



**REPUBLIC OF KENYA**

**IN THE SUPREME COURT OF KENYA**

*(Coram: Koome; CJ & P, Wanjala, Njoki, Lenaola & Ouko, SCJJ)*

**PETITION NO. E042 OF 2024**

– BETWEEN –

**DR. MAGARE GIKENYI J. BENJAMIN..... APPELLANT**

-AND-

**HON. ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**  
**PUBLIC SERVICE COMMISSION ..... 2<sup>ND</sup> RESPONDENT**  
**NATIONAL ASSEMBLY ..... 3<sup>RD</sup> RESPONDENT**  
**TERESIA MBAIKA MALOKWE ..... 4<sup>TH</sup> RESPONDENT**  
**JULIUS KIPLANGAT KORIR ..... 5<sup>TH</sup> RESPONDENT**  
**SALOME MUHIA-BEACCO ..... 6<sup>TH</sup> RESPONDENT**  
**AURELIA CHEPKIRUI RONO ..... 7<sup>TH</sup> RESPONDENT**  
**RAYMOND VICKY OJWANG' OMOLLO ..... 8<sup>TH</sup> RESPONDENT**  
**MARY MUTHONI MURIUKI ..... 9<sup>TH</sup> RESPONDENT**  
**PROF. JULIUS KIBET BITOK ..... 10<sup>TH</sup> RESPONDENT**  
**DR. CHRIS K. KIPTOO ..... 11<sup>TH</sup> RESPONDENT**  
**JAMES MUHATI BUYEKANE ..... 12<sup>TH</sup> RESPONDENT**  
**PATRICK MARIRU ..... 13<sup>TH</sup> RESPONDENT**  
**DR. ABRAHAM KORIR SING'OEI ..... 14<sup>TH</sup> RESPONDENT**  
**ROSELINE KATHURE NJOGU ..... 15<sup>TH</sup> RESPONDENT**  
**AMOS NJOROGE GATHECHA ..... 16<sup>TH</sup> RESPONDENT**  
**VERONICA MUENI NDUVA ..... 17<sup>TH</sup> RESPONDENT**  
**ENG. JOSEPH MUNGAI MBUGUA ..... 18<sup>TH</sup> RESPONDENT**  
**MOHAMED ABDULKARIM DAGHAR ..... 19<sup>TH</sup> RESPONDENT**  
**KIPROTICH KORIR NIXON ..... 20<sup>TH</sup> RESPONDENT**  
**CHARLES HINGA MWAURA ..... 21<sup>ST</sup> RESPONDENT**  
**JOEL PSIMATWA LOREMOI ARUMONYANG ..... 22<sup>ND</sup> RESPONDENT**  
**PROF. EDWARD NAMISIKO**  
**WASWA KISIANGANI..... 23<sup>RD</sup> RESPONDENT**  
**ENG. JOHN KIPCHUMBA TANUI ..... 24<sup>TH</sup> RESPONDENT**  
**ENG. PETER KIPLAGAT TUM ..... 25<sup>TH</sup> RESPONDENT**  
**ANN NJOKI WANG'OMBE ..... 26<sup>TH</sup> RESPONDENT**  
**DR. RICHARD BELIO KIPSANG ..... 27<sup>TH</sup> RESPONDENT**

<b>DR. ESTHER THAARA MUORIA .....</b>	<b>28<sup>TH</sup> RESPONDENT</b>
<b>BEATRICE MUGANDA INYANGALA .....</b>	<b>29<sup>TH</sup> RESPONDENT</b>
<b>PHILLIP KELLO HARSAMA .....</b>	<b>30<sup>TH</sup> RESPONDENT</b>
<b>HARRY KIMTAI KACHUWAI .....</b>	<b>31<sup>ST</sup> RESPONDENT</b>
<b>ALFRED OMBUDO K'OMBUNDO .....</b>	<b>32<sup>ND</sup> RESPONDENT</b>
<b>ABUBAKAR HASSAN ABUBAKAR .....</b>	<b>33<sup>RD</sup> RESPONDENT</b>
<b>DR. EUSEBIUS JUMA MUKHWANA .....</b>	<b>34<sup>TH</sup> RESPONDENT</b>
<b>PATRICK KIBURI KILEMI .....</b>	<b>35<sup>TH</sup> RESPONDENT</b>
<b>SUSAN AUMA MANGENI .....</b>	<b>36<sup>TH</sup> RESPONDENT</b>
<b>ISMAIL MAALIM MADEY .....</b>	<b>37<sup>TH</sup> RESPONDENT</b>
<b>JONATHAN MWANGANGI MUEKE .....</b>	<b>38<sup>TH</sup> RESPONDENT</b>
<b>ENG.FESTUS KIPKOECH NGENO .....</b>	<b>39<sup>TH</sup> RESPONDENT</b>
<b>EPHANTUS KIMOTHO KIMANI .....</b>	<b>40<sup>TH</sup> RESPONDENT</b>
<b>JOHN LEKAKENY OLOLTUAA .....</b>	<b>41<sup>ST</sup> RESPONDENT</b>
<b>MUSEIYA SILVIA KIHORO .....</b>	<b>42<sup>ND</sup> RESPONDENT</b>
<b>UMMI MOHAMED BASHIR .....</b>	<b>43<sup>RD</sup> RESPONDENT</b>
<b>DR. PAUL KIPRONOH RONO .....</b>	<b>44<sup>TH</sup> RESPONDENT</b>
<b>GITONGA MUKETHA MUGAMBI .....</b>	<b>45<sup>TH</sup> RESPONDENT</b>
<b>ALEX KAMAU WACHIRA .....</b>	<b>46<sup>TH</sup> RESPONDENT</b>
<b>MOHAMED LIBAN .....</b>	<b>47<sup>TH</sup> RESPONDENT</b>
<b>GEOFFREY EYANAE KAITUKO .....</b>	<b>48<sup>TH</sup> RESPONDENT</b>
<b>MOGOSI JOSEPH MOTARI .....</b>	<b>49<sup>TH</sup> RESPONDENT</b>
<b>ABDI DUBAT FIDHOW .....</b>	<b>50<sup>TH</sup> RESPONDENT</b>
<b>IDRIS SALIM DOGOTA .....</b>	<b>51<sup>ST</sup> RESPONDENT</b>
<b>ELIJAH GITHUMBU MWANGI .....</b>	<b>52<sup>ND</sup> RESPONDENT</b>
<b>BETSY MUTHONI NJAGI .....</b>	<b>53<sup>RD</sup> RESPONDENT</b>
<b>SHADRACK MWANGOLO MWADIME .....</b>	<b>54<sup>TH</sup> RESPONDENT</b>
<b>LAW SOCIETY OF KENYA .....</b>	<b>55<sup>TH</sup> RESPONDENT</b>
<b>FREDRICK BIKERI .....</b>	<b>56<sup>TH</sup> RESPONDENT</b>

