



Centre for Litigation on Environment and Governance (CLEG) v Auditor General of the Republic of Kenya & 2 others; Attorney General of the Republic of Kenya & another (Interested Parties) (Petition E069 of 2024) [2025] KEHC 3065 (KLR) (7 March 2025) (Ruling)

Neutral citation: [2025] KEHC 3065 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
PETITION E069 OF 2024**

G MUTAI, J

MARCH 7, 2025

**IN THE MATTER OF ARTICLES 2(1), 3(1), 22, 23
AND 258 OF THE CONSTITUTION OF KENYA, 2010**

**IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER ARTICLES 27, 35, 41 AND 47 OF THE CONSTITUTION OF KENYA**

**IN THE MATTER OF CONTRAVENTION OF ARTICLES 10, 73, 74, 75, 201, 206, 225, 228 (4)
AND (5), 229, 230 (4) AND (5), 232 AND 259(1) OF THE CONSTITUTION OF KENYA, 2010**

IN THE MATTER OF SECTION 17 OF THE PUBLIC AUDIT ACT

**IN THE MATTER OF SECTIONS 12, 13, 15, 17 AND 68 OF
THE PUBLIC FINANCE MANAGEMENT ACT OF 2012**

IN THE MATTER OF SECTION 5 OF THE CONTROLLER OF BUDGET ACT OF 2016

**IN THE MATTER OF EMPLOYMENT OF 184 PERSONS FOR THE POSITION OF AUDIT
ASSOCIATE II: GRADE OAG 8 BY OFFICE OF THE AUDITOR GENERAL WITHOUT
ADVERTISEMENT IN NATIONAL MEDIA/NEWSPAPER OF NATIONAL CIRCULATION**

BETWEEN

**CENTRE FOR LITIGATION ON ENVIRONMENT AND GOVERNANCE
(CLEG) PETITIONER**

AND

AUDITOR GENERAL OF THE REPUBLIC OF KENYA 1ST RESPONDENT

CONTROLLER OF BUDGET 2ND RESPONDENT

SALARIES AND REMUNERATION COMMISSION 3RD RESPONDENT

AND

ATTORNEY GENERAL OF THE REPUBLIC OF KENYA INTERESTED PARTY



NATIONAL ASSEMBLY OF THE REPUBLIC OF KENYA INTERESTED PARTY

RULING

1. The petitioner herein moved this court vide a petition dated 27th November 2024. The petitioner also filed an application vide which it sought the following orders:-
 - a. Spent;
 - b. That pending the hearing and determination of this petition, this honourable court be pleased to issue prohibitory orders prohibiting the 1st respondent from paying any monies as salaries and remuneration to the 184 personnel employed by the 1st respondent as Audit Associate II, Grade OAG8, whose employment was allegedly a product of Advert No. 05/4/23;
 - c. That pending the hearing and determination of this petition, this honourable court be pleased to issue prohibitory orders prohibiting the 2nd respondent from authorising the withdrawal of funds in favour of the 1st respondent for payment of salaries and remuneration of the 184 personnel employed by the 1st respondent as Audit Associate II, Grade OAG8 whose employment was allegedly a product of Advert No. 05/4/2023; and
 - d. That the cost of this application be in the cause.
2. The application is premised on the grounds stated therein and also on the supporting affidavit of Ainea Ragen, sworn on 27th November 2024, in which he stated that on or around 5th April 2023, the office of the 1st respondent advertised for the position of 80 Audit Associates II, Grade OAG8, Advert No. 05/4/2023. On 12th March 2024, he wrote to the 2nd and 3rd respondent seeking information regarding the 184 persons employed by the 1st respondent without advertisement. The 1st respondent responded to the request/letter on 14th March 2024 and, instead of responding substantively, invoked their constitutional independence.
3. Being dissatisfied with the response, he wrote a second letter to the 1st respondent on 21st March 2024 seeking specific information on the employment of 184 persons, which was not responded to. As a result, he raised complaints with the Commission on Administrative Justice Mombasa regional office against the 1st respondent. The Commission wrote to the 1st respondent and the 1st respondent responded on 20th June 2024.
4. He stated that on 28th August 2024, he wrote a second letter to the 2nd and 3rd respondents as a reminder seeking information in line with their core mandate on the employment of 184 personnel by the 1st respondent, which was not responded to.
5. Mr Ragen deposed that the 1st respondent planned, initiated and executed the employment of 184 personnel as Audit Associate II, Grade OAG 8 without advertisement in print media of national circulation to accord the general public equal opportunity to apply in a fair, competitive and merit-based employment. The same violated articles 27 and 232 (1) (g), (h), (i) of *the Constitution* of Kenya, 2010 and, as a result, discriminating and disenfranchising eligible Kenyans of equal employment opportunity in public service. The employment opportunity was for 80 personnel and not 184 personnel, yet the 1st respondent ended up employing 104 more personnel irregularly.



