



**Kaniu v Family Bank Limited; Central Bank of Kenya & another
(Interested Parties) (Petition E342 of 2023) [2024] KEHC 15767 (KLR)
(Constitutional and Human Rights) (13 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15767 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION E342 OF 2023

LN MUGAMBI, J

DECEMBER 13, 2024

BETWEEN

KENNETH KANIU PETITIONER

AND

FAMILY BANK LIMITED RESPONDENT

AND

CENTRAL BANK OF KENYA INTERESTED PARTY

CAPITAL MARKETS AUTHORITY INTERESTED PARTY

JUDGMENT

Introduction

1. The Petition dated 12th September 2023 is supported by the Petitioner’s affidavit in support of even date and further affidavits dated 8th November 2023 and 8th April 2024.
2. The gravamen of this Petition is the Petitioner’s allegation that the Respondent’s unlawful termination of his employment and its adverse publication of the same has rendered him unemployable. He is aggrieved that the Respondent’s action has violated his right to a livelihood and is in violation of inter alia his right to life under Article 26 of the Constitution.
3. Consequently, the Petitioner seeks the following reliefs against the Respondent:
 - i. A Declaration of interpretation that the fundamental right to life guaranteed by Article 26 of the Constitution, extends to and includes the right to a livelihood.



- ii. A Declaration that by the publication vide letter dated 24th July 2022, the Respondent has violated the Petitioner's rights guaranteed and protected under Articles 26 and 28 of the Constitution.
- iii. A Declaration that the Petitioner is entitled under Article 35(2) of the Constitution, to the correction or deletion of untrue and misleading information in letter dated 24th July 2022, alleging that there is in existence a negative report against the Petitioner from the Central Bank of Kenya or any other person and/ or institution.
- iv. A mandatory injunction compelling the Respondent to within seven (7) days of issuance and service of the Order of Court, to prominently publish a correction of the untrue and misleading information on the existence of a negative Report from Central Bank of Kenya against the Petitioner in newspapers of nationwide circulation in Kenya, specifically the Daily Nation, Business Daily and the Standard Newspapers;
- v. An appropriate Order for compensatory damages for violation of the Petitioner's fundamental right to protection of life and livelihood guaranteed under Article 26 of the Constitution, for the lost period of 23 years, guided by the rate of the Petitioner's last permanent and pensionable salary of Kshs. 2.6 Million per month.
- vi. An appropriate Order for compensatory damages for violation of the Petitioner's fundamental right to human dignity guaranteed by Article 28 of the Constitution.
- vii. Any other additional appropriate relief that the Court shall deem fit to grant in vindication and protection of the violation of the Petitioner's fundamental rights;
- viii. Costs on indemnity basis.

Petitioner's Case

4. The Petitioner states that he is a professional who has worked in the Finance and Management industry for many years. He adds that during his career, he has maintained professionalism, discipline, diligence and integrity in all his undertakings. Owing to his reputable reputation he has had the privilege of working with numerous financial institutions such as Commercial Bank of Africa, Stanbic Investment Management Services (EA) to mention but a few.
5. He depones that back in 2021, the Respondent through Deloitte and Touche' conducted a rigorous selection process for the position of Chief Commercial Officer. At the end of the process, the Petitioner was appointed to the position vide a letter dated 24th December 2021. This appointment was however subject to a successful vetting process by the 1st Interested Party. He informs that prior to being appointed in this position, he held the position of Chief Executive Officer at Britam Asset Managers for 6 years earning a salary of Ksh.2.6 million.
6. He depones that in a turn of events, he received a letter dated 24th May 2022, which informed him of the termination of his current position. This was due to the background checks conducted by the Respondent and the 1st Interested Party which yielded a negative report. This communication is said to have been disseminated to the Respondent's Finance and Human Resource Department and the Board of Directors.
7. He alleges that the negative report by the Respondent was false as it was later unearthed that no report was ever issued in the first place. In fact, the 1st Interested Party's fit and proper test was withdrawn



at the Respondent's behest. The Petitioner asserts that the Respondent's aim was to un-procedurally and illegally terminate his contract of employment.

