



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: Odunga, J)

CONSTITUTIONAL PETITION NO.2 OF 2019

IN THE MATTER OF: ARTICLES 22 & 258 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 1, 10,
27, 47, 73 & 232 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

AND

**IN THE MATTER OF PROVISIONS OF THE PHARMACY AND POISONS
ACT AND THE PUBLIC SERVICE COMMISSION ACT**

BETWEEN

WAMBUA MAITHYA.....PETITIONER

=VERSUS=

PHARMACY AND POISONS BOARD.....RESPONDENT

AND

PHARMACEUTICAL SOCIETY OF KENYA.....1ST INTERESTED PARTY

DR. PIUS WANJALA.....2ND INTERESTED PARTY

RULING

1. This petition, according to the petitioner was triggered by the decision of the Respondent herein on 25th January, 2019 when it advertised in the Daily Newspaper the vacancy in the position of the Registrar -Chief Executive Officer pursuant to section 5(1) of the **Pharmacy and Poisons Act** which provides for competitive recruitment from the open Labour Market of the most suitable and merited person.

2. The challenge taken to that decision was based on the fact that the petitioner deemed the said action as unfair and or unlawful discrimination by requiring that Applicants to the advertised position should have served for at least 5 years in Senior Management or leadership position at the Board or in a similar organization as that requirement contravenes clear provision at section 5(1) of the **Pharmacy and Poisons Act** which provides for non-discriminative competitive recruitment from the open Labour Market to obtain the best candidate.

3. According to the Petitioner, the decision to narrow down the potential applicants to only those in Senior Management or leadership position at the Pharmacy and Poisons Board (who are about 5) considering the 15 years' requirement as well and since there is no similar organization with Pharmacists, the same is couched to lock out the more than 2000 Pharmacists with suitable experience and qualifications

and thus a violation of Articles 10, 27 and 232 of the Constitution.

4. Based on legal advice, the petitioner contended that the decision is unreasonable on the part of the respondents since, whereas section 5(1) of the **Pharmacy and Poisons Act** envisages recruitment from open labour market; it is manifestly unreasonable on the part of the Respondent to require Applicants from the private sector to possess Strategic Leadership Development Programme and which programme is offered to existing Public Servants by Government School and thus by putting this as a must meet condition, the Respondent aims to unreasonably limit the advertisement to Public Servants.

5. The Petitioner further contended that it is unreasonable and abuse of discretion on the part of the Respondent to require Corporate Governance Certification as a must meet requirement since the said certification is largely issued by State Corporation Advisory Committee upon attendance of three-day workshop as an induction training for newly appointed Board of Directors of State Corporations and its Senior Management. However, the same is not a statutory requirement and in any case, once the candidate is appointed, the Respondent is obligated to organize for such induction courses.

6. The petitioner contended that it is violation of the principles of Public service under Article 232 and 10 of the constitution and abuse of discretion by the Respondents to deliberately make an opaque and or vague advert to confuse the potential applicants by importation of such requirements as “hold relevant Master's degree from a recognized University” and “Similar Organization”.

7. The petitioner further contended that the advert by the respondent is Illegal and since, while Section B.4 (1) of Public Service Commission Code of Regulations (Human Resource Policies and Procedures Manual for the Public Service May, 2016) provides that Ministries/State Departments will advertise all vacant posts in a manner that reaches the widest pool of potential applicants and allow for at least twenty one (21) days before closing the advert; the impugned advertisement allows for only 13 days; from 25th January, 2019 being the date of the advertisement and which closes on the 7th February, 2019.

8. It was the petitioner's case that there is clear Conflict of interest on the part of the Respondent contrary to articles 10 and 232 of the constitution and further violation of the **Public Service Commission Act**. To the Petitioner, since the Chairman of the Pharmacy and Poisons Board is not an executive Chairman hence does not have a Secretary and or functional office at the Pharmacy and Poisons Board, the Applications will be received by the acting Registrar-Chief Executive Officer who is an interested party being the Chief Applicant.

9. It was averred that the failure by the Respondent to disclose the applicable remuneration including salary, allowances and other benefits in contravention of section 37 (4) (e) of the **Public Service Commission Act** was calculated at muting the interest of potential Applicants.

10. The petitioner therefore sought the following orders:

1) A declaration that the Respondent's must meet conditions such that an applicant must have served for at least 5 years in Senior Management or leadership position at the Board or in a similar organization, possess Strategic Leadership Development Programme and others calculated at locking out potential Applicants especially from Private Practice and other public Service Sector as contained in the Respondent's advertisement in the daily Newspaper of 25th January, 2019 violates Articles 10, 27 and 232 of the constitution and the same is unconstitutional, null and void.

2) An order of *certiorari* to remove to this Honourable Court and quash the Respondent's decision to exclude all potential Applicants Except about 5 Pharmacists in Senior Management and leadership of the Pharmacy and Poisons Board itself for the vacant position of Registrar/CEO of the Pharmacy and Poisons Board contained in the daily Newspapers advert of 25th January, 2019.

3) An order prohibiting and or restraining the Respondent whether by itself, its officers, agents and/or servants or employees from putting up an unfair/unlawful discriminative advertisement for the vacancy position of the Registrar or any other position of the Pharmacy and Poisons Board.

4) An order that the costs consequent upon this Petition be borne by the Respondents in any event.

5) All and any such other Orders as this Honourable Court shall deem just.

11. The Respondent has however taken issue with this court's jurisdiction to hear and determine this petition and filed a Preliminary Objection dated 18th February, 2019 on the 19th February, 2019. It is that objection that is the subject of this ruling.

