

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
CONSTITUTIONAL PETITION NO. E156 OF 2024

CLIFFORD ONYANGO ODHIAMBO.....
PETITIONER

VERSUS

ATTORNEY GENERAL.....1ST
RESPONDENT

SPEAKER OF NATIONAL ASSEMBLY.....
.....2ND RESPONDENT

KENYA LAW REFORM COMMISSION.....
.....3RD RESPONDENT

FEDERATION OF KENYA EMPLOYERS(FKE).....
4TH RESPONDENT

KENYA NATIONAL COUNCIL FOR CHILDREN'S
SERVICES.....5TH RESPONDENT

CS, MINISTRY OF LABOUR AND SOCIAL
PROTECTION.....6TH RESPONDENT

R U L I N G

Introduction

1. This matter comes up for the ruling in respect of the 1st Respondent's Notice of Preliminary Objection dated 3rd May 2024 to the Petition dated 19th March 2024 that challenges the constitutionality of Sections 55, 56, 57, 58, 59, 60, 61, 62, 63, 64 and 65 of the Employment Act together with Part

IV the Employment Act [Employment (General) Rules] and Section 18 of the Children Act, in relation to employment of persons under 18 years.

2. The Preliminary Objection is based on the grounds that:

- i. *This Court lacks jurisdiction to hear and determine the Petition herein because it relates to issues arising out of employment and labour relations by virtue of the provisions of Article 165 (5) of the Constitution which provides that ‘the High Court shall not have jurisdiction in respect of matters- (b) falling within the jurisdiction of the courts contemplated in Article 162 (2).’*
- ii. *Section 12 of the Employment and Labour Relations Act provides that the Employment and Labour Relations Court shall have original and appellate jurisdiction to hear and determine all dispute in accordance with Article 162 (2) (a) 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.*
- iii. *Section 12 (3) of the Employment and Labour Relations Act provides that the Employment and Labour Relations can issue prerogative orders, which provision if read together with the provisions of Article 162 (2) of the Constitution ousts the jurisdiction of this Court to hear and determine this case.*
- iv. *In the **Ali Jarso Wako & another vs. Ministry of Interior & Coordination of National Government & 5 others; Public Service Commission & 5 Others (Interested Parties) [2020] eKLR** where it was held that:*

“The issue of jurisdiction is quite crucial in that it avoids the hearing and determination of cases by superior courts haphazardly. Issue relating to recruitment and employment of public servants or any employee belong to the Labour court. Any Constitutional issue revolving around employment or recruitment of an employee has to be dealt by the Labour Court. We cannot have Constitutional issue relating to employment or recruitment dealt by the High court and thereafter refer the other issues in the same dispute to the Labour Court.”

Parties Responses

3. The other Parties responses and submissions to this Preliminary Objection are not in the Court file or in the Court Online Platform (CTS), save for the Petitioner’s and 2nd Respondent’s submissions.

Petitioner’s Submissions

4. The Petitioner through Clifford Odhiambo and Company Advocates filed submissions dated 3rd May 2024 in opposition to the 1st Respondent’s Notice of Preliminary Objection. Counsel set out the key issues as: *whether this Petition raises constitutional issues, whether this Court has jurisdiction to determine a Petition that raises more than one constitutional matter and whether this Court should dismiss the Petition or transfer it to the Employment and Labour Relations Court.*
5. On the first issue, Counsel submitted that the Petition does not raise employment issues as alleged. Instead the Petition

concerns interpretation of the Constitution and determination of the question whether the Employment Act and Children Act are inconsistent with the Constitution. Counsel noted that this is a question which the Employment and Labour Relations Court does not have jurisdiction to determine. Further, that the Petition is filed in public interest in regard to all the children of Kenya. Reliance was placed in **Sollo Nzuki v Salaries and Remuneration Commission & 2 others [2019] eKLR** where the Court held that:

“The jurisdiction of the Court to invalidate laws that are unconstitutional is in harmony with its duty to be the custodian of the Constitution, which pronounces its supremacy at Article 2.”

