



**Governor, County Government of Kakamega & 4 others v  
Omweno & 12 others (Civil Appeal E176, E177 & E179 of 2024  
(Consolidated)) [2025] KECA 190 (KLR) (7 February 2025) (Judgment)**

Neutral citation: [2025] KECA 190 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPEAL E176, E177 & E179 OF 2024 (CONSOLIDATED)  
HM OKWENGU, HA OMONDI & JM NGUGI, JJA  
FEBRUARY 7, 2025**

**BETWEEN**

**THE GOVERNOR, COUNTY GOVERNMENT OF KAKAMEGA .... 1<sup>ST</sup>  
APPELLANT**

**COUNTY GOVERNMENT OF KAKAMEGA ..... 2<sup>ND</sup> APPELLANT**

**THE COUNTY SECRETARY KAKAMEGA COUNTY ..... 3<sup>RD</sup> APPELLANT**

**AND**

**MRS CATHERINE RAINI OMWENO ..... 1<sup>ST</sup> RESPONDENT**

**MR STANLEY AMWAYI WERE ..... 2<sup>ND</sup> RESPONDENT**

**DR RALPH WANGATIA IMMAM ..... 3<sup>RD</sup> RESPONDENT**

**JOEL ANYERA OMUKOKO ..... 4<sup>TH</sup> RESPONDENT**

**THE COUNTY ASSEMBLY OF KAKAMEGA ..... 5<sup>TH</sup> RESPONDENT**

**DENNIS DANCUN MUHANDA ..... 6<sup>TH</sup> RESPONDENT**

**AS CONSOLIDATED WITH  
CIVIL APPEAL E177 OF 2024**

**BETWEEN**

**COUNTY ASSEMBLY OF KAKAMEGA ..... APPELLANT**

**AND**

**MRS CATHERINE RAINI OMWENO ..... 1<sup>ST</sup> RESPONDENT**

**MR. STANLEY AMWAYI WERE ..... 2<sup>ND</sup> RESPONDENT**



DR. RALPH WANGATIA IMMAM ..... 3<sup>RD</sup> RESPONDENT  
MR. JOEL ANYERA OMUKOKO ..... 4<sup>TH</sup> RESPONDENT  
JOHN AMBROSE WANYAMA ..... 5<sup>TH</sup> RESPONDENT  
SILVIA ITEMBE OTUNGA ..... 6<sup>TH</sup> RESPONDENT  
GOVERNOR, COUNTY OF KAKAMEGA ..... 7<sup>TH</sup> RESPONDENT  
COUNTY GOVERNMENT OF KAKAMEGA ..... 8<sup>TH</sup> RESPONDENT  
COUNTY SECRETARY, KAKAMEGA COUNTY ..... 9<sup>TH</sup> RESPONDENT  
DENNIS DANCUN MUHANDA ..... 10<sup>TH</sup> RESPONDENT

AS CONSOLIDATED WITH  
CIVIL APPEAL E179 OF 2024

BETWEEN

DENNIS DANCUN MUHANDA ..... APPELLANT

AND

MRS CATHERINE RAINI OMWENO ..... 1<sup>ST</sup> RESPONDENT  
MR. STANLEY AMWAYI WERE ..... 2<sup>ND</sup> RESPONDENT  
DR. RALPH WANGATIA IMMAM ..... 3<sup>RD</sup> RESPONDENT  
JOEL ANYERA OMUKOKO ..... 4<sup>TH</sup> RESPONDENT  
JOHN AMBROSE WANYAMA ..... 5<sup>TH</sup> RESPONDENT  
SILVIA ITEMBE OTUNGA ..... 6<sup>TH</sup> RESPONDENT  
THE COUNTY ASSEMBLY OF KAKAMEGA ..... 7<sup>TH</sup> RESPONDENT  
THE GOVERNOR COUNTY GOVERNMENT OF KAKAMEGA .... 8<sup>TH</sup>  
RESPONDENT  
COUNTY SECRETARY KAKAMEGA COUNTY ..... 9<sup>TH</sup> RESPONDENT  
COUNTY GOVERNMENT OF KAKAMEGA ..... 10<sup>TH</sup> RESPONDENT

*(Being an Appeal from the Judgment of the Employment and Labour Relations Court at Kakamega (Keli, J.) dated 6th June, 2024 in Petition No. E008 of 2023)*

**The ELRC does not have jurisdiction to determine matters related to the appointment and removal of County Public Service Board members**

*The consolidated appeals were on the removal from office of the Chairperson and three members of the County Public Service Board of Kakamega. The court found that any matters related to the appointment and removal of constitutional office holders – including holders of offices which were derivative of constitutional provisions such as county public service board members – were to be ventilated as constitutional questions before the High Court and not as labour and employment issues before the Employment and Labour Relations Court (ELRC). The court*



further held that the questions presented in the consolidated appeals did not fall within the meaning of disputes related to employment and labour relations and therefore, the ELRC did not have jurisdiction to deal with the petition before it.