12. According to the Respondent, on 25th January, 2019 the Pharmacy and Poisons Board hereinafter the 'Board' advertised in the Daily Newspapers the vacancy in the position of the Registrar/Chief Executive Officer of the Board who shall among other things be responsible to the Board for the day to day management of the organization. The aforementioned advertisement was three pronged drawing specific attention to the duties and responsibilities of the Chief Executive Officer, key qualification and competencies of the office holder and lastly the method of application. According to the Respondent, the second part of the advertisement which highlights the key qualification and competencies of the Registrar/Chief Executive Officer is the subject of this Petition as the Petitioner contends that the applicant must meet qualifications laid down by the Board which qualifications have discriminately excluded over 2000 potential applicants and only admitted pharmacists in Senior Management and Leadership of the Board.

13. It was the Respondent's case that the Petition touch on the subject of 'employment' which in its respectful view is a matter preserved for the Employment and Labour Relations Court in accordance with Articles 162(2)(a) of the Constitution, section 12 of the **Employment and Labour Relations Court Act** and Rule 7 of the **Employment and Labour Relations Court (Procedure) Rules (2016)**.

14. Section 12 of the *Employment and Labour Relations Court Act* provides 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 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.

15. In the Respondent's view, the Petitioner seeks to challenge the criteria established by the Pharmacy and Poisons Board for the recruitment and appointment of Registrar/ Chief Executive Office of the Pharmacy and Poisons Board, 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.

16. According to the Respondent, jurisdiction is the power of a court over the nature of a case and the type of remedy demanded. Generally, there are two categories of jurisdiction; personal jurisdiction and subject matter jurisdiction. In this respect reference was made to the case of **Okiya Omtatah Okiiti & Another vs. Attorney General & 2 Others [2015] eKLR.**

17. Article 162 (2)(a) of the Constitution, it was submitted, empowers Parliament to establish Courts with the status of the High Court to hear and determine disputes relating to employment and labour relations while section 12 of the *Employment and Labour Relations Court Act* expounds on the jurisdiction of the Court. The philosophy behind the quoted provisions above, according to the Respondent, is that specialized Courts would deal with the subject of 'employment' and since the Petitioner herein seeks to challenge the criteria established by the Pharmacy and Poisons Board for the recruitment of Registrar/Chief Executive Officer, this is a question that should be addressed by the Employment and Labour Relations Court because it seeks to challenge a criteria that would be used by the PPB to hire the CEO.

18. The Respondent cited rule 7 of the *Employment and Labour Relations Court (Procedure) Rules (2016)* which provides that:

7(1) A party who wishes to institute a petition shall do so in accordance with the Constitution of Kenya (Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution) Practice and Procedure Rule.

19. Based on the foregoing, it was submitted that the High Court does not have jurisdiction to determine matters that are a preserve of the Employment and Labour Relations Court and reliance was placed on the case of **Malindi Law Society vs. Attorney General & 4 Others [2016] eKLR, Gcaba vs. Minister for Safety and Security and Others CCT 64/088 [2009] ZACC 26** cited with approval in **Karisa Chengo & Others vs. Republic (2015) eKLR** and it was submitted that the journey towards establishment of specialized Courts in Kenya was as a result of a lengthy law making process as observed in the *Karisa Chengo* case. The drafters of the Constitution purposed to have a specialized forum for the resolution of employment disputes and not only did they provide this in the Constitution but also in statute and in the rules governing the said court. It is also important to note that the Court is of equal status to the High Court meaning that the two have to operate at par where this Court cannot be directed or supervised by the High Court in the conduct of its affairs. Therefore, questions relating to fundamental rights including labour rights as provided for under Article 41 of the Constitution are thus within the purview of the jurisdiction of the ELRC. In this respect the Respondent referred to the decision by **Majanja J**, in the case of **United States International University (USIU) vs. Attorney General & 2 Others [2012] eKLR, Prof Daniel N. Mugendi vs. Kenyatta University and 3 others [2013] eKLR, and Judicial Service Commission v Gladys Boss Shollei & Another [2014] eKLR.**

20. In view of the foregoing, this court was urged to be persuaded by the pronouncements above, in arriving at a finding that any claims by the Petitioners in respect to an alleged breach of their fundamental Rights by the Respondent can be determined by the ELRC. Those claims arise out of the employment relationship that is the gravamen of the Petition before the Court. In so submitting the Respondent relied on **Owners of Motor Vessel "Lilian S" vs. Caltex Kenya Ltd. 1989 1KLR,** for the proposition that the Court lacks jurisdiction, and should strike out the Petition with costs.

21. The preliminary objection was however opposed by the petitioner. According to the petitioner, the Petitioner filed in this honourable court an Application/Petition on the 7th February 2019 and the substratum of the Petition is that the Respondent's impugned advertisement

for competitive recruitment and appointment of a candidate to the vacant position of the Registrar/ CEO of the Pharmacy and Poisons Board was craftily designed to yield predetermined candidate, the current acting Registrar/CEO, by arbitrarily putting pre-qualification requirements (must meet conditions) that locked out all other potential Applicants/competitors and instead favoured the current acting Registrar/CEO: And which pre-qualification requirements are in express contravention of relevant provisions of the **Pharmacy and Poisons Act, Public Service Commission Act** and Articles 2, 3, 10, 27, 73 and 232 of the Constitution.

22. Consequently, the Petitioner (just like potential Applicants who were locked out) who does not have any employment and labour relationship with the Respondent, petitioned this honourable court under Articles 22 and 258 of the constitution on his own behalf and that of the locked out potential Applicants seeking for appropriate reliefs. In the Petitioner's view, Article 41 of the Constitution is absolutely not applicable to the petition.

