



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYAHURURU**

**CONSTITUTIONAL PETITION NO. 5 OF 2019**

**HON. VENANSIO MBATARU**

**KARIUKI.....PETITIONER/RESPONDENT**

**VERSUS**

**THE COUNTY ASSEMBLY OF NYANDARUA.....1<sup>ST</sup> RESPONDENT**

**THE SPEAKER, THE COUNTY ASSEMBLY OF NYANDARUA.....2<sup>ND</sup> RESPONDENT**

**THE CLERK, COUNTY ASSEMBLY OF NYANDARUA.....3<sup>RD</sup> RESPONDENT**

**HON. PAUL NDECHE WAMBAIRE.....4<sup>TH</sup> RESPONDENT**

**RULING**

1. The ruling herein relates to the question of jurisdiction of this court to adjudicate upon the dispute in this case. When this case came up for a mention on 18<sup>th</sup> November, 2020, Hon. Lady Justice R. Wendoh raised, *suo motu*, the issue of jurisdiction posing the question whether the Petition herein ought to have been filed before the Employment and Labour Relations Court or before this court.

2. With that, parties were invited to submit on the germane issue of jurisdiction. In a nutshell, the Petitioner contends that this court has jurisdiction to entertain the Petition and is thus properly seized of the case. On the other hand, the Respondents argue that this court has no jurisdiction to entertain the Petition, contending instead that the Employment and Labour Relations Court is the one with the requisite jurisdiction to hear and determine the Petition.

3. The issue in question in the main Petition is on the Petitioner's removal from office as the County Executive Committee Member (CECM) for the Department of Public Administration and ICT at the County Government of Nyandarua. The Petitioner was terminated from his employment by dint of **Section 40 of the County Government Act 2012** and the **Nyandarua County Assembly Standing Orders**.

**PETITIONER'S SUBMISSIONS**

4. It was the Petitioner's assertion that the Constitutional Court has jurisdiction to handle the instant suit as the Petition seeks to examine violations of the Petitioner's rights as guaranteed by the Constitution of Kenya 2010.

5. The Petitioner contended that from the pleadings herein he is seeking to challenge the procedure adopted by the Respondents herein to remove him from office and the denial of his fundamental right to information. That the Petitioner herein is not seeking redress on grounds that he was unlawfully suspended from office in breach of his terms of employment or that any of his terms of employment had been breached by his employer and that if the application had raised such complaints, the industrial court and not this court would have jurisdiction to determine such issues. Reliance was placed on **Martin Nyaga Wambora & 3 Others v Speaker of the Senate & 6 Others (2014) eKLR.**

6. The Petitioner further submitted that the county assembly in its oversight function seats like a tribunal and or a quasi-judicial body and therefore its decisions are amenable for interrogation by the High Court as per **Article 165 (6) of the Constitution of Kenya, 2010**.

7. It was averred that in its supervisory role, the High Court is to examine whether any procedural law or the constitution as violated by the County Assembly of Nyandarua in the impeachment process of the Petitioner herein.

8. On whether there exists an employer and employee relationship between the parties herein the Petitioner reiterated that for an employment relationship to exist, there must be a contract of service as defined by **Section 2 of the Employment Act, 2007** none of which exists in the

instant suit. Reliance was placed on the case of Nick Githinji Ndichu vs Clerk Kiambu County Assembly & Another.

9. It was his assertion that the Petitioner herein being a state officer does not fall under the ambit of the Employment Act.

10. In conclusion, the Petitioner submitted that this court has jurisdiction to determine the instant suit which flows from the law by dint of Article 165(6) of the Constitution of Kenya as was stated in the case of Samuel Kamau Macharia & Another v Kenya Commercial Bank Ltd & Another (2012) eKLR.

#### **1<sup>ST</sup> - 4<sup>TH</sup> RESPONDENT'S SUBMISSIONS**

11. The Respondents submitted that the instant Petition squarely falls under the ambit and exclusive original jurisdiction of the Employment and Labor Relations Court and that the dispute herein is one relating to employment and here the Petitioner is contending the procedure in which the 1st Respondent had undertaken in removing him from office as CECM for the Department of Public Administration and ICT. Reliance was placed on Charles Oyoo Kanyagi & 41 others v Judicial Service Commission of Kenya (2018) eKLR, Elijah Okemwa vs Clerk, County Assembly Of Nyamira & 4 others (2018) eKLR & Brahim Tadicha Sora v Isaac B. Nadera (SSP) & 2 Others (2019) eKLR.

12. The Respondents averred that the Petitioner had since been removed from office as a CECM and the said Petition therefore has since been overtaken by events and there is no cause of action in the said Petition which has been overtaken by events.