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*(Being an appeal from the Judgment and Decree of the Court of Appeal at Nairobi (Musinga(P), Asike Makhandia & Kantai, J.J.A.) dated 22<sup>nd</sup> November 2024 in Civil Appeal No. E722 of 2023)*

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Representation:

Dr. Magare Gikenyi  
(In person)

Mr. Muthuri for the 1<sup>st</sup> respondent  
(Attorney General's Chambers)

Ms. Suzanne Khadambi for the 3<sup>rd</sup> respondent  
(Suzanne L. M Khadambi Advocate)

# **JUDGMENT OF THE COURT**

## **A. INTRODUCTION**

[1] Before us is an appeal dated 10<sup>th</sup> December, 2024 at the instance of Dr. Magare Gikenyi J. Benjamin, the appellant. The appeal is premised on this Court's appellate jurisdiction under Article 163(4)(a) of the Constitution. The gravamen of the appeal revolves around whether the appointment by the President of the Republic of Kenya of 51 Principal Secretaries in various Ministries pursuant to Article 155 of the Constitution as well as the appointment of one Principal Administrative Secretary and Accounting Officer to the National Police Service Commission failed to reflect gender balance, ethnic, regional, and cultural diversity as required by Articles 10, 27, 73, 75, and 232 of the Constitution.

## **B. FACTUAL BACKGROUND**

[2] On 2<sup>nd</sup> December 2022, the President appointed the 4<sup>th</sup> to 54<sup>th</sup> respondents as Principal Secretaries in various Ministries. Prior to the appointment, the President had nominated the said persons and forwarded their names to the National Assembly on 2<sup>nd</sup> November 2022 for approval as required under Article 155(3) of the Constitution. On 1<sup>st</sup> December, 2022, the National Assembly duly approved the nominees and a Gazette Notice was duly issued on the same day. On 2<sup>nd</sup> December, 2022, they were sworn into office and immediately took up their respective positions. Contemporaneously, the President also appointed Bernice Sialaal Lemedeket (sued as the 52<sup>nd</sup> interested party before the Employment and Labour Relations Court (ELRC)) as a Principal Administrative Secretary and Accounting Officer, National Police Service Commission.

## **C. LITIGATION HISTORY**

### ***i) Proceedings Before the Employment and Labour Relations Court (ELRC)***

[3] Following the appointment of the 4<sup>th</sup> to 54<sup>th</sup> respondents, the appellant, who describes himself as a medic, consultant trauma and general surgeon, challenged

their appointment before the ELRC vide **Petition No. 207 of 2022** dated 5<sup>th</sup> December, 2022 (Record of Appeal page 297 to 323). He alleged that a quick scrutiny of the appointees, *prima facie* revealed that the impugned appointments did not reflect nor ensure that not more than two thirds of the nominees are from one gender. For instance, 11 out of the 51 appointees were women which translated to 21% and that the said list did not consider ethnic, regional and cultural diversity as demanded by Articles 10, 27, 73, 75 and 232 of the Constitution. Concerning the appointment of Bernice Sialaal Lemedeket (the 52<sup>nd</sup> interested party before the ELRC) as a Principal Administrative Secretary and Accounting Officer, National Police Service Commission, the appellant argued that the Constitution does not provide for the position of Principal Administrative Secretary. It is noteworthy that Bernice Sialaal Lemedeket was never joined as a party in the proceedings before the Court of Appeal and before this Court.

[4] It is also worth noting that prior to the filing of the appellant's proceedings, there had been filed three other and similar petitions; one filed by the Law Society of Kenya (the 55<sup>th</sup> respondent herein), being **Petition No. E186 of 2022**; a second filed by the appellant herein, being **Petition No. E189 of 2022**; and a third by Fredrick Bikeri (the 56<sup>th</sup> respondent herein), being **Petition No. E192 of 2022** also challenging the nominations of the same appointees. The three petitions were consolidated and by a judgment delivered on 29<sup>th</sup> November 2022, the ELRC (*Nduma Nderi, J.*) struck out the petitions for being prematurely filed. It was only thereafter that the appellant instituted **ELRC Petition No. 207 of 2022**, which has culminated in the present appeal.

[5] The National Assembly (the 3<sup>rd</sup> respondent) filed a preliminary objection to the petition, dated 17<sup>th</sup> January 2023, and later amended on 12<sup>th</sup> April, 2023. This is on the grounds that the appellant lacked *locus standi* to institute the petition due to the existence of an alternative statutory mechanism under Section 6(9) and 7 of the Public Appointments (Parliamentary Approval) Act, Cap. 7F (the Act); the appellant's similar petition was struck out for similar reason; the court lacked jurisdiction as the matter was not a labour or employment issue, rather a special constitutional innovation.

[6] The 3<sup>rd</sup> respondent also filed an application dated 7<sup>th</sup> February 2023 seeking a stay of further proceedings of the petition pending hearing and determination of an intended appeal from the judgment of the court in ***Nairobi ELRC Constitutional Petition No. E186 of 2022*** as consolidated with ***Nairobi ELRC Constitutional Petitions Nos. E189 of 2022 and E192 of 2022***, which was delivered on 29<sup>th</sup> November 2022. The trial court directed that both the application and the preliminary objections be heard and determined together.

[7] The ELRC (*Ongaya, J.*) dismissed the application for stay of proceedings for the reason that although the petition raised similar matters to the previous consolidated petitions considered by *Nduma Nderi, J.*, which was the subject of an appeal before the Court of Appeal, the petition raised a new cause of action. The trial court reasoned that, although related to the one in the previous petitions and whose ruling was being appealed, the legitimate path of justice was for the parties to present their respective arguments for determination by the court in the instant case.

[8] As concerns the preliminary objection, the learned Judge upheld the first limb of the preliminary objection to the effect that although a litigant is not required under Article 119(1) of the Constitution to first petition Parliament before moving to court, Section 6(9) of the Public Appointments (Parliamentary Approval) Act, gave the appellant the opportunity to submit evidence to Parliament, through the Clerk, contesting the suitability of the nominees before their approval hearings. The trial court observed that the appellant failed to demonstrate compliance with this provision, as there was nothing on record to show that he presented his grievances to the National Assembly or its Committee, or that he was denied such an opportunity or prevented by any valid bar. The court further held that while the provision uses the permissive word “*may*,” it was intended to be followed, unless a party could show good cause for non-compliance. Since no such cause had been established, the court found that the appellant’s failure to invoke the statutory procedure constituted a serious bar to his challenge. The court also held that the Act required such objections to be raised promptly within the prescribed procedure, and that the appellant’s omission, buttressed with the doctrine of

justiciability, that the Parliamentary forum was designed to deal with the kind of disputes raised in the petition, barred him from challenging the appointments already made and implemented. The court further observed that the findings did not apply to the petition as far as it relates to the 52<sup>nd</sup> interested party, whose recruitment procedures and subsequent appointment were not said and shown to be subject to the provisions of the Act.