23. According to the petitioner, the scope of the "exclusive jurisdiction" bestowed upon the Employment and Labour Relations Court has been well articulated and grounded in various immutable and binding judicial precedents. The Employment and Labour Relations Court is vested with jurisdiction over disputes which relate to employment and labour as between employees, employers, trade unions and employer organizations or federations. The Employment and Labour Relations Court also has jurisdiction to interpret the Constitution and enforce matters relating to breach of fundamental rights and freedoms in particular under Article 41 of the constitution in matters arising from disputes falling within the provisions of section 12(1) of the **Employment and Labour Relations Court Act** alongside claims of fundamental rights ancillary and incident to those matters. In this regard the petition relied on the decision of the Supreme Court in **Republic vs. Karisa Chengo & 2 Others [2017] eKLR**, **Kenya Universities Staff Union vs. University Council of Masinde Muliro University of Science and Technology & 2 Others [2018] eKLR** and **Patrick Musimba vs. National Land Commission & 4 Others [2015] eKLR**.

24. According to the petitioner, the exclusive jurisdiction of Employment and Labour Relations Court is drawn from Article 162 (2) & (3) of the Constitution of Kenya and particularized at section 12 of the **Employment and Labour Relations Court Act** and Article 41 of the Constitution. As regards the exclusive jurisdiction doctrine, the petitioner relied on **Nick Githinji Ndichu vs. Clerk, Kiambu County Assembly & Another [2014] eKLR** and it was submitted that the Constitution did not define the extent to which Employment and Labour Relations Court, as a Court having same status of the High Court should deal with matters that come before it which do not wholly relate to Employment and Labour Relations. However, under **Article 159 (2) e** both the High Court and the Employment and Labour Relations Court are enjoined to protect and promote the Principles of the Constitution and the petitioner relied on **Kenya County Government Workers' Union v National Social Security Fund Board of Trustees & 5 others [2015] eKLR**, **Patrick Musimba vs. National Land Commission & 4 others [2015] eKLR**, **Kenya Universities Staff Union vs. University Council of Masinde Muliro University of Science and Technology & 2 others [2018] eKLR**, **Leisure Lodges Ltd vs. Commissioner of Lands and 767 Others [2016] eKLR**.

25. According to the petitioner, the High Court has variously dealt with the question or subject of jurisdiction of the Employment and Labour Relations Court vis-a-vis the High Court through many Preliminary Objections that have been filed before it over time. The decisions that have been arrived at by the High Court in these cases are based on the foregoing case law, relevant statutory provisions and the constitution. In particular, the petitioner relied on **Joy Brenda Masinde vs. Law Society of Kenya & another [2015] eKLR**, **Philip Wanyonyi Wekesa & 2 Others vs. Clerk to County Assembly of Bungoma & 4 Others [2018] eKLR**, **Nick Githinji Ndichu vs. Clerk Kiambu County Assembly and Another [2014] eKLR**, **Stephen Sogoni Chune vs. County Government of Bungoma & Another [2018] eKLR**, and **Kenya Universities Staff Union vs. University Council of Masinde Muliro University of Science and Technology & 2 Others [2018] eKLR**.

26. Based on the foregoing, the petitioner concluded that it is quite clear that no employment relationship exists between the Petitioners/locked out potential Applicants and the respondent and that there is no issue in the instant Petition in respect of violation of human rights and fundamental freedoms falling within Article 41 of the Constitution. In any case, the Respondent has not demonstrated that there exists an oral or written contract of service or that the issue is a dispute that falls within the provision of Section 12(1) of the ELRC Act. Though the Advertisement is a step towards recruitment for creation of an employer – employee relationship, it is not envisaged in Section 12 of the Act to warrant placing this petition under the jurisdiction of the Employment and Labour Relations Court.

27. In the petitioner's view, the matter or question in issue in the instant petition is the legality of the decision by the respondent to introduce a qualification for the position of Registrar/CEO which is not provided by Statute being Section 5(1) of the **Law Pharmacy and Poisons Act** and section 36 & 37 of the **Public Service Commission Act**. The matter for determination is not a recruitment issue; rather it is a purely constitutional issue which this court has jurisdiction to determine by virtue of Article 165(3) of the Constitution. The question is whether the respondent, a statutory body in any way exceeded its mandate and in so doing infringed upon the rights of the petitioner and other potential Applicants which is not a labour dispute. Therefore, it was submitted that these are questions not for the Employment and Labour Relations Court but rather are for determination by the High Court.

28. It was further submitted that the issue in dispute applies to Articles 2, 3, 10, 22, 23, 73, 232 and 238 of the Constitution which have got nothing to do with the Employment and Labour Relations Court.

29. The petitioner however contended that even if the court was to find that the matter raised fall both within concurrent and or coordinate jurisdiction of the High Court and Employment and Labour Relations Court, it would be a travesty of justice for the High Court to decline jurisdiction since it would mean that the Petitioner would be forced to institute two sets of legal proceedings which eventuality would do violence to the provisions of Article 159 of the Constitution. It was however submitted that in case the court strains to find concurrence jurisdiction, it is in the interest of both parties, and the ends of justice as premeditated by the court on the basis of the dominating facts that makes it more appropriate for this court to determine the instant Petition as the Respondent has not demonstrated that it will suffer any prejudice considering that due to the need to have the Petition expeditiously disposed of it would be more appropriate to determine the Petition before this court.

30. According to the petitioner, the Employment and Labour Relations Court is vested with jurisdiction over disputes between employees, employers, trade unions and employer organizations or federations; and has also jurisdiction to interpret the Constitution and enforce matters relating to breach of fundamental rights ancillary and incidental to those matters falling within the provisions of Section 12(1) of the **Employment and Labour Relations Court Act** and Article 41 of the Constitution. However, the facts of the instant petition put it outside the

bounds of jurisdiction of the said court.

31. It was therefore argued that the Preliminary Objection as couched by the Respondent should fail. The Respondent's position was supported by the interested party who reiterated the Respondent's submissions.

Determination

32. I have considered the issues raised herein.

33. The issue for determination before me in this ruling is whether the issues the subject of this petition are issues that fall within the jurisdiction of the Employment and Labour Relations Court.

