



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. E005 OF 2023

ANNE WESONGA NAMBIRO

PETITIONER

-VERSUS-

**THE KAKAMEGA COUNTY ASSEMBLY
SERVICE BOARD1ST**

RESPONDENT

**THE COUNTY ASSEMBLY OF KAKAMEGA 2ND
RESPONDENT**

RULING

Introduction

1. The Petitioner, Anne Wesonga Nambiro is a former nominated member of the County Assembly of Kakamega who served in the period between 9th August 2017 and 9th August 2022.

2. By a Petition dated 5th April 2022 and filed on 11th May 2023, the Petitioner seeks redress from the 1st and 2nd Respondent for their failure to provide her with rental office space, a Personal Assistant, a Secretary, an Office Assistant/watch person, and office operation costs of Ksh. 50,000/= per month disbursed for the operations of the member of the County Assembly office, and a mortgage in the sum of Ksh. 3,000,000/=.
3. The Petition is premised on Articles 22, 23, 27, 40, 41 and 47 of the Constitution of Kenya and it is the Petitioner's contention that Section 12 of the Kakamega County Assembly Service Act 2015 is null and void to the extent it provides for differential treatment between elected members of the County Assembly and its nominated members.
4. The Petitioner states that the 1st Respondent, who was charge with disbursement of the mortgage failed to do so in unclear circumstances riddled with unequal treatment and discrimination.
5. The Petitioner further states that she was forced to pay for rent for her office for the entire term at Ksh. 10,000/= per

month totaling Ksh. 600,000/=. She further states that for the first four years of her term, she was forced to pay the salary for her Office Assistant/watchman at the rate of Ksh. 12,500/= per month totalling Ksh. 600,000/=. The Petitioner further states that for the first two years of her term, she was forced to pay for her Secretary's salary at the rate of Ksh. 14,000/= per month totaling Ksh. 336,000/.

6. It is the Petitioner's further averment that she was forced to pay her Personal Assistant's salary for the first year of her term at the rate of Ksh. 19,500/= per month totaling Ksh. 234,000/=. She also states that for the entire term of service of sixty (60) months, she did not receive any sum for monthly office operations and had to use her own sum of Ksh. 3,000,000/= for the same. She also claims that the 1st Respondent gave her a mortgage of Ksh. 2,000,000/= instead of the stipulated amount.
7. It is the Petitioner's case that the Respondent's actions were discriminatory and in violation of Article 27 as well as in violation of her right to property under Article 40 of the Constitution.

8. The Petitioner seeks the following orders:-
- (a) *A mandatory injunction do issue to the Respondents to reimburse the funds the Petitioner spent on salaries, office rent and office operation and maintenance costs.*
 - (b) *A declaration that the Respondents contravened an infringed upon the Petitioner's rights and freedoms under Article 27, 40, 41, 47 and 232 of the Constitution of Kenya.*
 - (c) *A declaration does hereby issue that a nominated member of the County Assembly and an elected member of the County Assembly have equal status and are entitled to equal opportunities, responsibilities and privileges including provision of office space or rent, office staff and office operation costs.*
 - (d) *A declaration be issued that the Petitioner while serving as a nominated member of County Assembly was entitled to provision of office rent or space, office staff and office operation costs.*

- (e) *A declaration be issued that Section 12 of the Kakamega County Assembly Service Act, 2015 on establishment of Ward Offices for elected members of the County Assembly and appointment of staff to the ward offices is erroneous, unlawful, unconstitutional, null and void.*
- (f) *A declaration be issued that the Kakamega County Assembly Service Act, 2015 contravenes Article 199 (1) of the Constitution and for want of publication in the Kenya Gazette.*
- (g) *A declaration be issued that the Kakamega County Assembly Service Act, 2015 is unconstitutional, null and void. It is hereby quashed.*
- (h) *A declaration be issued that the Kakamega County Assembly Service Act, 2015 is in conflict with the County Assembly services Act no. 24 of 2017 and that the County Assembly Services Act no.24 of 2017 should prevail over the Kakamega County Assembly Service Act, 2015.*
- (i) *Such further orders and reliefs the Honourable court deems fit and just to meet the ends of justice.*

