



**Centre for Human Rights and Mediation v Judicial Service Commission
& another; Law Society of Kenya North Rift Chapter (Interested Party)
(Petition 8 of 2019) [2019] KEHC 6197 (KLR) (7 June 2019) (Ruling)**

*Centre for Human Rights and Mediation v Judicial Service Commission &
another; Law Society of Kenya North Rift Chapter (Interested Party) [2019] eKLR*

Neutral citation: [2019] KEHC 6197 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

PETITION 8 OF 2019

OA SEWE, J

JUNE 7, 2019

IN THE MATTER OF ARTICLES 10, 27, 47, 56 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT

AND

IN THE MATTER OF SECTION 9 AND 10 OF THE JUDICIAL SERVICE ACT

AND

**IN THE MATTER OF REGULATIONS 6, 7 AND
9 OF THE JUDICIAL SERVICE REGULATIONS**

AND

IN THE MATTER OF REVIEW OF APPLICATIONS AND BACKGROUND INVESTIGATION

AND

**IN THE MATTER OF JUDGES OF COURT OF APPEAL, JUDGES OF ENVIRONMENT AND
LAND COURT AND JUDGES OF EMPLOYMENT AND LABOUR RELATIONS COURT**

BETWEEN

CENTRE FOR HUMAN RIGHTS AND MEDIATION PETITIONER

AND

JUDICIAL SERVICE COMMISSION 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

AND



High Court lacks jurisdiction to determine a petition challenging the recruitment process of judges

Along with its petition, the petitioner had filed an application seeking among other orders that; a conservatory order restraining the Judicial Service Commission (the 1st respondent) from conducting interviews and presenting a list of qualified persons for appointment pending the determination of the petition. The respondents filed notices of preliminary objection seeking the striking out of the petition for among others lack of jurisdiction of the court to hear and determine the petition. The court held that the recruitment process fell within the jurisdiction of the Employment and Labour Relations Court. The court further held that the matter ought to have been filed before the Employment and Labour Relations Court and therefore the instant court had no jurisdiction to entertain it.

Reported by Kakai Toili

Jurisdiction – jurisdiction of the High Court - jurisdiction to determine a petition challenging the recruitment process of judges - whether the High Court had the jurisdiction to determine a petition challenging the recruitment process of judges – Constitution of Kenya, 2010, article 162; Employment and Labour Relations Court Act, Cap 8E, section 12; Employment and Labour Relations Court (Procedure) Rules, 2016, rule 7.

Civil Practice and Procedure – submissions - supplementary submissions - what was the effect of filing supplementary submissions without the leave of court.

Civil Practice and Procedure – preliminary objections – nature of preliminary objections - what was the nature of a preliminary objection.

Words and Phrases - preliminary objection – an objection that, if upheld, would render further proceedings before the tribunal unnecessary. An objection to the court's jurisdiction is an example of a preliminary objection - Black's Law Dictionary, Tenth Edition.

Brief facts

Along with its petition, the petitioner filed an application seeking among other orders that; a conservatory order restraining the 1st respondent, the Judicial Service Commission, from proceeding to conduct interviews and presenting a list of qualified persons for appointment to the president pending the determination of the petition. The petitioner averred that the 1st respondent placed an advertisement in the press declaring the applicants who had submitted their applications for the advertised positions in the Court of Appeal, the Environment and Land Court and the Employment and Labour Relations Court. The petitioner complained that, without stating the criteria for inclusion or exclusion of some of the applicants, the 1st respondent shortlisted a list of persons for interview.

The respondents filed notices of preliminary objection seeking the striking out of the petition with costs. The 1st respondent's notice of preliminary objection was hinged on among others; that the court lacked jurisdiction to hear and determine the petition as the petitioner sought to challenge the criteria established by the 1st respondent for the recruitment and appointment of judges of the Court of Appeal, the Environment and Land Court and the Employment and Labour Relations Court, which was the preserve of the Employment and Labour Relations Court.

