Law Society of Kenya & 2 others v Attorney General & 2 others; Korir & 50 others (Interested Parties) (Constitutional Petition E186, E189 & E192 of 2022 (Consolidated)) [2022] KEELRC 13324 (KLR) (29 November 2022) (Judgment)

Neutral citation: [2022] KEELRC 13324 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CONSTITUTIONAL PETITION E186, E189 & E192 OF 2022 (CONSOLIDATED)

MN NDUMA, J

NOVEMBER 29, 2022

BETWEEN

LAW SOCIETY OF KENYA ..... 1ST PETITIONER

MAGARE GIKENYI J BENJAMIN ..... 2ND PETITIONER

FREDRICK BIKERI & ANOTHER ..... 3RD PETITIONER

AND

ATTORNEY GENERAL ..... 1ST RESPONDENT

NATIONAL ASSEMBLY ..... 2ND RESPONDENT

PUBLIC SERVICE COMMISSION ..... 3RD RESPONDENT

AND

JULIUS KORIR & 50 OTHERS ..... INTERESTED PARTY

JUDGMENT

1. The consolidated petitions were brought by the petitioners on diverse dates seeking the following reliefs:-

    a. A declaration and a finding that the impugned list of the Principal Secretaries nominees is null and void to the extent of disregarding principles of inclusivity, gender balance, ethnic balance, fair labour practices pursuant to Articles 10, 27, 41 and 232 of the *Constitution* of Kenya.

    b. An order of Judicial Review quashing the 1st Respondent's press release and gazette notice on or about the November 2, 2022 and any other document of purported nomination of the 1st to 51st interested parties and any other person nominated as principal secretary without considering statutory and constitutional provisions.

c. An order of judicial review by way of Mandamus, compelling the Respondents herein to initiate and come up with different list of nominees which reflects regional balance and ethnic balance, complies with the Two-thirds gender rule, represents the youth, people with disability, minority and marginalized to fill the positions of principal secretaries as contemplated in the *constitution* and all the enabling provisions of the *constitution* and the law

d. Any other order which the court may deem fit so as to achieve the ends of justice.

e. Costs

The lead file is Petition No E192 of 2022

Brief Facts

2. The petitions are brought under Article 22(2) of the *Constitution* as a matter of public interest as they concern the nominations of 51 named persons for appointment as Principal Secretaries by the President of the Republic of Kenya under Article 132(2) which provides:-

> " The president shall nominate and, with the approval of the National Assembly, appoint, and may dismiss –
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> a. -------
>
> b. -------
>
> c. ---------
>
> d. Principal Secretaries in accordance with Article 155;"

3. The office of the Principal Secretary is established under Article 155(1) of the *Constitution* as follows:-

> " 155(1) There is established the office of the Principal Secretary which is an office in the Public Service.
>
> (2) Each State Department shall be under the administration of a Principal Secretary.
>
> (3) The President shall-
>
> (a) nominate a person for appointment as Principal Secretary from among persons recommended by the Public Service Commission; and
>
> (b) With the approval of the National Assembly, appoint Principal Secretaries." (Empasis added)

4. The petitioners state that the 51 nominees undergoing approval for appointment by the National Assembly were nominated by the President on November 2, 2022, from a list of 477 candidates shortlisted by the Public Service Commission.

5. That from the list of the nominees, the nomination does not take into account the regional and tribal balance, the Two-Thirds gender Principle, People with disabilities, and the youth contrary to the tenets of good governance demanded by Article 10, 19, 20, 21(3) 22, 23, 35(1), 54, 55, 56, 57, 131(2) d, 232(1) (h) and 250(4), of the *Constitution* of Kenya, 2010.

6. That from the impugned list of 51 interested parties, 13 are from members of the Kalenjin community from Rift Valley region, and 13 others are from Central Kenya region to the detriment of the other 40 tribes and communities contrary to pluralism of the Country and depicts regional imbalance.

7. That further, the composition of the list contravenes the Gender Equality Principle under Article 27(8) as it is made up of 11 women out of 51 nominees which is contrary to the *Constitution* and national values and principles under Article 10 of the *Constitution*.

8. That the composition of 51 nominees for approval disregarded 426 candidates who by dint of being shortlisted, were qualified for nomination in fulfilment of the constitutional mandate for regional balance, gender equality, youth and people with disabilities.

