

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. E247 OF 2026

ACTION FOR JUSTICE AND EQUALITYPETITIONER

VERSUS

**KABALE TACHE AREO THE CHIEF EXECUTIVE OFFICER,
NATIONAL LAND COMMISSION.....1ST RESPONDENT**

**BEN CHERUTICH, THE DIRECTOR OF FINANCE, NATIONAL LAND
COMMISSION.....2ND RESPONDENT**

**BEN BET, THE DIRECTOR OF HUMAN RESOURCE, NATIONAL LAND
COMMISSION.....3RD RESPONDENT**

**1RULING GIVING REASONS FOR THE DECISION MADE ON 17TH
APRIL, 2026 ON A PETITION AND CERTIFICATE OF URGENCY
APPLICATION DATED 17TH APRIL 2026**

1. On 17th April 2026, this court heard the petitioner/ applicant herein Action for Justice and Equality on a notice of motion dated 17th April, 2026 brought under certificate of urgency. The court did not certify the application as urgent but proceeded to call on the petitioner to address the court on the urgency and on the jurisdictional issues identified by the court upon perusal of the petition.

2. On behalf of the petitioner, Mr. Gadaffi Isiavale submitted that he was aware that he was challenging recruitment of staff of the National Land Commission. That he was aware that recruitment of staff is a Human resource function which is an Employment and Labour Relations function. That he was aware that it is the Employment and Labour Court has jurisdiction to hear and determine Employment and Labour Relations disputes and matter.
3. He submitted that he filed this petition under Article 165 (2) (b), Article 165 (3) (d) and Article 35 of the constitution on access to information.
4. On the urgency involved, he submitted that the Commission is recruiting people without a procedure and contrary to the Constitution. That the matter involves interpretation of the Constitution including article 10. That he had credible information concerning what was happening and urged this Court to stop the recruitment process until the petition is heard and determined otherwise the petition shall be rendered nugatory.
5. After this Court had heard the petitioner, it was persuaded that this court was deprived of jurisdiction to hear and determine the merits of the petition and on the spot, I pronounced myself on that jurisdictional question and declined jurisdiction and struck out the petition with no orders as to costs.

6. However, as it was late in the evening and as I had other certificates of urgency to handle, I promised to provide detailed reasons for my decision within seven days and hence, this detailed ruling.
7. I now proceed to give reasons for my decision to decline jurisdiction in these proceedings, supported by constitutional, statutory and binding judicial pronouncements.
8. In his petition dated 17th April 2026, the petitioner seeks the following reliefs:
 - I. A declaration that the respondent's failure to provide the required information in unconstitutional and violates Article 35 of the Constitution of Kenya, 2010;***
 - II. A declaration that the recruitment, employment and payroll practices complained of are unconstitutional for violating Articles 10,27,47,201and 232 of the Constitution of Kenya, 2010;***
 - III. An order of mandamus compelling the respondents to provide the petitioner with the information requested in the letter dated 1st April, 2026 and to furnish certified records of recruitment and payroll within a specified period;***

- IV. An order restraining the respondents from recruiting, appointing, engaging or retaining any persons in employment outside lawful and constitutional procedures;**
- V. An order directing that any recruitment undertaken in violation of the Constitution be declared null and void; an order for independent audit and or investigation of recruitment and payroll practices within the National Land Commission**
- VI. Costs of the petition**
- VII. Any other or further relief that this Honourable Court may deem fit and just.**

9. This matter turns on a dual, decisive jurisdictional questions: whether the petitioner has exhausted the avenues for seeking information from the respondents and whether this Court has jurisdiction to entertain a dispute arising from the recruitment of staff, particularly where the process is alleged to have violated the Constitution and the law.

10. On the first issue, Article 35 of the Constitution guarantees every citizen the right to access information held by the State or by another person where that information is required for the exercise or protection of a right. That right to access information is given effect through the Access to Information Act, which

establishes a clear, structured process overseen by the Commission on Administrative Justice, (CAJ) or Ombudsman.

