



**Ochieng v Parliamentary Service Commission; National Assembly of Kenya
(Interested Party) (Petition E357 of 2022) [2022] KEHC 11516 (KLR)
(Constitutional and Human Rights) (4 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 11516 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION E357 OF 2022
HI ONG'UDI, J
AUGUST 4, 2022**

BETWEEN

BONIFACE ODHIAMBO OCHIENG PETITIONER

AND

PARLIAMENTARY SERVICE COMMISSION RESPONDENT

AND

NATIONAL ASSEMBLY OF KENYA INTERESTED PARTY

RULING

1. This Ruling is in relation to the interested party's preliminary objection dated 19th July 2022 in opposition to the petitioner's petition and application dated 12th July 2022.
2. The petitioner's case is premised on the respondent's recruitment and appointment process pursuant to its call for applications in its advertisement dated 26th November 2021. According to the petitioner the respondent in carrying out the process failed to adhere to the principles of an open and transparent recruitment and appointment process violating Articles 10, 27 and 196 of *the Constitution*.
3. From the foregoing, the interested party raised a preliminary objection on the grounds that:
 - i. This honourable Court lacks jurisdiction under Article 162(2)(a) of *the Constitution* on the grounds that the High Court has no jurisdiction to deal with the issues of employment between the petitioner and the 1st respondent.
 - ii. The application and petition are premature and pre-emptive and brought in violation of Articles 35 and 159 of *the Constitution* and Sections 4,5 and 8 of the *Access to Information Act*.



- iii. The application and petition violates the clear provisions of Article 127 and 128 of *the Constitution* and Part V of the *Parliamentary Service Act* No.22 of 2019.
 - iv. The petition is in violation of the *Fair Administrative Actions Act* as the petitioner has not exhausted all the administrative and procedural avenues to access the information now sought in Court on the recruitment process.
 - v. The petitioner has failed to place before the Court a prima facie case with a likelihood of success to warrant the grant of conservatory orders.
4. No responses were filed by the parties. The preliminary objection was orally heard on 21st July 2022.

The interested party's submissions

- 5. The interested party in support of its preliminary objection filed written submissions dated 20th July 2022 and a list of authorities dated 21st July 2022, through its Counsel, Sophie Otieno.
- 6. Counsel on the issue of jurisdiction submits that the jurisdiction of this Court has been ousted by *the Constitution* and Statute. As such the Court lacks jurisdiction to entertain the matter. In support reliance was placed on the classic case of the Owners of the Motor Vessel Lilian 'S' v Caltex Kenya Ltd(1989)KLR 1 and Nairobi Civil Application No.E121 of 2021,the Attorney General v Tolphine Nafula & Others.
- 7. Counsel submits that the issues raised revolve around the jurisdiction of the Employment and Labour Relations Court as espoused under Article 162(2)(a) of *the Constitution* making it a special Court. She submits that the jurisdiction to entertain recruitment matters is found under Section 12 of the Employment and Labour Relations Act, 2011. To support this view Counsel cited the case of *Brabim Tadicha Sora v Issac B. Nader(SSP) & 2 others(2019)*eKLR where it was held that the High Court has no jurisdiction to determine matters falling squarely under the jurisdiction of the 'status' courts and whose jurisdiction is spelt out in the respective constitutive statutes.
- 8. Additional reliance was placed on the case of *Samson Onyango Ngonga v Public Service Commission & 5 others(2013)*eKLR, Ali Jarso Wako & another v Ministry of Interior & Coordination of National Government & 5 others; Public Service Commission & 5 others (Interested Parties) [2020] eKLR and United States International University(USIU) V Attorney General (2012)eKLR.
- 9. On the issue whether the petitioner's right to access information was violated, Counsel submits that according to Section 8 of the *Access to Information Act* No.31 of 2016 one who is desirous to access such information should do so by making an application in the procedure set out. She notes that this was not done by the petitioner prior to approaching this Court.
- 10. On the issue whether the petition is premature, Counsel submits that according to Section 9(2) of the *Fair Administrative Actions Act* No. 4 of 2015, the respondent has original jurisdiction to review any decisions related to the recruitment process. This is because the Act requires that all mechanisms be first exhausted before a party moves to Court. In support reliance was placed on the Supreme Court case of Albert Chaurembo Mumba & 7 others (sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Maurice Munyao & 148 others (suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme) [2019] eKLR where it was noted that disputes pleaded with the erroneous intention of attracting jurisdiction of superior courts is not a substitute for known legal procedures. Additional reliance was placed on the cases of Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others [2015]eKLR and Okiya



Omtatah Okoiti v Selection Panel for the National Land Commission & 3 others; Gershom Otachi Bw'omanwa & 10 others (Interested Party) [2019] eKLR.

