



REPUBLIC OF KENYA



KENYA LAW
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**Law Society of Kenya v Attorney General & another (Constitutional
Petition E024 of 2023) [2025] KEHC 5050 (KLR) (14 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 5050 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CONSTITUTIONAL PETITION E024 OF 2023**

OA SEWE, J

MARCH 14, 2025

**THE MATTER OF ALLEGED CONTRAVENTION OF
ARTICLES 3, 10, 73, 131 & 156 OF THE CONSTITUTION OF
KENYA, 2010**

AND

**IN THE MATTER OF ALLEGED BREACH OF SECTIONS 8 AND
11 OF THE KENYA LAW REFORM COMMISSION ACT, 2013**

AND

**IN THE MATTER OF THE ALLEGED IRREGULAR
APPOINTMENT OF THE CHAIRPERSON AND MEMBER OF
THE KENYA LAW REFORM COMMISSION**

AND

**IN THE MATTER OF GAZETTE NOTICES NUMBERS 9300 AND
9370 DATED 5TH AUGUST 2022**

AND

**IN THE MATTER OF THE JURISDICTION OF THE HIGH COURT
UNDER ARTICLE 165(2) (D) (II) OF THE CONSTITUTION OF
KENYA, 2010**

BETWEEN

LAW SOCIETY OF KENYA PETITIONER

AND

ATTORNEY GENERAL 1ST RESPONDENT



RULING

1. The Petition dated April 12, 2023 was filed by the Law Society of Kenya alleging violation of the Constitution in the appointment of the two interested parties, Christine Anyango Agimba and Dr. Mary Gaturu. The petitioner prayed for several reliefs including a declaration that the impugned appointments were illegal, null and void.
2. The Petition was amended with the leave of the Court, given on 8th May 2023 whereupon the 1st and 2nd interested parties were impleaded as the 3rd and 4th respondents. The Attorney General, acting for the 1st and 2nd respondents then filed a Notice of Preliminary Objection dated 6th June 2023, contending that:
 - (a) the Court lacks the jurisdiction to hear and determine the matter by virtue of Article 162(2) of the Constitution of Kenya.
 - (b) The joinder of the 1st respondent offends the mandatory provisions of Article 143(2) of the Constitution and therefore the Court should strike out the 1st respondent from the Petition.
 - (c) The suit has been filed prematurely as the petitioner has not exhausted the remedies available under the Kenya Law Reform Commission Act, No. 19 of 2013 and specifically the removal procedure set out under Section 15 of the Act.
3. In the same vein, the 4th respondent also filed a Notice of Preliminary Objection dated 6th June 2023. She raised the following grounds:
 - (a) That the Petition offends the subject matter principle on jurisdiction for being filed at the High Court as opposed to the specialized court provided for at Article 162(2) of the Constitution.
 - (b) The Petition offends the territorial principle on jurisdiction and the provision of Section 15 of the Civil Procedure Act on the place of suing by being filed at the Mombasa High Court Registry as opposed to Nairobi.
 - (c) That the jurisdiction of this Court has been prematurely invoked pursuant to Section 15 of the Kenya Law Reform Commission Act that requires removal of a chairperson and member of the Commission to first be directed to the Public Service Commission as a complainant.
4. Following the filing of the two Notices of Preliminary Objection, the parties engaged in out of court negotiations that culminated in adjustments of the respective positions taken by the parties. For instance, on the 14th February 2024 the petitioner's application for conservatory orders was abandoned and the conservatory orders issued on 18th December 2023 vacated. Thereafter, on the 12th March 2024, the parties entered into a consent, which consent was adopted as an order of the Court, for the withdrawal of the Petition against the 1st and 3rd respondents. The petitioner was consequently granted leave to further amend the Petition to reflect those changes.
5. This ruling is therefore in respect of the two Notices of Preliminary Objection. Directions were given that the Notices of Preliminary Objection be canvassed by way of written submissions. The 1st and 2nd respondents filed their written submissions dated 14th August 2024. They gave the factual background of the Petition and proposed the following issues for determination:
 - (a) Whether the court has jurisdiction to determine this suit;



