



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 04 OF 2020

HENRY KIGEN & 6 OTHERS.....APPLICANT/PETITIONERS

=VERSUS=

BARINGO COUNTY GOVERNOR & 2 OTHERS.....RESPONDENTS

RULING

Introduction

1. By a Notice of Preliminary Objection dated **25th day of August 2020**, the Respondents raised preliminary points on, principally, the jurisdiction of the court to deal with the petition and application therein, as follows:

“NOTICE OF PRELIMINARY OBJECTION

The respondents herein raised Preliminary Objection on the petitioners’ application dated 12th August, 2020 and the entire petition on the following grounds.

1. That this Honourable is not seized with jurisdiction to entertain this matter on issues of employment since this is a preserve of employment, labour and relations Court.

2. That the Baringo Governor has no capacity to be sued in his own name or as the County Governor.

3. That the 3rd respondent further has no capacity to be sued as the County Attorney General since there is no such office existing within Baringo County Government hence the application is frivolous.

4. That the petition lacks merit and offence the provisions of the Law ought to be dismissed with costs.”

2. That the High Court and Court of Equal status established under Article 162(2) of the Constitution have jurisdiction to deal with the Bill of Rights issues is beyond doubt as since clarified by the Court of Appeal in ***Chimweli Jangaa Mangale & 3 others v Hamisi Mohamed Mwawasaa & 15 others*** [2016] eKLR by when dealing with question in relation to a land and environment matter, where it held as follows:

*“Does the ELC have jurisdiction to entertain an action for enforcement or protection of fundamental rights where the alleged violations arise from or relate to matters within its jurisdiction, such as violation of the right to property? This Court considered the issue in **Prof. Daniel N. Mugendi v. Kenyatta University & Others, CA No 6 of 2012** and in **Judicial Service Commission v. Gladys Boss Shollei & Another, CA No 50 of 2014**, involving the Labour and Employment Court, which, like the ELC, is a court of equal status as the High Court under Article 162(2) of the Constitution. **The Court concluded that the High Court did not have exclusive jurisdiction to enforce the Bill of Rights and that the Constitution contemplates enforcement and protection of fundamental rights and freedoms by other courts, other than the High Court.** Accordingly, where issues involving the environment or land raise constitutional issues or issues of protection and enforcement of the right to land as property, the ELC will have jurisdiction to hear and determine the dispute. We are satisfied that the appellant’s claim that the ELC lacks jurisdiction to enforce constitutional rights is totally bereft of merit.”*

3. The Petitioners responded to the Preliminary Objection by a replying Affidavit sworn by the 1st Petitioner expressed as being on behalf of the other petitioners as follows:

“REPLYING AFFIDAVIT

2. **That** in a reply to the 1st, 2nd & 3rd respondent’s preliminary objection paragraph 1 (one) this is a constitutional application and this court has no limited jurisdiction thus the respondents should not mislead this honorable court to believe that this matter is preserved for Employment and Labour Relation Court only is denied.

3. **That** in reply to the respondent Preliminary Objection paragraph (2) Two, is denied, and the petitioners wish to state that the County Governor or any other person once elected to hold such public office is eligible to sue or to be sued therefore the respondents Preliminary Objection has nothing to hold water over this matter but their obligation is only available for dismissal.

4. **That** further in reply to the 1st, 2nd & 3rd respondents’ Preliminary Objection paragraph (3) three is denied but the word “Attorney General” as stated by the respondents was a mere typing error that cannot be used to deny the petitioners chance to be heard over the respondents violation of their Constitutional Rights.

5. **That** further reply to the said paragraph the office of the Attorney exists and it is eligible to be sued for any violations of human rights and or in this suit there are the council for the respondents on records.

6. **That** in reply to 1st, 2nd & 3rd statement in Preliminary Objection that the petitioners application lacks merit and offend the provisions of the law is denied and petitioner wish to state that the respondents are the one who offended the law more so is the Constitution of Kenya 2010 bill of rights Article 10 (1) (a) (b) & (c) and 2 (a), (b), (c) and other articles in the bill of rights and issue before this court is a constitutional petition which this court has constitutional mandate to hear and determine all constitutional matters being brought before thus this court has jurisdiction contrary to the respondents statements.

7. **That** further, the 1st, 2nd & 3rd respondent are to blame for their maliciously use of the public office to oppress and discriminate the petitioners in the hiring process and lastly constituted the filling of this petition for the respondents action of undermining the petitioner Constitutional Rights.