The Petitioner's oral submissions

11. The petitioner opposed the preliminary objection and Counsel filed a list of authorities dated 19th July 2022 and submitted as presented below.
12. Counsel for the petitioner, Miss Kamende submitted that the preliminary objection raised does not satisfy the requirements set out in the case of *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* [1969]EA 696. This is because the objections require this Court to examine the facts of the case to make a determination hence not pure points of law. Moreover, Counsel notes that the preliminary objection challenges the pleadings as filed. She argues that this is also a fact and so the interested party should not use the preliminary objection as a defense. Additional reliance was placed on the case of *Deepak Lalchand Nichani v Kenya Revenue Authority & another* [2021] eKLR and *Kenya Breweries Limited & another v Keroche Breweries Limited* (2020) eKLR.
13. Counsel further submitted that the preliminary objection was based on the misconception that the petitioner was pursuing an employee issue yet such a relationship does not exist between the two parties. She informs that the challenge is solely based on the recruitment process which violated his constitutional rights. To support this argument Counsel relied on the *Deepak Lachand* case (*Supra*).
14. In essence, Counsel submits that this Court has jurisdiction to entertain this matter as set out under Article 165 of *the Constitution*. To support the issue of jurisdiction she relied on the case of *Kenya Hotel Properties Limited v the Attorney General* (2018) eKLR and *Hezekiel Oira v EACC & another* (2016) eKLR.
15. Counsel clarified that the petitioner had not sought any materials or information from the respondent in respect of the recruitment process hence the interested party's submission on the same was misconceived. Reliance was placed on the cases of *Katiba Institute v Presidential Delivery Unit & 3 others* (2017) eKLR and *James Kugocha v Chief County Officer, Department of Infrastructure* (2018) eKLR.
16. On the final point, Counsel submitted that the reliefs sought in this matter cannot be granted by another body. As such there are exceptions to the doctrine of exhaustion as held in the case of *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (interested parties)* [2020] eKLR. To that end she submits that this is the best forum to entertain this matter.

The Respondent's Oral Submissions

17. Counsel for the respondent, Miss Thanji supported the preliminary objection and relied on the interested party's submissions. Furthermore, she submitted that jurisdiction is everything as seen in the *Owners of the Motor Vessel Lilian 'S'* case. In view of this she argued that the matter should be entertained by the Employment and Labour Relations Court as the issue is Labour related. In addition, Counsel submitted that the jurisdiction of the Court was not ousted by the constitutional issues, raised therein.

Analysis and Determination

18. Having considered the pleadings, submissions of the parties, cited authorities, and the law, the issue that arises for determination is:



Whether the preliminary objection dated 19th July 2021 is merited.

19. The threshold of a preliminary objection was set out by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696* as follows:

“...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.”

20. The Court went further to note that:

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.

21. Likewise, the Court in the case *Oraro vs. Mbaja [2005] 1 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.”

22. The preliminary objection in this matter is founded on a number of grounds. The first is on the jurisdiction of this Court. The other objections deal with the issue of the procedure for access to information and violation of the doctrine of exhaustion under the Fair Administrative Actions Act. I find that the last two issues bear factual aspects calling for proof by the petitioner. I say so because the petitioner has to by way of admitting evidence show that the information was sought and denied or show the facts informing why all the mechanisms in place were not exhausted, if that be the case. Considering this, it is clear that the two grounds are not points of law failing the threshold of a pure point of law.

23. The issue of jurisdiction as guided by the authorities set out above, is a pure point of law hence if successful capable of disposing of the whole matter. Palpably this objection satisfies the test of a preliminary objection. The question that evidently follows is whether the petition and application have invoked the legal principles regarding this Court’s jurisdiction to entertain the matter hence meriting the objection.

24. The Supreme Court addressing its mind on the issue of jurisdiction in the case of *Samuel Kamau Macharia & another vs. Kenya Commercial Bank Limited & others (2012) eKLR* opined as follows:

“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 to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsels for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings ... where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

25. The interested party argues that the nature of the petition and application before this Court falls within the jurisdiction of the special courts under Article 162 of *the Constitution* which have the status of the High Court to hear and determine matters. This Article provides as follows:
- (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).
26. To give effect to this Article, Parliament under the Employment and Labour Relations Act under Section 12 defines the jurisdiction of the Court as:
- (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.
27. It is clear from the above reading that the High Court does not have jurisdiction to entertain matters that revolve around labour issues between an employer and an employee. The matter in issue however deals with the recruitment and the appointment process. The question that bears itself at this juncture



is whether the recruitment and appointment process which is at the preliminary stage of employment can be defined as an employment issue. To answer this question, I find guidance in the *Employment Act*, 2007.

28. The preamble reveals the purpose of the Act as one to declare and define the fundamental rights of employees, to provide basic conditions of employment of employees, to regulate employment of children, and to provide for matters connected with the foregoing.
29. An interrogation of the Act reveals that the term employment is granted a broad definition in line with the preamble. As such Section 5 of the Act that bars discrimination in employment divulges as follows:
- (7) For the purposes of this section
 - (a) “employee” includes an applicant for employment;
 - (b) “employer” includes an employment agency;
 - (c) an “employment policy or practice” includes any policy or practice relating to recruitment procedures, advertising and selection criteria, appointments and the appointment process, job classification and grading, remuneration, employment benefits and terms and conditions of employment, job assignments, the working environment and facilities , training and development, performance evaluation systems, promotion, transfer, demotion, termination of employment an disciplinary measures.
30. Similarly, the Employment (Amendment) Act, 2022 under Section 2 provides as follows:

Section 9 of the *Employment Act* is amended by inserting the following new subsections immediately after subsection (4)—

- (5) In respect of recruitment, an employer shall not require an employee to submit any clearance or compliance certificate unless such employer intends to enter into a contract of service with the employee:

Provided that an applicant for a state office shall provide compliance or clearance certificates at such times in the recruitment or approval process as they may be required.

