



REPUBLIC OF KENYA



**Gikenyi B & 6 others v Moi Teaching and Referral Hospital & 24 others; Chumba & 46 others  
(Interested Parties) (Petition E011 of 2024) [2024] KEHC 7510 (KLR) (20 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7510 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
PETITION E011 OF 2024  
SM MOHOCHI, J  
JUNE 20, 2024**

**BETWEEN**

**DR. MAGARE - GIKENYI B ..... 1<sup>ST</sup> PETITIONER  
LINAH NYABATE KINGSLEY ..... 2<sup>ND</sup> PETITIONER  
PHILEMON ABUGA NYAKUNDI ..... 3<sup>RD</sup> PETITIONER  
PAULINE NDU TA KINYANJUI ..... 4<sup>TH</sup> PETITIONER  
SHALLUM KAKAK NYAUNDI ..... 5<sup>TH</sup> PETITIONER  
JAMLICK OTONDI ORINA ..... 6<sup>TH</sup> PETITIONER  
AGNES WAMBUA WANZUU ..... 7<sup>TH</sup> PETITIONER**

**AND**

**MOI TEACHING AND REFERRAL HOSPITAL ..... 1<sup>ST</sup> RESPONDENT  
MOI TEACHING & REFERRAL HOSPITAL BOARD ..... 2<sup>ND</sup> RESPONDENT  
SITOYO LOPOKOIYOT ..... 3<sup>RD</sup> RESPONDENT  
DR. PHILIP KIPTANUI KIRWA ..... 4<sup>TH</sup> RESPONDENT  
PERIS BIRICHI ..... 5<sup>TH</sup> RESPONDENT  
JUDITH JEROTICH ..... 6<sup>TH</sup> RESPONDENT  
MESHACK KOIMA ..... 7<sup>TH</sup> RESPONDENT  
JAMES MUCHIRI NDUNGU ..... 8<sup>TH</sup> RESPONDENT  
DR. MICHAEL GICHANGI ..... 9<sup>TH</sup> RESPONDENT  
GEORGE OMBUA ..... 10<sup>TH</sup> RESPONDENT  
DR. ERNEO NYAKIBA ..... 11<sup>TH</sup> RESPONDENT**



PROF. ROBERT TENGE KUREMU .....	12 <sup>TH</sup> RESPONDENT
MR. FELIX K. KOSKEI .....	13 <sup>TH</sup> RESPONDENT
PUBLIC SERVICE COMMISSION .....	14 <sup>TH</sup> RESPONDENT
HON. ATTORNEY GENERAL .....	15 <sup>TH</sup> RESPONDENT
DR. BENJAMIN KIPCHUMBA TARUS .....	16 <sup>TH</sup> RESPONDENT
DR. OWEN MENACH .....	17 <sup>TH</sup> RESPONDENT
DR. WILSON K. ARUASA .....	18 <sup>TH</sup> RESPONDENT
ANN CHEMORSIO .....	19 <sup>TH</sup> RESPONDENT
ENG. JOSEPH MUNGAI KAMAU .....	20 <sup>TH</sup> RESPONDENT
ATHI WATER WORKS DEVELOPMENT AGENCY .....	21 <sup>ST</sup> RESPONDENT
AGNES KALEKYE NGUNA .....	22 <sup>ND</sup> RESPONDENT
KENYA BROADCASTING CORPORATION .....	23 <sup>RD</sup> RESPONDENT
ABDALLAH MOHAMMED HATIMY .....	24 <sup>TH</sup> RESPONDENT
KENYA NATIONAL SHIPPINGLINE LTD .....	25 <sup>TH</sup> RESPONDENT

**AND**

DR. JOHN CHERUIYOT CHUMBA .....	INTERESTED PARTY
DR. EVANS RONO CHERUIYOT .....	INTERESTED PARTY
DR. SIMON KIPCHIRCHIR KIBIAS .....	INTERESTED PARTY
TITUS TARUS .....	INTERESTED PARTY
DR. ANDALE THOMAS OKWARO .....	INTERESTED PARTY
DR. MAURICE NYONGESA WAKWABUBI .....	INTERESTED PARTY
DR. EVERLINE MUSANGI NYAMAI .....	INTERESTED PARTY
DR. ANDREW JOSEPH OJIAMBO WANDERA .....	INTERESTED PARTY
DR. RICHARD MOGENI MOGAKA .....	INTERESTED PARTY
DR. CHEPTINGA PHILIP KIPKURUI .....	INTERESTED PARTY
PROF. MICHAEL KIPTOO .....	INTERESTED PARTY
KENNEDY ADONGO .....	INTERESTED PARTY
ARNOLD MANGI MWABILI .....	INTERESTED PARTY
MACDONALD SABWA .....	INTERESTED PARTY
JOSPHAT MUTUKU .....	INTERESTED PARTY
MARTIN ALFRED WEKESA WAFULA .....	INTERESTED PARTY
EDWARD S. OMONDI .....	INTERESTED PARTY
ALIO IBRAHIM ADEN .....	INTERESTED PARTY