8. Furthermore, he is aggrieved that owing to the nature of the Finance and Management industry, such a negative report bears serious consequences. Worse in his case, the report was shared widely yet it was a false report. Due to this, he has not been able to be considered for employment. He avers that this was pointed out by the 2nd Interested Party in June 2022.
9. In addition to the Respondent's act being prejudicial to him, he makes known that his constitutional rights to dignity and livelihood have been infringed. He avers that his attempt to have this false information deleted and corrected by the Respondent has been futile. He for these reasons urges this Court to intervene so that he may receive justice.
10. It is further noted that the Petitioner filed ELRC Cause No. E534 of 2022; *Kenneth Kaniu v Family Bank Limited* wherein he sought redress for his unlawful employment termination. The parties entered into consent for the amicable settlement of the suit out of Court. He states in his further affidavit that a consent Judgment was entered on 6th June 2023 on the terms that:
 - By consent of the parties herein it is hereby agreed;
 - i. The Respondent to pay the Claimant 6 months' salary as Compensation for unlawful termination amounting to Kshs. 10,200,000.00.
 - ii. Each Party to bear its own Costs.
 - iii. This matter to be marked as settled with no orders as to costs.
11. He claims that the instant suit is distinct from the employment suit as relates to his life after termination of his employment and seeks compensatory damages for the loss of livelihood for the remaining 23 years which the Petitioner could have been employed and earned a living.
12. He as well informs that he had filed Nairobi High Court Civil Case No. E 104 of 2023 *Kenneth Kaniu v. Family Bank Limited* which he ultimately withdrew, thus the matter was not heard on merit.

Respondent's Case

13. In answer to the Petition, the Respondent filed its Replying Affidavit by its Chief Legal Officer, Eric Murai sworn on 25th October 2023.
14. On an opening note, he states that the Petition does not raise any constitutional issues as the dispute is an employment contract matter couched as such. As such, the issues between the parties are private as regulated by the attendant agreements between them.
15. He adds that the mechanism for redress in such matters is provided for under the *Employment Act, 2007* and hence this Court lacks the requisite jurisdiction to entertain the matter as the same is vested in the Employment and Labour Relations Court (ELRC).
16. Furthermore, the Petition is sub- judice as the issues raised herein are substantially in issue in two suits filed by the Petitioner currently before the ELRC (ELRC Cause No.E534 of 2022) and civil division of the High Court (Civil Case No.E104 of 2023 ;*Kenneth Kaniu v Family Bank Limited*). He asserts thus that this Court lacks jurisdiction to entertain this matter on this basis. Considering this, the Petitioner is said to be forum shopping.
17. Additionally, it is argued that the Petitioner had the opportunity of raising the matters herein before the ELRC but failed to do so, hence should be estopped from raising the same here. In light of these



- preliminary issues, the Petition is deemed to be frivolous, scandalous mischievous and an abuse of the Court process.
18. Turning to the substantive issue, he depones that the Petition is misconceived as is premised on non-existent facts in an attempt to mislead the Court. For instance, he states that the Respondent did not publish or circulate the Petitioner's termination to the persons and institutions mentioned as alleged. In fact, he points out that no evidence was adduced by the Petitioner to support this claim.
 19. For context, he depones that the Petitioner was employed by the Respondent as the Chief Commercial Officer on 24th December 2021. The Petitioner agreed to the terms and issued the signed copy on 28th December 2021.
 20. He notes that the Petitioner voluntarily agreed to submit himself to management background checks and even signed a consent form on 28th December 2021. To perform this check, the Respondent engaged the services of private investigators. In the end, they returned a confidential negative report on the Petitioner's suitability.
 21. It is on this premise that the Respondent resolved to terminate the Petitioner's employment vide the letter dated 24th May 2022. The letter was hand delivered to the Petitioner by the Respondent's Managing Director and Chief Human Resources Officer. He states that in light of this, the Respondent duly communicated the termination and also stated the reasons for termination.
 22. Contrary to the Petitioner's allegation, he avers that the Respondent did not receive any negative report from the 1st Interested Party in relation to the Petitioner and neither was the same communicated to the Petitioner.

Interested Parties Cases

1st Interested Party's Case

23. The 1st Interested Party through its General Counsel, Kennedy Kaunda Abuga, filed its response sworn on 5th February 2024. He commences by stating that since there is no relief sought against the 1st Interested Party, this party was wrongly joined in this suit and hence should be struck out.
24. He notes that the Petition seeks to challenge the Petitioner's termination of employment by the Respondent. As such this matter is based on a private employment relationship between the two parties, of which the 1st Interested Party is a stranger to.
25. He further avers that the issues raised in the Petition are substantially in issue in before the ELRC in ELRC Cause No. E534 of 2022. Accordingly, that by dint of Article 162 (2) of the [Constitution](#) and Section 12(3) of the [Employment and Labour Relations Court Act](#), this Court does not have jurisdiction to entertain this suit or even grant the reliefs sought. Similarly that this suit offends the doctrine of sub judice hence an abuse of the Court process.
26. He informs that by dint of Section 9A of the [Banking Act](#) every financial institution such as the Respondent is required to ensure that a person appointed as a senior officer is fit and proper to control an institution. This vetting process is an independent process conducted by the 1st Interested Party but the financial institution can also conduct its own due diligence through a background check.
27. He depones that when the Petitioner's termination letter was issued by the Respondent, the 1st Interested Party had not concluded its vetting process of the Petitioner. As such no adverse report had been issued by the 1st Interested Party to the Respondent concerning the Petitioner.