Reported by Kakai Toili

**Jurisdiction** – jurisdiction of the High Court vis a vis the Employment and Labour Relations Court (ELRC) – jurisdiction to determine matters related to the appointment and removal of chairpersons and members of county public service boards - whether the ELRC had the jurisdiction to determine a challenge on the removal of a chairperson and members of county public service boards – Constitution of Kenya, articles 10, 162, 165, 232 and 251; County Governments Act (cap 265), sections 58(5) and 59; Employment and Labour Relations Court Act (cap 8E), section 12(1).

**Jurisdiction** – jurisdiction of courts – raising of jurisdictional issues in court proceedings – time within which jurisdictional issues could be raised during court proceedings - whether issues on jurisdiction could be raised at any time in court proceedings including on appeal even if it was not raised earlier.

### **Brief facts**

The consolidated appeals were on the removal from office of the Chairperson and three members of the county public service board of Kakamega (the 1<sup>st</sup> to 4<sup>th</sup> respondents). Until their removal from office, the 1<sup>st</sup> to 4<sup>th</sup> respondents were serving a non-renewable term of six years which was due to lapse in June, 2025. They were removed from office following a positive vote at the County Assembly of Kakamega proceedings held on December 14, 2023. Aggrieved, the 1<sup>st</sup> to 4<sup>th</sup> respondents filed a petition at the Employment and Labour Relations Court (ELRC) challenging their removal from office. The 1<sup>st</sup> to 4<sup>th</sup> respondents' alleged that the County Assembly's proceedings were unconstitutional. The 1<sup>st</sup> to 4<sup>th</sup> respondents were successful at the ELRC. The ELRC declared that the removal process of the petitioners from office, by the Kakamega County Assembly, the 2<sup>nd</sup> respondent, was in violation of the Constitution. Further aggrieved, the appellants filed the instant consolidated appeals.

### **Issues**

- i. Whether the Employment and Labour Relations Court had the jurisdiction to determine a challenge on the removal of a chairperson and members of county public service boards.
- ii. Whether matters related to the appointment and removal of chairpersons and members of county public service boards were to be determined as labour issues before the Employment and Labour Relations Court.
- iii. Whether jurisdictional issues could be raised at any time in court proceedings including on appeal even if it was not raised earlier.

### **Relevant provisions of the Law**

#### **Employment and Labour Relations Court Act (Cap. 8E)**

#### **Section 12 - Jurisdiction of the Court**

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 –*
  1. *disputes relating to or arising out of employment between an employer and an employee;*
  2. *disputes between an employer and a trade union;*
  3. *(c)disputes between an employers' organisation and a trade unions organisation;*
  4. *disputes between trade unions;*
  5. *disputes between employer organizations;*
  6. *disputes between an employers' organisation and a trade union;*
  7. *disputes between a trade union and a member thereof;*



8. *disputes between an employer's organisation or a federation and a member thereof;*
9. *disputes concerning the registration and election of trade union officials; and*
10. *disputes relating to the registration and enforcement of collective agreements.*

**Held**

1. The appointment and removal of members of county public service boards was a textually constitutionalized and heavily regulated space. The key role of the county public service board was to align the county public service with the constitutional goals of devolution as well as the national values and principles in article 10 of the Constitution and the values of the civil service stipulated in article 232 of the Constitution. If there was any doubt about the constitutional image of the county public service boards, it was dispelled by the functions which were assigned in section 59 of the County Governments Act. The key constitutional role of county public service boards in anchoring and safeguarding devolution was spelt out in section 58(5) of the County Governments Act regarding their removal from office.
2. A court of law could only deal with a subject matter for which it had jurisdiction. So important was the issue of jurisdiction that it could be raised at any time in the proceedings – including on appeal even if it was not raised earlier.
3. The dispute was about the appropriate constitutional and statutory procedures and thresholds for the removal of members of a county public service board. Implicated in that inquiry, was the question whether, for example, the Evidence Act had application to proceedings for the removal of members of the county assembly board or any constitutional body whose removal was regulated by article 251 of the Constitution.
4. What the Constitution and the statute envisaged was not an employment disciplinary hearing in order to remove the chair or a member of the county public service board. By making reference to article 251 of the Constitution, the statute was making clear that a constitutional process was intended. Such a constitutional process was not subject to the rules of employment law and disciplinary procedures but to rules attending to constitutional processes. Any person aggrieved by such a process – whether a participant or a public spirited individual – could seek redress – not at the Employment and Labour Relations Court but at the High Court. Differently put, the law envisaged that any matters related to the appointment and removal of constitutional office holders – including holders of offices which were derivative of constitutional provisions such as county public service board members – were to be ventilated as constitutional questions before the High Court and not as labour and employment issues before the ELRC.
5. Constitutional controversies were to be heard by the High Court by dint of article 165 of the Constitution. The questions presented in the consolidated appeals did not fall within the meaning of disputes related to employment and labour relations and therefore, the ELRC did not have jurisdiction to deal with the petition before it and should have allowed the preliminary objection pursued by the respondents before it. The matter should have been appropriately before the High Court which had unlimited subject matter jurisdiction.
6. The ELRC was a specialized court established under article 162(2) of the Constitution as a superior court with equal status to the High Court. Its mandate was to hear and determine disputes relating to employment and labour relations. What amounted to employment and labour relations matters was detailed in section 12(1) of the Employment and Labour Relations Court Act, the constitutional statute enacted pursuant to article 162 of the Constitution. That section provided that the jurisdiction of the ELRC was to hear disputes relating to employment and labour relations.
7. The precise and limited jurisdiction of the ELRC was not meant to cover the type of constitutional questions presented in the petition that was before the superior court. Those questions related to the constitutional constraints and imprimatur in the procedures and standards for the removal of chairpersons and members of county public service boards. Those were matters which did not fall



