



Wasilwa v Judicial Service Commission; Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers & 3 others (Interested Parties) (Petition E237 of 2023) [2024] KEELRC 1071 (KLR) (13 May 2024) (Ruling)

Neutral citation: [2024] KEELRC 1071 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E237 OF 2023**

S RADIDO, CN BAARI & JK GAKERI, JJ

MAY 13, 2024

IN THE MATTER OF ARTICLES 1, 2, 3, 10, 20, 21, 22, 23, 24, 25, 28, 40, 47, 50, 159, 160, 162(2) 161, 165, 168, 172, 249, 258 AND 259 OF THE CONSTITUTION

AND

IN THE MATTER OF THE EMPLOYMENT AND LABOUR RELATIONS COURT ACT, 2011

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTIONS ACT, 2015

AND

IN THE MATTER OF THE JUDICIAL SERVICE ACT, 2011

AND

IN THE MATTER OF THE JUDICIAL SERVICE (CODE OF CONDUCT OF CONDUCT OF ETHICS) REGULATIONS, 2020

AND

**IN THE MATTER OF JSC PETITION NO. E026 OF 2022
ARISING FROM KERICHO ELR CAUSE NO. 10 OF 2016**

BETWEEN

JUSTICE HELLEN WASILWA PETITIONER

AND

JUDICIAL SERVICE COMMISSION RESPONDENT

AND

**KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL INSTITUTIONS,
HOSPITALS AND ALLIED WORKERS INTERESTED PARTY**



EDGAR MUTAI INTERESTED PARTY
RUTH NGELECHI INTERESTED PARTY
CHARLES KOROS INTERESTED PARTY

JSC assumed the character of a putative employer in its role of recruitment and setting the terms and conditions of service for the Judges..

Reported by John Ribia

Labour Law – employment – putative employer - doctrine of putative employer - what was the doctrine of putative employer – applicability of the doctrine in Kenya - what was a factual and legal contextualization on who in law was an employee and who was an employer - *Employment Act (cap 226) section 2.*

Labour Law - employment - employment of judges - putative employer – Judicial Service Commission vis-à-vis the President - whether the Judicial Service Commission was the putative employer of judges in Kenya - whether the appointment of judges by the President and setting of remuneration of judges by the Salaries and Remuneration Commission rendered the President the putative employer of judges of Kenya - *Constitution of Kenya articles 1, 2, 3, 10, 20, 21, 22, 23, 24, 25, 28, 40, 47, 50, 159, 160, 161, 162, 165, 168, 172, 249, 258, and 259; Employment and Labour Relations Court Act (cap 8E Sub Leg) section 12; Judicial Service Act (cap 8A) section 47; Fair Administrative Action Act (cap 7L) section 4.*

Words and Phrases – putative – definition - reputed; believed or supposed by most people - *The Black’s Law Dictionary, Tenth edition.*

Brief facts

The dispute arose when the petitioner, a judge of the Employment and Labour Relations Court (ELRC), challenged the disciplinary proceedings initiated against her by the Judicial Service Commission (JSC). The dispute stemmed from JSC Petition No E026 of 2022, which originated from Kericho ELR Cause No. 10 of 2016. The petitioner sought the court’s intervention, arguing that the JSC was her employer and that the disciplinary process was unfair.

The JSC filed a preliminary objection asserting that the ELRC lacked jurisdiction, as no employer-employee relationship existed between the parties. It contended that it merely recommended judges for appointment to the President and did not employ, pay, or determine their salaries. It further argued that its role in disciplinary matters was limited to investigating complaints and recommending a tribunal’s formation under article 168 of the Constitution.

The petitioner countered that the JSC exercised significant control over judges’ appointments, terms of service, and discipline, making it her *de facto* employer.

Issues

- i. What was a factual and legal contextualization on who in law was an employee and who was an employer?
- ii. What was the doctrine of putative employer?
- iii. Whether the Judicial Service Commission was the putative employer of judges in Kenya.
- iv. Whether the appointment of judges by the President and setting of their remuneration by the Salaries and Remuneration Commission rendered the President as the putative employer of judges of Kenya?



