

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT KAKAMEGA
JUDICIAL REVIEW NO. E006 OF 2025

REPUBLICAPPLICANT

-VERSUS-

PUBLIC SERVICE COMMISSION1ST RESPONDENT

REGIONAL COMMISSIONER2ND RESPONDENT

DCC NAKAKOHOLO3RD RESPONDENT

JOHN ANDATI BARASAINTERESTED PARTY

EX PARTE APPLICANTS

SAMUEL AMAMBIA

WYCLIFFE ASHUMMA

ERICK MUKOYA

HUMPHREY AMBINDO

MILDRED TABITHA NYONGESA

(BEFORE HON. JUSTICE DAVID NDERITU)

RULING

I. INTRODUCTION

1. On 12th June 2025 the ex-parte applicants (the applicants) were granted leave to commence judicial review proceedings against the respondents seeking for various orders.

2. Pursuant to the leave, the applicant filed a notice of motion (the application) dated 19th June 2025 through Marisio Luchivya & Co Advocates, seeking for the following orders –

1. THAT a prerogative order of certiorari do issue to bring into this court and quash the decision of the 1st respondent, on the recommendation of the 2nd and 3rd respondents, based on the interviews held on 6/10/2023, appointing the interested party vide the letter dated 19/2/2025 and as admitted by the interested party in his submissions in Kakamega Constitutional Petition No. E008/2025 the assistant chief of Matina sub location.

2. THAT a prerogative order of mandamus do issue directed at the respondents to produce the merit list of candidates who participated in the interviews conducted on 6/10/2023.

3. THAT upon production of the merit list aforesaid in paragraph 2 above the 1st respondent be directed by an order of mandamus to appoint the 2nd best candidate from candidates who participated in the interviews of 6/10/2023 as the Assistant chief Matiha sub location.

4. THAT costs hereof be provided for.

3. The application does not indicate the provisions of the law upon which it is found. However, the same is based on the grounds on the face of the application and supported with a statement of facts and an

affidavit sworn by Samuel Elondanga Amambia, one of the ex-parte applicants, on 19th June 2025 with several annexures thereto.

4. Upon service, only the 1st and 4th respondents responded to the application. The 4th respondent, through D. A. Omwenga & Co Advocates, filed a notice of preliminary objection (PO) dated 16th July 2025 to the effect that this court lacks the jurisdiction to hear and determine the matter on the grounds stated therein. The 4th respondent also filed a replying affidavit to the application sworn by himself on 3rd September 2025.
5. Although the 1st respondent appeared in court through Miss Wangechi Advocate, no papers were placed in the physical file on the appointment of counsel or response to the application.
6. On 22nd September 2025 the court directed that the PO be disposed of first and that the same be canvassed by way of written submissions. Miss Wangechi for the 1st respondent indicated that her client did not wish to participate in the PO and that she did not wish to submit on the PO.
7. Counsel for the 4th respondent Mr. Omwenga filed written submissions dated 24th September 2025 while Miss Ihachi for the applicants filed submissions dated 15th October 2025.
8. This ruling is thus in regard to the PO as filed and argued by the 4th respondent and opposed by the applicants.

II. THE GIST

9. In summary, the applicants' case is that the 4th respondent is illegally and unlawfully executing the duties of assistant chief of Matiha Sub-Location. The applicants participated in the interviews held on 6th October 2023 after which the interested party was appointed to the foregoing position vide a letter of 24th January 2024. The applicants challenged the appointment vide ELRC Kakamega JR E001 of 2024 on the basis that the interested party had not attained the mandatory age of 30yrs for appointment to the position. The appointment was subsequently rescinded.
10. It is the applicants' case that upon the withdrawal of the appointment they expected another of the interviewees to be appointed to the vacancy or at the very least new interviews conducted. However, neither of the above happened and the 1st respondent reappointed the interested party to the same position vide a letter dated 19th February 2025, purportedly based on the interviews held on 6th October 2023.
11. It is the applicants' case that they have challenged the appointment of the interested party not only in *ELRC Kakamega JR E001 of 2024* but also in Constitutional *Petition EOO8 of 2025* that is pending in the same court. It is stated that the appointment of the interested party to the position is illegal and unconstitutional. In particular, it is stated that the appointment offends *Articles 23, 35, 47, 165, and 232 of the Constitution* as the interested party was unqualified for the

position *ab initio*.