**[9]** The trial court affirmed that it had jurisdiction to undertake judicial review on the merits of the 1<sup>st</sup> to 3<sup>rd</sup> respondents' decisions, including on grounds such as unreasonableness as envisaged under Article 47 of the Constitution, illegality, unconstitutionality, and manifest injustice. However, the learned trial Judge noted that the grievances raised by the appellant fell squarely within the purpose and scope of the dispute resolution and challenge procedure established under the Public Appointments (Parliamentary Approval) Act. Moreover, the court endorsed that all public servants and state officers serving in the Legislature, the Judiciary and the Executive or other public bodies are all servants of the people and their employment is governed by constitutional, statutory and lawful policy provisions and, practices; therefore, the court had jurisdiction to determine the dispute.

**[10]** On that account, the trial court struck out the petition, except as related to Bernice Sialaal Lemedeket (the 52<sup>nd</sup> interested party before the ELRC), for the reason aforestated hereinabove. Considering the public interest of the matter, each party was ordered to bear its own costs.

## ***ii) Proceedings Before the Court of Appeal***

**[11]** Aggrieved by the Ruling of the ELRC, the appellant filed ***Civil Appeal No. E722 of 2023*** premised on 15 grounds which can be summarised as contending that the Learned Judge of the ELRC erred in law and fact:

- i) *By misinterpreting/mis-applying the doctrines of exhaustion, unreasonableness and justiciability principles in disregarding the appellant's petition premised on the application of Articles 3, 10, 23, 159, 162, 258 and 259 of the Constitution which was challenging the*

*constitutionality or otherwise of the outcome in appointment of principal secretaries and invoking an erroneous technicality finding of the process that the appellant failed to invoke and exhaust the procedure under the Public Appointment (parliamentary Approval) Act 33 of 2011.*

- ii) In putting an unknown pre-requisite condition that for one to challenge an outcome, then he/she must have challenged the process and therefore finding that one must present a petition to parliament, before challenging the constitutionality or otherwise of the outcomes of executive appointments of principal secretaries.*
- iii) By first, misapplying the relevant Acts in the case and secondly, elevating the said Acts of Parliament over the constitutional provisions contrary to known legal hierarchies on sources of law.*
- iv) By indirectly allowing the Executive to continue with unconstitutional appointments which inter alia does not respect 2/3 gender principle (11 women out of 51 PSs) and does not reflect the face of Kenya contrary to inter alia Articles 1,3,10,27,73,75,131, and 232 of the Constitution.*
- v) By essentially finding that the taking up of positions of the interested parties (principal secretaries) acted as a bar which automatically prohibited the appellant or any person from challenging the constitutionality or otherwise of their appointment in court, a finding which is not known in law.*

**[12]** Accordingly, the appellant sought the following reliefs:

- (a) That the Ruling of the superior court delivered on 27<sup>th</sup> April 2023 be and is hereby set aside.*
- (b) A declaration that there is no pre-requisite condition in law that one must challenge the process first before challenging the outcome in constitutional petitions.*
- (c) A declaration that a mere fact that appointments have been made and concerned parties have taken up positions which they have been*

- appointed to cannot bar any person from challenging the constitutionality or otherwise of the impugned appointment(s).*
- (d) A declaration that in the effort to respect, uphold, and protect the Constitution, any person at any time can challenge the outcome notwithstanding the fact that he/she did not challenge the process pursuant to inter alia Articles 1, 3, 10, 23, 159, 162, 165, 258, and 259 of the Constitution.*
- (e) A declaration that failure by any person to petition Parliament pursuant to Public Appointment (Parliamentary Approval) Act 33 of 2011 or any other law does not by itself prevent the said person from challenging in court the unconstitutionality or otherwise of the outcome and/or the process.*
- (f) A declaration that justiciability and exhaustion principles cannot be applied retrospectively and/or speculatively while intruding or/and interpreting the constitution in constitutional petitions.*
- (g) That the court is pleased to determine the correct court (either ELRC or the High Court) with appropriate jurisdiction suited for determination of the constitutionality or otherwise of executive appointments of the principal secretaries.*
- (h) That pursuant to prayer(g) above, this honourable court is pleased to remit the impugned petition to the appropriate court for it to be heard and be determined on merit.*
- (i) That any other order or/and modification of the appellant's prayer(s) which the honourable court may deem fit so as to achieve objects of justice for majority of Kenyans as a whole.*
- (j) That the appellant be awarded costs of the appeal and costs at the superior court against the respondents.*

**[13]** The Court of Appeal (*Musinga (P), Asike Makhandia & Kantai, JJA*) framed 2 issues for determination, namely: whether the ELRC erred in law in dismissing the petition because the appellant had failed to invoke and exhaust the dispute resolution mechanism provided for in the Public Appointments (Parliamentary

Approval) Act; and whether the ELRC applied the doctrine of justiciability correctly.

[14] On the first issue of *exhaustion of the dispute resolution mechanism provided for in the Public Appointments (Parliamentary Approval) Act*, the Court of Appeal noted that the appellant had failed to comply with the statutory procedure of contesting the suitability of the proposed persons. Consequently, relying on the decision by this Court in ***Albert Chaurembo Mumba & 7 Others Vs Maurice Munyao & 148 Others*** (Petition 3 of 2016) [2019] KESC 83 (KLR)(***Chaurembo Case***) on the doctrine of exhaustion, it upheld the findings of the trial court that failure to follow the statutory procedure under Section 6(9) of the Public Appointments (Parliamentary Approval) Act was such a serious bar as to preclude the appellant from challenging the appointments as made and already implemented.

[15] *On the doctrine of justiciability*, the appellate court noted that a close reading of the impugned ruling revealed that the main reason for striking out the appellant's petition was the failure to comply with the provisions of Section 6(9) of the Act, and not because the matter was not justiciable. The appellate court found that the concept of non-justiciability comprises three key elements: the political question doctrine, the constitutional avoidance doctrine, and the ripeness doctrine. However, none of these doctrines operate as an absolute bar to judicial scrutiny where allegations are made that the Executive or Legislature may have violated the Constitution in the process of nominating or approving public officers. The Court of Appeal affirmed that courts possess jurisdiction to subject such decisions to judicial review on their merits, including on grounds of unreasonableness, illegality, unconstitutionality and manifest injustice as contemplated under Article 47 of the Constitution.

[16] The appellate court further noted that there were several ongoing proceedings before the ELRC, including ***Petition No. E513 of 2022***, which directly touched on the constitutionality of the appointment of Principal Secretaries. In light of these live matters, and considering that the instant appeal

arose from a ruling on a preliminary objection, the appellate court found it necessary to exercise judicial restraint to avoid prejudicing the rights of the parties in the pending proceedings or preempting issues that were yet to be determined by the ELRC.