9. That the nomination amounts to favouritism in public office nominations and is a complete departure from values and principles of Public Service as enlisted in Article 232(1) of the *Constitution* of Kenya, 2010, which include impartiality, equitability, accountability for administrative acts, transparency, representation of Kenya's diverse communities among others.

10. That indeed, Article 232(1) of the *Constitution* on values and Principles of Public Service provides:-

> " 232(1) The Values and Principles of Public Service
>
> include-
>
> (a) .....
>
> (b) .....
>
> (c) .....
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> (d) .....
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> (e) .....
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> (f) .....
>
> (g) Subject to paragraphs (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 –
>
> (i) Men and Women.
>
> (ii) the members of all ethnic groups and
>
> (iii) persons with disabilities. (Emphasis added)

11. Furthermore, Article 232(2) provides:-

> " (2) The Values and Principles of Public Service apply to Public Service in –
>
> a. All State organs in both levels of government;"

12. The petitioners seek the Court to stop the National Assembly from proceeding with the process of approval of the 51 nominees contained in the list transmitted to them for vetting and approval which list was submitted in violation of the *Constitution* of Kenya as set out above.

13. That if the Court does not stop the process, the National Assembly will be debating/vetting an illegal list which does not reflect the Principles of governance.

14. That the actions of the respondents may lead to autocratic governance and exclusion of a considerable constituency of Kenya at this level of national government.

15. That the public will suffer continued marginalisation, and alienation in the appointments to key public positions in the country. That the overall result will be, loss of public confidence in the Leadership of the Country.

16. That the people of Kenya will be adversely affected in their individual and collective capacities by being subjected to a key level of national government that does not represent the face of Kenya.

17. That the petitioners have fully demonstrated violation of Articles 10, 27, 41 and 232 of the *Constitution* of Kenya, 2010. That the respondents are enjoined by Article 57 of the *Constitution* to protect the vulnerable, the weak, the young and the marginalised. That this Court has the mandate under Articles 162(2) (a) as read with Section 12 of the *Employment and Labour Relations Court Act*, 2014. That further mandate to the Court is provided under Article 165(5) (a) which provides:-

    (5) The High Court shall not have jurisdiction in respect of matters:-

    b. falling within the jurisdiction of the Courts contemplated in Article 162(2).

18. That the Court do grant the reliefs sought in the consolidated petitions.

19. The instant Ruling relates to Notices of Preliminary Objection dated the November 13, 2022 by the 27th Interested Party, November 11, 2022 and November 17, 2022 by the 2nd Respondent, and November 18, 2022 by the 1st Respondent.

20. The gist of the Notices of Preliminary Objections is to the effect that;

    a. The Honourable Court lacks jurisdiction to determine this matter as the appointment & removal from the positions of the Principal Secretaries is not a labour and employment issue, but a special constitutional innovation, a sui generis devise to address challenging governance needs and gaps, the final word rests not with the President but Parliament.

    b. The appointment of the Principal Secretaries does not involve any of the parties or raise any employment and labour relations issues envisioned by sections 12 (1) and (2) of the *Employment & Labour Relations Court* Act 2012.

    c. The jurisdiction of this Court unlike the High Court is not original or unlimited like the High Court. This Court's jurisdiction is limited to constitutional issues that arise in the context of disputes on employment and labour relations under section 12 as read with Article 162 (2) of the *Constitution*.

    d. The Petition is premature, in violation of the concept of separation of powers as well as Articles 37, 119, 132 (2) (d), and 155 (3) of the *Constitution* of Kenya as read together with the Public Appointments (Parliamentary Approval) Act, No 33 of 2011 and violates the constitutional principle/ doctrine of exhaustion.

21. The submissions by the parties are summarised as follows:-

Respondents' Submissions

22. The parties have filed written submissions in support of their respective positions. The Respondents and interested parties in sum argue that the Honourable Court lacks the requisite jurisdiction to entertain the Petitions and Applications since the dispute does not arise from an employment and labour relationship and thus falls outside the realm of Article 162 (2) of the *Constitution* read with section 12 of the *Employment and Labour Relations Court Act*, 2014. The Respondents relied on the celebrated case of *The Owners of the Motor Vessel 'Lillian 'S' versus Caltex Oil (K) Ltd* (1989) eKLR for the proposition that jurisdiction is everything, and without it the court must down its tools. The Respondents have cited, *inter alia*, the Court of Appeal case in *Attorney General & 2 Others versus Okiya Omtatah and 14 Others*, where the Court held that:-

> "We have no doubt that ELRC and ELC have jurisdiction to interpret and apply the *constitution* as held by the High Court in *United International University versus Attorney General and Others* 2012 eKLR and this Court in *Daniel N Mugendi versus Kenyatta University and others*. However, the jurisdiction of those specialized Courts to interpret and apply the *constitution* is not original or unlimited like that of the High Court. It is limited to the constitutional issues that arise in the context of disputes on employment and labour relations or employment and land matters."