34. It is trite where a preliminary objection is raised that goes to the jurisdiction such objection ought to be determined at the earliest opportunity. This was the position in **Owners and Masters of the Motor Vessel "Joey" vs. Owners and Masters of the Motor Tugs "Barbara" and "Steve B" [2008] 1 EA 367** where the Court of Appeal expressed itself as follows:

"The question of jurisdiction is a threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. 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 and without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined. There is no reason why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado."

35. Article 162 of the Constitution envisaged Parliament establishing a Court to hear and determine disputes relating to employment and labour relations. The Constitution in Article 162(3) goes further to provide that though the Employment and Labour Relations Court is a Superior Court just like the High Court, it is Parliament that confers the jurisdiction on the Employment and Labour Relations Court, as opposed to the High Court whose jurisdiction is expressly provided for in the Constitution. I must however hasten to emphasise that the Employment and Labour Relations Court is not an inferior court to the High Court since the two enjoy the same status but with different source of jurisdiction.

36. Pursuant to the said Article, Parliament enacted the ***Employment and Labour Relations Court Act*** and the jurisdiction of the Court is set out in section 12 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.***

37. It is therefore clear that Parliament having in its wisdom expressly provided for the jurisdiction of the Employment and Labour Relations Court, that Court can only exercise its jurisdiction as provided for by the Statute conferring jurisdiction upon it.

38. The High Court has variously dealt with the powers of the Employment and Labour Relations Court (the ELRC). In **Cabinet Secretary, Ministry of Mining & Another vs. National Environment Management Authority & 3 Others Ex-Parte Cortex Mining Kenya**

Limited, JR Misc. Appl. No. 298 of 2013 this Court expressed itself as follows:

“The High Court’s power and authority is derived from the Constitution and where the Constitution limits the jurisdiction of the High Court, that limit is legal and proper. Therefore it is my view that such High Court Divisions cannot be equated to the Courts established pursuant to the provisions of Article 162(2) of the Constitution. In my view by specifically creating the Courts with the status of the High Court to deal with employment and labour relations disputes on one hand and environment and land disputes on the other, the people of Kenya appreciated the importance of these specialised Courts.”

39. In United States International University (USIU) vs. Attorney General [2012] eKLR it was held that:

“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. 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 and recurrence of the situation obtaining before the establishment of the current Industrial Court.”

40. This was the position adopted by the Court of Appeal’s *dicta* in Daniel N. Mugendi vs. Kenyatta University & 3 Others CACA No. 6/2012[2013] eKLR, where the said Court expressed itself as hereunder:

“...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 and land court, when dealing with disputes involving environment and land with any claims of breaches of fundamental rights associated with the two subjects...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 fundamentals rights associated with two subjects”.

41. In Judicial Service Commission vs. Gladys Boss Shollei & Another [2014] eKLR, the Court of Appeal (Okwengu, JA) held at paragraphs 39 to 44 that:

“[39] Under *Section 12(3)*, the Industrial Court has powers to make interim preservative injunctive orders, prohibitory orders, orders of specific performance, declaratory orders, award of compensation or damages, an order for reinstatement, and any other relief as the court may deem appropriate. As already observed at paragraph 3 & 4 (*supra*), the reliefs sought by the respondent in her petition were orders of Judicial Review and Declaratory Orders in regard to violation of her constitutional rights. To that extent, the application was a constitutional reference. Nonetheless, the violations alleged by the respondent arose from a dispute in the employment relationship between the respondent and the appellant. Indeed, it was this acknowledgement that informed the consensus before the High Court to have the matter transferred to the Industrial Court for determination.

[40] *Article 23(1) & Article 165(3)(b)* of the Constitution grants the High Court powers to hear and determine questions involving redress of violations or infringement or threatened violations of fundamental rights and freedoms in the Bill of Rights. However, *Article 23(2)* provides for legislation giving original jurisdiction to subordinate courts to hear and determine disputes for enforcement of fundamental rights and freedom. In addition, *Article 23(3)* does not limit jurisdiction in the granting of relief in proceedings for enforcement of fundamental rights to the High Court only, but empowers “a court” to grant appropriate relief including orders of Judicial Review in the enforcement of rights and fundamental freedoms under the Bill of Rights. Also of note is *Article 20(3)* that places an obligation on “any court” in applying a provision of the Bill of Rights to develop the law and to adopt the interpretation that most favours the enforcement of a right or fundamental freedom. These provisions confirm that the Constitution does not give exclusive jurisdiction in the enforcement of the Bill of Rights to the High Court, but anticipates the enforcement of the Bill of Rights by other Courts.

[41] Under *Article 162(2)(a)*, the Constitution has provided for special Courts with the “status” of the High Court to determine employment and labour relations disputes. The fact that the Industrial Court has been given the “status” of the High Court enhances the power and discretion of the Court in granting relief. In my considered view, the general power provided to the Industrial Court under *Section 12(3)(viii)* of the Industrial Court Act to grant relief as may be appropriate, read together with *Article 23(3)*, empowers the Industrial Court to grant the kind of reliefs that the respondent sought in her petition.

[42] In my view to hold that the Industrial Court has no jurisdiction to hear and determine a petition seeking redress of violations of fundamental rights arising from an employment relationship would defeat the intention and spirit of the Constitution in establishing special courts to deal with employment and labour disputes. Indeed, such a stance would not only be inimical to justice, but would expressly contravene *Article 20* of the Constitution that provides that the Bill of Rights “applies to all law and binds all state organs and persons”, and enjoins a court to promote the spirit, purport and objects of the Bill of rights and adopt an interpretation that most favours the enforcement of a right or fundamental freedom.

