



REPUBLIC OF KENYA



Moi Teaching and Referral Hospital & 3 others v Gikenyi B & 152 others (Civil Appeal E107 & E116 of 2024 (Consolidated)) [2025] KECA 937 (KLR) (23 May 2025) (Judgment)

Neutral citation: [2025] KECA 937 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL E107 & E116 OF 2024 (CONSOLIDATED)
JM MATIVO, PM GACHOKA & WK KORIR, JJA
MAY 23, 2025**

BETWEEN

MOI TEACHING AND REFERRAL HOSPITAL 1ST APPELLANT

DR PHILIP KIPTANUI KIRWA 2ND APPELLANT

AND

DR MAGARE GIKENYI B 1ST RESPONDENT

LINAH NYABATE KINGSLEY 2ND RESPONDENT

PHILEMON ABUGA NYAKUNDI 3RD RESPONDENT

PAULINE NDUITA KINYANJUI 4TH RESPONDENT

SHALLUM KAKA NYAUNDI 5TH RESPONDENT

JAMLICK OTONDI ORINA 6TH RESPONDENT

AGNES WAMBUA WANZUU 7TH RESPONDENT

PROF ROBERT TENGE KUREMU 8TH RESPONDENT

DR WILSON K ARUASA 9TH RESPONDENT

ANN CHEMORSIO 10TH RESPONDENT

MOI TEACHING & REFERRAL HOSPITAL BOARD 11TH RESPONDENT

SITOYO LOPOKOIYOT 12TH RESPONDENT

PERIS BIRICHI 13TH RESPONDENT

JUDITH JEROTICH 14TH RESPONDENT

MESHACK KOIMA 15TH RESPONDENT

JAMES MUCHIRI NDUNGU 16TH RESPONDENT



DR MICHAEL GICHANGI	17 TH RESPONDENT
DR GEORGE OMBUA	18 TH RESPONDENT
DR ERNEO NYAKIBA	19 TH RESPONDENT
MR FELIX K KOSKEI	20 TH RESPONDENT
PUBLIC SERVICE COMMISSION	21 ST RESPONDENT
HON ATTORNEY GENERAL	22 ND RESPONDENT
DR BENJAMIN KIPCHUMBA TARUS	23 RD RESPONDENT
DR OWEN MENACH	24 TH RESPONDENT
ENG JOSEPH MUNGAI KAMAU	25 TH RESPONDENT
ATHI WATER WORKS DEVELOPMENT AGENCY	26 TH RESPONDENT
AGNES KALEKYE NGUNA	27 TH RESPONDENT
KENYA BROADCASTING CORPORATION	28 TH RESPONDENT
ABDALLAH MOHAMMED HATIMY	29 TH RESPONDENT
KENYA NATIONAL SHIPPING LINE LIMITED	30 TH RESPONDENT
DR JOHN CHERUIYOT CHUMBA	31 ST RESPONDENT
DR EVANS RONO CHERUIYOT	32 ND RESPONDENT
DR SIMON KIPCHIRCHIR KIBIAS	33 RD RESPONDENT
TITUS TARUS	34 TH RESPONDENT
DR ANDALE THOMAS OKWARO	35 TH RESPONDENT
DR MAURICE NYONGESA WAKWABUBI	36 TH RESPONDENT
DR EVERLINE MUSANGI NYAMAI	37 TH RESPONDENT
DR ANDREW JOSEPH OJIAMBO WANDERA	38 TH RESPONDENT
DR RICHARD MOGENI MOGAKA	39 TH RESPONDENT
DR CHEPTINGA PHILIP KIPKURUI	40 TH RESPONDENT
PROF MICHAEL KIPTOO	41 ST RESPONDENT
KENNEDY ADONGO	42 ND RESPONDENT
ARNOLD MANGI MWABILI	43 RD RESPONDENT
MACDONALD SABWA	44 TH RESPONDENT
JOSPHAT MUTUKU	45 TH RESPONDENT
MARTIN ALFRED WEKESA WAFULA	46 TH RESPONDENT
EDWARD S OMONDI	47 TH RESPONDENT
ALIO IBRAHIM ADEN	48 TH RESPONDENT



