



Abdirashid v Governor, Wajir County & 3 others; Kenya National Commission on Human Rights & another (Interested Parties) (Petition E016 of 2025) [2025] KEHC 15516 (KLR) (30 October 2025) (Ruling)

Neutral citation: [2025] KEHC 15516 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
PETITION E016 OF 2025
JN ONYIEGO, J
OCTOBER 30, 2025**

IN THE MATTER OF THE ANTICIPATED AND/OR ONGOING PROCESS OF APPOINTMENT OF MEMBERS OF THE WAJIR COUNTY PUBLIC SERVICE BOARD

BETWEEN

ABDIKARIM HAJI ABDIRASHID PETITIONER

AND

THE GOVERNOR, WAJIR COUNTY 1ST RESPONDENT

THE COUNTY GOVERNMENT OF WAJIR 2ND RESPONDENT

THE SELECTION PANEL FOR WAJIR COUNTY PUBLIC SERVICE BOARD 3RD RESPONDENT

THE HON. ATTORNEY GENERAL 4TH RESPONDENT

AND

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS INTERESTED PARTY

NATIONAL COHESION AND INTEGRATION COMMISSION ... INTERESTED PARTY

RULING

1. The petitioner moved this court via a petition filed alongside a notice of motion all dated 25.09.2025. The petition sought for the following reliefs:
 - i. A declaration that the practice of appointing members of the Wajir County Public Service Board in a manner that allocates more than one –third of the positions to any one community



is discriminatory, unconstitutional, illegal and in violation of articles 10,27,56 and 232 of the constitution and section 7 of the National Cohesion and Integration Act.

- ii. A declaration that the selection panel for the Wajir County Public Service Board has failed to act with the requisite independence and impartiality, thereby acting in a manner inconsistent with the constitution and the County Governments Act.
 - iii. An order of prohibition restraining the 1st, 2nd and 3rd respondents from constituting or appointing members of the Wajir County Public Service Board in a manner that allocates more than one third of the positions to any single community.
 - iv. An order of stay suspending and/or staying the current recruitment and appointment process initiated in September 2025, pending the hearing and determination of this petition.
 - v. An order of mandamus compelling the 1st, 2nd and 3rd respondents to commence a fresh, transparent and inclusive recruitment and appointment process for the Wajir County Public Service Board in full compliance with the constitution, the County Governments Act and the NCIC Act.
 - vi. An order that the costs of this petition be borne by the 1st, 2nd and 3rd respondents.
 - vii. Any other orders that this Honourable Court may deem fit to grant to secure the ends of justice, constitutionalism and inclusivity in Wajir County.
2. On the other hand, the notice of motion contemporaneously filed with the petition sought for orders as follows:
- i. Spent.
 - ii. Pending the hearing and determination of this application inter partes, an interim order of stay be issued suspending the recruitment and appointment process for members of the Wajir County Public Service Board initiated through the advertisement of September, 2025.
 - iii. A conservatory order be issued restraining the 1st, 2nd and the 3rd respondents whether by themselves, their agents or anyone under their authority from continuing with, concluding or otherwise making any appointments to the Wajir County Public Service Board pending the hearing and determination of the petition.
 - iv. An order of prohibition be issued restraining the 1st, 2nd and the 3rd respondents from constituting or appointing members to the Wajir County Public Service Board in a manner that allocates more than 1/3rd of the positions to any one clan or community pending the hearing and determination of the petition.
 - v. The costs of this application be provided for.
3. The crux of the matter herein is the fact that the petitioner /applicant is not happy with the fact that there is an ongoing process of recruitment and appointment of members of the Wajir County Public Service Board. That the process threatens to perpetuate discriminatory and unconstitutional practices that have been a hallmark of the previous appointments.
4. That the process is laced with contravention of the provisions of the constitution leading to systemic exclusion and marginalization of other clans and communities. It appears like the alleged history of the respondents in the process of employing its members is what informed the filing of the instant application and petition.



