence was not statutory like the other courts of equal status but emanated directly from *the Constitution*.
68. It also cited the case of William Odhiambo Ramogi & 3 Others vs The Attorney General & 6 Others [2020] (sic) where it was held that in determining whether the granting of such constitutional reliefs



- was appropriate in the circumstances , there was need for the court to scrutinise the purpose for which a party is seeking relief.
69. Notably, Article 235 (1) of *the Constitution* of Kenya, 2010 stipulates that a county government was responsible, within a framework of uniform norms and standards prescribed by an Act of Parliament for:-
- a. establishing and abolishing offices in its public service;
  - b. appointing persons to hold or act in those offices, and confirming appointments; and
  - c. exercising disciplinary control over and removing persons holding or acting in those offices.
70. The PSC is one of the Commissions provided for under Chapter 15 of *the Constitution* on Commissions and Independent Office per Article 248 (2) (g) of *the Constitution* of Kenya. It has been established under Article 233 of *the Constitution* of Kenya.
71. Under Article 234 (2)(i) of *the Constitution* of Kenya, one of the powers and functions of PSC is to:-
- “hear and determine appeals in respect of county governments’ public service.”
72. Further, Article 234(3)(b) of *the Constitution* of Kenya provides that the functions and powers of the PSC do not apply to an office in the service of a county government, except as contemplated in Article 234 (2) (i) of *the Constitution* of Kenya hereinabove.
73. In addition, Article 249 (1) of *the Constitution* of Kenya provides that the objects of the commissions and independent office are to:-
- a. protect the sovereignty of the people;
  - b. secure the observance by all state organs of democratic values and principles; and
  - c. promote constitutionalism.
74. Article 249(2) of *the Constitution* of Kenya provides that the commissions and independent offices are subject only to *the Constitution* and the law and are independent and not subject to direction or control by any person or authority.
75. On general powers and functions of constitutional commissions, Article 252 of *the Constitution* of Kenya stipulates that each commission and holder of an independent office:-
- a. may conduct investigations on its own initiative or on a complaint made by a member of the public;
  - b. has the powers necessary for conciliation, mediation and negotiation;
  - c. shall recruit its own staff; and
  - d. may perform any functions and exercise any powers prescribed by legislation, in addition to the functions and powers conferred by *the Constitution*.
76. Within that constitutional background and with respect to the Public Service Commission’s powers and functions under Article 234 (2) (i) to hear and determine appeals in respect of county governments’ public service, the Parliament has enacted various statutory provisions. Part XV of the *Public Service Commission Act*, 2017 provides for hearing and determination of appeals in respect of county governments. It is some of the provisions under that part that are impugned in the present Petition.