DR STANLEY CHERUIYOT	49 TH RESPONDENT
DR NICKSON KIPCHIRCHIR KIPKORIR	50 TH RESPONDENT
DR JUSTA WAWIRA KIURA MWANGI	51 ST RESPONDENT
ANANGWE MUNALA SAMSON	52 ND RESPONDENT
DR ISSAAC OBORE OMERI	53 RD RESPONDENT
ZETH OUMA OMOLLO	54 TH RESPONDENT
DR ISALAH TANUI	55 TH RESPONDENT
WILLY MUKOMA MUNYUTHE	56 TH RESPONDENT
BEN SAMOEI	57 TH RESPONDENT
RACHEL MUSYOKI	58 TH RESPONDENT
JOSEPH K CHOGE	59 TH RESPONDENT
DR TARUS FELIX KIPLIMO	60 TH RESPONDENT
FRANKLYNE MISIKO OMUHOLO	61 ST RESPONDENT
KAUSHIK HALDER	62 ND RESPONDENT
BENSON BIWOTT	63 RD RESPONDENT
DAVID NAMU KARIUKI	64 TH RESPONDENT
DR ROBERT KIPLAGAT RONO	65 TH RESPONDENT
DR GIDEON KIBET TOROMO	66 TH RESPONDENT
DR EDWARD KIMUTAI SEREM	67 TH RESPONDENT
JULIANA SYOWEU TISNANGA	68 TH RESPONDENT
WEKESA CHRISTINE NAKHUMICHA	69 TH RESPONDENT
DR SAMSON KIPKURGAT NDEGE	70 TH RESPONDENT
DR ALEXANDER IRUNGU WANJIRU	71 ST RESPONDENT
LUCY AKOTH OKOTH	72 ND RESPONDENT
DR NGOITSI HENRY NONO	73 RD RESPONDENT
DR WILSON KIPTOO SUGUT	74 TH RESPONDENT
DR VICTOR KIPYEGON MAINA	75 TH RESPONDENT
DR KANDIE NG'OCHOCH	76 TH RESPONDENT
DR PHILIP KIPKIRUI TONUI	77 TH RESPONDENT

**AS CONSOLIDATED WITH
CIVIL APPEAL E116 OF 2024**



BETWEEN

ATHI WATER WORKS DEVELOPMENT AGENCY 1ST APPELLANT

ENG JOSEPH MUNGAI KAMAU 2ND APPELLANT

AND

DR MAGARE GIKENYI B & 76 OTHERS & 76 OTHERS RESPONDENT

(Being an appeal against the ruling and orders of the High Court of Kenya at Nakuru (Mohochi J.) dated 20th June 2024 in Petition No. E011 OF 2024)

JUDGMENT

1. This judgment determines two consolidated interlocutory appeals, namely, Civil Appeal No. E107 of 2024, Moi Teaching & Referral Hospital and Dr. Philip Kiptanui Kirwa vs. Dr. Magare Gikenyi B. & 76 Others and Civil Appeal No. E116 of 2024, Athi Water Works Development Agency and Eng. Joseph Mungai Kamau & 76 Others. During the virtual hearing of the appeals on 5th March 2025, it was agreed by consent of the parties that the two appeals be consolidated and heard together. Civil Appeal No. 107 of 2024 was designated as the lead file.
2. The common factor between the two appeals is that they both seek to overturn the ruling rendered by Mohochi, J. on 20th June 2024 in Nakuru High Court Constitutional Petition No. E011 of 2024. Consolidation of suits saves costs, time and makes the conduct of several actions more convenient by treating them as one action and determining together common questions of fact and law. (See the High Court decision in Korean United Church of Kenya & 3 Others vs. Sen Ho Sang [2014] eKLR).
3. The factual background which elicited the proceedings before the High Court, which culminated in the ruling the subject of these consolidated appeals is essentially straight forward and uncontested. Briefly, on 12th December 2023, the 1st appellant in conjunction with the 2nd appellant published an advertisement inviting qualified persons to apply for the position of the 1st appellant's Chief Executive Officer. On 16th January 2024, (after the closure of the period provided for the applications), the appellants shortlisted 8 candidates and invited them to attend an interview on 4th March 2024 at Boma Inn Hotel, Eldoret. On 17th May 2024, the Government spokesman Mr. Isaac Mwaura issued a press release entitled

“Notification of Government Action” in which he announced appointments to various state corporations which according to him were made following a successful competitive recruitment process and with the concurrence of the 20th respondent, Mr. Felix Kosgei, EGH, the Chief of Staff & Head of the Public Service. As per the said communication, Dr. Philip Kiptanui Kirwa (the 2nd appellant) was appointed the 1st appellant's CEO. Eng. Joseph Mungai Kamau (the 4th appellant) was appointed the CEO of Athi Water Works Development Agency, (the 3rd appellant. Ms. Agnes Kalekye Nguna (the 27th respondent) was appointed the Managing Director of Kenya Broadcasting Corporation (the 28th respondent) while Mr. Abdalla Mohamed Hatimy (the 29th respondent) was appointed the Managing Director, Kenya National Shipping Line Limited (the 30th respondent).