[43] From the respondent’s petition, it was evident that although the dispute between the appellant and the respondent was anchored on the employment labour relationship, the respondent’s claim arose from the alleged violation of her fundamental

rights in the disciplinary process.

[44] The above pleading is consistent with the prayers for orders of Judicial Review and declaratory orders that were sought by the respondent in her petition. In this regard, the respondent's position is distinguishable from that in *Prof. Daniel M. Mugendi v Kenyatta University & Others* (supra) where although the claim filed in the Constitutional Court sought to enforce fundamental rights, only breaches of the contract of employment were set out in the petition and no concise or specific allegations of violations of rights under the Constitution were pleaded. I would nonetheless reiterate what this court (differently constituted) stated in the Mugendi case whilst setting aside the High Court order striking out that petition for want of jurisdiction and directing that the petition be transferred to the Industrial Court for determination, that the Industrial Court can determine Industrial and labour relation matters alongside claims of fundamental rights ancillary and incidental to those matters."

42. Article 23(3) of the Constitution provides that:

In any proceedings brought under Article 22, a court may grant appropriate relief, including—

(a) a declaration of rights;

(b) an injunction;

(c) a conservatory order;

(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;

(e) an order for compensation; and

(f) an order of judicial review.

43. The question that arises is which courts have the powers to issue reliefs under Article 23? Article 22(2) of the Constitution provides that:

Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

44. In my view a court that has jurisdiction to deal with Article 22, whether it is the High Court or any other Court must necessarily have the powers to issue the reliefs under Article 23(3) thereof. That is my understanding of the decision of **Judicial Service Commission vs. Gladys Boss Shollei & Another** (supra) in which **Kiage, JA** held that:

"It is clear from the foregoing that far from limiting this Bill of Rights- enforcement jurisdiction to the High Court or to superior courts, the Constitution expects that such jurisdiction be found in subordinate courts as well. It matters not that the jurisdiction-donating legislation is yet to be enacted. It is enough for the point to be made that the Constitution does not commit its application and enforcement to a narrow and rarefied forum. It would therefore be a misdirection for argument to be made that the superior courts contemplated by Article 162 must consider the Constitution and its application and interpretation, even when touching on matters fundamentally within the special competence of those courts, as anathema. The law, as I understand it, is that whereas those courts may not embark on a generalized handling of Bill of Rights disputes, they would definitely be entitled and are jurisdictionally empowered to address such constitutional issues as arise directly and in relation to the matters within their jurisdictional competence and specialization... I am firmly of the view that this remains the correct position, for it is not uncommon for allegations of violation of constitutional rights to be made out within the context of and related to the employment relationship. It would be absurd and quite inimical to the self-evident duty of efficient, timely and cost-effective delivery of justice were a complaining party to be required to deal with the contractual aspect proper before the Industrial Court and then file separate proceedings at the High Court with regard to the violation of rights."

45. Therefore, in **United States International University –v- Attorney General** (supra), **Daniel Mugendi vs. Kenyatta University** (supra) and **Judicial Service Commission vs. Gladys Boss Shollei & Another** (supra) the courts returned the verdict that the High Court could not deal with and determine matters where a purely labour and industrial dispute also had constitutional issues arising.

46. Similarly, pursuant to Article 23(3) of the Constitution as read with section 12(3) of the **Employment and Labour Relations Court Act**, it is my view that the Employment and Labour Relations Court can grant reliefs in a constitutional petition. However, the jurisdiction to do so is confined to matters falling within Article 41 of the Constitution as read with section 12 of the **Employment and Labour Relations Court Act**. The Court cannot therefore purport entertain petitions outside the aforesaid matters as its jurisdiction is limited only in so far as employment matters and matters related thereto are concerned. In my view the matters which fall within the ambit of Article 162(2) of the Constitution must be matters within the exclusive jurisdiction of the said specialised Courts. However, as stated above, the Employment and Labour Relations Court may not embark on a generalized handling of petitions but is entitled to and is jurisdictionally empowered to address such matters if they arise directly and in relation to the matters within the court's jurisdictional competence and specialization. Accordingly, where the matters raised fall both within their jurisdiction and outside, it would be a travesty of justice for the High Court to decline jurisdiction since it would mean that in that event a litigant would be forced to institute two sets of legal proceedings. Such eventuality would do violence to the provisions of Article 159 of the Constitution. As was held in Nairobi High Court Petition No. 613 of 2014 – **Patrick Musimba vs. The National Land Commission and Others**:

“...it would be ridiculous and fundamentally wrong, in our view, for any court to adopt a separationistic view or approach and insist on splitting issues between the Courts where a court is properly seized with a matter but a constitutional issue not within its obvious exclusive jurisdiction is raised.”

47. The *Musimba* decision therefore concluded on this issue that:

“...both the High Court and the ELC Court have a concurrent and or coordinate jurisdiction and can determine constitutional matters when raised and do touch on the environment and land. Neither the Constitution nor the ELC Act limit the High Court’s jurisdiction in this respects while a closer reading of the ELC Act reveals that the ELC Court’s jurisdiction was in 2012 limited by Parliament in so far as constitutional issues touching on land and environment are concerned but the Court of Appeal in *Mugendi* expressed the view that the ELC when dealing with disputes concerning the environment and land may also deal with claims of breaches of fundamental rights touching on the subject at hand. We hold that in matters constitution the ELC has jurisdiction not just when it involves clean and healthy environment but also land.”

48. This window, it has been held, is to empower the Employment and Labour Relations Court to fully handle employment matters that are exclusively reserved for it under Article 162(2) of the Constitution of Kenya 2010. This position, in my view is the true interpretation of section 12 of the *Employment and Labour Relations Act* Cap 234B, Laws of Kenya

49. Therefore, the High Court does not have jurisdiction to determine matters that are a preserve of the Employment and Labour Relations Court and vice versa. This was the position in *Malindi Law Society vs. Attorney General & 4 Others* [2016] eKLR, in which the Court observed as follows:

102. It is correct that Article 165(5) of the Constitution prohibits the High Court from exercising jurisdiction on matters of employment and labour relations, and matters of environment, use, occupation and title to land. It is also correct that there is no corresponding provision denying courts of equal status jurisdiction on matters other than “employment and labour relations, and use, occupation of and title to land”.”