6. In view of this, Counsel submitted that this Court has the requisite jurisdiction to entertain this matter as the Petition does not specifically deal with employment matters. Counsel added that if at all the Petition revolved around labour relations as provided under Article 41 of the Constitution as read with Section 12 of the Employment and Labour Relations Act, then it would be apparent that jurisdiction belongs to the Employment and Labour Relations Court. In sum, Counsel highlighted that this Petition specifically concerns:

- a) *It raises concerns regarding specific provisions of the Employment Act that violate the rights of children under the Bill of Rights, more so their rights under Article 43 (1) (f) as read with Article*

53 (1) (b) of the Constitution, their rights under Article 31 regarding forced labour, Article 29 on treatment in cruel, inhuman or degrading manner, Article 25 of the Constitution on freedom from slavery/servitude, inhuman or degrading treatment, etc. Ultimately it seeks that the infringing provision of the Employment Act be declared unconstitutional.

- b) It also raises concerns with specific provisions of the Children Act which it argues violates the rights of children under the Bill of Rights such as Article 43 (1) (f) as read with Article 53 (1) (b) of the Constitution, their rights under Article 31 regarding forced labour, Article 29 on treatment in cruel, inhuman or degrading manner, Article 25 of the Constitution on freedom from slavery/servitude, inhuman or degrading treatment, etc. Likewise, it seeks to have those provisions of the Children Act declared unconstitutional;*
- c) It seeks to have the International Labour Organization (ILO) C138 Minimum age Convention, 1973 (as known as the ILO Minimum age Convention of 1973 unconstitutional as it violates and/or threatens the fundamental rights and freedoms of children as guaranteed in the Bill of Rights of the Constitution of Kenya more so Article 43 (1) (f) as read with Article 53 (1) (b) of the Constitution.*
- d) It laments that the exercise and/or failure to exercise the powers bestowed upon the Cabinet Secretaries responsible for matters relating to children affairs and education under section 18 (4), (a) and (b) of the Children Act No.29 of 2022 risk exposing children to the threat of their rights under Article 53 of the Constitution.*

7. On the second issue, Counsel submitted that Courts have determined that it would be absurd for a party to file separate suits in relation to various issues raised such as in this Petition. Reliance was placed **Wycliffe Amukowa & 2 others v Machakos University [2022] eKLR** where it was held that:

“In my view the matters which fall within the ambit of Article 162(2) of the Constitution must be matters within the exclusive jurisdiction of the said specialized Courts. However, where the matters raised fall both within their jurisdiction and outside, it would be a travesty of justice for the High Court to decline jurisdiction since it would mean that in that event a litigant would be forced to institute two sets of legal proceedings. Such eventuality would do violence to the provisions of Article 159 of the Constitution.”

8. Similar reliance was based on **Nairobi High Court Petition No. 613 of 2014 - Patrick Musimba vs. The National Land Commission and Others.**
9. Counsel submitted nonetheless that the Petitioner and Respondents do not have an employer-employee relationship, thus the Petition does not fall within Section 12 of the Employment and Labour Relations Act hence the Preliminary Objection is unmerited.
10. In support of this submission, Counsel cited the case of **Law Society of Kenya v Federation of Kenya Employers [2021] eKLR** where it was held that:

“the jurisdiction to do so is confined to matters falling within Article 41 of the Constitution as read with section 12 of the Employment and Labour Relations Court Act. The Court cannot therefore purport to entertain petitions outside the aforesaid matters as its jurisdiction is limited only in so far as employment matter and matters related thereto are concerned.... Accordingly, where the matters raised fall both within their jurisdiction and outside, it would be a travesty of justice for the High Court to decline jurisdiction since it would mean that in that event a litigant would be forced to institute two sets of legal proceedings.”

11. On the same issue, the Petitioner relied on **Patrick Musimba** (supra), **Mohamed Ali Baadi and others v Attorney General & 11 others [2018] eKLR** and **Suzanne Achieng Butler & 4 others v Redhill Heights Investments Limited & another [2016] eKLR**.

