

(1) That the appointments of the 3rd and 4th respondents as the Clerk and Deputy Clerk of the County Assembly of Vihiga respectively be declared null and void;

(2) That, the 1st respondent be directed to submit only the name of JAMES OYUNDI MUKABI who had been appointed as the Clerk of the County Assembly of Vihiga for Approval by the 2nd respondent in line with the dictates of Section 13 (1) and 14 (3) (a), (b) and (c) of the County governments Act as read with provisions of Standing Order 42 of the County Assembly Standing Orders.

The Preliminary Objection.

2. The 3rd respondent through the firm of A.B.L Musiega & Company raised a preliminary objection dated 27th June, 2016 seeking to strike out the petition and/or entire pleadings on the following grounds:-

(1) This court is bereft of the requisite jurisdiction to entertain the dispute and or grant the remedies sought;

(2) The petition concerns Employment and Labour Relations which falls under the exclusive jurisdiction of the Industrial Court (Employment and Labour Relations Court.)

(3) The jurisdiction of this court to entertain disputes concerning Employment and Labour Relations is expressly ousted by Article 162 of the Constitution.

Submissions on the Preliminary Objection.

3. Parties were directed to file written submissions on the preliminary objection. I see on record the submissions by the petitioner, 3rd and 4th respondents who have submitted on the Preliminary Objection but the 1st and 2nd respondent have submitted on the main petition. This court will only deal with the issues at hand and that is the preliminary objection.

4. The Preliminary Objection raises the issue of jurisdiction of this honourable court to hear and determine the petition herein. As it is well known, jurisdiction is everything and without it, the court cannot make any further step but to down its tools.

5. The issue of jurisdiction is best dealt with in the first instance of a case before moving further with the substantive issues or the merits and demerits of the particular case.

6. The argument raised by the petitioner in his submissions are that under article 162 (2) (a) of the Constitution, the ELRC is clothed with the authority to arbitrate over disputes relating to Employment and Labour Relations' under section 12 (1) (a) – (j) of the Industrial Court Act.

7. He differentiates between employment relations and labour relations and adds that he is not an employee of the 1st respondent neither is he a member of any employer's organization or trade union.

8. He argues that the petition against the 3rd respondent questions the legality of the procedure adopted in appointing him as the Clerk of the Assembly.

9. With regard to the 4th respondent the petition decries his suitability to hold public office on account of his past misdeeds and that he is unfit to hold the office of the Deputy Clerk of the Assembly for failure to meet the minimum requirements necessary for one to ascend to such office which the petitioner holds are issues not falling for the consideration of the ELRC.

10. On his part the 3rd respondent contends that the dispute is about the regularity or otherwise of employment and hence outside the province of this honourable court.

11. The third respondent opines that the dispute falls under the jurisdiction of the Employment and Labour Relations Court under Article 162 of the Constitution.

12. The 4th respondent submit that the issues in the petition relate to labour matters, they relate to the employment of the 3rd and 4th respondents as employees of the 2nd respondent following an exercise carried out by the 1st respondent.

Determination.

13. The only issue for determination is whether this court as constituted has jurisdiction to hear and determine the petition herein. In determining this question the court is guided by the pleadings which in this case are the petition and the supporting affidavit.

14. A reading of the petition shows that the 3rd and 4th respondents have been employed by the 1st and 2nd respondents as clerks of the County Assembly of Vihiga and Deputy Clerk respectively.

15. The issues raised by the petitioner surround the employment of the 3rd and 4th respondent, the procedure that was undertaken to employ them and the flaw or mistake the petitioner has singled out that show why they shouldn't hold those offices.

16. These are all employment related issues and they cannot be separated. The procedure adopted by the 1st and 2nd respondent in appointing the 3rd and 4th respondent and their suitability to hold those offices are employment related and they cannot be separated.

17. Having come to the conclusion that the matters in the petition or the cause of action raised in the petition surround the employment and appointment of the 3rd and 4th respondent, this court finds that it has no jurisdiction to entertain the petition as filed.

