



**Nyange v Taita County, Executive Committee Member For Education & 2 others
(Petition E016 of 2024) [2026] KEELRC 882 (KLR) (19 March 2026) (Ruling)**

Neutral citation: [2026] KEELRC 882 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
PETITION E016 OF 2024
K OCHARO, J
MARCH 19, 2026**

BETWEEN

MALEMBE NYANGE PETITIONER

AND

**THE TAITA COUNTY, EXECUTIVE COMMITTEE MEMBER FOR
EDUCATION 1ST RESPONDENT**

**THE GOVERNOR, THE COUNTY GOVERNMENT OF TAITA
TAVETA 2ND RESPONDENT**

THE COUNTY ASSEMBLY OF TAITA TAVETA 3RD RESPONDENT

RULING

Background

1. The petitioner initiated the action herein through a petition dated 13th November 2024, alleging a violation of various constitutional and statutory provisions. By the Respondents, and sought against them jointly and severally, the following reliefs;
 - a. A declaration that the actions of the Respondents in appointing members to the County Education Board, predominantly from one ethnic group, are unconstitutional, null and void for violating Articles 10,27, 56 and 232 of *the Constitution* of Kenya and Sections 65 and 66 of the County Government Act.
 - b. A declaration that the list of nominees submitted by the 2nd Respondent to the 3rd Respondent for vetting and approval as unconstitutional, null and void for violating Articles 10, 27, 56, and 232 of *the Constitution* of Kenya and Sections 65 and 66 of the *County Governments Act*.
 - c. A declaration that Section 4 of the Taita-Taveta County Education Fund Act, 2023 is unconstitutional for violating Articles 10, 27, 56 and 232 of *the Constitution* of Kenya.



- d. An order directing the Respondents to conduct a fresh, transparent and inclusive recruitment process for the County Education Board that is compliant with the principles of transparency, fair competition, inclusivity, equity, non-discrimination and the express provisions of Section 65[1] [e] of the County Government Act.
 - e. Costs of the Petition.
2. Contemporaneously with the Petition, the Petitioner filed a Notice of Motion Application dated 13th November 2024, seeking the following orders;
 - a. Spent
 - b. Spent
 - c. That pending the inter partes hearing and determination of the Petition, a conservatory order be issued restraining the Respondents from recruiting and or appointing and or swearing in of the Taita -Taveta County Education Fund Board members as shared by the 3rd Respondent in its presser annexed to this Application as Exhibit MN2.
 - d. That the costs of the Application be provided for.
 3. The Petition is premised upon the grounds set out on the face thereof, and the supporting affidavit sworn by the Petitioner on 13th November 2024.
 4. Through their Notice of Preliminary Objection dated 20th November 2024, the 1st and 2nd Respondents indicated that they are raising a preliminary objection to the petition, principally asserting that this Court lacks the necessary jurisdiction to hear and determine the petition.
 5. The 1st and 2nd Respondents oppose the Petitioner’s application by a Replying Affidavit sworn on 4th March 2025.
 6. This Court directed that both the preliminary objection and the Notice of Motion Application be addressed concurrently through written submissions. The parties obliged and filed their respective submissions.

The Objection

7. The 1st and 2nd Respondents raised three grounds in their preliminary objection. Thus;
 - a. That the Honourable Court lacks jurisdiction to hear this matter pursuant to Article 165[3] [b] & [d] of *the Constitution* of Kenya, 2010.
 - b. That the nature of the Petition and the Notice of Motion Application dated 13th November, 2024, does not disclose a dispute relating to or arising out of employment between an employer and an employee by dint of Section 12 of the Employment & *Labour Relations Act*, Cap 8 E of the Laws of Kenya.
 - c. That Honourable Court is divested of jurisdiction to hear and determine this matter by Section 5 of the High Court [Organisation & Administration] Act, Cap 8C of the Laws of Kenya.

The Respondents ‘Submissions on the Preliminary Objection

8. Counsel for the Respondents submitted that jurisdiction is a fundamental aspect of judicial proceedings. Without jurisdiction, any act a court undertakes is a nullity. To support this submission, reliance was placed on the owners of Motor Vessel “Lillian S” vs Caltex Oil [Kenya] Limited [1989]



KLR. Further reliance was placed on the Supreme Court decision in Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & Others [2012] eKLR.