77. Section 77 of the *County Governments Act*, 2012 also provides for appeals to the PSC against decisions of the CPSB or a person in exercise or purported exercise of disciplinary control against any county public officer. The said Section 77 of the County Government Act further provides that the PSC shall entertain appeals on any decision relating to employment of a person in a county government
78. Litigants ought to appreciate that statutes do not just happen to be in place. There is a rigorous legislative process, preceding enactment of statutes. The process involves many hours of parliamentary debate by Legislators that also requires rigorous public engagement.
79. In every litigation, courts should presume statutes enacted by Legislature to be valid and constitutional. The dispute resolution mechanisms under the *County Governments Act* and the *Public Service Commission Act*, have constitutional anchorage under Article 234(2)(i) of *the Constitution* of Kenya which could not be wished away.
80. Alternative administrative remedies and processes must be exhausted, before judicial process was invoked. The PSC was not limited to dealing with disputes such as the one before this court. Its mandate under Article 234(2)(i) of *the Constitution* of Kenya was broad. It included the mandate to make provisional and final decisions. Any party aggrieved by the decision of CPSB could therefore apply to it for the granting of provisional and/or final measures.
81. The Public Service Commission [County Appeals Procedures] Regulations, 2022 provides for the procedure for the appeals. It provides for preliminary proceedings, interim applications and preliminary objections. Regulation 13 allows any party to the Appeal, to apply for any orders or directions to the Commission, before the Appeal is heard and determined. Conservatory measures can be sought before the Commission.
82. Access to justice has not been impeded. In fact, the aforesaid Regulations have enhanced the procedure and ensured all person including the Petitioner herein had full access to the PSC when aggrieved by the decisions of CPSB.
83. Jurisdiction could be conferred either by *the Constitution* and/or an Act of Parliament. With regard to the landmark case Owners of Motor Vessel Lillian S vs Caltex Oil Kenya Ltd (Supra), which held that jurisdiction was everything and without it a court could not move a step, it was this court's finding that it was not in its jurisdiction to hear and determine matters arising from the County Public Service Board. The Public Service Commission, with the adoption of the Public Service Commission (County Appeals Procedures) Regulations, 2022, is now a self-contained dispute resolution mechanism, with little or no need for judicial assistance or intervention. The doctrine of exhaustion must be faithfully embraced by aggrieved County Public Servants and Parties interested in disputes involving County Public Service Board (CPSB).
84. Section 45(1)(a) of the *County Governments Act* provides that:-
- “The Governor shall nominate qualified and experienced county chief officers from among persons competitively sourced and recommended by the County Public Service Board.”
85. From the affidavit evidence of the 1<sup>st</sup> and 3<sup>rd</sup> Respondents, it was clear that the names of the nominees emanated from the 3<sup>rd</sup> Respondent. The positions were advertised, candidates shortlisted, candidates interviewed, the names of the successful candidates sent and approved by the 2<sup>nd</sup> Respondent whereafter the successful candidates were employed by the County Government of Vihiga and sworn by the 1<sup>st</sup> Respondent herein.



86. This court also noted that the Petitioner did not rebut and/or controvert the 1<sup>st</sup> and 3<sup>rd</sup> Respondents' arguments that Mary Susan Anyienda who was nominated and approved by the 2<sup>nd</sup> Respondent for the office of Chief Officer Health was qualified.
87. If the Petitioner was dissatisfied with the decision of the CPSB, it was obligated to have sought redress from the PSC in line with Section 77(1) of the County Governments Act. The said Section 77(1) and 2(a) of the said County Governments Act provides that:-
1. Any person (emphasis court) dissatisfied or affected by a decision made by the County Public Service Board or a person in exercise or purported exercise of disciplinary control against any county public officer may appeal to the Public Service Commission.
  2. The Commission shall entertain appeals on any decision relating to employment of a person in a county government including a decision in respect of:-
    - a. recruitment, selection, appointment and qualifications attached to any office.
88. Further, Section 87(2) of the Public Service Commission Act provides that:-
- “A person shall not file any legal proceedings in any court of law with respect to matters within the jurisdiction of the jurisdiction of the Commission to hear and determine appeals from County Government Public Service...”
89. There was no clearer provision emphasising the doctrine of exhaustion in matters relating to recruitment, selection, appointment and qualifications attached to any office in the County Government before recourse can be sought in the High Court than Section 87(2) of the Public Service Commission Act.
90. This is a position that is now well settled in several decisions amongst them Hussein Wanyama Mulebo & 5 Others vs County Public Service Board & 2 Others [2022] eKLR, County Government of Mandera & Another vs Attoreny General & Another; Hussein Dayow Abdullahi & 3 Others (Interested Parties) [2020] eKLR, Kisumu County Public Service Board & Another vs Samuel Okuro & 7 Others [2018] eKLR and Secretary, County Public Service Board & Another vs Hulbhai Gedi Abdille [2017] eKLR.
91. The case of Abidha Nicholus vs The Attorney General & Others (Supra) that the Petitioner herein relied on was distinguishable from the facts of this case. This is because in matters of recruitment at the county government level, there is an elaborate structure of dispute resolution. The powers of the court could not be invoked until an applicant had demonstrated that he or she had complied with the doctrine of exhaustion.
92. It is important to point out that even while parties are exhausting the dispute resolution mechanisms, the jurisdiction of the court is not ousted. It only awaits to be invoked at the appropriate time. In the case of Evans Ladtema Muswahili v Vihiga County Public Service Board & 2others; Marley Ezekiel Ayiego (Interested Party) [2021] eKLR, the court therein associated itself with the position stated in Wambua Maithya vs. Pharmacy and Poisons Board, Pharmaceutical Society of Kenya & 2 others (Interested Parties) [2019] eKLR, that there is jurisdiction, in cases of this nature, so long as the High Court confines itself to determining the question as to whether the recruitment process undertaken by the respondents met the requisite constitutional threshold.
93. For the foregoing reasons, this court found and held that it did not have jurisdiction to hear and determine the Petition herein as the jurisdiction to hear the Petitioner's dispute lay first with the 3<sup>rd</sup>