8. **That** the petitioner has constitutional rights to be heard more so in the Enforcement of bill of Rights. Article 22 (1) and 2 (a), (b), (c) (d) and the 1st, 2nd & 3rd respondents objection intentions are to deny the petitioner the said rights to be heard which should be avoided and this court do proceed to hear this petition and grant orders as prayed.

9. **That** the petitioner during the filing of this petition has followed all the requirement lay down more so in the provisions of law, thus the petitioners pray that the respondents objection lack merit and the same be dismissed with costs and have the petition proceed.

10. **That** the petition has been filed properly and in good faith and had not offended any provision of the law as stated by the respondents and the petitioner pray that respondents objection is contradictory, full of lies and is only intents to deny the petitioner opportunity to be heard thus this court is a court of law and cannot tolerate such but only to dismiss forthwith and the petitioner, petition to proceed and orders sought be granted.

11. **That** the 1st petitioner has authority to swear this reply affidavit on behalf of all petitioners.

12. **That** the above stated are deemed to be true and correct to the best of my knowledge and information and believe source whereof have already disclosed.

13. The petitioner is further apprehensive that if the 1st, 2nd & 3rd respondent are allowed to stagnate the process the petitioner stand to suffer irreparable damage and loss.

Sworn at Kabarnet this 9TH day of SEPTEMBER 2020

Sworn by the said

HENRY K. KIGEN

On behalf of the Petitioners”

The Petition

4. The Petition, the cause of action appears to irregular recruitment of personnel by the 2nd Respondent as exemplified by the alleged appointment of relatives of the Board and other persons in position of influence or authority as stated in Paragraph 3 of the Petition, and the failure to recruit qualified personnel as alleged in the statement of facts set in the Petition, as follows:

“PETITION

3. That the 2nd respondent is the County Public Service Board of Baringo County Government. Its established by the County Government act 2012 to among other things do shortlisting, interviewing and appointing qualified personnel to the County but

contrary they;

I. CS. Samson Kibii (Board Secretary) appointed his real sister Kibii Joyce Jematian as Lab Technician without required qualification. (No. 14 in the attached list of appointees) who was not shortlisted nor attended any interview.

II. Caren Sumukwo appointed as Pharmaceutical Technologist who is uncle to C.O Health Preventive without licence and graduated recently (2018).

III. Meshack Maluk appointed as Lab Technologist but his profession was applied Biology he lacks capacity to act as such.

IV. M.C. Bartabwa Ward Chepsongol's second wife was appointed as nurse who graduated recently (2018).

V. M.C.A Tenges Ward – Sylus Tochim's nephew by the names Korir Johnson Kipruto was appointed as an assistant Nutritionist who graduated recently (2019).

VI. The above appointees and others to be adduced in the hearing hereof.

4. The 3rd respondent is the County Attorney General - the Principal County Legal advisor.

THE FACTS

1. **That we petition to this honourable court contesting and or opposing strongly as a matter of public interest shortlisting, interviewing and later appointment of the medical professionals who lacks qualification and/or experience in the field of Medical Services contrary to Chapter Six of the Constitution of the Republic of Kenya 2010 laws of Kenya.**

2. **Shortlisting, interviewing and later appointing in the cadres of Health Department – Baringo County Government in the process of appointment which was not fair and/or full of nepotism/corrupt manner contrary to the constitution thus they are unfit to hold such health offices and/or offer such sensitive services to the public.**

3. That the contested Health cadres in the Health Department above which intended to be allocated and hold by the said appointees of which incase allowed will totally offend the Constitution of the Republic of Kenya Chapter six laws of Kenya and the petitioner's right of equality and interested members of public.

4. **That the, process of shortlisting and interviewing was done unfairly resulted in picking incompetent health professionals with lack of experience within those cadres of health.**

5. That the County Public service board chose to go against the national values that led to not picking merited, qualified and experienced medical professionals who have been in the field for long as from 2002 e.g. Christine Jerop Chelimo.

6. That it's principal of natural justice and a constitutional provision that when you subjected to administrative process it's that you do base on the constitution more so chapter (6) six of the constitution of the Republic of Kenya 2010.

7. That the respondents denied the public the right to be served by competent medical professionals and fair service delivery and a transparent process.