50. The Supreme Court in *Republic vs. Karisa Chengo & 2 Others* [2017] eKLR was categorical in holding that:

“As Article 165(5) precludes the High Court from entertaining matters reserved to the ELC and ELRC, it should, by the same token, be inferred that the ELC and ELRC too cannot hear matters reserved to the jurisdiction of the High Court... From a reading of the statutes regulating the specialized Courts (ELRC & ELC), it is a logical inference, in our view, that their jurisdictions are limited to the matters provided for in those statutes.”

51. The High Court in Nairobi in *Kenya Universities Staff Union vs. University Council of Masinde Muliro University of Science and Technology & 2 Others* [2018] eKLR held that:

“...the jurisdiction of the Employment and Labour Relations Court in matters in respect of the violation of human rights and fundamental freedoms are confined to matters falling within Article 41 of the Constitution...In other words, the matters which fall within the ambit of Article 162(2) of the Constitution must be matters within the exclusive jurisdiction of the said specialized Courts. That is my understanding of the holding in *United States International University (USIU) vs. Attorney General* (supra).”

52. In *Patrick Musimba vs. National Land Commission & 4 Others* [2015] eKLR a 5 judge Bench held that:

“It is to be noted that in both *United States International University –v- Attorney General* (supra) and *Daniel Mugendi –v- Kenyatta University* (supra) the question was whether the High Court could continue to deal with and determine matters in light of the establishment of the ELRC where a purely labour and industrial dispute also had constitutional issues arising. The two courts returned the verdict that the High Court could not...While the High Court’s jurisdiction is founded under Article 165 of the Constitution, it is certainly not erroneous to argue that the jurisdictions of the courts established pursuant to Article 162(2) are mainly statutory...The jurisdiction of these two courts, as directed by Article 162(3) of the Constitution was to be determined by Parliament.”

53. It is with this in mind that I appreciate the decision of the South African Constitutional Court decision in *Gcaba vs. Minister for Safety and Security and Others* CCT 64/088 [2009] ZACC 26, a decision cited with approval in *Karisa Chengo & Others vs. Republic* (2015) e KLR in which it was held that:

“However, another principle or policy consideration is that the Constitution recognises the need for specificity and specialisation in a modern and complex society under the rule of law. Therefore, a wide range of rights and the respective areas of law in which they apply are explicitly recognised in the Constitution. Different kinds of relationships between citizens and the state and citizens amongst each other are dealt with in different provisions. The legislature is sometimes specifically mandated to create detailed legislation for a particular area, like equality, just administrative action (PAJA) and labour relations (LRA). Once a set of carefully-crafted rules and structures has been created for the effective and speedy resolution of disputes and protection of rights in a particular area of law, it is preferable to use that particular system. This was emphasised in *Chirwa* by both Skweyiya J and Ngcobo J. If litigants are at liberty to relegate the finely-tuned dispute resolution structures created by the LRA, a dual system of law could fester in cases of dismissal of employees. Following from the previous points, forum shopping by litigants is not desirable. Once a litigant has chosen a particular cause of action and system of remedies (for example, the structures provided for by the LRA) she or he should not be allowed to abandon that cause as soon as a negative decision or event is encountered. One may especially not want litigants to “relegate” the LRA dispensation

because they do not “trust” its structures to do justice as much as the High Court could be trusted. After all, the LRA structures were created for the very purpose of dealing with labour matters, as stated in the relevant parts of the two majority judgments in Chirwa, referred to above.”

54. The holding in Chirwa vs. Transnet Limited and Others [2007] ZACC 23; 2008 (3) BCLR 251 (CC); 2008 (4) SA 367 (CC) was to the effect that:

“the existence of a purpose-built employment framework in the form of the LRA and associated legislation infers that labour processes and forums should take precedence over non-purpose-built processes and forums in situations involving employment-related matters. At the least, litigation in terms of the LRA should be seen as the more appropriate route to pursue. Where an alternative cause of action can be sustained in matters arising out of an employment relationship, in which the employee alleges unfair dismissal or an unfair labour practice by the employer, it is in the first instance through the mechanisms established by the LRA that the employee should pursue her or his claims...Where...an employee alleges non-compliance with provisions of the LRA, the employee must seek the remedy in the LRA. The employee cannot...avoid the dispute resolution mechanisms provided for in the LRA by alleging a violation of a constitutional right in the Bill of Rights. It could not have been the intention of the Legislature to allow an employee to raise what is essentially a labour dispute under the LRA as a constitutional issue under the provisions of section 157(2). To hold otherwise would frustrate the primary objects of the LRA and permit an astute litigant to bypass the dispute resolution provisions of the LRA.”

55. I therefore agree that the *Employment and Labour Relations Court Act*, and Articles 162(2) and 165(5) of the Constitution must all be interpreted in a manner as to allow the Employment and Labour Relations Court to have the powers to grant appropriate remedies when an employment or labour relations matter is before it.

56. I agree that jurisdiction is the power of a court over the nature of a case and the type of remedy demanded and that generally there are two categories of jurisdiction; personal jurisdiction and subject matter jurisdiction. I also concur with the view expressed in Okiya Omtatah Okoiti & Another vs. Attorney General & 2 Others [2015] eKLR where it was noted that:

“Personal jurisdiction is the constitutional requirement that a defendant have certain minimum contacts with the forum in which the court sits so that the court may exercise power over the defendant. Subject-matter jurisdiction is the requirement that the court have power to hear the specific kind of claim that is brought to that court.”