5. As a response, the 1st and 2nd respondents filed a notice of preliminary objection dated 01.10.2025 grounded on following:
 - i. That the issues raised for determination do not fall within the purview of article 165(3) of *the constitution* of Kenya 2010 as it relates to the process of nomination and appointment of members of the County Public Service Board of Wajir which is a constitutional issue closely connected to labour relations and therefore this Honourable Court lacks jurisdiction to hear and determine this application and petition.
 - ii. That this matter falls within the purview of article 162(2) of *the constitution* of Kenya 2010 as read together with section 12 of the *Employment Act*,2007 which gives the Employment and Labour Relations Court the jurisdiction to determine the application and petition herein and issue or decline the orders sought as this is a dispute relating to the intended nomination and subsequent appointment of members to the County Public Service Board Wajir.
 - iii. That the Supreme Court in the case of Kenya Tea Growers Association & 2 Others v The National Social Security Fund of Trustees & 13 Others, Petition E004 & E002 of 2023 – consolidated- [2024] KESC 3 (KLR) (21 February 2024) (Judgment) adopted a wholistic interpretation of section 12(2) of the *Employment Act* in finding that the Employment and Labour Relations Court has jurisdiction to determine disputes arising from the application of a statute that affects labour rights and relations notwithstanding the fact that there was no strict employer relationship between the parties.
 - iv. That by choosing to file the pleadings in this court, the petitioner/applicant misapprehended the provisions of the law and therefore the proceedings commenced herein have been rendered a nullity.
 - v. That owing to the foregoing, the petition and notice of motion application dated 25.09.2025 should be struck out with costs to the 1st and 2nd respondents.
6. Noting that this court's jurisdiction was challenged, the court directed that the notice of preliminary objection be heard first by way of written submissions.
7. The 1st – 3rd respondents filed submissions dated 18.10.2025 arguing on two issues as follows:
 - i. Whether the preliminary objection is competent?
 - ii. Whether this court has the jurisdiction to determine the issues raised in the petition and application.
8. Counsel urged in regards to the first issue thereby contending that the question of jurisdiction is purely an issue touching on point of law and thus can be properly invoked in a preliminary objection. To that end, reliance was placed on the case of Mary Wambui Munene v Peter Gichuki Kingara & 6 Others, Petition No. 7 of 2013 where the Supreme Court held that jurisdiction is a pure question of law and should be resolved on priority.
9. It was further urged that the jurisdiction of this court is embedded on article 165 of *the constitution* and further, clause 5 of the said article provides that this court shall not have jurisdiction in respect of matters reserved for the exclusive jurisdiction of the Supreme Court under *the constitution* and further, matters falling within the jurisdiction of the courts contemplated under article 162(2) of *the constitution*.



10. It was contended that the issues raised in both the petition and the application relate to the process of nomination and appointment of the member of the County Public Service Board which is a constitutional issue but related to labour issues. That the foregoing was relevant for the reason that the petitioner/applicant has questioned the recruitment process, That the court would thus have to interrogate the entire selection process including advertisement requirements, application forms and even interview score sheets, an exercise which is within the scope of employment. To support the foregoing, reliance was placed on section 5(8) of the Employment Act which defines employment policy or practice to include:
- “ any policy or practice relating to recruitment procedures, advertising and selection criteria, appointments and the appointment process..”
11. Learned counsel submitted that it has now been settled that it is not only disputes which emanate from an employee - employer relationship that can be determined by an Employment and Labour Relations Court. That the Supreme Court in the case of National Social Security Fund Board of Trustees v Kenya Tea Growers Association & 14 others Civil Appeal No. 656 of 2022 [2023] KECA 80 (KLR) held that the employment and labour relations court had jurisdiction to entertain the question as to the constitutionality of the NSSF Act as it was an employment related issue.
12. Further, that section 12 of the Employment and Labour Relations Act expounds the jurisdiction of the Employment and Labour Relations court which sets out a non – exhaustive list of the various kinds of disputes that should be determined by the court. In the end, this court was urged to down its tools as it lacked the requisite jurisdiction to handle the suit herein.
13. The petitioner/applicant filed submissions dated 20.10.2025 thus distilling the following issues for determination:
- i. Has the threshold for a preliminary objection been met?
 - ii. Do the issues raised for determination fall within the purview of article 165(3) of the constitution of Kenya 2010?
 - iii. Does this matter fall within the jurisdiction of the Employment and Labour Relations Court to determine the application and petition herein and issue or decline the orders sought?
 - iv. Whether the matter at hand raises any employer-employee relationship between the parties?
14. On whether the threshold for a preliminary objection had been met, the petitioner/applicant relied on the case of Samuel Waweru v Geoffrey Muhoro Mwangi [2014] eKLR where the court relying on the case of Mukhisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1996) EA 696 defined a preliminary objection as follows:
- “So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings, and if argued as a preliminary point may dispose of the suit.”
15. That a preliminary objection ought to be raised only on a point of law which when argued successfully disposes the suit in entirety. That the averments by the 1st – 3rd respondents require further interrogation to determine the question of authenticity and therefore the same cannot fall under the purview of preliminary objection. Additionally, that section 162(2) of the constitution as read together with section 12 of the Employment Act 2007 does not apply in this case since the petitioner is not an employee of the 1st – 2nd respondents.