[17] Moreover, although the appellant invited the appellate court to determine whether it is the High Court or the ELRC that has jurisdiction to hear and determine matters concerning the constitutionality of the appointment of Principal Secretaries, the appellate court declined to do so. The appellate court noted that the learned trial judge, in the impugned ruling, had already held that the jurisdictional issue had been adequately addressed by *Nduma Nderi, J.* in a prior ruling delivered in the consolidated petitions, which were the subject of a pending appeal. In the circumstances, the appellate court found that pronouncing itself on the jurisdictional question would be improper, as doing so could potentially embarrass the bench seized of the related appeal.

[18] In the end, the Court of Appeal dismissed the appeal and ordered the parties to bear their own costs.

### ***iii) Proceedings Before the Supreme Court***

[19] Undeterred, the appellant has now filed this second appeal challenging the decision of the Court of Appeal on 10 grounds, which he summarized into 3 proposed issues for determination in his submissions as follows:

- i) Whether the non-justiciability principles were correctly applied in cases where the appointments have passed the parliamentary vetting stage and the impugned appointments have already been made, gazetted and individuals sworn into office.*
- ii) Whether non-justiciability principles can be used to bar/prevent present and future petitioners from challenging the “outcome” of unconstitutional appointments and allegations of violations of rights and fundamental freedoms if the petitioners did not challenge the “process” of appointments.*

iii) *Whether constitutional questions and allegations of violations of rights and fundamental freedoms as raised in the impugned petition, can be resolved outside the court system.*

**[20]** The appellant now seeks the following reliefs:

- a) *That the judgment of the Court of Appeal delivered on 22<sup>nd</sup> November 2024 be and is hereby set aside*
- b) *A declaration that there is no pre-requisite condition in law that one must challenge the process first before challenging the outcome in constitutional petitions.*
- c) *A declaration that in the effort to respect, uphold, and protect the constitution, any person, at any time, can challenge the outcome notwithstanding the fact that he/she did not challenge the process pursuant to inter alia Articles 1,3,10, 23,159,162,165,258, and 259 of the Constitution.*
- d) *A declaration that failure by any person to petition Parliament pursuant to the Public Appointment (Parliamentary Approval) Act or any other law does not by itself prevent the said person from challenging in court the unconstitutionality or otherwise of the outcome and/or the process especially in situations where the process had passed the parliamentary stage and the respondents gazetted and sworn in.*
- e) *A declaration that there is no other mechanism for resolving constitutional questions raised in the superior court petition except through the court system.*
- f) *A declaration that the superior courts (ELRC & Court of Appeal) misapplied the justiciability doctrine (exhaustion limb) in striking out and/or upholding the striking out of the petition on a non-existent process.*
- g) *A declaration is made that justiciability and exhaustion principles cannot be applied retrospectively and/or speculatively while construing or/and interpreting the Constitution in constitutional petitions.*
- h) *That the court is pleased to determine the correct court (either ELRC or the High Court) with appropriate jurisdiction suited for the determination of*

*the constitutionality or otherwise of executive appointments of the principal secretaries.*

- i) That pursuant to prayer (h) above, this honourable court is pleased to remit the impugned petition to the appropriate court for it to be heard and be determined on merit*
- j) That in order to preserve the principles of public interest litigations in upholding and protecting the Constitution and regardless of whether prayer (i) is available or not, this honourable Court pursuant to the Court's mandate under section 3 of the Supreme Court Act), is pleased to give extensive determination on the following:
  - (i) Principles of application of non-justiciability doctrines.*
  - (ii) Whether the said non-justiciability principles/exhaustion doctrines do apply when the process has passed the parliamentary stage.*
  - (iii) Which is the appropriate court to determine the constitutionality of the appointment of 4th-54 respondents and/or similar offices (mutatis mutandis) now or in the future.**
- k) That any other order or/and modification of the Appellant's prayer(s) which this honourable Court may deem fit to achieve the objects of justice for the majority of Kenyans as a whole be granted.*
- l) That the appellant be awarded costs of the appeal and costs at the superior court against the respondents.*

#### **D. PARTIES' SUBMISSIONS**

##### ***i) The appellant's submissions***

**[21]** In his submissions dated 30<sup>th</sup> April 2025, the appellant submits as follows: On whether there was proper application of non-justiciability principles, the appellant contends that he filed the petition before the ELRC five days after the 4<sup>th</sup> to 54<sup>th</sup> respondents had been gazetted, sworn in, and assumed office. Relying on ***Anthony Miano & Others Vs Attorney General & Others*** KEHC 12687 e(KLR), he argues that the non-justiciability doctrine does not apply, as the

enforcement of the two-thirds gender rule and inclusivity are constitutional obligations, not discretionary powers of the Executive or Legislature. He maintains that the petition raised substantive constitutional issues that required determination on merit, rather than dismissal via preliminary objection. He further faults the superior courts below for misapplying the doctrine by requiring exhaustion of an unspecified procedure under the Act, despite the process having progressed past Parliament and the respondents having already assumed office. The appellant asserts that his challenge was based on real, not hypothetical issues concerning the constitutionality of the appointments. He adds that the appointments, made in disregard of statutory and constitutional mandates, were both illegal and irrational. As such, there was no other way the dispute could be resolved outside a constitutional petition. He therefore urges the Court to find that the doctrines of non-justiciability and constitutional avoidance were wrongly applied, contrary to Article 159 of the Constitution.

**[22]** *On whether it is a pre-condition for a person challenging the constitutionality or otherwise of an executive appointment in a constitutional petition to first challenge the process before challenging the outcome, the appellant argues in the negative. He asserts that Article 3 of the Constitution demands that every person has an obligation to respect, uphold and defend the Constitution. Despite his not challenging the process leading to the impugned appointments, he argues that Articles 3, 10, 22, 23, 159, 258 and 259 of the Constitution do not provide any pre-conditions for any petitioner approaching the courts to challenge the legality or otherwise of public appointments. He maintains that he was only trying to enforce constitutional dictates of the rule of law and constitutionalism and cites the case of **Salaries and Remuneration Commission & another Vs Parliamentary Service Commission & 15 others; Parliament & 4 others** (Interested Parties) [2020] KEHC 10370 (KLR) where the High Court emphasized the importance of the rule of law to buttress his argument. The appellant lastly submits on this issue that the trial court's ruling has led to a situation where constitutional questions*

have not been determined on merit to date and has allowed the Executive to continue with unconstitutional appointments.

**[23]** *On whether assuming office as Principal Secretaries bars legal challenges to the constitutionality of such appointments*, the appellant argues that no law prohibits any person from questioning the legality or constitutionality of these appointments at any time. He therefore urges the Court to find that the 4<sup>th</sup> to 54<sup>th</sup> respondents' assumption of office does not, in itself, preclude a constitutional challenge to their appointments in court.