- (b) Whether the joinder of the 1st respondent offends the provisions of Article 143(2) of the Constitution; and,
- (c) Whether the suit is premature and debarred by the doctrine of exhaustion.
6. The respondents relied on various authorities on jurisdiction, notably, Owners of Motor Vessel “Lilian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1, Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR, and National Social Security Fund Board of Trustees v Kenya Tea Growers Association & 14 others (Civil Appeal 656 of 2022) [2023] KECA 80 (KLR) (3 February 2023) (Judgment) to underscore their argument that the subject matter must be within the power of the Court for it to entertain any dispute.
 7. According to the respondents, the predominant issue informing this suit is the recruitment and/or appointment of members to the Law Reform Commission as pleaded at paragraph 17 of the Amended Petition. Reliance was placed on Trusted Society of Human Rights Alliance v Nakuru Water and Sanitation Services Company & another [2013] eKLR, Centre for Human Rights and Mediation v Judicial Service Commission & another; Law Society of Kenya North Rift Chapter (Interested Party) [2019] eKLR and Okoiti v Attorney General; Njenga (Interested Party) (Petition E101 of 2020) [2022] KEELRC 2 (KLR) (17 February 2022) (Judgment) to support the assertion that, by virtue of Article 162(2) of the Constitution.
 8. It was further the submission of the 1st and 2nd respondents that the Constitution expressly accords the President immunity from civil proceedings at Article 143(2). They therefore urged the Court to find that the suit against the 1st respondent is misconceived. The respondents relied on Attorney General & others v Ndi & 79 others; Prof Rosalind Dixon & 7 others (Amicus Curiae) (Petition 12, 11 & 13 of 2021 (Consolidated) [2022] KESC 8 (KLR) (31 March 2022) (Judgment) (with dissent) and submitted that any such claims ought to be instituted against the Attorney General as the legal advisor and representative of the Government.
 9. On the doctrine of exhaustion, the 1st and 2nd respondents submitted that since the 3rd and 4th respondents had already assumed office as Chairperson and member of the Commission respectively, the petitioners ought to have exhausted the alternative dispute resolution mechanisms provided for under Section 15 of the Kenya Law Reform Act. They also relied on Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others [2015] eKLR and William Odhiambo Ramogi & 3 others v Attorney general & 40 others; Muslims for Human Rights & 2 others (Interested Parties) [2020] eKLR and prayed that their Preliminary Objection be upheld and the suit struck out accordingly.
 10. The 4th respondent also filed written submissions herein in support of her Preliminary Objection. The submissions are dated 7th August 2023. She reiterated her posturing that the subject matter of the Petition touches on the employment and labour rights of the 3rd and 4th respondents and therefore, by dint of Articles 162(2) and 165(5) of the Constitution, the Court with jurisdiction to handle it is the Employment and Labour Relations Court. The 4th respondent relied on Local Authorities Provident Fund Board (Lapfund) v Kisii County Government [2018] eKLR in which it was held that it suffices that the subject matter “relates to” or “arises out of” the relationship between an employer and employee.
 11. The second limb of the 4th respondent’s written submissions was that, since the 1st and 2nd respondents’ offices are headquartered in Nairobi, the Petition ought to have been filed in Nairobi. She also pointed out that she is also resident in Nairobi, as is the 3rd respondent. In the premises, the contention of the 4th respondent was that this Court lacks jurisdiction to entertain this Petition.



12. Lastly, it was the submission of the 4th respondent that the Petition was prematurely filed before exhaustion of the alternative dispute resolution procedure provided for at Section 15 of the Kenya [Law Reform Act](#) for the removal of a chairperson or member of the Commission. She further submitted that no exceptional circumstances were given to justify non-compliance. Accordingly, the 4th respondent prayed for the striking out of the Petition with costs.
13. The petitioner filed written submissions dated 21st October 2023 and proposed the following issues for determination:
 - (a) Whether the right forum for the disposal of the issues in contest herein is the Employment and Labour Relations Court.
 - (b) Whether the petitioner did not exhaust available dispute resolution mechanisms;
 - (c) Whether the 2nd respondent improperly jointed to the Petition.
 - (d) Whether the Petition offends territorial principle of jurisdiction.
14. In the petitioner's submission, the dispute in this Petition is whether the appointment of the 3rd and 4th respondents is inconsistent with and in violation of the pleaded Articles of the [Constitution](#). The petitioner was of the view that since Article 165(3)(ii) of the [Constitution](#) donates jurisdiction to determine the question whether anything said to be done under any law is inconsistent with or in contravention of the [Constitution](#), this matter falls squarely within the jurisdiction of the High Court and not the Employment and Labour Relations Court (ELRC).
15. The petitioner relied on [National Social Security Fund Board of Trustees v Kenya Tea Growers Association & 14 others \(Civil Appeal 656 of 2022\)](#) [2023] KECA 80 (KLR) (3 February 2023) (Judgment) in which the Court of Appeal held that the jurisdiction of the ELRC is confined to interpreting the [Constitution](#) only in instances where there is employer-employee relationship. Thus, the petitioner submitted that, there being no such dispute at play herein, the objection is misconceived.
16. In respect of the provisions of Section 15 of the [Law Reform Act](#), the petitioner submitted that the objection is premature because that provision requires that the process of removal of a chairperson and member of the Kenya Law Reform Commission be commenced at the Public Service Commission; and that in any event this Petition does not seek removal of the 3rd and 4th respondents from office on the grounds provided for in Section 14 of the Act. The petitioner further submitted that the Public Service Commission lacks jurisdiction to hear and determine the question whether an appointment was in contravention of the [Constitution](#); which jurisdiction is the preserve of the High Court.
17. The petitioner also justified the joinder of the 1st and 2nd respondent and submitted that an application for their striking out cannot be made by way of a Preliminary Objection. In their view, the respondents ought to have filed an application to that effect. Additionally, the petitioner submitted that the President is not a party to this Petition and therefore the case is distinguishable from the facts of Attorney General & 2 others v Ndii & 79 others; Prof. Rosalind Dixon & 7 others (Amicus Curiae) (Petition 12, 11 & 13 of 2021 (Consolidated)0 [2022] KESC 8 (KLR) (31 March 2022) (Judgment) in which the then President, His Excellency Uhuru Kenyatta, was sued and named directly as a respondent.
18. Lastly, the petitioner submitted that, since this is a constitutional petition Section 15 of the [Civil Procedure Act](#) is inapplicable. The petitioner relied on Rule 8(1) of the [Constitution](#) of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules which provides that a petition shall be instituted in the High Court within whose jurisdiction the alleged violation took