16. That the petitioner/applicant's concern is the discriminatory practices perpetuated by the 1st – 3rd respondents aimed at excluding minorities and marginalized communities from the affairs of the county. It was urged that the petition is hinged on the alleged violations of the rights of the minorities and marginalized communities and the same was buttressed by the provision of article 56 of *the constitution* which urges that a state shall put in place affirmative action programs designed to ensure that minorities and marginalized groups access employment.
17. On whether the petition falls under the purview of article 165(3) of *the constitution*, counsel urged that the petition challenges the unconstitutional process of nomination and intended appointment of members to the Wajir County Public Service Board. That the petition simply raises pure constitutional issues concerning inclusivity, equality, fairness, representation and the rule of law in all public appointments, which fall squarely within the jurisdiction of this Honourable Court. To that end, reliance was placed on article 22 of *the constitution* which provides for enforcement of rights and further, article 165(3) which establishes the jurisdiction of this court. Further, reliance was placed on the case of *Okiya Omtatah Okioti and 2 Others v Attorney General & 3 Others* [2014] KEHC(KLR) where the court held that:
- ‘The court reaffirmed the High court’s jurisdiction by stating that *the constitution* is thus clear and grants every citizen a right of access to the High Court where there is an allegation of infringement of *the constitution*’.
18. On whether the issue in question falls within the purview of the Employment and Labour Relations Court, this court was urged that the jurisdiction of such courts is limited to disputes arising from employment relationships and labour rights, not constitutional challenges to the exercise of public power or composition of public institutions.
19. That the petition herein is not by any way related to employer – employee relationship and therefore the right court to hear the suit is this court. Further, that the petitioner/applicant is not a candidate seeking employment and that he is simply a citizen questioning the state’s compliance with *the constitution* in its conduct. Reliance to support the foregoing was placed on the case of *Nick Githinji Ndichu v Clerk Kiambu County Assembly and Another* [2014] eKLR where the court held that:
- “For one to access the jurisdiction at ELRC, he must demonstrate that there exists an employer – employee relationship; that there is an oral or written contract of service or that the issue as a dispute falls within the provision of section 12(1) of the ELRC Act.”
20. On the last issue, counsel argued that this suit does not elicit any issue related to employer – employee relationship. That the matter simply challenges the constitutionality and legality of the nomination and intended appointment of members to the Wajir county Public Service board on grounds of exclusion, discrimination and violation of constitutional principles of equality and inclusivity. Counsel urged that this court by dint of article 165 is possessed of jurisdiction to entertain this suit. Additionally, Counsel relied on the case of *Daniel N. Mugendi v Kenyatta University & 3 Others* [2013] KECA 41 (KLR) where the Court of Appeal held that:
- “In endeavouring to meet the ends of justice untrammelled by procedural technicalities, we set aside the order striking out the appellant’s petition and direct the High Court do transfer it to the Industrial Court which also has jurisdiction and authority to consider the claims of breach of fundamental rights as pertains to Industrial and Labour matters...”
21. In the end, counsel urged this court to dismiss the preliminary objection and issue the prayers sought.



