



**Gesicho v Attorney General (Constitutional Petition E003 of 2023)
[2024] KEHC 17057 (KLR) (31 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 17057 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CONSTITUTIONAL PETITION E003 OF 2023**

**TA ODERA, J
OCTOBER 31, 2024**

BETWEEN

MORAA GESICHO PETITIONER

AND

THE ATTORNEY GENERAL RESPONDENT

RULING

Introduction

1. The Petitioner herein filed Petition dated 14th February, 2023 seeking the declarations that;
 - a. The name ‘The Executive Office of the President’ is unconstitutional.
 - b. The office of the Prime Cabinet Secretary is unconstitutional.
 - c. The Cabinet is unconstitutional.
 - d. The whole lot of fifty-one Principal Secretaries is unconstitutional.
 - e. The whole lot of fifty Chief Cabinet Secretaries is unconstitutional.
 - f. Wycliffe Musalia Mudavadi is a Cabinet Secretary and not a Prime Cabinet
 - g. Secretary.
 - h. The President unconstitutionally assigned the Prime Cabinet Secretary the role of assisting him as the Deputy President. .
 - i. The system of governance running the country is a mongrel.
 - j. The Executive [Order No. 1 of 2023](#) is illegitimate
 - k. The nominations of the Cabinet Secretaries are unconstitutional.



- l. The appointments of the Cabinet Secretaries are unconstitutional.
 - m. The nominations of the Principal Secretaries are unconstitutional.
 - n. The appointments of Principal Secretaries are unconstitutional.
 - o. The nominations of the Chief Cabinet Secretaries are unconstitutional.
 - p. The appointments of the Chief Cabinet Secretaries are unconstitutional.
 - q. The President established a government not in compliance with the [Constitution](#).
 - r. The government the President established is unlawful.
2. The Petitioner equally sought for orders;
- a. Compelling the President to drop the name: ‘The Executive Office of the President’.
 - b. Compelling the President to shut down the office of the Prime Cabinet Secretary.
 - c. Compelling the President to stop assigning duties to Wycliffe Musalia Mudavadi as a Prime Cabinet Secretary.
 - d. Stopping the President from operating with the Cabinet.
 - e. Stopping the President from operating with the fifty-one Principal Secretaries.
 - f. Stopping the Preside from operating with the 51 Chief Administrative Secretaries. Compelling the President to stop implementing the executive [Order No.1 of 2023](#).
 - g. Stopping the President from running the mongrel system of governance.
 - h. Compelling the President to restore the Presidential system of government which was running the country before he re-organized the government.
3. The Petitioner pleaded that; the president changed the name of the executive without amending the [Constitution](#). He pleaded too that the president changed the composition of the cabinet and created the position of the Prime Cabinet Secretary without amending the [Constitution](#). He further pleaded that the President appointed 51 Permanent Secretary, and 51 Chief Administrative Secretaries unconstitutionally. It was his claim too that the president created the office of the Prime cabinet Secretary an unconstitutionally and appointed Hon. Wycliffe Musalia Mudavadi as the Prime whom he unconstitutionally assigned roles of assisting him and the deputy presidents. He contended that the Executive order No. 1 of 2023 was illegitimate as it intended to change the system of governance from the one provide for under the [Constitution](#). He claimed too that the president unconstitutionally appointed the cabinet secretaries, CASs, Prime Cabinet Secretary and the PSs without publishing their nominations and appointments. In short he contended that the President out of the Executive Order. No. 3 his subsequent actions established a government that was not in accordance with the [Constitution](#).
4. In response the Respondent filed a preliminary objection dated 25th January, 2024 that was based on ground that this court lacks requisite Jurisdiction to entertain this petition by virtue of Article 162(2) (a) of the [Constitution](#) of Kenya 2010 a read together with section 4 and 12 of the [Employment and Labor Relation Court Act, 2011](#) and as such the same is a non-starter and an abuse of the court process.



5. This court directed that the preliminary Objection be heard first and be canvassed by way of written submissions. This court notes that it is only the Respondent who filed written submissions and the same are dated 1st July, 2024.

Determination.