9. Counsel further argues that it is the High Court that has the power to hear and determine the instant dispute; clearly, there is no employment relationship between the Petitioner and the Respondents, and the Petitioner alleges a violation of various constitutional provisions by the Respondents.
10. It was further argued that under Article 165[3] and [5], jurisdiction to determine the question of whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened, to hear any question respecting the interpretation of *the Constitution*, and any matter relating to the constitutional powers at state organs, in respect of county governments and any matter relating to the constitutional relationship between the levels of government, is wholly vested in the High Court.
11. To give effect to the stipulations of Article 162[2]&[3] of *the Constitution*, the Employment and Labour Relations Act was legislated to establish and set out the jurisdiction of the Employment and Labour Relations Court. The Court can only entertain disputes where there exists an employment relationship. The Petitioner has not at all demonstrated that there existed an employer-employee relationship between the Respondent and him.
12. The matters raised by the Petitioner are matters that fall within the exclusive jurisdiction of the High Court. To support this point, Counsel for the Respondents places reliance on the provisions of Section 5 of the High Court [Organisation & Administration] Act, and the case of Republic V Karisa Chengo & 2 Others [2017] eKLR.

The Petitioner's Submissions

13. The Petitioner's Counsel submitted that the current dispute falls within the Jurisdiction of this court as contemplated under Article 162[2] [a] of *the Constitution*.
14. The wording of the preamble and Section 12[1] of the Employment and Labour Relations Act, keenly read, reveals that the jurisdiction of the Employment and Labour Relations is not only confined to matters where there is an employer-employee relationship, but extends to other disputes connected with employment and labour relations.
15. The list of scenarios enumerated in Section 12[1] of the said Act is not a closed list. The provision employs the expression including ", which does not limit it to the specific scenarios. To support this point, reliance was placed on EG v Non-Governmental Organisation Coordination & others [2015] eKLR.
16. Nothing in *the Constitution*, the *Employment and Labour Relations Court Act* or the cited decision of Karisa Chengo[supra] cited by the 1st and 2nd Respondents suggest that in exercising its jurisdiction over disputes relating to employment and labour relations, the court is precluded from determining matters pertaining to recruitment and appointment of county officials as in the instant suit on appointment of members to the County Education Board of Taita.
17. The Employment and Labour Relations Court has the requisite jurisdiction to deal with constitutional disputes within its competencies. To reason otherwise shall be to allow the High Court to have supervisory power over the court, a thing prohibited under Article 165[6] of *the Constitution*. To bolster this submission, the case of United States International University v Attorney General [2012] eKLR was cited.



18. Further reliance was placed on the Supreme Court decision in *Kenya Tea Growers Association & 2 others v The National Social Security Fund Board & 13 others* [KESC 3[KLR] [KLR], where it was held;

“If a question arises regarding the constitutional validity of a statute or a provision thereof, there can be no reason to prevent the ELRC from disposing of that particular issue. Stripping the court of such authority would leave it jurisdictionally hum-strung; a consequence that could hardly have been envisaged by the framers of *the Constitution*, even as they precluded the High Court from exercising jurisdiction over matters and labour pursuant to Article 165[5].”

Analysis and Determination of the Preliminary Objection.

19. It is a longstanding principle of law that the issue of jurisdiction is fundamental, consisting the very core and foundation of a case, and must be addressed as a priority. Jurisdiction grants a court the authority to hear and determine a suit and, conversely, denies it that authority. Whenever jurisdiction is contested at any stage of the trial, the court is obligated to determine whether the subject matter falls within its adjudicatory competence. Once a Court concludes that it lacks jurisdiction to adjudicate a case, it must refrain from proceeding, as a case conducted without jurisdiction is ultimately rendered null and void. See. *Owners of Motor Vessel “Lilian S” v Caltex Oils[K] Limited* [1989] KLR 1.
20. It bears repeating that the well-known principle of law is that when determining whether a Court can exercise jurisdiction over a matter, it must examine only the facts outlined in the pleadings and the reliefs endorsed thereon. In the present case, the Court must therefore limit itself to the Petition, the verifying affidavit, and the reliefs sought in deciding the question of jurisdiction.
21. Article 258 of *the Constitution* marks a deliberate and transformative departure from the traditionally restrictive doctrine of locus standi. It unequivocally affirms that any person has the right to institute proceedings claiming that *the Constitution* has been contravened or is threatened with contravention. This provision extends beyond the protection of individual interests and embraces a broader, public-spirited approach to constitutional enforcement.
22. In clear terms, Article 258 empowers not only individuals acting in their own interest, but also those acting on behalf of others, in the public interest, or in the interest of a group or class of persons. Consequently, the rigid and technical barriers that previously governed standing have been dismantled in favour of a more liberal and purposive framework.
23. The principle of locus standi is therefore no longer constrained as it was; it has evolved into an open and facilitative doctrine that ensures access to justice and promotes the vigilant protection of *the Constitution*. The courts are thus enjoined to adopt an expansive and progressive interpretation that advances constitutional values, rather than one that unduly limits them.
24. Based on the aforementioned premises, I hold that the Respondents’ assertion that the Petitioner has not demonstrated, even to the slightest degree, the existence or prior existence of an employer-employee relationship between himself and the Respondents is unfounded and of no relevance in the circumstances of this case.
25. The establishment of the Employment and Labour Relations Court, as outlined in Article 162 [2] of *the Constitution* of Kenya 2010, was driven by the Kenyan population’s aspiration for a specialised court. The court’s exclusive jurisdiction is justified by the judges’ comprehensive