**[24]** *Regarding the correct forum to challenge Executive appointments and whether this Court can remit the impugned petition to be heard on merit*, the appellant acknowledges that, while the ELRC has declared that it had jurisdiction to handle the matter, there has been contradicting jurisprudence emanating from this Court and the Court of Appeal on the question of the proper forum between the ELRC and High Court to determine the constitutionality of Executive appointments or appointments in general. He highlights that, whereas this Court provided some directions in the matter of ***Kenya Tea Growers Association & 2 others Vs The National Social Security Fund Board of Trustees & 13 others*** [2024] KESC 3 (KLR), there is still confusion as to which court has the requisite jurisdiction on issues challenging various appointments. Given the foregoing, the appellant prays that his appeal be allowed and the petition be remitted to the appropriate court for determination on the merits.

**ii) The 1<sup>st</sup> respondent's (Attorney General) submissions**

**[25]** In the 1<sup>st</sup> respondent's submissions dated 11<sup>th</sup> June 2025, the Attorney General submits on 2 issues as follows: *On the doctrine of exhaustion*, the 1<sup>st</sup> respondent submits that the appellant's failure to exhaust the parliamentary process renders the petition premature and incompetent.

**[26]** *On the doctrine of justiciability*, the 1<sup>st</sup> respondent argues that the appellant has not raised a ripe or justiciable claim. In support thereof, reliance is placed on

the persuasive authorities of ***Coalition for Reform and Democracy (CORD) & 2 others Vs the Republic & another; Director of Public Prosecution & 6 Others (Interested Parties); Law Society of Kenya & Another*** (Amicus Curiae) (Petition 628 & 630 of 2014 & 12 of 2015 (Consolidated)) [2015] KEHC 7074 (KLR), which emphasized the requirement for disputes to be both ripe and justiciable, and ***Patrick Ouma Onyango & 12 Others Vs The Attorney General & 2 Others***, Misc. Appl. No. 677 of 2005 (unreported), where the court held that a claim must present a real and substantial controversy to qualify as justiciable. The 1<sup>st</sup> respondent maintains that the issues raised by the appellant are inherently political and fall within the constitutional mandate of the Executive and Legislature. Accordingly, it urges the Court to dismiss the petition with costs.

### ***iii) The 3<sup>rd</sup> respondent's (National Assembly) submissions***

[27] In its submissions dated 21<sup>st</sup> May 2025, the 3<sup>rd</sup> respondent submits on three issues as follows: *on whether this Court's jurisdiction has been properly invoked* the 3<sup>rd</sup> respondent argues that the appeal fails to raise any substantive constitutional issues that would warrant the Court's intervention. It contends that the appeal does not challenge the Court of Appeal's interpretation or application of the Constitution but merely cites general constitutional provisions, namely, Articles 1, 3, 10, 23, 50(1), 159(2)(c), 162, 165, 258, and 259, without demonstrating how these formed the basis of the appellant's grievance before the Court of Appeal. The 3<sup>rd</sup> respondent maintains that the primary issue determined by the Court of Appeal was the application of the doctrine of exhaustion by the ELRC, and no cogent question of constitutional interpretation arose. It relies on this Court's decisions in ***Waity Vs Independent Electoral & Boundaries Commission & 3 Others*** [2019] KESC 54 (KLR) and ***Ngoge Vs Kaparo & 5 Others*** [2012] KESC 7 (KLR) in support of this position.

[28] *On whether the Court of Appeal properly applied the doctrine of exhaustion*, the 3<sup>rd</sup> respondent submits that Section 6(9) of the Public Appointments (Parliamentary Approval) Act provides a clear avenue for individuals aggrieved by

the shortlisting, nomination, vetting, or appointment of Principal Secretaries to seek redress before the National Assembly. While the provision uses the term “may”, suggesting discretion, courts have consistently held that such legislative frameworks must be respected in accordance with Article 159(2)(c) of the Constitution. It once again relies on ***Waity Vs Independent Electoral & Boundaries Commission & 3 others*** (supra) and ***Mumba & 7 others (Sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) Vs Munyao & 148 others (Suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme)*** [2019] KESC 83 (KLR) where this Court stressed the importance of exhausting internal dispute resolution mechanisms conferred by legislation before approaching courts.

[29] It further submits that, in the event that this Court finds that an alternative remedy does not necessarily bar a constitutional petition, the exception to the doctrine of exhaustion does not apply in the present case. It cites ***Nicholus Abidha Vs Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties)*** [2023] KESC 113 (KLR), where this Court held that a constitutional petition is only appropriate if the alternative remedy is inadequate. The 3<sup>rd</sup> respondent maintains that Section 6(9) of the Public Appointments (Parliamentary Approval) Act provides an adequate and effective remedy for grievances relating to presidential nominees, and urges the Court to uphold the findings of the superior courts below.

[30] Lastly, *on costs*, the 3<sup>rd</sup> respondent posits that, although the appellant purports to be a public interest litigant, he has sought costs both before the Court of Appeal and this Court. It relies on ***Okoiti & 2 Others Vs Attorney General & 14 Others*** [2023] KESC 31 (KLR), where the Court cautioned that public interest litigants must not be motivated by self-interest, especially when seeking costs. The Court emphasized that the primary objective in public interest litigation

should be to promote access to justice, not personal gain. For these reasons, the 3<sup>rd</sup> respondent prays that the appeal be dismissed with costs awarded to it.

**[31]** Lastly, we note that, save for the 1<sup>st</sup> and 3<sup>rd</sup> respondents, the other respondents did not participate in the proceedings before this Court.

## **F. ISSUES FOR DETERMINATION**

**[32]** Having carefully evaluated the pleadings, the decisions of the two superior courts below and the arguments in this appeal, we consider the following issues as emerging for determination;

- i) Whether this Court is properly seized of jurisdiction under Article 163(4)(a) of the Constitution.*
- ii) Whether both superior courts below properly applied the doctrine of exhaustion as well as the doctrine of non-justiciability.*
- iii) And if the answer to (ii) is in the negative, what reliefs should be issued.*

## **G. ANALYSIS**

### ***i) Whether this Court has jurisdiction to determine the appeal***

**[33]** As a matter of practice, this Court must first determine whether an appeal before it meets the jurisdictional threshold. A party seeking to rely on Article 163(4)(a) of the Constitution, as is the case here, must go beyond merely stating that constitutional interpretation or application is involved. In order to properly invoke the jurisdiction in the Supreme Court, the party must specifically identify the relevant constitutional provisions, explain how those provisions were at issue in the impugned decision, and demonstrate that the same constitutional question was the basis of both the High Court's and the Court of Appeal's decisions. If the judgment under appeal bears little or no relation to the interpretation or application of the Constitution, it does not qualify for appeal under Article 163(4)(a) of the Constitution. This principle was clearly set out in ***Nduttu & 6000 others Vs Kenya Breweries Ltd & another*** [2012] KESC 9 (KLR).