within the meaning of a dispute relating to employment and labour relations. Consequently, those were matters which were not within the jurisdiction of the ELRC.

8. The ELRC and the Environment and Land Court had jurisdiction, in appropriate cases, to interpret and apply the Constitution in matters that arose in the context of disputes on employment and labour relations or environment and land matters. They, however, had no original or unlimited jurisdiction to interpret and apply the Constitution.

*Consolidated appeals allowed.*

### **Orders**

- i. *Consolidated appeals allowed to the extent that the ELRC did not have jurisdiction.*
- ii. *The judgment of the ELRC dated June 6, 2024 was set aside and substituted with an order dismissing Kakamega ELRC Petition No. E008 of 2023.*
- iii. *Each party shall bear its own costs.*

### **Citations**

#### **Cases**

1. Attorney General & 2 others v Okiya Omtata Okoiti & 14 others [2020] KECA 30 (KLR) — (Explained)
2. County Assemblies Forum v Attorney General & 3 others; Parliamentary Service Commission (Interested Party) Petition 22 of 2017; [2022] KESC 66 (KLR) — (Explained)
3. Lemita Ole Lemein v Attorney General, Land Registrar, Narok County & Lekinyot Ole Lanke Civil Appeal 64 of 2016; [2020] KECA 303 (KLR) — Explained
4. Owners Of The Motor Vessel “Lillian S v Caltex Oil (Kenya) Ltd Civil Appeal 50 of 1989; [1989] KECA 48 (KLR); [1989] KLR 1 — (Followed)

#### **Statutes**

1. Constitution of Kenya — articles 10; 23(3); 27; 28; 35; 37; 41; 47; 50; 165; 232; 235; 236; 251(1) — (Interpreted)
2. County Governments Act (cap 265) — sections 44; 56; 57; 58(3)(4)(5); 58A; 59 — (Interpreted)
3. Employment Act (cap 226) — section 45 — (Interpreted)
4. Employment And Labour Relations Court Act (cap 8E) — section 12 (1)— (Interpreted)
5. Evidence Act (cap 80) — sections 35; 80; 81; 82 — (Interpreted)

#### **Texts**

1. Saunders, JB., Burrows, R., (Eds) (1989), Words and Phrases Legally Defined (London: Butterworths Vol 3 p 113)

#### **Advocates**

None mentioned

## **JUDGMENT**

1. Article 235 of the [Constitution of Kenya](#) provides that:
  1. A county government is responsible, within a framework of uniform norms and standards prescribed by an Act of Parliament, for:
    - a. Establishing and abolishing offices in its public service;
    - b. Appointing persons to hold or act in those offices, and confirming appointments; and
    - c. Exercising disciplinary control over and removing persons holding or acting in those offices.