28. He stresses that although the 1st Interested Party is a regulator, it does not micromanage the day to day affairs of financial institutions. In this context, the Respondent was not obligated to seek approval from the 1st Interested Party before terminating the Petitioner’s employment.

2nd Interested Party’s Case

29. The 2nd Interested Party’s response and submissions to the instant Petition are not in the Court file or Court Online Portal (CTS).

Parties’ Submissions

Petitioner’s Submissions

30. In the submissions dated 11th April 2024, Echessa and Bwire Advocates LLP outlined the issues for discussion as: whether the present Petition is sub judice; whether the Petition raises issues that are res judicata and the jurisdiction of the Employment and Labour Relations Court in constitutional violations.
31. Counsel in this matter submitted that at the time of filing this suit on 12th September 2023, the impugned two suits did not exist hence the Respondent’s argument in this regard does not apply in the context of Section 6 of the *Civil Procedure Act*. This is because ELRC Cause No. E534 of 2022 had been concluded on 6th June 2023 and Civil Suit No. E104 of 2023 had been withdrawn on 7th August 2023. Nonetheless it was argued that the issues raised herein are not even the same as those raised in those suits.
32. On whether the matter is res judicata, Counsel submitted that with reference to ELRC Cause No. E534 of 2022 the matter was specifically focused on the Petitioner’s rights as an employee not his unemployability and loss of livelihood as raised herein. This is as a result of the Respondent’s malicious publication. The jurisdiction to hear the latter is thus vested in the High Court.
33. Equally that the issues raised herein were not prevailing at the time ELRC Cause No. E534 of 2022 had been filed thus this suit cannot be deemed to be res judicata. Similarly this doctrine was argued not to be applicable with regard to Civil Case No. E104 of 2023 as the suit was withdrawn and thus never heard on merit.
34. Reliance was placed in *Kenya Commercial Bank Ltd v Benjob Amalgamated Ltd* [2017] eKLR where the Court of Appeal held that:

“The elements of res judicata have been held to Conjunctive rather than disjunctive. As such, the elements reproduced below must all be present before a suit or an issue is deemed res judicata on account of a former suit;

- a. The suit or issue was directly and substantially in issue in the former suit.
- b. That former suits was between the same parties or parties under whom they or any of them claim.
- c. Those parties litigating under the same title.
- d. the issue was heard and finally determined in the former suit.
- e. The court that formerly heard and determined the issue was competent to try the subsequent suit of the suit in which the issue is raised.”



35. In like manner, Counsel submitted that the issues raised herein do not relate to employment and labour relations to warrant invoking of the ELRC jurisdiction. To support this claim, Counsel cited the case of *Abdikadir Suleiman -Versus-County Government of Isiolo and Another* [2016] eKLR where it was held that:
- “The Court holds that the compass or golden test for the court’s jurisdiction is the subject matter in the dispute.”
36. Turning to the third issue, Counsel asserted that this Court as guided by the principles of interpretation under Article 259 of the *Constitution* ought to interpret the right to life as encompassing the right to livelihood. Further that the Petitioner’s right in this regard had been violated by the Respondent owing to the false and prejudicial publication that rendered him unemployable.
37. Reliance was placed in *Independent Electoral and Boundaries Commission & 4 others v Ndi & 312 others; Ojwang & 4 others (Amicus Curiae)* [2021] KECA 363 (KLR) where it was held that:
- “What is called for is a purposive, value-laden and principled approach to constitutional interpretation as opposed to a narrow, neutral and ultimately neutered formalism.
- Moreover, those charged with interpreting and giving effect to the *Constitution* cannot shut their eyes to, or be indifferent to or, worse, evince hostility towards the rule of law, human rights and fundamental rights. the *Constitution* commands judges to be active participants in those causes and it behoves us to constantly introspect and deliberately push forward the rule of law and human rights project.”
38. Similar dependence was placed in *Peter K. Waweru v Republic* [2006] eKLR, *Musa Mbwagwa Mwanasii & 9 others v Chief of the Kenya Defence Forces & another* [2021] eKLR.
39. Counsel submitted that the implication of a bad report in the financial industry is detrimental and has legal implications as seen under Section 9A, 32A and 48 of the *Banking Act*.
40. It was submitted that the Petitioner being 42 years was expectant to practice his career until 65 years. Further that in his last permanent and pensionable employment at Britam he received a salary of Ksh.2.6 million and hence his career yield for the remaining 23 years would have been Ksh.717 million. Accordingly, it is argued that this is the appropriate remedy for the violation of the loss of his right to livelihood.
41. Correspondingly it was argued that his right to dignity under Article 28 of the *Constitution* had been violated. Relying on the averments in the Petitioner’s affidavit, Counsel submitted that it was evident that the Petitioner had developed and cultivated a reputation in the financial industry which was ultimately destroyed by the Respondent’s publication.
42. Reliance was placed in *MW K & another v Attorney General & 3 others* [2017] eKLR where it was reiterated with approval that:
- “The importance of dignity as a founding value of the *Constitution* cannot be overemphasized. Recognizing a right to dignity is an acknowledgement of the intrinsic worth of human beings.”
43. Furthermore, Counsel submitted that Article 35(2) of the *Constitution* makes it clear that it is a person’s right to correction and/deletion of untrue or misleading information. Consequently, the Petitioner is entitled to this remedy in view of the Respondent’s adverse publication. It is argued



