



**Mwangi & another v Speaker, County Assembly of Laikipia & another
(Petition E019 of 2023) [2024] KEELRC 1872 (KLR) (19 July 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1872 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
PETITION E019 OF 2023
ON MAKAU, J
JULY 19, 2024**

BETWEEN

**FRANCIS CHUBI MWANGI 1ST PETITIONER
PROACTIVE TEAM LAIKIPIA COMMUNITY BASED ORGANIZATION 2ND
PETITIONER**

AND

**THE SPEAKER, COUNTY ASSEMBLY OF LAIKIPIA 1ST RESPONDENT
LAIKIPIA COUNTY ASSEMBLY SERVICE BOARD 2ND RESPONDENT**

RULING

Introduction

1. By a Notice of Preliminary Objection dated 18th January, 2024 the respondent objects to the Petition dated 28th December 2023 for the following reasons:
 - a. The Honourable Court lacks the requisite jurisdiction to hear and determine the petition herein.
 - b. There is no employer-employee relationship between the Petitioners and the Respondents and a dispute to be heard and determined by this court.
 - c. The petition offends the mandatory provisions of section 12 of the *Employment and Labour Relations Court Act*.
 - d. That the suit is an abuse of the Court process, and a waste of judicial time and resources thus should be dismissed with costs.
2. In response the 1st Petitioner has filed his grounds of opposition dated 22nd January 2024, urging the court to dismiss the objection for the following reasons:



- i. That the Honourable Court, being a specialized court as provided under Article 162(2) of the Constitution of Kenya, 2010, has the jurisdiction to hear and determine this petition as it deals with employment issues.
- ii. That Article 22 (2) (a), (b) and (c) of the Constitution of Kenya, 2010 provides that court proceedings may be instituted by a person acting on behalf of another who cannot act in their own name, a person as a member of, or in the interest of a group or class of persons, or a person acting in public interest, which herein includes the 1st Petitioner and the 2nd Petitioner acting for and on behalf of the residents (including employees) of the Laikipia County, whose fundamental rights are being denied, violated, infringed or there's a threat of denial, violation, or infringement by the actions of the respondents.
- iii. That under section 12(1) of the Employment and Labour Relations Act CAP 234B, the petition will be deemed as inuring where under Article 22(2) (a) the 1st Petitioner institutes these proceedings for violation of a right or fundamental freedom where the employee cannot act in their own name.
- iv. That the plain reading of the foregoing Act reveals that section 12 (2) makes and does not make it mandatory or obligatory as it uses the term "may" which denotes permissiveness.
- v. That the Constitution of Kenya (Protection of Rights and Fundamental Freedoms Practice and Procedure) Rules, 2013 at Rule 3 (2) provides that the overriding objective of this rule is to provide access to justice for all persons as required under Article 48 of the Constitution. These Rules solely provide for applications to protect the rights and fundamental freedoms for all where there's denial, violation, infringement, or threat thereof.
- vi. That therefore the petition is properly and validly before this Honourable Court, which has the jurisdiction to hear and determine this matter to its conclusion.

Factual background

3. The 1st petitioner is a resident of Kinamba area in Laikipia County while the 2nd petitioner is a Community Based Organization based in Nanyuki in the same County. They have cited Article 22 of the Constitution as the source of their locus standi to petition the court against the impugned decision by the respondents. The Petition is dated 28th December 2023 and it seeks the following orders:
 - a. A declaration that the decision by the 2nd Respondent to establish the position of the Deputy Clerk Administrative Services Laikipia County Assembly is unconstitutional to the extent that the decision was made in contravention of the guiding principles provided in the County Governments Act and the County Assembly Service Act and as enshrined in Constitution of Kenya.
 - b. A declaration that the decision made by the 2nd Respondent to advertise the position of the Deputy Clerk Administrative Services Laikipia County Assembly is unconstitutional to the extent that the decision was made in contravention of the guiding principles provided in the County Governments Act and the County Assembly Service Act and as enshrined in Constitution of Kenya.
 - c. Judicial review by way of an order of mandamus to quash the decision of the Respondents in the establishment of the office of the Deputy Clerk Administrative Services of the County Assembly of Laikipia.



