



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

CONSTITUTIONAL PETITION NO.2 OF 2020

ALI JARSO WAKO.....1ST PETITIONER

BORANA ELDERS FROM

HEILU LOCATION.....2ND PETITIONER

VERSUS

MINISTRY OF INTERIOR & COORDINATION

OF NATIONAL GOVERNMENT.....1ST RESPONDENT

REGIONAL COMMISSIONER

EASTERN REGION.....2ND RESPONDENT

COUNTY COMMISSIONER

MARSABIT COUNTY.....3RD RESPONDENT

DEPUTY COMMISSIONER

MOYALE SUB COUNTY.....4TH RESPONDENT

MOHAMUD MOHAMMED GODANA.....5TH RESPONDENT

THE ATTORNEY GENERAL.....6TH RESPONDENT

AND

PUBLIC SERVICE COMMISSION.....1ST INTERESTED PARTY

MOHAMED HAPICHA.....2ND INTERESTED PARTY

HASSAN ADAN.....3RD INTERESTED PARTY

HON. KHADIJA IBRAHIM.....4TH INTERESTED PARTY

ISSACJI GALGALO.....5TH INTERESTED PARTY

EDIN GABABO.....6TH INTERESTED PARTY

RULING

In their Petition dated 10th July, 2020 the two respondents seek the following orders:-

(a) A declaration be and is hereby issued that the recruitment of the 5th respondent as Chief Heilu Location is unconstitutional, illegal, unreasonable, irrational and procedurally unfair.

(b) An order restraining and/or prohibiting the 5th respondent from assuming office, exercising powers and functions of Chief grade II for Heilu location, Central Division, Moyale sub-county or drawing/earning any salaries or allowances thereof.

The respondents raised a preliminary objection dated 17.7.2020 on the ground that this Court lacks jurisdiction to hear and determine the petition. The respondents seek to have the petition struck out for lack of jurisdiction. This ruling is in relation to the Preliminary Objection.

The initial Petition was against the first six (6) respondents and the 1st interested party. The 2nd to 6th interested parties were later enjoined in the proceedings. Mr. Kiogora Mugambi appeared for the petitioners, Miss Mbakyata from the Attorney General's office appeared for the six respondents and 1st interested party while Mr. Nyandieka appeared for the 2nd to 6th interested parties. The Preliminary objection was filed by the 5th respondent who was initially represented by Mr. Nyandieka. Miss Mbakyata adopted the objection to be part of the respondents' reply to the petition.

Mr. Nyandieka submitted that the objection is based on pure points of law. It is premised under Article 162 of the Constitution which gives jurisdiction on employment and labour matters to the Employment and Labour Court. Article 165 of the Constitution takes away the Jurisdiction of the High Court on matters relating to the labour Court. The objection is not a procedural technicality. If a decision is made without jurisdiction it amounts to nothing. The Court which has no jurisdiction cannot transfer the matter to the Court with jurisdiction. Counsel relies on the case of **Equity Bank Limited –V- Bruce Mutie Mutuku T/A Diani Tour & Travel (2016)eKLR** where the Court of Appeal in Mombasa stated:

In numerous decided cases, courts, including this Court, have held that it would be illegal for the High Court in exercise of its powers under section 18 of the Civil Procedure Act to transfer a suit filed in a Court lacking jurisdiction to a court with jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow court to transfer an incompetent suit for want of jurisdiction to a competent court would be to muddle up the waters and allow confusion to reign. It is settled that parties cannot, even by their consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where it lacks, parties cannot even seek refuge under the “02” principle or the overriding objective under the Civil Procedure Act, the appellate Jurisdiction Act or even Article 159 of the Constitution to remedy the situation. In the same way, a Court of Law should not through what can be termed as judicial craftsmanship sanctify an otherwise incompetent suit through a transfer. In Abraham Mwangi Wamigwi –V- Simon Mbiriri Wanjiku & another [2012] eKLR, it was held as follows:-

“It is therefore trite that where a suit is instituted before a tribunal having no jurisdiction, such a suit cannot be transferred under Section 18 aforesaid to a Tribunal where it ought to have been properly instituted. The reason for this is that a suit filed in a court without jurisdiction is a nullity in law and whatever is nullity in law is in the eyes of the law nothing and therefore the court cannot purport to transfer nothing and wound it into something through a procedure known as “transfer”. In other words, courts can only transfer a cause whose existence is recognized by law.”