knowledge, experience, and specialisation in employment and labour law. This serves to dispel the misconception that the court’s jurisdiction over constitutional matters is overly restricted.

26. The 1st and Respondents’ assertion that it is solely the prerogative of the High Court to interpret *the Constitution* and to enforce the Fundamental Freedoms and Bill of Rights is predominantly a manifestation of adherence to antiquated positions and a failure to acknowledge judicial precedents that have cleared the unwarranted or perceived jurisdictional conflicts between the High Court and the Employment and Labour Relations Court. A comprehensive interpretation of *the Constitution*, particularly Article 163, clearly indicates that it establishes distinct operational lanes for each Court in the interpretation or enforcement of *the Constitution*.

27. In *Kenya Tea Growers Association & 2 others v The National Social Security Fund Board of Trustees & 13 others* [2024] KESC 3[KLR], the Supreme Court of Kenya held;

“In our view, there is nothing in *the Constitution*, the ELRC Act, or indeed in the *Karisa Chengo Case* to suggest that in exercising its jurisdiction over disputes emanating from employment and labour relations, the ELR court is precluded from determining the constitutional validity of statute. This is especially so if the statute in question lies at the centre of the dispute. What it cannot do is sit as if it were the High Court under Article 165 of *the Constitution* and declare a statute unconstitutional in circumstances where the dispute in question has nothing or little to do with employment relations within the ELRC Act.

..... For avoidance of doubt, and so as to stop the pendulum of jurisdictional re-jigging that has characterised this case from the beginning, we hereby restate that the ELRC has jurisdiction to determine the constitutional validity of a statute in matters employment and labour. Suffice it to say that the statute in question must be in focus and at the centre of the dispute in question.”

28. Consequently, based on the aforementioned premises, I must conclude that the Respondents’ assertion that the Jurisdiction of the Employment and Labour Relations Court is explicitly limited to disputes concerning the scenarios specified under Section 12 of the *Employment and Labour Relations Court Act* is unfounded. It is my considered view that the Court possesses jurisdiction over all employment and labour relations matters unless explicitly excluded by statute.

29. In the upshot, I come to the inevitable conclusion that this Court has the requisite jurisdiction to entertain the instant petition and application.

The Petitioner’s Application

30. The Petitioner argues that *the Constitution* provides for national values and principles of governance, which include equity, inclusiveness, human rights, non-discrimination and protection of the marginalised.

31. He further states that, under Article 232 of *the Constitution*, the values and principles of public service are outlined. These include fair competition and merit as the basis for appointments and promotions, representation of Kenya’s diverse communities, and providing adequate and equal opportunities for appointment, training, and advancement at all levels of the public service for men and women, members of all ethnic groups, and persons with disabilities.

32. It is further asserted that the provisions of Articles 10, 27, and 232 of *the Constitution* are effectuated through the *County Governments Act*. Under section 66, the Act mandates that County Governments ensure that at least 30 per cent of vacant entry-level positions are occupied by candidates who do not



belong to the dominant ethnic group within the County, emphasising the importance of open and transparent recruitment processes in the public service.

