



Koluna & 5 others v County Assembly of Vihiga (Being Sued through its Honourable Speaker); Governor of the County of Vihiga (Interested Party) (Constitutional Petition E006, E005 & E007 of 2021 (Consolidated)) [2022] KEHC 16719 (KLR) (21 December 2022) (Ruling)

Neutral citation: [2022] KEHC 16719 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CONSTITUTIONAL PETITION E006, E005 & E007 OF 2021 (CONSOLIDATED)
PJO OTIENO, J
DECEMBER 21, 2022**

BETWEEN

**DR. AMOS KUTWA KOLUNA 1ST APPLICANT
PAMELA MBAGAYA KIMWELE 2ND APPLICANT
ENG. KENNETH ELVUNA KESEKO 3RD APPLICANT
PAUL JISEVE MBUNI 4TH APPLICANT**

AND

**COUNTY ASSEMBLY OF VIHIGA (BEING SUED THROUGH ITS
HONOURABLE SPEAKER) RESPONDENT**

AND

GOVERNOR OF THE COUNTY OF VIHIGA INTERESTED PARTY

**AS CONSOLIDATED WITH
CONSTITUTIONAL PETITION E005 OF 2021**

BETWEEN

STEPHEN LUMWAJI CHAHASI PETITIONER

AND

**COUNTY ASSEMBLY OF VIHIGA (BEING SUED THROUGH ITS
HONOURABLE SPEAKER) RESPONDENT**

**AS CONSOLIDATED WITH
CONSTITUTIONAL PETITION E007 OF 2021**



BETWEEN

STEPHEN LUMWAJI CHAHASI 1ST PETITIONER

JULIUS OBUGA MASIVA 2ND PETITIONER

AND

**COUNTY ASSEMBLY OF VIHIGA (BEING SUED THROUGH ITS
HONOURABLE SPEAKER) RESPONDENT**

AND

GOVERNOR OF THE COUNTY OF VIHIGA INTERESTED PARTY

RULING

1. The Court of Appeal in Judgment dated November 18, 2022 in Civil Appeal No E215 of 2021, while dismissing the appeal did say:-

“27. The position under our law, then, is that the ELRC is the Court constitutionally vested with the jurisdiction to hear and determine all matters relating to labour and employment. This includes matters such as is presently before us relating to the impeachment of CEC members of County Assemblies. Should any issue relating to the protection of a right or fundamental freedom touching on the matter before it arises, the ELRC has the same jurisdiction as the High Court to determine the issue.

29. As this Court observed in its decision in Daniel N. Mugendi, however, the Appellants should not have filed those matters before the High Court. Having done so, either they or the Respondents should have applied for their transfer to the ELRC, though the High Court could also have transferred the matters to the ELRC on its own motion. This not having been done, and there being matters pertaining to the same parties and the same issues before two courts, albeit with different jurisdictions, I take the view that the ELRC properly dismissed the application before it. The Appellants could not properly maintained the suits before the two courts, with the possibility that the Courts would arrive at conflicting decisions. It is long past time, as this Court observed in Daniel N. Mugendi in 2015, that parties, more so their learned Counsel, became sufficiently acquainted with the jurisdiction of the various courts established under *the Constitution* to avoid the kind of situation that the present appeal presents.”

2. On the second day after that decision, the Interested Party herein, who was the Respondent in the appeal, brought the Notice of Motion dated November 21, 2022 praying, in the main, among other prayers that the three Petitions, as consolidated, be struck out with the consequence that all proceedings taken herein, before and after the consolidation, be of no legal effect and that this court has now been rendered functus officio.