The 2nd respondent premised his preliminary objection on among other grounds that; the court had no jurisdiction to entertain the petition as it had been brought in breach of the mandatory provisions of the Fair Administrative Actions Act and the Access to information Act; and that it was premature as there was no dispute before the court for determination.

Issues

- i. Whether the High Court had the jurisdiction to determine a petition challenging the recruitment process of judges.
- ii. What was the effect of filing supplementary submissions without the leave of court?



iii. What was the nature of a preliminary objection?

Held

1. It would be inconsequential for a court of law to proceed to hear and determine a matter if it lacked the jurisdiction to do so. The question of jurisdiction was one that must be taken in *limine*.
2. If the petitioner found it necessary to file supplementary submissions, then leave of the court ought to have been sought and the respondents given an opportunity to be heard in that regard. The court accordingly expunged from the record the supplementary submissions filed on May 27, 2019 without leave by the petitioner.
3. A preliminary objection consisted of a pure point of law which had been pleaded, or which arose by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples were an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties were bound by the contract giving rise to the suit, to refer the dispute to arbitration.
4. While the issue about the incompetence of the petition on grounds of non-compliance or lack of authority to sue may be a valid response to the interlocutory application and indeed the petition, it was not a proper ground to raise by way of preliminary objection.
5. The recruitment process fell within the jurisdiction of the Employment and Labour Relations Court. The matter ought to have been filed before the Employment and Labour Relations Court and therefore the instant court had no jurisdiction to entertain it.

Preliminary objection on jurisdiction upheld.

Orders

Matter to be transferred to the Employment and Labour Relations Court at Eldoret for hearing and determination.

Citations

Cases

1. Adrian Kamotho Njenga vs. Judicial Service Commission & 2 Others; Trusted Society of Human Rights Alliance vs. Nakuru Water and Sanitation Services Company & Another (Petition No. 103 of 2019) — Explained
2. Chrispine Otieno Owiye v Selection Panel for Appointment of Members of the Commission (IEBC) & Attorney General (Constitutional Petition 515 of 2018; [2018] KEHC 4868 (KLR)) — Explained
3. Daniel N Mugendi v Kenyatta University, Benson I Wairegi, Eliud Mathiu & Olive M Mugenda (Civil Appeal 6 of 2012; [2013] KECA 41 (KLR)) — Explained
4. East African Portland Cement Ltd v Capital Markets Authority, Attorney General, National Social Security Fund, Trustees of the Board of the National Social Security Fund & Nairobi Securities Exchange Ltd (Petition 600 of 2013; [2014] KEHC 6976 (KLR)) — Mentioned
5. James Nyamai Kitivi v Justice Joseph Mbalu Mutava & Central Bank of Kenya (Civil Suit 12 of 2013; [2014] KEHC 518 (KLR)) — Mentioned
6. Joseph M. Kurui & 2 others v Ministry of Forestry & Wildlife & 4 others (Environment & Land Case 6 of 2013; [2014] KEELC 451 (KLR)) — Explained
7. Kenya National Parents Association v Cabinet Secretary, Ministry of Education Science & Technology & Public Service Commission (Cause 1549 of 2015; [2015] KEELRC 5 (KLR)) — Explained
8. Kipsiwo Community Self Help Group v Attorney General And 6 Others (Environment & Land Case 9 of 2013; [2013] KEELC 63 (KLR)) — Mentioned
9. Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others ([2012] 3 KLR 199) — Mentioned
10. Martin Nyaga Wambora & County Government of Embu v Speaker of the Senate & Attorney General (Petition 51 of 2014; [2014] KEHC 7080 (KLR)) — Mentioned



