



**Malack v Kosgey & 3 others (Constitutional Petition E159 of 2022)  
[2023] KEHC 17968 (KLR) (Constitutional and Human Rights) (30 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17968 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
CONSTITUTIONAL PETITION E159 OF 2022**

**AC MRIMA, J**

**MAY 30, 2023**

**BETWEEN**

**DAVID N. MALACK ..... PETITIONER**

**AND**

**JOSEPH KIPKETER KOSGEY ..... 1<sup>ST</sup> RESPONDENT**

**CABINET SECRETARY MINISTRY OF TREASURY AND  
PLANNING ..... 2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**BOARD OF DIRECTORS, PRIVITISATION COMMISSION 4<sup>TH</sup> RESPONDENT**

**RULING**

**Introduction:**

1. This ruling is in respect of the Notice of Preliminary Objection dated 9<sup>th</sup> May, 2022 taken out by the 1<sup>st</sup> Respondent. The objection impugns the jurisdiction of this Court.
2. The objection was supported by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.
3. The objection was heard by way of written submissions.

**The Objection:**

4. The objection is tailored as follows: -
  1. The application and entire Petition is ex-facie incompetent, fatally defective and an abuse of the Court process as the cause of action is premised on employment and labour relations matters



which original jurisdiction lies with the employment and labour Relations Court pursuant to section 12 of the *Employment and Labour Relations Court Act*. Cap 234B Laws of Kenya.

2. The entire Petition falls short in achieving the threshold required of a constitutional petition.
3. The entire Petition is frivolous, scandalous and vexatious.
4. The entire Petition be struck out with costs to be borne by the Petitioner.
5. The 1<sup>st</sup> Respondent filed his written submissions expounding on his objection. The submissions were adopted by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.
6. The Petitioner who appeared in person seems not to have filed any submissions.

#### **Analysis:**

7. Given the length and nature of the submissions, I will not reproduce the same verbatim in this ruling. However, I will consider the parties' positions, arguments and decisions referred to in the discussion herein.
8. From the consideration of the parties' submissions and the decisions referred to, I hereby discern the following issues for determination: -
  - i. Whether the Preliminary Objection is sustainable in law.
  - ii. In the event that the answer to (i) above is in the affirmative, whether it is the High Court or the Employment and Labour Relations Court which has the jurisdiction over the instant proceedings;
9. I will now deal with the issues as under.

#### **i. Whether the Preliminary Objection is sustainable in law:**

10. The validity of a preliminary objection is considered on the basis that it conforms with the long-standing legal principle that it is raised on a platform of agreed set of facts, it raises pure points of law and is capable of wholly determining the matter.
11. To that end, the locus classicus decision in *Mukisa Biscuit Manufacturers Ltd v Westend Distributors Ltd* (1969) EA 696. At page 700, comes to the fore. In that case, the Court defined a preliminary objection and discussed its operation in the following eloquent manner: -

...so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection 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. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop.



12. The Supreme Court weighed in on the issue in *Aviation & Allied Workers Union Kenya v Kenya Airways Ltd & 3 others* [2015] eKLR and stated thus: -

.... 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.
13. Ojwang J, as he then was, emphasized the finding in *Mukisa Biscuit v West End Distributors* case (supra) in Civil Suit No. 85 of 1992, *Oraro v Mbaja* [2005] 1 KLR 141 when he observed as follows: -

..... I think the principle is abundantly clear. A “preliminary objection”, correctly understood, 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 processes 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....
14. In *John Musakali v Speaker County of Bungoma & 4 others* (2015) eKLR the validity of a preliminary objection was considered in the following manner: -

.... The position in law is that a Preliminary Objection should arise from the pleadings and on the basis that facts are agreed by both sides. Once raised the Preliminary Objection should have the potential to disposing of the suit at that point without the need to go for trial. If, however, facts are disputed and remain to be ascertained, that would not be a suitable Preliminary Objection on a point of law....
15. Finally, in *Omondi v National Bank of Kenya Ltd & others* {2001} KLR 579; [2001] 1 EA 177, guidance was given on what Courts ought to consider in determining the validity of preliminary objections. It was observed: -

..... In determining (Preliminary Objections) the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters...What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise of judicial discretion and therefore the contention that the suit is an abuse of the process of the Court for the reason that the defendant’s costs in an earlier suit have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done ex debito justitiae (as of right) but as a matter of judicial discretion....
16. On whether the issue of jurisdiction is a pure point of law, the Supreme Court in Petition No. 7 of 2013 *Mary Wambui Munene v. Peter Gichuki Kingara and Six others*, [2014] eKLR, stated that ‘jurisdiction is a pure question of law’ and should be resolved on priority basis.
17. I now return to the contents of the objection.
18. Without much ado, since the objection impugns the jurisdiction of this Court, then going by the Supreme Court in *Mary Wambui Munene v. Peter Gichuki Kingara and Six others* case (supra), the objection is a jurisdictional challenge on a pure question of law and if sustained by this Court, it can terminate the entire matter. Therefore, the objection passes the proprietary test and is for further consideration.