22. The other parties did not file their submissions in canvassing the preliminary objection herein.
23. The Court has carefully read and considered the preliminary objection and the response thereof. The only issue that germinates for determination is; whether this Honourable Court is endowed with the jurisdiction to hear and determine the suit herein.
24. A preliminary objection was clearly defined in the case of I.N. & 5 others v Board of Management St G. School Nairobi & another (2017) eKLR where it was stated: -

“Definition of a preliminary objection

7. I find it necessary to define what constitutes a preliminary objection on a point of law. A preliminary objection must first, raise a point of law based on ascertained facts and not on evidence. Secondly, if the objection is sustained, that should dispose of the matter. A preliminary objection is in the nature of a legal objection not based on the merits or facts of the case, but must be on pure points of law.
 8. It may be noted that preliminary objections are narrow in scope and cannot raise substantive issues raised in the pleadings that may have to be determined by the court after perusal of evidence. Understanding the nature and scope of preliminary objections is very important for practicing lawyers. Knowing how to raise a properly formulated preliminary objection, and when to raise it, can save a lot of time and costs. [Also See Mukisa Biscuit Manufacturers Ltd v Westend Distributors Ltd [1969] EA 969].
25. Thus, a preliminary objection may only be raised on a “pure question of law.” To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.
 26. It is trite that a Court is bound to entertain proceedings that fall within its jurisdiction. Therefore, jurisdiction is determined on the basis of pleadings and not the substantive merits of the case. The South African Constitutional Court In the matter between Vuyile Jackson Gcaba v Minister for Safety and Security First & Others Case CCT 64/08 [2009] ZACC 26] had this to say:

“Jurisdiction is determined on the basis of the pleadings... and not the substantive merits of the case... In the event of the Court’s jurisdiction being challenged at the outset (in limine), the applicant’s pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court’s competence. While the pleadings – including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant’s claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognizable only in another court. If however the pleadings, properly interpreted, establish that the applicant is asserting a claim ..., one that is to be determined exclusively by.....{another court}, the High Court would lack jurisdiction...”
 27. It is not in dispute that the petitioner is challenging the process of appointing members to the Wajir County Public Service Board. According to him, the said appointment threatens to perpetuate gross violation of the minority and marginalized clans’ rights. That the board has systemically been allocating



a disproportionate number of slots in the Board to one clan thereby denying the petitioner/applicant's clan equal opportunity in public employment.

28. In further support of his case, the petitioner/applicant has been categorical that there exists no element of employer – employee relations to warrant this court down its tools. That to the contrary, the issues raised in this suit are constitutional in nature.
29. The 1st - 3rd respondents on the other hand urged this court to down its tools for lack of jurisdiction to entertain this matter. That in as much as the petitioner/applicant urges that the issues herein are constitutional in nature, the Labour Court is equally endowed with the jurisdiction to entertain such issues.
30. The jurisdiction of the High Court is provided for in Article 165(3) of *the Constitution*
- (3) Subject to clause (5), the High Court shall have—
- a. unlimited original jurisdiction in criminal and civil matters; thus:
 - b. jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
 - c. jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
 - d. jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
 - i. the question whether any law is inconsistent with or in contravention of this Constitution;
 - 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. any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
 - iv. a question relating to conflict of laws under Article 191;
31. Further, article 165(5) of *the Constitution* is however explicit that:
- (5) The High Court shall not have jurisdiction in respect of matters—
- a. reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or
 - b. falling within the jurisdiction of the courts contemplated in Article 162 (2). Article 162(2)
32. For avoidance of doubt, I wish to reproduce Article 162.
- (1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the Courts referred to in clause (2).
- (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—
- (a) a) employment and labour relations; and



- (b) b) the environment and the use and occupation of, and title to, land.
- (3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).

33. In addition to the above, severally, our courts have identified the correct approach to determine the appropriate superior court to hear such hybrid cases. I say so for the reason that it is not to be denied that the suit herein in as much as it questions the recruitment process, the same is hinged on whether the same is constitutional. Courts have resolved the issue by inquiring what the most substantial or predominant question or issue presented in the controversy or dispute.