Further, in the case of **Maefoy V United Africa Co LTD [1961] 3 All ER, 1169**, it was held thus:

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.....”

It is submitted that the petition relates to Employment and Labour relations issues. The petition on its heading raises Article 41 among other articles of the Constitution. The petition also cites the Employment Act, 2007 and refers to the appointment of the 5th respondent, Mohamed Mohamed Godana as a matter for determination. Further, the petition includes an employer/ employee's names. The petitioners' complaints are with regard to the recruitment of the 5th respondent as the Chief of Heilu location, Moyale sub county in Marsabit County. Also the reliefs being sought relate to the said recruitment. The 5th respondent admit having been recruited and appointed as the Chief of Heilu location and has annexed his appointment letter dated 10th July 2020.

Mr. Nyandieka contend that the subject matter of the petition relates to employment of the 5th respondent. Counsel relies on the case of **Trusted Society of Human Rights Alliance –V- Nakuru Water & Sanitation Services Company & another (2013)eKLR** where Justice Byram Ongaya states as follows:

The Court further holds that in mapping out the boundaries to determine jurisdiction, the court must consider the four crucial traditional elements of jurisdiction namely parties, territory or geographical area, remedies that may issue and subject matter in dispute. The court holds that the authority to decide will relate to the parties, the territory of geographical area of the dispute, the remedies that may issue and the subject matter involved. Depending on the authority to decide as may be conferred, all the four parameters may be pertinent or one or two of them may apply. In the opinion of the court, unless any of the four results into bar to jurisdiction in the given case or circumstance, presence of any of the four as permitting jurisdiction will be sufficient for the court to assume jurisdiction and proceed to entertain and determine the case

at hand.

In the present case, there is no dispute on territorial or the geographical jurisdiction throughout the Republic of Kenya. The Court finds that on that parameter, the court has jurisdiction in the instant petition.

It is further submitted that it is the Employment and Labour Court which has Jurisdiction to deal with issues relating to employer/employee relationship as well as to deal with parties who are not in an employer – employee relationship. The High Court lacks jurisdiction to entertain a dispute relating to an employer – employee relationship. Section 12 of the Employment and Labour Relations Court vests jurisdiction to the Labour Court. The subject matter of the petition is recruitment. If the recruitment of the 5th respondent is removed the case collapses. The law gives the Labour Court jurisdiction to grant the reliefs being sought. One of the reliefs is recruitment. The objection has nothing to do with the right of access to justice but simply points out that the suit has been filed before the wrong forum.

Miss Mbakyata supported the Preliminary Objection. It is submitted that the objection was properly filed as Mr. Nyandieka was initially appearing for the respondent before the Attorney General's office took over. The Attorney General took over and adopted the documents filed by Mr. Nyandieka.

Mr. Kiogora for the petitioners appeared together with Mr. Gikonyo. Counsels opposed the Preliminary Objection. It is submitted that the Preliminary Objection is not proper and offends the provisions of Article 48 of the Constitution on access to Justice. It also offends Article 159 which requires that Justice be dispensed without undue regard to technicalities. The 3rd and 4th respondents have clearly recommended that the 1st petitioner be appointed as the chief of Heilu location. There is a letter which instead appointed the 5th respondent as the Heilu location Chief. There is no proof so far that the 5th respondent is an employee of the Government. At this stage we cannot determine an employee/employer relationship. There is no response to confirm whether the 5th respondent is an employee.

Mr Kiogora further submitted that under Article 165(3) of the Constitution the High Court has jurisdiction over the matter at hand. The petition is based on fair administrative action. Section 2 of the Employment Act defines what constitutes contract of employment. What has been annexed is an appointment of a chief which needs further probing by way of oral evidence. The letter dated 4th July 2020 addressed to the assistant County Commissioner cannot be confirmed as appointing the 5th respondent. The letter was received on a Saturday. The 1st petitioner emerged as number one while the 5th respondent was number two (2). The petition involves constitutional violations and at this stage it cannot be concluded that the dispute is a labour relation matter . The preliminary objection is a mere technicality.