6. He further stated that the 1st respondent has continued to pay salaries and remunerations to the 184 personnel without the approval of the national assembly and the 4th respondent in violation of *the Constitution* and the *Public Finance Management Act*.
7. He averred that the public continues to lose funds through illegal schemes crafted and actualised by the 1st respondent, and the same ought to be halted. This matter raises questions of serious constitutional violations and, therefore, in the interest of the public, rule of law, constitutionalism and protection against the wastage of scarce public resources, the orders sought should be granted as prayed.
8. In response, the 2nd interested party filed a preliminary objection dated 5th December 2024 seeking to have the petition and notice of motion dated 27th November 2024 dismissed with costs on the following grounds:-
 - a. That this honourable court lacks the requisite jurisdiction as the petitioner seeks to challenge the employment and remuneration of audit associates by the 1st respondent, which in accordance with article 162 (2)(a) as read together with Article 165(5)(b) of *the Constitution*, and *Employment and Labour Relations Court Act* is the preserve of the Employment and Labour Relations Court;
 - b. The proceedings directly affect the rights and interests of 184 audit associates employed by the 1st respondent. The failure to join them as parties violates the fundamental principle of natural justice, specifically the right to be heard, as enshrined in Article 25(c) of *the Constitution*. This omission renders the petition and application defective and incapable of proper determination by this honourable court.
9. The Court, on 9th December 2024, directed that the preliminary objection be heard first. It is the said objection that is the subject of this ruling.
10. The 2nd Interested Party, through its advocates, Mbarak Awadh Ahmed Advocates, filed a written submission dated 5th December 2024 regarding the preliminary objection.
11. In his submissions, counsel for the 2nd Interested Party relied on Article 165(5)(b) of *the Constitution* and the *Employment and Labour Relations Court Act* and submitted that the core issues raised in the petition fundamentally relate to the recruitment and appointment of the 184 audit associates by the 1st respondent which falls squarely within the exclusive jurisdiction of the Employment and Labour Relations Court. Counsel relied on various decisions of the courts of records and submitted that this court has no jurisdiction to entertain the application and the petition.
12. On the 2nd issue, counsel submitted that the petitioner seeks permanent freezing and quashing of the payment of salaries and remunerations of all 184 personnel employed by the 1st respondent as audit associates, an order to terminate their employment contracts and an order to recover all monies paid to them when they had not been identified or joined in these proceedings. If the court proceeds to hear the petition in their absence then the principles of natural justice shall have been breached. Counsel urged the court to strike out or dismiss the application with costs.
13. During the highlighting of submissions on 28th January 2025, Mr Akama, learned counsel for the 2nd interested party, reiterated the contents of their submission and urged that the petition should have been filed in the Employment and Labour Relations Court. He stated that the right to a hearing is fundamental. He, therefore, prayed that the petition ought to be struck out with costs.



14. Mr Wahome, learned counsel for the 3rd respondent, submitted that he supported the preliminary objection as article 162 gives the Employment and Labour Relations Court jurisdiction on labour relations matters and, therefore, the court should down its tools.
15. Mr Kemei, learned counsel for the 2nd and 4th respondent, also submitted to the court that they supported the preliminary objection and relied on the submissions of the 2nd interested party and urged the court to down its tools.
16. Mr Ainea Ragen, learned counsel for the petitioner, relied on Article 165(3)(b) and 165(5)(d) on jurisdiction. He referred the court to section 12 of the *Employment and Labour Relations Court Act* on the jurisdiction of the said court and also on the question of who has the locus to file a suit before it. He submitted that the petitioner is not an employee or an employer and, therefore, cannot file the case before the said court.
17. On failing to add the 184 employees, he stated that they wrote letters which did not elicit appropriate responses, forcing them to seek help from the office of the Ombudsman. He urged that the 184 employees' right to a fair hearing has not been violated. He urged the court to dismiss the preliminary objection and allow the petition to proceed to its conclusion.
18. Mr Akama, in rejoinder, submitted that the Supreme Court, in the case of Kenya Tea Growers Association & 2 others v The National Social Security Fund Board of Trustees & 13 others [2024] KESC 3 (KLR), gave a wide reading of Section 12 of the *Employment and Labour Relations Court Act*.
19. I have considered the petition, the application, the responses thereto, as well as the preliminary objection and the submissions made by the parties. At the heart of the objection is the issue of the jurisdiction of this Court. It is the view of the 2nd interested party, which has been supported by the respondents that the High Court may not determine this matter, and the same should be struck out on that ground.
20. It cannot be emphasised enough that jurisdiction is a fundamental matter and that where a Court finds that it lacks jurisdiction it should down its tools there and then. In very timeless and pithy remarks Nyarangi, JA stated as follows in the case of the Owners Of The Motor Vessel "Lillian S v Caltex Oil (Kenya) Ltd [1989] KECA 48 (KLR):-

“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 a 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”

21. The above holding was reiterated by the Supreme Court in the case of Macharia & another vs Kenya Commercial Bank Limited & 2 others [2012] KESC 8 (KLR). The apex court stated:-

“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.”

