



**Ogori v Nyamira County Assembly & 7 others; Nyamira County
Assembly Service Board (Interested Party) (Petition E008 of 2024)
[2024] KEHC 16281 (KLR) (16 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16281 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
PETITION E008 OF 2024
WA OKWANY, J
DECEMBER 16, 2024**

BETWEEN

ENOCK OKERO OGORI PETITIONER

AND

NYAMIRA COUNTY ASSEMBLY 1ST RESPONDENT

CLERK - NYAMIRA COUNTY ASSEMBLY 2ND RESPONDENT

KENNEDY ATUTI 3RD RESPONDENT

DUKE MASIRA 4TH RESPONDENT

GEORGE ABUGA 5TH RESPONDENT

JULIUS NYANGENA 6TH RESPONDENT

SAMUEL OGETO 7TH RESPONDENT

JOSIA MANGERA 8TH RESPONDENT

AND

NYAMIRA COUNTY ASSEMBLY SERVICE BOARD INTERESTED PARTY

RULING

1. The background of this ruling is contained in the ruling that this court delivered on 4th November 2024 (the “earlier ruling”). Suffice is to say that this ruling will also apply in a subsequent and related Petition, filed by the Petitioner herein, being Nyamira HCCHR PET. No. E011 of 2024. In the said earlier ruling, this court indicated that it would deliver the ruling on the Contempt Application first before delving into determining the Respondents’ Preliminary Objection (PO).



2. The Respondents herein objected to this court's jurisdiction to hear and determine this suit/Petition for want of jurisdiction. The Respondents' case was that this court lacks the jurisdiction to entertain this case as the proper forum, by dint of Article 162(2)(a) of the Constitution, is the Employment and Labour Relations Court (ELRC).
3. According to the Respondents, the suspension of the Petitioner from office is a disciplinary process that may lead to his removal from office which is a human resource function thus falling squarely under the ELRC.
4. The Petitioner, on the other hand, argued that this court as a constitutional court has jurisdiction, by dint of Article 165 of Constitution, to hear and determine matters revolving around violation of constitutional rights.
5. It is trite that a court's jurisdiction flows from either Constitution or Statute. *In the Matter of Interim Independent Electoral Commission* [2011] eKLR, Constitutional Application No. 2 of 2011 the Supreme Court held as follows: -
 - (30) ...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.....
 - (68). A Court's jurisdiction flows from either Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by Constitution or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law.
6. The scope of the High Court's jurisdiction is codified in Article 165 of Constitution as: -
 - (3) Subject to clause (5), the High Court shall have—
 - (a) unlimited original jurisdiction in criminal and civil matters;
 - (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
 - (c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
 - (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
 - (i) the question whether any law is inconsistent with or in contravention of this Constitution;
 - (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
 - (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
 - (iv) a question relating to conflict of laws under Article 191; and
 - (e) any other jurisdiction, original or appellate, conferred on it by legislation.



- (4) Any matter certified by the court as raising a substantial question of law under clause (3)(b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.
- (5) The High Court shall not have jurisdiction in respect of matters—
 - (a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or
 - (b) falling within the jurisdiction of the courts contemplated in Article 162(2).
7. Article 162 provides for specialized courts of equal status to the High Court as follows: -
 - (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.
8. The instant Petition relates to the suspension, from office, and the eventual impeachment of the Petitioner/Applicant as Speaker of the County Assembly. The question therefore is whether the issues raised by the Petitioner/Applicant both in his Petition and the subsequent Applications fall under the scope of constitutional violations or are the subject of an employer-employee relationship.
9. Following the promulgation of the 2010 *Constitution* and the establishment of specialised courts; the Environment and Land Court (ELC) and the ELRC, two schools of thought have emerged over which court is seized with jurisdiction to handle disputes around the removal of the speaker from office. While some courts have held the view that such cases fall under the purview of the High Court other courts tend to favour the ELRC as the proper forum for such disputes.
10. In *Daniel N. Mugendi vs. Kenyatta University & 3 Others* CACA No. 6/2012[2013] eKLR, it was held as follows: -

“In the same token we venture to put forth the position that as we have concluded that the Industrial Court can determine industrial and labour relations matters alongside claims of fundamental rights ancillary and incident to those matters, the same should go for the Environment & Land Court, when dealing with disputes involving environment and land with any claims of breaches of fundamentals rights associated with two subjects”
11. In *United States International University vs. Attorney General* HCCP 170 of 2012 [2012] eKLR it was held thus:-