Held

1. To establish an employment relationship, a three-part test was required by a party asserting an employer-employee relationship or lack thereof:
 1. establish the existence or non-existence of an oral or written contract of service;
 2. provision of a service to a real or legal person; and
 3. receipt of wage or salary for the services.
2. Section 2 of the Employment and Labour Relations Court Act defined an employer as any person, public body, firm, corporation or company who or which had entered into a contract of service to employ any individual and included the agent, foreman, manager or factor of such person, public body, firm, corporation or company. The same definition was given under section 2 of the Employment Act. Apart from the real or legal employer, other persons or entities acting at the behest of the real or legal employer would for purposes of the law qualify as an employer.
3. The definition gave recognition to the doctrine of a putative employer. The putative employer would include an agent, foreman, manager or factor of the real or legal employer. Putative meant reputed, believed or supposed by most people.
4. A judge was not an employee as understood within the context of the Employment Act or the Employment and Labour Relations Court Act. A judge held a constitutional office. He or she was a State officer and an office holder.
5. Despite not being an employee within the parameters of the Employment Act and Employment and Labour Relations Court Act, a practice had developed after the promulgation of the Constitution, 2010 to issue judges with written contracts, setting out the basic terms and conditions of service. Judges rendered their services on behalf of the people of Kenya, and were remunerated from the Consolidated Fund. A judge occupied an office created by the Constitution. A judge was, therefore, an office holder who exercised judicial authority on behalf of the people of Kenya.
6. The JSC stood in the position of a constitutional agent, foreman, manager and factor of the people of Kenya as far as the independence, accountability, recruitment, setting terms and conditions of service and discipline of judges was concerned.
7. The constitutional role reposed to the President was a nominal one and he could not legally act otherwise than in accordance with the recommendation of the JSC in the appointment of a judge or petition on the removal of a judge. With the restricted constitutional role, the President could not stand as a presumed or putative employer of judges.
8. The normative role of the Salaries and Remuneration Commission (SRC) to set the remuneration of judges was a function which the SRC played with respect to all State officers, and there was a reason why it was established and assigned the roles. Even if imagination were to be stretched, the Commission would not qualify to be a putative employer or co-employer of judges.
9. The tribunal envisaged by article 168 (5) of the Constitution to inquire into the removal of a judge had no other role in the constitutional architecture and the respondent misapprehended its function in the arguments on whether it was an employer of judges. The JSC played a fundamental role in the administration of justice. It had amongst its primary roles the promotion and facilitation of judicial independence, the recruitment of judges and setting the terms and conditions of service. In those roles, the JSC assumed the character of a putative employer and in that respect, the objection to the lack of an employer-employee relationship had no merit.
10. Article 68 of the Constitution did not envisage a petition such as the instant petition. Article 22 of the Constitution entitled the petitioner to the right to institute court proceedings claiming that a right or fundamental freedom had been denied, violated or infringed, or was threatened.
11. The petitioner was challenging the manner in which the proceedings were being conducted and in particular, bias and curtailment of her advocate's right to cross-examine witnesses on material issues. Such complaints or allegations ought not to remain undecided or unsettled until the proceedings were



concluded and when raised they should be addressed and determined. The right to fair administrative action was a constitutional imperative under article 47 of the Constitution and reinforced by section 4 of the Fair Administrative Action Act.

Preliminary objection dismissed with no order as to costs.