however that the Respondent has failed, ignored and refused to delete the said untrue and misleading information.

44. To buttress this point reliance was placed in [Linus Simiyu Wamalwa v. University of Nairobi & Another](#) [2015] eKLR where it was held that:

“The normative content of the above right is clear and it requires no more than a literal interpretation. It comprises two elements; firstly, for one to enforce the above right, there must be untrue or misleading information. Secondly, the untrue or misleading information affects that person and I dare add that it affects him in a prejudicial manner.

In addition to the above, as I understand the jurisprudence on the subject, for a person to enforce the provisions of Article 35(2) of the [Constitution](#), he must have requested for the deletion of the untrue and misleading information and the same had been denied.”

Respondent’s Submissions

45. On 23rd May 2024, Waweru Gatonye and Company Advocates filed submissions where the highlighted issues for determination were set out as: whether or not the instant Petition is incompetent and defective on basis of jurisdiction; whether or not the Petition offends the doctrine of constitutional avoidance and ripeness; whether or not the Petition offends the principle of sub judice and/or res judicata; whether or not the Petition amounts to forum shopping and whether or not the Respondent published and/or circulated the Petitioner’s termination letter dated 24th May 2022.
46. It was submitted in the first issue that the substratum of the instant Petition is the termination of the Petitioner’s employment vide the letter dated 24th May 2022. Counsel stressed that this is a private employment contract between the Petitioner and the Respondent thus falls within the ELRC jurisdiction as set out under Article 162 (2)(a) of the [Constitution](#) as read with Section 12 of the [Employment and Labour Relations Court Act](#) and the [Employment Act](#).
47. Consequently, being an employment dispute, it was contended that this Court is not vested with the requisite jurisdiction to entertain the matter. Reliance was placed in [Muli -v- Kenya Water Institute & 2 others](#) KEELRC 942 (KLR) where it was held that:

“The 1st respondent filed a petition directly retying on the provisions of the [Constitution](#) for enforcement of contractual rights governed by the [Employment Act](#) without seeking a declaration of invalidity of the provisions of the [Employment Act](#) or alleging that the remedies provided therein are inadequate. The petition did not raise any question of the interpretation or application of the [Constitution](#).

We adopt and uphold the general principle in the persuasive authority in *Barbara De Klerk* (supra) that where legislation has been enacted to give effect to a constitutional right, it is not permissible for a litigant to found a cause of action directly on the [Constitution](#) without challenging the legislation in question. That principle has been reinforced by the Supreme Court in *Communications Commission* case (supra). In conclusion, we find that the alleged unlawful interdiction and termination of a contract of employment was not a constitutional issue and thus the petition did not disclose a cause of action anchored on the [Constitution](#).”

48. Comparable dependence was placed in [Jabir Singh Rai & 3 others -v- Tarlochan Singh Rai & 4 others](#) [2013] eKLR; [Republic -v- Paul Kihara Kariuki and 3 others, Ex-parte Law Society of Kenya](#) [2020] eKLR; [Judicial Service Commission -v- Gladys Boss Shollei & another](#) [2014] eKLR; [Ruth Njiru James](#)



-v- Njoroge Ndirangu & 3 others [2015] eKLR; and Abno Software International Limited -v- Sammy Ochieng Onyango [2021] eKLR.