23. It has been submitted that whereas the Court has jurisdiction to interpret and apply the *constitution*, it can only do so in the context of an employment and labour relationship between the parties involved as provided under section 12 of the *Employment & Labour Relations Court Act*.

24. On the doctrine of exhaustion, the Respondents' submit that the Petitioners have not exhausted all the other avenues for redress before moving to court and therefore the Petitioners are in violation of the doctrine of exhaustion. It is urged that this arises as there is an alternative mechanism of addressing the dispute which ought to be exhausted before the jurisdiction of the Court can be invoked.

25. To buttress the above legal position, the Respondents have relied on the case of *Geofrey Muthinja Kabiru & 2 Others versus Samuel Munga Henry & 1756 others* 2015 eKLR where the Court of Appeal held:-

> "It is imperative that where a dispute resolution mechanism exists outside Courts, the same must be exhausted before the jurisdiction of the court is invoked. Courts ought to be of last resort and not the first port of call the moment a storm brews...the exhaustion doctrine is a sound one and serves the purpose of ensuring that there is postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interests within the mechanisms in place for the resolution outside the courts."

26. The Respondents have also relied on the Supreme Court's decision in *Justus Kariuki and Another versus Martin Nyaga Wambora* 2017 Eklr, where the Supreme Court found, inter alia, that for the due functioning of constitutional governance, the Court should be guided by restraint, limiting themselves to intervention in requisite instances, upon appreciating the prevailing circumstances, and the objective needs and public interests attending each case.

27. The Respondents submit that each arm of the Government has an obligation to recognize the independence of the other arms of government and should refrain from directing other arm how to exercise its mandate. It has been argued that even if the successful nominees were vetted and appointed,

nothing stops a court of law from determining the validity, legality or even the constitutionality of the appointments.

28. The Respondents also relied on the case of *Mwende Maluki Mwinzi versus Cabinet Secretary; Ministry of Foreign Affairs & 2 Others* 2019 eKLR where Makau J held that:-

> "This Court has been entreated by the petitioner to overturn the decision of the National Assembly of giving a conditional approval to appointment of the petitioner. The declaration sought will be an affront to the twin doctrine of separation of powers and deference as enunciated by the Court of Appeal in *Mumo Matemo vs Trusted Society of Human Rights Alliance & 5 others* (2013) eKLR where the Court of Appeal made the following salient findings that:-
>
> " a) The rational basis test involves restraint on the part of the Court. It respects the respective roles of the courts and the Legislature. In the exercise of its legislative powers, the Legislature has the widest possible latitude within the limits of the *Constitution*. In the exercise of their power to review legislation, courts should strive to preserve to the Legislature its rightful role in a democratic society. This applies equally to executive decisions."
>
> b) The rule that executive decisions may be set aside only if they are irrational and may not ordinarily be set aside because they are merely unreasonable or procedurally unfair has been adopted precisely to ensure that the principle of the separation of powers is respected and given full effect. If executive decisions are too easily set aside, the danger of courts crossing boundaries into the executive sphere would loom large."
>
> c) Deference is multi-directional, and we are prepared to hold that in the same way the other branches are to defer to the jurisdiction of the courts, the courts must also defer to the other branches where the constitutional design so ordains. We hold that the standard of judicial review of appointments to State or Public Office should therefore be generally deferential, although courts will not hesitate to be searching where the circumstances of the case demand a heightened scrutiny provided that the courts do not purport to sit in appeal over the opinion of the other branches."

29. The Respondents urged the Court not to depart from the decision in Mumo Matemu (*supra*), as relied upon by Makau J in Mwenda Mwinzi and not sit on appeal over the duties of other organs of government.