Citations

Cases

Kenya

1. *Attorney General & 2 others v Okiya Omtatah Okoiti & 14 others* Civil Appeal 621 of 2019; [2020] KECA 30 (KLR) - (Explained)
2. *Chitembwe v Tribunal Appointed to Investigate Into the Conduct of the Said Juma Chitembwe, Judge of the High Court* Petition E001 of 2023; [2023] KESC 114 (KLR) - (Explained)
3. *Clerk, Nakuru County Assembly & 3 others v Odongo & 7 others* Civil Appeal E136 & E137 of 2022 (Consolidated); [2023] KECA 427 (KLR) - (Explained)
4. *In the Matter of the Interim Independent Electoral Commission* [2011] KESC 1 (KLR); [2011] 2 KLR 223 - (Mentioned)
5. *Judicial Service Commission v Mbalu Mutava & another* Civil Appeal 52 of 2014; [2015] KECA 741 (KLR) - (Explained)
6. *Kenya Tea Growers Association & 2 others v National Social Security Fund Board of Trustees & 13 others* Petition E004 & E002 of 2023; [2024] KESC 3 (KLR) (Consolidated) - (Mentioned)
7. *Mate & another v Wambora & another* Petition 32 of 2014; [2017] KESC 1 (KLR) - (Mentioned)
8. *National Land Commission v Attorney-General & 5 others; Kituo Cha Sheria & another (Amicus Curiae)* Advisory Opinion Reference 2 of 2014; [2015] KESC 3 (KLR) - (Mentioned)
9. *Ndichu v Clerk Kiambu County Assembly & another* Petition 11 of 2014; [2014] KEELRC 437 (KLR); [2014] 3 KLR 575 - (Explained)
10. *Njenga v Attorney General; Judicial Service Commission & 2 others (Interested Parties)* Petition 369 of 2019; [2020] KEHC 9228 (KLR) - (Mentioned)
11. *Okiya Omtatah Okoiti v Attorney General; Adrian Kamotho Njenga (Intended Interested Party)* Petition 101 of 2020; [2020] KEELRC 339 (KLR)
12. *Okiya, Omtatah Okoiti v Selection Panel for the National Land Commission & 3 others, Gershom Otachi Bw'omanwa & 7 others (Interested Parties)* Petition 162 of 2019; [2019] KEELRC 752 (KLR) - (Mentioned)
13. *Okoiti v Attorney General; Njenga (Interested Party)* Petition E101 of 2020; [2022] KEELRC 2 (KLR) - (Mentioned)
14. *Oyatsi v Judicial Service Commission* Petition E111 of 2021; [2022] KEELRC 3 (KLR) - (Mentioned)
15. *Teachers Service Commission v Kenya National Union of Teachers (KNUT) & 3 others* Petition 3 of 2015; [2015] KEELRC 863 (KLR)
16. *Waity v Independent Electoral & Boundaries Commission & 3 others* Petition 33 of 2018; [2019] KESC 54 (KLR) - (Mentioned)

Regional Court

Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd [1969] EA 696 - (Explained)

Texts

1. Garner, BA., Black, HC., (Ed) (2014), *Black's Law Dictionary* St Paul, Minnesota: Thomson Reuters 10th Edn
2. The Judiciary (2014), *Human Resource Policies and Procedures Manual* The Judiciary

Statutes

Kenya



1. Constitution of Kenya articles 1, 2, 3, 10, 20, 21, 22, 23, 24, 25, 28, 40, 47, 50, 159, 160, 161, 162(2); 165; 168; 172; 249; 258; 259 - (Interpreted)
2. Employment Act (cap 226) section 2 - (Interpreted)
3. Employment and Labour Relations Court Act (cap 8E) section 12 - (Interpreted)
4. Fair Administrative Action Act (cap 7L) section 4 - (Interpreted)
5. Judicial Service Act (cap 8A) section 47 - (Interpreted)

Advocates

Mr Wambola for the petitioner.

Mr Kipkoge and *Mr Kisia* for the respondent.

Kemboi Chambers Advocates for the interested parties.

RULING

1. For determination is a notice of preliminary objection by the Judicial Service Commission (the Commission) dated December 20, 2023, contending:
 - (a) That the jurisdiction of this honourable court has been wrongly invoked in relation to matters not falling within the contemplation of section 12 of the *Employment and Labour Relations Court Act, 2011*.
 - (b) The court further lacks jurisdiction to hear and determine the matter considering that there is no employer-employee relationship between the petitioner and respondent; and that:
 - (i) The respondent does not employ the petitioner or indeed any other judge as by dint of article 172(1)(a) of the *Constitution*, it merely recommends to the President persons for appointment as judges.
 - (ii) The respondent does not pay the salaries or remuneration of the petitioner or any other judge as the same is a direct charge on the Consolidated Fund and if anything, members of the respondent and the petitioner are remunerated from the same pool of funds.
 - (iii) The respondent does not determine the salaries to be paid to judges but simply reviews and makes recommendations on their conditions of service to the Salaries and Remuneration Commission.
 - (iv) The respondent does not dismiss judges, but merely receives complaints and investigates such complaints subject to the *Constitution* and the *Judicial Service Act* and by article 252(2)(a) has the power to conduct investigations by its own motion or on a complaint by a member of the public.
 - (v) Moreover, the respondent's disciplinary powers do not extend to the power to dismiss judges but is limited to recommending to the President to set up a Tribunal to establish whether a judge should be removed from office on the grounds stipulated under article 168(1).
 - (c) The role of the respondent in the process of removal of a judge from office is constitutionally circumscribed and is required to consider the Petition seeking removal and if satisfied that the petition discloses a ground for removal, send the petition to the President.
 - (d) The petition seeks to impede the carrying out of a constitutionally vested mandate which is still ongoing and which cannot be extinguished in the manner sought.