- d. Judicial review by way of an order of mandamus to quash the decision of the Respondents to advertise the position of the Deputy Clerk Administrative Services of the County Assembly of Laikipia.
 - e. Costs of and incidental to this petition; and
 - f. Any other order that this Honourable Court deems fit and just to grant in the circumstances.
4. The gravamen of the Petition is that the County Assembly Services Act makes reference to “the Deputy Clerk” and as such it contemplates only one Deputy Clerk; that there is in place an organogram of the Laikipia County Assembly which was established vide an organizational structure review and job evaluation report of November 2019 which established only one office of the Deputy Clerk; that the 2nd respondent has purported to establish the new office of Deputy Clerk Administrative Services without following due procedure since it has not done any review of its organizational structure before creating the new position; that the said decision is also not based on any advice from the Laikipia County Assembly Staff Advisory Committee which is responsible for advising the respondents on staff matters including appointments, confirmation among others; and that the job advertisement has been done prematurely without a Human Resources Plan and without the guidelines of establishing an office/creation of a post.
 5. The Petitioners further contend that the actions by the Respondents are in contravention of Articles 2(1), 10, 22, 23, 47, and 175 (a) of the Constitution because they deny, infringe upon, violate or breach the fundamental right to fair administrative action of the residents of Laikipia County; that it will lead to misuse of county funds in paying personnel in the new office instead of applying it for the upliftment of the residents; that the fundamental rights of the petitioners and other residents of Laikipia County will be denied, infringed upon, violated or breached by the biased appointment to the established office; and that the respondents actions shall breach the Constitution of Kenya and the statutes which provide guidelines to the offices while making decisions that affect the public.
 6. The parties agreed to dispose of the Preliminary Objection by way of written submissions. The Respondents filed theirs on the 2nd February 2024 and the Petitioners filed on 19th February 2024.

Respondent’s submissions

7. The Respondents collapsed the grounds of the objection into one, that is, whether this Honourable Court has the jurisdiction to hear and determine this petition.
8. From the onset, it was submitted that jurisdiction is the basis upon which a court derives authority to hear matters. To support that view, reliance was placed on the case of Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1 and the case of Samuel Kamau Macharia v Kenya Commercial Bank & 2 others [2012] eKLR where it was held that a Court derives jurisdiction from Constitution or statute or both.
9. It was further submitted that this Court having derived its jurisdiction from Article 162 (2) of the Constitution and section 12 of the Employment and Labour Relations Court’s Act, there ought to exist an employer-employee relationship before the court can hear and determine a matter. It was argued that the Petition was filed before the recruitment was completed and therefore there was no employment relationship between the parties.
10. Consequently, it was submitted that the Court lacked the jurisdiction to hear the matter as the petition did not raise allegation of infringement of labour rights under Article 41 of the Constitution or statute. To buttress this argument, reliance was placed on the cases of Nick Githinji Ndichu vs Clerk Kiambu



County Assembly and Another [2014] eKLR and Casmur Nyankuru Nyaberi v Mwakikar Agencies Limited [2016] eKLR where the court held that there must be employer-employee relationship for its jurisdiction to accrue.

11. In addition, it was submitted that the petition does not fall under the disputes stipulated under section 12 of this Court's Act as the issue on advertisement for the position was secondary to the establishment of the office. Reliance was placed on the case of Kenya Universities Staff Union vs University Council of Masinde Muliro University of Science and Technology & 2 others [2018] eKLR. This Court was therefore urged to down its tools and strike out the petition with costs to the Respondents.