3. As at the date the application was filed the court had walked the long and treacherous journey spanning over thirteen months trying to dispose an application for contempt and a ruling on the same was due for delivery on December 5, 2022 and had in fact been prepared.
4. The application is fairly straight forward and must be understood to say that the High Court has no jurisdiction to entertain the dispute pleaded in the three Petitions because the Court of Appeal has pronounced itself and said so. That is all that is contended by the Applicant in the eight paragraphed affidavit sworn by James Oyondi Mukebi only adding that the Court of Appeal decision binds upon this Court and that the only option left for this court is to down its tools.
5. The application was resisted by the three Petitioners in Pet No E006 and E007 both of 2021 by Replying Affidavits sworn by Pamela Mbagaya Kimwele and by Julius Masiva Obuga, the petitioner in E007/2021.
6. The Affidavit by Pamela Mbagaya Kimwele contends that the application has been propelled by bad faith on toes with previously filed application and targeted at stalling the court from delivering its ruling slated for Decemeber 5, 2022 and that the Judgment had been entirely misunderstood by the Applicant because the three Petitions as consolidated were not before the Court of Appeal for consideration hence the Court could not have made findings on matters not placed before it. It was then added that Petitioners in No E005 and E007 of 2021 are private citizens and not employees of the County Executive and were never impeached but are merely questioning, as citizens, the propriety and constitutionality of the Ad Hoc Committee's Report which recommended the impeachment. The orders by this court dated December 16, 2021 were reiterated to have decreed that the determination of the application for contempt precedes all else.
7. In addition the deponent contended that by the time the orders were issued, the Petitioners in E006/2021 had not been dismissed hence the question was not material and that the decision by the Court of Appeal must be left to mean that it agreed with the Employment and Labour Relations Court that the suit filed before it was sub-judice Pet No E005, E006 and E007/2021 pending before the High Court and not more. The Respondents/Petitioners then cited to court the decision in *Aden Ibrahim Mobammed v County Assembly for Wajir (2021) eKLR* for their contention that it is the high Court with jurisdiction to determine questions of impeachment by members of the County Assembly. Lastly, Mr masiva contends that it is the law that the conduct by the contemnors has been blatant and Vihiga Court, being a young Court, whatever that means, should set example by dealing firmly with them. He underscored the conduct of Mr Musiega and Rakewa Advocates of withdrawing from the matter when unfavourable orders were made against them was merely intended to delay and derail the Court process. His prayer was that the application be dismissed.
8. The Court determined and directed that the application be argued orally and the Counsel offered such oral submissions on the December 6, 2022 when Mr Musiega told the Court that he was leading Mr Echesa and Mukabi for the Interested Party/Applicant and holding brief for Mr Rakewa and Osango for the other interested parties who were reported to support the application just like Mr Arwanda for the County Secretary.
9. In very brief submissions, Mr Musiega told the court that the background facts of the dispute in the three Petitions is well covered in the Judgment of the Court of Appeal touching the application for striking out. He underscored the fact that while the matter was pending here the Petitioners(sic) went to the Employment and Labour Relations Court seeking orders for reinstatement but the matter was struck out for being sub judice a decision which was upheld by the Court of Appeal which then found that the High Court had no jurisdiction is never a justification nor a defence to an application for contempt.