49. Moving to the second issue, Counsel submitted that since there exists an alternative remedy for the Petitioner to pursue, this Petition effectively invokes the doctrine of constitutional avoidance and ripeness. These mechanisms are reasoned to be adequate to resolve the Petitioner's dispute and hence should be utilized. Reliance was placed in Communications Commission of Kenya & 5 others -v- Royal Media Services Limited & 5 others [2014] eKLR where it was held that:

"The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis."

50. Like dependence was placed in Hussein Khalid ft 16 others -v- Attorney General & 2 others [2019] eKLR; Gabriel Mutava & 2 others -v- Managing Director Kenya Ports Authority & another [2016] eKLR and Aliela -v- Kenton College Trust & another KEELRC 226.

51. On the third issue, Counsel in view of ELRC Cause No. E534 of 2022 stated that the instant suit is res judicata as the Petitioner is seeking further compensation as a result of his alleged unlawful termination. This is despite having been duly compensated in the Consent Judgement dated 6th June 2023. Owing to this it is argued that the instant Petition is in breach of the principles under Section 7 of the Civil Procedure Act. In addition, it is pointed out and revealed that the Petitioner thereafter filed the Civil Case No. E104 of 2023 which was later transferred to the Chief Magistrates Court under Milimani MCCC No.421 of 2023. In this regard, the instant suit is sub judice.

52. Tying to this, Counsel stated that it was clear that the Petitioner was forum shopping owing to the multiple suits that he had filed and an abuse of the Court process. Reliance was placed in Paul Kihara Kariuki case (supra) where it was held that:

"39. Abuse of court process creates a factual scenario where a party is pursuing the same matter by two-court process. In other words, a party by the two court process is involved in some gamble; a game of chance to get the best in the judicial' process. A litigant has no right to pursue pari pasu two processes, which will have the same effect in two courts at the same time with a view of obtaining victory in one of the process or in both. In several decisions of this court, I have stated that litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation is a contest by judicial process where the parties place on the table of justice their different position clearly, plainly and without tricks. Pursuing two processes at the same time constitutes and amounts to abuse of court/legal process.

40. Thus, the multiplicity of actions on the same matter between the same parties even where there exists a right to bring the action is regarded as an abuse."

53. Lastly, Counsel submitted that the Petitioner's allegation of publication of termination of his employment was false as the same was shared with the relevant persons only on a need to know basis. Infact as already deponed in the Respondent's affidavit the communication was hand delivered to the Petitioner specifically by the Managing Director and Chief Human Resource Officer. Be that as it may it was argued that the Petitioner had not adduce any evidence to support the allegation that he missed out on other employment opportunities as a result of the adverse report.



54. Reliance was placed in *Selina Patani & another -v- Dhiranji V. Patani* [2019] eKLR where it was held that:

“The evidence on record is the testimony by the 2nd appellant that her boss read the letter. The alleged boss was never called to testify. No other third party was called to testify as to the publication and injury to reputation. As to whether the appellants character and reputation was destroyed, there is no evidence on record from a third party stating that as a result of reading the impugned letter, the appellants reputation and standing in society was injured. It is in this context that we agree with the learned Judge that a person's own view about his/her reputation is not material in a claim for defamation; there must be evidence from a third party to the effect that the standing and reputation of the claimant has been lowered as a result of the defamatory publication.”

1st Interested Party's Submissions

55. Iseme Kamau and Maema Advocates filed submissions dated 11th June 2024 and set out the issues to consider as follows: whether the Court is divested of Jurisdiction to hear the dispute; and whether the 1st Interested Party has been wrongly enjoined in the proceedings.
56. Counsel in the first issue, submitted that this Court lacks jurisdiction to entertain this matter by virtue of Article 162(2) of the *Constitution* as read with Section 12(3) of the *Employment and Labour Relations Court Act*. This is since the issues raised herein revolve around the termination of the Petitioner's employment also raised in ELRC Cause No. E534 of 2022. Consequently it was argued that it is the ELRC that has jurisdiction to entertain the issues raised herein.
57. Reliance was placed in *Attorney General & 2 others v Okiya Omtata Okoiti & 14 others* [2020] eKLR where the Court of Appeal held that:

“We have no doubt that the ELRC and the ELC have jurisdiction to interpret and apply the *Constitution* as held by the High Court in *United States International University (USIU) v. The Attorney General & Others* [2012] eKLR and this Court in *Daniel N. Mugendi v. Kenyatta University & 3 Others* [2013] eKLR. However, the jurisdiction of those specialized courts to interpret and apply the *Constitution* is not original or unlimited like that of the High Court. It is limited to constitutional issues that arise in the context of disputes on employment and labour relations or environment and land matters”

58. Like dependence was placed in *National Social Security Fund Board of Trustees v Kenya Tea Growers Association & 14 others* [2023] KECA 80 (KLR).
59. On second the issue, Counsel asserted that the 1st Interested Party had been wrongly enjoined in these proceedings as is a stranger to the employment contract and termination of the Petitioner by the Respondent. Further it was stressed that the 1st Interested Party did not issue any adverse report concerning the Petitioner before his termination. In view of this, Counsel submitted that the 1st Interested Party ought to be struck out from these proceedings.