11. Okiya Omtatah v Joseph Kinyua & Public Service Commission (Petition 24 of 2018; [2018] KEELRC 1657 (KLR)) — Mentioned
12. Oraro vs. Mbaja ([2005] 1 KLR 141) — Explained
13. Owners of Motor Vessel "Lilian s" vs. Caltex Oil (K) Ltd (Civil Appeal 50 of 1989) — Explained
14. Republic vs. Minister in the Office of the President in charge of Provincial Administration & Internal Security & 2 Others, Ex parte Francis Mbutia Kamau (Judicial Review Miscellaneous Application E037 of 2021) — Mentioned
15. Saaka Saaka Community Internally Displaced Persons Group v Ministry of State for Special Programmes & Attorney General (Constitutional Petition 15 of 2012; [2014] KEHC 1507 (KLR)) — Mentioned
16. Trusted Society of Human Rights Alliance & 3 others v Judicial Service Commission & another; Law Society of Kenya (Interested Party); Article 19-Eastern Africa Curiae (Amicus Curiae) (Petition 314 of 2016 & Judicial Review 306 of 2016 (Consolidated); [2016] KEHC 3581 (KLR)) — Mentioned
17. Bugerere Coffee Growers Ltd vs. Sebaduka & Another ([1970] EA 147) — Explained
18. Mukisa Biscuits Manufacturers Ltd vs. West End Distributors Ltd ([1969] E.A 696) — Explained

Statutes

1. Access to Information Act (No. 31 of 2016) — section 8,9 — Interpreted
2. Constitution of Kenya, 2010 (Const2010) — article 47,56,162,165,260 — Interpreted
3. Constitution of Kenya, (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Const2010 Sub Leg) — In general — Cited
4. Employment And Labour Relations Court Act (No. 20 of 2011) — section 12 — Interpreted
5. Employment And Labour Relations Court (Procedure) Rules, 2016 (No. 20 of 2011 Sub Leg) — rule 7 — Interpreted
6. Fair Administrative Action Act (No. 4 of 2015) — section 9(2)(3)(4)

Texts

1. Aiyar: LPR (2015), The Major Law Lexicon (Lexis Nexis, 4th Edn)

Advocates

None mentioned

RULING

1. Along with its petition dated May 14, 2019, the petitioner, Centre for Human Rights and Mediation, filed a notice of motion of even date seeking orders that:
 - (a) Spent
 - (b) a conservatory order be issued restraining the 1st respondent from proceeding to conduct interviews and present a list of qualified persons for appointment to the President pending the determination of the petition herein.
 - (c) That in the alternative orders be issued by this court compelling the 1st respondent to comply with the procedure approved by the court in High Court Petition No 314 of 2016: *Trusted Society of Human Rights Alliance & 30 others v Judicial Service Commission & another* as it remains good law on the hiring of judges and superior court officers.