DR. STANLEY CHERUIYOT BII ..... INTERESTED PARTY  
DR. JUSTA WAWIRA KIURA MWANGI ..... INTERESTED PARTY  
DR. NICKSON KIPCHIRCHIR KIPKORIR ..... INTERESTED PARTY  
ZETH OUMA OMOLLO ..... INTERESTED PARTY  
ANANGWE MUNALA SAMSON ..... INTERESTED PARTY  
DR. ISAAC OBORE OMERI ..... INTERESTED PARTY  
DR. ISALAH TANUI ..... INTERESTED PARTY  
WILLY MUKOMA MUYUTHE ..... INTERESTED PARTY  
BEN SAMOEI ..... INTERESTED PARTY  
RACHEL MUSYOKI ..... INTERESTED PARTY  
JOSEPH K. CHOGE ..... INTERESTED PARTY  
DR. TARUS FELIX KIPLIMO ..... INTERESTED PARTY  
FRANKLYNE MISIKO OMUHOLO ..... INTERESTED PARTY  
KUASHIK HALDER ..... INTERESTED PARTY  
BENSON BIWOTT ..... INTERESTED PARTY  
DAVID NAMU KARIUKI ..... INTERESTED PARTY  
DR. ROBERT KIPLAGAT RONO ..... INTERESTED PARTY  
DR. GIDEON KIBET TOROMO ..... INTERESTED PARTY  
DR. EDWARD KIMUTAI SEREM ..... INTERESTED PARTY  
JULIANA SYOWEU TISNANGA ..... INTERESTED PARTY  
WEKESA CHRISTINE NAKHUMICHA ..... INTERESTED PARTY  
DR. SAMSON KIPKURGAT NDEGE ..... INTERESTED PARTY  
DR. ALEXANDER IRUNGU WANJIRU ..... INTERESTED PARTY  
LUCY AKOTH OKOTH ..... INTERESTED PARTY  
DR. NGOITSI HENRY NONO ..... INTERESTED PARTY  
DR. WILSON KIPTOO SUGUT ..... INTERESTED PARTY  
DR. VICTOR KIPYEGON MAINA ..... INTERESTED PARTY  
DR. KANDIE NG'OCHOCH ..... INTERESTED PARTY  
DR. PHILIPH KIPKIRUI TONUI ..... INTERESTED PARTY

## RULING

1. The 1<sup>st</sup> Petitioner is a Consultant Trauma and General Surgeon working for the County Government of Nakuru and is a resident of Eldoret and Nakuru. He is Kenyan Medic by profession, human rights activist, a parent and patriotic citizen of Kenya who looks into a future of Kenya where society



strictly follows rule of law for betterment of society. He is a law-abiding citizen, a public-spirited individual, and a human rights defender. His objectives are, to promote democratic governance, non-discrimination, stop ethnic marginalization, uphold the rule of law/constitutionalism, defending human rights, and agitating for sustainable economic development for the prosperity and wellbeing of the general population in this lovely Country of ours. The 2<sup>nd</sup> to the 7<sup>th</sup> Petitioners are described as law-abiding citizens of Kenya, public spirited individuals, and human rights defenders.

2. The Petitioners collectively moved the court on the strength of Article 3(1) which provides that every person has an obligation to respect, uphold and defend *the Constitution* of Kenya 2010; under Article 22(1) of *the Constitution* Article which states that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened; pursuant to Article 22(2)(c) which states that in addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by person acting in the public interest; contending that, Article 23(1) of *the constitution*, the High Court and/or special courts (in article 162(2) has jurisdiction, in accordance with Article 165, 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.
3. A cursory look at the Petition is indicative of the lamentation of the Petitioners of recruitment of the Chief Executive Officers of Moi Teaching and Referral Hospital, Athi Water Works Development Agency, Kenya Broadcasting Corporation and Kenya National Shipping Line Ltd not being on merit and of being on ethnic considerations and in contravention of *the constitution*, it is also alleged that, Athi Water Works Development Agency, Kenya Broadcasting Corporation and Kenya National Shipping Line Ltd are operating without requisite constitutive statutory instruments thereby seeking the following seventeen (17) Reliefs/Prayers;
  - a. A Declaration that, the Announcement, shortlisting, interviewing and eventual appointment of Chief Executive Officer or any other post of the 1<sup>st</sup> Respondent-Moi Teaching and Referral Hospital and all other respondent institutions, the Respondents must at all material time meet the requirements of the National Values and principles of Governance and Public Service on appointments in Public Service provided at inter alia Articles 2, 10, 27, 73 and 232 of *the constitution* and relevant laws.
  - b. A Declaration that, the purported announcement and/or appointment and/or gazettement of the 4<sup>th</sup> Respondent and/or any person as Chief executive officer of the 1<sup>st</sup> Respondent-Moi Teaching and Referral Hospital by the Respondents and/or any other person as communicated by the press release and/or gazette notice and/or any letter and/or any document dated 17/5/2024 or any other date without constitutional, statutory and all enabling provisions of the law inter alia article 1,3,10,19,20, 27,28,41,43,47,73,75,129,131,132,135,154 AND 232,233,248,249, and 232 of *the constitution* and other relevant laws is unconstitutional and therefore, invalid, null and void ab initio.
  - c. A Declaration that, the purported recruitment process, action and/or appointment as Chief executive officer of the 1<sup>st</sup> Respondent Moi Teaching and Referral Hospital without constitutional and statutory provisions is contrary to article 1,2,3,10, 27,28,35,41,43,54,55,56,73,75,94,201 and 232



of *the constitution* (2010) and other relevant laws is unconstitutional and therefore, invalid, null and void ab initio.

