



**Kariuki v Board of the Tourism Regulatory Authority & 2 others
(Constitutional Petition E340 of 2022) [2022] KEHC 11517 (KLR)
(Constitutional and Human Rights) (4 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 11517 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E340 OF 2022**

HI ONG'UDI, J

AUGUST 4, 2022

BETWEEN

AGNES KARIUKI PETITIONER

AND

**THE BOARD OF THE TOURISM REGULATORY AUTHORITY 1ST
RESPONDENT**

**CABINET SECRETARY MINISTRY OF TOURISM & WILDLIFE 2ND
RESPONDENT**

THE HON. ATTORNEY GENERAL 3RD RESPONDENT

RULING

1. The respondents filed a preliminary objection dated 13th July 2022 on the following grounds, that: -
 - i. Honourable Court lacks jurisdiction to hear and determine this Petition because the dispute arises from employment relationships in terms of article 162 of *the Constitution* and the *Employment and Labour Relations Court Act* (ELRC) and, therefore, falls for determination in the Employment and Labour Relations Court (ELRC).

Background of the case

2. The petitioner filed a petition and application dated July 6, 2022. They both touch on the alleged failure to regard the right to fair administrative action and public participation by the respondents in the process of recruitment of a Director General for the Tourism Regulatory Authority. In the



application, the petitioner/applicant seeks for orders that this Court stops; the 1st respondent from conducting the process of recruiting a Director General until they adhere to constitutional provisions on transparency and public participation; the 2nd respondent from appointing a Director General that has not been transparently recruited; and, the 1st respondent from conducting the process of recruitment until the Board is fully constituted as contemplated under section 4 of the [Tourism Act](#) No. 28 of 2011.

3. In the petition, he seeks for orders that: -
 - A. declaration that the ongoing recruitment pursuant to the Vacancy Notice titled: “Advertisement for Job Vacancy Director General- Ref: TRA/1/10” offends articles 10, 22, 23,35,47 and 232(1) of [the Constitution](#) as read with section 8 of the [Tourism Act](#), 2011 and is thus unconstitutional, unlawful, null and void.
 - B. declaration that the failure to make public the names of all Applicants and provide meaningful public participation in the recruitment process pursuant to the Vacancy Notice titled: “Advertisement for Job Vacancy Director General- Ref: TRA/1/10 offends articles 10, 22, 23, 35, 47 and 232(1) of [the Constitution](#).
 - C. The Honourable Court be pleased and do hereby grant a judicial review order of prohibition to prohibit the 1st respondent from proceeding with the ongoing recruitment pursuant to the Vacancy Notice titled: “Advertisement for Job Vacancy Director General- Ref: TRA/1/10.
 - D. An order or prohibition restraining the Board of the Tourism Regulatory Authority from conducting the process of recruiting a Director General until it is fully constituted as per the requirements of section 8 of the [Tourism Act](#) and appointment of the two representatives of the Tourism Sector Association to the Board is done.
 - E. An order directing the Board of the Tourism Regulatory Authority to observe due process in the advertising, interviewing and selection a Director General in accordance with article 47 of [the Constitution](#) of Kenya
 - F. An order quashing the Vacancy Notice titled: “Advertisement for Job Vacancy Director General- Ref: TRA/1/10 and entire process of recruitment of Director General and directing the Board of the Tourism Authority to commence a new recruitment process that adheres to [the Constitution](#).
 - G. Any other order the court may deem fit to grant.
 - H. Costs of this Petition.

The petitioner’s case

4. The petitioner filed the following grounds of opposition to the preliminary objection dated July 19, 2022: -
 - i. The Petition raises issues regarding the recruitment process of the Director General of the 1st respondent and does not touch on the rights/ duties emanating from an employer and employee and thus the High Court has jurisdiction to determine the constitutionality of the process.
 - ii. The Petition does not raise constitutional violations of the rights arising from an employee-employer relationship. Further, the constitutional breach raised



in the Petition is not ancillary and/ or incidental to the matters contemplated under section 12 of the Employment and *Labour Relations Act*, 2011.

- iii. In the absence of an employee-employer relationship, the court has jurisdiction to entertain and determine the issues raised in the petition is the High Court whose jurisdiction flows directly from *the constitution*.
- iv. The High Court has jurisdiction to determine the petition based on the decision of the Court of Appeal in *Public Service Commission & 4 others v Cheruiyot & 20 others* (Civil Appeal 119 & 139 of 2017(Consolidated) [2022] KECA 15 (KLR).