Mr. Kiogora further maintain that the preliminary objection offends Article 156 of the constitution, the Attorney General merely took over the suit on behalf of the 5th respondent without filing any document confirming that the 5th respondent is the chief. The A.G under the law is the defender of public interest. The A.G cannot adopt documents filed by a private law firm and take over without filing any documents.

Mr. Gikoyo contend that the High Court has jurisdiction to transfer the case to another court in the event that it finds that it has no jurisdiction. Counsel relies on the case of **UNITED STATES INTERNATIONAL UNIVERSITY (USIU) -V- ATTORNEY GENERAL (2012) eKLR** where Justice D.S Majanja transferred the case to the Industrial Court for hearing and disposal.

The dispute at this stage raises only two issues namely:-

- (i) Whether the Preliminary objection is properly on record.
- (ii) Whether this Court has jurisdiction to hear and determine the dispute.

On the first issue, Mr. Kiogora, Counsel for the petitioner contends that the preliminary objection was filed by Mr. Nyandieka advocate on behalf of the 5th respondent. The Attorney General purportedly took over the Preliminary objection yet miss Mbakyata had not filed a memorandum, of appearance or any other document. It is submitted that the Attorney General is expected to be the defender of public interest and cannot adopt documents filed by private advocates.

The record shows that the petition was filed on 10th July, 2020. On 17th July, 2020 Mr. Nyandieka entered appearance for the 5th respondent, and filed a replying affidavit, an application to discharge the interim orders as well as the preliminary objection. On 21.7.2020 Mr. Nyandieka informed the Court that he had information that the Attorney General was going to take over the representation of the 5th respondent. The Court gave directions on 21.7.2020 whereby Counsels were to file written submissions in relation to the preliminary objection. Parties also agreed to have the 2nd to 6th interested parties enjoined in the proceedings. The matter came up for hearing of the preliminary objection on 3.8.2020 at Meru. Miss Mbakyata informed the court that she was yet to file a notice of appointment of advocates for the respondents as she did not know whether to file it in Meru or Marsabit. Miss Mbakyata further informed the Court that she was adopting the preliminary objection and was associating herself with the submissions filed by the 2nd to 6th interested parties by Mr. Nyandieka. The matter could not proceed on 3.8.2020 and was adjourned to 5.8.2020. On this day the Court that was informed that Mr. Kiogora had filed a preliminary objection. The Court directed that the petitioners' objection do form part of their response. A notice of appointment of advocate had been filed on 4th August,2020 by the Attorney General.

The Preliminary objection by Mr. Kiogora states as follows:-

- 1. That the honourable court lacks the jurisdiction to entertain the preliminary objection dated 17.7.2020 as it affects Article 156 (4) and (6) of the constitution and section 5 and 6 of the office of the Attorney General Act No.49 of 2012.**

2. That despite Attorney General taking over proceedings on behalf of all respondents and the first interested party no pleadings whatsoever has been filed by the Attorney General.

3. On the whole the preliminary objection dated 17th July 2020 drawn and filed by Nyandieka Associates advocates is misconceived, incompetent fatally defective, hence it should be struck out else expunged from the record with costs to the petitioners.

The issue is whether the preliminary objection by the 5th respondent is properly on record. Article 156(4) -(7) of the Constitution states as follows: -

“(4) The Attorney General

(a) is the principal legal adviser to the government

(b) shall represent the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings; and

(c) shall perform any other functions conferred on the office by an Act of Parliament or by the President.

(5) The Attorney General shall have authority, with the leave of the Court to appear as a friend of the court in any civil proceedings to which the Government is not a party.

(6) The Attorney General shall promote, protect and uphold the rule of law and defend the public interest.

(7) The powers of the Attorney General may be exercised in person or by subordinate officers acting in accordance with general or special instructions.”