- d. A Declaration that, the purported introduction/requirement of boards of state corporations requiring them concurrence of their appointment with the 13<sup>th</sup> Respondent, chief of staff head of the public service, Mr. Felix K. Koskei, and/or the president and/or any other person is usurpation of powers of the respective state corporations' boards has no basis in law hence its illegal and unconstitutional, Null and Void.
- e. A Declaration that, there is no requirement by boards of state corporations requiring them concurrence of their appointment with the 13<sup>th</sup> Respondent, chief of staff head of the public service, Mr. Felix K. Koskei or any other office/officer.
- f. A Declaration that, the Respondent or any person's actions and/or omissions done and/or omitted during the period when Statutory Instruments for the respondents had expired/not valid/not in force has no force in law hence Null and Void.
- g. A Declaration that, the 14<sup>th</sup> Respondent (public service commission) and 15<sup>th</sup> Respondent the honourable Attorney General failed to advise the Respondents of the correct way of handling state corporations' appointments
- h. A Declaration that, the short listing of candidates who did not meet the required qualifications as outlined in the advert is illegal and goes against good governance and public service commission and other relevant constitutional provisions, relevant statutes and hence the same is illegal and unconstitutional
  - i. The court is pleased to issue an Order of Judicial Review by way of CERTIORARI, quashing the respondent's press release and or gazette notice and/or any document dated 17/5/2024 or any other date produced for the purpose of the purported appointment of any person as Chief executive officer of the 1st respondent-Moi Teaching and Referral Hospital.
- j. The court is pleased to issue an Order of Judicial Review by way of CERTIORARI Quashing the appointment of Dr. Philip Kiptanui Kirwa 4<sup>th</sup> Respondent herein as the 1<sup>st</sup> Respondent hospital chief executive officer, CEO.
- k. An Order of Judicial Review by way of PROHIBITION, prohibiting the Respondents and/or interested party and /or any other person from performing and/or in any way acting in any way or manner as Chief executive officer of the 1<sup>st</sup> Respondent-Moi Teaching and Referral Hospital Principal.
- l. An Order of Judicial Review by way of MANDAMUS, compelling the respondents herein to initiate a fresh proper/legal process of filling the positions of Chief executive officer of the 1<sup>st</sup> Respondent-Moi Teaching and Referral Hospital and other institutions as contemplated in the statutory instrument, constitution and all enabling provisions of the law.
- m. The court is pleased to issue an Order of Judicial Review by way of CERTIORARI, quashing the Respondent's press release and or gazette notice



and/or any document dated 17/5/2024 or any other date on appointment of 20<sup>th</sup>, 22<sup>nd</sup> and 24<sup>th</sup> Respondents as Chief Executive Officer (CEO) and/or managing directors of 21<sup>st</sup>, 23<sup>rd</sup> and 25<sup>th</sup> state corporations/entities respectively;

- n. An Order of Judicial Review by way of MANDAMUS, compelling the respondents herein to initiate a fresh proper/legal process of filling the positions of Chief executive officers/managing directors of the 21<sup>st</sup>, 23<sup>rd</sup> and 25<sup>th</sup> state corporations/entities;
  - o. An Order of Judicial Review by way of MANDAMUS, compelling the respondents to perform staff audit of ALL members of staff (from top level management-middle and to lowest level staff members) with view of aligning them with constitutional and legal requirements inter alia on issues of regional/ethnic representation/balance, gender balancing, PWD and other requirements as provided in institutional human resource policy, statutory and constitutional requirements.
  - p. That, any other order or/and modification of Petitioner's prayer(s) which this honourable court may deem fit so as to a achieve objects of justice for majority of Kenyans as a whole; AND
  - q. Costs of this Petition to be borne by Respondents.
4. Paragraph 119 of the Petition refines the following as some of the eighteen (18) alleged specific constitutional violations committed;
- a. That, Legal Notice No. 78 of 1998 which established Moi Referral Hospital as a State Corporation under the *State Corporations Act* as a Statutory Instruments having lapsed and, therefore, have no force of law. This means the respondents are not following any law and are following their law of the jungle contrary to Article 90(4) of *the constitution*.
  - b. That, the appointments the 1<sup>st</sup> Respondent CEO without being open to the public on the process of recruitment of the CEO in secrecy and without, transparency and accountability is contravention of article 10 of *the constitution* 2010.
  - c. That, by Respondents using public office to do shoddy work with predetermined outcome of short-listing applicants is against Article 73 and 75 of *the Constitution*
  - d. That, by Respondents conducting the recruitment without be accountable to the public in their administrative action is contrary to article 232(1)(d).
  - e. By Respondents cherry picking their people they want shortlisted as opposed to open system where the public is information of the process and in the process discriminate other communities is contrary to article 10, 27,73,75 and 232 of *the constitution*.
  - f. That, by leaving out other applicants who would have benefitted had the recruitment being fair is denial of economic and social rights and is poor labour practices contrary to article 41 and 43 of *the constitution*.
  - g. By the Respondents not considering women, people with disability and minority groups, then it is contravention of article 27,54,56 and 232 of *the constitution* 2010.