2. The application was premised on the grounds that the 1st respondent, the Judicial Service Commission, as a constitutional body, is enjoined to exercise its mandate objectively and ensure the following minimum constitutional threshold:
 - (a) Fair administrative action in short-listing;
 - (b) Non-discrimination based on colour, creed, status, culture, race, language, pregnancy or marital status;
 - (c) Public participation;
 - (d) Transparency and accountability in the exercise of its mandate;
 - (e) Protection of minority rights.
3. The application was supported by the affidavit sworn on May 14, 2019 by Mr Angu Kitigin, an Advocate of the High Court of Kenya and a board member of the petitioner/applicant. He averred that the petitioner is a non-governmental organization involved in human rights and mediation monitoring and evaluation in the field of constitutional implementation; and that it filed this petition on behalf of the applicants who were not shortlisted for positions of Judge of the Court of Appeal, Judge of the Environment and Land Court and Judge of the Employment and Labour Relations Court through public interest litigation. It was further averred by Mr Kitigin that following the advertisement of the vacancies on February 22, 2019, the 1st respondent placed an advertisement in the press dated March 18, 2019, declaring that the following numbers of applicants had submitted their applications for the advertised positions:
 - (a) Court of Appeal - 113 applicants;
 - (b) Environment and Land Court - 229 applicants;
 - (c) Employment and Labour Relations Court - 160 applicants
4. The petitioner complained that, without stating the criteria for inclusion or exclusion of some of the applicants, the 1st respondent shortlisted a list of persons for interview; and that it is necessary, therefore, for the 1st respondent to demonstrate, before the scheduled interviews commence, that the exclusion of the other applicants does not amount to a contravention of article 27 of the Constitution. It was further the assertion of the petitioner that, since the Law Society of Kenya, the professional body that licenses legal practitioners in Kenya, received a request for submission of comments/views on the exercise only on May 3, 2019, the short-listing was prematurely, granted that the verification process through public participation was still ongoing.
5. In addition to the foregoing, the petitioner averred that none of the applications who did not make the short-list have been furnished with a letter of regret outlining the reasons for their disqualification, which amounts to a contravention of article 47 of the Constitution; and therefore that it is necessary for the 1st respondent to account to Kenyans and the applicants by not only furnishing reasons for the short-listing, but also providing a full disclosure as to whether article 56 of the Constitution was adhered to in the short-listing process.
6. In response to the application, learned counsel for the respondents filed notices of preliminary objection herein dated May 20, 2019, seeking the striking out of the petition with costs. The 1st respondent's notice of preliminary objection was hinged on the following grounds:
 - (a) That this court lacks jurisdiction to hear and determine the instant petition as the petitioner seeks to challenge the criteria established by the Judicial Service Commission for the



recruitment and appointment of Judges of the Court of Appeal, Judges of the Environment and Land Court and Judges of the Employment and Labour Relations Court, which in accordance with article 162 of the Constitution of Kenya, section 12 of the Employment and Labour Relations Court Act and rule 7 of the Employment and Labour Relations Court (Procedure) Rules, 2016 is the preserve of the Employment and Labour Relations Court.

- (b) That the Employment and Labour Relations Court is a specialized court which is autonomous and has the exclusive jurisdiction to determine matters that touch on the subject of 'employment' including constitutional petitions related thereto.

7 Counsel for the 2nd respondent premised his preliminary objection on the following grounds:

- (a) That the court has no jurisdiction to entertain the petition as it has been brought in breach of the mandatory provisions of section 9(2),(3) and (4) of the Fair Administrative Actions Act, No 4 of 2015;
- (b) That the court has no jurisdiction to entertain the petition as it has been brought in breach of the mandatory provisions of sections 8 and 9 of the Access to information Act, 2016;
- (c) That the petition is premature as there is no dispute before the court for determination;
- (d) That the petition is not supported by a competent supporting affidavit as the deponent is a stranger and hence lacks capacity to swear the supporting affidavit on behalf of the petitioner;
- (e) That the petitioner has no legal capacity and/or authority to institute this petition on behalf of undisclosed persons;
- (f) That the petition is incompetent, defective, misconceived, frivolous and vexatious.

8. Needless to say that it would be inconsequential for a court of law to proceed to hear and determine a matter if it lacks the jurisdiction so to do. This was aptly expressed by the Court of Appeal in the *Owners of Motor Vessel "Lilian S" v Caltex Oil (K) Ltd* [1989] KLR 1, thus:

“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.”

11. And there is no gainsaying that the question of jurisdiction is one that must be taken in limine. In the *MV Lilian S* case, the court (per Nyarangi, JA) held 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...”

10. Accordingly, it is imperative for the court to satisfy itself that it does have the requisite jurisdiction to entertain the petition itself in order to hear and determine the interlocutory application. Hence, directions were issued on May 21, 2019 that the preliminary objections be disposed of by way of written submissions; and on behalf of the 1st respondent, it was the submission of Mr Cheruiyot that the issue before the court is the question whether the process of recruitment of the superior court judges by the 1st respondent is constitutionally above board; and therefore that, by dint of article 162(2) and (5) of the *Constitution* and section 12 of the *Employment and Labour Relations Act*, this is a matter that ought to have been filed before the Employment and Labour Relations Court.