Petitioners' submissions

12. The Petitioners raised the following issues for determination:
 - a. Whether the Petitioners herein have the locus standi to institute the petition.
 - b. Whether the Honourable Court has the jurisdiction to hear and determine the instant petition dated 28th December 2023.
 - c. Whether the issues raised in the instant petition are akin to the employment or any labour relations issues as contemplated by the provisions of section 12 (1) (a-j) of the *Employment and Labour Relations Court Act*.
 - d. Whether the impugned actions of the 2nd Respondent in establishing the position of the Deputy Clerk Administrative Services, and advertising, shortlisting, interviewing, recruiting, employing, confirming into employment and filling the said position are processes leading to or aimed at creating an employment or labour relations.
 - e. Whether the provision of section 12 (2) imposes a mandatory provision and whether it limits parties who may institute these types of suits in Employment and Labour Relations Court.
13. On the first issue, it was submitted that the same would be answered upon determination that the court has jurisdiction. On the second issue, it was submitted that the Court not only had jurisdiction over employment matters, but also over matters incidental to employment. Reliance was placed on the following cases:
 - a. Abidha Nicholus vs Hon. AG. & Others SC Petition No. 7 of 2023;
 - b. United States International University vs Attorney General [2012] Eklr
 - c. Grace Gacheri Muriithi vs Kenya Literature Bureau [2012] eKLR
 - d. Daniel N. Mugendi v Kenyatta University & 3 Others [2013] eKLR
 - e. *Okoti v Attorney General; Njenga (Interested Party) (Petition E101 of 2020)* [2022] KEELRC 2(KLR) (17 February 2022).
14. It was argued that the Court's jurisdiction is not confined to the employer-employee relationship but to disputes relating to employment and labour relations. It was submitted that the Mutunga Rules provided for applications by all in quest for protection of fundamental rights where there is denial, violation, infringement or threat. It was argued that the Petitioner's rights and those of the residents of Laikipia County to fair administrative action had been violated.
15. On the third issue, it was submitted that the Court ought to act and not wait for the creation of employment relations as the issues before the court appertain to labour relations. Reliance was



placed on the case of *Odongo vs Nakuru County Service Board & 5 others Kiplangat & 20 others (interested parties) (ELRC Petition E017 of 2022)* [2022] KEELRC 13319 (KLR) and the United States International University case supra. Accordingly, it was argued that the matter was properly before the court.

16. On the fourth issue, reliance was again placed on the Odongo case supra to urge that, there ought not only to be an employment relationship but also were there a process related to employment relation and more so, the petitioner ought not to be an employee. It was submitted that the petition was in the purview of public litigation and the violation complained of is to the detriment of the public.

Analysis

17. I have carefully considered the pleadings, the notice of the preliminary objection and the rival submissions. It is not in dispute that the 2nd respondent has advertised the vacancy of a new post of Deputy Clerk Administrative Services. It is also a fact that the process of filling the vacancy has not been concluded and appointment made. The issues falling for determination by this Court are as follows:
- a. Whether this court has jurisdiction to hear and determine the suit.
 - b. Whether the Petitioners have the locus standi to pursue this claim.
 - c. Whether the Respondents' P.O. is merited.

Jurisdiction to hear and determine the suit

18. The respondents contend that the court lack jurisdiction to hear the petition because there exists no employer employee relationship between the petitioners and them as defined under section 2 of the *Employment Act*. Consequently, they urged the court to down tools for want of jurisdiction. On the other hand, the petitioners argue that this court's jurisdiction is not confined to the employer – employee relationship but to disputes relating to employment and labour relations.

19. It is now trite law that a Court derives its jurisdiction from either *the Constitution* or a Statute or both. Accordingly, this court majorly derives its jurisdiction from Articles 162 (2)(a) of *the Constitution* and section 12 of the Employment and Labour Relations Court's (ELRC) Act. Article 162(2) provides that:

“(2) Parliament shall establish courts with the status of the high court to hear and determine disputes relating to-

a. Employment and labour relations; and

b. ...

(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2)”

20. Section 12 of the ELRC Act provides that:

“12. Jurisdiction of the Court

1. The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of *the Constitution* and the provisions of this



Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including-

a. Disputes related to or arising out of employment between employer and an employee;

b. ...

2. An application, claim or complaint may be lodged with the court by or against an employee, an employer, a trade union, an employer' organization, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose.”

21. The Supreme Court has settled the question of this court's jurisdiction in the recent decision of Kenya Tea Growers Association & 2 others v The National Social Security Fund Board of Trustees & 13 others [2024] KESC 3 (KLR) where the full bench of the Court sat. While referring to Article 162(2) and section 12 of the ELRC Act the Court held that:

“75. ... From the above provision of *the Constitution* and the Act, it is clear that the jurisdiction of the ELRC is limited in terms of the types of disputes and the parties.”