- h. By the Respondents allowing the 4<sup>th</sup> Respondent to be involved in process of recruitment of the next CEO where he is also a candidate goes against good governance against “nemo iudex in causa sua”-no one should be made a judge in their cause) is contravention of article 10, 73,75 of *the constitution* 2010.
- i. That, the appointments the 1<sup>st</sup> Respondent CEO without being open to the public on the process of recruitment of the CEO in secrecy and without, transparency and accountability is contravention of article 10 of *the constitution* 2010.
- j. That, improper procedure used to recruit CEO with conflicted interest leads to loss of public funds since public funds are used for other purposes is non-prudent use of scarce public financial resources is contravention of article 201 of *the constitution* 2010.
- k. The actions of Respondents not using transparency and provision to the public of timely, accurate information and using merit and fair competition as the only method for shortlisting candidates from Kenya's diverse communities; is against article 232 of *the constitution*.
- l. The humiliations which applicants underwent even taking almost one month before even getting feedback and at the same time subjecting them to a process which Respondent know has predetermined outcome indignities the applicants contrary to article 28 of *the constitution*.
- m. That, the Respondents have not demonstrated that there is a rational relationship between the object sought (inclusive & diverse appointment) to be achieved and the means chosen in these impugned appointments. The legitimate purpose is determined by *the Constitution* itself which requires that such appointments must reflect ethnic and regional diversity while taking into account the rights of special groups like the youth, the marginalized and person. There is no rationality and statutory considerations in the appointments. Contrary actions and to violations of article 10,27,28, 73,75 and 232 of *the constitution*.
- n. That, the Respondents violated Articles 2 (1) & 2;3 10, 27, 73 and 232 on the supremacy of *the constitution* binds all persons and all State organs by claiming to exercise State authority except as authorized under *the Constitution*:
- o. That, the Respondents shortlisted five (5) out of the 8 candidates from one region/ethnicity is contrary to article 10 and 232.
- p. That, the failure by the Respondents to give the Petitioner accurate information and correct the irregularities in their procedures even upon a demand by the Petitioner amounted to acts of impunity in violation of the provisions of Articles 10, 73 and 232 of *the constitution*;
- q. That, the appointment was made in consultation/concurrence with chief of staff and head of the public service, Mr. Felix K. Koskei, is not based on any law or constitution. This is bad governance contrary to article 10,73,75,232 of *the constitution*; and
- r. That, the office chief of staff and head of the public service, is not envisaged to make appointments nor provide any concurrency to the appointments of CEOs and managing directors of state corporations as doing so is contrary to article 10, 248,249,33 as read to PSC Act no. 10 of 2017 as read with and *state corporations Act*-cap 4446 of the laws of Kenya.



5. On the 21<sup>st</sup> May 2024 this court ex-parte directed and ordered:
  - a. That, this Application and Petition is hereby certified extremely urgent to be heard on priority basis and service of the same is dispensed with in the first instance.
  - b. That, a Conservatory Order is hereby issued, compelling the Respondents, Suspending the Press Release, Gazette Notice or any Other Authority or document dated 17<sup>th</sup> May 2024 or any other date purporting to appoint Dr. Phillip Kiptanui Kirwa the 4<sup>th</sup> Respondent, As the 1<sup>st</sup> Respondent's CEO, pending the hearing and determination of this Application.
  - c. That, a Conservatory Order is hereby issued Suspending the Press release, gazette notice and/or any other document or authority appointing of the 20<sup>th</sup>, 22<sup>nd</sup> and 24<sup>th</sup> Respondents as Chief Executive Officer (CEO) and/or Managing directors of the 21<sup>st</sup>, 23<sup>rd</sup> and 25<sup>th</sup> state corporations/entities respectively.
  - d. That, Temporary injunction is hereby issued, issued prohibiting the Respondents and any other person either by themselves, their agents and/or any other person(s) whatsoever, from acting and/or giving effect to the press release or/and gazette notice and/or any document notifying of the appointment of Dr. Philip Kiptanui Kirwa, the 4<sup>th</sup> Respondent herein or any other person herein as the hospital CEO of the 1<sup>st</sup> Respondent pending the hearing and determination of this Application.
  - e. That, A conservatory is hereby issued Restraining Dr. Philip Kiptanui Kirwa, the 4<sup>th</sup> Respondent or any other person appointed pursuant the impugned notice from performing or/and continuing to perform/function as 1<sup>st</sup> Respondent CEO whatsoever, pending determination of this application inter-parties.
  - f. That, this Application be served on the Respondents and All Interested Parties within (Five) 5 days of today. Not later that close of business on Monday 29<sup>th</sup> May 2024
  - g. That, the Respondents files and serves its Response upon the Petitioners and All the Interested Parties within Seven (7) days from the date of service. (Not later that close of business on Thursday 6<sup>th</sup> June 2024) and
  - h. That, Inter-parte Mention shall be on the 11<sup>th</sup> June 2024.
6. In response to the Petition, the Hon. Attorney General, who appeared on behalf of the 15<sup>th</sup>, 23<sup>rd</sup> and 24<sup>th</sup> Respondents, filed a Notice of Preliminary Objection dated 6<sup>th</sup> June, 2024.
7. The Court Directed that parties argue the preliminary objections orally.
8. The objection was tailored as follows: -

That this entire petition be struck out with costs in limine premised on the grounds that this court has no jurisdiction to preside over and or determine this Petition.