12. In the filed replying affidavit, the interested party stated that he attended the interview on 6th October 2023 and subsequently he was appointed and issued with a letter of appointment dated 1st February 2024 and commenced duty on 6th February 2024.
13. It is deposed that the appointment was withdrawn after the same had been challenged vide ***ELRC Kakamega JR E001 of 2024***. However, he allegedly appealed the withdrawal of the letter of appointment to the 1st respondent on 29th April 2024. He was allegedly reinstated to the position in a decision made by the 1st respondent on 11th February 2025.
14. It is further deposed that instead of filing this matter in court, the applicants ought to have challenged his reinstatement as provided for in law. It is thus stated that this court lacks the jurisdiction to hear and determine the subject matter.

III. SUBMISSIONS BY COUNSEL

15. It is on the basis of the foregoing dispositions that the 4th respondent filed the PO dated 16th July 2025 raising the following issues –

- 1. THAT this honourable court does not have jurisdiction to hear and determine this matter.***
- 2. THAT this honourable court does not have jurisdiction to entertain the application herein by dint of Articles 162(1), (2)***

(a) and 3 as well as Articles 165 (5) (b) of the Constitution of Kenya, 2010.

- 3. THAT this honourable court does not have jurisdiction to entertain this matter by dint of Section 12(1), (2)(a)-(f) of the Employment and Labour Relations Court Act.*
- 4. THAT the Supreme Court in Odongo v Clerk, Nakuru County Assembly & 5 others (Application E053 of 2034) (2024) KESC 29 (KLR) (Civ) (28 June 2024) (Ruling) decided that the jurisdiction of the Employment and Labour Court is only limited to employment disputes between an employer and employee(s).*
- 5. THAT issues raised in the application dated 19th June 2025 herein are sub-judice as there is a similar matter that was heard and determined in respect of the same parties through a ruling dated 30th April 2024 in the Employment and Labour Relations Court at Kakamega, ELRC JUDICIAL REVIEW NO. 001 OF 2024 by Lady Justice J. W. KELI, the copy of the said ruling is attached in the applicant's application dated 19th June 2025.*
- 6. THAT the instant application is sub-judice since there is an existing matter between the applicants and the respondents herein Petition No. E008/2025.*
- 7. THAT the application herein is therefore misconceived, bad*

in law, scandalous, frivolous, vexatious, unsubstantial, ill-advised, an abuse of the court process and ought to be dismissed with costs.

16. In his submissions, counsel for the 4th respondent stated that the 4th respondent was appointed the assistant-chief of Matiha Sub-location vide a letter of appointment dated 1st February 2025 and started working as such on 6th February 2025. His appointment was challenged by the applicants herein vide ***ELRC Kakamega E001 of 2024*** but the same was later on withdrawn. The withdrawal of the same was precipitated by the withdrawal of the letter of appointment of the 4th respondent by the 3rd respondent herein.
17. It is submitted that the 4th respondent appealed the revocation of his appointment by the 3rd respondent to the 1st respondent, the Public Service Commission (the Commission).
18. It is submitted that on 11th February 2025 the Commission decided to reinstate the 4th respondent vide a letter of even date.
19. With the above background, counsel for the 4th respondent isolated the following issues for determination by the court -
 - a) *Who are the applicants herein?*
 - b) *Whether there is an employment relationship between the applicants herein and the 1st, 2nd and 3rd respondents herein.*
 - c) *Whether the applicants herein have got the locus standi to institute the instant application in view of Articles 162 of the*

Constitution of Kenya, 2010 as read with Section 12 of the ELRC Act.

d) Whether this honourable court has jurisdiction to hear and determine this matter.

e) Who bears the costs of this suit?

20. On the first and second issues, it is submitted that the applicants, just like the 4th respondent, were only interviewees for the vacancy and are thus neither employees nor employers of the respondents or any of them or at all and hence the cause herein is improperly before the court and without any legal basis or foundation.
21. On the third issue, it is submitted that the applicants herein lack the locus to file the claim based on ***Section 12 of the Employment and Labour Relations Court Act***. In support of this argument counsel cited ***Odongo V Clerk, Nakuru County Assembly & 5 Others (2024) KESC 29 (KLR)*** and ***Attorney General V Okiya Omtata Okiiti & 14 Others (2020) eKLR***.
22. On the fourth issue, it is submitted that this court lacks jurisdiction to entertain the matter and should down its tools at this point based on the PO. In support of this argument counsel cited ***Samuel Kamau Macharia & Another V Kenya Commercial Bank Limited & 2 Others (2012) KESC 8 (KLR)*** and ***Public Service Commission & 4 Others V Cheruiyot & 20 Others (2022) KECA 14 (KLR)***.
23. Further, counsel cited ***Republic V Karisa Chengo & Another (2017)***

eKLR in delineating the jurisdiction of this court as opposed to that of the other courts of equal status.