13. The Respondent submitted that there are two schools of thought in relation to what should happen to the instant Petition. The first school and which they associate with is that the Petition should be dismissed since the honorable court has no jurisdiction and as was rightfully held in the cases of Owners of the Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Ltd (1989) eKLR (Supra) & Brahim Tadicha Sora v Isaac B. Nadera (SSP) & 2 Others (2019) eKLR (Supra); a court upon making a finding that it does not have jurisdiction should down its tools and should not take any other step on the matter. The second school of thought is that this Petition in light of the Oxygen Principles ought to be transferred to the Employment and Labor Relations Court which has jurisdiction.

14. In conclusion, the Respondents submitted that this honorable court has no jurisdiction and that the Petition only deserves to be dismissed with costs.

#### **ANALYSIS AND DETERMINATION**

15. The fundamental issue of jurisdiction has to be addressed first whether it is raised by the court *suo moto* as is with case or by the parties themselves.

16. It has long been established that jurisdiction is everything and without it the Court must down its tools otherwise everything after that becomes a nullity. In Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd [1989] eKLR, wherein Nyarangi J.A (as he then was) expressed himself on the issue as follows:

**"Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law down its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction....Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given**

**Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. ....:**

**By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics.**

**Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given"**

17. Further, the Supreme Court in the Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & 2 others (2021) eKLR, emphasized 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."**

18. In order to address the issue of jurisdiction, it is pivotal for this court to take into account the issues and arguments raised in the Petition. The Petitioner seeks to challenge the procedure adopted by the Respondents to remove him from office and the denial of his fundamental right to information under Article 35 of the Constitution of Kenya.

19. Looking at the Petition, it is evident that the Petitioner's main contention is that the procedure for his removal from office was legally

infirm. The Petitioner therefore appears to challenge his removal from office on the basis of non-conformity with **Article 47 of the Constitution**. Based on the subject matter raised in the Petition herein I opine that this court has proper jurisdiction as enshrined in **Article 165(3) of the Constitution**. In light of the issues raised in the main Petition and the reliefs sought, it is my view that this court is vested with powers to hear and determine disputes on contraventions and infringements of constitutional rights and fundamental freedoms as raised by the Petitioner. In **Joseph Otieno Oruoch v Kenya Medical Practitioners Pharmacists & Dentists Union & another [2021] eKLR** it was stated that:

***“The final conclusion is that the jurisdictional limitation placed on this Court is only with regard to the subject matter of the case; it has nothing to do with the question whether application or interpretation of the Constitution is involved. To use the phrase ‘constitutional court’ coined by the 2<sup>nd</sup> Respondent, one could safely say that the High Court, the Employment and Labour Relations Court and the Environment and Land Court are all ‘constitutional courts’ within their specific areas of jurisdiction.”***

20. Flowing from the above, I further rely on the position stated by the court in the case of **Martin Nyaga Wambora & 4 others v Speaker of the Senate & 6 others 2014] eKLR** as quoted by the Petitioner which stated as follows:

***“In this case, a cursory look at the verifying affidavit sworn by the Applicant on 16th January 2014 and the statutory statement of facts dated the same day shows clearly that the gist of the Applicant’s complaint in this matter is that the Joint committees of infrastructure, Youth and Sports; the Committees of Agriculture, Fisheries and Livestock and the Committee on Public Investments and Accounts (herein after referred to as the Joint committees) made recommendations on 6th January, 2014 that she should step aside from the performance of her duties as County Secretary for the County Government of Embu pending investigations to be undertaken by the Ethics and Anti- Corruption Commission (EACC) without having given her an opportunity to be heard which in her view amounted to a violation of the rules of natural Justice and her right to fair administrative action guaranteed under Article 47 of the Constitution.***

***It is therefore clear from the pleadings that the Applicant’s complaint relates to the process adopted by the Joint committees of the County Assembly of Embu in undertaking the inquiries before them leading to the impugned recommendations. The said complaint has nothing to do with a labor dispute. The Applicant was not for example seeking redress on grounds that she was unlawfully suspended from office in breach of her terms of employment or that any of her terms of employment had been breached by her employer. If the application had raised such complaints, we would have readily agreed with Counsel for the Respondents that it is the Industrial Court not this court that would have Jurisdiction to determine the issues raised therein but in so far as what is challenged is the process followed in arriving at the recommendations in question, we find that it is this court in the exercise of its Judicial Review Jurisdiction that has the mandate to investigate whether that process complied with the law.”***

21. It is clear that from the Petitioner’s pleadings, he challenged the procedure followed by the Respondents to remove him from office and the denial of his right to information. For the reasons stated above, I hold that this court has jurisdiction to hear and determine the instant Petition.

***i. Thus court orders that petition herein be fixed for hearing on priority basis***

**DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 5TH DAY OF OCTOBER, 2021.**

.....

**CHARLES KARIUKI**

**JUDGE**