11. In support of this argument, Mr Cheruiyot relied on *Adrian Kamotho Njenga v Judicial Service Commission & 2 others; Trusted Society of Human Rights Alliance v Nakuru Water and Sanitation Services Company & another* [2013] eKLR; contending that disputes touching on the recruitment process are disputes that fall within the jurisdiction of the Employment and Labour Relations Court. The cases of *Okiya Omtatah v Joseph Kinyua & another* [2018] eKLR and *Prof Daniel N Mugendi v Kenyatta University & others*, among others, were also cited by the 1st respondent for the proposition that the Employment and Labour Relations Court has the jurisdiction to determine industrial and labour relations matters alongside claims in respect of alleged infringement of fundamental rights that are ancillary and incidental thereto; and that that jurisdiction is not confined to situations where there is in existence an employer-employee relationship. Counsel accordingly urged the court to uphold the 1st respondent's preliminary objection dated May 20, 2019 and strike out the Petition for want of jurisdiction.
12. In his written submissions on behalf of the 2nd respondent, Mr Wabwire submitted that, while article 165 of the Constitution confers on this court unlimited original jurisdiction, there is a claw-back thereof by several provisions of Statute, such as the provisions of section 9(2) and (3) of the *Fair Administrative Actions Act* and section 8 of the Access to Information Act. Counsel relied on *Republic v Minister in the Office of the President in charge of Provincial Administration & Internal Security & 2 others, ex parte Francis Muthia Kamau* [2013] eKLR and *Chrispine Otieno Owiye v Selection Panel for Appointment of Members of the Commission (IEBC) & another* [2018] eKLR to buttress his argument that where there is an alternative remedy provided under an Act of Parliament, which remedy is effective and applicable to the dispute before the court, the dispute ought to be resolved in accordance with the relevant statute, and it is incumbent upon such a petitioner to take the stipulated course to completion before moving to court to challenge the decision complained of.
13. Mr Wabwire also challenged the petition on technical grounds, contending that it is incompetent for want of capacity, authority and compliance. His submission was that, although the petitioner can be described as a person for purposes of article 260 of the *Constitution*, it was imperative that the petition be brought in the names of the individual members of the entity or its registered officials; and that the deponent of the supporting affidavit, Mr Angu Kitigin, needed to demonstrate that it had the authority of the petitioner and its members to make the deposition and to file the petition on behalf of the petitioner. Counsel relied on the following authorities to support his submissions:
 - (a) *Saaka Saaka Community Internally Displaced Persons Group v Ministry of State for Special Programmes & another* [2014] eKLR;
 - (b) *Kipsiwo Community Self Help Group v Attorney General & 6 others* [2013] eKLR;
 - (c) *Joseph M Kurui & others v Ministry of Forestry & Wildlife & others* [2014] eKLR;
 - (d) *Chrispine Otieno Owiye v Selection Panel for Appointment of Members of the Commission (IEBC) & another (supra)*.
14. Learned counsel for the interested party, Mr Yego, aligned himself with the 2nd respondent's written submissions and added that it was imperative that all the internal mechanisms provided for under section 9(1) of the Fair Administrative Actions Act and section 8 of the Access to Information Act be exhausted before the petition could be filed. Mr Yego further impugned the petition on the ground that no minutes or resolution were attached to show that Mr Angu Kitigin was duly authorized to institute the proceedings on behalf of the petitioner. He relied, *inter alia*, on Petition No. 600 of 2013: *East African Portland Cement Ltd v The Capital Markets Authority & 5 others* particularly because it followed the Ugandan case of *Bugerere Coffee Growers Ltd v Sebaduka & another* [1970] EA 147,



which supports his submission on the necessity for a resolution to sue. His contention, therefore was that, the petitioner lacks the authority to institute this petition and therefore that the petition ought to be struck out with costs as prayed in the 2nd respondent's notice of preliminary objection.