Oral submissions

5. The preliminary objection was dispensed with by way of oral submissions on July 22, 2022.
6. Mr. Marwa for the respondents argued that the entire process falls within the mandate of the Employment and Labour Relations Court (ELRC). That this court lacks the jurisdiction to transfer the matter and also cannot issue interim orders sought as there is a contest on the jurisdiction. He relied on *Ali Jarso Wako & another v Ministry of Interior & Coordination of National Government & 5 others; Public Service Commission & 5 others (Interested Parties)* [2020] eKLR; *Rahab Gathoni Gichohi v Muraga County Government* [2016] eKLR; *Okoti v Attorney General; Njenga (Interested Party)* (Petition E101 of 2020) [2022] KEELRC 2 (KLR) (17 February 2022)(Judgment); and, *George Maina Kamau v County Government of Murang'a & 2 others* [2015] eKLR.
7. Mr. Walumbe for the petitioner argued that for an issue to lie to the Employment and Labour Relations Court there must be a nexus with section 12 of the ELRC Act; that for the ELRC to have jurisdiction, the dispute should be touching on the parties labour Relations; the recruitment of the Director General has nothing to do with an employer- employee relationship; that in the absence of an appointment there is no relationship. He urged the court to transfer the matter in the unlikely event that the preliminary objection succeeds and to grant the interim orders to stay the appointment since the interviews were completed and names forwarded to the CS for appointment. She relied on *Public Service Commission & 4 others v Cheruiyot & 20 others* (Civil Appeal 119 & 139 of 2017 (consolidated) [2022] KECA 15 (KLR) (8 February 2022) (Judgment),

Analysis and determination

8. Having carefully considered the parties' pleadings and oral arguments, the following issues arise for determination: -
 - i. Whether this court has jurisdiction
9. The respondents' preliminary objection is raising an issue on the jurisdiction of this court to handle this matter. According to them, this matter falls within the jurisdiction of the ELRC and this Court cannot transfer the matter or issue interim orders if it does not have jurisdiction. The petitioner on the other hand has argued that this Court has jurisdiction to handle this matter since there is no employer-employee relationship in place and the petition does not speak to the constitutional violations of rights arising from an employer-employee relationship; but on the recruitment process of the Director General. She has further urged this court to transfer the matter to the ELRC in the unlikely event.



10. Article 162 of *the Constitution* states as follows:

162(1) The Superior Courts are the Supreme Courts, 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 Court as contemplated in clause (2).
- (4) The subordinate courts are the courts established under Article 169, or by Parliament in accordance with that Article.

11. Article 165(5) of *the Constitution* states-

- (5) 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).

12. It is pursuant to article 162(2) of *the Constitution* that the Employment and *Labour Relations Act*, 2011 was enacted. The preamble of the said Act provides “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”

13. Section 12 (1) of the *Employment and Labour Relations Court Act* (ELRC Act) provides for the Court’s jurisdiction as follows-

12. Jurisdiction of the court

- (1) 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.

14. The locus classicus on jurisdiction is the case of *Owners of the Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Ltd* [1989] KLR 1. Nyarangi, JA. 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.

15. The Supreme Court *in the Matter of Interim Independent Electoral Commission* [2011] eKLR, Constitutional Application No. 2 of 2011 held in part as follows:

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

16. In *Samuel Kamau Macharia and Another v. Kenya Commercial Bank Limited & 2 others* [2012] eKLR, Application No. 2 of 2011, 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.

17. In the case of *Alex Mrefu v Rural Electrification & 3 others* [2022] eKLR the Court held: -

54. This Court derives its jurisdiction from article 162(2)(a) of *the Constitution* as read together with Section 12 of the *Employment and Labour Relations Court Act*. Section 12 of the Act provides in material part that 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 provisions of the 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. Section 5(1)(a) of the *Employment Act* provides. 5(1)(a) it shall be the duty of the Minister, Labour Officer and the court to promote equality of opportunity in employment in order to eliminate discrimination in employment.

Subsection 7 of the said section provides (7) for purposes of this section,

- a) employee includes an applicant for employment.