57. What that decision holds is that in determining whether the court has jurisdiction or not, the court must also take into account the subject matter of the dispute vis-à-vis the issues contemplated by the particular statute under consideration. In this case section 12 of the *Employment and Labour Relations Court Act* expressly provides for the issues which fall for exclusive determination by the Employment and Labour Relations Court and these are, firstly, all disputes referred to it in accordance with Article 162(2) of the Constitution. Article 162 refers to the Court disputes relating to employment and labour relations but proceeds to state that Parliament is to determine the jurisdiction and functions of the courts contemplated in clause. Accordingly, without making reference to the *Employment and Labour Relations Court Act* not much assistance as regards the actual jurisdiction and functions of the Employment and Labour Relations Court can be gathered from the Article. However, the *Employment and Labour Relations Court Act* provides these functions and matters as including disputes relating to or arising out of employment between an employer and an employee; disputes between an employer and a trade union; disputes between an employers’ organisation and a trade unions organisation; disputes between trade unions; disputes between employer organizations; disputes between an employers’ organisation and a trade union; disputes between a trade union and a member thereof; disputes between an employer’s organisation or a federation and a member thereof; disputes concerning the registration and election of trade union officials; and disputes relating to the registration and enforcement of collective agreements. Obviously, all the other scenarios, apart from employer relationship are far removed from the circumstances of this petition which challenge the manner in which the Respondent intends to go about recruiting its Registrar -Chief Executive Officer. As was rightly appreciated by Nduma, J in Nick Githinji Ndichu vs. Clerk, Kiambu County Assembly & Another [2014] eKLR at paragraph 13 and 14:

“...the law is not concerned with the method of acquiring an employee. The law does not concern itself with whether the person was appointed or elected. Rather, the person must;

- (i) be having an oral or written contract of service;**
- (ii) be providing a service to a real or legal person;**
- (iii) be receiving a wage / salary for the services rendered.**

If such a person has a dispute with the person with whom he/she has a contract of service and to whom he / she provides services for a wage or salary, the court has jurisdiction over such dispute and has available remedies for that purpose.

It is the Court’s finding that the Petitioner has a relationship with all the above attributes with the 2nd Respondent. This Court has therefore got jurisdiction over this matter.”

58. That the Employment and Labour Relation’s Court’s jurisdiction is restricted to where there exists employer and employee relationship has been the subject of several decision in our jurisdiction. In Joy Brenda Masinde vs. Law Society of Kenya & another [2015] e KLR, the Petitioner filed a Petition in the High Court challenging the legality of an advertisement placed in the Daily Nation Newspaper by the *Law Society of Kenya*, inviting applications for the position of Secretary/Chief Executive Officer. Certain requirements/qualifications were included in the said advertisement, being that the applicant must hold a Bachelor of Laws Degree, be an Advocate of the High Court of Kenya of not less than ten (10) years standing and be a Certified Public Secretary of not less than five (5) years standing and possess

experience and knowledge in management. The Petitioner challenged the requirements that an applicant for the post must be a Certified Public Secretary arguing that such a requirement is not included in Section 26 (a) of the *Law Society of Kenya Act 2014*. In declining to uphold the preliminary objection based on jurisdiction the court held that:

“The petitioner herein had merely expressed an intention to apply for the advertised position. She had not yet been recruited and as such cannot be said to be an employee...From the above definition it is quite clear that no employment relationship exists between the petitioner and the 1st respondent...The matter or question in issue in this petition is the legality of the decision by the 1st respondent to introduce a qualification for the position of Secretary/CEO which is not provided by Statute being Section 26(4) of the Law Society of Kenya Act. The matter for determination is not a recruitment issue. Rather it is a purely constitutional issue which this court has jurisdiction to determine by virtue of Article 165(3) of the Constitution. The question is whether the 1st respondent a statutory body in any way exceeded its mandate and in so doing infringed upon the rights of the petitioner. This is not a labour dispute. I find that these are questions not for the Employment and Labour Relations Court but rather are for determination by the High Court.”

59. Similarly, in **Philip Wanyonyi Wekesa & 2 Others vs. Clerk to County Assembly of Bungoma & 4 Others [2018] eKLR**, the Speaker of the County Assembly convened a special sitting where the Interested Party and another were approved for appointment to the County Assembly Service Board in spite of contentions by the Petitioner which had been filed in form of a petition to the County Assembly to the effect that the process of nomination and approval of the Interested Party and another was not undertaken in a manner contemplated by the constitution and was in violation of Article 1, 2, 3, 10, 21, 24, 73, 174 and 232 of the Constitution. Dealing with the issue whether the court had jurisdiction to entertain the petition, the court relied on the holding of Nduma, J in the case of **Nick Githinji Ndichu vs. Clerk Kiambu County Assembly and Another [2014] eKLR** and held that;

“For one to access the jurisdiction at ELRC he must demonstrate that there exists an employer – employee relationship; that there is an oral or written contract of service or that the issue is a dispute falls within the provision of Section 12(1) of the ELRC Act. Though Advertisement, Shortlisting, Interviewing are all steps towards recruitment and steps towards creating an employer – employee relationship, they are not in my view envisaged in Section 12 of Employment and Labour Relations Court Act and which will place this petition under the jurisdiction of the Employment and Labour Relations Court.

There being no contract of employment yet, between the interested party and Respondents, this is not a dispute envisaged in Section 12(1) of the ELRC Act which would oust the jurisdiction of this Court. I therefore find this court has jurisdiction to hear and determine the Petition.”