“The Industrial Court is a specialist court to deal with employment and labour relations matters. By virtue of Article 162(3) Section 12 of the Industrial Court Act 2011 has set out matters within the exclusive domain of that court. Since the court is of the same status of the High Court, it must have the jurisdiction to enforce labour rights in Article 41 and the jurisdiction to interpret *Constitution* and fundamental rights and freedoms, is incidental to the exercise of jurisdiction over matters within its exclusive domain. In any matter falling within the provisions of Section 12 of the Industrial Court Act, then the Industrial Court has jurisdiction to enforce not only Article 41 rights but also all fundamental rights



ancillary and incidental to the employment and labour relations including interpretation of Constitution within the matter before it”. (emphasis ours)

12. In *County Assembly of Kisumu & 2 others vs. Kisumu County Assembly Service Board & 6 others* [2015] eKLR, the Court of Appeal explained the relationship between a Speaker and the County Assembly as follows: -

“42. Article 178 (3) of Constitution as read with Section 11 of the County Governments Act, provide an unequivocal procedure to be followed in proceedings for the impeachment of the Speaker of a County Assembly. Article 181 of Constitution and Section 33 of the County Governments Act provide for more or less the same procedure for the impeachment of a Governor of a County Assembly. We concur with the High Court decision in the case of Hon. Martin Nyaga Wambora v. The Speaker, County Assembly of Embu, that under that procedure, the impeachment of a Governor of a County Assembly is quasi-judicial in nature. It follows that the removal of a Speaker of a County Assembly is equally quasi-judicial in nature.

43. According to Article 162 of Constitution, the ELRC has the status of the High Court. This being the case, it follows that in matters falling within its jurisdiction, the ELRC has supervisory powers over “any person, body or authority exercising judicial or quasi-judicial functions.” We have already found that the removal of a Speaker of a County Assembly is a quasi-judicial function. As we shall shortly demonstrate, the issues raised in the petition fell within the jurisdiction of the ELRC. We therefore find that the challenge of the impeachment of the 2nd respondent was a matter that fell squarely within the ELRC’s supervisory mandate.

44.

48. The third point on the issue of jurisdiction is that there is no employer/employee relationship between the Speaker of any County Assembly and the County Assembly itself to warrant the invocation of the ELRC’s jurisdiction to entertain the petition.....

51. As is clear from these submissions, both sides of the divide in this appeal agree that pursuant to the provisions of Article 162 (2) (a) of Constitution as read with Section 12 (1) of the Industrial Court Act, the jurisdiction of the ELRC stems from the existence of employment and labour relations. The main issue in this appeal therefore is whether or not such relationship exists between a Speaker and a County Assembly. The appellants contended that employer/employee relationship arises on appointment and not on election and since the position of a Speaker is elective, such relationship does not exist. The respondents contended otherwise arguing that the determinant factor is remuneration.

52. The position of the Speakers of the National and County Assemblies should be distinguished from those of the Members of the National and County Assemblies. The Members of National and the County Assemblies are elected by the public at large to represent them and urge their interests in their respective assemblies. The Speakers, on the other hand, are not elected to



represent any constituency. They are elected by their respective Assemblies to assist the Assemblies conduct their businesses in an orderly and lawful manner. Their responsibilities include managing House business and facilitating the operations of the National or County Assemblies. To provide for seamless support for the workings of the County Assembly, the Speakers of the County Assemblies also chair the County Assembly Service Boards which are responsible for the provision of services and facilities, including the appointment of office holders such as the Clerks and the Deputy Clerks of the County Assemblies to ensure the effective and efficient operations of the County Assemblies. In a sense therefore, the Speakers' roles are akin to those of managing directors of body corporates answerable to their Boards of Directors on the day-to-day operations of the companies. The Speakers' elections are therefore akin to appointments which create employer/employee relationships.

53. As Nduma J. correctly observed in *Nick Gitbinji Ndichu v. Clerk Kiambu County Assembly & Another*, a decision followed by Sitati J. in *Peter Kingoina v. County Assembly of Nyamira*, employer/employee relationship exists when there is a “contract of service” as defined by Section 2 of the [Employment Act](#), 2007. We concur with the learned Judge that the law is not concerned with the manner of engagement or assumption of the position of employee. What is important is the existence of a contract of service “whether oral or in writing, and whether expressed or implied to employ or to serve as an employee for a period of time...for wages or a salary.” On this additional criterion, we once again concur with the learned Judge that there exists a contract of service between a Speaker of a County Assembly and the County Assembly concerned.
54. On the basis of these points, we therefore uphold Wasilwa, J’s finding that the ELRC had jurisdiction to determine the petition. We accordingly dismiss the ground on jurisdiction.”

