



**Mwangi v Attorney General & others; Judicial Service Commission & others
(Interested Party) (Constitutional Petition E048 of 2022) [2023] KEHC 451 (KLR)
(Constitutional and Human Rights) (31 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 451 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E048 OF 2022**

**AC MRIMA, J
JANUARY 31, 2023**

BETWEEN

JONATHAN MUNENE MWANGI PETITIONER

AND

HON. ATTORNEY GENERAL & OTHERS RESPONDENT

AND

JUDICIAL SERVICE COMMISSION & OTHERS INTERESTED PARTY

RULING

Introduction

1. This ruling is in respect of the application by way of a Notice of Motion dated February 10, 2022. The application was taken out by the Petitioner herein and mainly seeks the review of this Court's orders issued on February 7, 2022 transferring this matter from the High Court to the Employment and Labour Relations Court.
2. The application was vehemently opposed by the Respondents. The Interested Parties did not take part in the application.

Background:

3. On February 7, 2022, the Petitioner instituted the instant proceedings by filing a Petition dated February 4, 2022 together with an evenly dated Notice of Motion seeking the hearing of the Petition on priority basis.



4. On perusal of the matter, this Court made an order transferring the matter from the High Court to the Employment and Labour Relations Court on the basis of a similar matter which had been previously filed in the High Court and later transferred to the Employment and Labour Relations Court. That was Petition No. E034 of 2022.
5. Before the Hon. Deputy Registrar could effectively transfer this matter as ordered, the application under consideration in this ruling was filed.
6. It has, however, now been revealed in these proceedings that the Petition No. E034 of 2022, which was the basis of the transfer, was withdrawn prior to the institution of the instant Petition.

The Application:

7. The application was supported by the Petitioner's affidavit sworn on February 10, 2022. The Applicant also filed written submissions and two Lists of Authorities in support thereof.
8. Opposing the application, the 1st and 2nd Respondents filed Grounds of Opposition dated March 15, 2022 as well as written submissions.
9. The 3rd Respondent opposed the application by filing a Replying Affidavit sworn by its Chief Executive Officer one Anne R. Gitau, MBS, on March 9, 2022. It also filed written submissions.

Analysis:

10. I have carefully considered the application alongside the parties' responses, the written submissions and the decisions referred to therein.
11. In dealing with the application, I will address two issues. They are whether the Employment and Labour Relations Court (hereinafter referred to as 'the ELRC Court') has jurisdiction over the subject matter and whether the application is merited.
12. I will deal with the issues in seriatim.

Jurisdiction:

13. The parties herein through their well-researched written submissions addressed the doctrine of jurisdiction at length. They also referred to various decisions. This Court will, therefore, not rehash the issue.
14. The jurisdiction of the ELRC Court is now well settled. The ELRC Court only assumes jurisdiction over a matter once an employer-employee relation exists.
15. The Court of Appeal in Nakuru Civil Appeal No. 119 of 2017 *Public Service Commission & 2 Others v Eric Cheruiyot & 16 Others consolidated with Civil Appeal No. 139 of 2017 County Government of Embu & Another v Eric Cheruiyot & 15 Others* (2022) KECA 15 (KLR) emphatically expressed itself 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.
 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 a nullity ab-initio.



16. When I dealt with this matter on February 7, 2022, a similar matter ([Petition No. E034 of 2022](#)) had been filed in this Court and subsequently transferred to the ELRC Court by Her Ladyship the Presiding Judge of the Division. In order to avoid the possibility of conflicting decisions over similar matters, I made the impugned order such that both matters would be dealt with by the same Court. Unknown to this Court, [Petition No. E034 of 2022](#) had been withdrawn.
17. From the record, it has now emerged that there exists no employer-employee relationship between the Petitioner herein and any of the other parties. The Petitioner seeks to enforce the [Constitution](#) as a citizen and not as an employee.
18. Having said so, it is this Court's finding that since there exists no employer-employee relationship between the Petitioner herein and any of the other parties, then the ELRC Court has no jurisdiction over the matter.

Is the application merited?

19. On the basis of the finding in respect of the first issue, it, therefore, follows that if the orders sought are disallowed then the Petitioner will not have any opportunity to be heard before any Court.
20. Allowing such state of affairs to remain in situ will be tantamount to serious affront to the [Constitution](#). Since the Petitioner is properly before the Court which is constitutionally-seized with the matter, then on that ground alone, he ought to be heard.
21. The position, hence, takes care of all other issues raised in opposition to the application since even if the orders sought are declined still the ELRC Court cannot exercise jurisdiction in this matter.
22. Going forward, this Court will, nevertheless, briefly respond to the issues raised by the Respondents.
23. The 1st and 2nd Respondents contended that the Petitioner ought to instead withdraw this Petition and file a fresh one. To me, that is unnecessary since it will not take the parties any further than increasing costs of litigation thereby inhibiting access to justice.
24. On the aspect of whether the High Court became functus officio in this matter when it made the order on transfer, the legal principle behind the doctrine of functus officio is that the principle prevents the re-opening of a matter before a Court that rendered a final decision (See the Supreme Court in [Raila Odinga & 2 Others v Independent Electoral and Boundaries Commission & 3 others](#) (2013) eKLR and the Court of Appeal in [Telkom Kenya Limited v John Ochanda](#) (2014) eKLR).
25. In this case, the High Court has not rendered itself on any issue save the transfer. The doctrine of *functus officio* does not, therefore, apply in the circumstances of this matter.
26. On whether the application satisfies the requirements of section 80 of the [Civil Procedure Act](#), Cap. 21 of the Laws of Kenya and Order 45 of the [Civil Procedure Rules](#) on review, suffice to say that the application is mounted on two solid grounds.
27. The first ground is that there exists a sufficient reason for the review of the orders. This ground, which has been dealt with above, can be summed up as the lack of jurisdiction by the ELRC Court over the subject Petition and the withdrawal of [Petition No. E034 of 2022](#).
28. The second ground is that the application was made timeously. The impugned order was made on the February 7, 2022 and the application was filed on February 10, 2022.
29. The application is, therefore, merited.



Disposition:

30. Deriving from the foregoing, the following final orders do hereby issue: -

- a. The order transferring this matter to the ELRC Court issued on February 7, 2022 is hereby reviewed and set-aside.
- b. The matter is hereby recalled to the High Court and shall be placed before the Presiding Judge of the Division for further dealing.
- c. Costs of the application shall be in cause.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 31ST DAY OF JANUARY, 2023.

A. C. MRIMA

JUDGE

Ruling No. 1 virtually delivered in the presence of:

Mr. Simiyu, Learned Counsel for the Petitioner.

Miss. Chibole, Learned Counsel for the 1st and 2nd Respondents.

Mr. Wahome, Learned Counsel for the 3rd Respondent.

Regina/Chemutai – Court Assistants.