Analysis and Determination

60. It is my considered view that the issues that arise for determination are as follows:
- i. Whether this Court has jurisdiction to entertain this suit.
 - ii. Whether an interpretation of Article 26 of the *Constitution* includes livelihood.



- iii. Whether the 1st Interested Party was improperly joined in this suit and thus should be struck out.
- iv. Whether the Respondent violated the Petitioner’s constitutional rights.
- v. Whether the Petitioner is entitled to the relief sought.

Whether this Court has jurisdiction to entertain this suit.

- 61. Jurisdiction of this Court was objected to on two main grounds, namely that this matter
 - a. Properly belongs to the jurisdiction of the Employment and Labour Relations Court, and two;
 - b. It is barred by the Doctrine of *Res Judicata*.

62. Jurisdiction refers to the competence or the legal capacity of the Court to adjudicate a dispute. The Court of Appeal in the locus classicus case of *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] eKLR explained the significance of jurisdiction as follows:

“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 downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

63. This Court’s jurisdiction to entertain constitutional matters is founded in Article 165 which has among others Sub-Article 3 (d) which provides thus:

Jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

- a. the question whether any law is inconsistent with or in contravention of this Constitution;
- b. 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;
- c. 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
- d. a question relating to conflict of laws under Article 191.

64. The Supreme Court addressing its mind on the issue of jurisdiction in *Samuel Kamau Macharia & Another v. Kenya Commercial Bank Limited & others* (2012)eKLR guided as follows:

“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 counsels 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 upon 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.”

65. Equally, In the Matter of the Interim Independent Electoral Commission (Applicant) [2011] KESC 1 (KLR) the Supreme Court held that:

“Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in *Owners of Motor Vessel ‘Lillian S’ v. Caltex Oil (Kenya) Limited* [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):“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.”[30] The Lillian ‘S’ case establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the Constitution.”

66. The creation of Employment and Labour Relations Court (ELRC) is made reference to under Article 162 of the Constitution as one of the special courts that Parliament is conferred with authority to establish. Article 162 states:

1. The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts mentioned in clause (2).
2. Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—
 - a. employment and labour relations; and
 - 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).

67. To give effect to this Article, Parliament enacted the Employment and Labour Relations Court Act and conferred it with jurisdiction as provided for in Section 12 of the ELRC Act as follows:

“The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including—

- a. disputes relating to or arising out of employment between an employer and an employee;



- b. disputes between an employer and a trade union;
- c. disputes between an employers' organisation and a trade union's organisation;
- d. disputes between trade unions;
- e. disputes between employer organisations;
- f. disputes between an employers' organisation and a trade union;
- g. disputes between a trade union and a member thereof;
- h. disputes between an employer's organisation or a federation and a member thereof;
- i. disputes concerning the registration and election of trade union officials; and
- j. disputes relating to the registration and enforcement of collective agreements.

68. Interpreting Section 162 (2) of the *Constitution*, the Court of Appeal in *Law Society of Kenya Nairobi Branch v Malindi Law Society & 6 others* [2017] eKLR held that High Court has no jurisdiction in respect of matters falling within the jurisdiction of the specialized courts and this extends to matters raising constitutional questions that flow from within the sphere of the specialized court's jurisdiction.

“70. Contrast the expression “reserved for the exclusive jurisdiction” with the expression “falling within the jurisdiction”. It is a pointer, in our view, that it was never intended that disputes relating to employment and labour relations and the environment and the use and occupation of, and title to, land would be “reserved for the exclusive jurisdiction” of the specialized courts under Article 162(2). It is also noteworthy that *In Re The Matter of the Interim Independent Electoral Commission* [2011] eKLR, the Supreme Court of Kenya in construing Article 165(3) of the *Constitution* that confers jurisdiction on the High Court to hear any question respecting the interpretation of the *Constitution* noted that although the High Court was entrusted, under that Article, with the mandate to interpret the *Constitution*, that “empowerment by itself, however, does not confer upon the High Court an exclusive jurisdiction.”

