



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAPENGURIA**  
**CONSTITUTIONAL PETITION NO. 3 OF 2020**  
**IN THE MATTER OF THE CONSTITUTION OF KENYA 2010**  
**AND**  
**IN THE MATTER OF THE COUNTY GOVERNMENT ACT 2012**  
**AND**  
**IN THE MATTER OF THE DEVOLVED GOVERNMENT ACT**  
**BETWEEN**  
**THE THIRD FORCE KENYA CBO.....PETITIONER/APPLICANT**  
**AND**  
**THE COUNTY PUBLIC SERVICE BOARD, WEST POKOT.....1<sup>ST</sup> RESPONDENT**  
**THE COUNTY GOVERNMENT, WEST POKOT.....2<sup>ND</sup> RESPONDENT**  
**CORAM: LADY JUSTICE RUTH N. SITATI**

**RULING**

**Introduction**

1. The petitioner herein filed a Notice of Motion dated 27<sup>th</sup> March 2020 under Certificate of Urgency. The Notice of Motion is said to be brought under *Articles 2(1); 3(1); 10(1)(2b). 19(1); 20(1)(2); 22(1), 23(3); 2; 28; 47; 48; 50; 165 and 162(2) of the Constitution of Kenya 2010, sections 1, 1A, 3, 3A and 63(e) of the Civil Procedure Act* and all other enabling provisions of the law seeing orders:-

1. THAT this application be certified urgent and heard *ex parte* in the first instance.
2. THAT pending the hearing and determination of this application *inter parte*, a conservatory order of temporary [injunction] do issue against the 1<sup>st</sup> and 2<sup>nd</sup> respondents, their agents, officers or persons acting under their instructions from carrying on any interviews scheduled for the position of secretary /CEO County Board.
3. THAT pending the hearing and determination of this suit, this Honourable Court do issue an order against the 1<sup>st</sup> and 2<sup>nd</sup> respondents, their agents, officers or persons acting under their instructions from carrying on any interview scheduled for the position of secretary/CEO County Board.
4. THAT pending the hearing and determination of this application *inter partes*, a conservatory order of temporary injunctions do issue restraining or prohibiting the 1<sup>st</sup> respondent from forwarding to the 2<sup>nd</sup> respondent and the 2<sup>nd</sup> respondent from appointing the previously 6 vetted Public Service Board members to the advertised positions.
5. THAT pending the hearing and determination of this suit *inter partes*, a conservatory order of temporary injunctions do issue restraining or prohibiting the 1<sup>st</sup> respondent from forwarding to the 2<sup>nd</sup> respondent and the 2<sup>nd</sup> respondent from appointing the previous 6 vetted Public Service Board members to the advertised positions.

**6. THAT pending the hearing and determination of this application inter partes, a conservatory order of temporary injunction do issue restraining or prohibiting the 1<sup>st</sup> and 2<sup>nd</sup> respondents from allowing the already vetted six members to the 2<sup>nd</sup> respondents service board from taking office.**

**7. THAT pending the hearing and determination of this suit inter partes, a conservatory order of temporary injunctions do issue restraining or prohibiting the 1<sup>st</sup> and 2<sup>nd</sup> respondents from allowing the already vetted six members to the 2<sup>nd</sup> respondents Public Service Board from taking office.**

**8. THAT the costs be provided for.**

2. The Notice of Motion is premised on nine grounds set out on the face of the application and is also supported by the affidavit of BRUNO LUMENNO WAMKOTA sworn on 27<sup>th</sup> March 2020. The deponent says he is the chairman of the petitioner herein. He also avers he has express authority from the other co-members of the Petitioner to swear the supporting affidavit and the annexures thereto. The court was not shown a copy of the authority to the deponent.