place. The petitioner contended that the appointments which form the basis of this petition were done vide a Gazette Notice, which is a Government instrument with application in the entire Republic of Kenya; and not confined to the Nairobi High Court Station. It was therefore the contention of the petitioner that the Notices of Preliminary Objection filed by the 1st, 2nd and 4th respondents are lacking in merit and ought to be dismissed with costs.

19. I have considered the arguments presented by the respondents in support of their respective Preliminary Objections and the petitioner's response thereto. It is manifest that, with the subsequent withdrawal of the suit against the 1st and 3rd respondents, some of the grounds have been overtaken by events. In particular, the contention that the joinder of the 1st respondent offends the mandatory provisions of Article 143(2) of the Constitution and therefore the Court should strike out the 1st respondent from the Petition, is now otiose.
20. Accordingly, only two issues remain for determination, namely:
 - (a) Whether this court is vested with the requisite jurisdiction to hear and determine the suit herein, and
 - (b) Whether the Petition offends the doctrine of exhaustion.

Whether this court is vested with the requisite jurisdiction to hear and determine the suit herein:

21. The respondents' contention was that this court lacks the jurisdiction to hear and determine the Petition herein from the standpoint of Article 162(2) of the Constitution. In *Mukisa Biscuits Manufacturing Ltd v West End Distributors* (1969) EA 696 it was held that:

“...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 a contract giving rise to the suit to refer the dispute to arbitration”.

22. In the same case Sir Charles Newbold, P. stated:

“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. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.

23. Further, in the Supreme Court case of *Aviation & Allied Workers Union Kenya v Kenya Airways Limited & 3 others* [2015] eKLR, it was reiterated that:

- (15) Thus a preliminary objection may only be raised on a “pure question of law”. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.



24. Jurisdiction is one of the issues that can be taken by way of a preliminary objection because it is a threshold issue. In the Owners of Motor vessel Lillian ‘S’ v Caltex Kenya Limited (supra) the court held:

“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 it the moment it holds the opinion that it is without jurisdiction.”

25. In the Major Law Lexicon, Volume 4, jurisdiction is aptly defined thus:

“By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it, or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by Statute or Chapter or Commission under which the Court is constituted and may be extended or restricted by similar means. If no restriction or limitation is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind or nature of the actions or the matters of which the particular court has cognizance or as to the area over which the jurisdiction extends, or it may partake of both these characteristics...”

26. Accordingly, in Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others [2012] eKLR, the Supreme Court held that:

“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 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...Where the *Constitution* exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by the *Constitution*. Where the *Constitution* confers power on Parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

27. The jurisdiction of the High Court is provided for in Article 165(3) of the *Constitution* 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.

28. Article 165(5) of the Constitution is explicit 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).

29. Article 162(2) and (3) of the Constitution provides for Courts of equal status to the High Court. It provides:

- (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).

30. In the light of the provisions of Articles 162(2) and 165(5) of the Constitution, Section 12 of the Employment and Labour Relations Act stipulates that:

“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...”

31. Thus, it is imperative to ascertain what the predominant issue herein is, and the correct forum for its adjudication. In this respect, the petitioner set out at paragraphs 6 to 12 of the Amended Petition the background facts touching on the recruitment process; and paragraph 1 under the subheading “THE ISSUE IN DISPUTE”, the petitioner averred that:

“...the appointment of the 4th Respondent as a member of the Commission was done in a manner that is in violation and breach of the Kenya Law Reform Commission Act, 2013 and the Constitution of Kenya, 2010 because the 4th respondent did not apply to be a member of the Kenya Law Reform Commission and neither was she interviewed for the said position.”