### Submissions by the Respondents;

9. Ms Shirika Advocate for the 15<sup>th</sup>, 23<sup>rd</sup> and 24<sup>th</sup> Respondents submitted that, the Court does not have jurisdiction to hear and determine the dispute.
10. That the petition prayer (j) seeks judicial review quashing the appointment. And Page 103 of Petition (Internal Memo) stating that Dr. Kirwa appointed on 17<sup>th</sup> May, 2024 and Petition filed on 20<sup>th</sup> May, 2024.
11. That a contract was created that employment under Article 162 Environment and Land Court heard and determines cases relating to employment dispute.
12. That Section 12 of the *Employment and Labour Relations Court Act* prescribes that those Courts shall hear disputes of employment.
13. That the question has been litigation Kenya Tea Growers and 2 others vs NSSF & 13 Others, Petition E004 and Pet.E003 of 2013.
14. The question of whether the ELRC had jurisdiction to determine matters which emanated from that did not emanate from employer-employee disputes but which impact will affect employer – employee dispute.
15. She invited this Court to determination of this question contending that even when conservatory orders were issued there was an employment contract.
16. Rights accrued from 17<sup>th</sup> May, 2024 and can only be determined before the Employment and Labour Relations Court. And that Page 4 of Authority paragraph *II* Supreme Court held even if matter did not emanate from employment, employee contract the act as (read) authority an affected party may end up in the employment court and prayed that, the objection be sustained and the petition be struck out.
17. Mr. Katwa Advocate for the 1st, 4th, 12th, 18th, 19th Respondents Supported the Preliminary Objection pointing out five issues as is contained in their grounds of objection dated 6th June 2024 as follows;
  - i. The petition and application were brought to this court in an act of forum shopping by the Petitioners.
  - ii. The petition, and application were filed in this court in abuse of court process.
  - iii. The orders made on 21st May 2024 were in error for lack of substantive and geographical jurisdiction.
  - iv. The court lacks subject matter jurisdiction as the matter is wholly an employment and Labour relations dispute that ought to have been filed at the Employment and Labour Relations Court.
  - v. . Further the court lacks territorial jurisdiction within the meaning of Rule 8 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 as;
    - a. The matters in dispute in the petition occurred at Eldoret where the 1<sup>st</sup> Respondent is based and the alleged violations are said to have occurred.



- b. Otherwise, the other jurisdictions would have been Nairobi where the 20<sup>th</sup>, 21<sup>st</sup>, 22<sup>nd</sup> and 23<sup>rd</sup> Respondents are situated,
    - c. Or otherwise Mombasa where the 24<sup>th</sup> and 25<sup>th</sup> Respondents are.
    - d. Nakuru where the petition is filed has no geographical relationship, nor nexus to any aspect of the petition.
  - vi. The court made ex-parte orders for a period exceeding 14 days, which exceeds the usual and reasonable time, of 14 days.
  - vii. The petition does not demonstrate how the 2<sup>nd</sup> to 6<sup>th</sup> Petitioners have any nexus or interest or association with the petition.
  - viii. There is fatal error of;
    - a. Suing both the board, as a body, and again simultaneously suing individual board members.
    - b. Duplicating the alleged cause of action by incorporating the board members in person and also board as corporate entity.
    - c. Enjoining the board members in person whilst they did not conduct any of the activities implicated at a personal level.
  - ix. Parties were improperly enjoined as Respondents and as interested parties whilst
    - a. there was no cause of action against them;
    - b. without their consent and
    - c. without leave of the court, contrary to *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and the Supreme Court Precedent in *Trusted Society of Human Rights Alliance vs. Mumo Matemo & 5 others [2014] eKLR*.
  - x. The Petition and application both dated 20th May 2024 are frivolous, vexatious and an abuse of court process.
18. That all five (5) issues touch on question employment and from the petitioner's submission he also identifies issues coming up for trial and submit that the 1<sup>st</sup>, 4<sup>th</sup>, 12<sup>th</sup>, 18<sup>th</sup>, 19<sup>th</sup> Respondents agree on what issues are that, what the court should determine is the residual issues which remain in the Employment and Labour Relations Court.
19. That Petitioner has made distinction whether Respondent have legitimate instruments to sustain their existence and Relying on authority at paragraph 12 Section paragraph 79; *KTPG Vs NSSF*.
20. That when a labour dispute obtains and need for interpretation the Environment and Land Court has powers to consider constitutional issues, therefore the narrow question whether Moi Teaching and Referral Hospital, Athi Water, KBC and Shipping line have valid instruments can be dealt with by the Environment and Land court it is for the Environment and Land Court to determine.