60. In **Stephen Sogoni Chune vs. County Government of Bungoma & Another [2018] eKLR**, the Petitioner responded to the advertisement by Bungoma Public Service Board in Nation Newspaper by applying for county chief officer’s lands, urban/physical planning and housing. He met all the requirements set out in the advertisement and also the requirements of Chapter 6 of the Constitution. On 29th June, 2018 he noticed that he had not been shortlisted as per the list of shortlisted candidates published in the Daily Nation. He noticed that all the shortlisted candidates were from one tribe and that his not being shortlisted was a discriminatory act which is repugnant to the provisions and spirit of the Kenyan Constitution 2010. He therefore filed the Petition seeking the relevant reliefs. The Respondent filed a Preliminary Objection challenging the jurisdiction of the high court to hear and determine the Petition. The Court in declining to uphold the preliminary objection based on jurisdiction held that:

“In determining whether this court has jurisdiction to handle this matter or not, I relent back to similar cases which have been dealt by this Court in similar circumstances. The list under Section 12 of the Employment and Labour Relations Court Act states that the court can deal with any matter arising out an employment relationship. Nduma J in Nick Githinji Ndichu Vs. Clerk Kiambu County Assembly and Another [2014] eKLR where he held as follows:

.....

For one to access the jurisdiction at ELRC he must demonstrate that there exists an employer – employee relationship; that there is an oral or written contract of service or that the issue is a dispute falls within the provision of Section 12(1) of the ELRC Act. Though Advertisement, Shortlisting, Interviewing are all steps towards recruitment and steps towards creating an employer – employee relationship, they are not in my view envisaged in Section 12 and which will place this petition under the jurisdiction of the Employment and Labour Relations Court. That being so I find that this court has jurisdiction to hear and determine this petition and dismiss the preliminary objection by the Respondent.”

61. This Court in **Kenya Universities Staff Union vs. University Council of Masinde Muliro University of Science and Technology & 2 Others [2018] eKLR**. Was confronted with a case in which the Ethics and Anti-Corruption Commission (2nd Interested Party) was carrying out investigations into allegations of abuse of office, embezzlement of funds and employment irregularities against the Vice Chancellor (1st interested party) of Masinde Muliro University of Science and Technology (1st Respondent). In the course of the said investigations, the 1st interested party was alleged to intimidate staff involved in the process through transfer, demotions, interdictions and dismissals. The 2nd Interested party had recommended for suspension of the 1st interested party but the Respondents had failed to suspend the 1st interested party which failure prompted the Petitioner to file the Petition to the high court to compel the Respondents to suspend the 1st Interested Party. The Respondent filed a Preliminary Objection to the effect that the high court lacks jurisdiction to determine the subject matter which revolves around the issue of transfer of staff, demotions, interdictions and staff dismissal being undertaken by the 1st interested party in order to intimidate the staff involved in the investigations. The Court held that:

“Employment and Labour Relations Court can grant orders of judicial review. However, the jurisdiction to do so is confined to matters falling within Article 41 of the Constitution...matters which fall within the ambit of Article 162(2) of the

Constitution must be matters within the exclusive jurisdiction of the said specialized Courts. However, where the matters raised fall both within their jurisdiction and outside (concurrent and or coordinate jurisdiction), it would be a travesty of justice for the High Court to decline jurisdiction since it would mean that in that event a litigant would be forced to institute two sets of legal proceedings. Such eventuality would do violence to the provisions of Article 159 of the Constitution. In concurrent jurisdiction, it is the cause of action that determines which Court is to hear the dispute. It follows that this matter falls within the jurisdiction of the High Court...This application be heard and determined by the Anti-Corruption and Economic Crimes Division of this Court.”

62. In this case, it is clear that no employment relationship exists between the Petitioner and the respondent and that there is no issue in the instant Petition in respect of violation of human rights and fundamental freedoms falling within Article 41 of the Constitution. Accordingly, the issue is a dispute does not fall within the ambit of section 12(1) of the **Employment and Labour Relations Court Act**. I agree that though the Advertisement is a step towards recruitment and may lead to the creation of an employer – employee relationship between the petitioner and the respondent, that relationship is yet to be concretised and may in fact never be concretised. Accordingly, this court cannot deem that possibility as a reality in order to bring this petition within section 12 of the Act in order to warrant this petition being deemed as one that is in respect of an employer and employee so as to make it fall under the jurisdiction of the Employment and Labour Relations Court.

63. I agree with the petitioner’s view that the matter or question in issue in the instant petition is the legality of the decision by the respondent to introduce a qualification for the position of Registrar/CEO which is not provided by statute being Section 5(1) of the **Pharmacy and Poisons Act** and section 36 & 37 of the **Public Service Commission Act**. The matter for determination is not a recruitment issue; rather it is a purely constitutional issue which this court has jurisdiction to determine by virtue of Article 165(3) of the Constitution. The question is whether the respondent, a statutory body in any way exceeded its mandate and in so doing infringed upon the rights of the petitioner and other potential Applicants which is not a labour dispute. Therefore, these are not exclusive questions for the Employment and Labour Relations Court but rather are for determination by the High Court.

64. I further agree that whereas the Employment and Labour Relations Court is vested with jurisdiction over disputes between employees, employers, trade unions and employer organizations or federations; and has also jurisdiction to interpret the Constitution and enforce matters relating to breach of fundamental rights ancillary and incidental to those matters falling within the provisions of Section 12(1) of the **Employment and Labour Relations Court Act** and Article 41 of the Constitution, the facts of the instant petition put it outside the bounds of jurisdiction of the said court.

Order

65. In the premises the Preliminary Objection fails and it is dismissed with costs to the petitioner.

66. It is so ordered.

Read, signed and delivered in open Court at Machakos this 27th day of March, 2019

G V ODUNGA

JUDGE

Delivered the presence of:

Dr Pius Wanjala the 2nd interested party and holding brief for Mr Kinyanjui for the Petitioners

Miss Okello for Mr Malenya for the Respondent

CA Geoffrey