



**Njenga v Judicial Service Commission & another; Law Society of Kenya  
(Interested Party) (Petition 103 of 2019) [2019] KEHC 10901 (KLR)  
(Constitutional and Human Rights) (29 March 2019) (Ruling)**

*Adrian Kamotho Njenga v Judicial Service Commission &  
another; Law Society of Kenya (Interested Party) [2019] eKLR*

Neutral citation: [2019] KEHC 10901 (KLR)

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

**PETITION 103 OF 2019**

**WK KORIR, J**

**MARCH 29, 2019**

**BETWEEN**

**ADRIAN KAMOTHO NJENGA ..... PETITIONER**

**AND**

**JUDICIAL SERVICE COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**HONOURABLE ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**LAW SOCIETY OF KENYA ..... INTERESTED PARTY**

**RULING**

[1<sup>st</sup> Respondent’s Notice of Preliminary Objection dated 25<sup>th</sup> March, 2019]

1. The 1<sup>st</sup> Respondent, the Judicial Service Commission of Kenya, has filed a Notice of Preliminary Objection dated 25<sup>th</sup> March, 2019 which states as follows:

“ Take Noticethat the Respondent shall object to the hearing of this Application and Petition on the following grounds:

- i. This Honourable Court lacks jurisdiction to hear and determine the instant Petition as the Petitioner primarily seeks an Order of prohibition, prohibiting the 1<sup>st</sup> Respondent from carrying on the process of short listing, scheduling



of interviews, interviewing, receiving public views, nomination and making recommendations to the President for the appointment of any person as a Judge of a Superior Court which in accordance with Article 162 of the *Constitution of Kenya*, section 12 of the *Employment and Labour Relations Court Act* and Rule 7 of the *Employment and Labour Relations Court (Procedure) Rules* 2016 is a subject which is a preserve of the Employment and Labour Relations Court.

ii. The Employment and Labour Relations Court is a specialized Court which is autonomous and has the exclusive jurisdiction to determine matters that touch on the subject of ‘employment’ including Constitutional Petitions.”

2. The Petitioner, Adrian Kamotho Njenga, strongly opposed the Preliminary Objection. The 2<sup>nd</sup> Respondent, the Attorney General, did not take any stand on the same.

3. The law on jurisdiction was stated by the Supreme Court in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & others* [2012]eKLR; Supreme Court of Kenya Application No 2 of 2011. The Court held that:

“(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 to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel 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. This Court dealt with the question of jurisdiction extensively in, *In the Matter of the Interim Independent Electoral Commission (Applicant)*, Constitutional Application Number 2 of 2011. 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”.

4. There is no dispute that the jurisdiction of this Court to hear and determine disputes relating to employment and labour relations is expressly ousted by Article 165(5)(b) of the *Constitution*. The only question therefore is whether the dispute before this Court concerns employment and labour relations. Section 4 of the *Employment and Labour Relations Court Act*, 2011 (E&LRC Act), as amended in 2014, harkens to the command of Article 162(2)(a) of the *Constitution* by establishing the Employment and Labour Relations Court (E&LR Court) to hear and determine disputes relating to employment and labour relations.

5. Section 12(1) of the E&LRC Act confers jurisdiction on the E&LR Court as follows:

“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.”

6. There was a spirited argument by the Petitioner that the E&LR Court is only mandated to deal with matters in which an employment contract has been created. I did ask parties to avail authorities on this issue. A perusal of the authorities supplied to the Court are all in agreement that the recruitment process falls within the jurisdiction of the E&LR Court-see Trusted Society of Human Rights Alliance v Nakuru Water and Sanitation Services Company & another [2013]eKLR; Kenya National Parents Association v Cabinet Secretary, Ministry of Education Science & Technology & Another [2015] eKLR; Philemon Mboye Kachila v County Public Service Board of Taita Taveta & another [2016] eKLR; and Wilfred Murithi Kirima & others v Meru County Public Service Board [2018]eKLR.

7. For example in Trusted Society of Human Rights Alliance v Nakuru Water and Sanitation Services Company & another [2013] eKLR, Byram Ongaya, J emphatically stated that:

“As relates to jurisdiction by subject matter, Article 162(2)(a) of the Constitution and section 12(1) of the Act are elaborate that jurisdiction attaches to this court with respect to disputes relating to employment and labour relations. In the instant case, the dispute is about a recruitment process undertaken by the respondent. The court finds that recruitment is a proper element of employment and therefore the court has jurisdiction in view of that subject matter”

8. For avoidance of doubt it must also be stated that the Petitioner cannot claim that this Court has jurisdiction because this is a constitutional petition. Arguments of such kind were put to rest by the Court of Appeal in Daniel N. Mugendi v Kenyatta University & 2 others [2013] eKLR when it held that:

“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.”



9. The question that remains to be answered is whether the instant petition deals with matters reserved for the E&LR Court. Counsel for the 1<sup>st</sup> Respondent pointed to certain paragraphs of the certificate of urgency and the prayers in the petition in persuading this Court that this matter is one that squarely falls within the jurisdiction of the E&LR Court.
10. Indeed the prayers in the petition and the notice of motion filed by the Petitioner are all geared towards stopping the process that the 1<sup>st</sup> Respondent has put in motion towards the recruitment of judges for some of the superior courts of Kenya. Nevertheless, orders sought in pleadings cannot be read in isolation. The plaint or petition must be read in its entirety in order to understand what a party seeks from the court. A decision as to whether a particular court has jurisdiction cannot be reached by simply looking at the prayers in the pleadings. The matter before the court must be interrogated in detail before the question of jurisdiction can be determined.
11. A perusal of the Petitioner's papers filed in court will instantly show that the Petitioner is questioning the legal capacity of the 1<sup>st</sup> Respondent to discharge its mandate. The orders the Petitioner seek, if granted, although directed at the recruitment of judges will not only bring to a halt recruitment of other Judiciary employees but may also disrupt all the activities of the 1<sup>st</sup> Respondent. This is not a matter limited to the employment of judges. It questions the legality of the 1<sup>st</sup> Respondent. That is a pure constitutional question.
12. Although the prayers in the petition before this court are directed at stopping the 1<sup>st</sup> Respondent from recruiting judges for some of the superior courts, the predominant theme is the question as to whether the 1<sup>st</sup> Respondent as currently constituted has the legal capacity to discharge its mandate. That is a question reserved for the determination of this Court. It is my considered view that the Petitioner's Petition though clothed as a challenge to the recruitment of judges actually questions the capacity of the 1<sup>st</sup> Respondent to discharge its constitutional and statutory mandate.
13. It is possible that the E&LR Court could have as well heard this matter if the same had initially been filed before that Court. However, since the matter has been filed before this Court and it is evident that the predominant issue is the composition of the 1<sup>st</sup> Respondent, I decline the request by the 1<sup>st</sup> Respondent to have this matter struck out or transferred to the E&LR Court.
14. The end result is that the 1<sup>st</sup> Respondent's Preliminary Objection dated 25<sup>th</sup> March, 2019 fails and the same is dismissed. Costs shall abide the outcome of the petition.

**DATE, SIGNED AND DELIVERED AT NAIROBI THIS 29<sup>TH</sup> DAY OF MARCH, 2019**

**W. KORIR,**

**JUDGE OF THE HIGH COURT**