22. The Supreme Court went on to discuss the above statement and concluded that ELRC has jurisdiction to determine the constitutionality of a statute if the matter arises in the context of employment and labour relations. The Court went on to state that:

“79. What it (ELRC) cannot do, is to sit as if it were the High Court under article 165 of *the Constitution*, and declare a statute unconstitutional in circumstances where the dispute in question has nothing or little to do with employment and labour relations within the context of the ELRC Act. But, if at the commencement or during the determination of a dispute falling within its jurisdiction, as reserved to it by article 162(2)(a) of *the Constitution*, a question arises regarding the constitutional validity of a statute or a provision thereof, there can be no reason to prevent the ELRC from disposing of that issue. Otherwise, how else would it comprehensively and with finality determine such a dispute? Stripping the court such authority would leave it jurisdictionally hum-strung; a consequence that could hardly have been envisaged by the framers of *the Constitution*, even as they precluded the High Court from exercising jurisdiction over matters employment and labour pursuant to article 165(5)(b).”

23. By the above decision, the Supreme Court has affirmed that by dint of Article 165(5)(b) of *the Constitution*, the ELRC has jurisdiction to exercise the powers given to the High Court by Article 165(3) (d) in the context of disputes related to employment and labour relations. The Supreme Court has just echoed or reinforced what Majanja J held, over a decade ago, in *United States International University (USIU) v Attorney General* [2012] eKLR thus:

“In the final analysis, I would adopt the position of the Constitutional Court of South Africa in *Gcaba v Minister of Safety and Security* (Supra). The industrial court is a specialist court to deal with employment and labour relations matters. By virtue of the Article 162(3),



section 12 of the Industrial Court Act, 2011 has set out matters within the exclusive domain of that court. Since the court is of the status of the High Court, it must have the jurisdiction to enforce labour rights in Article 41 and the jurisdiction to interpret *the constitution* and the fundamental rights and freedoms is incidental to exercise of jurisdiction over matters within its exclusive domain. In any matter falling within the provisions of section 12 of the Industrial Court Act, the industrial Court has jurisdiction to enforce not only Article 41 rights but also all fundamental rights ancillary and incidental to the employment and labour relations including interpretation of *the Constitution* within a matter before it.”

24. There is a legion of other decisions that have given expanded meaning of the term “employment and labour relations” as used in section 12 of the ELRC Act. In the case of *in okiya Omtatah Okoit v Attorney General & another* [2022] KEELRC 2 (KLR) Rika J considered the local decision and UK on this subject and held that:

“119. Jurisdiction of the E&LRC involves disputes relating to employment, and labour relations, in their wider context. It is not confined to employer-employee relationship, which is defined in a contract of employment. The relationship can be regulated by the *Employment Act* and the relevant contract.

120. E&LRC Act itself does not confine the court’s jurisdiction to employer-employee relationship. The Act confers jurisdiction on the Court- to hear and determine all disputes referred to it in accordance with Article 162(2) of *the Constitution*. These disputes, going back to the article, are not restricted to employer-employee disputes, but employment and labour relations...

121. The Act lists the matters which the court can deal with. It describes those matters as ‘including’, which simply means the listed matters are not exclusive.”

25. In view of supreme court decision in *Kenya Tea Growers Association & 2 others v The National Social Security Fund Board of Trustees & 13 others*, *Supra*, it is now settled that the use of the word “including” in section 12 (1) of the ELRC Act means that the list of the disputes this court can determine is not conclusive. The disputes include but it is not limited to types listed in that provision so long as they relate to employment and labour relations in the widest meaning possible. This position reverses the Court of Appeal decision in *The Clerk, Nakuru County Assembly & 2 others v Keneth Odongo & 3 others* [2023] KECA 427 (KLR), where it had held that the word ‘including’ in section 12(1) of the ELRC Act was conclusive.

26. In view of the foregoing discussion, the question begging for answer is whether this court has jurisdiction to determine the constitutionality of 2nd respondent’s decision or actions of creating a new office in the county assembly service, and also the process of recruiting a person to fill the post. That is a matter falling within Article 165(3)(d)(ii) of *the Constitution* which provides that:

“(3) Subject to clause (5), the High Court shall have –

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of –

i. ...

ii. the question whether anything said to be done under the authority of this Constitution or of any



law is inconsistent with, or in contravention of, this Constitution;

iii. ...”