8. That if the process is allowed to go unchallenged it would result into an injustice against the Medical fraternity, the constitution itself and the general public who were also interested in the process and this will also set a bad precedents in future undertaking and it may result in apathy and lack of faith in due process for employment/appointment's

9. **That the petitioners and the entire group of Medical Interns who have been in internship for 15 months have not been served with any letter notifying them for their position as at now despite the term of service completion.**

5. On the basis of these allegations, the Petitioners seek specific reliefs as follows:

“Your Humble Petitioner Therefore Prays for the following orders;

1. This honourable court be pleased to issue **a declaration order that the shortlisting, interviewing and appointing incompetent candidates with lack of experience and qualifications is substantively ultra vires** and contravenes Article 10, 47 & 232 of the Constitution of the Republic of Kenya as read TOGETHER Article 65 of the County Government act 2012 laws of Kenya and therefore the processes be declared null and void.

2. That this honourable court be pleased to issue **a declaration order that it is unconstitutional for the respondents and or any person, state organ and or any state authority to recruit and or hire the service of incompetent individuals** to serve in sensitive health departments of Baringo County thus the process was unconstitutional and be nullified and **direct all the process to be repeated and done fairly.**

3. That the petitioners pray this honourable court to **compel the Baringo County Government Authorities to prioritize the**

appointment of the said Interns.

4. That the court further be pleased to issue an order restraining the respondent's appointees assuming to their areas of deployment/work stations pending hearing and determination of this petition.

FURTHER the petitioners pray for:

a) Costs of this suit be awarded to the petitioner.

b) That we pray further that as a matter of public interest of justice orders sought be allowed."

Submissions

6. In submissions before the Court on 29th September 2020, Counsel for the respondents urged his Preliminary Objection to the Petition and application, and the Petitioners and Interested Party responded thereto, and ruling was reserved for the 6th October 2020.

7. The Petitioners urged the court to find jurisdiction under Article 165 (3) (b) of the Constitution for the enforcement of rights in the Bill of Rights, the Interested Party pointing to the right against discrimination under Article 27 (4) of the Constitution and the unlimited jurisdiction of the High Court, while the respondent urged that the petition was a labour issue relating to fair right in recruitment as part of the recruitment process which the proper subject of the Employment and Labour Relations Court.

To transfer or not to transfer petition to E&LRC

8. It was urged for the respondents that the petition and application were "purely on employment as recruitment - shortlisting, interviewing and appointment of applicants is a purely an employment matter" and the Court was invited to find that it did not have jurisdiction to hear the matter and, therefore, to **transfer** the suit to the Employment and Labour Court, counsel seeking costs for the suit. Counsel for the Respondents relied on the High Court decision in **Pamoja Women Development Programme & 3 others v Jackson Kihumbu Wangombe & another** [2016] eKLR, where the Court (Prof. Joel Ngugi, J.) admirably considered the issue whether the High Court can transfer a suit to the Environment and Land Court, and held as follows:

"10. The parties did not cite to me any authorities to support their respective positions. However, I am aware of some decisions of the High Court that have held that much as sections 1A and 1B of the Civil Procedure Act has softened the rigidity of the Kagenyi Case stranglehold, the High Court cannot transfer suits to Equal Status Courts. Three such cases include: **Rob De Jong & Another -Vs- Charles Mureithi Wachira** [2012] eKLR, **Joseph Mururi v Godfrey Gikundi Anjuri** [2012] eKLR and **Wycliffe Mwangaza Kihugwa v Grainbulk Handlers Limited** [2014] eKLR.

11. It is true that my perspective on the question of when the High Court can order a transfer of a suit filed in the "wrong" court has evolved. In 2012, in a case filed in Machakos, I took the hard-line position – following Kagenyi Case – that a suit filed in the "wrong" magistrates' court could not be saved and had to be struck out. That was a case that implicated section 18 of the CPA. More recently, in **Esther Mugure Karegi v Penta Tancom Ltd (Kiambu Civil Misc. App. No. 19 of 2016)**, my attitude evolved and ordered the transfer of such a suit. One of the reasons for the evolution in my thinking is the shift in our jurisprudence towards more functional as opposed to formalist approach to questions of jurisdiction. I explained this evolution in the **Esther Mugure Karegi Case** thus:

I would agree that the liberating light of the provisions of Article 159(2) of the Constitution interpreted liberally and generously would inform our interpretation of sections 14, 15 and 18 of the Civil Procedure Act. To my mind, freeing the interpretation from the constraints of technicality and eager to do substantive justice would lead to a conclusion that sections 14 and 15 are procedural sections aimed at guiding parties on the appropriate place for suing. Suing in the "wrong" court as far as geographical location is concerned does not, however, necessarily make the suit a "nullity." Such a suit may be a suitable candidate for transfer under section 18 of the Civil Procedure Act to the appropriate Court. It is important to point out, however, even under this liberal interpretation not all suits will be automatically transferred. Among other things, in my view, the High Court will consider the reasons for filing the suit in the "wrong" court in the first place. Where there is evidence of bad faith or improper motives, for example, the Court may refuse to transfer such a suit and leaving it to endure objections under section 16 of the Civil Procedure Act.