24. For the foregoing reasons, counsel for the 4th respondent urged the court to dismiss the entire proceedings with costs.
25. On the other hand, counsel for the applicants submitted that based on ***Mukisa Biscuits Manufacturing Co. Ltd V West End Distributors Ltd (1969) EA 696***, grounds 1, 2, 3, 5, 6, & 7 do not fit into the realm of preliminary objection.
26. It is submitted that the reason for the objection to the appointment of the 4th respondent into the vacancy, and this formed the basis for the filing of ***JR E001 of 2024***, is that he had not attained the mandatory age of 30yrs as at the time of the interview and appointment. It is further submitted that the appointment was withdrawn and hence the proceedings in the above matter were withdrawn.
27. However, without the calling of other interviews, the 1st respondent reappointed the 4th respondent into the position vide a letter dated 11th February 2025 thus provoking the applicants into filing the instant proceedings.
28. It is submitted that upon the cancelation of the appointment of the 4th respondent, the law, reason, and logic demanded that new interviews be called and conducted or another of the interviewed candidates be appointed into the vacancy.
29. It is submitted that this court has jurisdiction over the subject matter.

It is submitted that the applicants have approached the court under **Articles 1, 3, 22, and 258 of the Constitution** and that their constitutional rights cannot be restricted by **Section 12 of the Employment and Labour Relations Court Act**. It is submitted that except for employment in elective positions, all employment disputes are subject to the jurisdiction of this court. It is further submitted that employment is a process and hence declaration of vacancies, advertisement, interviewing, recruitment, and appointment may be challenged in this court at any point of the process.

30. It is thus submitted that the applicants having taking part in the interviews for the vacancy and further to them being residents of Matiha Sub-location, they do have a legitimate locus to challenge the appointment of the 4th respondent into the impugned position.

31. The court is urged to dismiss the PO with costs.

IV. ISSUES FOR DETERMINATION

32. The fundamental facts in this matter are rather straight-forward. The applicants and the 4th respondent were interviewees for the vacancy in the office of the assistant chief of Matiha Sub-Location in the interviews conducted on 6th October 2023. The 4th respondent was subsequently appointed to the position but the appointment was rescinded after the applicants challenged the same on the basis that the 4th respondent had not attained the mandatory age of 30yrs as at

the time of the interviews. It is the 4th respondent's case that he appealed the withdrawal of the appointment to the 1st respondent and that he was thereafter reappointed in February 2025 and has since taken the duties and roles of that office.

33. It is the 4th respondent's argument, as raised in the PO, that this court lacks jurisdiction over the subject matter as there is no employment relationship between the applicants and the respondents.
34. It is the applicants' case that having been candidates for the vacancy and having taken part in the interviews they are entitled to challenge the appointment of the 4th respondent as the same is illegal and unlawful as he was not qualified to take part in the interviews as he was not of age.
35. In the considered view of the court the following issues commend themselves to the court for determination –
 - a) ***Is the subject matter of these proceedings within the jurisdiction and purview of this court?***
 - b) ***Costs.***

V. JURISDICTION

36. A court that proceeds without jurisdiction labours in vain. The pronouncements by Nyarangi JA in ***Owners of Motor Vessel "Lilian S" V Caltex Oil (Kenya) LTD*** hold true to this day. Many other decisions have come up thereafter expounding on that position while

maintaining the rationale of that landmark holding. For example, the Supreme Court in ***Samuel Kamau Macharia & Another V Kenya Commercial Bank LTD & Another (supra)*** affirmed that same position.