11. Section 5 of the Access to Information Act mandates public entities to disclose information to the information seeker. However, access to public information is not absolute and section 6 of the Act provides for limitations to accessing information.
12. On the procedure for accessing information from a public entity, section 8 provides that an application must be made to the entity, section 9 providing the application process, while section 14 provides for Review of decisions by the Commission on Administrative Justice, where the request for access of information sought is denied.
13. Thus, a person seeking information is required, in the first instance, to make a request to the relevant public body, in writing, with sufficient detail to enable the information to be identified. Upon receipt, the public entity is under a legal obligation to respond expeditiously, and in any event within the timelines prescribed by the Act, either by providing the information, giving reasons for any refusal, or indicating if more time is needed.
14. Where access is denied, or the response is unsatisfactory, the applicant may seek an internal review within the institution, and thereafter lodge a complaint with the Commission on Administrative Justice, which is empowered to

investigate, compel disclosure where appropriate and ensure compliance with the law. This procedure reflects the broader constitutional commitment to transparency, accountability and the public's right to know, while balancing legitimate limitations such as national security or privacy as stipulated in section 6 of the Access to Information Act.

15. The Supreme Court in **Kenya Railways Corporation & 2 others v Okoiti & 3 others [2023] KESC 38 (KLR)** observed as follows:

“Article 35 of the Constitution of Kenya 2010 provides for the right to access information held by the State, including that held by public bodies. The Access to Information Act No 31 of 2016 was enacted to give effect to article 35 and sets out the procedure to be followed when requesting information including on the mandate of the Commission on the Administrative Justice. Pursuant to this provision, citizens should be able to access the information by first, requesting for the information from the relevant State agency. In Kahindi Lekalhaile & 4 others v Inspector General National Police Service & 3 others Nrb Petition No 25 of 2013 [2013] eKLR, the High Court stated as follows:

“However, in order for this right to be justiciable, it must be established that the person seeking the information has sought the information, and access to such information has been denied. ... In

the instant case, no request for information has been made to the respondents. The enforcement of the right cannot therefore be said to have crystallized.”

16. In this case, there is no evidence that the petitioner/ applicant sought for information and upon being denied, it applied to the Commission on Administrative Justice for review of the decision declining to furnish the information sought.

17. On that ground alone, the prayer for mandamus to compel the respondents to furnish information as requested in the letter dated 1st April, 2026 fails for want of exhaustion of remedies.

18. On whether this Court has jurisdiction to entertain the substantive prayers regarding the recruitment and employment of staff by the respondents, it is important to note that Jurisdiction is not a procedural technicality that a court may overlook in the interests of substantive justice. Jurisdiction is the very authority of the Court to act. Without it, the court has no power to take even a single step. This principle has long been settled, most famously in **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd (Civil Appeal 50 of 1989) [1989] KECA 48 (KLR) (17 November 1989) (Judgment)** where the Court of Appeal held that once a court finds it lacks jurisdiction, it must immediately down its tools.

19. The Court of Appeal stated as follows:

30. With that I return to the issue of jurisdiction and to the words of Section 20 (2) (m) of the 1981 Act. I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. 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 down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority:

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the

jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given”

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31. It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined.”

20. The starting point on jurisdiction is the Constitution itself. Article 165(3) vests in the the High Court wide jurisdiction in the following terms:

(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.

21. However, that jurisdiction is not without limits. Article 165(5)(b) expressly deprives the High Court any matters that fall within the jurisdiction of the

Supreme Court and the courts contemplated under Article 162(2). Those Courts are the Employment and Labour Relations Court, established under Article 162(2)(a) to deal specifically with employment and labour relations disputes and the Environment and Land Court established under Article 162(2) (b) to deal with disputes relating to the environment and the use and occupation of, and title to, land.