15. On his part, Mr Mogambi, learned counsel for the petitioner took issue with the respondents' notices of preliminary objection, contending that nowhere is there provision in the *Constitution or the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013 for the raising of preliminary objections to petitions. On that account, he urged the court to dismiss the respondents' preliminary objections without further ado. On the jurisdiction of the Employment and Labour Relations Court, Counsel reiterated the provisions of article 165(3)(a) of the *Constitution* that gives the High Court unlimited original jurisdiction in criminal and civil matters. He acknowledged the limitations provided for in article 165(5) of the Constitution and by statute; but contended that where there is a threatened violation as is the case herein, it cannot be said a petition is premature. Mr Mogambi pointed out that the publication of the shortlist came with a schedule of dates when the shortlisted candidates are expected to appear before the 1st respondent for interview; and therefore that any delay on the part of the petitioner would most likely meet an objection that the petitioner slept on its rights. Counsel relied on the case of *Martin Nyaga Wambora & 4 others v Speaker of the Senate & 6 others* [2014] eKLR and *Trusted Society of Human Rights Alliance & 3 others v Judicial Service Commission & another* [2016] eKLR to support these arguments.
16. It was further the submission of Mr Mogambi that the process of implementation and determination of interest, jurisdiction and power under the Constitution is yet to be fully settled; and that there are conflicting decisions on the question as to which court has the jurisdiction to entertain disputes relating to constitutional offices. He cited the case of retired Justice Mutava in *Joseph Mbalu Mutava v Attorney General & Another* [2014] eKLR as one such dispute with the 1st respondent, which was handled, not by the Employment and Labour Relations Court but by the High Court; and submitted that until the conflicting decisions are resolved, there would be no basis for shutting out a petitioner who opts to vindicate his rights before the High Court. Counsel accordingly urged the court to dismiss the respondents' preliminary objections.
17. The petitioner's counsel purported to file supplementary submissions without the leave of the court. As would be expected, the respondents were opposed to that move; and rightly so in my view, because of the dictate of fair play. If the petitioner found it necessary to file supplementary submissions, then leave of the court ought to have been sought and the respondents given an opportunity to be heard in that regard. I would accordingly expunge from the record the supplementary submissions filed herein on May 27, 2019 without leave by the petitioner.
18. I have given careful consideration to the grounds raised by the respondents in their respective notices of preliminary objection filed herein on May 21, 2019, the written and oral submissions made by their counsel in that regard as well as the petitioner's response thereto, in the light of the petitioner's averment in the petition dated May 14, 2019. It is manifest therefrom that the respondent's preliminary objection is premised on two grounds; the competence of the petition and the jurisdictional question as to whether the petition ought to have been filed in the Employment and Labour Relations Court.
19. On the competence of the petition, very valid arguments were advanced by both Mr Wabwire and Mr Yego that the petition is premature for the reason that compliance has not been had by the petitioner with regard to the provisions of section 9(2) and (3) of the *Fair Administrative Actions Act* and section 8 of the Access to Information Act. It was further submitted that there has been no proof that the deponent of the supporting affidavit, Mr Angu Kitigin, was authorized by way of a resolution of the petitioner's Board to not only make the deposition but to also file this petition. Those arguments



immediately bring to mind the pertinent question as to what matters ought to be raised by way of preliminary objection.

20. In *Mukisa Biscuits Manufacturers Ltd v West End Distributors Ltd* [1969] EA 696, it was held that:

“...a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit, to refer the dispute to arbitration.”

21. Likewise, in *Oraro v Mbaja* [2005] 1 KLR 141 the principle was restated thus by Hon Ojwang, J (as he then was):

“...The principle is abundantly clear. A “preliminary objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed...Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence...”

