



Republic v Cabinet Secretary, Ministry of Interior and National Administration & 4 others; Ali (Exparte Applicant) (Judicial Review E003 of 2024) [2024] KEHC 7553 (KLR) (24 June 2024) (Ruling)

Neutral citation: [2024] KEHC 7553 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
JUDICIAL REVIEW E003 OF 2024
JN ONYIEGO, J
JUNE 24, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

CABINET SECRETARY, MINISTRY OF INTERIOR AND NATIONAL ADMINISTRATION 1ST RESPONDENT

REGIONAL COMMISSIONER, NORTH EASTERN 2ND RESPONDENT

COUNTY COMMISSIONER, WAJIR COUNTY 3RD RESPONDENT

DEPUTY COMMISSIONER, WAJIR NORTH SUB COUNTY ... 4TH RESPONDENT

THE PUBLIC SERVICE COMMISSION 5TH RESPONDENT

AND

ABDISALAN KULA ALI EXPARTE APPLICANT

RULING

1. The *ex parte* applicant via chamber summons dated 28.03.2024 moved this court seeking for the following reliefs:
 - i. Spent.
 - ii. That this Honourable Court do grant leave to the applicant to file and argue the *ex parte* applicant’s chamber summons dated 28.03.2024 during the current court vacation seeking among other orders grant of leave to institute judicial review proceedings against the respondents.



- iii. That upon granting prayer 2, this Honourable court be pleased to certify the application dated 28.03.2024 urgent and fit to be heard ex parte forthwith.
 - iv. That costs of this application be provided for.
2. The Honourable Court on 03.04.2024 certified the matter urgent and thereafter granted prayer 2. The court further directed that, the applicant filed a substantive notice of motion within 3 days; upon service, the respondents to file their response within 7 days and the applicant to file a rejoinder within 3 days if need be.
3. The applicant filed a notice of motion dated 05.04.2024 together with a statutory statement of even date and seeking orders as follows:
 - i. An order of certiorari to move into the High Court and quash the decision of the Cabinet Secretary, Ministry of Interior and National Administration publishing and advertising calling for applications for the post of chief, Bassakurow location.
 - ii. An order of mandamus compelling the 5th respondent to employ Abdinoor Mohamednur Abdille being the merited candidate selected after the interviews conducted on 29.05.2023 following the advertisement of the post of Chief in September, 2022.
 - iii. The costs of this application be provided for.
 - iv. Any other order or relief as the Honourable Court may deem fit and expedient to grant.
4. From the statutory statement attached, it was stated that the Chief of Bassakurow location died on 08.08.2022 and on 25.08.2022, the respondents published an advertisement calling for applications to fill the same position. That candidates made their applications and tendered them to the Deputy County Commissioner, Wajir North Sub County. He averred that on 23.09.2022, the respondents again published another advertisement calling for applications to fill the said position when candidates further submitted their applications.
5. It was deposed that despite the interviews being conducted and the names of the merited candidates being forwarded to the permanent secretary of the 1st respondent, there was no communication made to the selected candidates regarding their applications. That another re-advertisement was made on 26.03.2024 when no reason was offered in reference to the two previous advertisements.
6. It was deposed that the failure on the part of the respondents not to inform the previous applicants of the outcome of the previous advertisements violated their rights as enshrined in article 47 of the *constitution*. That the people of Bassakurow location now genuinely believe that there is political interference in the recruitment of a candidate for the said position. The court was urged that it was just and mete that it grants the prayers sought.
7. In response, the 1st, 2nd, 3rd and 4th respondents through Leah Gathenya, a state counsel filed grounds of opposition dated 07.05.2024 on grounds that; the application was unmerited as it amounted to an abuse of the court process; the applicant lacked locus standii as he was not a prospective candidate in the advertised post; there was no proof that Abdinoor Mohamednur Abdille is the merited candidate out of the alleged 5 shortlisted candidates and that the applicant is seeking the court to direct the respondents on how to exercise their discretionary powers.
8. In the same vein, Kepha Onyiso, legal officer of the 1st respondent filed a replying affidavit sworn on 07.05.2024 urging that; the suit herein is incompetent and amounts to abuse of the court process; there was no proof of illegality, irrationality or impropriety committed by the respondents; that the



- applicant lacked locus and that the court lacks jurisdiction as the applicant ought to have appealed against the impugned decision in the prescribed manner and not to move to court.
9. On the other hand, the 5th respondent filed a notice of preliminary objection dated 26.04.2024 citing the following grounds:
 - i. That the issue relating to appointment and/or employment of assistant chiefs in any part of the country is an employment related issue.
 - ii. That this being an employment and labour relations matter, the jurisdiction to hear and determine the same is preserved for the Employment and Labour Relations Court pursuant to article 162(2) (b) of the constitution as read with section 12 of the Employment and Labour Relations Court.
 - iii. That by dint of article 165(5) (b) of the constitution as read with section 12 of the Employment and Labour Relations Court, this Honourable Court lacks jurisdiction to hear and determine the instant suit.
 10. Noting that this court's jurisdiction was challenged, the court directed that the notice of preliminary objection be heard first by way of written submissions.
 11. Of importance to note is the fact that only the 5th respondent complied with the same order. In its written submissions dated 15.05.2024, it was submitted that from the face value, the suit relates to a question of employment or appointment of a person to the position of a Chief of Bassakurow Location in Wajir County.
 12. That based on article 162(2) (a) of the constitution as read with section 12(1) (a) of the ELR Act, clearly the dispute lies in the purview of the employment laws. Reliance was placed on the case of National Social Security Fund Board of Trustees v Kenya Tea Growers Association & 14 others Civil Appeal No. 656 of 2022 [2023] KECA 80 (KLR) where the Supreme Court found and held that the employment and labour relations court had jurisdiction to entertain the question as to the constitutionality of the NSSF Act as it was an employment related issue.
 13. It was contended that Abdinoor Mohamednur Abdille, the person in whose favour the *ex parte* applicant moved this Honourable Court having not complained, then, the *ex parte* applicant lacks standing to move the court herein. In view of the foregoing, this court was urged that there is no suit properly so called before it for hearing and determination. It was therefore urged that this court ought to down its tools.
 14. Mr. Njenga for the *ex parte* applicant submitted orally urging that the preliminary objection lacked merit for the reason that the suit mainly challenges the administrative actions by the respondents. That this court is endowed with the requisite jurisdiction as the *ex parte* applicant relies on the provision(s) under article 22(b) of the constitution. He argued that there existed no employer – employee relationship between the parties herein to warrant the matter be dealt with the employment and labour relations court. In urging the court to dismiss the preliminary objection, Counsel reiterated that this Honourable Court has the requisite jurisdiction to determine the issues raised herein.
 15. I have carefully read and considered the preliminary objection vis a vis the notice of motion. The issue that germinates for determination is; whether this Honourable Court is endowed with the jurisdiction to hear and determine the suit herein.



