



**Odungo v Export Processing Zones Authority & 3 others (Petition E093 of 2023)
[2024] KEHC 16475 (KLR) (Constitutional and Human Rights) (31 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16475 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION E093 OF 2023
LN MUGAMBI, J
DECEMBER 31, 2024**

BETWEEN

JUAN MOSES ODUNGO PETITIONER

AND

EXPORT PROCESSING ZONES AUTHORITY 1ST RESPONDENT

**CABINET SECRETARY, MINISTRY OF INVESTMENTS, TRADE AND
INDUSTRY 2ND RESPONDENT**

ATTORNEY GENERAL 3RD RESPONDENT

HUSSEIN ADAN MOHAMMED 4TH RESPONDENT

RULING

Introduction

1. This Ruling relates to the 2nd and 3rd Respondents' Notice of Preliminary Objection dated 11th April 2023 as against the Petition dated 24th March 2023.
2. The gravamen of the Petition is that the 4th Respondent the acting Chief Executive Officer (CEO) of the 1st Respondent is holding the position illegally on grounds that he held the position for more than 12 months contrary to Section 34(3) of the *Public Service Commission Act* which stipulates 6 months.
3. For context, the 1st Respondent appointed the 4th Respondent in acting capacity effective from 2nd February 2022 following a Board resolution. The Petitioner also faults the 1st Respondent for its failure to officially appoint a substantive person for this post. Instead, it is contended that the 1st Respondent has continually appointed various persons in acting capacity since September 2018.
4. In opposition, the 2nd and 3rd Respondents filed this Preliminary objection on the grounds that:



- i. By dint of Article 162 (2) (a) as read with Article 165 (5) (b) of *the Constitution* and Section 12 of the *Employment and Labour Relations Court Act* No. 20 of 2011, this Court is not vested with the requisite jurisdiction to hear and determine this Application and Petition.
- ii. By dint of Section 12 of the *Employment and Labour Relations Court Act*, the Employment and Labour Relations Court is clothed with the requisite jurisdiction to hear and determine issues and/ or allegations that relate to employment such as in the instant Application and Petition.

Petitioner's Case

5. In response to this objection, the Petitioner filed grounds of opposition dated 8th May 2023 on the basis that:
 - i. The Notice of Preliminary Objection is bad in law, incompetent, frivolous, vexatious and is otherwise an abuse of Court process and should be dismissed in limine with costs to the Petitioner.
 - ii. The Employment and Labour Relations Court lacks jurisdiction to hear and determine the issues raised in this Petition since the subject matter directly and substantially in issue herein does not relate to or arise out of employment relationship between an employer and an employee as relates the parties herein.
 - iii. The Petitioner has no employment relationship with either of the Respondents and, therefore, the jurisdiction of the Employment and Labour Relations Court cannot be invoked to determine the issues raised in this Petition. Moreover, there is no dispute between the 1st Respondent and the 4th Respondent as relates to his employment.
 - iv. The issues raised in the Petition herein fall within the exclusive jurisdiction of the High Court of Kenya established under Article 165 (3) (a), (b), (d) and (e) of *the Constitution* of Kenya, 2010.
 - v. The Preliminary Objection has been raised maliciously to intentionally derail the hearing of the instant Petition and illegally extend the unlawful tenure of the 4th Respondent as the Acting Chief Executive Officer of the 1st Respondent.

Parties' Submissions

2nd and 3rd Respondents' Submissions

6. On 19th April 2023, Senior State Counsel, Grace M. Mutindi filed submissions in support of these Respondents' Preliminary objection.
7. It was submitted that this Court lacks jurisdiction to entertain this Petition by dint of Articles 162 (2) (a) and 165 (5) (b) of *the Constitution* as read with Section 12 of the *Employment and Labour Relations Court Act*. Counsel argued that the jurisdiction of the High Court as established under Article 165 of *the Constitution* is limited. It is argued that Article 165(5)(b) of *the Constitution* drafted in mandatory terms, emphasizes that the High court shall not have jurisdiction in respect of matters reserved for the Employment and Labour Relations Court and the Environment and Land Court.
8. Reliance was placed on Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1 that a Court can only exercise jurisdiction where the same has been granted and only within the confines of the law.