2. Clause (1) shall not apply to any office or position subject to the Teachers Service Commission.
2. The Act of Parliament contemplated in article 235 of the *Constitution* is the *County Governments Act*. This makes the *County Governments Act* (“the Act”) a constitutional statute, at least those portions dealing with the county public service. Section 56 of that *Act* provides that each county shall have, in accordance with article 235 of the *Constitution*, its own public service to be known as the County Public Service; and that it shall be headed by a County Secretary appointed under section 44 of that *Act*.
3. Further, section 57 of the *Act* provides for the establishment of the County Public Service Board in each county. Under section 58 of the *Act*, the County Service Board shall comprise of a chairperson appointed in accordance with section 58A of that *Act*; and at least three but not more than five members, also appointed in accordance with section 58A of the *Act*. The County Service Board is also to consist of a certified public secretary in good professional standing nominated and appointed by the Governor, with the approval of the County Assembly, who shall serve as the Secretary to the County Service Board.
4. Section 58(3) of the *Act* provides for qualifications of members of the County Assembly Board. It provides that among other qualifications, a person only qualifies for appointment if the person:
  - a. satisfies the provisions of Chapter Six of the *Constitution*;
  - b. is not a state or public officer;
    - (ba) has not, at any time within the preceding five years, held office, or stood for election as —(i)a member of Parliament or of a county assembly; or(ii)a member of the governing body of a political party;
    - (bb) is, or as at any time been, a candidate for election as a member of Parliament or of a county assembly;
    - (bc) is, or has at any time been, the holder of an office in any political organisation that sponsors or otherwise supports, or has at any time sponsored or otherwise supported, a candidate for election as a member of Parliament or of a county assembly;
  - c. in the case of Chairperson or vice-Chairperson, possesses a minimum qualification of a bachelor’s degree from a recognised university and working experience of not less than ten years; and
  - d. in the case of any other members—
    - (i) possesses a minimum of a bachelor’s degree from a recognised university and working experience of not less than five years; and
    - (ii) is a professional, demonstrates absence of breach of the relevant professional code of conduct.
5. Under section 58(4) of the *Act*, a member of the Board shall hold office for a non-renewable term of six years; and may serve on a part-time basis.
6. It is readily obvious from these constitutional and statutory provisions that the appointment and removal of members of County Service Boards is a textually constitutionalized and heavily regulated space. The reason is not too far to hazard: the key role of the County Service Board is to align the county public service with the constitutional goals of devolution as well as the national values and principles in article 10 of the *Constitution* and the values of the civil service stipulated in article 232 of



- the Constitution. If there was any doubt about the constitutional image of the County Service Boards, it is dispelled by the functions it is assigned in section 59 of the Act.
7. The key constitutional role of County Service Boards in anchoring and safeguarding devolution is spelt out in section 58(5) of the Act regarding their removal from office. Under that subsection of the Act, the members of the Board may only be removed from office:
    - a. On grounds set out for the removal of members of a constitutional commission under article 251(1) of the Constitution; and
    - b. by a vote of not less than seventy five percent of all the members of the county assembly.
  8. We have gone into this exposition about the nature and role of the County Service Boards because the appeals before us respect the removal from office of the Chairperson and three members of the County Service Board of Kakamega. Catherine Raini; Stanely Amwayi Were; Dr Ralph Wangatia Immam; and Joel Anyera Omukoko, were, respectively the Chairperson and members of the Kakamega County Service Board – at least until December 14, 2023. They are, respectively, the 1<sup>st</sup> to 4<sup>th</sup> respondents all the three civil appeals under consideration ie Civil Appeal No 176 of 2024; No 177 of 2024 and 179 of 2024 (hereinafter collectively referred to as the “1<sup>st</sup> to 4<sup>th</sup> respondents”).
  9. Until their removal from office, the 1<sup>st</sup> to 4<sup>th</sup> respondents were serving a non-renewable term of six years which was due to lapse in June, 2025. They were removed from office following a positive vote at the County Assembly of Kakamega proceedings held on December 14, 2023. The circumstances preceding and leading up to their removal proceedings were as follows.
  10. On October 12, 2023, the Clerk of the County Assembly of Kakamega received a petition from Dennis Duncan Muhanda (hereinafter, “Mr Muhanda”) for the removal from office of the 1<sup>st</sup> to 4<sup>th</sup> respondents in their capacity as chairperson and members of the County Service Board respectively. Mr Muhanda is the 6<sup>th</sup> respondent in Civil Appeal No 176 of 2024; the 10<sup>th</sup> respondent in Civil Appeal No 177 of 2024; and the appellant in Civil Appeal No 179 of 2024. In his petition for the removal of the 1<sup>st</sup> to 4<sup>th</sup> respondents, Mr Muhanda alleged that the 1<sup>st</sup> to 4<sup>th</sup> respondents had committed various violations of the Constitution and statutory laws.
  11. On receipt of Mr Muhanda’s petition, the Clerk of the County Assembly of Kakamega notified the Speaker of the County Assembly of the petition. The Speaker, then, notified the County Assembly of Mr Muhanda’s petition on 17 October , 2023. At a plenary sitting on 19 October, 2023, the County Assembly of Kakamega committed Mr Muhanda’s petition to the Committee of the County Assembly responsible for Public Service and County Administration (hereinafter, “County Assembly Committee”) to consider it and prepare a report back to the County Assembly.
  12. The County Assembly Committee, thereafter, drew its work plan and invited Mr Muhanda to provide better and further particulars to his petition. It also invited the 1<sup>st</sup> to 4<sup>th</sup> respondents to respond to the petition – although one of the issues later taken up on litigation by the 1<sup>st</sup> to 4<sup>th</sup> respondents is the adequacy of the notice granted to them.
  13. One of the contested issues in the trial at the Employment and Labour Relations Court [ELRC] is exactly what transpired at the Committee stage. However, it is common that the County Assembly Committee proceedings eventually took place between December 4, 2023 and 7 December 2023 in public. The County Assembly Committee retired to deliberate and released its report dated December 11, 2023. In the report, the County Assembly Committee made adverse findings against the 1<sup>st</sup> to