4. The said appointments elicited the dissatisfaction of the 1st to the 7th respondents who viewed the process of appointment to be riddled with brazen constitutional violations and ethnic marginalization, and in effort to protect preserve and uphold *the Constitution*, they instituted Nakuru High Court Constitutional Petition No. E011 OF 2024 challenging the recruitment process and the appointment of the Chief Executive Officer/Managing Director of the 26th respondent, the 1st appellant, the 28th respondent, and the 30th respondent. The said entities are all State corporations. The petition was accompanied by an application seeking conservatory orders suspending the said press release, the gazette notice and/or any other document or authority dated 17th May 2024 or any other date appointing Dr. Philip Kiptanui Kirwa, Eng. Joseph Mungai Kamau, Ms. Agnes Kalekye Nguna and Mr. Abdalla Mohamed Hatimy to the said positions.
5. The said application was placed before Mohochi, J. on 21st May 2024, who upon considering it issued the following orders ex parte:
 - a. That, this application and petition is (sic) hereby certified extremely urgent to be heard on priority basis and service of the same is dispensed with in the first instance.
 - b. That, a conservatory order is hereby issued, compelling the respondents, suspending the Press Release, Gazette Notice or any other authority or document dated 17th May 2024 or any other date purporting to appoint Dr. Phillip Kiptanui Kirwa, the 4th Respondent, as the 1st respondent's CEO, pending the hearing and determination of this application.
 - c. That, a conservatory order is hereby issued suspending the Press release, gazette notice and/or any other document or authority appointing of the 20th, 22nd and 24th respondents as Chief Executive Officer (CEO) and/or Managing Directors of the 21st, 23rd and 25th state corporations/entities respectively.
 - d. That, temporary injunction is hereby issued, prohibiting the respondents and any other person either by themselves, their agents and/or any other person(s) whatsoever, from acting and/or giving effect to the press release and gazette notice and/or any document notifying of the appointment of Dr. Philip Kiptanui Kirwa, the 4th respondent herein or any other person herein as the hospital CEO of the 1st respondent pending the hearing and determination of this application.
 - e. That, a conservatory order is hereby issued restraining Dr. Philip Kiptanui Kirwa, the 4th respondent or any other person appointed pursuant to the impugned notice from performing and continuing to perform function as 1st respondent's CEO whatsoever, pending determination of this application inter-parties.
 - f. That, this application be served on the respondents and all Interested Parties within (Five) 5 days of today. Not later than close of business on Monday 29th May 2024.
 - g. That, the respondent files and serves its response upon the petitioners and all the Interested Parties within seven (7) days from the date of service. (Not later than close of business on Thursday 6th June 2024) and
 - e) That, inter-partes mention shall be on the 11th June 2024.
6. In response to the petition, the 22nd respondent (the Hon. Attorney General) also representing the 28th and 30th respondents) filed a Notice of Preliminary Objection dated 6th June 2024 urging that the entire petition be struck out with costs in limine on grounds that the trial court lacked jurisdiction to hear and determine the case.



7. Mr. Katwa, learned counsel for the 1st and 2nd appellants, 8th, 9th, 10th respondents, supported the preliminary objection contending that: (a) the filing of the petition before the trial court was informed by forum shopping and the suit is an abuse of court process; (b) that the ex parte orders were issued in error for want of geographical jurisdiction and subject matter jurisdiction because the dispute wholly falls within the jurisdiction of the Employment and Labour Relations Court (ELRC); and, (c) that the trial court lacked territorial jurisdiction within the meaning of Rule 8 of *The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* (the Mutunga Rules) because the cause of action arose in Eldoret where the 1st respondent is based and the alleged violations are said to have occurred. Alternatively, the jurisdictions would have been Nairobi where the 20th, 21st, 22nd and 23rd respondents are situated, or Mombasa where the 24th and 25th respondents are.
8. In addition, Mr. Katwa questioned the ex-parte orders because they exceeded 14 days period and maintained that the 2nd to 6th petitioners' interest in the petition is not disclosed. Mr. Katwa contended that there were fatal errors in the petition such as suing both the board, as a body corporate, and the individual board members, essentially duplicating the alleged cause of action, and enjoining the board members in person yet they did not act at a personal level nor was there a cause of action against them. Lastly, Mr. Katwa maintained that both the petition and the application are frivolous, vexatious and an abuse of court process.
9. Ms. Cherogony, learned counsel for the 21st respondent filed a preliminary objection on 30th May 2024 avowing that the petition offends Articles 162 (2) (a), 162 (3) and 165 (5) (b) of *the Constitution*.
10. Ms Kashindi, learned counsel for the 13th, 14th, 16th, and 18th respondents filed grounds of opposition dated 3rd June 2024 in support of the preliminary objection asserting that the court lacks subject matter jurisdiction as the dispute involves the recruitment and selection of the 1st appellant's Chief Executive Officer, which is an employment and labour relations dispute that ought to be filed before the Employment and Labour Relations Court (the ELRC), and that even if the High Court has jurisdiction, it lacks territorial jurisdiction within the meaning of Rule 8 of the Mutunga Rules because the matters in dispute in the petition occurred at Eldoret where the 1st appellant is based and where the alleged violations are said to have occurred.
11. In the impugned ruling dated 20th June 2024, the learned judge dismissed the preliminary objections stating inter alia:

“73 ...the 1st, 14th, 21st, 23rd, and 25th respondents are State Corporations and a Commission whose geographic sphere of operation is Kenya and cannot be heard to be lamenting of the matter not having been filed in Nairobi. Constitutional petitions against State Corporations can be filed in any high court in Kenya...

75. This Court further reiterates that, the jurisdiction of the Employment and Labour Relations Court is not activated where the petitioner is not and was never, in an employer-employee relationship and the substratum of the dispute is an alleged infringement of a fundamental right or freedom or the threat of its contravention.

76. In this instant petition, the grievance is not a dispute between employer-employee but rather an unconstitutional recruitment in contravention of *the constitution* based on ethnic considerations and not meritocracy. This court shall not undertake a merit review of the petition, at this juncture, but observe that the scope of the petition would subsume the limited aspect of recruitment



contemplated in the jurisdiction of the Employment and Labour Relations Court.”

12. Aggrieved by the above verdict, Moi Teaching and Referral Hospital and Dr. Philip Kiptanui Kirwa (the appellants in Civil Appeal No. 107 of 2024) and Athi Water Works Development Agency and Eng. Joseph Mungai Kamau (the appellants in Civil Appeal No. 116 of 2024) filed their respective memorandum of appeals dated 17th July 2024 and 7th August 2024. In both appeals, the appellants essentially seek orders that the ruling dated 20th June 2024 be set aside and/or vacated; the preliminary objections dated 6th May 2024 and 30th May 2024 be upheld; that any other hearing of the petition be conducted by any other Judge other than Mohochi, J. and the costs of these appeals be awarded to the appellants.
13. In their memoranda of appeal, the appellants in Civil Appeal No. 107 of 2024 have cited 12 grounds while the appellants in Civil Appeal No. 116 of 2024 cited 4 grounds. For the sake of brevity, we have abridged the grounds in both appeals as follows: (a) whether the trial court was justified in dismissing the preliminary objections; (b) whether the trial court erred in finding that it had territorial jurisdiction to entertain the matter in Nakuru instead of courts at Eldoret, Nairobi or Mombasa where the challenged parastatals have headquarters, and (c) whether the conservatory orders issued on 21st May 2024 met the threshold for grant of conservatory orders.
14. During the virtual hearing of the appeals on 5th March 2024, learned counsel Mr. Katwa Kigen appeared for the appellants in Civil Appeal No. E107 of 2024. Dr. Magare (the 1st respondent in the said appeal) appeared in person and learned Counsel Mr. Odera represented the 11th and 12th respondents, Ms. Gathira held brief for Mr. Kamotho for 25th and 26th respondents, Mr. Ogozo appeared for the 21st respondent while Ms. Irene Kashindi together with Ms. Wagongu represented the 13th, 14th, 15th, 16th, 31st, 34th, 57th, 60th, 74th and 75th respondents. There was no appearance for other respondents in this appeal.
15. As for Civil Appeal No. E116 of 2024, Ms. Gathira held brief for Dr. Kamotho for the appellants, Dr. Magare (the 1st respondent) appeared in person, Mr. Katwa Kigen appeared for the 8th and 9th respondents, Mr. Odera appeared for the 9th and 10th respondents, Mr. Ogozo appeared for the 21st respondent, Mr. Mungai Kamau held brief for Mr. Mogaka for the 27th respondent while Ms. Irene Kashindi appeared for the 12th, 13th, 14th, 15th, 16th, 61st, 68th and 69th respondents. There was no representation for all the other respondents in this appeal.
16. In support of Civil Appeal No. 107 of 2024 and on behalf of the 9th and 10th respondents in Civil Appeal No. 116 of 2024, Mr. Katwa Kigen adopted his written submissions dated 28th February 2025. Essentially, his contestation was that the learned judge erred in dismissing the preliminary objections and that he lacked the jurisdiction to entertain the dispute which is vested by *the Constitution* and the *Employment and Labour Relations Court Act* (the ELRC Act) in the ELRC, therefore, the learned judge contravened Article 162 (2) of *the Constitution* and Section 12 of the ELRC Act. He asserted that it is the ELRC that has the competence to interpret *the Constitution* in employment and labour relations matters, which includes recruitment, employment and other Labour related disputes and no court can arrogate to itself jurisdiction not expressly conferred by law. Counsel maintained that matters such as recruitment and appointment of Chief Executive Officers of State Corporations are inherently employment, therefore, they fall squarely within the jurisdiction of the ELRC. He argued that the trial court overstepped its constitutional and statutory mandate and cited the Supreme Court holding in *Kenya Tea Growers Association & 2 Others vs. The National Social Security Fund Board of Trustees & 13 Others (Petition E004 & E002 of 2023 (Consolidated))* [2024] KESC 3 (KLR) (21 February 2024)