2. The petition was accompanied by a motion under a certificate of urgency seeking interim injunctive orders and the Principal Judge granted the interim orders, and further ordered that since the petition raised substantial questions of law, should be sent to the Honourable Chief Justice to empanel an uneven number of judges.
3. The Honourable Chief Justice empaneled the bench herein, and on February 8, 2024, the court directed the parties to file and exchange submissions on the notice of preliminary objection.
4. Both parties filed their submissions and the commission further filed supplementary submissions. The court took oral highlights on 8th March 2024.

Commission's Submissions

5. The commission submitted on two issues, namely; the jurisdiction of the court to hear and determine the petition, and whether the petition is premature.
6. The commission submits that though petitioner herein was appointed under articles 166(1)(b) and 172(1)(a) of the *Constitution of Kenya, 2010* and presents the dispute herein as a Judge of the Employment and Labour Relations Court, on the basis of an employer-employee relationship with the Commission, the court has no jurisdiction as the dispute does not fall within the ambit of section 12 of the *Employment and Labour Relations Court Act, 2011*.
7. It is the Commission's case that the jurisdiction of the Employment and Labour Relations Court is circumscribed by the provisions of article 162(2)(a) of the *Constitution, 2010* and section 12 of the *Employment and Labour Relations Court Act, 2011*.
8. While admitting that the use of the term "including" under section 12(1) of the *Employment and Labour Relations Court Act* is not exhaustive, the Commission contends that the jurisdiction of the court only encompasses matters relating to employment and labour relations as held in *Clerk of Nakuru County Assembly & 2 others v Kenneth Odongo & 3 others consolidated with The Speaker Nakuru County Assembly v Stephen Michael Oduor Ogutu & 3 others* (2022) (unreported), where the Court of Appeal held that there was no employer-employee relationship between the Clerk of the County Assembly and the County Assembly.
9. On the test to establish whether there is an employer-employee relationship, the Commission relies on the decision in *Nick Gitinji Ndichu v Clerk Kiambu County Assembly & another* [2014] eKLR, where the court prescribed the test for determining the existence of an employer-employee relationship as follows:
 - a. Oral or written contract from employer.
 - b. Provision of a service to the employer.
 - c. Receiving wage or salary for services rendered.
10. The Commission urges that it has no contract of service with the petitioner since the petitioner is a presidential appointee who does not render services to it, and neither is she remunerated by the respondent.
11. Advancing the assertion that it did not have an employer-employee relationship with the petitioner, the Commission contended that its role was founded upon articles 166(1)(b) and 172(1) of the *Constitution* and it was to recommend to the President, persons for appointment to the office of a judge.



12. For this assertion, the commission cited *Katiba Institute v President of Republic of Kenya & 2 others, Judicial Service Commission & 3 others (Interested Parties)* [2021] eKLR and *Okiya Omtatah Okiiti v Attorney General; Adrian Kamotho Njenga (Interested Party)* [2022] KEELRC.
13. The commission maintained that there was no contract of service between it and the petitioner.
14. The commission further urges that it did not remunerate nor determine the salaries of Judges generally and that in this respect, its function was only to review and recommend to the Salaries and Remuneration Commission on the terms and conditions of service.
15. Noting that an employer has disciplinary control over its employees, the commission submits that it has no disciplinary powers to dismiss judges, such as the petitioner and that its role is restricted to receiving complaints, investigating them and recommending to the President to set up a Tribunal to investigate and determine whether a Judge should be removed from office.
16. The commission further submits that the position of judges is analogous to that of members of constitutional commissions, independent offices, Members of Parliament, County Assemblies, Governothers and the Presidency.
17. To support this contention, the commission cited *Attorney General & 2 others v Okiya Omtatah Okiiti & 14 others* [2020] eKLR, where the Court of Appeal stated that the removal from Office of Commissioners of Independent Commissions was not a labour and employment issue.
18. Submitting on the issue of prematurity, the commission took the view that the process to remove a judge from office is circumscribed by the law, its role being confined by the proviso of article 168(4) of the *Constitution* to consider a petition for removal and if satisfied there are grounds for removal, send the petition to the President to form a Tribunal to inquire into the question.
19. According to the Commission, a challenge to the process could only be lodged with the Courts after it had concluded its consideration of the petition.
20. The commission urged the court to be guided by the jurisprudence emanating from decisions involving commissions and in particular the decision *In the Matter of the Interim Independent Electoral Commission* [2011] eKLR, *In the Matter of the National Land Commission* [2015] eKLR, *Justus Kariuki Mate & another v Martin Nyaga Wambora & another* [2017] eKLR, *Sammy Ndung'u Waity v Independent Electoral and Boundaries Commission & 3 others* [2019] eKLR and *Okiya Omtatah Okiiti v Selection Panel for the National Land Commission & 3 others, Gershom Otachi Bw'omanwa & 7 others* [2019] eKLR, among others, to urge that the court ought to construe article 168(4) of the *Constitution* against that background and find the Petition premature as it seeks to usurp its mandate by seeking the court's intervention.