**ii. Whether it is the High Court or the Employment and Labour Relations Court which has the jurisdiction over the instant proceedings:**

19. I must admit that the issue of the jurisdiction of the High Court and Courts of equal status, on some aspects, has been unsettled. However, the Court of Appeal and the Supreme Court have variously dealt with the matter and hopefully all such thorny areas shall soon stand resolved.
20. Speaking on the jurisdictional tug-of-war between the High Court and the Employment and Labour Relations Court, 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) in a decision rendered on 8<sup>th</sup> February, 2022 had the following to say on the aspect of jurisdiction: -
36. Jurisdiction is everything, it is what gives a court or a tribunal the power, authority and legitimacy to entertain a matter before it. John Beecroft Saunders in “*Words and Phrases Legally Defined*”, Volume 3 at Page 113 defines court jurisdiction 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 the 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 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 facts 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.
37. The locus classicus on jurisdiction is the celebrated case of *Owners of the Motor Vessel “Lillian S’ v. Caltex Oil (Kenya) Ltd* [1989] KLR 1. Nyarangi, JA. relying, *inter alia*, on the above cited treatise by John Beecroft Saunders held as follows:
- ...Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.
38. A decision made by a court of law without proper jurisdiction amounts to a nullity ab initio, and such a decision is amenable to setting aside ex debito justitiae.
39. The Supreme Court in *In the Matter of Interim Independent Electoral Commission* [2011] eKLR, Constitutional Application No. 2 of 2011 held that jurisdiction of courts in Kenya



is regulated by the *Constitution*, statute, and principles laid out in judicial precedent. The Supreme Court at paragraph 30 of its decision held in part as follows:

...a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of Legislation is clear and there is no ambiguity.

40. In *Samuel Kamau Macharia and Another v. Kenya Commercial Bank Limited & 2 others* [2012] eKLR, Application No. 2 of 2011, the Supreme Court reiterated its holding on a court's jurisdiction. In the matter of the Interim Independent Electoral Commission (supra) at paragraph 68 of its ruling, the Supreme Court held as follows:

(68). A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law.

21. The Court of Appeal went further and dealt with the issue of jurisdiction which had been raised impugning the Employment and Labour Relations Court.

22. The appellate Court laid the constitutional and legal foundation of the Employment and Labour Relations Court as follows: -

41. Article 162 of the *Constitution* provides for the establishment of the Employment and Labour Relations Court and its jurisdiction thereof. It reads as follows:

162.

- (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 dispute 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) ...

42. It is pursuant to the provisions of Article 162(2) of the *Constitution* that Parliament enacted the *Employment and Labour Relations Court Act*, 2011.

43. The jurisdiction of the Employment and Labour Relations Court is provided for under section 12 of the *Employment and Labour Relations Court Act*, 2011. The provisions of section 12(1) of this Act provides as follows:“

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



- a. disputes relating to or arising out of employment between and employer and an employee;
  - b. disputes between an employer and a trade union;
  - c. disputes between employers' organization and a trade union's organisation;
  - d. disputes between trade unions;
  - e. disputes between employer organisations;
  - f. disputes between an employer's organization and trade union;
  - g. disputes between a trade union and a member thereof;
  - h. disputes between and employer's organization 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." [Emphasis supplied]
92. In interpreting Section 12 of the *Employment and Labour Relations Court Act, 2011*, my Lordship and Ladyships stated as follows: -
- 44. 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. Our view is fortified by the preamble to the *Employment and Labour Relations Court Act, 2011* which provides that it is "An Act of Parliament to establish the Employment and Labour Relations Court to hear and determine disputes relating to employment and labour relations and for connected purposes.
93. Applying Section 12 of the *Employment and Labour Relations Court Act* to the matters at hand, the Court of Appeal presented thus: -
- 45. In the two consolidated petitions filed before the Employment and Labour Relations Court at Kericho, none of the petitioners demonstrated an existing employee-employer relationship with any of the respondents or with any public entity. Eric Cheruiyot, the 1st Petitioner in the consolidated petitions, described himself as a registered voter in Kericho County. At the hearing of



this appeal, Mr. Simiyu, learned counsel for Eric Cheruiyot conceded that indeed his client did not have an employee-employer relationship with any of the respondents but insisted that his client had a right under Article 22(1) of the *Constitution* to institute the petition and that the same Article conferred jurisdiction upon the Employment and Labour Relations Court to hear and determine the petition.