22. It is a question of fact as to whether or not the petitioner exhausted the remedies available under the Fair Administrative Actions Act and the Access to Information Act. It is similarly a question of fact whether or not the suit and the supporting affidavit were filed and deposited to with the authority of the petitioner. There is no indication that these aspects arise by clear implication out of the proceedings or that they have been admitted by the petitioner. Thus, while the issue about the incompetence of the petition on grounds of non-compliance or lack of authority to sue may be a valid response to the interlocutory application and indeed the petition, it is not, in my considered view, a proper ground to raise by way of preliminary objection, and I so find.

23. Arising from the foregoing conclusion, the only valid point for the Court to consider is that of jurisdiction; and in the work, the *Major Law Lexicon*, Volume 4, jurisdiction is aptly defined thus:

“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 Statute or Chapter or Commission under which the court is constituted and may be extended or restricted by similar means. If no restriction or limitation is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind or nature of the actions or the matters of which the particular court has cognizance or as to the area over which the jurisdiction extends, or it may partake of both these characteristics...”

24. Accordingly, in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR, the Supreme Court held 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 by law. We agree with counsel 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 on 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."

25. In the premises, the argument by learned counsel for the petitioner, that there is no provision in the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* for the raising of preliminary objections to petitions, is completely untenable for jurisdiction is everything. Indeed, in Black's Law Dictionary, Tenth Edition, preliminary objection is defined thus, and therefore can be taken at any point in time in the proceedings:

"...an objection that, if upheld, would render further proceedings before the tribunal unnecessary. An objection to the court's jurisdiction is an example of a preliminary objection."

26. There can be no dispute regarding the provisions of articles 162, 165(3)(a) and (5) of the *Constitution* or section 12 of the Employment and Labour Relations Act. In this respect, the court's attention was drawn by the respondents to the following persuasive authorities, which I entirely agree with:

- (a) In Prof *Daniel N Mugendi v Kenyatta University & 3 others* [2013] eKLR, it was held that the Employment and Labour Relations Court has the jurisdiction to interpret the constitution. The Court of Appeal expressed the following viewpoint in the matter:

"...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 fundamental rights associated with the two subjects."

- (b) In *Okiya Omtatah v Joseph Kinyua & another* [2018] eKLR, a case handled by the Employment and Labour Relations Court (Hon Abuodha, J) in which the issue arose as to whether that court had the jurisdiction to entertain a dispute involving the interpretation of the Constitution, and it was held that:

"The court while would like to avoid the never ending debate on the scope of jurisdiction of this court over constitutional issues would like to state that it is erroneous to apply the test of the existence of employer-employee relationship as the main criteria for deciding whether a constitutional question arising in that context can be determined by the court. Third parties towards whom there may be no employer-employee relationship may jointly or indirectly take decisions that affect employer-employee relationship. This makes them amenable to the jurisdiction of



the court. The preamble to the ELRC Act ...is wide enough and cannot by any manner of interpretation be understood to confine the jurisdiction of the court to only situations where there is in existence an employer-employee relationship. That would be too narrow interpretation."

27. Thus, it is imperative to ascertain what the predominant issue herein is, and the correct forum for its adjudication. In this respect, it is instructive that the petitioner averred, at paragraph 5 its petition dated May 14, 2019 that:

"...by an advertisement placed in the press both print and electronic media on the 22nd day of February 2019, the Judicial Service Commission invited applications for persons qualified to fill:

- (a) 11 posts for the Judges in Court of Appeal.
- (b) 20 posts for the Judges in the Environment and Land Court.
- (c) 10 posts for the Judges in the Employment and Labour Relations Court."