9. Further cited was the case of Republic v National Land Commission Ex-Parte Ephraim Muriuki Wilson & others [2018] eKLR where it was held that:

“26. The other closely related issue is the jurisdiction of the Environment and Land Court to deal with issues relating to constitutional interpretation and enforcement of constitutional remedies especially in respect to matters which fall within the ambit of the Environment and Land Court. This is clearly provided for under Section 13 (3) of the Act. Sub-section 7 (b) above allows the Environment and Land Court to grant prerogative orders. It follows that the Environment and Land Court can entertain this Judicial Review application challenging the decision of the Respondent revoking its title to land and grant the prerogative reliefs sought.”

10. Other cases relied on were Public Service Commission & 4 others[supra], University (USIU) v Attorney General (2012) eKLR, Daniel N. Mugendi v Kenyatta University (2013) eKLR and ICIPE v Nancy McNally (2018) eKLR.

Petitioner’s Submissions

11. The Petitioner further opposed the preliminary objection by filing submissions dated 8th May 2023 through Wandai Matheka and Company Advocates.

12. Counsel acknowledged that a Court cannot arrogate to itself jurisdiction through craft but only through *the Constitution* and the law as held in Samuel Kamau Macharia vs KCB & 2 others [2012] eKLR and In the Matter of Interim Independent Electoral Commission (2011) eKLR.

13. Counsel submitted that this Court is vested with the requisite jurisdiction to entertain this matter as empowered by Article 165 (3) of *the Constitution*. It was further contended that the primarily issue in this Petition is whether the 1st Respondent violated *the Constitution* by appointing the 4th Respondent and the notion that the 4th Respondent’s continued holding of the position is unlawful and unconstitutional by virtue of Section 34(3) of the *Public Service Commission Act*.

14. Counsel further stressed that the instant suit had not arisen from an employer - employee relationship to warrant invoking the Employment and Labour Relations Court jurisdiction. Counsel noted that this was apparent from a reading of Section 12 of the *Employment and Labour Relations Court Act*. Reliance was placed in Public Service Commission & 4 others v Cheruiyot & 20 others [2022] KECA 15 (KLR) where it was held that:

“Our interpretation of the provisions of section 12 of the *Employment and Labour Relations Court Act* is that the Employment and Labour Relations Court has jurisdiction to entertain any dispute or any contemplated dispute under section 12(1) but the dispute between the parties must be related to their employment and/or touching on labour relations. This is therefore to mean that the jurisdiction of the Employment and Labour Relations Court is not limited to the determination of disputes arising out of a contract of employment between an employee and an employer, the court can also determine any constitutional violations of the rights of any party arising from an employee-employer relationship. However, for the court to entertain a petition premised on the breach of a party’s fundamental rights under *the Constitution*, the alleged constitutional breach must be ancillary and incidental to the matters contemplated under section 12 of the Act.”



15. Like dependence was placed in National Social Security Fund Board of Trustees vs Kenya Tea Growers Association & 14 others (Unreported).
16. In view of the foregoing, Counsel concluded that this Court has jurisdiction to determine this matter.

1st and 4th Respondents' Submissions

17. In support of the 2nd and 3rd Respondents' objection, the 1st and 4th Respondents filed submissions dated 8th May 2023 through Adrian Kamotho Njenga and Company Advocates. The issues for discussion being whether the objection raises clear points of law and whether this Court lacks jurisdiction to determine the Application and Petition.
18. Relying in Mukisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Ltd [1969] EA 696, Counsel submitted that the objection raises a pure point of law as concerns the jurisdiction of the court.
19. Turning to the second issue, Counsel submitted that jurisdiction is the life blood of any adjudication because a court or tribunal without jurisdiction is like an animal without blood, which means it is dead as held by the Supreme Court of Nigeria in Ocheja Emmanuel Dangana & Anor V. Hon. Atai Aidoko Ali Usman & Ors (2012) LLJR-SC.
20. Reliance was placed on Kalpana H Rawal & 2 others vs Judicial Service Commission & 2 others [2016] eKLR and Samuel Kamau Macharia [supra].
21. Counsel submitted that the Petitioner's main grievance being the 4th Respondent's appointment, makes it certain that this Court does not have the jurisdiction to entertain this suit. Reliance was placed in Ali Jarso Wako & another vs. Ministry of Interior & Coordination of National Government & 5 others; Public Service Commission & 5 Others (Interested Parties) [2020] eKLR where it was held that:

“The issue of jurisdiction is quite crucial in that it avoids the hearing and determination of cases by superior courts haphazardly. Issue relating to recruitment and employment of public servants or any employee belong to the Labour court. Any Constitutional issue revolving around employment or recruitment of an employee has to be dealt by the Labour Court. We cannot have Constitutional issue relating to employment or recruitment dealt by the High court and thereafter refer the other issues in the same dispute to the Labour Court.”
22. Similar dependence was placed in Daniel N. Mugendi V Kenyatta University & 3 others (2013) eKLR.