- (Judgment) (the KTGA Case) that by dint of Article 165 (5) (b) of *the Constitution*, the High Court is precluded from assuming jurisdiction in employment and labour related matters.
17. In support of the ground that the learned judge lacked territorial jurisdiction to entertain the petition, Mr. Katwa Kigen contended that Rule 8 of the Mutunga Rules requires a petition to be filed at the nearest High Court station where the cause of action arises. He argued that in the instant case, the 1st appellant in Civil Appeal No. 107 of 2024 is based in Eldoret, the 1st appellant in Civil Appeal No. 116 of 2024 is based in Nairobi, Kenya Broadcasting Corporation is based in Nairobi and the Kenya National Shipping Line Ltd is based in Mombasa, while the advertisement for the vacancies and the recruitments were done at the headquarters of the respective parastatals and all the witnesses to be called would be from the High Court jurisdictions in the said areas. Mr. Katwa submitted that none of the entities operates within Nakuru County and no factual nexus was established connecting the cause of action to Nakuru. He contended that the failure to adhere to geographical jurisdiction creates an undue burden upon the respondents and the interested parties which negates the dictates of Articles 48 and 50 of *the Constitution*, and it also encourages forum shopping and bias.
 18. Mr. Katwa Kigen asserted that the learned judge's interpretation of *the Constitution* and statutory provisions was flawed and inconsistent with the binding judicial precedents. He maintained that the petitioners did not discharge their burden of proof and that the inclusion of many respondents and interested parties in the suits was aimed at sensationalizing the petition because there is no personal liability against the board of directors and furthermore, the petition is founded on illegally obtained documents.
 19. Regarding the accusation that the learned judge was biased against the respondents and the interested parties, he faulted the judge for: (a) insisting on presiding over the matter despite lacking jurisdiction; (b) rendering a strained reasoning on geographical jurisdiction; (c) disregarding the doctrine of stare decisis; (c) issuing onerous ex parte injunctive conservatory orders on public bodies offering essential services and issuing a far mention date instead of a date for inter partes hearing; and, (d) unilaterally deciding to dispense with the case by way of affidavit evidence without according the parties a hearing on what may be in the best interest of justice. For authority, counsel cited the Supreme Court holding in *Rai & 3 Others vs. Rai & 4 Others* (Petition 4 of 2012) 2013 KESC 20 that the test for establishing a judge's impartiality is the perception of a reasonable person, this being a well-informed, thoughtful observer who understands all the facts.
 20. Mr. Odera, learned counsel for the 11th and 12th respondents, in support of the appeals isolated two issues for determination, namely, (a) whether the High Court constitutional and human rights division has power to hear a petition that purely involves employeremployee dispute, (b) whether Nakuru High Court is the correct geographical jurisdiction to entertain the dispute.
 21. Regarding the first issue, counsel submitted that the trial court misapprehended the fact that the substratum of the petition is an attack on the manner in which the recruitment was done. Counsel maintained that the High Court lacks jurisdiction to decide a matter touching on unconstitutional recruitment of employees, which is essentially an employeemployer relationship, which exclusively falls within the jurisdiction of the ELRC. In support of this proposition, counsel cited the Supreme Court decision in the KTGA case (supra) that the ELC had the jurisdiction to determine disputes emanating from employment and labour relations and also to determine the constitutional validity of a statute especially if the Statute in question lies at the centre of the dispute.
 22. On territorial jurisdiction, Mr. Odera cited Rule 8 (1) of the Mutunga Rules and Section 15 of the *Civil Procedure Act* and submitted that every case should be instituted in the High Court within whose jurisdiction the alleged violation occurred and/or where the defendant resides or cause of action arose.