The Attorney General officially came on record and took over the representation of the 5th respondent. The 5th respondent is a party to these proceedings. He filed a replying affidavit and preliminary objection. He was initially represented by Mr. Nyandieka but the Attorney General took over. The Attorney General is an advocate of the Court. He can file a notice of change of advocates and take over a matter. There will be no need for the Attorney General to file a fresh preliminary objection yet the party who was represented by an advocate would have filed such an objection. I do find that the adoption of the preliminary objection by miss Mbakyata is proper. There is nothing wrong with that process and that does not mean that the Attorney General has become subservient to a private advocate. The 5th respondent had a right to appoint an advocate. Since there was the appointment letter in his favour, the Attorney General felt the he ought to have taken over his representation. The taking over did not abandon the objection. The Attorney General filed a memorandum of appearance online and was not required to file pleadings on behalf of the respondent in relation to the Preliminary Objection. The nature of Objection is that it is grounded on jurisdiction. The court on its own can determine the issue of jurisdiction even if that issue is raised orally. I do find that the Preliminary Objection is properly on record and the Objection by the petitioners is disallowed.

The next issue is whether this court lacks jurisdiction to hear and determine the matter. Article 162 of the Constitution states 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 disputes relating to –

(a) employment and labour relations; and

(b) the environment and the use and occupation of, and title to, land.

(3) Parliament shall determine the jurisdiction and functions of the Courts contemplated in clause (2).

(4) The subordinate courts are the courts established under Article 169, or by Parliament in accordance with that Article.

Similarly, 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).

Section 12 of the Industrial Court Act, 2011 states as follows:-

Jurisdiction of the Court

12. (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 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;
- (b) disputes between an employer and a trade union;”
- (c) disputes between an employers’ organization and a trade unions organization;
- (d) disputes between trade unions;
- (e) disputes between employer organization;
- (f) disputes between an employers’ organization and a trade union;
- (g) disputes between a trade union and a member thereof;
- (h) disputes between an employers’ 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.

The reliefs being sought in the petition have been stated herein. The Objection deals with the issue of both the subject matter and the reliefs being sought. The petitioners filed a notice of motion seeking three main orders namely: -

(b) That pending the hearing and determination of the application, the honourable court do issue an order compelling the 3rd and 4th respondents to file in court copies of the applications, curriculum vitae, academic documents and testimonials received by the 4th Respondent from the 5th Respondent and other shortlisted applicants for the position of Chief Grade II for Heilu location in Moyale Sub County as advertised by the office of the 4th respondent vide their letter dated 5th December 2019.

(c) That pending the hearing and determination of this application and the petition, an order of temporary injunction be issued restraining the 5th Respondent from assuming office, exercising the powers and functions of the Chief grade II for Heilu location, central division, Moyale Sub County or drawing/earning any salaries or allowances. (emphasis added)

(d) That an order do issue restraining the Respondents from swearing-in or handing over the tools of power/office to the 5th Respondent for the office of Chief Grade II for Heilu Location, Central division, Moyale Sub County pending the hearing and determination of this application and petition. (emphasis added)

The Petition states that on 5th December, 2019 the position of Chief Grade II, Heilu location was advertised. The 5th respondent and the 1st petitioner participated in the recruitment process. The 1st petitioner was ranked first while the 5th respondent emerged as number two. The 5th respondent was subsequently appointed as the Heilu Chief which appointment triggered the filing of the petition. The Petition at paragraph 14 states as follows:

That the intended appointment of the 5th respondent constitute an abuse of the legal process and administrative authority and discretion.

The Petition also raises issues relating to equality and freedom from discrimination, the right to human dignity and fair administrative justice.

The petition is basically against the recruitment of the 5th respondent as the Chief of Heilu location. In the case of Owners of the motor vessel “LILIAN-S-” V CALTEX OIL (KENAY) LTD (1989)eKLR, the Court of Appeal, Nyarangi J.A., stated as follows:-

With that I return to the issue of jurisdiction and to the words of Section 20(2)(m) of the 1981 Act. I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. 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 continuation of proceedings pending other evidence. A Court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority.

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or

limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of 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”

It is for that reason that a question of jurisdiction once raised by party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who final to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined.

In the case of **Law Society of Kenya, Nairobi Branch –V- Malindi Law Society & 6 Others (2017) eKLR**, the Court of Appeal observed as follows:

“By parity of reasoning, although under Article 162(2) of the Constitution parliament is mandated to establish courts with the status of the High Court to hear and determine disputes relating to employment and labour relations and environment and the use and occupation of, and title, to land, that in itself does not confer an exclusive jurisdiction to those specialized courts to hear and determine the specified types of cases. However, as already stated, article 165(5) is clear that the High Court has no jurisdiction in respect of matters falling within the jurisdiction of the specialized courts. Whereas Parliament is empowered to enact legislation to confer jurisdiction to the Magistrate’s Court to hear and determine disputes stipulated under Article 162(2) of the Constitution, it cannot establish a superior Court or confer upon a Superior Court jurisdiction to hear Employment and Labour Relations cases and Environment and Land cases....”