3. Contemporaneously with the Notice of Motion, the Petitioner filed a constitutional petition under the same constitutional provisions praying for:-

**a) An order of prohibition restraining the 1<sup>st</sup> respondent from forwarding to the 2<sup>nd</sup> respondent and the 2<sup>nd</sup> respondent from appointing the previous vetted board members to the advertised positions.**

**b) A declaration that the current composition of the County Public Service Board is a violation of Articles 10 and Article 27 of the Constitution of Kenya 2020(2010?) is hereby issued.**

**c) An order of mandamus directing the 1<sup>st</sup> and 2<sup>nd</sup> respondents to comply with the constitutional gender requirements and ensure that at least 3 out of the 7 members recommended for appointment are of the opposite gender be and is hereby issued.**

**d) An order striking down the current office as unconstitutional and pave way for compliance with constitution be and is hereby issued.**

**e) An order of mandamus be and is hereby directed against the 1<sup>st</sup> and 2<sup>nd</sup> respondents, their agents, officers or persons acting under their instructions from carrying on any interviews scheduled for the position of secretary/CEO County Board.**

**f) A declaration be and is hereby issued that the constitution and statutory breaches render the entire selection process constitutionally invalid.**

**g) The costs of this petition be provided for.**

4. The petition is premised on the facts set out in part C of the Petition and is also supported by the sworn affidavit of BRUNO LUMENNO WAMKOTA, dated 27<sup>th</sup> March 2020.

#### **Notice of Preliminary Objection**

5. On the 30<sup>th</sup> March 2020, the respondents through their counsel, M/S Manyonge Wanyama & Associates LLP, Advocates filed a Notice of Preliminary Objection dated same day to the entire suit herein on grounds that this Honorable court has no Constitutional jurisdiction to hear the dispute herein because it is a dispute that concerns employment relations the province of the Employment & Labour Relations Court.

#### **Taking of Directions**

6. Though the matter was filed during the court lockdown the parties appeared before me on 30<sup>th</sup> March 2020 and took the following directions:-

i. No interim/conservatory orders are issued.

ii. The court would first hear and determine the preliminary objection.

iii. The preliminary objection would proceed by way of written submissions to be filed and exchanged together with relevant authorities before 21<sup>st</sup> April 2020.

#### **The Submissions**

7. The respondents' submissions, dated 9<sup>th</sup> April 2020 were filed in court on the same day. There are nine authorities in support. The petitioner's submissions are dated 13<sup>th</sup> April 2020 and filed on 14<sup>th</sup> April 2020. The authorities relied upon by the petitioner are in the body of the written submissions.

## Issues for Determination

8. The only issue for determination is whether this honourable court has the constitutional jurisdiction to hear and determine the petitioner's case. The rival submissions are quite engaging. I commend counsel for the depth of research.

## Analysis and Determination

9. It is trite that what a court can do in terms of the matters that are brought before it is determined by whether or not it has jurisdiction to do so. In other words, is the court clothed with the power to entertain, hear and determine the dispute before it? In the well-known case of *Owners of Motor Vessel "Lillian S" versus Caltex Oil (Kenya) Limited [1989] KLR 1, the Court of Appeal* (Nyarangi JA) held thus:-

***"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 its tools in respect of the matter before it, the moment it holds the opinion that it is without jurisdiction."***

10. It was because of the need to determine the issue of jurisdiction which had been raised that this court declined to grant the petitioner's prayer for a temporary conservatory order during the taking of directions. If at the end of this ruling I find that as a court I do not have the jurisdiction to hear and determine this dispute, I shall down my tools, so that the appropriate court can take over the dispute for purposes of conclusively dealing with it.

11. As rightly submitted by the respondents, the jurisdiction of any court is enshrined in the Constitution or Statute and must be exercised in accordance with the conferring provisions. In the case of *Samuel Kamau Macharia versus Kenya Commercial Bank Limited and 2 Others*, a Supreme Court of Kenya decision reported in *[2012] eKLR*, and cited by the respondents herein, the court held:-

***"A court's jurisdiction flows from either the Constitution or legislation or both. Thus a court of law can only exercise jurisdiction as conferred on it by law. It cannot arrogate to itself jurisdiction of a court of law, it must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation."***

12. In the case of the High Court and the dispute before me, the conferring provisions of jurisdiction is **Article 23 of the Constitution of Kenya 2010**, which reads:-

***(1) The High Court 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.***

***(2) Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts 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) In any proceedings brought under Article 22, a court may grant appropriate relief including:-***

***a) A declaration of rights***

***b) An injunction;***

***c) A conservatory order;***

***d) A declaration of invalidity of any law that denies, violates, infringes or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;***

***e) An order for compensation; and***

***f) An order of judicial review***

13. The provisions of **Article 22** reads as follows:-

***1) 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.***

***2) In addition to a person acting in their own interest court proceedings under clause (1) may be instituted by:-***

***a. A person acting on behalf of another person who cannot act in their own name;***

***b. A person acting as a member of, or in the interest of, a group or class of persons***

14. The jurisdiction of the High Court is further provided under **Article 165(3)(b) of the Constitution of Kenya 2010** to the effect that the High Court shall have jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.