12. The question for me, therefore, is whether I should follow these High Court decisions or take a different stance since I am not aware of any decision by the Court of Appeal directly on the issue and the parties before me did not cite any.

13. I begin with two background questions: what was the intention of Kenyans in creating the two Article 162(2) Courts? Second, if section 18 of the Civil Procedure Act was being written now, how would it read? I make the preliminary point that section 18 of the CPA neither permits nor prohibits the High Court to transfer suits to the Equal Status Courts. Therefore, one can only rely on the section by analogy.

14. Kenyans desired specialised courts to deal with certain matters that they felt should be dealt with by these courts with special expertise and repeated experience in the questions they deal with. What Kenyans bargained for, and got in constitutionalizing the two Article 162(2) courts are the benefits associated with the creation of specialized courts in environment and law (as well as employment relations and labour): improved substantive decision making in the two areas fostered by having experts decide complex cases in the two areas and improving judicial efficiency through decreasing the judicial time it takes to process complex cases by having legal and subject-matter experts with repeated experience on the subject-matter adjudicate them. These were the

advantages Kenyans bargained for in creating Article 162(2) Equal Status Courts.

15. Kenyans' objectives was not to set up judicial booby traps for unsuspecting litigants who after timeously filing and pleading their cases would have to undergo a technical game of jurisdictional Russian Roulette to determine if their case will survive or be struck out. While Kenyans did not wish to give litigants a blank cheque to file suits in the wrong fora in bad faith, they intended to give parties a fair chance to have their cases determined on their merits. This intention is defeated if, in close cases filed in a Court of cognate jurisdiction but where the parties subsequently or the Court makes a determination that the particular Court in which the matter has been filed does not have the requisite jurisdiction and that the requisite jurisdiction lies in a cognate court, the Court responds by striking out the suit and requiring the parties to file a fresh the suit. I see no useful purpose that is served by this other than punishing a party that acted in good faith. This would be an appropriate course of action where it can be shown that the Plaintiff acted in bad faith in suing in the wrong court but not where the Plaintiff acted in good faith. There has been no allegation or showing that the Plaintiff acted in bad faith here. Indeed, it is the Court and the Defendants who raised the issue for the first time and upon reflection the Plaintiff concluded that jurisdiction probably lies in the Environment and Land Court. They then, without any delay, made the current application.

16. I agree there is **no substantive concurrent jurisdiction** shared between the High Court of Kenya and the two Article 162(2) Equal Status Courts. Indeed our Constitution advertently aimed to isolate the jurisdiction of the Equal Status Courts and prohibit the High Court from exercising jurisdiction in areas of specialisation of these Courts. However, I believe the constitutional architecture provides for **incidental concurrent jurisdiction**. For example, there is no longer any serious questions that the two Equal Status Courts have case-wide jurisdiction to hear and determine any additional other issues raised or pleaded in a case which is primarily on their area of specialisation even if those issues normally fall outside their jurisdiction. This is the reason Equal Status Courts can deal with any issues raised respecting the violation of the Bill of Rights for example.

17. In my view, this incidental concurrent jurisdiction includes the ability of both the High Court and the Equal Status Courts to deal with certain procedural or administrative questions that present quasi-judicial issues where the Court in question is requested to act in the interests of justice or due administration of justice. This is where I would locate the ability of any of the three superior courts of cognate jurisdiction to transfer to the counterpart superior court any case filed before it that would more appropriately be adjudicated in the cognate superior court. Under this incidental concurrent jurisdiction, the High Court was able, for example, to transfer certain matters to the Environment and Land Court and the Environment and Labour Relations Court initially.

18. It is, of course, quite possible to abuse and misuse this incidental concurrent jurisdiction. Hence, it must be exercised with caution and always with the conscious reminder that every Court must beware that jurisdiction is bequeathed by the People of Kenya and as such it is usurpation of the Constitution to aggrandize the Court's jurisdiction using judge-craft or innovation.