In the case of **United States International University -V-Attorney General (Supra)** Majanja J observed:-

“Labour and employment rights are part of the Bill of Rights and are protected under Article 41 which is within the providence 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 (so) 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 litigants and ingenious lawyers would contrive causes of action designed to remove them from the scope of the Industrial Court. Such a situation would lead to diminishing the status of the Industrial Court The intention to provide for a specialist court is further underpinned by the provisions of Article 165(6) which specifically prohibits the High Court from exercising supervisory jurisdiction over superior courts. To accept a position where the Industrial Court lacks jurisdiction to deal with constitutional matter arising within matters its competence would undermine the status of the court. Reference of a constitutional matter to the High Court for determination or permitting the filing of Constitutional matters incidental of labour relations matters would lead to the High Court supervising a superior court. Ordinarily where the High Court exercises jurisdiction to interpret the Constitution or enforce fundamental rights, its decisions even where declaratory in nature will require the court to follow or observe the direction. This would mean that the High Court would be supervising+ the industrial Court which is prohibited by Article 165(6)....”

It is my view that the petition’s core issue is the recruitment process of the Heilu location chief. The 1st petitioner is of the view that having emerged as the first choice after the interviews, the respondents should not be allowed to appoint the 5th respondent who emerged as number two as the Heilu location Chief. Therefore, the subject matter of the petition revolves around the recruitment of the Heilu chief. Recruitment leads to employment. The 5th respondent annexed a letter dated 10th July, 2020 addressed to himself from the Deputy County Commissioner, Moyale sub-county. The letter reads partly:

Mohamud Mohamed Godana

ID No.22823337

Thro’

Assistant County Commissioner

Central Division

RE: APPOINTMENT OF CHIEF

I am pleased to inform you that following he interview that you attended in this office, the Principal Secretary vide his authority letter Ref.No.PA2/21A dated 22nd June, 2020, has conveyed his approval for your appointment to Chief Grade II of Heilu location, in central Division of Moyale sub County.

On receipt of this letter, you are asked to report to the Human Resource Management Officer during working hours for processing of your appointment documents.

The Employment and Labour Relations Court has Jurisdiction to hear and determine constitutional issues under the Bill of Rights. In the

case of **Registrar of Trade Unions –V- Nicky Njuguna & 4 Others (Eklr)** Court of Appeal held:-

“This same issue was central in the following matters; Prof, Daniel N. Mugendi V Kenyatta University & Others Nairobi Civil Appeal No.6 of 2012 (Unrepresented); U.SI.U V A.G & others (2012) eKLR Seven Seas Technologies V Eric Chege Nairobi HC Misc Appeal No.29 of 2013 (Unrepresented) 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 f rights, the Article did not cast 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 matter that arise before it in employment and labour dispute.

In the case of **SPEED AG INTERFEIGHT LIMITED –V- CABINET SECRETARY FOR LABOUR & SOCIAL RELATIONS & 2 OTHERS (2019) eKLR** Justice Ogola at paragraph 28 and 29 made the following observations:

In International Centre for **Insect Physiology and Ecology (ICIPE) V Nancy McNally [2018] eKLR** it was held as follows:

“There cannot be any argument that the ELRC is clothed with jurisdiction to hear and determine such constitutional issues as and when they arise from employment and labour relations. Any doubts on that jurisdiction were settled in the case of United States International University (USIU) Vs Attorney General (2012) eKLR which was upheld by this Court in Daniel N. Mugendi Vs Kenyatta University & 3 others (2013) eKLR.

Similarly, in **Chunky Limited & Another, V Patrick Ndune 11 other [2018] eKLR** it was held as follows:

“Whereas the jurisdiction to determine whether there has been a violation of any of the rights under the Bill of rights was vested in the High Court under article 165(3)(b), the said jurisdiction was subject to clause (5) which prohibited the High Court from exercising jurisdiction over matter that fell within the province of the courts established under article 162(2).”

