



REPUBLIC OF KENYA



KENYA LAW
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**Ongaga v County Assembly of Nyamira & another (Petition
E001 of 2023) [2023] KEHC 3754 (KLR) (27 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3754 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
PETITION E001 OF 2023
WA OKWANY, J
APRIL 27, 2023**

BETWEEN

EMILY ONGAGA PETITIONER

AND

THE COUNTY ASSEMBLY OF NYAMIRA 1ST RESPONDENT

**THE SPEAKER OF THE COUNTY ASSEMBLY OF
NYAMIRA 2ND RESPONDENT**

RULING

1. Emily Ongaga, the Petitioner herein, , who describes herself as the County Executive Committee (CEC) Member for Finance, ICT and Economic Planning of the County Government of Nyamira, sued the Respondents through the Petition filed on 7th March 2023 seeking the following orders: -
 - a. A Declaration that the Respondents have violated the Petitioner's rights and freedoms as set out at Articles 10, 25(c), 35, 47, 50(1) and (2) (b)' and 236, of the *Constitution of Kenya*;
 - b. A Declaration that within the purview of Article 10 of the *Constitution*, the Respondents are bound by the key national values and principles to wit, the rule of law.
 - c. A Declaration that within the purview of Article 236 of the *constitution*) the Respondents cannot victimize and impeach the petitioner without the due process of law.
 - d. A Declaration that within the purview of Articles 25(c), 35, 47 and 50 (1) & (2) (b) of the *Constitution*, a person facing impeachment proceedings under Section 40 of the *County Government Act* 2012 is entitled to be informed substantially with particularity and specificity and supported with evidence the grounds of the impeachment before the commencement of the impeachment proceedings by the select committee.



- e. A Declaration that the impeachment proceedings against the Petitioner commenced by the Notice of Motion letter dated 23rd February, 2023 is contrary to the Constitution, the County Governments Act and the Standing Orders of the County Assembly of Nyamira and are a nullity contrary to Articles 47, 50 (l) and 236 of the Constitution.
 - f. An Order of certiorari to remove into this Court and quash the decision of the County Assembly of Nyamira commenced vide the Notice of Motion dated 23rd February, 2023 to impeach and remove the Petitioner without substantiation and with specificity informing the Petitioner of the allegations leveled against her.
 - G. An order of certiorari to remove into this Court and quash the decision of the County Assembly of Nyamira commenced vide the Notice of Motion dated 23rd February, 2023 to impeach and remove the Petitioner on allegations the Petitioner's conduct when she was not a Member of the County Executive Committee of Nyamira County on and prior to 26th March, 2011.
 - h. An Order of certiorari to remove into this court and quash the decision of the County Assembly of Nyamira commenced vide the Notice of Motion dated 23rd February, 2023 to impeach and remove the Petitioner on allegations the Petitioner's conduct that is the responsibility of and relates to the collective responsibility of the County Executive Committee of Nyamira County and not the Petitioner as an individual.
 - i. An order of certiorari to remove into this court and quash the decision of the county Assembly of Nyamira commenced vide the Notice of Motion dated 23rd February, 2023 to impeach and remove the Petitioner on mere allegations against the Petitioner's conduct that are not supported by any evidence.
 - j. An order of permanent injunction be issued to stop the Respondents from initiating any impeachment proceedings against the Petitioner based on the conduct of the Petitioner when she was not a Member of the County Executive Committee of Nyamira County on and prior to 26ⁿ March, 2021.
 - k. An order of permanent Injunction be issued to stop the Respondent' from initiating any impeachment proceedings against the Petitioner based on allegations of the Petitioner's conduct that is the responsibility of and relates to the collective responsibility of the County Executive Committee of Nyamira County and not the Petitioner as an individual.
 - L. An order of permanent Injunction be issued to stop the Respondents from initiating any impeachment proceedings against the Petitioner based on mere allegations that are not backed up by any evidence.
 - m. This honourable court be pleased to issue any other order that may deem fit and just to ensure that law and order is maintained in church and that the rule of law is upheld.
 - n. Costs of this petition.
2. The Petitioner's case is that the intended impeachment proceedings contravene various Articles of the Constitution and is based on allegations that ideally fall under the collective responsibility of the County Executive Committee of Nyamira County and not the Petitioner as an individual.
 3. Concurrently with the petition, the Petitioner filed an application dated 6th March 2023 seeking, inter alia, conservatory orders suspending the impeachment proceedings initiated against her pending the hearing and determination of the petition.