- Counsel further submitted that the matters in dispute occurred in Eldoret, therefore, falling within the geographical jurisdiction of the ELRC in Eldoret. Accordingly, filing the petition in Nakuru amounts to forum shopping.
23. Ms. Kashindi, Ms. Gathira holding brief for Mr. Kamotho and Mr. Ongoso in support of the appeal reiterated the submissions by Mr. Katwa Kigen and Mr. Odera. Therefore, it will add no value for us to rehash them here.
 24. Dr. Gikenyi in opposition to the two appeals on behalf of himself and the 2nd to 7th respondents addressed five issues, namely : (a) whether this court can set aside the conservatory orders issued on 21st May 2024; (b) whether the High Court has jurisdiction to hear and determine the suit; (c) whether Nakuru High Court lacks territorial jurisdiction to hear the petitions, and, (e) whether this Court can order recusal of the trial judge when the ruling in question has not been appealed against?
 25. Dr. Gikenyi questioned this Court’s decision to set aside the conservatory orders issued on 21st May 2024 despite the fact that the appellants never appealed against the said orders and added that though Judges can err in interpreting the law, they are not permitted to issue orders against decisions which are not appealed against.
 26. Regarding the question whether the High Court has the jurisdiction to hear and determine the impugned petitions, Dr. Gikenyi maintained that constitutional questions are not private law matters confined to an employer-employee relationship, therefore, the petitions are properly before the High Court because they do not deal with an employer-employee relationship per se, but constitutional violations affecting other persons such as the petitioners who do not have any employer-employee relationship with the respondent. To buttress his submission, Dr. Gikenyi cited Civil Appeal No. E136 of 2022 - Clerk, Nakuru County Assembly & 2 Others vs. Kenneth Odongo & 3 Others (“the Judgment”), in which this Court (at page 16-17) held that though advertisement, shortlisting, and interviewing are all steps towards recruitment and steps towards creating an employer – employee relationship, they are not envisaged in Section 12 which will place the petition under the jurisdiction of the Employment & Labour Relations Court.
 27. Addressing the argument that the High Court, Nakuru lacked the “geographical territorial jurisdiction” to entertain the petition, Dr. Gikenyi argued that the petitions involved institutions which are state corporations with wide national coverage. So, trying to confine the petition on its “tribal base home” headquarters amounts to tribalizing/regionalizing state corporations yet they are national entities as opposed to regional entities. In support of the said argument, he cited *Orogo vs. Chairman Board of Directors Kenya Revenue Authority & 2 Others (Petition E004 of 2023)* [2023] KEHC 24847 (KLR) (3 November 2023) (Ruling) in which the High re-affirmed another High Court decision in *JKM vs. COO* [2014] eKLR that its territorial jurisdiction is unlimited.
 28. Dr. Gikenyi also contended that where petitioners and respondents reside in different locations, the question arises, where the petition should be filed without splitting the suit, thereby unnecessarily overburdening judicial resources. It was his submission that in such a scenario, the answer lies in statutory interpretation, but, since the Mutunga Rules do not provide what happens in such a situation, one way addressing the issue it to consider the petitioners’ location since the petitioners and respondents are two sides of the same coin.
 29. Responding to the allegations of forum shopping, he maintained that the said accusations have not been substantiated, and added that the appellants will not suffer any prejudice if the trial proceeds in Nakuru because with virtual hearings, parties can log in and be heard from any location in the country, and in any event, almost 90% of respondents instructed Nairobi based advocates.