10. For the Petitioner in E007/2021 the position taken in the replying affidavit is that, bringing of the application under a certificate is a misuse of the certificate of urgency to achieve the ignoble design to delay the delivery of the ruling on contempt contrary to the Court Orders of December 16, 2021 hence the application is a candidate for being expunged from the record of the Court. The deponent recommended the court that while there was an order that no recruitment takes place to replace the four County Executive Committee members, the interested party had contemptuously proceeded and conducted the recruitment.
11. Mr Malenya for the Petitioners in No E005 and E006/2021 opposed the application on the basis that it lacks merits because the decision by the Court was made obiter dicta for reasons that none of the three Petitions was before the Court of Appeal hence it could not have substantively and on the merits determined what was pleaded and if the Court had jurisdiction to determine the disputes.
12. Counsel added that even if the court was to find that the matter was a dispute of employment relations it cannot strike out but added that while the Petitioners in Petition No E006/2021 may be entertained by the Employment and Labour Relations Court, the Petitioners in No E005 and E007 being non-employees cannot have audience before that Court. He urged that the application be dismissed for being a ploy to delay the conclusion of the matter.
13. For Mr Julius Masiva Obuga, the Petitioner in E007/2021, he relied on his Replying Affidavit and prayed that the application be dismissed so that contempt is dealt with to conclusion arguing that the technicalities relied upon by the Applicant should be shunned as Kenyans need to be protected from misuse of state offices by holders of such offices.
14. Mr Sore did address the Court only to stress the point that an assertion that the Court lacked jurisdiction when it made the order should never be a justification to hold onto a contemptuous position against a Court Order. He viewed that to be the only strategy of the application and urged Court to stop the practice of parties choosing what Orders to comply with and what to ignore. He pointed out that the instant Petitioners were never parties and subject to the appeal adding that to send the matter to the Employment and Labour Relations Court is to deny the Petitioners justice by the Court declining the jurisdiction given by *the Constitution* where there is no employer-employee relationship.
15. In his rejoinder, Mr Musiega denied having had any premonitions about the outcome of the contempt application and distinguished the decision in Wajir Governor's case as not been applicable here because, Governors unlike Members of the County Executive Committee members, is not an employee. That the Court must down its tools whenever it discovers it has no jurisdiction was reiterated while a concession was made to the effect that Mr Masiva and Chahazi merely seek to enforce the constitutional requirements and not enforcing employment rights.
16. With that summary of the rival positions taken by the parties the Court discerns its mandate in the application to be whether it has jurisdiction to handle and determine the Petitions or in deed any of them. In doing so it shall be obligated to consider whether the Court of Appeal did say with finality that this Court lacks jurisdiction in the three Petitions, as consolidated. It needs no reiteration that jurisdiction is everything¹; that jurisdiction is bestowed by *the Constitution* or statute and not by the Court itself by abrogation or by parties through consent or acquiescence².

¹ [Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service \[2019\] eKLR](#)

² [Lillian "S" vs. Caltex Kenya Limited \[1989\] eKLR](#)*



17. The Constitution by article 165 (3) vests the duty and mandate upon the High Court, only subject to Clause 5 of the same article, to determine the Constitutionality of any law or thing said to be done under the authority of the Constitution or any law is inconsistent with or in continuation of the Constitution. Essentially, therefore the jurisdiction of the High Court is only ousted on matters reserved for the Courts of equal status by dint of article 162 (5) of the Constitution. The disputes excluded are therefore those that concern Employment and Labour Relations as well as disputes on Environment and use and occupation of and title to land. The specifics of that ouster of jurisdiction is then constitutionally left for determination by Parliament in a legislation.
18. For Employment and Labour Relations Court, the Parliament has by, Employment and Labour Relations Court Act, Section 12, vested the court with jurisdiction as follows :-
- “(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 unions organisation;
 - d. disputes between trade unions;
 - e. disputes between employer organizations;
 - 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.
19. The law therefore is not equivocal in anyway on what the Kenyan people in making the Constitution intended to be the jurisdiction of that Court. Because jurisdiction must be vested by the Constitution or Statute, the Employment and Labour Relations Court must confine itself to what the Statute dictates. Not itself, this Court or even the parties may by consent, waiver or acquiescence enlarge or shrink what the Statute prescribes.
20. To determine the Interested Party's application, the Court must look at the pleadings filed by the parties to the three Petitions and satisfy itself whether the same falls for determination by this Court or the Employment and Labour Relations Court. For that undertaking the Court agrees with Mr



Sore that each of the three Petitions must be studied. I have undertaken the duty of reading the three Petitions and note that each makes prayers as follows:-