- Respondent where after an appeal lay with the PSC. This court was therefore called upon to down its tools forthwith and decline to grant the Petitioner any of the reliefs it had sought in the Petition herein.
94. Going further, Section 77(1) of the [County Governments Act](#) stipulates that any person (emphasis court) dissatisfied or affected by a decision made by the 3<sup>rd</sup> Respondent could appeal to the PSC.
95. Article 258 (1) and (2) of [the Constitution](#) of Kenya stipulate as follows:-
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 (emphasis court).
96. The aforesaid provision has also been re-stated in Section 22(1) and 22(2) of [the Constitution](#) of Kenya.
97. Though the Petitioner herein had lodged a Petition with the 3<sup>rd</sup> Respondent, Its appeal appeared not to have been addressed for not having been incorporated. The 3<sup>rd</sup> Respondent could not have been faulted for having not entertained the Petitioner's Petition if it was an amorphous body. Article 22(2) (d) and Article 258(2)(d) of [the Constitution](#) of Kenya refers to an "association" and for which then that association has to be registered under the appropriate laws of Kenya depending on its purpose and structure.
98. At any given time, an association must be a structure and incorporation of an entity for it to have locus standi to institute proceedings. The Petitioner did not rebut the 2<sup>nd</sup> Respondent's assertions that the said William Muriuki Waturu informed it that the Petitioner was not incorporated. This court was therefore not certain if the Petitioner had locus standi to institute the proceedings herein as it required to have capacity to sue and be sued. If the Petitioner was a natural person, the issue of locus standi would not have arisen. However, as this issue was not before this court and was not raised by the Respondents herein, this court did not wish to say more on it.
99. Although the court must always keep at the back of its mind that it could be found to have been wrong on appeal and was required to pronounce itself on the merits or otherwise of the matter that was before it, this court nonetheless found it prudent not to pronounce itself on the merits or otherwise of the Petition herein to give the Petitioner herein an opportunity to comply with the doctrine of exhaustion, if at all it wished to pursue this matter further. This court could then be called upon to adjudicate an appeal from the PSC, if at all the Petitioner was aggrieved by its decision. Pronouncing itself on the merits or otherwise of the Petition herein would be tantamount to ousting the Petitioner herein from the seat of justice before it has exhausted the avenues that are available to it as provided in the [County Governments Act](#) and the [Public Service Commission Act](#).

## Disposition

100. For the foregoing reasons, the upshot of this court's decision was that the 1<sup>st</sup> and 3<sup>rd</sup> Respondents' Notice of Preliminary Objection dated 19<sup>th</sup> May 2023 be and is hereby upheld. The effect of this is



that Petitioner's Petition dated and filed on 11<sup>th</sup> May 2023 be and is hereby struck out for want of jurisdiction.

101. As this was a public interest litigation and it would be unconscionable to award costs to a government against its citizen, this court hereby directs that each party will bear its own costs of the Petition herein.

102. Orders accordingly.

**DATED AND DELIVERED AT VIHIGA THIS 30<sup>TH</sup> DAY OF APRIL 2024.**

**J. KAMAU**

**JUDGE**