22. Material to these proceedings, Parliament, in implementing that constitutional design, enacted the Employment and Labour Relations Court Act. Section 12 of that Act confers upon the Court exclusive jurisdiction over all disputes relating to employment and labour relations. The language of that provision is deliberately broad. It does not confine the Court's mandate to disputes arising after employment has commenced; rather, it extends to all matters sufficiently connected to employment, including recruitment.

23. It is therefore not in doubt that the recruitment of staff is an integral part of the employment relationship. It is the gateway through which employment is initiated. Disputes arising from that process, whether framed as unfairness, illegality, or even unconstitutionality, remain, in substance, employment disputes.

24. The Supreme Court in **Macharia & another v Kenya Commercial Bank Ltd & 2 others (Application 2 of 2011) [2012] KESC 8 (KLR) (23 October 2012)**

(Ruling) made it clear that a court's jurisdiction flows only from the Constitution or statute, and that no court may arrogate to itself jurisdiction that has not been expressly conferred. The Court held as follows:

“A court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law could only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which was conferred upon it by law. The issue as to whether a court of law had jurisdiction to entertain a matter before it, was not one of mere procedural technicality; it went to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings.

Where the Constitution exhaustively provided for the jurisdiction of a court of law, the court must operate within the constitutional limits. It could not expand its jurisdiction through judicial craft or innovation. Nor could Parliament confer jurisdiction upon a court of law beyond the scope defined by the Constitution. Where the Constitution conferred 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.”

25. That pronouncement binds this Court. It also serves as a caution against the temptation to expand jurisdiction on the basis of perceived injustice or the manner in which a claim is framed.

26. It may be argued that where a recruitment process is alleged to violate constitutional provisions, such as the national values, equality and non-discrimination, or the principles of public service under Article 232 of the Constitution, the High Court should assume jurisdiction under its constitutional mandate. That argument, though attractive at first sight, cannot stand in light of the constitutional structure.

27. The Constitution did not create parallel or competing jurisdictions between the High Court and the specialised courts. Instead, it established a clear division of labour. Matters relating to employment and labour relations were deliberately removed from the High Court and placed within the exclusive realm of the Employment and Labour Relations Court. Article 162 (1) is clear that that Court is not subordinate to the High Court; it is a court of equal status, fully competent to interpret and apply the Constitution within its sphere.

28. Therefore, to allow parties to bypass that Court simply by clothing employment disputes in constitutional language would defeat the very purpose of Article 162(2) and render Article 165(5)(b) hollow. I hasten to add that Jurisdiction cannot be conferred by craft. Moreso, 16 years after the promulgation of the

Constitution, the establishment and operationalization of the ELRC and the many decisions rendered by that Court over time, in constitutional petitions, one cannot feign ignorance to inadvertently stray to the High Court to seek orders that if issued by the High Court, would embarrass the Court.

29. All that I have stated above is that where the substance of a dispute concerns employment or labour relations, including the recruitment of staff, the proper forum is the Employment and Labour Relations Court. The High Court is expressly barred from entertaining such matters, regardless of the remedies sought or the constitutional dimensions invoked.

30. In the present case, the grievance arises from a recruitment process. However, it is framed, its core lies in employment. That being so, this Court cannot assume jurisdiction without acting in direct contravention of the Constitution.

31. The consequence is inevitable. This Court must decline jurisdiction. As was stated in the *Owners of Motor Vessel Lilian S* case, the moment a court holds that it lacks jurisdiction, it must down its tools. Any further step would be taken without lawful authority and would render the proceedings a nullity.

32. Accordingly, I affirm my order made on 17th April 2026 and hold that this Court has no jurisdiction to hear and determine this dispute. The appropriate forum is the Employment and Labour Relations Court, which is properly seized of such

matters and is fully empowered to grant appropriate relief, including on constitutional questions arising therein.

33. These proceedings are therefore found to be incompetently filed before this Court and are accordingly struck out

34. I make no orders as to costs.

35. This file is closed.

36. Orders accordingly.

Dated, Signed and Delivered at Nairobi this 23rd Day of April, 2026

**R.E. ABURILI
JUDGE**