- (j) *Damages for violation, infringement and denial of the Petitioners constitutional rights.*
- (k) *Costs.*
- (l) *Interest on reliefs a and j until full payment.*
9. The Respondents opposed the Petition and filed a Replying Affidavit sworn by Esther A. Ariko, the Clerk to the 2nd Respondent and Chief Executive Officer of the 1st Respondent. The Respondents deny ever treating the Petitioner in a discriminatory manner and aver that her claim is baseless, frivolous, vexatious and scandalous.
10. By a Notice of preliminary objection dated 23rd October 2024, the Respondents objected to the entire Petition on the grounds that the same offends the clear provisions of Section (1) (a) of the Employment and Labour Relations Act and Section 87 of the Employment Act. They urge the court to strike out the entire Petition.
11. Since the preliminary objection touches on the jurisdiction of the court, I directed that it be heard and determined first. Both parties were directed to file written submissions.

Respondent's Submissions

12. The Respondents submit that from the onset and from the Petition, it is express and there is no doubt that the relationship between the Petitioner and the Respondents was that of employer-employee wherefore the jurisdiction to deal with such issues as are raised in the Petition lies with the Employment and Labour Relations Act. They submit that the said court only has jurisdiction to deal with infringement of rights and liabilities arising in the cause of employment and hence this court lacks jurisdiction to hear the Petition.
13. The rest of the Respondent's submissions relate to the Petition and since the issue of jurisdiction has been raised, the court needs to deal with it first because jurisdiction is pivotal to the entire proceedings.

Petitioner's Submissions

14. The Petitioner submits that the preliminary objection necessitates an investigation into issues of fact and evidence as to whether there exists an employer-employee relationship as envisaged under Section 12(1) (a) of the Employment and Labour Relations Court Act and Section 87 of the Employment Act. She further asserts

- that the issues for determination fall squarely within the constitutional and supervisory jurisdiction of the High Court as contemplated under Article 165 (3) and 165 (6) of the Constitution.
15. The Petitioner contends that the preliminary objection does not raise pure points of law and cannot stand. She relies on **Superon Schweisstechnik India Ltd v. Oxychem Africa Limited, Registrar of Trademarks (Interested Party) [2025] KEHC 8298 (KLR)**, **Oraro v. Mbaja [2005] 1 KLR 141** and **Casmir Nyankuru Nyaberi v. Mwakikar Agencies Limited [2016] KEELRC 1323 (KLR)**.
 16. She further posits that that the pleadings before court do not show or give proof of employment and refers to **Meta Platforms Inc. & 2 others v. Motaung & 186 others; Kenya National Human Rights and Equality Commission & 14 others [2024] KECA 1262 (KLR)**.
 17. Relying on **Nick Githinji Ndichu v. Clerk Kiambu County Assembly & Another [2014] eKLR**, the Petitioner submits that the court would have to look into the position of the parties in relation to each other and

such a process would be an inquiry into fact and evidence which cannot be done at the preliminary stage.

18. Further, the Petitioner submits that by virtue of Section 9 (2) (b) of the County Governments Act, she was not and cannot be considered to be an employee of the Respondents. She cites the case of **Catherine Kamau & 9 others v. Speaker of the County Assembly of Nakuru, Clerk Nakuru County Assembly & another [2021] eKLR** and argues that the Petition does not concern employment and labour relations and cannot be subjected to the Employment and Labour Relations Court.
19. Relying on **County Government of Kakamega & 4 others v. Omweno & 12 others [2025] KECA 190 (KLR)**, the Petitioner argues that this court is seized with jurisdiction to hear and determine the Petition.

Analysis and Determination

20. The issues for determination are as follows:-
 - i. **Whether the preliminary objection meets the threshold of pure points of law.**
 - ii. **Whether the matters raised in the Petition are matters under the Employment Act which**

should be dealt with by the Employment and Labour Relations Court (ELRC).

iii. Whether the High Court is clothed with the jurisdiction to hear and determine the Petition.