Petitioner's Submissions

21. The petitioner on his part submitted that there exists an employer-employee relationship between her and the commission.
22. The petitioner first made an exegesis on the definition of the term employer in section 2 of the *Employment Act, 2007*, which in her view was sufficiently broad to include the commission as an employer of judges.
23. The petitioner submits that the commission identifies vacancies in the office of judge, advertises vacant positions, selects persons, and prescribes terms of service including the welfare of judges.
24. These roles or functions, according to the petitioner, constitute the commission as an employer.



25. According to the petitioner, further considerations and ingredients which pointed to the existence of an employer-employee relationship with the Commission included the acknowledgement in the *Judiciary Human Resource Policies and Procedures Manual*, 2014, that the Manual applied to all employees of the judiciary, and that “employee” was defined to include Judges.
26. The petitioner cited *Oyatsi v Judicial Service Commission* [2022] KEELRC 3 (KLR) and section 47 of the *Judicial Service Act* to submit that the same position had been accepted by the court.
27. In the view of the petitioner, judges could not be considered employees of either the President because he appointed them to office, or of the Salaries and Remuneration Commission because it set their remuneration.
28. To move forward the assertion, the petitioner relies on *Teachers Service Commission (TSC) v Kenya National Union of Teachers (KNUT) & 3 others* [2015] eKLR and *Adrian Kamotho Njenga v Attorney General* [2020] eKLR.
29. In the latter case, the commission herein had argued that the President’s appointment of judges was ceremonial to formalise the process, and appeared to argue otherwise in the instant case.
30. The petitioner submits that employees of several Commissions such as the Teachers Service Commission, Public Service Commission and the National Police Service Commission serve Kenyans, yet they have no contracts of service with Kenyans, hence the court should take judicial notice that where an employee has a relationship with different entities, he or she should seek the court’s intervention to remedy any infringement of legal rights by any of them.
31. Reliance was also made on the Supreme Court decision in *Kenya Tea Growers and others v National Social Security Fund* on the jurisdiction of the court.
32. To crown her submissions, the petitioner contended that the Commission would have no role in questioning and investigating the manner in which she discharged her functions in the course of employment.
33. On the issue of prematurity, the petitioner submits that the Commission’s argument that the removal of a judge can only be challenged after the Commission had concluded the process, lacked legal anchorage and cited the Supreme Court decision in *Hon Justice Said Juma Chitembwe v The Tribunal Appointed to Investigate into the Conduct of the Hon Justice Said Juma Chitembwe, Judge of the High Court* [2023] eKLR to urge that the petition is not premature.
34. The petitioner urged the court to dismiss the preliminary objection.

Analysis and Determination

35. The issues for determination are:
 - i. Employer–Employee relationship: Whether the court has jurisdiction?
 - ii. Whether the petition is premature?
36. What constitutes a preliminary objection was outlined by the Court of Appeal in *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696, thus;

. . . a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point 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 . . .

37. Further in the words of Sir Charles Newbold v P;

A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion . . .

Whether the Court has jurisdiction: Employer-employee relationship

38. The parties have adopted contrasting positions on whether the petitioner and the commission have an employer–employer relationship to clothe the court with jurisdiction.