The Petitioners Written Submissions

30. The Petitioners submit that there has been no violation of the doctrine of exhaustion for the reason that the matter before court pertains to a Constitutional violation committed in the nomination of the 51 nominees for vetting and employment into public service as Principal Secretaries. That given the nature and level of the public interest involved, this matter falls within the exceptional circumstances warranting exemption from the doctrine of exhaustion.

31. It has been contended that the National Assembly accepted the unconstitutional list and proceeded to prepare a vetting calendar on the November 4, 2022 inviting the 51 nominees for vetting. The National Assembly did not raise any objections regarding the unconstitutionality of the list as forwarded to

it by the executive. It is argued that the National Assembly failed to fault or find any illegality or unconstitutionality with the list.

32. The Petitioners have relied inter alia, on the case of *William Odhiambo Ramogi & 3 Others versus Attorney General & 4 others; Muslims for Human Rights & 2 Others (Interested Parties)* (2020) eKLR where the court observed that:-

> "Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere 'bootstraps' or merely framed in the Bill of Rights language as pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court."

33. As to whether the Petition contravenes the doctrine of separation of powers, the Petitioners submit that the Petition is not inviting the Court to vet and approve the nominees but to have some involvement and check the constitutionality of the composition of the 51 nominees. The Petitioners affirms that the vetting and approval of the nominees remain a preserve of the National Assembly and that the exercise of the said powers is not under challenge. What has been challenged is the composition of the list of nominees. It has been submitted that the doctrine of separation of powers or the independence of the National Assembly cannot oust the jurisdiction of the court since the *constitution* is the supreme law of the land.

34. The Petitioners have relied on, *inter alia*, the case of *Speaker of Senate versus the AG & 4 Others* 2013 eKLR where the court held, *inter alia*, that Parliament has always to abide by the prescriptions of the *constitution* and that it cannot operate besides or outside the four corners of the *constitution*. The Petitioners also relied on the case of *Appollo Mboya versus the Attorney General and 2 others* 2018 eKLR where the court held that:-

> "Constitutions adhering to the doctrine of the separation of powers such as ours do not typically keep the branches of government entirely separate. The doctrine allows for each of the three branches of government to have some involvement in, or control over, the acts of the other two. This partial mixture of mutually controlling powers is known as the system of checks and balances."

35. On whether the court has jurisdiction under Article 162 (2) of the *Constitution* as read with section 12 of the *Employment & Labour Relations Court Act* 2014, the Petitioners submit that the Principal Secretaries are stricto sensu employees. The nominees have completed their interviews at the Public Service Commission and have been nominated by the President for placement in different government departments and awaiting the National Assembly's vetting and approval. The Petitioners submit that by dint of being officers in public service as provided and described by the *constitution* of Kenya under Article 155, the appointment of the Principal Secretaries is an employment to the public service and thus amongst matters contemplated under section 12 of the Act. The Petitioners cite the case of *Lilian W Mbogo Omollo versus Cabinet Secretary Ministry of Public Service and Gender and Another* 2020 eKLR in which the former Principal Secretary, Public Service and Gender, Lilian W Mbogo Omollo filed a claim disputing her suspension before the Employment and Labour Relations court and the dispute was resolved by the court without any jurisdictional hitches. The Petitioners argue that the foregoing confirms that the recruitment, appointment and holding of public offices by the Principal Secretaries is an employment matter which the honourable court has jurisdiction to hear and determine.

Determination

36. Upon a careful consideration of the depositions and submissions by the parties, the Court has delineated the following issues for determination: -

    i. Whether the Employment and Labour Relations Court has jurisdiction to entertain the consolidated petitions.

    (ii) If the answer to (i) above is in the affirmative, whether in the light of the doctrine of exhaustion, separation of powers and judicial restraint, the petitions are ripe for consideration.

    (iii) What orders should the Court grant?