4. The Respondents opposed the application through the Notice of Preliminary Objection (PO) dated 10th March 2023 wherein they listed the following grounds: -
 1. That this court lacks jurisdiction to hear and determine matters related to employment contrary to Article 162 (2) (a) as read with 165 (5) (b) of the constitution.
 2. That the issues raised in the application and the claim can only be determined by dint of Section 12 of the Employment and Labour Relations Court Act.
 3. That the application and the petition filed before this court are premature and amounts to an abuse of due process of court under Article 165 (5) (b) of the constitution.
 4. That the Employment and Labour Relations Court has requisite jurisdiction under Article 162 (2) (a) of the Constitution of Kenya 2010 to hear and determine any issues regarding interpretation of the constitution.
 5. That the entire claim by way of a petition before this court is misconceived and bad in law and ought to be struck out with costs.
5. Parties canvassed the Preliminary Objection by way of written submissions.
6. The Respondents' Preliminary Objection is premised on the jurisdiction of this court to hear and determine the petition in light of the provisions of Article 162 (2) of the Constitution which at sub-article (a) thereof establishes the Employment and Labour Relations Court (ELRC) to deal with the disputes over the employer/employee relationships.
7. According to the Respondents, the Petitioner is an employee of the 1st Respondent having been appointed as a Member of the Executive Committee pursuant to Article 179 of the Constitution and County Government Act.
8. The Respondents maintained that upon appointment, the Petitioner was issued with a contract of service and entered into a contractual employment with the County Government of Nyamira.
9. It was submitted that the Petitioner is a salaried employee who receives monthly wages from the County Government of Nyamira. It was the Respondent's case that Section 12 (1) of the Employment and Labour Relations Act provides that the Employment and Labour Relations Court (ELRC) has the jurisdiction to hear and determine the dispute.
10. Reference was made to the decision in Nick Githinji Ndichu v Clerk, Kiambu County Assembly & Another [2014] eKLR where the court held as follows on the employment relationship between the Speaker of the County Assembly of Kiambu and the said County Assembly: -

“the law is not concerned with the method of acquiring an employee. The law does not concern itself with whether the person was appointed or elected. Rather, the person must;

- i. Be having an oral or written contract of service;
- ii. Be providing a service to a real or legal person;
- iii. Be receiving a wage/salary for the services rendered.

If such a person has a dispute with the person with whom he/she has a contract of service and to whom he/she provides services for a wage or salary, the court has jurisdiction over such dispute and has available remedies for that purpose.



It is the court's finding that the petitioner has a relationship with all the above attributes with the 2nd Respondent. This Court has therefore got jurisdiction over this matter.”

11. On her part, the Petitioner submitted that there is no employer/employee relationship between her and the 1st Respondent. It was submitted that this court has an original and unlimited jurisdiction Constitutional and Human Rights matters.
12. It was submitted that the 1st Respondent and the Nyamira County Executive are two separate and distinct entities with separation of powers. The Petitioner added that the 1st Respondent is the Legislative Arm of the County Government of Nyamira while the Governor heads the Executive Arm and that the only role the 1st Respondent played in her appointment was during the approval of the Petitioner's appointment by the Governor as an oversight body.
13. The main issue for determination in this Preliminary Objection is whether this court has the jurisdiction to hear and determine this petition. The jurisdictional question must be dealt with first. As Nyarangi, J.A put it in the landmark case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1 “Jurisdiction is everything”.
14. The question of jurisdiction was also addressed in the case of *David Ramogi & 4 Others v The Cabinet Secretary, Ministry of Energy and Petroleum & 7 Others* (2017) eKLR as follows:

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the fact exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”
15. To down tools, this Court must satisfy itself of the existence of a relationship of employer-employee between the parties herein. Ordinarily an employee would be a person employed for wages or salary and especially at a non-executive level.
16. *Black's Law Dictionary* defines an employee as:

“A person who works in the service of another person (the employer) under an express or implied contract of hire, under which the employer has the right to control the details of work performance.”
17. Article 165(5) of the *Constitution of Kenya* 2010 bars the High Court from hearing and determining any matter falling within the jurisdiction of the Courts contemplated in Article 162(2) of the *Constitution of Kenya* 2010 which are the Employment and Labour Relations Courts and the Environment and Land Court. This means that should this court find that there is an employer/employee relationship between the Petitioner and the Respondents herein, then the court will have to down its tools and/or refer the matter to the ELRC for hearing and determination.



