

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT HOMA BAY

JUDICIAL REVIEW APPLICATION NO. E003 OF 2025
IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW
ORDER OF MANDAMUS

AND

IN THE MATTER OF ARTICLE 47 & 48 OF THE
CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTION 21 OF THE GOVERNMENT
PROCEEDINGS ACT, CAP 40

AND

IN THE MAATTER OF EXECUTION OF THE JUDGMENT &
DECREE IN HOMA BAY CHIEF MAGISTRATE’S CIVIL ASE NO
41 OF 2018 ISSUED ON 28TH OCTOBER 2019

BETWEEN

REPUBLIC.....
APPLICANT

VERSUS

THE COUNTY GOVERNMENT OF HOMA BAY.....1ST
RESPONDENT

THE CHIEF FINANCE OFFICER,
THE COUNTY GOVERNMENT OF HOMA BAY.....2ND
RESPONDENT

AND

BENSON OKETCH ACHIENGA.....EX PARTE
APPLICANT

RULING

[1] The *ex parte* applicant, **Benson Oketch Achienga** (hereinafter, the applicant), approached the Court by way of a Chamber Summons dated 1st April 2025. The application was filed pursuant to **Order 53 Rules 1 and 2** of the Civil Procedure Rules, 2010 for the following orders:

[a] That leave do issue for the applicant to apply for a judicial review order in the nature of Mandamus directed to the 1st and 2nd respondents to compel them to pay the applicant the decretal sum of Kshs. 319,641/= inclusive of costs and interest awarded in **Oyugis Principal Magistrates Employment and Labour Relations Cause No. 1 of 2020** and **Kisumu Employment and Labour Relations Civil Appeal No. E052 of 2021**.

[b] That the costs of the application be provided for.

[2] The application was premised on the grounds that the applicant is a successful litigant and decree-holder who is entitled to the decretal sum of Kshs. 319,641/= awarded in **Oyugis Principal Magistrates Employment and Labour Relations Cause No. 1 of 2020** and **Kisumu Employment and Labour Relations Civil Appeal No. E052 of 2021**. The applicant further deposed that the judgments and decrees have not been appealed and therefore overdue for payment. The applicant annexed several documents to his Verifying Affidavit sworn on 2nd April 2025, including copies of judgment and Certificate of Costs as well as a Certificate of Order against the Government.

[3] The respondents opposed the application vide the Notice of Preliminary Objection dated 12th May 2025. They contended that the Court lacks the jurisdiction to entertain these proceedings because the subject matter revolves around an employment dispute, which falls within the realm of **Section 12** of the Employment and Labour Relations Court. Accordingly, the respondents proposed the following issues for determination:

[a] Whether the Preliminary Objection meets the threshold established by law;

[b] Whether the Court has jurisdiction to hear and determine the suit;

[c] Whether the applicant has met the threshold for the grant of leave to apply; and

[d] Who should bear the costs of the suit.

[4] The application was canvassed by way of written submissions, pursuant to the directions given herein on 19th May 2025. In their written submissions filed in support of their Notice of Preliminary Objection, the respondents relied on **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd** [1969] EA 696 and contended that the point raised herein is that of jurisdiction; and therefore a valid point of law to raise as a preliminary issue. The respondents reiterated their contention that the primary decisions were made by the Employment and Labour Relations Court and therefore the issue of jurisdiction is pertinent for purposes of **Article 162(2)(a) and 165(5)** of the

Constitution as well as **Section 12(1)(a)** of the Employment and Labour Relations Act.

[5] The respondents also relied on the **Owners of Motor Vessel “Lillian S” v Caltex Oil Kenya Ltd** [1989] eKLR, **Virginia Nthenya v AG and 4 others** [2021] eKLR and **Samuel Kamau Macharia & another** [2012] eKLR to buttress their submission that the court with jurisdiction to entertain the instant application is the Employment and Labour Relations Court. The respondents accordingly urged for the dismissal of the application dated 1st April 2025 with costs.

[6] The applicant relied on his written submissions dated 22nd May 2025 filed on 3rd June 2025. His contention was that the application is for the judicial review order of Mandamus; and therefore does not in any way relate to an employment and/or labour relations dispute. He relied on **Joyce Cherop Kaspondoy & others v Kenya Power and Lighting Co.** [2019] eKLR and **Article 23(1)** of the Constitution. The applicant further submitted that he had no recourse against the 1st respondent outside the strictures of **Section 21** of the Government Proceedings Act. He therefore urged the Court to allow his application and grant the orders sought.

[7] I have given due consideration to the respondents’ Preliminary Objection in the light of the submissions made herein by counsel for the parties. What constitutes a preliminary objection was aptly discussed in the case of **Mukisa Biscuits**

Manufacturing Ltd v West End Distributors (supra) as follows:

“...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 a contract giving rise to the suit to refer the dispute to arbitration”.

[8] Sir Charles Newbold, P. added:

“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.”

[9] In **Independent Electoral & Boundaries Commission v Cheperenger & 2 others (Civil Application 36 of 2014)**

[2015] KESC 2 (KLR) (15 December 2015) (Ruling), the Supreme Court reiterated the position thus:

“...The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits...”

[10] Accordingly, since the respondents’ Preliminary Objection was taken on the point of jurisdiction, it was well taken in the circumstances. It is now trite law that jurisdiction is everything and without it, a court should down its tools. In **The Owners of Motor vessel Lillian ‘S’ vs Caltex Kenya Limited** (supra) the Court of Appeal held:

“Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of Law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

[11] Moreover, in **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others** (supra), the Supreme Court pointed out that:

“(68) A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law...”

[12] The jurisdiction of the High Court is provided for in **Article 165(3)** of the **Constitution** thus:

- (3) 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.

[13] 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).

[14] Article 162(2) and (3) of the Constitution on the other hand provides for Courts of equal status to the High Court. It provides:

(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).

[15] In the light of the provisions of Articles 162(2) and 165(5) of the Constitution, Section 12 of the Employment and Labour Relations Act stipulates that:

"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..."

[16] Having perused the Chamber Summons dated 1st April 2025 it is plain that the predicate suit and appeal were handled by the Employment and Labour Relations Court. Accordingly, the instant application ought to have been filed before the Employment and Labour Relations Court. Indeed, **Rule 21** of the Fair Administrative Action Rules, 2024, is explicit that:

"The High Court, Employment and Labour Relations Court and Environment and Land Court shall have the power to hear and determine, at first instance or on appeal, any judicial review application within the respective

areas of jurisdiction of the courts based on the subject matter and substance of the application.”

[17] In the premises, I find merit in the respondents’ Preliminary Objection dated 12th May 2025 and find that the Chamber Summons dated 1st April 2025 ought to have been filed before the Employment and Labour Relations Court. The same is hereby struck out for want of jurisdiction with no order as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT HOMA BAY

THIS 6TH DAY OF FEBRUARY 2026

.....

OLGA SEWE

JUDGE