39. The commission contended that the court lacked jurisdiction because an employer-employee relationship as contemplated by section 12 of the *Employment and Labour Relations Court Act* as read with article 162(2)(a) of the *Constitution* did not exist between it and the petitioner. The jurisdiction according to the Commission, lay with the High Court.

40. To support its arguments, the Commission cited a portion of the Court of Appeal judgment in *Clerk, Nakuru County Assembly, the Speaker Nakuru County Assembly & 3 others v Odongo & 7 others consolidated with the Speaker, Nakuru County Assembly v Stephen Michael Oduor Ogotu & 3 others* [2023] KECA 427 KLR that:

It is evident that from the provisions of both article 162(2)(a) and section 12 of the E&LRC Act, the jurisdiction of the E&LRC is limited to matters relating to employment and labour relations.... Having found that there was no employee/employer relationship between the appellants and the 1st respondent, nor an employment and labour relations dispute as contemplated by article 162(2) of the *Constitution* or section 12(1) of the *E&LRC Act*, it is our view that the court fell into error when it proceeded to assume and arrogate itself, a jurisdiction that it did not have... Further and with utmost respect to the learned Judge, it is our view that he could not rely on the preamble to the *E&LRC Act* which provides that the court will hear and determine disputes relating to employment and labour relations and ‘for connected purposes’. He also erred by interpreting the word ‘including’ in section 12 of the *E&LRC Act* to arrogate himself a jurisdiction that he did not have and handle all and sundry matters before him as the preamble and S12 thereof cannot be read in isolation to the other substantive sections of the *E&LRC Act*. ... Having found that the E&LRC did not have jurisdiction to handle the petition that was before it, the court ought to have immediately downed its tools and struck out the petition since a decision made by a court without jurisdiction is a nullity in law.

41. On the parameters to establish an employment relationship, the Commission drew the attention of the court to the 3-part test established by the Court of Appeal in *Nick Githinji Ndichu v the Clerk, Kiambu County Assembly & another* [2014] eKLR.

42. The 3-part test requires a party asserting an employer-employee relationship or lack thereof, to establish the existence or non-existence of an oral or written contract of service; provision of a service to a real or legal person and receipt of wage or salary for the services.

43. Taking umbrage from the said authority, the commission asserted that it did not employ the petitioner, but merely recommended her appointment in terms of article 172(1)(a) of the *Constitution*.



44. The commission further asserts that it had no contract of service with the petitioner, it did not remunerate nor determine the petitioner's remuneration, and that it is the public that benefited from the petitioner's services.
45. According to the commission, its role was restricted to making recommendations to the Salaries and Remuneration Commission on the terms and conditions of service of judges, and that it had no power to dismiss the petitioner since its role was limited to receiving and investigating complaints and recommending to the President whether removal of a judge should be undertaken.
46. The petitioner, however, took the position that the Commission was estopped from denying the existence of an employer-employee relationship with her because the Judiciary Human Resource Policies and Procedures Manual, 2014 defines employee to mean judge, judicial officer and judicial staff.
47. The petitioner also made reference to the definition of employer in section 2 of the [Employment Act](#) which defines an employer as:
- any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company.
48. According to the petitioner, it is the Commission which communicates the terms of service of Judges and flowing from the definition, neither the President who appoints Judges nor the Salaries and Remuneration Commission which sets the remuneration for judges could legally be considered as an employer of judges.
49. The legal and factual contours of the jurisdiction of the High Court and Employment and Labour Relations Court has been simmering since the establishment of this Court, and some of the jurisdictional concerns have been the subject of debate in the Court of Appeal and Supreme Court innumerable times.
50. Despite the pronouncements from the Court of Appeal and the Supreme Court, the debate on jurisdiction grounded on the existence of an employer-employee relationship does not appear to end, and it goes on.
51. This court has perused the authorities from the Court of Appeal and the Supreme Court cited by the parties.
52. Although the decisions talk authoritatively on the jurisdiction of this court *vis a viz* the jurisdiction of the High Court, the holdings have been primarily grounded on the application and interpretation of article 162(2) of the [Constitution](#) and section 12 of the [Employment and Labour Relations Court Act](#).
53. What has been lacking is a factual and legal contextualisation on who in law is an employee and who is an employer.
54. Section 2 of the [Employment and Labour Relations Court Act](#) defines an employer as:
- any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company;
55. The same definition is given under section 2 of the [Employment Act, 2007](#).
56. What the definition suggests is that apart from the real or legal employer, other persons or entities acting at the behest of the real or legal employer would for purposes of the law qualify as an employer.