- (9) For the purposes of this section—
 - (a) “employee” includes an applicant for employment;
 - (b) “employer” includes an employment agency;
 - (c) “relevant entity” includes any public or private entity that issues clearance certificates for purposes of satisfying the requirements under chapter six of *the Constitution*.

31. My understanding of the stated Sections is that the term ‘employment’ is a process that commences the moment an employer or a recruiting agency calls for applications. According to the preamble of the *Employment Act*, the purpose and intent of the Parliament was to have all matters pertaining to labour relations and employment merged as one and dealt with as such. In my opinion, the intention of *the Constitution* in creating the Special Court was to ensure this Courts has jurisdiction to entertain all matters pertaining to employment and labour relations.
32. In this way, as outlined in Section 5(7) and 9 of the *Employment Act*, the employment process is not a fragmented process but an automatic course that is set in motion by the employer or recruiting



agency when they call for employment applications. The recruitment and appointment process cannot therefore be divorced from the actual performance of duties once a successful applicant is duly employed. In this case the petitioner is one of the applicants who made his application following the respondent's call.

33. The undeniable conclusion that renders itself is that the matters raised by the petitioner fall squarely within the jurisdiction of the Employment and Labour Relations Court albeit asserts violation of constitutional principles and violation of fundamental rights.
34. I find guidance on this issue from the Court of Appeal case of Registrar of Trade Unions v Nicky Njuguna & 4 others [2017] eKLR where it was held as follows:

“This is not the first time an issue of jurisdiction of the Employment Labour Relations Court (ELRC) to determine matters involving the interpretation of *the Constitution* has been raised. Indeed, way back in 2012, the same issue was before the High Court in United States International University (USIU) v Attorney General & 2 Others [2012] eKLR and Majanja J., took the following position:-

“Labour and employment rights are part of the Bill of Rights and are protected under Article 41 which is within the province of the Industrial Court. To exclude the jurisdiction of the Industrial Court from dealing with any other rights and fundamental freedoms howsoever arising from the relationships defined in Section 12 of the Industrial Court Act 2011 or to interpret *the Constitution*, would lead to a situation where there is parallel jurisdiction between the High Court and the Industrial Court. This would give rise to forum shopping thereby undermining a stable and consistent application of employment and labour law.

This same issue was central in the following matters; Prof. Daniel N. Mugendi v Kenyatta University & Others Nairobi Civil Appeal No. 6 of 2012 (Unreported); U.S.I.U v A.G & Others (2012) eKLR Seven Seas Technologies v Eric Chege Nairobi HC Misc. Appl. No. 29 of 2013 (Unreported) and Judicial Service Commission v Gladys Boss Shollei & Another Civil Appeal No 50 of 2014. In all the aforesaid decisions by this Court differently constituted, it was emphasized that although Article 165(3) (c) of *the Constitution* gives the High Court jurisdiction to determine questions involving violation of the Bill of Rights, the Article did not oust the jurisdiction of ELRC to deal with such issues especially when the interpretation of *the Constitution* is intricately interwoven with a labour issue or is central to the determination thereof. In any case the Court found that under Article 20, *the Constitution* gives all courts and bodies powers to deal with constitutional matters; thus the court had jurisdiction to deal with all constitutional matters that arise before it in employment and labour disputes.

We will say no more on the jurisdiction of the ERLC to interpret *the Constitution* on fundamental rights that are germane and intricately connected with labour issues, as it has adequately been dwelt with and we fully agree with the above findings.”

35. It is apparent that the petitioner's contention with reference to his constitutional rights stems from the respondent's recruitment and appointment process which he participated in. This thus necessitates the conclusion that the issues touching on the petition and application bear their legal implication under Article 162(2)(a) of *the Constitution*. I say so because the issues though presented as constitutional issues, their root is in the respondent's recruitment and appointment process.



36. The existence of these elements in essence bars this Court from entertaining the instant petition. This is because the Employment and Labour Relations Court is vested with the requisite jurisdiction to entertain all matters including violations of the Bill of Rights with reference to the recruitment process. Owing to this, this Court is barred from exercising jurisdiction over matters reserved for ELRC. As a consequence, this Court must down it's tools at this juncture.
37. On this premise it is my finding that the preliminary objection dated 19th July 2022 is merited and is accordingly allowed, with costs.

In exercise of this Court's discretion I hereby transfer this file to the ELRC Nairobi for hearing and determination. The matter to be placed before the presiding Judge on 19th September 2022 for further directions.

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

H. I. ONG'UDI

JUDGE OF THE HIGH COURT