18. The best forum for determining the issues raised in the petition will be the ELRC as constituted under Article 162 (2) of the Constitution which provides that:-

“Parliament shall establish courts with status of the High Court to hear and determine disputes relating to:-

a. Employment and Labour Relations;

b.”

19. Under **Article 165(5) of the Constitution**, the jurisdiction of the High Court is ousted in the following clear terms: -

“165(5) The High Court shall not have jurisdiction in respect of matters:-

.....falling within the jurisdiction of the courts contemplated in Article 162(2).”

20. Pursuant to **Article 162 (3) of the Constitution**, the Industrial Court Act, 2011 (now the Industrial Court Act, Chapter 234 of the Laws of Kenya) was enacted and under Section 12 its jurisdiction clearly stated as follows:-

-“12 (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:

- disputes relating to or arising out of employment between an employer and an employee.

- disputes between an employer and a trade union;
- disputes between an employers' organization and a trade unions organization;
- disputes between trade unions;
- disputes between employer organizations;
- disputes between an employers' organization and a trade union;
- disputes between a trade union and a member thereof;
- disputes between an employer's organization or a federation and a member hereof;
- disputes concerning the registration and election of trade union officials; and;
- disputes relating to the registration and enforcement of collective agreements.

21. And, under **Section 12(3) of the said Act**, the Industrial Court has the following powers:-

- (2) *In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders:-*
- Interim preservation orders including injunctions in cases of urgency;*
- a prohibitory order;*
- an order for specific performance;*
- a declaratory order;*
- an award of compensation in any circumstances contemplated under this Act or any written law;*
- an award of damages in any circumstances contemplated under this Act or any written law;*
- 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*
- any other appropriate relief as the court may deem fit to grant.*

22. It is now settled, having been held times without number, that jurisdiction is everything and without it a Court has no power to take one more step. Indeed jurisdiction is a fundamental matter in the dispensation of justice.

23. The Supreme Court in the decision of **Re: The matter of the Interim Independent Electoral Commission, Constitutional Application No. 2 of 2011 (unreported)** at paragraphs 29 and 30 discussed the issue of jurisdiction in the following manner:-

“Assumption of jurisdiction by courts in Kenya is a subject regulated by the constitution; by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in Owners of Motor Vessel “Lilians’ vs. Caltex Oil (Kenya) Limited (1989) KLR 1, which bears the following passage (Nyarangi, JA at page 14.):-

“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.”

The Lilian ‘S’ case establishes that jurisdiction flows from the law, and the recipient –Court is to apply the same, with any limitations embodied therein. Such a court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the Constitution”

24. The Employment and Labour Relations Court as has been said time and again has been clothed with powers to enforce all fundamental rights ancillary and incidental to the employment and labour relations including interpretation of the constitution.

This Court has been asked to strike out the Petition with costs. A look at the Notice of Preliminary Points of Law reveal three issues raised under items 4, 5 and 6 thereof which deals with the merits or otherwise of the Petition.

25. Having found that this Court has no jurisdiction and having not considered the issues 4, 5, and 6 in the Notice it will not be in the interests of fair play and justice to strike out the Petition. I so decline to do.

26. However, since the issues raised in the Petition are on an alleged contravention of the Petitioner’s constitutional rights, it is only fair that those issues be dealt with by the appropriate Court.

27. The upshot is therefore that this Court makes the following final orders:-

- 1. The High Court has no jurisdiction to in any manner whatsoever deal with the cause of action as so pleaded in the Petition herein.***
- 2. The Deputy Registrar shall cause this file to be transferred to the Employment and Labour Relations Court at Kisumu;***
- 3. This matter shall be fixed for a Mention before the Honourable Judge at Kisumu for further orders and/or directions;***
- 4. Costs be in cause.***

It is so ordered.

SIGNED, DATED and DELIVERED at KAKAMEGA this 5TH day of OCTOBER, 2016.

C. KARIUKI

JUDGE.

In the presence of:-

..... **for the Petitioner.**

..... **for the Respondent.**

.....**Court Assistant.**