19. At the same time, however, Courts must act to give our Constitution meaning and life that is keeping with the lived realities of Kenyans. To paraphrase a famous American legal aphorism which found its orality in the stirring dissent of Justice Robert H. Jackson in **Terminiello v City of Chicago, 337 U.S.1 (1949)**, our Constitution is not a suicide pact. Like Justice Jackson in expressing apprehension that a rigid and dogmatic reading of the US Bill of Rights might destroy the very society it was meant to govern, we must worry here that an ultra-formalistic reading of the constitutional bequests of jurisdictions to various Courts could easily lead to much substantive injustice and a return to mechanical jurisprudence that Kenyans loathed in the pre-2010 period of our constitutional adjudication. **We must, to paraphrase Justice Jackson again, temper doctrinaire logic on the jurisdiction issue with a little practical wisdom.**

20. For me, that practical wisdom which we must bring to the strident doctrinaire logic that seemingly flows from Article 162(2) is one that permits the High Court in circumstances and context such as the one in this case to transfer it to the Environment and Land Court where primary jurisdiction lies. I believe that there is no constitutional subversion in the act of channeling the suit to the rightful Court. If anything, this furthers access to justice and eschews the use of technicalities as the golden pivot for adjudicating disputes. I find no categorical bar in the Constitution to this form of redemptive jurisprudence to prevent substantive injustice.

21. As stated above, I would readily accept that section 18 of the Civil Procedure Act does not apply to transfer of cases from the High Court to Equal Status Courts and vice versa. However, that does not, in my view, settle the matter. **The High Court is still vested with inherent authority and inherent (incidental) jurisdiction to transfer certain suits which have been filed in good faith in the High Court to Equal Status Courts even in the absence of a specific statutory text bequeathing such powers to the High Court. This is in keeping with the Constitutional commandment to do substantive justice without undue obsession with technicalities.**

22. Consequently, I would exercise the inherent jurisdiction of the Court to allow the present application. **However, while I have held that there is no evidence of bad faith on the part of the Plaintiffs in filing the matter in the High Court, it is also true that the Defendants have been inconvenienced and have been forced to incur extra costs for having to entertain the present application due to the action by Plaintiffs in filing the matter in the High Court. It is, therefore, only fair that the Defendants should be compensated for their costs for this Application.**

9. I would agree that the proper course having regard to the overriding objection of the civil process and to Article 159 principle of substantial justice is to transfer a matter to the more appropriate or correct court, as the case may be, so as to avoid expensive delays in the substantive determination of disputes. I would also agree that costs may be imposed where a respondent has incurred costs in the forum from which the case it be transferred. Overall, however, as a general principle I consider that constitutional litigation for its great public importance ought not be stifled by award of costs.

Issue for Determination

10. In determination whether to down its tools, as counseled by Nyarangi, J.A in the Court of Appeal decision of **The Owners of Motor**

Vessel Lilian "S" v. Caltex Oil Kenya Ltd. [1989] KLR 1, where a court concludes that it has no jurisdiction in a matter, and to transfer the case to the Employment and Labour Relations Court as in *Pamoja Women*, supra, this court must now consider whether the matters raised in this petition are matters for the exclusive jurisdiction of the Employment and Labour relations or matter within the competence of the High Court under its Bill of Rights and constitutional interpretation jurisdiction under Article 165 (3) (b) and (d) of the Constitution, as urged by the Petitioners.

DETERMINATION

Jurisdiction of the Employment and Labour Relations Court

11. It is generally agreed that a contract of service or employment relationship is central to the jurisdiction of the Employment and Labour Relations Court. The threshold decision of Nduma, J. in *Nick Githinji Ndichu vs. Clerk Kiambu County Assembly and Another [2014] eKLR* has been accepted by several subsequent decisions of the High Court, among others, *Philip Wanyonyi Wekesa & 2 others v Clerk to County Assembly of Bungoma & 4 others [2018] eKLR*, *Stephen Sogoni Chune v County Government of Bungoma & another [2018] eKLR*, and *Sollo Nzuki v Salaries and Remuneration Commission & 2 others [2019] eKLR*. In *Nick Githinji Ndichu*, the court held that -

*“For one to access the jurisdiction at ELRC he must demonstrate that there exists an employer – employee relationship; that there is an oral or written contract of service or that the issue is a dispute falls within the provision of Section 12(1) of the ELRC Act. Though **Advertisement, Shortlisting, Interviewing are all steps towards recruitment and steps towards creating an employer – employee relationship**, they are not in my view envisaged in Section 12 and which will place this petition under the jurisdiction of the Employment and Labour Relations Court.”*

12. Section 12 of the Employment and Labour Relations Court Act No. 20 of 2011 provides for the jurisdiction of the Court established under Article 162 (2) of the Constitution as follows:

“12. Jurisdiction of the Court

(1) 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.