12. On the final issue, Counsel urged that if at all this Court finds that it lacks jurisdiction to entertain the matter, then the Petition should be transferred to the Employment and Labour Relations Court instead of it being dismissed. The case of **Wycliffe Amukowa & 2 others (supra)** was cited to buttress this point where it was held thus:

“It is my view that in the circumstances of this case, it would not advance the course of justice to terminate these proceedings. Since I am satisfied that the dispute can be properly dealt with by the ELRC, the order which commends itself to me and which I hereby make is that further proceedings in this petition will be undertaken by the ELRC since the said Court is a Court of equal

status as the High Court and is empowered to grant the reliefs sought herein.”

2nd Respondent’s Submissions

13. Suzanne L.M. Khadambi for the 2nd Respondent filed submissions dated 10th September in support of the Preliminary Objection. She identified two issues, namely; *whether the Preliminary objection is proper and whether this Court has jurisdiction to hear and determine the suit.*
14. On the first issue, she submitted that the Preliminary Objection is proper because it challenges this Court’s jurisdiction to hear and determine employment related constitutional issues. Reliance was placed in **Joho & another v Shahbal & 2 others [2014] KESC 34 (KLR)** where the Supreme Court echoed that:

“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... 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”.

15. She also relied on **Independent Electoral & Boundaries Commission v Cheperenger & 2 others [2015] KESC 2 (KLR)** to emphasize this point.
16. On the second issue, Counsel submitted that the proper forum for the resolution of the Petitioner's dispute is the Employment and Labour Relations Court. For this reason, Counsel stressed that this Court lacks jurisdiction to entertain this matter. To buttress this point reliance was placed in **Lemita Ole Lemein v Attorney General & 2 Others [2020] eKLR** where it was held that:

"In my view, jurisdiction is primordial and must exist right from the filing of a case to determination. The issue of jurisdiction need not be raised by the parties to a suit for the court to address its mind to it. It is incumbent upon every judicial or quasi-judicial tribunal or court to satisfy itself that it has jurisdiction to entertain a matter before settling down to hear it. In essence, therefore, a court or tribunal should not wait for a party to move it on the issue of jurisdiction for it to determine the issue. The Court can suo motu determine the issue even without being prompted by a party. Just like you cannot confer jurisdiction even by consent of the parties, you cannot confer jurisdiction by ignoring the issue or sidestepping it. It is omnipresent and cannot be wished away. Moreover, it being a point of law, the issue of jurisdiction can also be raised at any stage; in the trial court, first appeal or even on second or third appeal."

17. Further reliance was based on **United States International University (USIU) V Attorney General [2012] KEHC 5516 (KLR)** and **Macharia & another v**

Kenya Commercial Bank Ltd & 2 others [2012] KESC 8 (KLR).

18. Counsel argued that the Petitioner had framed the Petition as a constitutional matter yet a close scrutiny reveals that the core grievance relates to employment relationships, remuneration and fair labour practices, which are matters expressly reserved for determination by the Employment and Labour Relations Court in line with Article 162(2)(a) of the Constitution and Section 12(1)(a) of the Employment and Labour Relations Court Act. Counsel submitted that the issue of employment of minors is regulated under Sections 56 to 58 of the Employment Act. In light of this, Counsel concurred with the 1st Respondent that this Court lacks jurisdiction to entertain this matter.

Analysis and Determination

19. This Court finds that there is only one issue that arises for determination, which is:

Whether or not this Court has jurisdiction to entertain this matter.

20. As a starting point, is the question of threshold, that is, whether this preliminary objection meets the fundamental characteristics of a preliminary objection as set out by the Court of Appeal in **Mukisa Biscuit Manufacturing Co. Ltd**

vs West End Distributors Ltd [1969] EA 696. In the said case, the Court held thus:

“...a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit.”

21. The Court went further to note that

“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. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop.”

22. Further, the Court in **Oraro vs. Mbaja [2005] 1 KLR** on the nature of preliminary objections observed that:

“A preliminary objection is now well identified as and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection and yet it bears factual aspects calling for proof or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary objection anything that purports to be a preliminary objection must not deal with

disputed facts and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.”