- 4<sup>th</sup> respondents and found some of the allegations made against them in Mr Muhanda's petition, as proved. The County Assembly Committee recommended the removal from office of the 1<sup>st</sup> to 4<sup>th</sup> respondents.
14. The County Assembly Committee report was taken back to the County Assembly which voted on 14 December 2023, to remove each of the 1<sup>st</sup> to 4<sup>th</sup> respondents: 76 out of 87 members voted to remove the 1<sup>st</sup> respondent; 71 of 87 members voted to remove the 2<sup>nd</sup> respondent; 74 of 87 members voted to remove the 3<sup>rd</sup> respondent; and 75 of 87 members voted to remove the 4<sup>th</sup> respondent.
  15. The Speaker of the County Assembly, having determined that the votes against each of the 1<sup>st</sup> to 4<sup>th</sup> respondents reached the threshold of 75% required under section 58(5) of the *Act* for the removal of the chairperson and members of the County Assembly Board, announced that the four had been duly removed from office.
  16. This provoked the 1<sup>st</sup> to 4<sup>th</sup> respondents to take out a petition at the Kakamega Employment and Labour Relations Court (ELRC) being Petition No E008 of 2023 to challenge their removal from office. The 1<sup>st</sup> to 4<sup>th</sup> respondents' petition to the ELRC was dated December 19, 2023. It alleged that the County Assembly's proceedings of December 14, 2023 were illegal, unjust, selective and/or discriminatory and unconstitutional. They sought the following remedies, reproduced verbatim from the petition, under article 23(3) of the *Constitution*:
    - a. A declaration that the findings and recommendations of the 2<sup>nd</sup> respondent's Committee on Public Service and County Administration dated 11/12/2023 and as supersessionally adopted and/or passed and purportedly executed by the said 2<sup>nd</sup> respondent vide its letter of 15/12/2023 to the Petitioners and served upon the petitioners on 19/12/2023 technically, substantively and legally amounted to usurping exclusive powers an independent constitutional organ and or entity and in contravention of the *Constitution*, the *County Government Act* and the *Employment Act* and in the premises unconstitutional, illegal, null and void and of no legal consequence at all.
    - b. A declaration that the Resolution, Decision and or Directive by the 2<sup>nd</sup> respondent made on 14/12/2023 and or as contained in its letters of 15/12/2023 to the petitioners or any other date pursuant to the findings of the select committee date 11/12/2023 were in contravention of the *Constitution*, The *County Governments Act* and the *Employment Act* and therefore unconstitutional, illegal, null and void and of no legal consequences at all.
    - c. A declaration that the respondents are jointly and or severally in violation of the principles of natural justice and in violation of the petitioners' rights as guaranteed under articles 27, 28, 35, 37, 41, 47 and 50 and contrary to article 236 of the *Constitution*.
    - d. A declaration that the proceedings before the Committee on Public Service and County Administration of the 2<sup>nd</sup> respondent and the motions for adoption of the said findings and or recommendations thereof as contained in the said report dated 11/12/2023 of the said committee were made in error, deliberate ignorance, contravention of the rules of natural justice and therefore illegal, null and void.
    - e. A declaration that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> respondent's purported summary dismissal of the petitioners herein albeit on the basis of reliance on the purported communication from the 2<sup>nd</sup> respondent in its letters of 15/12/2023 delivered to the petitioners on 19/12/2023 purporting to remove them from office and purportedly subsequent to the alleged proceedings before the Committee on Public Service and County Administration of the 2<sup>nd</sup> respondent and the



motions for adoption of the finding and or recommendations thereof as contained in the said Report dated 11/12/2023 of the said Committee amount to usurping the discretionary powers of the 1<sup>st</sup> respondent and in the premise unconstitutional, illegal, null and void and of no legal consequences at all.