30. Regarding the plea to this Court to order the recusal of the trial judge, Dr. Gikenyi maintained that the court delivered its ruling on 23rd October 2024 dismissing the appellants' application for recusal, and no appeal has been preferred against the said ruling.
31. We have carefully addressed our minds to the pleadings filed before the trial court, the submissions made by the parties before the trial court, the impugned ruling, the grounds of appeal, the parties' submissions in support and in opposition to this appeal, the authorities and the law. We find that this appeal will be disposed of by determining the following questions:
- a. Whether the High Court had jurisdiction to hear and determine the petition;
 - b. Whether the Nakuru High Court had the "geographical jurisdiction" to entertain the petition.
 - c. Whether the conservatory orders granted on 21st May 2024 were properly issued.
32. Regarding the first issue, namely whether the High Court was divested of the jurisdiction to entertain the case, it is important to underscore that jurisdiction is a threshold matter which goes to the competence of a court to hear and determine a suit. As was held by this Court in *National Social Security Fund Board of Trustees vs. Kenya Tea Growers Association & 14 Others* [2023] KECA 80 (KLR):
- "Jurisdiction, a mantra in adjudication connotes the authority or power of a court to determine a dispute submitted to it by contending parties in any proceeding. A Court of law is invested with jurisdiction to hear a matter when: (a) it is properly constituted as regards numbers and qualifications of members of the bench, and no member is disqualified for one reason or another; (b) the subject matter of the case is within its jurisdiction, and there is no feature in the case which prevents the Court from exercising its jurisdiction; and, (c) the case comes before the Court initiated by due process of law, and upon fulfilment of any condition precedent to the exercise of jurisdiction. The three ingredients must co-exist in order to infuse jurisdiction in a Court. Where a Court is drained of the jurisdiction to entertain a matter, the proceedings flowing from it, no matter the quantum of diligence, dexterity, artistry, sophistry, transparency and objectivity injected into it, will be marooned in the intractable web of nullity."
33. Interestingly, almost fifteen years since the promulgation of the 2010 Constitution on 27th August 2010 and almost fourteen years since the enactment of the ELRC Act, (whose commencement date was 30th August 2011), the question of the jurisdiction of the ELRC appears not to have been settled despite the existence of explicit provisions in *the Constitution* and the said Act providing for the court's jurisdiction. The existence of numerous decisions rendered by our superior courts appear not to have settled the issue. Judge Nduma Nderi, in a 2015 judgment, in ELR No. 38 of 2014 consolidated with numbers 35, 34, 49 and 50 of 2024 likened the ELRC's jurisdiction to a "moving pendulum". This metaphor suggests that the ELRC's power to hear cases related to employment and labor disputes is not static, but rather fluid and can shift based on legal interpretation and the specific circumstances of each case.
34. The Supreme Court decision in the KTGA case, a pivotal moment in Kenya's legal landscape, affirmed that the ELRC has jurisdiction to determine the constitutional validity of statutes in matters of employment and labor disputes, settling a long-standing jurisdictional question. The Apex Court



at paragraph 87 of the judgment was categorical that its decision would stop the pendulum of jurisdictional re-jiggling. It stated:

“For the avoidance of doubt, and so as to stop the pendulum of jurisdictional re-jiggling 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....”

35. However, the above decision means that the ELRC can address the constitutionality of laws related to employment and labor. The Supreme Court clarified that while the High Court retains residual jurisdiction, the ELRC is not precluded from determining the constitutional validity of a statute at the center of an employment dispute. However, the preliminary objection which elicited the ruling the subject of this appeal was premised not on determining the constitutional validity of a statute arising in an employeremployee relationship as determined by the Supreme Court in the above decision, but it challenged the jurisdiction of the High Court to hear and determine a petition challenging the constitutionality of a recruitment process. The question here is whether an employeremployee relationship can be deemed to exist prior the commencement of an employeremployee relationship.
36. Undeniably, the gravamen of this appeal is the question whether determining the constitutionality or legality of pre- employment procedures and processes undertaken by a prospective employer such as the manner in which the advertisement of the vacancy is done, the manner in which the shortlisting of the applicants who qualify for the interview is done, the interview process and the selection of the successful candidates falls within the jurisdiction of the ELRC or the High Court. This question has been raised before the ELRC, the High Court and the Court of Appeal on numerous occasions as is evidenced by the numerous decisions on the subject.
37. The starting point in addressing this issue is to recall that Article 162 (2) (a) of *the Constitution* required Parliament to establish courts with the status of the High Court to hear and determine disputes relating to employment and labour relations. Sub-Article (3) required Parliament to determine the jurisdiction of the courts contemplated under clause (2). Pursuant to this provision, Parliament enacted the ELRC Act. The enactment of this statute not only resolved the question of the jurisdiction and status of the ELRC as a superior court of record, but it also established the court as the prime and exclusive judicial body for the resolution of all labour, employment and industrial relations disputes in the country. In terms of subject matter, the ELRC is a court of limited jurisdiction. It cannot entertain any matter outside the prescribed subject matter area. The Preamble to the ELRC Act gives an outlook of the purpose of the statute. It reads: “An Act of Parliament to establish the Employment and Labour Relations Court to hear and determine disputes relating to employment and labour relations and for connected purposes.”
38. Section 12 (1) (a) – (f) of the Act reads:
 - “1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of *the Constitution* and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including —
 - a. disputes relating to or arising out of employment between an employer and an employee;



- b. disputes between an employer and a trade union;
 - c. disputes between an employers' organisation and a trade unions organisation;
 - d. disputes between trade unions;
 - e. disputes between employer organizations;
 - f. disputes between an employers' 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 the registration and enforcement of collective agreements.”
1. Section 12 (3) of the Act settles who may lodge a complaint or a claim and against whom it can be brought. It reads:

“(2) An application, claim or complaint may be lodged with the Court by or against an employee, an employer, a trade union, an employer's organisation, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose.”