34. In the case of *Suzanne Achieng' Butler & 4 Others v Redhill Investments & Another* [2016] KEHC 1313 (KLR) the Court stated the test in the following words:

“When faced with a controversy whether a particular case is a dispute about land (which should be litigated at the ELC) or not, the Courts utilize the Pre-dominant Purpose Test: ... Ordinarily, the pleadings give the Court sufficient glimpse to examine the transaction to determine whether sale of land or other services was the predominant purpose of the contract. This test accords with what other Courts have done and therefore lends predictability to the issue”.

35. It follows that the main issue in contention more so according to the petitioner/applicant's pleadings, is the recruitment and/or appointment of persons to the Board. From the foregoing, it is my understanding that the process of recruitment and /or employing members to the Board falls more under the court as provided for under article 162(2) (a) being the Employment and Labour Relations Court.

36. This is further buttressed by the fact that the petitioner/applicant alleges direct discrimination of the respondents in recruiting and/or employing only members of a particular clan or community. Section 5(8) of the *Employment Act* provides that:

- (7). in any proceedings where a contravention of this section is alleged, the employer shall bear the burden of proving that the discrimination did not take place as alleged, and that the discriminatory act or omission is not based on any of the grounds specified in this section.
- (8). For the purposes of this section—
 - (a) ...
 - (b) ...
 - (c) an “employment policy or practice” includes any policy or practice relating to recruitment procedures, advertising and selection criteria, appointments and the appointment process, job classification and grading, remuneration, employment benefits and terms and conditions of employment, job assignments, the working environment and facilities, training and development, performance evaluation systems, promotion, transfer, demotion, termination of employment on disciplinary measures.



37. In the case of *Okiya Omtatah v Joseph Kinyua & Another* [2018] eKLR, in which the issue arose as to whether that court had the jurisdiction to entertain a dispute involving the interpretation of *the Constitution*, it was held that:

“...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’.

38. From the above case law, it is clear that Parliament was very clear that disputes arising from the exercise of the matters of employment are to be appealed and/or filed in the Employment Court and not this Court. In as much as the petitioner/applicant urged that the issues in the suit herein related to enforcement of bill of rights as stipulated under articles 10, 22, 27 and 232, it is important to note that the said court under article 162 equally has jurisdiction to deal in issues of enforcement of the said constitutional rights.

39. I equally note that the petitioner/applicant also urged that should this court be of the view that the issues herein fall in the purview of the Employment and Labour Relations Court, then this court be pleased to transfer the same to such court in Garissa. From the foregoing, the question that I ask myself at this juncture is whether this court has the capacity to transfer the suit herein to the court with the requisite jurisdiction. And in answering the same, I rely on the case of *Republic v Commissioner for Labour & another; Masoud (Exparte Applicant)* (Judicial Review Application E008 of 2024) [2025] KEHC 7325 (KLR) (16 May 2025) (Judgment) where the Court held that

“ 20. It is clear from the foregoing that the claim by the respondent was filed before a court devoid of jurisdiction. The suit was a nullity ab initio and was not transferable to another court; jurisdiction cannot be conferred by consent and ultimately, all orders emanating from that suit are null and void. CIVIL APPEAL NO. 6 OF 2018 Phoenix East Africa Assurance Co. Ltd v. S.M. Thiga t/a Newspapers Services is therefore a nullity as it was based on a nullity.”

40. It shouldn't be lost that courts are bound by the mandate of the legislature and once a court finds that it lacks the requisite jurisdiction to deal in a matter, then the proper thing to do is to down its tools which I hereby do. See *Owners of Motor Vessel Lillian S v Caltex Oil Limited (Kenya) LTD* (1989)KLR”.

41. As a consequence of the above;

- i. The notice of preliminary objection dated 01.10.2025 is found meritorious and the same is hereby upheld.
- ii. The petition together with notice of motion all date 25.09.2025 are hereby struck out for lack of jurisdiction.
- iii. This being a matter of public interest, each party shall bear own costs.
- iv. Interim Orders herein are hereby limited.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 30TH DAY OF OCTOBER 2025

.....

J. N. ONYIEGO

JUDGE