37. It is on the basis of the foregoing that the issue of jurisdiction as raised by the 4th respondent in the PO and the submissions by his counsel must be tackled as a preliminary issue. It is argued that the applicants have not established an employer-employee between them and any of the respondents and hence the subject matter does not fall within the jurisdiction of this court (ELRC) as envisaged in ***Article 162(2)(a) of the Constitution*** and ***Section 12 of the Employment and Labour Relations Court Act***.
38. In my considered view, counsel for the 4th respondent misapprehended the jurisdiction of this court. While the above cited constitutional and statutory provisions somehow delineate the jurisdiction of the court, it does not limit on the persons that may file or present matters before the court in regard to the issues spelt out in the said provisions. Moreover, petitions and judicial review proceedings may be filed in the public interest by persons who are not parties to the employment relationship.
39. It is admitted that the 1st respondent was recruited into the impugned position and as at the time of filing of the proceedings herein he had been appointed to that position by the 4th respondent

vide a letter dated 1st February 2025. Surely, there is an employer-employee between the 4th and the 1st respondents and it is that process and the appointment that created the said relationship that is challenged by the applicants through these proceedings.

40. Furthermore, the applicants were interviewees, alongside the 4th respondent, for the vacancy and they had a lawful and legitimate interest in the outcome thereof alongside legitimate expectation that the recruitment and appointment process was to be fair, just, and lawful. This set of facts distinguishes this matter from those that obtained in *Odongo V Clerk Nakuru County Assembly & 5 Others (supra)*.
41. It is neither correct nor constitutional to restrict the jurisdiction of this court to only apply where there is an employer-employee relationship between the parties. In my considered view, and this does not in any way contradict any finding of any superior court, the recruitment process right from declaration of vacancies, shortlisting, interviewing, appointment, and even deployment are all matters employment and labour relations within the purview and jurisdiction of this court.
42. What the applicants are saying loudly, and this has so far not been disputed by the respondents, is that the 4th respondent had not attained the minimum mandatory age of 30yrs as at the time of the interviews. It is their case that no other interviews were ever

conducted and as such any subsequent appointment of the 4th respondent based on the said interview was null and void *ab initio*.

43. The issue in the above paragraph is not one that may be wished away. It does not matter that the 1st respondent may have okayed and or overlooked the issue. It is an issue that calls for interrogation and determination by the court. Deliberately or otherwise, the records of the alleged appeal by the 4th respondent to the 1st respondent and the alleged letter of reappointment are not on record. Interestingly, the 1st respondent decided not to take part in the PO proceedings.
44. It is important to note that two wrongs cannot make a right. Without prejudging the matter, if the 4th applicant was not qualified to take part in the interviews by virtue of inferior age, his subsequent attainment of the minimum age for the vacancy did not and cannot validate the initial error.
45. The 4th respondent alleged that the subject matter hereof is the same or similar to the subject matter in ***ELRC Kakamega Petition No. E008 of 2025*** that is pending before court. However, no supporting records or evidence has been availed to the court. The court is aware of the matter that is pending seeking for the commission to apply information on the process. That is not the subject matter hereof.
46. It is the finding and holding of this court that the subject issue(s)

raised in this matter falls squarely within its jurisdiction and purview as the same is challenging an employer-employee relationship and the process that created that relationship. This is the same view that was expressed in *Kenya Tea Growers Association & 2 Others V NSSF & 13 Others* and *London Distillers Kenya Limited & Another V Kenya Union of Commercial Food Allied Workers* amongst many other decisions.

47. Counsel for the 4th respondent appear to have taken a very narrow and restrictive interpretation of the law concerning the jurisdiction of this court. In my considered view, this court has jurisdiction in all matters relating to employment and labour relations and those incidental thereto – see the preamble to the *Employment Labour Relations Court Act*. Within the purview and jurisdiction of this court is not only the employment-employee relationship but also the recruitment process, selection, and the appointment. Further, in the foregoing context, it is not only the parties to such relationships or processes who can file or present a matter in court over the subject matter but also a public-spirited litigant.
48. In the circumstances, and for all the foregoing, the court returns that this matter is properly before the court and the same shall be considered and determined on merit. The PO as filed, presented, argued, and prosecuted is devoid of merits.

VI. ORDERS

49. The court makes the following orders –

- a) The preliminary objection by the 4th respondent is hereby dismissed for lack of merits.*
- b) Costs in the cause.*

**DELIVERED VIRTUALLY, DATED, AND SIGNED AT
KAKAMEGA THIS 15TH DAY OF JANUARY, 2026.**

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DAVID NDERITU
JUDGE