28. In Paragraphs 7-10 of the petition, the petitioner complained about the short-listing process, pointing out that those who were excluded from the short list had not been given any reasons as the short-listing criteria was not disclosed. It was further averred that the applicants whose names are not in the short-list risk missing an opportunity to participate in the hiring of judges without full knowledge of the reasons for their disqualification and/or whether the reasons are constitutionally valid or not; and in paragraph 11 the petitioner averred that:

"In the premises the petitioner shall demand that the 1st respondent commission fully complies with interviewing guidelines outlined by the High Court in Constitutional Petition No 314 of 2016: *Trusted Society of Human Rights Alliance & 3 others v Judicial Service Commission & another*; and meet the minimum constitutional thresholds of short-listing and accounting to applicants for interview to the office of judges of the superior courts and further account to the Public as to the method/tool of short listing/non-listing similar qualified professionals and point of disqualification for the rest in order not to be concluded as discrimination."

29. It is manifest from the foregoing excerpt that what is impugned by the petition is the short-listing aspect of the recruitment process commenced by the 1st respondent in respect of the vacant positions of Judge of the Court of Appeal, Judge of the Environment and Land Court and Judge of the Employment and Labour Relations Court. Accordingly, the single issue that presents itself for determination in this Ruling is the question whether a grievance in connection with the recruitment process is a matter that can be ventilated before the High Court.

30. In the light of the provisions of articles 162(2) and 165(5) of the Constitution, section 12 of the Employment and Labour Relations Act stipulates that:

"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..."

31. In *Trusted Society of Human Rights Alliance v Nakuru Water and Sanitation Services Company & another* [2013] eKLR, a question arose as to whether the Employment and Labour Relations Court



was properly seized of a dispute arising from a recruitment process; and it was held (by Hon B Ongaya, J) that:

“As relates to jurisdiction by subject matter, article 162(2)(a) of the Constitution and section 12(1) of the Act are elaborate that jurisdiction attaches to this court with respect to disputes relating to employment and labour relations. In the instant case, the dispute is about a recruitment process undertaken by the respondent. The court finds that recruitment is a proper element of employment and therefore the court has jurisdiction in view of that subject matter.”

32. Similarly, in *Kenya National Parents Association v Cabinet Secretary, Ministry of Education Science & Technology & another* [2015] eKLR, the Employment and Labour Relations Court (Hon Mbaru, J) weighed in on the matter and held that:

“...The orders sought relate to the claimant seeking to stop the recruitment of 53 county education to replace the current Directors of County Education. Thus, the issues in dispute and the orders sought relate to employment and labour relations, matters directly under the jurisdiction of this court. Matters of recruitment of employees, termination of employment through whatever means - constructive dismissal/termination as well - fall under the purview of this court's jurisdiction.”

33. In the more recent Petition No 103 of 2019: *Adrian Kamotho Njenga v Judicial Service Commission & others*, a notice of preliminary objection was filed in connection with the same process as is in issue herein. The petitioner contended thus in respect of the jurisdiction of the High Court to hear and determine the petition:

“This honourable court lacks jurisdiction to hear and determine the instant petition as the petitioner primarily seeks an order of prohibition, prohibiting the 1st respondent from carrying on the process of short listing, scheduling of interviews, interviewing, receiving public vies, nomination and making recommendations to the President for the appointment of any person as a Judge of a superior court which in accordance with article 162 of the Constitution of Kenya, section 12 of the *Employment and Labour Relations Court Act* and rule 7 of the *Employment and Labour Relations Court (Procedure) Rules 2016* is a subject which is a preserve of the Employment and Labour Relations Court.”

34. Whereas the High Court (Hon Korir, J) dismissed the preliminary objection on the ground that the predominant issue in the petition was the composition of the 1st respondent, it was of the view that the recruitment process falls within the jurisdiction of the Employment and Labour Relations Court. I am of the same persuasion.

35. In the result, I would uphold the respondents' preliminary objection on jurisdiction and find that this is a matter that ought to have been filed before the Employment and Labour Relations Court; and therefore that this court has no jurisdiction to entertain it. In the premises, and in the interests of justice, rather than strike out the petition, it is hereby ordered that it be transferred to the Employment and Labour Relations Court at Eldoret for hearing and determination.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 7TH DAY OF JUNE 2019

OLGA SEWE



JUDGE