21. The 3<sup>rd</sup> argument by the 1<sup>st</sup>, 4<sup>th</sup>, 12<sup>th</sup>, 18<sup>th</sup>, 19<sup>th</sup> Respondents questions if High Court concludes it has jurisdiction? What else will the labour court do?
22. The last item by the 1<sup>st</sup>, 4<sup>th</sup>, 12<sup>th</sup>, 18<sup>th</sup>, 19<sup>th</sup> Respondents is to point out, concurrency of jurisdiction between High Court and Environment and Land Court See Paragraph 73 and 78 of the authority and pray that the court uphold the preliminary objection.
23. That the petitioners will suffer no prejudice as they can still argue in the Employment and Labour Relations Court with the 1<sup>st</sup>, 4<sup>th</sup>, 12<sup>th</sup>, 18<sup>th</sup>, 19<sup>th</sup> Respondents expressed concerned why case is filed in Nakuru while Respondents are based in Nairobi.
24. The petitioners cannot be the basis of determination of geographic jurisdiction and location should be the one of Respondents praying that the court uphold the preliminary objection.
25. Ms. Cherogony Advocate for 14th Respondent filed preliminary objection on 30/5/24. Contending want of jurisdiction and submit that petition offends 162 (2) (a), 162 (3) and 165 (5) (b) she associated with submissions made by 1st, 4th, 12th, 18th, 19th Respondents, the 15th, 23rd and 24th Respondents. I pray that you find for the preliminary objection.
26. Ms Kashindi Advocate for the 5<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup>, and 10<sup>th</sup> Respondents and the 1<sup>st</sup>, 4<sup>th</sup>, 27<sup>th</sup>, 30<sup>th</sup>, 44<sup>th</sup>, and 45<sup>th</sup> interested parties supported the preliminary objection referring to their grounds of opposition dated 3<sup>rd</sup> June 2024 supported the preliminary objection and had filed ground on 3/6/24 and paragraph 1 and 2 raises jurisdictional question.
27. Ms Kashindi for the 5<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup>, and 10<sup>th</sup> Respondents and the 1<sup>st</sup>, 4th, 27<sup>th</sup>, 30<sup>th</sup>, 44<sup>th</sup>, and 45<sup>th</sup> interested parties supported the preliminary objection referring to their grounds of opposition dated 3rd June 2024 referred to rule 8 of the Mutunga rules that Petition should be filed within geographical limits.
28. That according to Section 12 Environment and Land Act the jurisdiction starts with Article 162 and 165 (5) that the High Court shall not have jurisdiction. Section 12 (1) (a) jurisdiction of ELRC and that Paragraph 21 and 25 petitioner says matters extends beyond employee- employer relationship.
29. Court of Appeal decision of Public Service Commission and 4 others and Cheruyoit and 20 others, Court of Appeal 119 and 139 of 2024. Whether there is need for employment dispute (broad jurisdiction) and Indeed, the Supreme Court in the USIU (case) paragraph 25 and 26 2012 held that ELRC has jurisdiction to handle constitutional matters arising from employment and every issue can be argued at the ELRC. The crux is recruitment which creates employment relations.
30. If Court finds it has jurisdiction the ELRC shall be rendered (jurisdictionally hamstrung) reference was made to the Case of Wafula and 2 others vs Public Service Commission and 4 Others Petition 218 of 2023 (appointment of Chief Lands Registrar) and Nelson Havi Vs JSC & Another – ELRC addressed its own jurisdiction.
31. Ms Kashindi for the 5th, 6th, 8th, and 10th Respondents and the 1st, 4th, 27th, 30th, 44th, and 45th interested parties supported the preliminary objection referring to their grounds of opposition dated 3rd June 2024 and urged the court to down its tools.
32. Mr. Odera for the 2nd and 3rd Respondent filed grounds where they raise objection on competency of the petition on basis that it is anchored on Electronic evidence.
33. That he obtained all document from 1st Respondent website and annexed certificate of electronic evidence.



34. Important issue arising is he claims to have used his mobile phone to download. That the question is how did he download, it requires external hard drive and must print out requires printer.
35. Section 106 – what printer was used. Issue not addressed by the petitioner that has been held by various High Court. The whole process of production requires meticulous. These are not technical issue and is for strict compliance. It is not curable under Article 159 (Raila Odinga Supreme Court Case)
36. That some of document relied upon by the Petitioners are confidential at page 181. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondent urges the court to find for want of jurisdiction and incompetence.
37. That the interim orders were granted way beyond the 14 days and urge the court to discharge the same.
38. Mr. Kirima Advocate for 11<sup>th</sup>, 16<sup>th</sup> and 17<sup>th</sup> Respondent and 5<sup>th</sup> and 6<sup>th</sup> Interested party. fully supported the preliminary objection on jurisdiction raised by the other Respondents, more specifically what Katwa Advocate said Moi Teaching and Referral Hospital is in Eldoret. That the Cause of action arose in Eldoret.
39. Dr. Kamotho Advocate for 20<sup>th</sup> and 21<sup>st</sup> Respondent supported the preliminary objection by the other Respondents on want of jurisdiction seeking that the petition be struck out on question of jurisdiction and associated the 20<sup>th</sup> and 21<sup>st</sup> Respondent with all other Respondents, raising objection. That Article 162 (2) (a) as read with Article 165 (5) ousts the jurisdiction of the Court.
40. Reliance was placed on the Decision of KTGA vs NSSF Board (jurisdiction) noting that the petition has been brought by several petitioners and only one petitioner has sworn affidavit. By not swearing affidavit they have disowned the petition.
41. That the only allegation against 20<sup>th</sup> and 21<sup>st</sup> Respondent are in paragraph 22 and 23 of petition that appointment of 13<sup>th</sup> Respondent at page 103 is a press release attributed to Isaac Mwaura. No action by 13<sup>TH</sup> Respondent is exhibited.
42. That the 13<sup>th</sup> Respondent has been dragged in court on basis of hearsay. No role of 13th Respondents is show-cased.
43. The 20<sup>th</sup> and 21<sup>st</sup> Respondent submit that the temporary conservatory orders secured, do not meet the threshold for conservatory order that affects the 20th and 21st rRspondents of orders that ought not to have accrued ab initio.
44. The petition has not been framed with precision as to the violation or contravention of constitution by the 20<sup>th</sup> and 21<sup>st</sup> Respondents.
45. That the petition lacks precision particularly and as such attract any reliefs at the interlocutory stage and at the tail end.