[34] In short, the constitutional article(s) in question must have been a consistent and pivotal issue throughout the proceedings in the superior courts below. See also ***Oporo Vs Independent Electoral and Boundaries Commission & 2 others***, [2018] KESC 5 (KLR). Finally, a matter will be said to involve the interpretation and application of the Constitution where specific constitutional provisions cannot be identified as having formed the gist of the cause at the Court of Appeal, but where the court's reasoning, and its conclusions leading to the determination of the issue, put in context, can properly be said to have taken a trajectory of constitutional interpretation or application. See ***Peter Gatirau Munya Vs Dickson Mwenda Kithinji & Others*** (Application 5 of 2014) [2014] KESC 30 (KLR).

[35] In ***Rutongot Farm Ltd Vs Kenya Forest Service & 3 others*** (Petition 2 of 2016) [2018] KESC 27 (KLR) we determined that in order to address the issue whether the Court has jurisdiction or not, the questions that need to be answered are:

- i. *What was the question in issue at the High Court and the Court of Appeal?*
- ii. *Did the superior courts below dispose of the matter after interpreting or applying the Constitution?*
- iii. *Does the instant appeal raise a question of constitutional interpretation or application, which was the subject of judicial determination at the High Court and the Court of Appeal?*

In determining whether the matter concerns the interpretation or application of the Constitution and whether the same was canvassed in the superior courts below and has progressed through the appellate mechanism, each case must be evaluated based on its own facts.

[36] Applying the set-out principles to the instant case, and having perused the record before us, we note that the genesis of the matter is a petition that was filed before the ELRC that is ***Petition No. 207 of 2022*** where the appellant contended that the Presidential appointees for the position of Principal Secretary

*contravened the Constitution for failing to consider ethnic, regional and cultural diversity as demanded by Articles 10, 27, 73, 75 and 232 of the Constitution.* In upholding the 3<sup>rd</sup> respondent's preliminary objection dated 17<sup>th</sup> January, 2023 and later amended on 12<sup>th</sup> April, 2023, the ELRC in its ruling delivered on 27<sup>th</sup> April, 2023 struck out the appellant's petition. The Court held that the appellant's failure to invoke and exhaust the procedure under the Public Appointments (Parliamentary Approval) Act, as buttressed with the doctrine of justiciability, further holding the Parliamentary forum was the proper forum to deal with issues raised. The trial court also held that the appellant failed to make presentations to Parliament as provided under Section 6(9) of the Act, or failed to demonstrate that he was denied such an opportunity. It is this impugned ruling that the appellant appealed before the Court of Appeal, which upheld the findings of the trial court, giving rise to the instant appeal.

**[37]** The Court of Appeal in its Judgment of 22<sup>nd</sup> November, 2024 restricted itself to determining whether the ELRC erred in law in dismissing the petition because the appellant failed to invoke and exhaust the dispute resolution mechanism provided for in the Public Appointments (Parliamentary Approval) Act; and whether the ELRC applied the doctrine of justiciability correctly. After examining the doctrine of exhaustion of administrative remedies and doctrine of justiciability, the Court of Appeal upheld the findings of the ELRC.

**[38]** We note that before us, the appellant is arguing that the non-justiciability doctrine does not apply in this instance, as the enforcement of the two-thirds gender rule and inclusivity are constitutional obligations, not discretionary powers of the Executive or Legislature. He maintains that the petition raised substantive constitutional issues that required determination on merit, rather than dismissal via a preliminary objection. He further faults the superior courts below for misapplying the doctrine by requiring exhaustion of an unspecified procedure under the Public Appointments (Parliamentary Approval) Act, despite the process having progressed past Parliament and the respondents having already assumed office. He asserts that his challenge was based on real, not hypothetical, issues concerning the constitutionality of the appointments. He adds that the

appointments, made in disregard of statutory and constitutional mandates, were both illegal and irrational. As such, there was no other way the dispute could be resolved outside a constitutional petition.

**[39]** We are inclined to agree with the appellant. It is our finding, without stating more, that the record bears out the appellant's contention that the dispute he presented before the superior courts below related to the interpretation of the enforcement of gender, ethnic, regional and cultural considerations during the recruitment of Principal Secretaries and a Principal Administrative Secretary and Accounting Officer to National Police Service Commission as demanded by Articles 10, 27, 73, 75 and 232 of the Constitution vis-à-vis the doctrine of exhaustion and the doctrine of justiciability. We therefore find that the issues herein were canvassed before the superior courts below and, now before this Court, concern the interpretation and application of the Constitution, save that the courts determined the petition without delving into the merits of the arguments on account of non-justiciability and exhaustion doctrines. Therefore, this Court has jurisdiction to hear and determine the appeal before us.

*ii) Whether both superior courts below properly applied the doctrine of exhaustion as well as the doctrine of non-justiciability.*

**[40]** The appellant's contention is that the superior courts below misapplied the doctrines of non-justiciability and exhaustion contrary to Article 159 of the Constitution by requiring exhaustion of an unspecified procedure under the Act, despite the process having progressed past Parliament and the respondents having already assumed office. For him, his challenge to the appointments was based on real issues concerning the constitutionality of the appointments, arguing that they had been made in disregard of statutory and constitutional mandates. As such there was no other way his dispute could be resolved outside a constitutional petition. It is his further contention that Articles 3, 10, 22, 23, 159, 258 and 259 of the Constitution do not provide any pre-conditions for any petitioner approaching the courts to challenge the legality or otherwise of public appointments.

[41] For the 1<sup>st</sup> and 3<sup>rd</sup> respondents however, we are urged to find that the appellant's failure to exhaust the parliamentary process renders the petition premature and incompetent. This parliamentary process referred to is to be found under Section 6(9) of the Public Appointments (Parliamentary Approval) Act, and it provides an avenue for individuals aggrieved by the shortlisting, nomination, vetting, or appointment of Principal Secretaries to seek redress before the National Assembly. We are further urged to find that the appellant also failed to raise a ripe or justiciable claim, as the issues he raised were inherently political and fell within the constitutional mandate of the Executive and Legislature.

[42] The superior courts below held that although a litigant is not required under Article 119(1) of the Constitution to first petition Parliament before moving to court, Section 6(9) of the Public Appointments (Parliamentary Approval) Act gave the appellant an opportunity to submit evidence to Parliament, through the Clerk, contesting the suitability of the nominees before their approval hearings. The Courts further held that the appellant's failure to follow the statutory procedure under Section 6(9) of the Public Appointments (Parliamentary Approval) Act was a serious bar precluding the appellant from challenging the appointments as made and already implemented. The Courts furthermore held that while the provision uses the permissive word "may," it was intended to be followed, unless a party could show good cause for non-compliance. However, the appellate court noted that a close reading of the impugned Ruling reveals that the main reason for striking out the appellant's petition was the failure to comply with the provisions of Section 6(9) of the Act, and not because the matter was not justiciable.