21. On whether the preliminary objection meets the threshold of pure points of law, what constitutes a pure ground of law was defined in **Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd [1969] EA 696** where the court held that a preliminary objection must raise a pure point of law arising from the pleadings which would result in the disposal of the entire suit. The court stated that such objection should not involve disputed facts or require proof by way of evidence or call for the exercise of the court's discretion. This position was reiterated in **Superon Schweisstechnik India Limited, Registrar of Trademarks (Interested Party) (Supra)**.
22. As to whether the matters raised in the Petition are matters under the Employment Act, it is not apparent from the pleadings. Whereas the Respondent argue that the Petition raises issues of employment as there is no doubt that the relationship between the Petitioner and the

Respondents is that of employer-employee, the Petitioner contends that no such relationship existed. This calls upon the court to delve into fact and evidence to ascertain whether the Petitioner's assertions are true, hence the preliminary objection does not raise purely points of law as contemplated in the Mukisa case.

23. As to whether the High Court has the requisite jurisdiction to hear and determine the Petition, it is clear that the Petitioner, who is a public officer alleges that the Respondents violated her fundamental rights by discriminating against her.
24. In **Catherine Njuguna & 11 others v. Speaker of the County Assembly of Nakuru & 2 others, (Supra)**, the Employment and Labour Relations Court declared that it lacked jurisdiction to hear a Petition in which the Petitioners were seeking orders compelling the Respondents to pay them the allocation of personnel emoluments for 3 Wards staff and maintenance costs and quoted **Attorney General & 2 others v. Okiya Omtata Okiiti & 14 others [2020] KECA 30 (KLR)** where it was held that:-

“...There is no fidelity to the Constitution in seeking to enforce the constitution through unconstitutional means. The issues raised in the petitions were weighty but were misdirected to the wrong forum. The Constitution has granted the High Court the requisite jurisdiction to hear and determine those issues and that is where they ought to have been raised. Having come to that conclusion, we have no basis for venturing into the merits of the appeal.

We have no doubt that the ELRC and the ELC have jurisdiction to interpret and apply the Constitution as held by the High Court in *United States International University (USIU) v. The Attorney General & Others [2012] eKLR* and this Court in *Daniel N. Mugendi v. Kenyatta University & 3 Others [2013] eKLR*. However, the jurisdiction of those specialized courts to interpret and apply the Constitution is not original or unlimited like that of the High Court. It is limited to constitutional issues that arise in the context of disputes on employment

and labour relations or environment and land matters.”

25. Section 12 (1) (a) of the Employment and Labour Relations Court (ELRC) Act provides that:-

“(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 relating to or arising out of employment between an employer and an employee.”

26. The Petitioner is not an employee of the Respondents. Her services were not retained by the Respondent. She only works with the Respondents in discharge of her mandate as the people’s representative. In **Casmir Nyankuru Nyaberi v. Mwakikar Agencies Limited [2016] KEELRC 1323 (KLR)**, the court held that:-

“I have stated elsewhere that an employment relationship is not the same as a work relationship.

The mere fact that parties work together does not necessarily give rise to an employment relationship (see *John Kamau Mburu v Program for Appropriate Technology in Health & Another* [2015] eKLR).

This Court is fully aware that it is the responsibility of an employer to document the employment relationship and in certain respects, the burden of proving or disproving a term of employment shifts to the employer.”

27. Having said that, Article 165 (3) of the Constitution of Kenya grants the High Court the jurisdiction in the following:-

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

(a) unlimited original jurisdiction in criminal and civil matters;

(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; and

(e) any other jurisdiction, original or appellate, conferred on it by legislation.”

28. The Petitioner's prayers fall within the purview of Article 165 (3) of the Constitution as they seek declarations that fall exclusively within the jurisdiction of the High Court. The Petition involves the interpretation of the constitutional provisions regarding non-discrimination, the right to property, the exercise of public power by the County Assembly, and the enforcement of fundamental rights and freedom of a state officer, to wit, a nominated member of the County Assembly. No other court has the original jurisdiction to hear and determine the Petition as Article 23 and 165 of the Constitution underscore the position that the proper forum to hear and determine such Petitions is the High Court.
29. Consequently, I find that this Honourable Court is seized with jurisdiction to hear and determine the Petition and so the preliminary objection lacks merit and the same is dismissed. Costs shall be in the cause.

Dated, signed and delivered at Kakamega this 5th day of February 2026.

**A. C. BETT
JUDGE**

In the presence of:

Mr. Amukhale for the Petitioner

No appearance for the Respondents

Court Assistant: Polycap

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