23. The preliminary objection challenges the jurisdiction of the Court and is based solely on facts pleaded by the Petitioner, without contrary facts being introduced by the Respondent. If the objection succeeds, it would terminate the proceedings entirely, as the Court cannot adjudicate on merits of the case in absence of jurisdiction. I am therefore satisfied the Preliminary Objection raises a pure point of law and fulfils the technical requirements of such an objection.
24. I now turn to answer the core question, that is whether this Court has the requisite jurisdiction to entertain this Petition.
25. **Article 162(2)** of the Constitution provides as follows:
- 1) *The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts mentioned in clause (2).*
 - 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) *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).*

26. To give effect to this Article, the Parliament enacted the Employment and Labour Relations Act. Section 12 defines the jurisdiction of the Court as follows:

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 relating to or arising out of employment between an employer and an employee;*
- b) disputes between an employer and a trade union;*
- c) disputes between an employers' organisation and a trade union's organisation;*
- d) disputes between trade unions;*
- e) disputes between employer organisations;*
- f) disputes between an employers' organisation and a trade union;*
- g) disputes between a trade union and a member thereof;*
- h) disputes between an employer's organisation or a federation and a member thereof;*
- i) disputes concerning the registration and election of trade union officials; and*
- j) disputes relating to the registration and enforcement of collective agreements.*

27. The constitutional jurisdiction of the High Court is expansive and includes among others jurisdiction under **165(3) (b) & (d) (i) and (ii)** of the Constitution.

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(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;

28. The above notwithstanding, the High Court's jurisdiction is limited under Article 165(5) as follows:

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).

29. The Court of Appeal in **Chimweli Jangaa Mangale & 3 others v Hamisi Mohamed Mwawasaa & 15 others** [2016] KECA 413 (KLR) held as follows:

“This Court considered the issue in Prof. Daniel N. Mugendi v. Kenyatta University & Others, CA No 6 of 2012 and in Judicial Service Commission v. Gladys Boss Shollei & Another, CA No 50 of 2014, involving the Labour and Employment Court, which, like the ELC, is a court of equal status as the High Court under Article 162(2) of the Constitution. The Court concluded that the High Court did not have exclusive jurisdiction to enforce the Bill of Rights and that the Constitution contemplates enforcement and protection of fundamental rights and freedoms by other courts, other than the High Court. Accordingly, where issues involving the environment or land raise constitutional issues or issues of protection and enforcement of the right to land as property, the ELC will have jurisdiction to hear and determine the dispute. We are satisfied that the appellant’s claim that the ELC lacks jurisdiction to enforce constitutional rights is totally bereft of merit.”

30. The Court of Appeal in **Public Service Commission & 4 others v Cheruiyot & 20 others [2022] KECA 15 (KLR)** further stated as follows:

“49. In the absence of an employee-employer relationship, it is our considered view that the court that had jurisdiction to entertain and determine the issues raised in the consolidated petitions was in fact the High Court. The establishment of the High Court is found at article 165(1) of the Constitution. Under article 165(3), the High Court has jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been violated, infringed or threatened. Under article 165(d)(i), the High Court has jurisdiction to determine

whether any law is inconsistent with or in contravention of the Constitution.

50. The issues raised in the consolidated petitions, especially the issue relating to the constitutionality of section 43(5) of the Elections Act, 2011 are the kind of issues contemplated under article 165(3(d) of the Constitution determination of which would be within the exclusive constitutional mandate of the High Court. This is jurisdiction flowing directly from the Constitution, which the Supreme Court alluded to in the matter of Interim Independent Electoral Commission (supra) and Samuel Kamau Macharia & another (supra).

51. The Constitution appreciates that there are matters within the exclusive jurisdiction of the High Court on the one hand and those reserved and/or falling within the jurisdiction of the courts contemplated in article 162(2) on the other hand, notwithstanding the fact that the latter courts enjoy the same status as the High Court. This court in Karisa Chengo & 2 others v Republic [2015] eKLR held thus:

“...The jurisdiction of the High Court as established under article 165 of the Constitution is limited in two fronts. First, it shall not exercise jurisdiction on matters reserved for the Supreme Court and matters falling within the jurisdiction of the two courts contemplated in article 162(2). It is therefore clear that the High Court no longer had the original and unlimited jurisdiction in all matters as it used to have under the repealed Constitution. It cannot deal with matters set out under section 12 of the ELRC

Act and section 13 of the ELC Act. Conversely, the courts contemplated in article 162(2) of the Constitution cannot deal with matters reserved for the High Court.”