71. By parity of reasoning, although under Article 162 (2) of the *Constitution* Parliament is mandated to establish courts with the status of the High Court to hear and determine disputes relating to employment and labour relations and environment and the use and occupation of, and title, to land, that in itself does not confer an exclusive jurisdiction to those specialized courts to hear and determine the specified types of cases. However, as already stated, Article 165 (5) is clear that the High Court has no jurisdiction in respect of matters falling within the jurisdiction of the specialized courts. Whereas Parliament is empowered to enact legislation to confer jurisdiction to the Magistrates courts to hear and determine disputes stipulated under Article 162 (2) of the *Constitution*, it cannot establish a Superior Court or confer upon a Superior Court jurisdiction to hear employment and labour relations cases and environment and land cases.”



69. Similarly, the Court in *United States International University (Usiu) v Attorney General* [2012] eKLR observed as follows:

“ 41. Labour and employment rights are part of the Bill of Rights and are protected under Article 41 which is within the province of the Industrial Court. To exclude the jurisdiction of the Industrial Court from dealing with any other rights and fundamental freedoms howsoever arising from the relationships defined in section 12 of the Industrial Court Act, 2011 or to interpret the *Constitution* would lead to a situation where there is parallel jurisdiction between the High Court and the Industrial Court. This would give rise to forum shopping thereby undermining a stable and consistent application of employment and labour law. Litigants and ingenious lawyers would contrive causes of action designed to remove them from the scope of the Industrial Court. Such a situation would lead to diminishing the status of the Industrial Court and recurrence of the situation obtaining before the establishment of the current Industrial Court... The fact that the content of labour rights protected under Article 41 is reiterated in the *Employment Act*, 2007 and *Labour Relations Act*, 2007 does not create a separate wall of jurisdiction for the High Court and the Industrial Court as contended by Mr Obura. The reiteration of these rights is merely a consequence of Article 19 and recognition of their universality and indivisibility in application is all spheres of labour and employment law.”

70. Further on cross-cutting issues between the High Court and the specialized Courts, the Court in *Benson Makori Makworo v Nairobi Metropolitan Services & 2 others* (2022)eKLR borrowing from the Supreme Court and the Court of Appeal highlighted as follows:

“ 28. ...The matter, however, did not end there. A further problem arose. It was on the cases raising ‘cross-cutting’ or ‘cocktail’ or ‘mixed grill’ issues within either Courts.

29. Initially there were two schools of thought in the High Court on the matter. One school favoured the ‘pre-dominant purpose test’ whereas the other school rooted for the ‘pre-dominant issue before Court test’.

30. The proponents of the former include Ngugi, J who rendered himself in *Suzanne Achieng Butler & 4 Others v Redhill Heights Investments Limited & Another* (2016) EKLR as follows: -

23. When faced with a controversy whether a particular case is a dispute about land (which should be litigated at the ELC) or not, the Courts utilize the Pre-dominant Purpose Test: In a transaction involving both a sale of land and other services or goods, jurisdiction lies at the ELC if the transaction is predominantly for land, but the High Court has jurisdiction if the transaction is predominantly for the provision of goods, construction, or works.

24. The Court must first determine whether the pre-dominant purpose of the transaction is the sale of land or construction.



Whether the High Court or the ELC has jurisdiction hinges on the predominant purpose of the transaction, that is, whether the contract primarily concerns the sale of land or, in this case, the construction of a townhouse.

31. Munyao, J was for the other test. In *Lydia Nyambura Mbugua v Diamond Trust Bank Kenya Limited & Another* [2018] eKLR the Learned Judge argued as follows: -

25. On my part, I would modify the above test, and hold the position that what is important when determining whether the court has jurisdiction, is not so much the purpose of the transaction, but the subject matter or issue before court, for I think that the purpose of the transaction, may at times be different from the issue or subject matter before court. Let us take the transaction of a charge as an example. The predominant purpose of creating a charge is for one to be advanced some financial facilities. However, when it comes to litigation, the predominant issue may not necessary be the money, but the manner in which the chargee, is exercising its statutory power of sale. Here, I trust that you will see the distinction between the predominant purpose of the transaction and the predominant issue before court. That is why I hold the view, that in making a choice of which court to appear before, one needs to find out what the predominant issue in his case is, and not necessarily, the predominant purpose of the transaction. If the litigant's predominant issue will touch on the use of land, or occupation of land, or a matter that affects in one or another, title to land, then such issue would fall for determination before the ELC.