My findings on the issue of jurisdiction is justified by the recent case of **Kuscow Billow Isack –V- Ministry of Interior and Coordination of National government & 3 others [2020] eKLR** Nairobi Petition number 191 of 2019. The above suit was filed before the Employment and Labour Relations Court. The Petitioner Sought Several orders including:-

(b)That pending the hearing of this instant application inter parties, the honourable Court do issue an order restraining the 1st and 2nd respondents jointly and severally, either acting on their own and or through their agents, employees, servants and/or any other person from executing the impugned letter dated 27.11.2018, which purports to cancel the appointment of the Petitioner as the Assistant Chief of Fafi Sub-county.

(c)That an order do issue directing the 1st and 2nd respondent to reinstate the Petitioner as the Assistant Chief Fafi Sub-county in line with the letter of appointment dated 11.10.2016 and to continue performing his functions and duties in accordance with the law and the said appointment letter.

(d)That an injunction be issued restraining the respondents from advertising, shortlisting, interviewing or recruiting candidates for the post of the Assistant Chief for Fafi Sub-county pending the hearing and determination of the suit.

Justice Onsumus N. Makau of the Industrial Court dealt with the matter and held at paragraphs 20 and 21 as follows:-

The next question to consider is whether the applicant will suffer irreparable harm if the injunction sought is withheld. In my view the answer is in the affirmative because once the vacancy is advertised and filled, the applicant will not have any chance to recover his job again and the petition herein will become moot. The purposes of interlocutory injunction is to preserve the substratum of the suit. In this case the court has been invited to determine whether the appointment and dismissal of the applicant was procedurally right. In my view, therefore the vacancy in dispute should remain within the reach of the court so that it does not act in vain.

Having found that the applicant has shown a prima facie case with probability of success, and that he stands to suffer irreparable harm, I return that the application herein meets the threshold for granting interlocutory injunction as formulated in the Giella V Cassman Brown case, supra.

The issue of jurisdiction is quite crucial in that it avoids the hearing and determination of cases by superior courts haphazardly. Issue relating to recruitment and employment of public servants or any employee belong to the Labour court. Any Constitutional issue revolving around employment or recruitment of an employee has to be dealt by the Labour Court. We cannot have Constitutional issue relating to employment or recruitment dealt by the High court and thereafter refer the other issues in the same dispute to the Labour Court.

In the case of **Spedag International Limited (Supra)**, Justice Erick Ogola transferred the suit to the Employment and labour relations Court. Similarly, in the case of **ABDUL MAJID MOHAMED ADAN V NIMISH SHA T/A FLORA PRINTERS [2017] eKLR**, Justice P.J Otieno stated:-

“...However, what does the expression “down tools” mean “To me the learned Judge, R.O Kwach, to be precise, meant and can only be taken to have meant that once jurisdiction is established to be lacking, the court cannot purport to deal with the matter further. It cannot not be taken to mean that I just down my tools, the pen, and fold the file and infinitum. That

could result in a large numbers of files that are just folded, never to touched because the court has downed its tools ...Being bound and guided by those very wise and well-founded words of the court of Appeal, I chose prudence over imprudence and order that, the appeal be and is hereby transferred to the Environment and Land Court, Mombasa for hearing and determination...”

The Petition was filed the same date the letter was sent to the 5th respondent. In essence therefore the Petition is against the appointment or employment of the 5th respondent as the Heilu chief. Under Section 12(1) of the Industrial Court Act, 2011, matters relating to employment falls under the jurisdiction of the Employment and Labour Court. Although the dispute involves two parties who were contesting the position of a chief, the employer, namely the Ministry interior and coordination of national Government has been enjoined as the 1st respondent. The petition intends to stop the employer from recruiting the 5th respondent. I believe the 1st petitioner would like to be declared as the bona fide chief of Heilu location having emerged as the first preference. All that boils down to employment which is a preserve of the Employment and Labour Court as provided under Article 162 of the Constitution. The end result is as provided under Article 165(5) whereby the High Court lacks jurisdiction in respect of matters reserved for the exclusive jurisdiction of the Supreme Court as well as those falling written the jurisdiction of the Courts under Article 162(2). I do find and hold that this court lacks jurisdiction to hear and determine this matter. The objection is not a technicality. There is no need to wait until the 5th respondent to start working as a chief for the Court to find that the dispute has now matured and fall under the Labour and Employment Court.