(2) An application, claim or complaint may be lodged with the Court by or against an employee, an employer, a trade union, an employer’s organisation, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose.

(3) In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders—

(i) interim preservation orders including injunctions in cases of urgency;

(ii) a prohibitory order;

(iii) an order for specific performance;

(iv) a declaratory order;

(v) an award of compensation in any circumstances contemplated under this Act or any written law;

(vi) an award of damages in any circumstances contemplated under this Act or any written law;

(vii) an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law; or

(viii) any other appropriate relief as the Court may deem fit to grant.

(4) In proceedings under this Act, the Court may, subject to the rules, make such orders as to costs as the Court considers just.

(5) The Court shall have jurisdiction to hear and determine appeals arising from—

(a) decisions of the Registrar of Trade Unions; and

(b) decisions of any other local tribunal or commission as may be prescribed under any written law. [Act No. 18 of 2014, Sch.]”

13. The paragraph relevant to this Petition is section 12 (1) paragraph (a) of the Employment and Labour Relations Court Act, which provides for jurisdiction in ‘**(a) disputes relating to or arising out of employment between an employer and an employee**’. I respectfully agree with Nduma J. in *Ndichu* case that although shortlisting and interview are part of the recruitment process, the want of an eventual employee-employer relationship denies the Employment and Labour Relations Court of the jurisdiction in the exercise of which it could deal with bill of rights issues arising in the manner contemplated in the *Chimweli Mangeli, Shollei* and *Mugendi* cases.

14. The issue for this court in arriving at a decision on the Preliminary Objection is, therefore, **whether an employer-employee relationship exists to support jurisdiction of the E&LR court under section 12 of the Act established pursuant to Article 162 (2) (a) of the Constitution.**

CONCLUSION

The Principle

15. From the foregoing discussion of the law, this Court must hold as the *ratio decidendi* that if the process of the recruitment through shortlisting, interview and appointment stops short of a contract of service, the substratum of the employer-employee relationship necessary for founding jurisdiction of the Employment and Labour Relations Court Act under section 12 (1) (a) of the Employment and Labour Relations Court Act is not established, and the E&LRC has no jurisdiction over any matter arising therefrom.

The facts

16. The Petitioners in this case do not pretend to be employees of the respondent. In fact, the petition is based on their failure to secure employment with the respondent for reasons alleged to have been fraudulent and discriminatory, and a cancellation of the recruitment and the holding of a new process of recruitment are sought as specific reliefs.

17. The inescapable conclusion is that even though the petitioners complaint relates to breaches of the constitutional provisions and the Bill of Rights over which the High Court has no monopoly in accordance with relevant case-law authorities (see *Chimweli Jangaa Mangale & 3 others v Hamisi Mohamed Mwawasa & 15 others* [2016] eKLR, *Mugendi* and *Shollei* cases, supra,) and the court with equal status under Article 162 (2) may in cases falling under their respective spheres deal with such bill of Rights claims, the complaints subject of this Petition did not happen in the context of a matter within exclusive jurisdiction of the relevant court of equal status herein.

18. The recruitment process that leads to employment relationship, the employee-employer relationship did not fruition, and for that reason, the alleged breaches of Constitution did not occur in the context of a matter over with the Employment and Labour Relations Court has jurisdiction. In other words, although the Employment and Labour Relations Court has jurisdiction to deal with human rights and constitutional interpretation, the necessary primary jurisdiction over employment matters did not exist for want of the foundational context of an employer-employee relationship between the parties.

Verdict

19. This court must, therefore, return a verdict that the Employment and Labour Relations Court has no jurisdiction to deal with the matters raised in this Petition, and that it is the High Court in its constitutional jurisdiction to interpret the Constitution and enforce the Bill of Rights under Article 165 (3) of the Constitution that has the power to deal with the petitioners’ complaint herein. As the disputes in this Petition did not become “**disputes relating to or arising out of employment between an employer and an employee**”, within the meaning of section 12 (1) (a) of the Employment and Labour Relations Court Act, the court has no jurisdiction over the same.