- f. A declaration that the petitioner's rights to a fair termination of service under section 45 of the Employment Act were violated.
  - g. An order of *certiorari* to remove from the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents into the honourable court to quash the decision and or recommendations of the 2<sup>nd</sup> respondent's Committee on Public Service and County Administration as contained in its Report dated 11/12/2023 and its subsequent adoption and recommendation made on 14/12/2023 by and as purportedly communicated by the said 2<sup>nd</sup> respondent vide its letters dated 15/12/2023 and delivered to the petitioners on 19/12/2023 purporting to remove the Petitioners from office be and is hereby issued and of made.
  - h. Permanent conservatory orders against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> respondents herein restraining and or prohibiting them and or their authorized representatives from proceeding on account of the illegal, irregular, unprocedural and ultra vires recommendation by the 2<sup>nd</sup> respondent on 14/12/2023 as contained in its letters of 15/12/2023 purporting to remove the Petitioners from office as Chairperson and Members of the Kakamega County Public Service Board and further permanently staying the purported and ultra vires decision of the respondents herein purporting to summarily dismiss the Petitioners vide their advertisements as appearing in the local dailies.
  - i. A permanent conservatory order and or injunction do issue to restrain the respondents, their agents and or anyone claiming under them from removing the petitioners from office based on the findings contained in the 2<sup>nd</sup> respondent's Committee on Public Service and County Administration Report dated 11/12/2023 and or the 2<sup>nd</sup> respondent's recommendation of 14/12/2023, further restraining any advertising as vacant and or recruiting any person as chairperson and member of the Kakamega County Public Service Board on any basis until their Petitioners terms are served.
  - j. General and exemplary damages for violations hereinabove complained of be made to the petitioners.
  - k. Costs of the petition.
17. The 1<sup>st</sup> to 4<sup>th</sup> respondents prevailed at the ELRC. After considering their petitions and the opposition thereto, the learned Judge of ELRC granted the following orders:
1. It is hereby declared that the removal process of the petitioners from office, by the Kakamega County Assembly, the 2<sup>nd</sup> respondent, was in violation of articles 35, 47, 50 and 236 of the Constitution.
  2. It is declared that the rushed proceedings without sufficient notice to the petitioners before the Assembly and removal of the petitioners from office was unlawful. The petition by the 4<sup>th</sup> respondent before the Assembly did not meet the threshold of removal of members of the Kakamega Public Service Board under article 251 (1) of the Constitution. The signing/affirming of the report by Assembly members who were not at the hearing was unlawful.
  3. An order of *certiorari* is hereby issued quashing the Report of the Assembly committee dated December 11, 2023 and the consequential decisions including the resolutions of 14 December



2023 of the 2<sup>nd</sup> respondent communicated vide letters to the petitioners dated 15 December 2023 removing them from office.

4. The 1<sup>st</sup>, 3<sup>rd</sup> and 5<sup>th</sup> respondents are restrained from relying on the letters dated 15 December 2023 communicating removal from office of the petitioners.
  5. The petitioners are to resume office with immediate effect and serve for the remainder of their term unless lawfully removed from office.
  6. The petitioners are each awarded Kshs.1 million each for violation of their rights plus costs. Monies awarded to attract interest at court rates from the date of judgment if not paid within 30 days of the judgment.
18. That disposition triggered three appeals:
- a. In Civil Appeal No 176 of 2024, the appellants are the Governor of the County Government of Kakamega; the County Government of Kakamega; and the County Secretary of Kakamega County.
  - b. In Civil Appeal No 177 of 2024, the appellant is the County Assembly of Kakamega.
  - c. In Civil Appeal No 179 of 2024, the appellant is Dennis Duncan Muhanda.
19. The three appeals were listed together before us. During the plenary hearing of the appeals on 24 July 2024, after noting that the three appeals emanated from the same judgment, it was agreed, by consent of all the parties that the three appeals be consolidated and heard together with a single judgment determining all three. This judgment does that.
20. The parties had filed their written submissions, lists of authorities and digest of cases which we have all keenly considered. Additionally, the parties' advocates appeared before us during plenary hearing and made oral presentations. Learned counsel Mr Lutta and Ms Seleke appeared for the Governor of the County Government of Kakamega; the County Government of Kakamega; and the County Secretary of Kakamega County; Mr Okong'o for the County Assembly of Kakamega; Mr Odero for Mr Dennis Muhanda; and Mr Shifwoka for the 1<sup>st</sup> to 4<sup>th</sup> respondents.
21. At the onset, it became clear to the Court that jurisdiction was a major issue to be determined and had the capacity to dispose of the consolidated appeals. We, thus, chose to determine the jurisdictional question before we can delve into the merits of the consolidated appeal. The jurisdictional question is whether the Employment and Labour Relations Court (ELRC) has jurisdiction to determine the constitutionality of the removal from office of the chairperson and members of the County Assembly of Kakamega County in the circumstances of this case.
22. While all the three appellants in the three appeals (as consolidated) argue that the ELRC had no jurisdiction to deal with the matter, the 1<sup>st</sup> to 4<sup>th</sup> respondents have insisted that it did. In doing so, they have had to make the implicit argument that the chairperson and members of the County Assembly Board of Kakamega County were employees of the County.
23. There is no question that a court of law can only deal with a subject matter whose jurisdiction it has. The eternal words of Nyarangi, JA in the *Owners of the Motor Vessel "Lillian S" v Caltex* [1989] eKLR cannot be said in a more perfect way:

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 as 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.’