Analysis and Determination

23. From the foregoing it is my considered view that the issues that arise for determination are:
 - i. Whether the Notice of Preliminary Objection dated 11th April 2023 satisfies the established threshold for preliminary objections.
 - ii. Whether the 2nd and 3rd Respondent's Preliminary Objection is merited.
24. What constitutes a preliminary objection was set out in Mukisa Biscuit Manufacturing Co. Ltd (Supra) and was subsequently reaffirmed by the Supreme Court in the Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others (2014) eKLR as follows:

“(31) To restate the relevant principle from the precedent-setting case, Mukisa Biscuit Manufacturing Co Ltd –vs. - West End Distributors (1969) EA 696:



“a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration....a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.

25. Discussing its nature in *Dismas Wambola v Cabinet Secretary, Treasury & 5 others* (2017) eKLR, the Court noted as follows:

“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.

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....”

26. Likewise, the Court in the *George Oraro V Barak Eston Mbaja* ([2005] KEHC 731 (KLR) on the nature of preliminary objections observed that:

“A preliminary objection is now well identified as and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection and yet it bears factual aspects calling for proof or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary objection anything that purports to be a preliminary objection must not deal with disputed facts and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.”

27. The preliminary objection herein is raised on the ground that this Court lacks jurisdiction to entertain the matter as the issues raised in the Petition revolve around a question of appointment hence the jurisdiction belongs to the Employment and Labour Relations Court.

28. Jurisdiction is matter of law as it is what gives the Court the power or authority to adjudicate a matter. It flows from *the Constitution*, Statute or principles established through judicial precedents. The instant Preliminary Objection is premised on jurisdictional ground and the facts as stated in pleadings are not contested for purposes of the Preliminary Objection.

29. I am thus satisfied the issue raised herein satisfies the threshold of a preliminary objection.

Whether the Preliminary Objection is merited

30. The Employment and Labour Relations Court is made reference to under Article 162 (2) (a) which provides thus:



- (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—
- a. employment and labour relations;
 - b.
- (3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).
31. To give effect to this Article, the Parliament enacted the Employment and *Labour Relations Act* that established the Employment and Labour Relations Court and prescribed its jurisdiction under Section 12 of the Act as follows:

The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of *the Constitution* and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including—

- a. disputes relating to or arising out of employment between an employer and an employee;
 - b. disputes between an employer and a trade union;
 - c. disputes between an employers' organisation and a trade union's organisation;
 - d. disputes between trade unions;
 - e. disputes between employer organisations;
 - f. disputes between an employers' organisation and a trade union;
 - g. disputes between a trade union and a member thereof;
 - h. disputes between an employer's organisation or a federation and a member thereof;
 - i. disputes concerning the registration and election of trade union officials; and
 - j. disputes relating to the registration and enforcement of collective agreements.
32. Although the High Court has expansive jurisdiction to hear and determine disputes relating to *the Constitution* and the Bill of Rights under Article 165(3) (d) of *the Constitution*; that jurisdiction is limited under Article 165(5) as follows:
- The High Court shall not have jurisdiction in respect of matters-
- a. Reserved for the exclusive jurisdiction of the Supreme Court Under this Constitution; or
 - b. Falling within the jurisdiction of the Courts contemplated in Article 162(2).
33. The Court in *Sollo Nzuki v Salaries and Remuneration Commission & 2 others* [2019] eKLR expounding on the jurisdiction of the Employment and Labour Relations Court opined as follows:

“Similarly, pursuant to Article 23(3) of *the Constitution* as read with section 12(3) of the *Employment and Labour Relations Court Act*, it is my view that the Employment and Labour Relations Court can grant reliefs in a constitutional petition. However, the



jurisdiction to do so is confined to matters falling within Article 41 of *the Constitution* as read with section 12 of the *Employment and Labour Relations Court Act*. The Court cannot therefore purport entertain petitions outside the aforesaid matters as its jurisdiction is limited only in so far as employment matters and matters related thereto are concerned. In my view the matters which fall within the ambit of Article 162(2) of *the Constitution* must be matters within the exclusive jurisdiction of the said specialized Courts. However, as stated above, the Employment and Labour Relations Court may not embark on a generalized handling of petitions but is entitled to and is jurisdictionally empowered to address such matters if they arise directly and in relation to the matters within the court's jurisdictional competence and specialization. Accordingly, where the matters raised fall both within their jurisdiction and outside, it would be a travesty of justice for the High Court to decline jurisdiction since it would mean that in that event a litigant would be forced to institute two sets of legal proceedings. Such eventuality would do violence to the provisions of Article 159 of *the Constitution*....The Employment and Labour Relation's Court's jurisdiction is restricted to where there exists employer and employee relationship has been the subject of several decisions in our jurisdiction."