[43] Our reading of the impugned Ruling and Judgments of the trial court and appellate court respectively, reveal that this Court's decision in the case of ***Albert Chaurembo Mumba & 7 Others Vs Maurice Munyao & 148 Others (supra)*** on the doctrine of exhaustion was taken as a blanket bar to preclude litigants from pursuing constitutional petitions where alternative statutory procedures are provided. Indeed, Article 159(2)(c) of the Constitution mandates the Courts to promote alternative dispute resolution mechanisms. In the ***Chaurembo Case***, this Court held that, where there exists an alternative method

of dispute resolution established by legislation, the courts must exercise restraint in exercising their jurisdiction conferred by the Constitution and must give deference to the dispute resolution bodies established by statutes with the mandate to deal with such specific disputes in the first instance. In particular, the Court stated as follows:

*“118. In the pursuit of such sound legal principles, it is our disposition that disputes disguised and pleaded with the erroneous intention of attracting the jurisdiction of superior courts is not a substitute for known legal procedures. Even where superior courts had jurisdiction to determine profound questions of law, first opportunity had to be given to relevant persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute.”* [Emphasis ours]

[44] The question of the appropriateness of a forum between the Courts and a statutory dispute resolution mechanism also arose in the case of ***Adega & 2 others v Kibos Distillers Limited & 5 others*** (Petition 3 of 2020) [2020] KESC 36 (KLR). In that case, this Court in determining whether it had jurisdiction to hear the appeal or not, was confronted with the central issue of the Environment and Land Court’s (ELC) general competence to determine constitutional questions, and whether the ELC had taken on powers that the Environmental Management and Coordination Act reserved for other statutory bodies. The Court went on to find that it did not have jurisdiction to entertain the appeal as there was minimal reference to the Constitution, as the decisions of the superior courts below were primarily on an interrogation and adjudication of statutory provisions.

[45] The ***Chaurembo Case***, as well as the case of ***Adega & 2 others v Kibos Distillers Limited & 5 others*** (*supra*), must be read together with this Court’s decision in ***Nicholus Abidha Vs Attorney General & 7 others; National Environmental Complaints Committee & 5 others*** (Interested Parties) (Petition E007 of 2023) [2023] KESC 113 (KLR), where this Court further clarified that the doctrine of exhaustion is not to be applied as a blanket principle. We

clarified that the right to access the court for redress of alleged constitutional violations should not be impeded or stifled in a manner that frustrates the enforcement of fundamental rights and freedoms. We further held that the availability of an alternative remedy does not necessarily bar an individual from seeking constitutional relief. This is because the act of seeking constitutional relief is contingent upon the adequacy of an existing alternative means of redress. If the alternative remedy is deemed inadequate in addressing the issue at hand, then the court is not restrained from providing constitutional relief. However, there is also a need to emphasize that a court should scrutinize the purpose for which a party is seeking relief, in determining whether the granting of such constitutional relief is appropriate in the given circumstances. Nevertheless, the overarching consideration remains the safeguarding of a litigant's right of access to justice, while at the same time acknowledging the efficiency and specificity that established alternative dispute resolution mechanisms and other statutory pathways provided by legislation. The Court held as follows:

*“106. The restraint and effective remedy rule, which we find favour in, is what led the Supreme Court of India in **United Bank of India vs Satyawati Tondon & Others**; (2010) 8 SCC to state as follows:*

*“44.... we are conscious that the powers conferred upon the High Court under article 226 of the Constitution to issue to any person or authority, including in appropriate cases, any Government, directions, orders or writs including the five prerogative writs for the enforcement of any of the rights conferred by Part III or for any other purpose are very wide and there is no express limitation on exercise of that power but, at the same time, we cannot be oblivious of the rules of self-imposed restraint evolved by this Court, which every High Court is bound to keep in view while exercising power under article 226 of the Constitution.*

*45. It is true that the rule of exhaustion of alternative remedy is a rule of discretion and not one of compulsion, but it is difficult to*

*fathom any reason why the High Court should entertain a petition filed under article 226 of the Constitution and pass interim order ignoring the fact that the petitioner can avail effective alternative remedy by filing application, appeal, revision, etc. and the particular legislation contains a detailed mechanism for redressal of his grievance.” [Emphasis ours]*

107. Flowing from the above findings and in that context, it is our view that, where the reliefs under the alternative mechanism are not adequate or effective, then there is nothing that precludes the adoption of a nuanced approach, as we have stated. What must matter at the end is that a path is chosen that safeguards a litigant’s right to access justice while also recognizing the efficiency and specificity that established alternative dispute resolution mechanisms can offer. This is because, to achieve a harmonious and effective legal framework, it is imperative to strike a judicious balance between the emphasis on providing the initial opportunity for resolution to entities established by law and the assertion of a litigant’s right to access the court. **However, such convergence requires a case-by-case assessment by considering issues such as the nature of the dispute and the adequacy of the alternative dispute mechanism.** See also our decision in ***Bia Tosha Distributors Ltd v Kenya Breweries Ltd & 6 Others*** (Pet No 15 of 2020) [2023] KESC 14(KLR) (Const. and JR) (17 February 2023) (Judgment).”

[46] Applying these principles to the present case, we must ask ourselves whether this was an appropriate case to ouster the jurisdiction of the courts to handle the appellant’s claim on the basis of the doctrine of exhaustion due to the existence of an alternative forum in the form of Section 6(9) of the Public Appointments (Parliamentary Approval) Act.

[47] The undisputed facts of the case are that on 1<sup>st</sup> December 2022, the President appointed the 4<sup>th</sup> to 54<sup>th</sup> respondents as Principal Secretaries in various Ministries. Prior to the appointment, the President had nominated the said persons and on

2<sup>nd</sup> November 2022, forwarded their names to the National Assembly for its approval as required under Article 155(3) of the Constitution, and they were duly approved by the National Assembly. The respondents immediately took up their respective positions. Contemporaneously, the President also appointed Bernice Sialaal Lemedeket (the 52<sup>nd</sup> interested party before the ELRC) as a Principal Administrative Secretary and Accounting Officer, National Police Service Commission.

[48] Following their appointment, the appellant filed his petition before the ELRC vide ***Petition No. 207 of 2022*** wherein he alleged that the impugned appointments did not reflect nor ensure that not more than two thirds of the nominees are from one gender for example, 11 out of the 51 appointees were women which translated to 21% and that the said list did not consider ethnic, regional and cultural diversity as demanded by Articles 10, 27, 73, 75 and 232 of the Constitution. Concerning the appointment of Bernice Sialaal Lemedeket as a Principal Administrative Secretary and Accounting Officer, National Police Service Commission, the appellant argued that the Constitution does not provide for the position of Principal Administrative Secretary.