The next issue is whether the petition should be struck out or it should be referred to the Employment and Labour Court for hearing and determination. According to Mr. Nyandieka, once the Court lacks jurisdiction, it should down its tools and struck out the matter. It appears that according to Mr. Nyandieka lack of jurisdiction comes with it the incapacity to refer the same matter to another Court. On his part, Mr. Gikonyo was of the view that where the Court finds that it lacks jurisdiction, it can transfer the matter to the Court with jurisdiction.

The two contrary views emanate from two different findings of the Court of Appeal. Whereas in the case of **Equity Bank Ltd –V- Bruce Mutie T/A Diani Tour & Travel (Supra)** the Court of Appeal (Asike Makhandia, W. Ouko and K. M’Inoti) held that the Court without jurisdiction cannot transfer a matter to another Court, the same Court of Appeal in the case of **Daniel N. Mugendi –V- Kenyatta University & 3 Others (2013) eKLR** held as follows:-

“Believing as we do that approach taken by Majanja, J. (supra) is the correct one, and in endeavouring to meet the ends of justice untrammelled by procedural technicalities, we set aside the order striking out the appellant’s petition and direct that the High Court do transfer it to the Industrial Court which also has jurisdiction and authority to consider the claims of breach of fundamental rights as pertain to industrial and labour relations matters. It is only meet and proper that the Industrial Court do exclusively entertain those matters in that context and with regard to article 165(5)(b). And in order to do justice, in the event where the High Court, the Industrial Court or the Environment & Labour Court comes across a matter that ought to be litigated in any other courts, it should be prudent to have the matter transferred to that Court for hearing and determination. These three courts with similar/equal status should in the spirit of harmonization, effect the necessary transfers among themselves until such time as the citizenry is well-acquainted with the appropriate forum for each kind of claim. However, parties should not file “mixed grill” causes in any court they fancy. This will only delay dispensation of justice.

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 matter alongside claim of fundamental rights ancillary and incident to those matters, the same should go for the environment and Land Courts when dealing with dispute involving environment and land with any claims of breaches of fundamental right associated with the tow subjects.” (emphasis added)

In my view lack of jurisdiction is limited to the handling of the dispute at hand substantially. Transfer or referring cases to the Court with the proper jurisdiction is an administrative matter which is aimed at facilitating the speedy disposition of the case at hand. It has nothing to do with jurisdiction. All what the Court will be saying is that **“you have come to the wrong forum, please take your file to the correct forum”**. I don’t think such an order needs jurisdiction or can be held as null and void. This is my honest view. Further, I do opine that the contrary view will be running against the provisions of Article 159 of the Constitution in relation to procedural technicalities. Justice should not be made expensive to litigants. Striking out the matter would lead to the filing of a fresh suit before the Court with proper jurisdiction. This entails the typing of fresh pleadings, filing the same in Court and paying Court fees afresh. Thereafter service has to be effected upon all the respondents and interested parties. On the other hand, when the matter is referred to the proper Court, the proceedings will start afresh and the file will be allocated a fresh Court file number. I believe such process saves litigants time and money and is in line with the spirit of the Constitution.

The upshot is that the preliminary objection in relation to the jurisdiction is merited and is hereby allowed. The petitioners have a constitutional right to complain against the recruitment of the 5th respondent as the Heilu location chief. The 1st petitioner has a legitimate expectation that having emerged as the first choice for the position of the Heilu location chief, the appointing authority would have simply appointed him. All what this Court is saying is that the complaint is legitimate but has been filed before the wrong Court. It will be improper for this Court to determine the dispute yet the Constitution has demarcated Jurisdiction among the Superior Courts. An action on part of this Court in relation to this matter amounts to nothing.

Having found that this Court Lacks Jurisdiction, I do hereby set aside the interim orders granted by this Court. The interim orders are hereby vacated. This matter shall be transferred to the Employment and Labour Court at Nyeri for hearing and final determination. Cost shall follow the outcome of the main course.

Dated, Signed and Delivered at Marsabit this 21st day of September, 2020

S. CHITEMBWE

JUDGE