Petition No E005/2021

1. A declaration that the composition of the Ad Hoc Committee established by the Vihiga County Assembly on March 24, 2021 fails the regional and ethnic balance test and is thus unconstitutional, illegal, null and void.
2. A declaration that the establishment of the Ad Hoc Committee by the Vihiga County Assembly does not have a legal basis in Law and the Vihiga County Assembly Standing Orders and is thus unconstitutional, illegal, null and void.
3. A declaration that the Resolutions/Recommendations contained in the Report of the Ad Hoc Committee established on March 24, 2021 by the County Assembly of Vihiga titled, 'Ad Hoc Committee Report On The Unrest Of Health Workers, Coordination Of County Public Service, Pending Bills And Implementation Of County Assembly Resolutions By The County Executive' passed and adopted by the County Assembly of Vihiga on May 12, 2021 is unconstitutional, illegal, null and void.
4. An order of Certiorari do issue quashing the Report of the Ad Hoc Committee established on March 24, 2021 by the County Assembly of Vihiga titled, 'Ad Hoc Committee Report On The Unrest Of Health Workers, Coordination Of County Public Service, Pending Bills And Implementation Of County Assembly Resolutions By The County Executive' passed and adopted by the County Assembly of Vihiga on May 12, 2021.
5. Cost of the suit; and
6. Any other relief that the Court may deem fit and necessary in upholding the Constitution and the rule of law.

Petition No E006/2021

1. That the Respondent and Interested Party be Permanently Injuncted from removing the Petitioners from office based upon the contents of the Report of the Ad Hoc Committee dated the May 11, 2021.
2. That an Order of Certiorari do issue bringing before this Honourable Court the Report of the Ad Hoc Committee dated the May 11, 2021 for the purposes of being quashed.
3. That costs of this Petition be awarded to the Petitioners.

Petition No E007/2021

- a. An injunction order to restrain the Respondents, agents, servants, employees jointly and or severally from impeaching the Interested Parties pending the determination of the Petition.
- b. That this Petition is properly before this Court and has jurisdiction to determine as justice cannot be done but seen to be done.
- c. A declaration that the Respondents, agents, servants, employees jointly and or severally contravened and infringed articles 19, 20, 23, 35, 40, 47, 50, 159, 185, 201, and 258 of the 2010 Kenya Constitution and that the Interested Parties



remains Executive Committee Member of Vihiga County Government until constitutionally removed.

d. Any other relief this Honourable may deem fit to grant.

21. It is to this Court clear that there is no employer employee relationship between the Petitioners and the Respondent or is any employment created right sought to be proved or protected. I see petitioners in No E005 and E007 to fall clearly under article 165 (3) b (d) (ii) & (iii) and outside the exclusive jurisdiction created by section 12 of the *Employment and Labour Relations Court Act*. Those two Petitions cannot be sent to the Employment and Labour Relations Court unless this Court was to purport to be vested with powers to vest that other Court with jurisdiction beyond that vested by Parliament.
22. How about the Petition No E006/2021 clearly brought by persons who have pleaded being employees of the County Government of Vihiga and whose employment was threatened with and subsequent termination by way of impeachment? The Court finds that the Petitioners were indeed employees of the Government of Vihiga County and that the positions to which the four (4) were removed are indeed constitutional officers and the removal was done by the 1st Respondent, State organ, acting pursuant to a constitutional mandate.
23. It is to this court not a dispute between the employee, (Petitioners) and the employer, the County executive, Vihiga County Government but a dispute questioning if the conduct of the assembly and its committees had been consistent and in adherence with *the Constitution*. It is a matter that can be narrowed down, to whether the assembly complied with *the Constitution* in executing its mandate. To this Court, it is a matter that falls for determination by only the High Court in that even though there is an employment relationship pleaded, the employer is not an impleaded as a party and thus the dispute falls outside the boundaries set by the Statute for the employment and Labour Relations Court to entertain.
24. If the Court was to be wrong on this conclusion, it would still seek guidance in the decision of the Court of Appeal cited by the Court of Appeal in its decision of November 18, 2022, *Daniel Mugendi v Kenyatta University and 3 Others [2013] eKLR* where the Court expressed itself thus :-