See *Words and Phrases Legally defined* – Volume 3: I – N Page 113.”

24. So important is the issue of jurisdiction that it can be raised at any time in the proceedings – including on appeal even if it was not raised earlier. In *Lemita Ole Lemein v Attorney General & 2 others* [2020] eKLR, Karanja, JA took the view that:

“In my view, jurisdiction is primordial and must exist right from the filing of a case to determination. The issue of jurisdiction need to 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 mottu 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 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.”

25. In the present case, the issue of jurisdiction was raised at the ELRC. The ELRC ruled that it had jurisdiction. The learned Judge of the ELRC held that:

“65. The petitioners in this case, relying on the provisions of articles 10, 27, 28, 35, 47, 48, 50, 41 and 236 of the *Constitution* and section[s] 35, 80, 81, & 82 of the *Evidence Act*; section 58 of the *County Governments Act*, challenged their removal from office by the 2<sup>nd</sup> respondent on the grounds [that] the process was procedurally and substantially biased, discriminative, indignifying, suppressing their right to access to information, administratively unfair, contrary to ideals of fair trial and hearing and geared towards taking adverse action on public servants.



66. As to whether the acts of the 2<sup>nd</sup> respondent were within the constitutional confines is a pertinent issue that the court is asked to determine in the Petition.
67. The [County Governments Act](#), section 58(5) provides for the removal of the members of the County Public Service Board to be through the procedure for the removal on grounds set out for the removal of members of a constitutional commission under article 251(1) of the [Constitution](#). The process of removal must comply with the constitutional requirements.
68. The process of removal is through a petition as per article 251(2) before the County Assembly and this process is provided under the Kakamega County Assembly's Standing Orders and the process for the removal of the said members of the Public Service Board is quasi-judicial.
69. Under article 162 of the [Constitution](#), this court has the status of the High Court and it follows that in matters falling within its jurisdiction, the ELRC has supervisory powers over 'any person, body or authority exercising judicial or quasi-judicial functions.'

26. We have keenly looked at the record of the superior court, the pleadings by the parties and their submissions before us. It is impossible to deny that this is not a plain vanilla employment dispute between the members of the County Service Board and the County Assembly of Kakamega. Indeed, there is a real question whether the members of the County Service Board can, *strictu sensu*, be said to be employees for purposes of the [ELRC Act](#). What is readily obvious is that the dispute is about the appropriate constitutional and statutory procedures and thresholds for the removal of members of a County Service Board. Implicated in that inquiry, is the question whether, for example, the [Evidence Act](#) has application to proceedings for the removal of members of the County Assembly Board or any constitutional body whose removal is regulated by article 251 of the [Constitution](#). It seems obvious to us that what the [Constitution](#) and the Statute envisaged is not an employment disciplinary hearing in order to remove the Chair or a member of the County Assembly Board.

By making reference to article 251 of the [Constitution](#), the statute is making clear that a constitutional process is intended. Such a constitutional process is not subject to the rules of employment law and disciplinary procedures but to rules attending to constitutional processes. Any person aggrieved by such a process – whether a participant or a public spirited individual – can seek redress – not at the Employment and Labour Relations Court but at the High Court. Differently put, the law envisages that any matters related to the appointment and removal of constitutional office holders – including holders of offices which are derivative of constitutional provisions such as County Service Board members – are to be ventilated as constitutional questions before the High Court and not as labour and employment issues before the ELRC.

27. Indeed, the learned Judge's analysis in the excerpted quotation above appears to be on point until at the last point of deduction where she suddenly uses the fact that the ELRC is an Equal Status Court as justification for it to take on the purely constitutional questions presented in the petition before her. In paragraphs 65 to 68 of her judgment as excerpted above, the learned Judge is keenly driving the point that the controversy before her is a constitutional one. Constitutional controversies are to be heard by the High Court by dint of article 165 of the [Constitution](#). However, at paragraph 69 of the judgment, the learned Judge, like a thaumatropist, elides the natural trajectory of her analysis by transmuting the ELRC into the equation as one which exercises supervisory jurisdiction "over matters falling within its jurisdiction." In reaching this conclusion, the learned Judge peremptorily decides, without analysis, why the matter at hand is within the jurisdiction of the ELRC. In fact, her earlier analysis in paragraphs



65-68 had psychedelically demonstrated that the matter at hand was a constitutional one within the jurisdiction of the High Court under article 165 of the Constitution.