57. The definition has given recognition to a doctrine which has found acceptance under the common law; the doctrine of a putative employer.
58. Under our law, the putative employer would include an agent, foreman, manager or factor of the real or legal employer.
59. The *Black's Law Dictionary*, Tenth edition defines putative as:
reputed; believed or supposed by most people.
60. The question, therefore, arises whether the commission would qualify to be considered a putative employer of Judges.
61. Before addressing that question, it is worth noting that a Judge is not an employee as understood within the context of the *Employment Act* or the *Employment and Labour Relations Court Act*. A judge holds a constitutional office. He or she is a state officer and an office holder.
62. Despite not being an employee within the parameters of the *Employment Act* and *Employment and Labour Relations Court Act*, it is not in dispute that a practice has developed after the promulgation of the *Constitution, 2010* to issue judges with written contracts, setting out the basic terms and conditions of service.
63. It is also true that judges render their services on behalf of the people of Kenya, and are remunerated from the Consolidated Fund.
64. This is so because a judge occupies an office created by the supreme law, the *Constitution* of Kenya. A Judge is, therefore, an office holder who exercises judicial authority on behalf of the people of Kenya.
65. Article 1 of the *Constitution* recognises that all sovereign power belongs to the people of Kenya and that the people of Kenya may exercise the sovereign power either directly or through those to whom they delegate the power to in terms of the *Constitution*.
66. Pursuant to article 1(3) of the *Constitution*, the people of Kenya have delegated the judicial power and authority to the Judicial Service Commission and the judiciary.
67. In order to realise the exercise of judicial power and authority, the people of Kenya agreed that a Judicial Service Commission be established. The Commission is established pursuant to article 171 of the *Constitution* and being the holder of delegated authority, it must be answerable to the people of Kenya. The Commission thus is in a constitutionally ordained contractual relationship with the people of Kenya as it carries out its functions.
68. In that social contractual enterprise of exercising delegated sovereign authority, the Commission stands in the position of a constitutional agent, foreman, manager and factor of the people of Kenya as far as the independence, accountability, recruitment, setting terms and conditions of service and discipline of Judges is concerned.
69. And to further the exercise of the delegated authority, article 172 delineates the functions of the commission thus:
172. Functions of the Judicial Service Commission
1. The Judicial Service Commission shall promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice and shall-



- a. recommend to the President persons for appointment as Judges;
 - b. review and make recommendations on the conditions of service of Judges and judicial officers, other than their remuneration; and ii. the staff of the Judiciary;
 - c. appoint, receive complaints against, investigate and remove from office or otherwise discipline registrars, magistrates, other judicial officers and other staff of the Judiciary, in the manner prescribed by an Act of Parliament;
 - d. prepare and implement programmes for the continuing education and training of Judges and judicial officers; and
 - e. advise the national government on improving the efficiency of the administration of justice.
2. In the performance of its functions, the Commission shall be guided by the following-
- a. competitiveness and transparent processes of appointment of judicial officers and other staff of the judiciary; and
 - b. the promotion of gender equality.
70. Of significance to the arguments on putative employer is that the commission has been vested with the power to promote and facilitate the independence and accountability of the judiciary; recruit and recommend to the President, persons for appointment as Judges; review and make recommendations on the conditions of service of Judges save for remuneration; receive complaints against Judges and investigate the complaints and initiate the process for removal of a Judge.
71. The commission argued that it could not be perceived as an employer of judges because the appointment is sealed by the President, the remuneration is set by the Salaries and Remuneration Commission and that it is a Tribunal which has the ultimate say on the decision to remove a judge.
72. The constitutional role reposed to the President is a nominal one and he cannot legally act otherwise than in accordance with the recommendation of the commission in the appointment of a judge or petition on the removal of a judge.
73. With the restricted constitutional role, the President cannot stand as a presumed or putative employer of judges.
74. The normative role of the Salaries and Remuneration Commission to set the remuneration of Judges is a function which the Salaries and Remuneration Commission plays with respect to all state officers, and there was a purpose why it was established and assigned the roles. Even if the imagination were to be stretched, the said commission would not qualify to be a putative employer or co-employer of judges.
75. The Tribunal envisaged by article 168(5) of the Constitution to inquire into the removal of a judge has no other role in the constitutional architecture and the respondent misapprehended its function in the arguments on whether it is an employer of judges.
76. The commission plays a fundamental role in the administration of justice. It has amongst its primary roles the promotion and facilitation of judicial independence, the recruitment of judges and setting the terms and conditions of service.
77. In these roles, which the commission exercises on behalf of the people of Kenya, the commission assumes the character of a putative employer and in this respect, the Court finds that the objection to the lack of an employer-employee relationship has no merit.