33. In 2023, the 2nd Respondent passed the Taita Taveta County Education Fund Act. The Act provides in Section 4 the composition of the Board: -
- a. The Governor as the Patron,
 - b. A Chairperson appointed by the Governor with the approval of the County Assembly,
 - c. A Vice Chairperson elected by members.
 - d. A Secretary who shall be the Fund Administrator appointed pursuant to the provisions of the [Public Finance Management Act](#),
 - e. A representative of the youth,
 - f. Two members representing special interest groups; a legal advisor who should be appointed by the Governor,
 - g. The Chief Officer in charge of Education, who shall be ex officio with no voting rights.
34. The 1st Respondent nominated, and the 2nd Respondent is in the process of approving the persons nominated to be members of the Board. Nine of the ten nominated members are from the Taita tribe. Taita-Taveta is a cosmopolitan county with all 44 tribes of Kenya. The process undertaken by the Respondents, therefore, violates the stipulations of Articles 10, 27, 56, and 232 of [the Constitution](#) and section 66 of the County Government Act.
35. The appointment was made without advertisement and violates the principle of competition and merit recruitment as provided under Article 232 of [the Constitution](#).

The Respondents' Response

36. The Respondents contend that the nature of the application does not disclose a dispute relating to or arising out of employment between an employer and an employee by dint of Section 12 of the [Employment Act](#). The Court lacks jurisdiction to hear and determine this matter pursuant to Article 165[3][b] and [d] of [the Constitution](#). The proper forum to ventilate the dispute is the High Court.
37. The Petitioner has not met the legal threshold for a grant of conservatory orders. He has not demonstrated that he has a petition with prima facie chances of success, and that he is likely to be prejudiced if the conservatory orders sought are not granted.
38. It was stated that following the County Government's advertisement for the position of member, Education Fund Board, various individuals submitted applications for consideration for nomination and consequent appointment to the Board.
39. The said applications were considered, and the 2nd Respondent nominated the following nominees as Chairperson and Member of the Board;
- I. Mr Elias Mberi- Chairperson or Vice Chairperson
 - II. Mr Rest Mwanjala Nyambu- Youth Rep [Male]
 - III. Ms Christina W Kilimo- Youth Rep [Female]
 - IV. Mr Nesphary Nyange Mghana- County Director Rep



V. Bishop Joram Mwangua- Special Interest [Christian]

VI. Ms Asmini Mwanamima- Special Group [Muslim]

40. The Respondents further state that pursuant to the provisions of Section 5[1] [10] of the Public Appointments [County Assemblies Approval] Act, 2017, the Clerk of the 3rd Respondent placed an advertisement in the print media on 30th October 2024, inviting the public to submit memoranda by way of written statements on oath on the suitability or otherwise of the nominee. The submissions were to be received by 6th November 2024 at the latest.
41. Further, pursuant to the provisions of Article 196[1] and [2] of *the Constitution*, Section 5[1] [5] of the Public Appointments [County Assemblies Approval] Act,2017 and Taita Taveta County Assembly Standing Order No. 43, the general public was also notified in print media by the Clerk of the 3rd Respondent of the intention of the County Assembly Committee to conduct the vetting and approval hearing on 11th November 2024.
42. The Committee noted that they did not receive any memoranda against the approval of the nominees for appointment to the position of the Board Chairperson and members.
43. The Committee conducted the vetting process, whilst examining the nominees against their academic qualifications, employment record, professional affiliation, knowledge of relevant subject, overall suitability for the position, integrity, vision and leadership and expectations and key priorities.
44. The list of nominees submitted fulfils the requirements of regional diversity as stipulated in *the Constitution* of Kenya 2010.
45. It is further stated that of the seven [7] nominees, only six [6] appeared before the approval hearing held on 11th November 2024.
46. Following the approval, the 2nd Respondent appointed the nominees to serve in the positions mentioned hereinabove [para.39].
47. The Petitioner/Applicant is clearly engaging in a fishing expedition and in the process abusing the court process. He has not presented any evidence, empirical or otherwise, on the statistical analysis and cosmopolitan nature of Taita - Taveta County.

Analysis and determination

48. Having decided as I have hereinabove on the Respondent's preliminary objection, I now consider one issue as outstanding for determination: whether the Petitioner's application meets the threshold for the granting of the sought-after conservatory orders.
49. The principles that the Court must consider when approached to determine whether a party is entitled to an interim conservatory order are now well settled. In the case of the Board of Management of Uhuru Secondary School v City County Director of Education & 2 Others [2015] KEHC 2174 [KLR], the Court aptly set out the principles, thus;
 - a. Foremost, the Applicant ought to demonstrate a prima facie case with a likelihood of success and that, in the absence of conservatory orders, he is likely to suffer prejudice. It is, in my view, not enough to merely establish a prima facie case and show that it is potentially arguable. Potential arguability is not enough to justify a conservatory order; rather, there must also be evidence of a likelihood of success. The prima facie case ought to be beyond a speculative basis.