37. In answer to issue (i) above, the nature and extent of the jurisdiction of this Court was well set out in the Court of Appeal decision in *Daniel N Mugendi vs Kenyatta University and 338 Others* [2013] eKLR in which the High Court decision in *United States International University (USIU) vs The Attorney General and Others* [2012] eKLR was upheld. The Court of Appeal laid to rest the issue of Employment and Labour Relations Court jurisdiction as follows:-

> " The Industrial Court is a specialist Court to deal with employment and labour relations. 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 the same status as of the 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 Court 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 the matter before it.
>
> We have quoted in extenso the pertinent parts of the judgment above for the relevance attached to this appeal. In sum on this ground of jurisdiction, we find as we had stated earlier that the High Court had no jurisdiction to entertain the claim which essentially was based on breaches of contract of employment along with some unstated claims of breaches of rights, as the learned judge did find. Believing as we do that the approach taken by Majanja J is the correct one, and in endeavouring to meet the ends of justice untrammelled by procedural technicalities, we set aside the order striking out the appellant's petition and direct that the High Court do transfer it to the Industrial Court which also has jurisdiction and authority to consider the claims of breach of fundamental rights as pertain to industrial and labour relations matters.
>
> It is only meet and proper that the Industrial Court do exclusively entertain those matters in that context and with regard to Article 165(5) (b)."

38. The Respondents and Interested parties have however submitted that the jurisdiction of this Court being a specialised Court, is limited to Constitutional issues that arise in the context of disputes on Employment and Labour relations. The Respondents have cited the Court of Appeal decision in

Daniel Maingi Muchiri vs Jubilee Insurance Company Limited, Civil Appeal No 138 of 2016, in which the Court of Appeal stated;

> "The Environment and Land Court and the Employment and Labour Relations Court too have jurisdiction to redress violations of constitutional rights in matters falling under their jurisdiction." (Emphasis added.)

39. The Respondents and Interested parties have further submitted that the present suit does not disclose any Employment and Labour Relations dispute and therefore, the Court cannot be called upon to determine the constitutional issues raised in the petition because they do not arise from an Employment and Labour Relations matter.

40. The Respondents and Interested Parties also rely on the Court of Appeal decision in *Attorney General and 2 Others vs Okiya Omtata and 14 Others*, Civil Appeal No 621 of 2020 for this proposition

41. In the case of *Daniel Maingi*, (*supra*), the cause of action arose from appointment and removal from office of commissioners of an Independent Commission.

42. The Court of Appeal rendered itself thus:-

> "What all this suggests to us is that the appointment and removal from office of commissioners of these Independent Commissions is not a labour and employment issue as the Employment and Labour Relations Court erroneously held, but a special Constitutional intervention, a sui generis devise to address challenging governance needs and gaps. The appointment of the Chairperson and members of the Commission did not involve any of the parties or raise any of the employment and Labour relations issues contemplated by Section 12 of the Act. With due respect, it was completely off the mark for the learned judge to hold that the recruitment of the chairperson and members of the commission raised employment and labour relations issues merely because they were to be remunerated from the Consolidated Fund. On the parity of that reasoning the election or removal from office of the President of the Republic or appointment and removal of judges of the Superior Courts would amount to employment and Labour relations issues merely because they are remunerated from the consolidated fund."

43. The Court was also referred to the Supreme Court decision in *Republic vs Karisa Chengo & Another* [2017] eKLR, where the Supreme Court stated:-

> "Although the High Court and the specialised Courts are of the same status, as stated, they are different Courts. It also follows that the Judges appointed to those Courts exercise varying jurisdictions, depending upon the particular Courts to which they were appointed. From a reading of the statutes regulating the specialised Courts, it is logical inference, in our view, that their jurisdiction, are limited to the matters provided in those statutes. Such an inference is reinforced by and flows from Article 165(5) of the *Constitution*, which prohibits the High Court from exercising jurisdiction in respect of matters reserved for the exclusive jurisdiction of the Supreme Court under this criteria; or (b) falling within the jurisdiction of the Courts contemplated in Article 162(2)."

44. The Respondents and Interested Parties submit that the appointment of Principle Secretaries in terms of Article 132(2) (d) as read with Article 155(1) (2) and 3(a) and (b) falls within the purview described by the Court of Appeal in the decision in *Daniel Maingi* (*supra*) and in *Attorney General & 2 Others vs Okiya Omtata and 14 Others*, Civil Appeal No 621 of 2020 and therefore any intervention by

Employment and Labour Relations Court in this matter amounts as was stated by the Court of Appeal in Omtata case (*supra*) to enforcing the *Constitution* through unconstitutional means.

45. This view has been vehemently opposed by the petitioners in their extensive submissions and the authorities cited as set out above.

46. A plain, contextual and purposive reading of the *Constitution* as guided under Article 10(1) (a); 20(1), (3) (a) and (b) 22(1) (c); 159(1); and 2(a) and 259 (1) (a) (b) (c) and (d) has led this Court to the following conclusion:-

    (a) The office of the Principle Secretary is an office in the Public Service.