27. Article 165(5) of *the Constitution* basically states that the High Court shall have no jurisdiction on matters (a) reserved for the exclusive jurisdiction of the Supreme Court or, (b) falling within the jurisdiction of the specialized courts established under Article 162(2) of *the Constitution*. As highlighted above, this court has jurisdiction under Article 165(3)(d)(ii) of *the Constitution* in respect of all matters related to employment and labour relations. The dispute in this matter in my considered view relate to employment and labour relations in the expanded meaning as it concerns employment of a person in the office of the Clerk, Laikipia County Assembly. The type of the dispute is employment and labour relation and the respondents are sued in their capacity as the employer or office created by the statute for that purpose.
28. In the upshot, I find and hold that this court is properly clothed with the jurisdiction to hear and determine the petition herein by dint of Article 162(2) (a), 165(3)(d)(ii) & (5) of *the Constitution* and section 12(1) & (2) of the ELRC Act.

Petitioners have the locus standi

29. Locus standi is defined under the Black’s Law Dictionary 8th edition as:

“the right to bring an action or to be heard in a given forum.”

30. The Petitioner invoked the provision of Article 22 in this Petition as the enabling provision, which provides as follows:

“Enforcement of Bill of Rights.

22.

- (1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.
- (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by-
 - a. a person acting on behalf of another person who cannot act in their own name;
 - b. a person acting as a member of, or in the interest of, a group or class of persons;
 - c. a person acting in the public interest; or
 - d. an association acting in the interest of one or more of its members.” (emphasis added)

31. Further, Article 258 of *the Constitution* reiterates the provisions of Article 22 but with respect to contravention or threatened contravention of *the constitution*. It states as follows:

“Enforcement of this Constitution.



258.

- (1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.
- (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by-
 - a. a person acting on behalf of another person who cannot act in their own name;
 - b. a person acting as a member of, or in the interest of, a group or class of persons;
 - c. a person acting in the public interest; or
 - d. an association acting in the interest of one or more of its members.”

32. The above provisions clearly give every person the express right to institute proceedings claiming that a right or fundamental freedom guaranteed in the Bill of Rights has been denied, violated, infringed or threatened; and/or that *the Constitution* has been contravened or threatened with contravention. In this case, the petitioners are acting in their own interest and that of the residents of Laikipia county and are alleging that the impugned actions by the respondents have denied residents of the county the right to fair administrative action; and shall contravene *the Constitution* and the statutes which provide guidelines to the offices while making decision that affect the public.
33. The alleged denial or violation of rights, and the contravention of *the Constitution* are in the context of employment and labour relations as contemplated by Article 162(2)(a) of *the Constitution* and section 12(1)(a) of the ELRC Act. Consequently, I find that the petitioners have the locus standi to bring the instant petition. The standing is not lost just because the second petitioner may not be a body corporate.
34. I gather support from the Court of Appeal decision in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2014] eKLR that:

“The NGO Act must be interpreted in conformity with *the Constitution*. Although Section 12(2) and (3) of the Act provides for the legal status of the 1st respondent, when read together with Articles 22, 258 and 260 of *the Constitution*, and in the public interest, it is to be inferred that the 1st respondent did not lose its locus standi, even if it were to be assumed to have lacked registered status. The three Articles give an enlarged view of locus standi, to the effect that every “person”, including persons acting in the public interest, can move a Court of law contesting infringements of any provisions in the Bill of Rights, or *the Constitution*”. (emphasis added)

Conclusion

35. I have found that the petition before the court involves a dispute that relate to employment and labour relations and therefore this court is clothed with jurisdiction to determine the same by dint of Article 162(2) (a), 165(3)(d)(ii) & (5) of *the Constitution* and section 12(1) & (2) of the ELRC Act. I have further found the petitioners have locus standi to bring the petition before the court by dint of Article



22 and 258 of *the Constitution* on his behalf and that of the residents of Laikipia County. Consequently, I hold that the preliminary objection by the respondents lacks merits and it is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NYERI THIS 19TH DAY OF JULY, 2024.

ONESMUS N MAKAU

JUDGE

ORDER

This ruling has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N MAKAU

JUDGE