6. Having considered the Application by the Applicant, the response by the second Respondent the preliminary objection by the interested parties and their written submissions, I find issues for determination are:
- a. whether this court has Jurisdiction to hear and determine this Petition
 - b. whether the Petitioner meets the threshold of a constitutional Petition

Whether this court has Jurisdiction to hear and determine this Petition

7. The Respondent Preliminary Objection is based on account of this court lacking Jurisdiction to hear and determine the matter this petition by virtue of Article 162(2) (a) of the Constitution of Kenya 2010 read together with section 4 and 12 of the Employment and Labor Relation Court Act, 2011. Article 162 of the Constitution empowered Parliament to establish Courts with the status of the High Court to hear and determine disputes relating to employment and labor relations. Consequently, Parliament enacted the Employment and Labour Court Act, whose section 12 provides for the jurisdiction of that Court. According to section 12(1), ELRC has jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of the Act or any other written law which extends jurisdiction of matters relating to employment and labour relations to that Court.
8. I have perused the Petition and what comes out is that the main claims related to the unconstitutionality of the Executive order No.1 of 2023, the constitutionality creation of the Office of the Prime Cabinet secretary, the Unconstitutionality of assigning the Prime Cabinet Secretary the role of assisting the President and the Deputy President and the unconstitutionality of failing to publish the nomination and appointment of Prime Cabinet Secretary, 51 Permanent Secretaries and 51 CAS and the unconstitutionality of restructuring of the Cabinet by the President. It outright that the said offices are public and held by public officers from my understanding of the petition. The petition thus relates to the procedure of their appointment and validity of the said offices under the Constitution of Kenya. In the case of Okiya Omtatah Okiiti v Attorney General, Public Service Commission & State Corporations Advisory Committee; Francis K. Muthaura (AMB), Mukesh Shah, Leonard Itbau (ENG), Susan Mudhune, Charles Makori Omanga & Kenya Revenue Authority (Interested Parties) [2019] KEELRC 1411 (KLR) it was held that ;

“The Court finds that the dispute is about employment in the public service. The Court finds that the chairperson and the members of the Board of the KRA (just like the chairpersons and members of other state corporations or boards of other public bodies) are public officers bound by applicable constitutional and statutory provisions and lawful policies and practices that govern public employment. The Court holds that in the constitutional framework under the Constitution of Kenya 2010, the public officers despite their designation or position held in the service, they are all in public or state service and governed by specific applicable constitutional and statutory provisions and lawful policies and practices – so that the variance in positions held or designation does not render any of the public or state officers to escape their being servants of the people, employed by the people, within such applicable constitutional and statutory provisions, and, lawful policies



and practices. Thus the provisions of Article 73 as read with Article 80 (c), and, Article 232 apply accordingly. In view of that finding, the dispute in the present petition is about employment within the complex framework of public service or public sector employment. The substantive law applicable to such employment ranging from declaration of vacancy, recruitment and selection procedures, appointment procedure, and termination procedure would be the applicable public service constitutional and statutory provisions and such other lawful policies and practices to the extent that they prescribe minimum or better terms and conditions of service than those envisaged in the *Employment Act*, 2007. Also in the case of *Abdikadir Suleiman –Versus-County Government of Isiolo and Another* [2015] eKLR it was held thus:

“As stated by the court earlier in this judgment, the original and unlimited jurisdiction to make a finding on legitimacy or lawfulness of decisions in disputes between employers and employees rests with this court as vested with the appropriate jurisdiction under Articles 159(1), 162 (2) (a) as read with Article 165(5) and (6) of the *Constitution*; Articles 22(1) and 258(1) of the *Constitution*, and the provisions of the *Employment and Labour Relations Act*, 2011. The court holds that the jurisdiction spreads to all issues in the employment relationship and related matters including the enforcement of the fundamental rights and freedoms under Article 22 of the *Constitution* and enforcement of the *Constitution* under Article 258 as far as the issues in dispute are, evolve, revolve or relate to employment and labour relations. The court holds that the compass or golden test for the court’s jurisdiction is the subject matter in the dispute namely disputes relating to employment and labour relations as provided for Article 162 (a) of the *Constitution* and as amplified in the *Employment and Labour Relations Court Act*, 2011 and not the remedies sought or the procedure of moving the court or the situ of the applicable law or any other extraneous considerations as may be advanced by or for a litigant.”

The said decisions are of a court of equal status and I do agree with ratio decidendi in both of the said cases as this court has no jurisdiction to deal with employment and labour relations matters by dint of Article 162 (2) (a) as read with Article 165 (5) of the *Constitution*. This court must therefore down it’s tools for want of jurisdiction.

9. The Petition must therefore fail as this court lacks Jurisdiction to hear and determine it.

Conclusion

10. In the end I proceed to strike out the Petition.

11. No orders as to costs as this is a public interest Matter.

It is so ordered.

T.A ODERA

JUDGE

31.10.24

DElivered Virtually in the Presence of:

Court Assistant - Oigo.

Parties Absent