Amendment of the Petition

20. The reference to County Attorney General who is used as the 3rd Respondent which was conceded by petitioners as an error will be corrected by removal of the said name from the Petition.

21. There is no material assertion made against **the Governor** who is sued as the 1st Respondent in the Petition and no relief is sought directly to issue from or against him.

22. Accordingly, the Court directs that the Petition shall be amended in such a manner as may be necessary to reflect the striking out of the

Governor of the County Government of Baringo as a respondent and removal of name **County Attorney General** as a party in the Petition.

Service of Petition on the persons named in Paragraph 3 of the Petition

23. Persons against whom varied action is sought to be ordered by the court must be served with the application so that they are not condemned unheard in contravention of their right to be heard under Article 50 (1) of the Constitution. THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013 commonly known as **Mutunga Rules** provide as regards parties to a constitutional suit as follows:

“Addition, joinder, substitution and striking out of parties.

5. The following procedure shall apply with respect to addition, joinder, substitution and striking out of parties—

(a) Where the petitioner is in doubt as to the persons from whom redress should be sought, the petitioner may join two or more respondents in order that the question as to which of the respondent is liable, and to what extent, may be determined as between all parties.

(b) A petition shall not be defeated by reason of the misjoinder or nonjoinder of parties, and the Court may in every proceeding deal with the matter in dispute.

(c) Where proceedings have been instituted in the name of the wrong person as petitioner, or where it is doubtful whether it has been instituted in the name of the right petitioner, the Court may at any stage of the proceedings, if satisfied that the proceedings have been instituted through a mistake made in good faith, and that it is necessary for the determination of the matter in dispute, order any other person to be substituted or added as petitioner upon such terms as it thinks fit.

(d) The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear just—

(i) order that the name of any party improperly joined, be struck out; and

(ii) that the name of any person who ought to have been joined, or whose presence before the court may be necessary in order to enable the court adjudicate upon and settle the matter, be added.

(e) Where a respondent is added or substituted, the petition shall unless the court otherwise directs, be amended in such a manner as may be necessary, and amended copies of the petition shall be served on the new respondent and, if the court thinks, fit on the original respondents.”

24. It is pleaded that the 2nd respondent as the County Public Service Board of Baringo County Government established by the County Government Act 2012 to among other things do shortlisting, interviewing and appointment of qualified personnel to the County breached its duty when it allowed irregular recruitment in that:

1. **CS. Samson Kibii** (Board Secretary) appointed his real sister **Kibii Joyce Jematian** as Lab Technician without required qualification. (No. 14 in the attached list of appointees) who was not shortlisted nor attended any interview.
2. **Caren Sumukwo** appointed as Pharmaceutical Technologist who is uncle to C.O Health Preventive without licence and graduated recently (2018).
3. **Meshack Maluk** appointed as Lab Technologist but his profession was applied Biology he lacks capacity to act as such.
4. **M.C. Bartabwa Ward Chepsongol’s** second wife was appointed as nurse who graduated recently (2018).
5. **M.C.A Tenges Ward – Sylus Tochim’s** nephew by the names **Korir Johnson Kipruto** was appointed as an assistant Nutritionist who graduated recently (2019).

25. In accordance with Rule 5 (d) (i) and (ii) of the **Mutunga Rules**, the Court orders that the persons set out paragraph 3 of the Petition shall be added and the Petition shall be served upon them within **the next three (3) days**.

Hearing of the Petition

26. The 2nd Respondent and the other respondents to be joined shall file responses appropriate to their defences to the Petition and application **within ten (10) days from today or from the date of service**, as the case may be.

27. The Petition and or the application shall be heard on a date to be fixed on a mention for such **Directions** on the **21st October, 2020**.

Costs

28. Costs are in the discretion of the court and at this stage of the proceedings where the court has not heard the petition on its merits and only declined to strike out the Petition or transfer it to the Employment and Labour Relations Court, the costs shall be in the cause to await the eventual outcome of the Petition.

Order accordingly.

DATED AND DELIVERED THIS 6TH DAY OF OCTOBER 2020.

EDWARD M. MURIITHI

JUDGE

Appearances:

Petitioners present in person.

Representative of the Interested Party, in Person.

Mr. Tarus, Advocate, for the Respondents.