18. Article 162 of the [Constitution of Kenya](#), 2010 provides thus:
- (1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts mentioned in clause (2).
 - (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—
 - (a) employment and labour relations; and
 - (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).
 - (4) The subordinate courts are the courts established under Article 169, or by Parliament in accordance with that Article.
19. Article 165(5)(b) of the [Constitution of Kenya](#), 2010 provides thus:
- (5) The High Court shall not have jurisdiction in respect of matters—
 - (b) falling within the jurisdiction of the courts contemplated in Article 162 (2).
20. Section 12 of the [Employment and Labour Relations Act](#) provides, *inter alia*, that the ELRC 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 disputes relating to or arising out of employment between an employer and an employee among other disputes.
21. A determination of whether this court has the jurisdiction to entertain this petition will require this court to establish whether there is an employer/employee relationship between the Petitioner and the Respondents and whether the dispute before the court concerns employer/employee relationship.
22. In [Daniel N. Mugendi v Kenyatta University & 3 Others](#) (2013) eKLR the Court of Appeal stated as follows while dealing with the issue of jurisdiction upheld the approach that was taken by Majanja J. when he adopted what was enunciated in the case of [Gcaba v Minister of Safety and Security & Others](#) CCT 64/08 (2009) ZACC 26 by stating thus: -

“I would adopt the position of the Constitutional Court of South Africa in *Gcaba v Minister of Safety and Security (supra)*. The Industrial Court is a specialist court to deal with employment and labour relations matters. By virtue of Article 162(3), section 12 of the *Industrial Court Act* 2011 has set out matters within the exclusive domain of that court. Since the court is of the same status of the High Court, it must have the jurisdiction to enforce labour rights in Article 41 and the jurisdiction to interpret the Constitution and fundamental rights and freedoms, is incidental to the exercise of jurisdiction over matters within its exclusive domain. In any matter falling within the provisions of Section 12 of the *Industrial Court Act*, then the Industrial Court has jurisdiction to enforce, not only Article 41 rights but also all fundamental rights ancillary and incidental to the employment and labour relations including interpretation of the Constitution within the matter before it.”



Employer/Employee Relationship

23. Is the 1st Respondent the Petitioner's Employer? While the Respondents argued that the Petitioner is the 1st Respondent's employee, the Petitioner maintained that she is an employee of the County Government who is her appointing authority. Section 30 (2) (d) and (e) of the [County Government Act](#) (CGA) stipulates as follows regarding the functions and responsibilities of the County Governor : -
- (d) appoint, with the approval of the county assembly, the county executive committee in accordance with Article 179 (2) (b) of the [Constitution](#);
 - (e) constitute the county executive committee portfolio structure to respond to the functions and competencies assigned to and transferred to each county;
24. Section 31 (a) and (b) provides as follows on the dismissal of a CEC Member: -
- The Governor –
- (a) may, despite section 40, dismiss a County Executive Committee member at any time, if the governor considers that it is appropriate or necessary to do so;
 - (b) shall dismiss a County Executive Committee member, if required to do so, by a resolution of the county assembly as provided under section 40;
25. Section 40 of the [County Government Act](#), on the other hand, stipulates as follows: -
- (1) Subject to subsection (2), the Governor may remove a member of the County Executive Committee from office on any of the following grounds—
 - a.
 - (2) A member of the County Assembly, supported by at least one-third of all the members of the county assembly, may propose a motion requiring the governor to dismiss a county executive committee member on any of the grounds set out in subsection (1).
26. Article 179 (2) (b) of the [Constitution](#) provides for the composition of the County Executive Committee as follows: -
- (1) The executive authority of the county is vested in, and exercised by, a County Executive Committee.
 - (2) The County Executive Committee consists of —
 - (a) the county governor and the deputy county governor; and (b) members appointed by the county governor, with the approval of the assembly, from among persons who are not members of the assembly.
 - (3) The number of members appointed under clause (2) (b) shall not exceed—
 - (a) one-third of the number of members of the County Assembly, if the assembly has less than thirty members; or
 - (b) ten, if the assembly has thirty or more members.
 - (4) The county governor and the deputy county governor are the chief executive and deputy chief executive of the county, respectively.