34. Additionally, the Court of Appeal further clarified the jurisdiction of the Courts established under Article 162 (2) of *the Constitution* in *Chimweli Jangaa Mangale & 3 others v Hamisi Mohamed Mwawasaa & 15 others* [2016] eKLR as follows:

"This Court considered the issue in Prof. *Daniel N. Mugendi v. Kenyatta University & Others, CA No 6 of 2012* and in *Judicial Service Commission v. Gladys Boss Shollei & Another, CA No 50 of 2014*, involving the Labour and Employment Court, which, like the ELC, is a court of equal status as the High Court under Article 162(2) of *the Constitution*. The Court concluded that the High Court did not have exclusive jurisdiction to enforce the Bill of Rights and that *the Constitution* contemplates enforcement and protection of fundamental rights and freedoms by other courts, other than the High Court. Accordingly, where issues involving the environment or land raise constitutional issues or issues of protection and enforcement of the right to land as property, the ELC will have jurisdiction to hear and determine the dispute. We are satisfied that the appellant's claim that the ELC lacks jurisdiction to enforce constitutional rights is totally bereft of merit."

35. The Court of Appeal in *Public Service Commission & 4 others* [Supra] further stated as follows:

"49. In the absence of an employee-employer relationship, it is our considered view that the court that had jurisdiction to entertain and determine the issues raised in the consolidated petitions was in fact the High Court. The establishment of the High Court is found at article 165(1) of *the Constitution*. Under article 165(3), the High Court has jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been violated, infringed or threatened. Under article 165(d)(i), the High Court has jurisdiction to determine whether any law is inconsistent with or in contravention of *the Constitution*.

50. The issues raised in the consolidated petitions, especially the issue relating to the constitutionality of section 43(5) of the *Elections Act, 2011* are the kind of issues contemplated under article 165(3)(d) of *the Constitution* determination of which would be within the exclusive constitutional mandate of the High Court. This is jurisdiction flowing directly from *the Constitution*, which the



Supreme Court alluded to in the matter of Interim Independent Electoral Commission (supra) and Samuel Kamau Macharia & another (supra).

51. *The Constitution* appreciates that there are matters within the exclusive jurisdiction of the High Court on the one hand and those reserved and/or falling within the jurisdiction of the courts contemplated in article 162(2) on the other hand, notwithstanding the fact that the latter courts enjoy the same status as the High Court. This court in *Karisa Chengo & 2 others v Republic* [2015] eKLR held thus:

“...The jurisdiction of the High Court as established under article 165 of *the Constitution* is limited in two fronts. First, it shall not exercise jurisdiction on matters reserved for the Supreme Court and matters falling within the jurisdiction of the two courts contemplated in article 162(2). It is therefore clear that the High Court no longer had the original and unlimited jurisdiction in all matters as it used to have under the repealed Constitution. It cannot deal with matters set out under section 12 of the ELRC Act and section 13 of the ELC Act. Conversely, the courts contemplated in article 162(2) of *the Constitution* cannot deal with matters reserved for the High Court.”

52. This court in the *Karisa Chengo* case (supra) held that status of a court is not synonymous to jurisdiction. In this context therefore, although the Employment and Labour Relations Court exercises the same power as the High Court in performance of its judicial functions, it has specialized jurisdiction and is not the High Court. It is important to point out that the finding of this court in the *Karisa Chengo* case was upheld by the Supreme Court.
53. Therefore, for want of an employee-employer relationship, we find and hold that the Employment and Labour Relations Court arrogated itself jurisdiction that exceeded that conferred upon it by law, which renders its decision nullity ab initio.”