### **Submission by the Petitioner**

46. The 1st petitioner argued against the preliminary objection and relied on his written submissions on 12/06/24 where in a nutshell he argues that the constitutional questions in the Petition are not private law matters confined to an employer-employee relationship and that the issues/questions of law/constitution raised are not in personal spheres per se. That these are rights both Personam and In Rem.
47. That the issues before this court is alleged constitutional violations made through omissions and commissions hence the court is clothed with requisite jurisdiction to deal with this matter as jurisdiction flows from either *the Constitution* or legislation or both. Reference is made to the locus



classicus on this subject in the matter of Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd. (1989) the Court (Nyarangi ,J) 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 upon it by law.”

48. That the jurisdiction of this honorable court is found at article 165 of *the constitution* (2010). That the high court is the court with unlimited original jurisdiction to hear and determine the constitutionality of a statute as provided in article 165(3)(b) &(d).
49. It states 165(3) Subject to clause (5), the High Court shall have (a) .....
  - (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) .....
  - (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of the question whether any law is inconsistent with or in contravention of this Constitution; 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; 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;
50. That the petition is not dealing with “disputes” on of employee and employer relationship per se. Infact the 1<sup>st</sup> & 2<sup>nd</sup> Respondent are in the same side with the purported appointed CEO (4<sup>th</sup> Respondent) The same applied to 20&21st Respondent, 22nd & 23nd Respondent and 24th and 25th Respondent. Hence there is no dispute between the appointed CEOs/MDs(employees) on one side and the institutions(employer) on the other. The petition is concerned on the constitutional violations of the Respondents and efforts to respect and uphold *the constitution*. All these are handled by the High Court.
51. That the Petition raise question of use of expired statutory instruments, inclusivity, marginalization, Powers of board of management and Constitutionality of 13 Respondents’ actions.
52. The issues raised are constitutional violations in the jurisdiction at this court that fundamental Rights and freedoms are threatened triggering Article 165 (3) (d) and that ELRC deals with disputed between employers and employees.
53. The 1<sup>st</sup> petitioner agrees that while the ELRC has jurisdiction the same is activated within Article 162 (2) only when the constitutional violations are within the employment issues.
54. That this petition deals with the issues raised outside employment contract. Reliance is placed in case of LSK vs Nairobi Metropolitan Court of Appeal (alongside). Further in case Article 165 (3) (b) the High Court has jurisdiction to hear such cases.
55. In Court of Appeal page 203 Clerk of Nakuru County and 3 Others vs Odongo & Others. The 1<sup>st</sup> Petitioner is not in an employee-employer relationship and that this is a pre-condition required for admission.
56. As for Geographical jurisdiction, Rule 8 of Mutunga Rules (jurisdiction of where matter took place) reference is made to the Case of Council of Governors.



57. That a Plain interpretation reveals violations took place in four (4) places and that the law is silent. Therefore, by virtue of having four 4 different locations. It can be filed in any of the 4 location.
58. The 1st petitioner submits that, no prejudice shall be occasioned to the Respondents if the case as filed in Nakuru proceeds to a full hearing and that Rule 4 and 55 presupposes a just expeditious hearing).
59. That the Respondents are themselves forum shopping in this court.
60. As for certificate of Electronic evidence by these are not pure matters of law qualifying as a preliminary objection and shall invite the court to consider issues of facts.
61. As for Mr Kamotho Advocate's issue of how the evidence was obtained is not a preliminary objection.
62. In conclusion, the 1st petitioner urges the court that no interim conservatory orders were irregularly issued. The Court has discretionary powers and jurisdiction to issue the same and that no law is quoted by the Respondents barring the court from giving conservatory orders.
63. Finally, the 1st petitioner asserts that, this court has jurisdiction and prays that the court dismisses the preliminary objection to allow the court proceed.
64. That if the court finds no jurisdiction exists, then the conservatory orders shall abate naturally.

### **Analysis & Determination;**

65. The validity of any preliminary objection is gauged against the requirement that it must raise pure issues of law capable of disposing of a dispute at once. It is, therefore, mandatory for a Court to ascertain that a preliminary objection is not caught up within the realm of factual issues that would necessitate the calling of evidence.
66. The foregoing nature of preliminary objections was discussed in *Mukisa Biscuit Manufacturers Ltd -vs- Westend Distributors Ltd*, (1969) E.A. 696 page 700 when the Court observed as follows: -
 

...so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection 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. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop.
67. In *Civil Suit No. 85 of 1992, Oraro vs. Mbaja* [2005] 1 KLR 141, Ojwang J, as he then was, cited with approval the position in *Mukisa Biscuit -vs- West End Distributors* (supra) and stated as follows on the operation of preliminary objection: -
 

.... I think the principle is abundantly clear. A "preliminary objection", correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed.



