



Mokaya & another v Clerk Nyamira County Assembly & 5 others (Petition E002 of 2024) [2025] KEHC 1044 (KLR) (20 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1044 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
PETITION E002 OF 2024
WA OKWANY, J
FEBRUARY 20, 2025**

BETWEEN

**REUBEN MOKAYA (SECRETARY) 1ST PETITIONER
JARED OTIAMBO (CHAIRMAN, NYAMIRA COUNTY MOH – COMMUNITY
HEALTH WORKERS ASSOCIATION) 2ND PETITIONER**

AND

**CLERK NYAMIRA COUNTY ASSEMBLY 1ST RESPONDENT
COUNTY SECRETARY NYAMIRA COUNTY 2ND RESPONDENT
CECM HEALTH SERVICES-NYAMIRA COUNTY 3RD RESPONDENT
CECM PUBLIC SERVICE –NYAMIRA COUNTY 4TH RESPONDENT
COUNTY CHIEF OFFICER PRIMARY HEALTH CARE NYAMIRA
COUNTY 5TH RESPONDENT
COUNTY ATTORNEY – NYAMIRA COUNTY 6TH RESPONDENT**

RULING

Introduction

1. The Petitioners herein filed the Petition dated 28th June 2024 seeking the enforcement of their constitutional rights in respect to accumulated remuneration and oversight of the Public Service of Nyamira County. Concurrently with the Petition, the Petitioners filed an Application, under Certificate of Urgency, seeking a raft of orders.
2. In response to the Petition and Application, the Respondents filed a Notice of Preliminary Objection (PO) dated 30th August 2024 wherein they state that this court lacks the jurisdiction to entertain the suit. They also state that the Petition is incompetent, poorly drafted, ambiguous and contravenes



the doctrines of constitutional avoidance, exhaustion and non-justiciability. The Petitioners filed a Replying affidavit in response to the PO.

3. The Petitioners responded to the PO through the 2nd Petitioner's Replying Affidavit wherein they state that the Respondents' failure to implement the Nyamira County Health Services Act 2022 amounts to a violation of their constitutional rights under Articles 22 and 258 of *the Constitution*. The Petitioners' case is that the Respondents have failed to pay them for the services that they rendered to the County.
4. The PO was canvassed by way of written submissions which I have considered. I find that the main issue for determination is whether the Preliminary Objection is merited.
5. In the case of *Hassan Ali Jobo and another vs. Suleiman Said Shabbal and 2 others* (2014) eKLR the Supreme Court referred to the locus classicus case of *Mukisa Biscuit Manufacturing Co Ltd vs. West End Distributors* (1969) EA 696 and explained the fundamental features of a Preliminary Objection as follows: -

“(31) To restate the relevant principle from the precedent-setting case, *Mukisa Biscuit Manufacturing Co Ltd vs. West End Distributors* (1969) EA 696:

“a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration....a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.

6. In *Odeny (Formerly Victor Onyango Odeny) vs. Attorney General* (Petition E415 of 2022) [2024] KEHC 5627 (KLR) (Constitutional and Human Rights) the court outlined the features of a preliminary objection as follows: -
 - i. It must be on a pure point of law, not factual matters.
 - ii. It is argued on assumption that all facts pleaded by the party against whom that objection is targeted are correct.
 - iii. If any fact has to be ascertained or if what is sought in the objection is an exercise of judicial discretion, it cannot be raised.
 - iv. If successful, it must be capable of disposing the suit without the need of proceeding to full trial.”
7. A perusal of the Petition reveals that it is concerned with the employment status and the payment of dues of the Ministry of Health of Nyamira health workers by the County Government of Nyamira. The Petitioners also asked for an audit of the record of all health workers. They seek orders to compel the Department of Public Service to submit quarterly reports to the County Assembly for purposes of oversight.



8. In *Samuel Kamau Macharia & another vs. Kenya Commercial Bank Limited & 2 others* [2012] eKLR the Supreme Court held that jurisdiction flows from either the Constitution or statute.
9. The High Court is established under Article 165 of the Constitution which also sets out its jurisdiction as follows: -
 3. Subject to clause (5), the High Court shall have—
 - (a) unlimited original jurisdiction in criminal and civil matters;
 - (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
 - (c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
 - (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
 - (i) the question whether any law is inconsistent with or in contravention of this Constitution;
 - (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
 - (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
 - (iv) a question relating to conflict of laws under Article 191; and
 - (e) any other jurisdiction, original or appellate, conferred on it by legislation.
 - (4) Any matter certified by the court as raising a substantial question of law under clause (3)(b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.
 - (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).
 - (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
 - (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.
10. The Constitution also provides for the Employment and Labour Relations Court as a court of equal status to the High Court under Article 162 as follows: -

162.



- (1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to 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

11. The *Employment and Labour Relations Court Act* No. 20 of 2011 further sets out the powers of the Employment and Labour Relations Court whose mandate is to hear and determine disputes arising from employment and labour relations. Section 12 of the said Act outlines the court’s jurisdiction as follows:

12. Jurisdiction of the Court

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.

12. Based on the foregoing, I find that even though issues of constitutional violations have been raised in this matter, this court lacks the jurisdiction to hear and determine the Petition as the predominant issue in the Petition relates to the employment status and outstanding salaries for the County Government workers. I find that the issues raised in this Petition fall squarely within the jurisdiction of the Employment and Labour Relations Court which was specifically set up to deal with employment disputes.

13. It is trite that jurisdiction is everything without which the Court cannot take one more step. This was the holding in *Owners of the Motor Vessel Lilian “S” vs. Caltex Oil [Kenya] Ltd* [1989] eKLR.) where it was held thus: -

“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 a continuation of proceedings pending



other evidence. A court of law downs tools in respect of the matter before court the moment it holds the opinion that it is without jurisdiction”.

14. The question which the court has to grapple with is whether, upon finding that it court lacks jurisdiction, it can transfer the case to the court that is vested with the jurisdiction to hear it or whether it should strike out the suit all together. In determining this issue, I make reference to the decision, by the Court of Appeal, in the case of *Equity Bank Limited vs. Bruce Mutie Mutuku T/A Diani Tour and Travel* [2016] eKLR where it was held that: -

“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 “O2” 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.”

15. Similarly, in *Mini Bakeries (NRB) limited vs. Levi Karuz Omedo* (2002) eKLR the court held:-

“A suit or appeal filed before the court which has no jurisdiction is incompetent and is not available for transfer to the court with jurisdiction. The fate that such suit or appeal should suffer is that of being struck off.”

16. Lastly, in *Wamathu Gichoya vs. Mary Wainoi Magu* [2015] eKLR the Court held that:-

“Furthermore, according to *Kagenyi vs. Musiramamo and Another*,
(supra), the power to transfer a case to the High Court for hearing may only be exercised if the court before which it is filed is a court vested with competent jurisdiction to try and dispose of the matter. In other words, if the suit filed is incompetent, the High Court lacks jurisdiction to effect a transfer.”

17. Guided by the findings in the above cited cases and having found that this court lacks the jurisdiction to entertain the instant suit, I find that I have no option but to down my tools and make no further step. The Preliminary Objection therefore finds merit and is hereby allowed. The instant Petition is therefore struck out for want of jurisdiction with no orders as to costs.

18. It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NYAMIRA VIA MICROSOFT TEAMS THIS 20TH DAY OF FEBRUARY 2025.

W. A. OKWANY

JUDGE