36. Guided by the principles in the authorities canvassed above, it is crystal clear that the jurisdiction the Employment and Labour Relations under Section 12 applies where the relationship of an employer and an employee exists. If the relationship of employer-employee is established, all matters that pertinent to that relationship fall within the jurisdiction of the Employment and Labour Relations Court.
37. The Public Service Commission is established under Article 233 of *the Constitution*. Under Article 234 (2); among the powers of the Public Service Commission are, subject to *the Constitution* and legislation-
- i) establish and abolish offices in the public service and
 - ii) appoint persons to hold or act in those offices, and to confirm appointments.
38. Parliament enacted the *Public Service Commission Act*, Cap 185. The definition of “Employee” is provided for under Section 2 of the Act which states: An “employee” in this Section means a person employed for wages or a salary and includes an apprentice and indentured learner while an “employer” means any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company.



39. The scope of the application of the *Public Service Commission Act* Cap 185 is quite expansive and covers all public service appointments except those expressly excluded in section 3 of the Act which provides:

Scope and application

Subject to Articles 155(3)(a), 158(3), 234(2)(a), 234(3) and 252(1) of *the Constitution* and section 28 of the *Kenya Defence Forces Act* (Cap. 199), this Act shall apply to all public bodies and persons holding office in the public service.

40. Under Section 31 of the *Public Service Commission Act*, the powers of the Public Service Commission may be delegated. Section 31 provides:

Delegation of powers

- (1) The Commission may, where appropriate and in writing, delegate any power or assign a duty conferred to it under *the Constitution* or this Act to its members, an officer, body or authority in the public service.
- (2) A delegation or assignment under subsection (1) shall not prevent the Commission from exercising the power.
- (3) A delegation under this section—
 - (a) shall be subject to any conditions that the Commission may impose;
 - (b) shall not divest the Commission of the responsibility concerning the exercise of the powers or the performance of the duty delegated, and
 - (c) may be withdrawn, and any decision made by the person to whom the delegation is made may be withdrawn or amended by the Commission.
- (4) The Commission may, at any time, institute an audit, investigation, inquiry or visit to determine whether the delegated powers are properly exercised by the authorized officer.
- (5) Where the audit, investigation, inquiry or visit establishes that an authorized officer has breached any condition or improperly exercised delegated powers, the Commission shall take corrective measures including revoking the delegation.

41. In *Okiya Omtatah Okiiti v Attorney General & 2 others; Francis K. Muthaura (AMB) & 5 others (Interested Parties)* [2019] eKLR, the Court had the following to say about state corporations:

“The Court holds that state corporations may and are usually established as corporate bodies by statute but the constitutional and statutory provisions do not confer the board members a distinctive status separate from that of other public officers including those serving as staff in the state corporations - the difference amongst public officers being distinctiveness in the role played as vested by *the Constitution*, statute or terms and conditions of service and as based on the public or state office held by the individual...”



42. An Acting Chief Executive of a State Corporation is a public service employee working under the Board of a State Corporation hence the matters raised herein revolve around the employment of the 4th Respondent.

43. The jurisdiction of the Employment and Labour Relations Court’s jurisdiction applies to claims of violation of fundamental rights and freedoms within the purview of Section 12 of the Employment and Labour Relations Act. This is a matter which raises issues pertaining to the employment of the 4th Respondent and thus perfectly falls within the jurisdiction of the Employment and Labour Relations Court. I am emboldened by the decision of Ali Jarso Wako & another vs. Ministry of Interior & Coordination of National Government & 5 others; Public Service Commission & 5 Others (Interested Parties) [2020] eKLR which observed thus:

“The issue of jurisdiction is quite crucial in that it avoids the hearing and determination of cases by superior courts haphazardly. Issue relating to recruitment and employment of public servants or any employee belong to the Labour court. Any Constitutional issue revolving around employment or recruitment of an employee has to be dealt by the Labour Court. We cannot have Constitutional issue relating to employment or recruitment dealt by the High court and thereafter refer the other issues in the same dispute to the Labour Court.”

44. Among the main issues raised in the Petition is a challenge is that the 4th Respondent’s appointment by the 1st Respondent’s is in violation of the Constitution and the Public Service Commission Act allegedly because 1st Respondent usurped the 2nd Respondent’s mandate in making the appointment. That is an employment related dispute which will involve an interpretation of the Constitution and the cited provisions in the Public Service Commission Act and those of the Export processing Zone Act in the matter relating to the employment of the 4th Respondent. This equally falls within purview of the Employment and Labour Relations Court under Article 162(2) of the Constitution and not this Court.

45. Consequently, I find and hold that this Court lacks jurisdiction. This Preliminary Objection is upheld and the instant petition struck out.

46. Each Party to bear its own costs.

DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 31ST DAY OF DECEMBER, 2024.

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L N MUGAMBI

JUDGE