13. In the case of *David Sifuna vs. Clerk, County Assembly of Trans Nzoia & Another* [2014] eKLR, the court dismissed the arguments by the Respondents that the Court lacked the Jurisdiction to hear and determine a Petition that had been lodged by the Petitioner challenging his removal from office by way of impeachment and held that: -

“Where [Constitution](#) has been violated or is threatened with violation, the Court cannot exercise restraint and therefore, any intended and blatant violation of any provision of [Constitution](#) by any state organ or person would definitely attract judicial scrutiny through the High Court.

In the upshot, it is this Court and not the *Employment and Labour Relations (Industrial) Court* which is possessed of the actual jurisdiction to hear and determine this petition.

36. Indeed, the role of the High Court for purposes of removal of a Governor or Speaker from office is supervisory in nature to ensure that the procedure and threshold provided for in [Constitution](#) and the County Government Act are followed so that if the process is unconstitutional, wrong, un-procedural or illegal, it cannot be said that the Court has no jurisdiction to address the grievance arising therefrom (see, *Martin N. Wambora & Other vs. the Speaker*



of the Senate (supra) and (*Mumo Matemu vs. Trusted Society of Human Rights Alliance & Others* NBI Civil Appeal No. 290 of 2012.)

37. This jurisdictional role is embedded in Article 165 (6) of *Constitution*. Thus, in the exercise of its supervisory role, the High Court does not attempt to replace the decision of the competent organ with its own decision, it only finds fault with it as it has to determine if the action taken was Constitutional, rational and examine if there had been any procedural impropriety. The Court merely examines the constitutionality of any action and does not seat in appeal over the opinion of the relevant organ. It examines whether relevant material and vital aspects having a nexus to the Constitutional and legislative purposes were taken into account in the actual process.
38. Impeachment is defined in *Black's Law Dictionary* 8th Edition, as the act by a legislature of calling for the removal from office of a public official accompanied by presenting a written charge of the officials' alleged misconduct. Therefore, proceedings of impeachment are quasi-judicial in nature and thus subject to the jurisdiction of the High Court under Article 165 (3) (a) and (6) of *Constitution* of Kenya, 2010. The High Court being that which is set up under Article 165 of *Constitution* and not Article 162 (2) of *Constitution*.”
14. The above decision was appreciated and applied by the High Court, sitting at Kisii, in its recent decision in the case of *David Ondimu Kombo vs County Assembly of Kisii and Others*, Petition 10 of 2021, where the court dismissed a Preliminary Objection challenging the Jurisdiction of the High Court to hear and determine the Petition over the removal, from office by way of impeachment, of the Petitioner therein.
15. Having regard to the varied opinions and decisions on the proper forum to hear this kind of dispute and having noted that it was not disputed that the Petitioner herein has filed an identical Petition before the ELRC in Kisumu, I find that the Petitioner cannot be seen to hop back and forth between the two courts or blow hot and cold over the subject of jurisdiction. I am persuaded that the Petitioner was cognizant of the fact that the proper court to handle his case was the ELRC thus informing his decision to file another case before the ELRC at Kisumu soon after filing this Petition. To my mind, the filing of the Petition in ELRC at Kisumu is a clear demonstration that he Petitioner appreciates that the issues he has raised herein are predominantly issues on labour and employment between him and the County Assembly of Nyamira.
16. I will therefore direct that this matter be sent to ELRC at Kisumu for hearing and determination. I am guided by the persuasive decision of Otieno J. in *Allan Mupe Bakari vs Diani Sea Lodge* (2020) eKLR, where it was held thus:-

“However study of what actually happens when a court finds that it has no jurisdiction in a matter, has not been a dismissal or striking out. The courts have taken the purposive approach to let the matter be heard where it belongs. That is achieved by regular transfer of suits between the courts of equal status almost on a daily basis. Suits have not been routinely defeated merely on the basis that it was filed in a court which lack jurisdiction. I am persuaded and fully convinced that this is the proportionate and robustly just approach to the administration of justice so that, ultimately, parties have their day in court.”



17. In the final analysis, I make the following final orders: -

- i. Petitions Nos. E008 and E011 of 2024 be consolidated and transferred to the Employment and Labour Relations Court in Kisumu for hearing and determination.
- ii. The parties shall bear their own costs in the Applications.

18. It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NYAMIRA VIA MICROSOFT TEAMS THIS 16TH DAY OF DECEMBER 2024.

W. A. OKWANY

JUDGE