15. The question that now arises for determination is whether in light of the above provisions and the pleadings, this honourable court has jurisdiction to hear and determine this matter. The respondents' contention is that this Honourable Court has no jurisdiction to hear this matter because the issue in controversy is an employer- employee issue which the petitioner should have taken to the Employment and Labour Relations Court in accordance with **Article 162(a) of the Constitution of Kenya 2010** which provides that:-

**“Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to employment and labour relations.”**

16. The respondents also rely on **Article 165(5) of the Constitution of Kenya 2010** in contending that the said provision bars the High Court from hearing and determining any matter which falls within the province of the courts contemplated under **sub article 2 of Article 162**, one such court being the Employment and Labour Relations Court.

17. The respondents have also placed reliance on **section 12 of the Employment and Labour Relations Court Act** which bars the High Court from hearing and determining suits akin to this suit because it is only the Employment and Labour Relations Court which has the 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 the Act itself in matters Employment and Labour Relations.

18. The respondents have fortified their argument that this is an Employment and Labour Relations matter by contending that the dispute relates to the 1<sup>st</sup> respondents mandate to appoint persons to act in the office of the County Public Service Board, thus making the dispute an employment dispute fit for determination by the Employment and Labour Relations Court. In this regard, the respondents cited the case of **Charles Oyoo Kanyangi & 41 others versus Judicial Service Commission of Kenya [2018] eKLR** where Mwita J transferred the petition to the Employment and Labour Relations Court because of the nature of the relationship between the parties. I agree that in the **Oyoo Kanyangi Case** (supra) the dispute was clearly between employer and employee.

19. Another authority cited by the respondents is **Okiya Omtata Okoiti versus Cabinet Secretary for information, communication and Technology & 2 others [2019] eKLR** in which Onyango J cited the case of **Abdikadir Suleiman versus County Government of Isiolo & Another [2015] eKLR** in holding that:-

**“The original and unlimited jurisdiction to make a finding on legitimacy or lawfulness of decisions in disputes between employers and employees rests with this court as vested with the appropriate jurisdiction under Article 159(1), 162(2)(a) as read with Article 165(5) and 6 of the Constitution Articles 22(1) and 258(1) of the Constitution and the provisions of the Employment and Labour Relations Act, 2011. The court also holds that the jurisdiction spreads to all issues in the employment relationship and related matters including the enforcement of the fundamental rights and freedoms under Article 22 of the constitution and enforcement of the Constitution under Article 258 as far as the issues in dispute are, evolve, revolve or relate to employment and labour relations. The court holds that the compass or golden test for the courts jurisdictions the subject matter in the dispute, namely disputes relating to employment and labour relations as provided for under article 162(a) of the Constitution and Labour Relations Court Act 2011, and not the remedies sought or procedure of moving the court or the situ of the applicable law or any other extraneous considerations as may be advanced by or for the litigant.”**

20. Also see the Court of Appeal decision in **International Centre for Insects Physiology and Ecology (ICIPE) versus Nancy McNally [2018] eKLR** where it was held, inter alia, that the Employment and Labour Relations court is clothed with jurisdiction to hear and determine such constitutional issues as and when they arise from Employment and Labour Relations.

21. The above is the position of the respondents on the issues that are before this honourable court in this matter.

22. The position of the petitioner is that there is nothing employment and labour relations in this matter. The petitioner contends that it is a community based organization whose members are not employees of the West Pokot County Government nor is any of its members an applicant for the advertised positions which are the subject of this dispute. The petitioner contends that this dispute seeks to address the all-important constitutional principle that requires the respondents to ensure that any appointments in the county meets the two thirds gender rule. It is for this reason that the petitioner contends this honourable court has the requisite jurisdiction to hear and determine this dispute. The petitioner has supported this position with relevant authorities.