32. At paragraph 5 under the subheading aforementioned, the petitioner stated:

“In a nutshell, the Petitioner’s case is that the recruitment and appointment of the 4th respondent member of the Commission is in violation and breach of the [Kenya Law Reform Commission Act](#), 2013 and the [Constitution](#) of Kenya, 2010 and is therefore illegal, null and void.”

33. I am therefore persuaded that the predominant issue in this matter is recruitment and employment which falls within the jurisdiction of the ELRC. I am fortified in this stance by the decision in *Trusted Society of Human Rights Alliance vs. Nakuru Water and Sanitation Services Company & Another* [2013] eKLR, a question arose as to whether the Employment and Labour Relations Court was properly seized of a dispute arising from a recruitment process; and it was held (by Hon. B. Ongaya, J.) that:

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

34. Similarly, in *Kenya National Parents Association v Cabinet Secretary, Ministry of Education Science & Technology & Another* [2015] eKLR, the Employment and Labour Relations Court (Hon. Mbaru, J.) weighed in on the matter and held that:

“...The orders sought relate to the Claimant seeking to stop the recruitment of 53 county education to replace the current Directors of County Education. Thus, the issues in dispute and the orders sought relate to employment and labour relations, matters directly under the jurisdiction of this court. Matters of recruitment of employees, termination of employment through whatever means - constructive dismissal/termination as well - fall under the purview of this court's jurisdiction.”

35. In the more recent *Petition No. 103 of 2019: Adrian Kamotho Njenga vs. Judicial Service Commission & Others*, a Notice of Preliminary Objection was filed in connection with the same process as is in issue herein. The Petitioner contended thus in respect of the jurisdiction of the High Court to hear and determine the Petition:

“This Honourable Court lacks jurisdiction to hear and determine the instant Petition as the Petitioner primarily seeks an Order of prohibition, prohibiting the 1st Respondent from carrying on the process of short listing, scheduling of interviews, interviewing, receiving public views, nomination and making recommendations to the President for the appointment of any person as a Judge of a Superior Court which in accordance with Article 162 of the [Constitution](#) of Kenya, section 12 of the [Employment and Labour Relations Court Act](#) and Rule 7 of the Employment and Labour Relations Court (Procedure) Rules 2016 is a subject which is a preserve of the Employment and Labour Relations Court.”

36. The Court took the view that the recruitment process falls within the jurisdiction of the Employment and Labour Relations Court. Needless to mention that the ELRC has the jurisdiction to handle



constitutional issues arising in the course of such disputes. For instance, in Prof. Daniel N. Mugendi vs. Kenyatta University & 3 Others [2013] eKLR, the Court of Appeal expressed the following viewpoint:

“...we venture to put forth the position that as we have concluded that the Industrial Court can determine industrial and labour relations matters alongside claims of fundamental rights ancillary and incident to those matters, the same should go for the Environment & Land Court, when dealing with disputes involving environment and land with any claims of breaches of fundamental rights associated with the two subjects.”

37. Likewise, in Okiya Omtatah vs. Joseph Kinyua & Another [2018] eKLR, it was held that:

“The court while would like to avoid the never ending debate on the scope of jurisdiction of this court over constitutional issues would like to state that it is erroneous to apply the test of the existence of employer-employee relationship as the main criteria for deciding whether a constitutional question arising in that context can be determined by the court. Third parties towards whom there may be no employer-employee relationship may jointly or indirectly take decisions that affect employer-employee relationship. This makes them amenable to the jurisdiction of the court. The preamble to the ELRC Act ...is wide enough and cannot by any manner of interpretation be understood to confine the jurisdiction of the court to only situations where there is in existence an employer-employee relationship. That would be too narrow interpretation.”

38. In the light of the provisions of Articles 162(2) and 165(5) of the *Constitution*, Section 12 of the Employment and *Labour Relations Act* I am convinced that the Court vested with jurisdiction to handle the issues in contest herein is the Employment and Labour Relations Court. That being my view, I must immediately down my tools and would have no basis for considering the second issue framed herein at paragraph 19.

39. In the result, I would uphold the Respondents' Preliminary Objection on jurisdiction and find that this is a matter that ought to have been filed before the Employment and Labour Relations Court. It is now trite that where there is no jurisdiction the Court has no power to transfer a suit. This Petition is hereby struck out with no order as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 14TH DAY OF MARCH, 2025.

OLGA SEWE

JUDGE