32. The Court of Appeal had an occasion and dealt with the issue. In *Co-operative Bank of Kenya Limited v Patrick Kang'ethe Njuguna & 5 others*, Civil Appeal No. 83 of 2016 [2017] eKLR, the Court dealt with the issue as follows: -

[30] Article 260 aforesaid echoes the traditional definition of land under the common law doctrine known as *Cujus est solum, eius est usque ad coelum et ad inferos* (cujus doctrine) which translates to 'whoever owns [the] soil, [it] is theirs all the way [up] to Heaven and [down] to Hell'. As with our Constitution, the doctrine defines land as the surface thereof, everything above it and below it as well.....

(31) Indeed, considering the above definitions, the inevitable conclusion to be drawn is that land connotes the surface of the land, and/or the surface above it and/or below it.”

(35) ...[F]or land use to occur, the land must be utilized for the purpose for which the surface of the land, air above it or ground below it is adapted. To the law therefore, land use entails the application or employment of the surface of the land and/or the



air above it and/or ground below it according to the purpose for which that land is adapted.

33. The Court of Appeal, therefore, settled for the ‘pre-dominant purpose test’. Therefore, that is the test I will use in this case.”

71. It is already acknowledged that the dispute on termination of employment has already been settled before the Employment and Labour Relations Court by the Parties. The Petitioner claims that the circulated the information which has made him unemployable or unable to earn a living from any future employment owing to false negative report is a matter outside the scope of the Employment and Labour Relations Court and thus is a separate Constitutional issue. I am unable to agree with this reasoning given the authorities I have reviewed in the foregoing. The issue of unlawful termination is intertwined with the future loss of employment considering the facts of this case. It should have formed a supplementary or additional issue to be decided by the ELRC Court in the factual matrix of the matter that was before it. Instead litigating fully in that forum, the petitioner chose to litigate in bits by filing this Petition. Nothing bars the ELRC Court from hearing and determining a Constitutional issue flowing from a matter whose substratum lies within the competence of that Court. The High Court would be overstepping its boundaries to assume jurisdiction over such cases as the Petitioner wants through this petition.

72. Closely connected to the above is the doctrine of res judicata. Section 7 of the [Civil Procedure Act](#) states as follows:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

73. The Supreme Court in [Kenya Commercial Bank Limited v. Muiri Coffee Estate Limited & another Motion](#) (2016)eKLR defined this doctrine as follows:

“(52) Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights. It would appear that the doctrine of res judicata is to apply in respect of matters of all categories, including issues of constitutional rights...”

74. Similarly, the Supreme Court in [John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others](#) [2021] KESC 39 (KLR) opined as follows:

“54. The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.



55. It emerges that, contrary to the respondent’s argument that this principle is not to stand as a technicality limiting the scope for substantial justice, the relevance of res judicata is not affected by the substantial-justice principle of Article 159 of the *Constitution*, intended to override technicalities of procedure. Res judicata entails more than procedural technicality, and lies on the plane of a substantive legal concept.
56. The learned authors of Mulla, *Code of Civil Procedure*, 18th Ed 2012 have observed that the principle of res judicata, as a judicial device on the finality of court decisions, is subject only to the special scenarios of fraud, mistake or lack of jurisdiction (p 293):

The principle of finality or res judicata is a matter of public policy and is one of the pillars on which a judicial system is founded. Once a Judgment becomes conclusive, the matters in issue covered thereby cannot be reopened unless fraud or mistake or lack of jurisdiction is cited to challenge it directly at a later stage. The principle is rooted to the rationale that issues decided may not be reopened and has little to do with the merit of the decision.”

75. The Court went on to observe that:

“59. For res judicata to be invoked in a civil matter the following elements must be demonstrated:

- a. There is a former Judgment or order which was final;
- b. The Judgment or order was on merit;
- c. The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and
- d. There must be between the first and the second action identical parties, subject matter and cause of action.”

76. Reading the provisions of Section 7 of the *Civil Procedure Act*, particularly explanation number 4, it states:

“Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.”

77. This condition ensures that the litigation is not done in a piece meal as the Petitioner is attempting to do in this case. My take is that the dispute relating to and surrounding his termination and the consequences arising therefrom be they be constitutional or otherwise ought to have been part and parcel of the original litigation and not multiple cases he is now filing. I find and hold that the instant Petition is barred by the principle of res judicata.

78. Having found that I have no jurisdiction, I must, as be guided by the dicta in *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989]* down my tools immediately and take no further step in these proceedings. Accordingly, I shall not delve into consideration of any other issue as it will serve no useful purpose.



79. The upshot therefore is that this Petition is struck out with costs to the Respondents and the 1st Interested Party that participated in these proceedings.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 13TH DAY OF DECEMBER, 2024.

.....

L N MUGAMBI

JUDGE