28. The question presented before this court in the consolidated appeals is analogous to the one this Court decided in Attorney General & 2 others v Okiya Omtata Okioti & 14 others [2020] eKLR. In that case, in the ELRC, some parties raised a preliminary objection, primarily on the grounds that the ELRC did not have jurisdiction in the matter because the appointment of the chairperson and members of the National Land Commission did not involve any employer- employee relationship and that in the circumstances, any alleged violation of the Constitution in the recruitment process was a matter for the High Court. In overruling the objection, the ELRC Judge at the trial court had held that:

“In relation to the National Land Commission commissioners, they have an obligation to work only for one employer, there are provisions on how they would work, how they may be removed and even how to be paid. Their positions fall squarely under a definition of a would-be employee and therefore their appointment is a matter for which this court is ceased (*sic*) with jurisdiction. I therefore return the verdict that this court had (*sic*) jurisdiction to entertain this petition.”

29. On appeal, in rejecting this reasoning, this court held that:

“From the [above-cited] provisions of the Constitution and the Act, it is obvious that the jurisdiction of the ELRC is precise and limited rather than unlimited. The straight forward jurisdictional question in this appeal therefore is whether recruitment of members of the National Land Commission falls within the meaning of a dispute relating to employment and labour relations.....What all this suggests to us is that the appointment and removal from office of the commissioners of these independent commissions is not a labour and employment issue as the ELRC erroneously held, but a special constitutional innovation, a sui generis devise to address challenging governance needs and gaps. The appointment of the chairperson and members of the Commission did not involve any of the parties or raise any of the employment and labour relations issues contemplated by section 12 of the Act. With due respect, it was completely off the mark for the learned judge to hold that the recruitment of the chairperson and members of the commission raised employment and labour relations issues merely because they were to be remunerated from the Consolidated Fund. On the parity of that reasoning, the election or removal from office of the President of the Republic or appointment and removal of Judges of the Superior Courts would amount to employment and labour relations issues, merely because they are remunerated from the consolidated fund.”

30. We are of the view that by parity of reasoning, the questions presented in the consolidated appeals before us do not fall within the meaning of disputes related to employment and labour relations and that, therefore, the ELRC did not have jurisdiction to deal with the petition before it and should have allowed the preliminary objection pursued by the respondents before it. The matter should have been appropriately before the High Court which has unlimited subject matter jurisdiction.

31. The Supreme Court has weighed in on the matter as well. In County Assemblies Forum v Attorney General & 3 others; Parliamentary Service Commission (interested party) [2022] KESC 66 (KLR), the Supreme Court held:

“On the question of appropriate forum of the dispute, the trial court found that the question of enforcement of rights and fundamental freedoms even touching on the employment



and labour is within the competence of the High Court pursuant to article 22. We are inclined to agree with the trial court and add that articles 23 and 165 of the Constitution fortifies this position as they are the provisions that gives the High Court jurisdiction to hear and determine applications for redress of denial, violation or infringement of rights or fundamental freedoms in the Bill of Rights.”

32. The upshot is that the ELRC is a specialized court established under article 162(2) of the Constitution as a superior court with equal status to the High Court. It’s mandate is to hear and determine disputes relating to “employment and labour relations.” What amounts to “employment and labour relations” matters is detailed in section 12(1) of the Employment and Labour Relations Act, the constitutional statute enacted pursuant to article 162 of the Constitution. That section provides that the jurisdiction of the ELRC is to hear disputes “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 employer’s 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 theregistrationa nd enforcement of collective agreements.
33. These provisions viewed against the constitutional provisions and exposition we began with to contextualize this dispute make is obvious that the precise and limited jurisdiction of the ELRC was not meant to cover the type of constitutional questions presented in the petition that was before the superior court. These questions related to the constitutional constraints and imprimatur in the procedures and standards for the removal of chairpersons and members of County Public Service Boards. Those are matters which do not fall within the meaning of a dispute relating to employment and labour relations. Consequently, those are matters which were not within the jurisdiction of the ELRC. As this court has variously said, the ELRC and ELC certainly have jurisdiction, in appropriate cases, to interpret and apply the Constitution in matters that arise in the context of disputes on Employment and Labour Relations or Environment and Land matters. They, however, have no original or unlimited jurisdiction to interpret and apply the Constitution.
34. The bottom line is that we find that the issues raised in the petition that was before the ELRC were constitutional in nature and the ELRC did not have jurisdiction to hear and determine them. Consequently, we allow the three appeals to the extent that the ELRC did not have jurisdiction. The judgment of the ELRC dated June 6, 2024 is set aside and substituted with an order dismissing Kakamega ELRC Petition No E008 of 2023.
35. Given the nature of the case and the public interest involved, we order that each party shall bear its own costs.

**DATED AND DELIVERED AT KISUMU THIS 7<sup>TH</sup> DAY OF FEBRUARY, 2025.**



**HANNAH OKWENGU**

.....

**JUDGE OF APPEAL**

**H. A. OMONDI**

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**JUDGE OF APPEAL**

**JOEL NGUGI**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original  
signed

**DEPUTY REGISTRAR**