    (b) The appointment, and tenure of a person in the office of the Principal Secretary is subject to the "Values and Principles of Public Service" under Article 232(1) (g) (h) (i) (ii) & (iii).

    (c) The office of the Principal Secretary is distinct from an office of a Commissioner in an Independent Commission.

    e. The office of the Principal Secretary is distinct from that held by a judge of a Superior Court.

    f. The office of the Principal Secretary is distinct from that held by persons elected to political offices within the meaning of the decision of the Court of Appeal in the case of *Daniel Maingi Muchiri* and *Okiya Omtata & 14 Others* (supra).

47. These cases are therefore distinguishable from the present case. The Court is fortified in this finding by the decisions of Employment and Labour Relations Court in *Sheria Mtaani Na Shadrack Wambui & Another vs Judicial Service Commission*, JR No E003 of 2021, in which the Court distinguished the case of *Attorney General & 2 Others vs Okiya Omtata Okoit & 14 Others* [2020] eKLR and found that, Magistrates, unlike, Commissioners employed by Independent Commissions are public servants and disputes arising from their recruitment, tenure and removal fall within the jurisdiction of Employment and Labour Relations Court.

48. Indeed, unlike the appointment of Cabinet Secretaries, by the President, in terms of Article 132(2) (a), who do not apply for the positions and are not interviewed and shortlisted prior to the nomination by the president, and approval by National Assembly, the Principal Secretaries are subjected to a full-fledged recruitment process comprising of advertisement of the positions and invitation to the interested persons to apply; be shortlisted and interviews conducted by the Public Service Commission before the successful candidates' names are submitted to the president for nomination and subsequent approval by the National Assembly.

49. It is my considered view that this rigorous process must meet the requirements under Articles 41(1) of the *Constitution* which provides:-

    " Every person has the right to fair Labour Practices".

    This is in addition to other requirements under Article 10, 27 and 232 of the *Constitution* of Kenya set out herein before. The recruitment of Principles Secretaries is indeed, an employment and labour relations matter within the meaning of Section 12 of the *Employment and Labour Relations Court Act*, 2014.

50. The Employment and Labour Relations Court has without a doubt, jurisdiction to determine all constitutional matters arising from the recruitment of Principal Secretaries and I so hold. The Preliminary Objections in this respect are therefore without merit and are dismissed.

Second issue

51. Having found the Court has jurisdiction to entertain these consolidated petitions, the next question for determination is whether the dispute is ripe for determination by the Court. In other words, should the petitioners have awaited the conclusion of the vetting process by the National Assembly before approaching the Court?

52. This Court and the High Court have previously dealt with related matters in the cases of; *Mike Sonko Mbuvi Kioko vs The Clerk, Nairobi City County and 5 Others* [2020] eKLR; *Ann Mumbi Waiguru v County Assembly of Kirinyaga* [2020] eKLR and *Charity Kaloki Ngilu vs The County Assembly of Kitui and 2 Others* [2020] eKLR.

53. The Court of Appeal also dealt with this issue in the case of *Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 Others* [2013] eKLR.

54. The *Locus Classicus* however is the Supreme Court decision in *Justus Kariuki Mate & Another vs Martin Nyaga Wambora & Another* [2017] eKLR in which the Supreme Court set out the guiding principles to be applied by courts while observing the doctrine of separation of powers as follows:-

> " From the course of reasoning emerging from such cases, it is possible to formulate certain principles, as follows:-
>
> > "(a) each arm of Government has an obligation to recognize the independence of other arms of Government;
> >
> > (b) each arm of Government is under duty to refrain from directing another Organ on how to exercise its mandate;
> >
> > (c) the Courts of law are the proper judge of compliance with constitutional edict, for all public agencies; but this is attended with the duty of objectivity and specificity, in the exercise of judgment;
> >
> > (d) for the due functioning of constitutional governance, the Courts be guided by restraint, limiting themselves to intervention in requisite instances, upon appreciating the prevailing circumstances, and the objective needs and public interests attending each case;
> >
> > (e) in the performance of the respective functions, every arm of Government is subject to the law."