68. And in the case of *Omondi -vs- National Bank of Kenya Ltd & Others* {2001} KLR 579; [2001] 1 EA 177, it was observed that, a Court in determining a preliminary objection can look at the pleadings and other relevant documents but must abide by the principle that the objection must raise pure points of law. It was held thus: -

...In determining (Preliminary Objections) the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters... What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise of judicial discretion and therefore the contention that the suit is an abuse of the process of the Court for the reason that the defendant's costs in an earlier suit have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done *ex debito justitiae* (as of right) but as a matter of judicial discretion.

69. On the question as to whether jurisdiction is a point of law, was dealt with by the Supreme Court in *Petition No. 7 of 2013 Mary Wambui Munene v. Peter Gichuki Kingara and Six Others*, [2014] eKLR, stated that 'jurisdiction is a pure question of law' and should be resolved on priority basis.

70. Without underestimating any of the other alleged points of preliminary objection Raised by the Respondents, this court has refined the objection to one that; the high court lacks jurisdiction to entertain a constitutional petition that includes recruitment or appointment grievance in appointment of Chief Executive Officers of state corporations, by spirited Kenyans as the petitioners in the absence of an employer employee relationship and that the same lies squarely in the ELRC.

71. The jurisdictional challenge raised, mirrors the Preliminary objection raised in the case of *Orogo v Chairman Board of Directors Kenya Revenue Authority & 2 others* (Petition E004 of 2023) [2023] KEHC 24847 (KLR) (3 November 2023) (Ruling) where W. Musyoka J held and found as follows;

a. "The three-point test evolving from the Court of Appeal<sup>1</sup>, firstly that, the Employment and Labour Relations Court has jurisdiction to determine constitutional questions, even in a constitutional petition, so long as they fall within the matters that are subject to the jurisdiction conferred on that court by Article 162(2) of *the Constitution* and section 12 of the *Employment and Labour Relations Court Act*, in terms of arising in the context of employment and labour relations.

b. Secondly, that the jurisdiction conferred on that court, by Article 162(2) of *the Constitution* and section 12 of the *Employment and Labour Relations Court Act*, contemplates existence an employer-employee relationship between the parties, in the absence of which the Employment and Labour Relations Court would have no jurisdiction to entertain such constitutional petitions or questions.

c. Thirdly, that in the absence of an employer-employee relationship between the parties, only the High Court, by dint of Articles 23 and 165 of *the Constitution*, would have jurisdiction to address such constitutional petitions or questions.

72. The Judge equally dismissed the objection of alleged forum shopping and filing of the petition in Busia and not in Nairobi, where KRA ostensibly resides, by finding that the High Court's territorial jurisdiction is unlimited and countrywide reaffirming (Kimaru, J) as stated in *JKM vs. COO* [2014] eKLR

<sup>1</sup> The Court of Appeal in Nakuru Civil Appeal No. 119 of 2017 *Public Service Commission & 2 Others vs. Eric Cheruiyot & 16 Others* consolidated with Civil Appeal No. 139 of 2017 *County Government of Embu & Another vs. Eric Cheruiyot & 15 Others* (unreported)



73. This court observes that the 1<sup>st</sup>, 14<sup>th</sup>, 21<sup>st</sup>, 23<sup>rd</sup>, and 25<sup>th</sup> Respondents are State Corporations and a Commission whose geographic sphere of operation is Kenya and cannot be heard to be lamenting of the matter not having been filed in Nairobi. Constitutional petitions against State Corporations can be filed in any high court in Kenya.
74. I shall not digress from the aforementioned standard, and observe that, in this instance while the Petitioners are public spirited citizens alleging contravention or threat of contravention of fundamental rights and freedoms, constitutional values and principals in the recruitment of CEO's of state corporations, the interference with such process by the head of public service and there-being state corporations operating illegally without enabling statutory instrument (thereby exposing taxpayers to further wanton wastage of state resources) emphasis is mine.
75. This Court further reiterates that, the jurisdiction of the Employment and Labour Relations Court is not activated where the Petitioner is not and was never, in an employer-employee relationship and the substratum of the dispute is an alleged infringement of a fundamental right or freedom or the threat of its contravention.
76. In this instant petition, the grievance is not a dispute between employer-employee but rather an unconstitutional recruitment in contravention of *the constitution* based on ethnic considerations and not meritocracy. This court shall not undertake a merit review of the petition, at this juncture, but observe that the scope of the petition would subsume the limited aspect of recruitment contemplated in the jurisdiction of the Employment and Labour Relations Court.
77. Finally, I find no merit in the preliminary objection on want of jurisdiction raised by the Respondents, and I hereby disallow the same. Consequently, I do hereby direct that, the Petition, dated 20<sup>th</sup> May 2024, be disposed-off by way of written submissions, to be filed and exchanged within fourteen (14) days, the Petitioners shall file and serve its written submissions and the Respondents and interested parties shall have a corresponding fourteen (14) days. The matter shall be mentioned virtually, on 23<sup>rd</sup> July 2024, for compliance, and further directions. The interim orders shall remain in force till 23<sup>rd</sup> July 2024.

Orders accordingly

**DATED, SIGNED AND DELIVERED AT NAKURU**

**THIS 20<sup>TH</sup> DAY OF JUNE 2024.**

**MOHOCHI S.M.**

**JUDGE**