- b. Once the Applicant has established to the Court's satisfaction, a prima facie case with a likelihood of success, the Court is then to decide whether a grant or denial of the conservatory relief will enhance the constitutional values and objects of the specific right or freedom in the Bill of Rights. See *Patrick Musimba v The National Land Commission & 4 Others* HCCP 613 of 2014 [No.1] [2015] eKLR.
 - c. Thirdly, flowing from the 1st two principles, is whether, if the interim conservatory order is not granted, the petition or its substratum will be rendered nugatory. It is indeed the business of the Court to ensure and secure, so far as possible, that any transitional motions before the Court do not render nugatory the ultimate end of justice;
 - d. The fourth principle, which emerges from the various cases and is well captured by the Supreme Court in the case of *Gatirau Peter Munya vs Dickson Mwenda Githinji & 2 Others* [2014] eKLR, is that the Court must consider conservatory orders also in the face of public interest dogma;
 - e. Finally, the Court is to exercise its discretion in deciding whether to grant or deny a conservatory order. The Court must consequently consider all relevant material facts and avoid immaterial matters. The Court will consider the Applicant's credentials, the prima facie correctness of the information availed, and whether the grievances are genuine and deserving and finally, whether the allegations are grave and serious or merely vague and reckless. See *Centre for Human Rights and Democracy & 2 others v Judges and Magistrates Vetting Board & 2 Others* CP No. 11 of 2012, as well as *Suleiman v Amboseli Resort Ltd* [2004]2KLR 589.
50. The Petitioner contends that he has established a Prima facie case, with a high chance of success, whereas the Respondents hold otherwise. Prima facie case was defined, and I see it as such, in the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] eKLR, as
- “So what is a prima facie case? I would say in civil cases, it is a case in which, on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party, as to call for an explanation or rebuttal from the latter.”
51. As stated hereinbefore, one of the fundamental bases upon which the Petitioner's petition is founded is the assertion that the process leading to the nomination and appointment of the Chairperson and the Members of the Board, in contravention of the values and principles of public service enshrined in Article 232 of *the Constitution*, lacked the requisite competitive component. Furthermore, the statutory requirement for competitiveness as stipulated under Section 66 of the *County Governments Act* was also absent.
52. It is not for ornamental or symbolic purposes that Kenyans demanded the entrenchment of values and principles of public service in law. Rather, this push was driven by a long history of flawed public recruitment practices. For many years, public institutions were plagued by nepotism, favouritism, tribalism, and the appointment of unqualified individuals, often at the expense of more deserving and qualified candidates.
53. To address these systemic problems, the legislature found it necessary to expressly provide for competitive recruitment processes, within County Governments. This is why Section 66 of the County Government Act emphasises competitiveness as a key requirement in hiring within the County Governments.



54. The intention behind this legal framework was to ensure fairness, transparency, and meritocracy in public service recruitment. By requiring that positions be filled through open competitive processes, the law seeks to eliminate biased decision-making and promote equal opportunity for all qualified applicants.
55. With the foregoing in mind, I have carefully considered the Respondent's response to the issue raised by the Petitioner, which I hold is not an idle one. It appears to me that there was no shortlisting of candidates for interviews, no interviews were conducted, and it is not possible to determine how many people applied or what their qualifications were. All these factors demonstrate a lack of transparency and competitiveness in the process.
56. It is not difficult to conclude that the Respondents' response to the issue raised regarding the nominees being from one tribe, whilst the County of Taita-Taveta comprises several tribes, was very casual and non-committal.
57. Based on the foregoing, I conclude that the Petitioner has demonstrated a prima facie case indicating that the Respondents violated the constitutional principles enshrined in Articles 10 and 232 of *the Constitution*, as well as the statutory requirements stipulated under the *County Governments Act*.
58. In my view, denying the conservatory order would not promote the safeguarding of constitutional values and their objectives; rather, it would weaken them. Upholding the rule of law is vital for the public interest. Failing to issue the conservatory order could be seen as rewarding the Respondents for what seems to be a deliberate neglect of statutory and constitutional duties. Ultimately, public interest would clearly disapprove of such an outcome.
59. It is by reason of the foregoing premises that I find the application suitable for granting. It is hereby granted.
60. For clarity of record, prayer 3 of the Application is hereby granted. The Respondents are hereby restrained from swearing in the Taita Taveta County Education Fund Board Members and allowing them to take office pending the hearing and determination of the Petition.
61. The Petition shall be heard on a priority basis.

READ SIGNED AND DELIVERED THIS 19TH DAY OF MARCH 2026.

OCHARO KEBIRA

JUDGE