55. The Supreme Court before arriving at this conclusion had cited the Court of Appeal decision in *Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 Others* [2013] eKLR as follows:-

> " It is no doubt that the doctrine of separation of powers is a feature of our constitutional design and a pre-commitment in our constitutional edifice. However, separation of powers does not only proscribe organs of government from interfering with the other's function. It also entails empowering each organ of government with counteracting powers which provide checks and balances on actions taken by other organs of government. Such powers are, however not a license to take over functions vested elsewhere. There must be judicial, legislative and executive deference to the repository of the function...."

56. In determining this matter, this Court is alive to the provisions of Article 2 of the *Constitution* which provides:-

> " 2(1) This Constitution is the Supreme law of the Republic and binds all persons and all State organs at both levels of government.
>
> (2) No person may claim or exercise State authority except as authorised under this Constitution."

Article 10(1) which provides:-

> " 10(1) The national values and principles of governance in this Article bind all State officers, Public Officers and all persons whenever anyone of them-
>
> (c) Makes or implements public policy decisions."

57. It cannot be gainsaid therefore the President and the National Assembly are bound by the provisions of Constitution while exercising their authority and decision making under Article 132(2) (d) as read with Article 155 of the *constitution* in the nomination, approval and appointment of Principal Secretaries.

58. The provisions of the *Public Appointments (Parliamentary Approval) Act*, No 33 of 2011, which guides the Parliamentary Approval process of Principal Secretaries provides under Section 7 as follows:-

> " The issues for consideration by the relevant House of Parliament in relation to any nomination shall be-
>
> a. the procedure used to arrive at the nominee including the criteria for the short listing of the nominee.
>
> b. any Constitutional or statutory requirements relating to the office in question, and
>
> c. the suitability of the nominee for the appointment proposed having regard to whether the nominee's ability, experience and qualities meet the needs of the body to which nomination is being made." (emphasis added)

59. A plain, contextual and purposive interpretation of Section 7 of the *Act* aforesaid leads this Court to the unequivocal conclusion that the National Assembly in the vetting (Approval) process is mandated to:-

(a) First determine in terms of section 7(a) and (b) whether the process leading to the nomination was in terms of Article 232 (1) and in particular if the list of nominees presented to them was arrived at in full compliance with the Values and Principles of Public Service and in particular whether the nominees are:-

> '' (h) representation of Kenya's diverse Communities;
>
> i. affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service, of-
>
> i. men and women
>
> (ii) the members of all ethnic groups;
>
> and

(iii) persons with disabilities."

(b) Secondly determine in terms of section 7 (c) the suitability of the nominee as an individual.

60. In terms of section 8(2) of the *Act*, the vetting committee at the conclusion of an approval hearing shall prepare a report on the suitability of the candidates to be appointed to the office to which they have been nominated, and shall include in the report, such recommendations as the committee may consider necessary. Furthermore in terms of section 8(1) the Committee shall table its report in the relevant house for debate and decision. Finally the clerk shall in terms of section 11 of the Act notify the appointing authority of the decision. (Emphasis added).

61. The transmission of the decision of the house to the appointing authority concludes the vetting process. The wording of sections 7, 8 and 11 is couched in mandatory terms. It is therefore clear to me that this Court may only be called upon to review the aforesaid matters upon the conclusion of the vetting process by the national Assembly. This is a sacred mandate given to the house by the people of Kenya and the court must pay deference to the house in that respect.

62. Accordingly, the consolidated petitions have been filed prematurely. The petitioners must await the conclusion of the process the National Assembly is now seized of. That process is participatory and the Court only hopes that appropriate presentations were made to the National Assembly by members of the public in terms of the Act to enrich that process.

63. In the final analysis, the Preliminary Objections by the Respondents and the Interested Parties succeed only to the extent that the petitioners consolidated petitions are struck out for having been filed prematurely.

64. This being a public interest case, parties to meet their costs of the suit.

DATED AND DELIVERED AT NAIROBI(VIRTUALLY) THIS 29TH DAY OF NOVEMBER, 2022.

Mathews Nderi Nduma

Judge

Appearances

Mr. Geoffrey Sore, for the Petitioner in E192 of 2022

Dr. Gikenyi Benjamin, the Petitioner in E186/2022

Mr. Danstan Omari for the Petitioner in 189/2022

Mr. Odukenya and Mr. Eredi for the Attorney General

Mr. Titus Makhanu for the 27th Interested Party

Jomo for 12th Interested Party.