16. A Preliminary Objection was clearly defined in the case of *I.N. & 5 others v Board of Management St G. School Nairobi & another* [2017] eKLR as follows;

“Definition of a preliminary objection

7. I find it necessary to define what constitutes a preliminary objection on a point of law. A preliminary objection must first, raise a point of law based on ascertained facts and not on evidence. Secondly, if the objection is sustained, that should dispose of the matter. A preliminary objection is in the nature of a legal objection not based on the merits or facts of the case, but must be on pure points of law.
8. It may be noted that preliminary objections are narrow in scope and cannot raise substantive issues raised in the pleadings that may have to be determined by the court after perusal of evidence. Understanding the nature and scope of preliminary objections is very important for practicing lawyers. Knowing how to raise a properly formulated preliminary objection, and when to raise it, can save a lot of time and costs. [Also See *Mukisa Biscuit Manufacturers Ltd v Westend Distributors Ltd* [1969] EA 969].
17. Thus, a preliminary objection may only be raised on a “pure question of law.” To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.
18. Therefore, a Court is bound to entertain proceedings that fall within its jurisdiction. Put differently, a court has no inherent jurisdiction to decline to entertain a matter within its jurisdiction. Jurisdiction is determined on the basis of pleadings and not the substantive merits of the case. The South African Constitutional Court [See In the matter between *Vuyile Jackson Gcaba v Minister for Safety and Security First & Others* Case CCT 64/08 [2009] ZACC 26] had this to say: -
- “Jurisdiction is determined on the basis of the pleadings... and not the substantive merits of the case... In the event of the Court’s jurisdiction being challenged at the outset (in limine), the applicant’s pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court’s competence. While the pleadings – including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant’s claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognizable only in another court. If however the pleadings, properly interpreted, establish that the applicant is asserting a claim ..., one that is to be determined exclusively by.....{another court}, the High Court would lack jurisdiction...”
19. It is not in dispute that the ex parte applicant is challenging the non-employment or appointment of somebody else to the position of a Chief Bassakurow Location in Wajir County. That the respondents herein have since advertised the said position at least three times without shortlisting and / or conducting interviews. Differently put, that the respondents have declined to employ one Abdinoor Mohamednur Abdille, whom according to the applicant, is qualified for the said position.
20. Clearly, the main contention is the employment of a new chief for Bassakurow Location in Wajir County. It shouldn’t be lost that in interpreting a statute, courts are bound by the mandate of the



legislature. Once it has expressed its intention in words which have a clear significance and meaning, the court is precluded from speculating.

21. If the provision is unambiguous and if from that provision the legislative intent is clear, the other rules of construction of statutes need not be called into aid. Courts would not be justified in so straining the language of the statutory provision as to ascribe the meaning which cannot be warranted by the words employed by the legislature. [See *Republic v National Employment Authority & 3 Others Ex - parte Middle East Consultancy Services Limited* [2018] eKLR].
22. The preliminary objection is basically under article 162 which provides;
 - (1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the Courts referred to in clause (2).
 - (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—
 - (a) a) employment and labour relations; and
 - (b) b) the environment and the use and occupation of, and title to, land.
 - (3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).
23. Article 162 cited above leaves me with no doubt that Parliament was very clear that disputes arising from the exercise of the matters of employment are to be appealed and/or filed at the Employment Court and not this Court.
24. In as much as the applicant urged that the issues in the suit herein related to enforcement of bill of rights as stipulated under article 22, it is important to note that the said court under article 162 equally has jurisdiction to deal with issues of enforcement of the said rights. In the instant case, the predominant question for determination is the employment aspect which then snatches jurisdiction from the high court and then places it right in the door step of ELR court.
25. In the circumstances therefore, I am convinced that this court does not have the jurisdiction to entertain the suit herein hence it must down its tools in line with the wise words of Nyarangi J in the celebrated case of *Owners of the Motor Vessel Lillian "Lillian S" v Caltex Oil Limited* [1989]e KLR.
26. As a consequence of the above holding, I am persuaded to make the following orders;
 - i. That the notice of preliminary objection dated 26.04.2024 is hereby upheld.
 - ii. That the notice of motion dated 03-04-2024 is hereby struck out for being incompetent and lack of jurisdiction by this court.
 - iii. That each party shall bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 24TH DAY OF JUNE 2024

J. N. ONYIEGO

JUDGE