52. This court in the Karisa Chengo case (supra) held that status of a court is not synonymous to jurisdiction. In this context therefore, although the Employment and Labour Relations Court exercises the same power as the High Court in performance of its judicial functions, it has specialized jurisdiction and is not the High Court. It is important to point out that the finding of this court in the Karisa Chengo case was upheld by the Supreme Court.

53. Therefore, for want of an employee-employer relationship, we find and hold that the Employment and Labour Relations Court arrogated itself jurisdiction that exceeded that conferred upon it by law, which renders its decision nullity ab initio.”

31. The Petition relies on Article 260 of the Constitution, which defines a ‘child’ as an individual who has not attained the age of 18 years. The Petitioner argues that despite this, the Employment Act permits employment of Children in violation of Article 53 (1) (d) which provides for the protection of the child from hazardous or exploitative labour and economic exploitation.

32. The Petitioner further points that the Children Act’s omission to provide for protection of children from abuse, violence,

inhuman treatment and hazardous or exploitative labour as provided for under Article 53 (1) (d) of the Constitution.

33. The Petitioner contends that the Government went further and assented to the International Labour Organization Convention No. 182 on the worst forms of labour and International Labour Organization Convention (ILO) C138 Minimum age Convention, 1973 both of which allow for the employment of children.
34. The Petitioner's main contention therefore is that legalization of employment of persons under the age of 18 years in the aforesaid Statutes is a violation of protection accorded to children by the Constitution. He thus prays for the following reliefs:

- a) A declaration the Sections 55, 56, 57,58,59,60,61,62,63,64 and 65 which all form Part VII of the Employment Act (Cap 226) Laws of Kenya together with Part IV the Employment Act [Employment (General) Rules] violate and/or threaten the fundamental rights and freedoms of children as guaranteed in the Bill of Rights of the Constitution of Kenya more so:**
- i. Article 43 (1) (f) as read with Article 53 (1) (b) of the Constitution on the right of children to education.**
- ii. Article 53 (1) (d) of the Constitution which provides that every child has the right to be protected from more so**

abuse, neglect, all forms of violence, inhuman treatment and hazardous or exploitative labour.

iii. Article 27 of the Constitution of Kenya which states that every person, including children, have the right to equal protection and equal benefit of the law.

b) Section 18 of the Children Act (Cap 141) Laws of Kenya violates and/or threatens the fundamental rights and freedoms of children as guaranteed in the Bill of Rights of the Constitution of Kenya more so:

i. Article 43 (1) (f) as read with Article 53 (1) (b) of the Constitution on the right of children to education.

ii. Article 53 (1) (d) of the Constitution which provides that every child has the right to be protected from more so abuse, neglect, all forms of violence, inhuman treatment and hazardous or exploitative labour.

c) International labour Organization (ILO) C138 Minimum age Convention, 1973 (as known as the ILO Minimum age Convention of 1973 violates and/or threatens the fundamental rights and freedoms of children as guaranteed in the Bill of Rights of the Constitution of Kenya more so:

i. Article 43 (1) (f) as read with Article 53 (1) (b) of the Constitution on the right of children to education.

ii. Article 53 (1) (d) of the Constitution which provides that every child has the right to be protected from more so abuse, neglect, all forms of violence, inhuman treatment and hazardous or exploitative labour.

35. As far as the jurisdiction of the Employment and Labour Relations Court is concerned, it is confined to matters where a relationship of employer-employee exists, and if constitutional questions arise as a result of that relationship, that is what is to be exclusively dealt with by the Employment and Labour Relations Court.

36. In the instant case however, it is apparent that the Petition is raising questions touching on consistency or otherwise of the several provisions of Employment and Children Act with the Constitution without being tied to any specific employer-employee relationship. This matter within the exclusive jurisdiction of the High Court under Article 165(3) (d) (i) & (ii) of the Constitution which provide as follows:

(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.

37. This Court thus finds that the 1st Respondent's Notice of Preliminary Objection lacks merit and is hereby dismissed.

38. I make no orders as to costs.

Dated, signed and delivered virtually at Nairobi this 29th January, 2026.

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L N MUGAMBI

JUDGE