46. The 2nd, 3rd and 4th petitioners in the consolidated petitions (2nd to 4th respondents in the consolidated appeals) had separately tendered their one-month resignation notices from their respective positions which they held in the County Government of Embu. Their resignation notices were given in conformity with the provisions of section 43(5) of the *Elections Act*, 2011. Their respective resignation notices dated 5th January 2017 and 6th January were accepted by the Governor, County Government of Embu; the respondents were asked to hand over their respective dockets to their appointed successors; they were cleared, and their respective dues processed. The resignation notices were to take effect on 5th February 2017 and on 6th February 2017 respectively. On 7th February 2017 when the resignations were to take effect, the respondents sought to revoke their separate letters of resignation upon learning of the interim court order issued by the trial court on 18th January 2017 barring the IEBC from disqualifying public servants from participating in the 2017 general election for not vacating office six months prior to the general election. By this time the one-month notice period had already lapsed, meaning that their respective resignation notices had already crystallized.
47. A notice of resignation is basically a notice of termination of employment, given by an employee to the employer. It is a unilateral act. The *Black's Law Dictionary* (tenth Edition) defines resignation as follows:
- The act or an instance of surrender or relinquishing an office, right or claim. A formal notification of relinquishing an office or position, an official announcement that one has decided to leave one's job or organization, often in the form of a written statement.
48. There was no evidence placed before the trial judge to show that the resignation by the 2nd to 4th respondents was involuntary. The 2nd to 4th respondents resigned voluntarily in compliance with a section of the law that was in force at the time. The 2nd to 4th respondents having resigned, their resignations having been formally accepted, their dues paid, and their respective positions filled meant that their resignation notices had already crystallized. There was nothing to go back to. The employee-employer relationship between the 2nd to 4th respondents and the County Government of Embu had already come to an end. The Employment and Labour Relations Court ought to have arrived at this finding and immediately downed its tools.
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 a nullity ab initio.
23. From the above decision, which is binding on this Court, the Court of Appeal settled the issue of the jurisdiction of the Employment and Labour Relations Court. The Court of Appeal was very emphatic that the Employment and Labour Relations Court can only exercise jurisdiction in instances where there is an employer-employee relationship.



24. In the said cases, the Court of Appeal even declined to accord the Employment and Labour Relations Court jurisdiction in an instance where the Petitioners were challenging the validity of their letters of resignation on the grounds that the letters had been accepted by the employer and acted upon thereby extinguishing the employer-employee relationship. According to the Court of Appeal, any challenge thereof could only be taken up before the High Court.
25. Applying the foregoing to this matter, it is plain that as at the time the Petition was filed there existed an employer-employee relationship between the 1<sup>st</sup> Respondent and the 4<sup>th</sup> Respondent.
26. The Petition herein was, hence, an attempt to terminate the 1<sup>st</sup> Respondent's employment.
27. As the matters in the instant Petition are those concerning an employer-employee relationship, then there is no way the High Court can claim any legitimacy over the subject proceedings.
28. In sum, the objection is merited.

**Disposition:**

29. Having found that the objection stands on the way of the Petition, the following final orders hereby issue: -
  - a. The Notice of Preliminary Objection dated 9<sup>th</sup> May, 2022 be and is hereby allowed.
  - b. The Petition and the Notice of Motion dated 6<sup>th</sup> April, 2022 are hereby struck out with costs.Orders accordingly.

**DELIVERED, DATED AND SIGNED AT KITALE THIS 30<sup>TH</sup> DAY OF MAY, 2023.**

**A. C. MRIMA**

**JUDGE**

Ruling No. 1 virtually delivered in the presence of:

N/A, for the Petitioner in Person.

Mr. Ligami, Learned Counsel for the 1<sup>st</sup> Respondent/ Applicant.

N/A for the 2<sup>nd</sup> & 3<sup>rd</sup> Respondents.

Regina/Chemutai – Court Assistants.