“In the same token we venture to put forth the position that as we have concluded that the Industrial Court can determine industrial and labour relations matters alongside claims of fundamental rights ancillary and incident to those matters, the same should go for the Environment & Land Court, when dealing with disputes involving environment and land with any claims of breaches of fundamental rights associated with the two subjects.” (emphasis added).
25. The court of appeal laid the position that, the substantive claim in the matter for determination by the Employment and Labour Relations Court must concern labour and relations and the constitutional question must be ancillary and incidental to the primary matter.
26. Even in the event that there was a clear case for the jurisdiction of the Employment and Labour Relations Court, this Court notes that the three cases are closely intertwined so that a determination of the sole question, whether or not the assembly acted in furtherance of *the Constitution* or in contravention thereof, in one, would have a bearing on the others and therefore for the sake of efficient use of judicial resource in time, the Court instead of transferring the matter would treat the conduct of the assembly as the overriding consideration and thus treat the dispute as constitutional one rather than an employment matter.



27. For the foregoing reasons, the Court finds no merit in the application and orders that it be dismissed.
28. That should effectively rest the matter, but Mr Musiega for the Interested Party/Applicant did place a heavy premium on the finding of the Court of Appeal at paragraphs 28 and 29 of its ruling of November 18, 2022. The submissions of the Applicant while relying on that very recent decision of the Court of Appeal must be seen to ask the question on how Courts apply the doctrine of precedence. The decisions by the Superior Courts in this jurisdiction are abound and are to the effect that a decision is only binding as precedent where the facts on which it is sought to serve as a precedent are identical to those at hand. A case is only an authority for what it decided³.
29. One may only cite [George Mike Wanjohi v Steven Kariuki & 2 Others \[2014\] eKLR](#) where the Supreme Court cited with approval, the authors of a treatise titled Legal Systems in the following words:-

“In practice, no two cases which have identical facts and a case is only applicable if the material facts are the same. The key question is whether the difference between the present and the previous case have a bearing on the outcome of the case. If they are materially different facts, the Court may distinguish the case from the earlier cases and so apply different Rule to decide whether the facts are material or not, the court must determine what general rule is which was laid down by the earlier case. This is called *ration decidendi*, which is the contribution of the rule of law and the material facts to which it applies.”

See also [Republic v Advocates Disciplinary Tribunal Ex parte, Appollo Mboya](#) (Supra)

30. The Court has read the decision relied on and discerns that it was indeed a matter, judicial review, by the Petitioners in E006/2021 against the Interested Party and where the Petitioners in E005 and E007/2021 in which the interested parties were not involved. If the dispute was whether these petitions were indeed filed in a Court without jurisdiction, all the parties here, by the requirements of natural justice, were entitled to be served and to make representation to the Court. This court is not satisfied from reading of the Judgment that the court was making a determination on the facts of these three Petitions without having the parties to be affected. Instead the Court takes the view that the court was showing and expressing the displeasure on the conduct of the four parties before it in seeking from the Employment and Labour Relations Court what they had failed to get before the High Court.
31. Accordingly, while the very Judgment of the Court of Appeal binds upon this Court always, the binding nature is only when it is an authority from the matters of facts as applied to the law as are identical or similar to those before this Court. The Court finds that the excerpts relied upon by the Applicant were comments made in the passing and obiter.
32. There was also a concern by Mr Masiva, that contempt continues in that new members of the County Executive Committee were recruited while the court orders were pending. The answer for that concern is readily available from the clear words of the law in Section 42 of the [County Government Act](#). The term of the Petitioners in E006/2021 were destined by law to terminate on the appointment of a new Committee after the elections.
33. Inevitably, therefore, the application fails and is dismissed with costs. I award costs to the Petitioners/ Respondents as a show of displeasure that a reading of the file reveals a deliberate and concerted effort to delay the matter.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 21ST DAY OF DECEMBER, 2022.

PATRICK J O OTIENO

³ [Republic v Advocates Disciplinary Tribunal, Ex parte, Appollo Mboya \[2019\] eKLR](#)



JUDGE

In the presence of:

Mr Malenya for the Petitioners/Respondent

Mr echesa for the Respondents/Applicants

N/A for the Interested Parties

Court Assistant: Polycarp