[49] We must juxtapose the appellant's petition against the alternative forum provided under Section 6(9) of the Public Appointments (Parliamentary Approval) Act. Section 6(9) of the Act gave the appellant the opportunity to submit evidence to Parliament, through the Clerk, contesting the suitability of the nominees before their approval hearings. The provision stipulates as follows:

**“Any person may, prior to the approval hearing, and by written statement on oath, provide the Clerk with evidence contesting the suitability of a candidate to hold the office to which the candidate has been nominated.”**

[50] However, it is evident that the appellant's contention was not with the suitability of the candidates, but rather the overall composition of the appointees and what he considered to be a *prima facie* failure to reflect the two thirds gender rule and a balance of ethnic, regional and cultural diversity as demanded by

Articles 10, 27, 73, 75 and 232 of the Constitution. Concerning the appointment of Bernice Sialaal Lemedeket as a Principal Administrative Secretary and Accounting Officer, National Police Service Commission, the appellant argued that the Constitution does not provide for the position of Principal Administrative Secretary.

[51] In light of the foregoing, and upon evaluating both the nature of the appellant's grievances and the scope of the alternative forum contemplated under Section 6(9) of the Public Appointments (Parliamentary Approval) Act, we are satisfied that the matters raised could not have been effectively ventilated through the statutory mechanism provided. The appellant's challenge went beyond the suitability of individual nominees and touched on broader constitutional questions regarding adherence to the two-thirds gender principle and the equitable representation requirements under Articles 10, 27, 73, 75 and 232 of the Constitution, issues that squarely fall within the province of judicial determination. This is a case where the facts fall squarely within the ambit of this Court's findings in the case of **Nicholus Abidha Vs. Attorney General & 7 others; National Environmental Complaints Committee & 5 others** (supra) where the appellant's right to access the court for redress of alleged constitutional violations, should not have been impeded or stifled in a manner that frustrates the enforcement of fundamental rights and freedom. We therefore find that this was not a proper case for the ouster of this Court's jurisdiction, and the appellant was entitled to approach the courts for appropriate relief. The trial court was thereafter obligated to interrogate the appellant's claims on merit and render a determination one way or the other. By not doing so, it fell into error, which the Court of Appeal failed to rectify.

*iii) What reliefs should be issued?*

[52] The appellant contends that despite this Court having provided guidance in **Kenya Tea Growers Association & 2 others Vs National Social Security Fund Board of Trustees & 13 others** [2024] KESC 3 (KLR),

uncertainty persists as to whether the High Court or the ELRC is the proper forum to determine the constitutionality of Executive appointments. He therefore urged that his petition be remitted to what he termed “the appropriate court” for determination on its merits

[53] Section 22 of the Supreme Court Act empowers the Court to remit proceedings to a court or tribunal where a matter began. It provides as follows:

**“The Supreme Court may remit proceedings that began in a court or tribunal to any court that has jurisdiction to deal with the matter.”**

[54] This Court has applied this provision in various decisions. In ***Geo Chem Middle East Vs Kenya Bureau of Standards*** [2020] KESC 1 (KLR), we held at para 47 that: “... As is the practice in all other disputes, where an appellate court holds that a lower court has wrongly declined to determine a matter in the mistaken belief that it lacks jurisdiction to do so, the court has to remit that matter to the lower court, directing it to exercise its jurisdiction. Only after the lower court has complied with such an order would a substantive appeal lie to the appellate court.”

[55] A similar approach was adopted in ***Nyutu Agrovet Limited Vs Airtel Networks Kenya Limited; Chartered Institute of Arbitrators Kenya Branch*** [2019] KESC 11 (KLR), where the Court stated at para 80: “... Without a firm decision by the Court of Appeal on that issue, we cannot but direct that the matter be remitted back to that court to determine whether the appeal before it meets the threshold explained in this Judgment or in the words of Kimondo, J, the ‘journey was a false start’.” In ***Kenya Tea Growers Association & 2 others Vs National Social Security Fund Board of Trustees & 13 others*** [2024] KESC 3 (KLR) we remitted a matter to the Court of Appeal to determine the substantive merits of the appeal from a judgment rendered by the ELRC. In ***Westmont Holdings SDN BHD v Central Bank of Kenya & 2 others*** [2023] KESC 11 (KLR), despite the fact that the matter had taken time in the

corridors of justice, we remitted the matter to the Court of Appeal to be determined on merit.

[56] Notwithstanding the foregoing, we are not persuaded that this is an appropriate case for remittance of proceedings to the trial court. As noted by the appellate court, there were several ongoing proceedings before the ELRC, including ***Petition No. E513 of 2022***, which directly touched on the constitutionality of the appointment of Principal Secretaries. We also note that the trial court struck out the petition except as relates to Bernice Sialaal Lemedeket, the 52<sup>nd</sup> Interested party before the ELRC. We are therefore inclined and indeed consider it prudent to let those proceedings take their course before the competent forum to their logical conclusion. We therefore emphatically decline the invitation to pre-empt their determination by pronouncing ourselves on the issues therein.

[57] Regarding costs, guided by our decision in ***Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others***, (Petition 4 of 2012) [2014] KESC 31 (KLR), and further considering that the matter is hinged on public interest issues, we find it appropriate that each party shall bear their own costs.

[58] **CONSEQUENTLY**, and for the reasons aforesaid, we make the following Orders:

- i. The Petition dated 10<sup>th</sup> December, 2024 and filed on 14<sup>th</sup> March, 2025 partially succeeds to the extent that we find that the superior courts below (ELRC & Court of Appeal) misapplied the doctrine of exhaustion in striking out and/or upholding the striking out of the appellant's petition.***
- ii. Each party will bear their own costs of the appeal.***
- iii. We hereby direct that the sum of Kshs. 6,000 deposited as security for costs upon lodging of this appeal be refunded to the appellants.***

It is so ordered.

**DATED and DELIVERED at NAIROBI this 23<sup>rd</sup> day of January 2026.**

.....  
**M. K. KOOME**  
**CHIEF JUSTICE & PRESIDENT**  
**OF THE SUPREME COURT**

.....  
**S. C. WANJALA**  
**JUSTICE OF THE SUPREME COURT**

.....  
**NJOKI NDUNGU**  
**JUSTICE OF THE SUPREME COURT**

.....  
**I. LENAOLA**  
**JUSTICE OF THE SUPREME COURT**

.....  
**W. OUKO**  
**JUSTICE OF THE SUPREME COURT**

**I certify that this is a  
true copy of the original**

**REGISTRAR**  
**SUPREME COURT OF KENYA**