55. From the foregoing provisions it would seem that in carrying out its statutory duty conferred by Section 5 (1)(a) this court has jurisdiction to entertain a claim by a prospective employee. This in a sense is the issue in this petition. The court is therefore of the opinion that it has jurisdiction.
18. Section 5(7) of the Employment Act, 2007 defines the employee and employer as follows-
- (7) For the purposes of this section—
- (a) “employee” includes an applicant for employment;
- (b) “employer” includes an employment agency;
19. A reading of article 162(2) of the Constitution, the preamble of the ELRC Act and section 12(1) of the ELRC Act is clear on the jurisdiction the ELRC. For avoidance of doubt, article 162(2) of the Constitution provides the ELRC shall hear and determine disputes relating to employment and labour relations; the Preamble provides “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; and, section 12(1) of the ELRC Act provides (1) 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—
20. What cuts across is that the jurisdiction is with regards to disputes relating to employment and labour relations. There has to be a relationship in existence. The question for this court to determine is whether there is an employer- employee relationship. Does this case revolve around employment and labour relations issues? Before delving into this question, it is important to note that section 5(7) of the Employment Act defines an employee to include an applicant for employment and an employer to include an employment agency (see the case of Alex Mrefu v Rural Electrification & 3 others (supra). This therefore means that a prospective employee falls under the jurisdiction of the ELRC. The petitioner herein is neither an employee, a prospective employee nor has she applied for the position of the Director General of the Tourism Regulatory Authority. She has brought this suit under article 22 of the Constitution in public interest and is challenging the recruitment process on the premise that there was failure to regard fair administrative action and public participation by the respondents’ in the conduct of the recruitment process and that the Tourism board is not properly constituted as required by law.
21. In my view, I do agree with the petitioner that there is no employer-employee relationship in existence; the petition does not touch on breach of fundamental rights emanating from an employer employee relationship nor does it speak to rights arising from constitution violations in an employer – employee relationship. In short there is no employer- employee relationship, between the petitioner and the 1st respondent I am in agreement with the decision of J.A Makau J. in London Distillers Kenya Limited & another vs Kenya Union of Commercial Food Allied Workers Union [2021]eKLR where the Judge stated:-
61. Upon consideration of the pleadings, case laws and submissions, I find that, the dispute filed herein rightly falls within the jurisdiction of the employment and Labour Relations Court. In addition thereto, I find that the jurisdiction of this Court is limited by Article 162(2) of the Constitution, that empowers the Employment and Labour Relations Court, to hear and determine all disputes, arising out of an employer and employee relationship, as well as,



disputes between an employer and a trade union. It is worth noting that the ELRC in exercising its mandate, the Employment and Relations Court, being a Court of equal and concurrent status as this Court, has jurisdiction to hear and determine constitutional violations on fundamental rights and freedoms arising from an employer and employee relationship, as well as, all disputes falling under Article 41 of *the Constitution*, as is in this case, as well as, all disputes stipulated under Section 12 of the *Employment and Labour Relations Court Act* 2011. Therefore the proper Court clothed with jurisdiction to hear and determine all issues raised in this Petition is Employment and Labour Relations Court.

22. Article 41 of *the Constitution* provides for Labour Relations as follows:-

- “(1) Every person has the right to fair labour practices.
- (2) Every worker has the right—
- (a) to fair remuneration;
 - (b) to reasonable working conditions;
 - (c) to form, join or participate in the activities and programmes of a trade union; and
 - (d) to go on strike.
- (3) Every employer has the right—
- (e) to form and join an employers organisation; and
 - (f) to participate in the activities and programmes of an employers organisation.
- (4) Every trade union and every employers’ organisation has the right—
- (a) to determine its own administration, programmes and activities;
 - (b) to organise; and
 - (c) to form and join a federation.
- (5) Every trade union, employers’ organisation and employer has the right to engage in collective bargaining.”

23. In the case of *Public Service Commission & 4 others v Cheruiyot & 20 others* (Civil Appeal 119 & 139 of 2017 (Consolidated) [2022] KECA 15 (KLR) (8 February 2022), the Court of Appeal held:

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."

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*.
24. Under the *Employment Act* 2007 "employee" includes an applicant. There is no evidence showing that the petitioner was an applicant and / or participated in the interviews. This then confirms that there was no employer – employee relationship between the petitioner and the 1st respondent.
25. Having determined that this court has jurisdiction to hear and determine the petition and application, it would not be necessary to answer delve into the issue as to whether the court can transfer the matter to the ELRC.
26. The upshot is that the preliminary objection lacks merit and is dismissed with costs.
27. For the interest of time the petition and application will be heard together. The respondents shall file their responses to both the petition and notice of motion both dated 6th July within 14 days.
28. Thereafter written submission to be filed and exchanged within 30 days. The petitioner to have the first 15 days upon service of the responses.
29. The petitioner is granted leave to file a further affidavit alongside the submission.
30. Mention on September 15, 2022 before the Deputy Registrar to confirm compliance.

Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 4TH DAY OF AUGUST 2022 IN OPEN COURT.

H. I. ONG'UDI

JUDGE OF THE HIGH COURT