- (5) When the county governor is absent, the deputy county governor shall act as the county governor.
 - (6) Members of a county executive committee are accountable to the county governor for the performance of their functions and exercise of their powers.
 - (7) If a vacancy arises in the office of the county governor, the members of the county executive committee appointed under clause (2) (b) cease to hold office.
27. Article 179 (6) of the Constitution provides that:
- (6) Members of a county executive committee are accountable to the county governor for the performance of their functions and exercise of their powers.
28. From the above cited provisions of the County Government Act and the Constitution, it is clear that the County Governor is the Petitioner’s appointing authority and therefore her employer as the 1st Respondent’s role is merely to approve such an appointment.
29. Similarly, the County Governor may dismiss a County Executive Committee Member.
30. I therefore find that the person who has the right to control details of the County Executive Committee member in terms of employment would be the Governor and the County Government and not the Respondents herein as no contract of service exist between them.
31. Article 176 (1) of the Constitution stipulates as follows: -
- “(1) There shall be a county government for each county, consisting of a County Assembly and a County Executive.”
32. The above Article is clear on the distinction between the Executive Arm of the County Government which exercises the executive authority through the County Executive Committee and the Legislative Arm which is the County Assembly.
33. Owing to the above clear distinction in the composition and functions of the County Executive and the County Assembly, and having found that the County Executive Arm headed by the County Governor, is the Petitioner’s employer, I am unable to find that there exists an employer/employee relationship between the Petitioner and the 1st Respondent so as to justify the Respondents’ argument that this case falls within the jurisdiction of the Employment and Labour Relations Court.
34. My above finding on the non-existence of an employer-employee relationship between the Petitioner and the 1st Respondent notwithstanding and even assuming, for arguments’ sake, that such a relationship exists, I would still find that this court has the jurisdiction to hear and determine the petition as the predominant issue in the petition is not employment per se but the alleged infringement of fundamental rights and freedoms enshrined under various articles of the Constitution in the Petitioner’s removal by impeachment.
35. The jurisdiction of the High Court emanates from the Constitution. Article 165(3) of the Constitution provides as follows:
- (3) Subject to clause (5), the High Court shall have—
 - (a) unlimited original jurisdiction in criminal and civil matters;
 - (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;



- (c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
- (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
 - (i) the question whether any law is inconsistent with or in contravention of this Constitution;
 - (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
 - (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
 - (iv) a question relating to conflict of laws under Article 191; and
- (e) any other jurisdiction, original or appellate, conferred on it by legislation.

36. When faced with a similar case challenging the jurisdiction of the High Court to hear a petition pitting Stephen Nendela, a member of the County Executive Committee and the County Assembly of Bungoma & 4 others in Stephen Nendela v County Assembly of Bungoma & 4 others [2014] eKLR, the court held as follows: -

“However, for the avoidance of doubt, this court reiterates that no person, state officer or state organ is above the Constitution or the law. All organs created by the constitution are subordinate to it. Further, Article 10 (1) binds all state organs, state officers, public officers and all persons while applying, interpreting, the Constitution or the law or public policy. Therefore when any of these organs, including the County Executive, County Assembly and Speakers of either Parliament or County Assemblies act in breach of the Constitution or outside their areas of operation, this court will not hesitate to intervene and reverse those actions. The Constitution is supreme and its dictates are to be jealously protected by this court. That is what Article 165 of the constitution decrees.”

- 37. The complaint raised by the Petitioner herein is in regard to violation or a threat to violation of her rights. She seeks the intervention of the Court to prevent an infringement of her rights. The Complaint of the Petitioner concerns the legal process adopted by the County Assembly in initiating the impeachment motion. I find that the complaint falls under the jurisdiction of this Court.
- 38. Having found that there is no employer/employee relationship between the Petitioner and 1st Respondent and having found that this court has jurisdiction to hear the petition on alleged infringement of fundamental rights and freedoms, under the Constitution, I find that the Preliminary Objection is not merited and I therefore dismiss it with orders that costs shall abide the outcome of the petition.
- 39. Orders accordingly.

RULING SIGNED, DATED AND DELIVERED IN CHAMBERS AT NYAMIRA THIS 27TH DAY OF APRIL, 2023.

W.A. OKWANY



JUDGE