22. There is no question that the subject matter of the proceedings is the decision of the 1st respondent to hire staff in a process that the petitioner impugns as not constitutional. What is at stake is the employment of the 184 employees and their terms and conditions of service. Can the High Court consider such a matter?

23. The jurisdiction question calls on this Court to examine *the Constitution* and determine if the issue is within its purview. Article 162 (2) and (3) states that:-

“(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).”

24. *The Constitution* specifically ousts the jurisdiction of the High Court in certain matters. Article 165(5) provides that:-

“(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).”

25. The petitioner contends that under section 12 of the *Employment and Labour Relations Court Act*, it could not file the petition in the said Court as it is not one of the parties that could commence the proceedings before it. It is necessary that I set out what the said provision states. It is 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.
2. An application, claim or complaint may be lodged with the Court by or against an employee, an employer, a trade union, an employer's organisation, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose.
 3. In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders
 - i. interim preservation orders including injunctions in cases of urgency;
 - (ii) a prohibitory order;
 - (iii) an order for specific performance;
 - (iv) a declaratory order;
 - (v) an award of compensation in any circumstances contemplated under this Act or any written law;
 - (vi) an award of damages in any circumstances contemplated under this Act or any written law;
 - (vii) an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law; or
 - (viii) any other appropriate relief as the Court may deem fit to grant.
 4. In proceedings under this Act, the Court may, subject to the rules, make such orders as to costs as the Court considers just.
 5. The Court shall have jurisdiction to hear and determine appeals arising from –
 - a. decisions of the Registrar of Trade Unions; and
 - b. decisions of any other local tribunal or commission as may be prescribed under any written law.

26. Does the foregoing provision mean that the petitioner was right to file the petition before this Court? The jurisdiction of the Employment and Labour Relations Court to hear and determine constitutional petitions has been the subject of many decisions of the Courts. In the case of Vincent Endekwa Mahasi & another vs Francis Angueyah Ominde & 2 others [2018] KEELRC 2244 (KLR) it was stated that:-

“The question of jurisdiction of Employment and Labour Court was resolved conclusively in the following cases:-

Professor Daniel Mugendi v Kenyatta University and 3 others Court of Appeal at Nairobi Civil Appeal No.6 of 2012 in which the Court of Appeal determined that the Employment and Labour Relations Court has exclusive jurisdiction to hear and determine all matters relating to Employment and Labour including any constitutional issues that may arise thereof as follows:-



“49 – A correspondent court of the High Court that is the industrial court has now been established to deal with employment and labour matters. It follows that all employment and labour relations matters pending in the High Court shall now be heard by the industrial court which is now a court of the status of the High Court. The High Court thereof lack jurisdiction to deal with matters of employment and labour whether filed at the High Court before or after the establishment of the industrial court.”

This position was elaborated and re-affirmed by the Court of appeal in *Judicial Service Commission v Gladys Boss Shollei and another*, Civil Appeal No. 50 of 2014, [2014] eKLR at page 15 as follows:-

“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 whatsoever arising from the relationship defined in section 12 of the industrial court Act 2011 or 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”

27. The Supreme Court made a definitive pronouncement on the jurisdiction of the Employment and Labour Relations Court, and in particular the pith and the substance of section 12 of the ELRC Act, in the case of *Kenya Tea Growers Association & 2 others v The National Social Security Fund Board of Trustees & 13 others* [2024] KESC 3 (KLR), by holding as follows:-

“83. Can it be said that the parties herein are not among the disputants contemplated under section 12(2) of the ELRC Act? Even where the Act stipulates that a complaint, application or suit may be lodged against the Cabinet Secretary for Labour or any office established by law for that purpose? Or that the nature of the dispute is not one that falls within the jurisdiction of the ELRC, even where, as in this case, both employers and employees, trade unions, and workers associations are decrying what they consider to be the adverse effect of a new law on their working conditions? We are in agreement with the Court of Appeal to the effect that this dispute did not arise strictly from an employer-employee relationship. But what about the other aspects of the dispute? What meaning is to be ascribed to the phrase “labour relations”?”

28. Applying the above decision to this case, I find and hold that this court has no jurisdiction to entertain the instant petition and application. If this court hears this matter further it would be usurping the jurisdiction of the Employment and Labour Relations Court. The right thing for me to do is to down my tools. Having found that this court has no jurisdiction, I will not delve into the other issue.

29. The upshot of the foregoing is that the preliminary objection has merit. I find and hold that the High Court has no jurisdiction to hear and determine this matter. Under the circumstances, the petition and the application are struck out.

30. As this is a constitutional petition raising serious questions of law, albeit one filed in a court without jurisdiction, an award of costs is inappropriate. Consequently, the parties will bear their own costs.



31. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 7TH DAY OF MARCH 2025. DELIVERED VIRTUALLY VIA MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of:-

Mr Ragen, for the Petitioner;

Mr Obara, for the 1st Respondent;

Ms Akama, for the 2nd Interested Party.

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