Whether the Petition is Premature

78. On whether the petition is premature, the commission submitted that as the process it is undertaking against the petitioner is constitutionally circumscribed, it can only be challenged after it is concluded and the petitioner ought not to circumvent the process.
79. The petitioner on the other hand maintains that the petition is not premature for the simple reason that she is aggrieved by the manner in which the commission was conducting the hearing of the complaint, and thus has an action against the commission.
80. It is not disputed that article 68 of the *Constitution* does not envisage a petition such as the one before us. Article 22 of the *Constitution* entitles the petitioner to the right to institute court proceedings claiming that a right or fundamental freedom has been denied, violated or infringed, or is threatened.
81. Article 22 explicitly states: -
- 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.
82. It is also true that the commission has not as yet arrived at any decision in relation to the complaint lodged before it against the petitioner, but the petitioner alleges that her rights are threatened with violation and/or infringement, which in our view, is sufficient ground to move the court.
83. Further, article 23 of the *Constitution*, mandates the court 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.
84. As submitted by the petitioner's counsel, no authority was cited for the proposition that the petitioner's action against the commission would only accrue after the proceedings.
85. As correctly captured by the Chief Registrar of the Judiciary in the replying affidavit, the petitioner is challenging the manner in which the proceedings are being conducted and in particular, bias and curtailment of her advocate's right to cross-examine witnesses on material issues.
86. Such complaints or allegations in our view ought not to be pended until the proceedings are concluded and when raised should be addressed and determined for the proceedings to continue to conclusion.
87. This position is fortified by the understanding that the right to fair administrative action is a constitutional imperative under article 47 of the *Constitution of Kenya, 2010* and reinforced by section 4 of the *Fair Administrative Action Act, 2015*.
88. In *Judicial Service Commission v Mbalu Mutava & another* [2015] eKLR, the Court of Appeal stated as follows;

Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of powers of state organs and other administrative bodies but also entrenches the right to fair administrative actions in the Bill of Rights.

The right to fair administrative action is a reflection of some of the national values in article 10 such as rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality



rather than to the doctrine of ultra vires from which administrative law under the common law was developed.

89. Further, in *Hon Justice Said Juma Chitembwe v The Tribunal Appointed to Investigate into the Conduct of the Hon Justice Said Juma Chitembwe, Judge of the High Court (supra)*, the Supreme Court of Kenya considered the question whether a Judge against whom a complaint has been made to the Judicial Service Commission and the process is on-going, has recourse against JSC's conduct and observed thus;

To our mind, in conducting these proceedings, JSC was performing a quasi-judicial function. if the petitioner felt aggrieved by the conduct of the proceedings before the JSC, which in his view amounted to a violation of his rights and fundamental freedoms, his recourse was not to the Tribunal that would be formed many months later but to the High Court, which has jurisdiction to determine questions of whether a right or fundamental freedom has been denied, violated, infringed or threatened under article 165(3)(b) of the *Constitution*.

90. We agree with the foregoing sentiments. For the foregoing reasons, we are not persuaded that the petition herein is premature.
91. Flowing from the foregoing, it is clear to us that the commission's notice of preliminary objection dated December 20, 2023 is for dismissal, and it is accordingly dismissed with no orders as to costs.
92. It is so ordered.

DELIVERED, DATED AND SIGNED IN NAIROBI ON THIS 13TH DAY OF MAY 2024.

.....

RADIDO STEPHEN, MCIARB
JUDGE

.....

CHRISTINE N. BAARI
JUDGE

.....

DR JACOB GAKERI
JUDGE

Appearances

For Petitioner Mr Wambola instructed by Ongoya and Wambola Advocates

For Respondent Mr Kipkoge and Mr Kisia instructed by G & A Advocates LLP

For Interested Parties Kemboi Chambers Advocates

Court Assistants Kemboi, Caleb and Fred