23. Apart from the provisions of **Article 165 of the Constitution**, the Petitioner has fallen back on the holding of Odunga J in the case of **Wambua Maithya versus Pharmacy and Poisons Board, Pharmaceutical Society of Kenya & Another** (Interested Parties). In the said case, the preliminary objection was dismissed on grounds, *inter alia*, that there was no proof of employer – employee relationship and further that since the applicants had raised issue of constitutional and human rights the High court was the proper forum at which the issues could be ventilated.

24. The petitioner submits that it has come to this court in the interest of its members and the public under the provisions of **Article 22 of the Constitution of Kenya 2010** seeking reliefs as provided under **Article 23 of the same constitution**. In the **Wambua Maithya Case** (above) Odunga J held that where a matter raises both constitutional and employment issues, the High Court could still proceed to hear and determine the matter, but where the matters brought before the High Court fall squarely under **Article 162(2) of the Constitution of Kenya 2010**, then **only the Employment and Labour Relations Court** can handle such matters. In other words, where the dispute involves an employer-employee relationship, there would be no option for the High Court but to transfer the matter to the Employment and Labour Relations Court as Mwita J did in the **Charles Oyoo Kanyangi Case** (above).

25. The petitioner also referred to paragraph 58 of Mr. Justice Odunga's ruling in the *Wambua Maithya Case* (above) in which he set out in full his view of the jurisdiction of the Employment and Labour Relations Court where he said:-

*“That the Employment and Labour Relation’s Court’s jurisdiction is restricted to where there exists employer and employee relationship [which] has been the subject of several decisions in our jurisdiction. In Joy Brenda Masinde vs Law Society of Kenya & Another [2015] eKLR, the Petitioner filed a Petition in the High Court challenging the legality of an advertisement placed in the Daily Nation Newspaper by the Law Society of Kenya, inviting applications for the position of Secretary/Chief Executive Officer. Certain requirements/qualifications were included in the said advertisement, being that the applicant must hold a Bachelor of Laws Degree, be an Advocate of the High Court of Kenya for not less than ten (10) years standing and be a Certified Public Secretary of not less than five (5) years standing and possess experience and knowledge in management. The Petitioner challenged the requirements that an applicant for the post must be a Certified Public Secretary arguing that such a requirement is not included in section 26(a) of the Law Society of Kenya Act 2014. In declining to uphold the preliminary objection based on jurisdiction the court held that:-*

*“The petitioner herein had merely expressed an intention to apply for the advertised position. She had not yet been recruited and as such cannot be said to be an employee...From the above definition it is quite clear that no employment relationship exists between the petitioner and the 1<sup>st</sup> respondent...The matter or question in issue in this petition is the legality of the decision by the 1<sup>st</sup> respondent to.....”*

26. In the instant case, from A-Z, the petitioner is talking about nothing else but the recruitment of members and the hiring of the secretary/CEO to the County Service Board of West Pokot County. This is the case in both the Notice of Motion, and the Petition itself. The petitioner's idea is to scuttle the recruitment process and my view of the matter is that the issue of gender equity was brought in by the petitioner to camouflage the true intent of the Petitioner, namely the hiring of the six (6) persons who have already been interviewed and vetted and whose names are not even given in the pleadings, and the hiring of the secretary/CEO of the Board. All these matters concern employee-employer relations which can only be determined by the Employment and Labour Relations Court.

27. The upshot of what I have said above is that this court does not have the constitutional jurisdiction to hear and determine this matter.

28. That being the case, and there being no Employment and Labour Relations court either here at Kapenguria or Kitale High Courts, this petition is hereby transferred to the Employment and Labour Relations Court at Eldoret for hearing and final determination on the merits.

**Ruling delivered through email on this 5<sup>th</sup> day of May, 2020**

**RUTH N. SITATI**

**JUDGE**

**In the presence of:-**

M/S Chebet Holding brief for Rotich for Petitioner

Mr. Lowasikou holding brief for Wanyama for Respondents