40. The remedies available from the ELRC are provided in Section 12 (3) as follows:

- “(3) In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders—
- i. interim preservation orders including injunctions in cases of urgency;
 - ii. a prohibitory order;
 - iii. an order for specific performance;
 - iv. a declaratory order;
 - v. an award of compensation in any circumstances contemplated under this Act or any written law;
 - vi. an award of damages in any circumstances contemplated under this Act or any written law;
 - vii. an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law; or



viii. any other appropriate relief as the Court may deem fit to grant.”

41. Article 165 (5) (b) of *the Constitution* in peremptory terms provides that the High Court shall not have jurisdiction in respect of matters falling within the jurisdiction of the courts contemplated in Article 162 (2). With such a clear constitutional edict, there is no doubt that the jurisdiction of the Courts of equal status are jealously guarded by *the Constitution*. On the other hand, the jurisdiction of the High Court has been broadly set out under Article 165(3) which states that subject to clause (5), the High Court shall inter alia, have, jurisdiction to hear any question respecting the interpretation of *the Constitution* including the determination of- (i) the question whether anything said to be done under the authority of *the Constitution* or of any law is inconsistent with, or in contravention of, *the Constitution*.

42. The issue at hand narrows to the question whether pre- employment processes such as advertising for job vacancies, shortlisting of the successful applicants for the interview, the manner in which the interview is conducted and the selection criteria of the successful applicant falls within the jurisdictional remit of the ELRC. Decisions rendered by the ELRC on this issue are not in agreement. For example, in *Nick Githinji Ndichu vs. Clerk Kiambu County Assembly & Ano.* [2014] eKLR (Nduma, J.) after analyzing the provisions of Section 12 of the ELRC Act stated:

“

“ 13. It is clear from the foregoing that the law is not concerned with the method of acquiring an employee. The law does not concern itself with whether the person was appointed or elected. Rather, the person must;

- i. be having an oral or written contract of service;
- ii. be providing a service to a real or legal person;
- iii. be receiving a wagesalary for the services rendered.

If such a person has a dispute with the person with whom heshe has a contract of service and to whom heshe provides services for a wage or salary, the court has jurisdiction over such dispute and has available remedies for that purpose.”

43. In *Benjamin vs. Nakhumicha, Cabinet Secretary, Ministry of Health & 15 Others* [2023] KEELRC 1560 (KLR), the ELRC (Ongaya J.) citing Section 12 of the ELRC Act held that any person is entitled to move the Court as long as the issue in dispute is about formulation, interpretation, and implementation of a term and condition of service which may arise pre, post and during a contract of service.

44. In *Alex Mrefu vs. Rural Electrification & 3 Others* [2022] KEELRC 14707 (KLR) (Abuodha J.) confronted with this question had the following to say:

“ 53. Counsel for the respondent raised an important issue of jurisdiction by arguing that since there was not yet in existence employer-employee relationship between the 1st respondent and petitioner the court lacked jurisdiction to entertain the suit. Whereas the issue of jurisdiction is everything and the court ought to have dealt with it first, I chose to deal with at this stage because the issue was novel and did not strictly go on to the issue of jurisdiction of the Court.



54. This Court derives its jurisdiction from article 162 (2) (a) of *the Constitution* as read together with Section 12 of the *Employment and Labour Relations Court Act*. Section 12 of the Act provides in material part that the court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with article 162 (2) of *the constitution* and provisions of the Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including (a) disputes relating to or arising out of employment between an employer and an employee. Section 5(1)(a) of the *Employment Act* provides. 5(1)(a) it shall be the duty of the Minister, Labour Officer and the court to promote equality of opportunity in employment in order to eliminate discrimination in employment. Sub Section 7 of the said Section provides (7) for purposes of this Section,

a. employee includes an applicant for employment.

54. From the foregoing provisions it would seem that in carrying out its statutory duty conferred by Section 5 (1)(a) this court has jurisdiction to entertain a claim by a prospective employee. This in a sense is the issue in this petition. The court is therefore of the opinion that it has jurisdiction.”

55. However, as was held by the Earl of Halsbury, LC in *Quinn vs Leathem*, 1901 AC 495:

“...every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides...”

56. As was observed by the Supreme Court of India in *State of Orissa vs. Sudhansu Sekhar Misra* MANUSC00471967:

“A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it.”

57. The facts in *Alen Mrefu* (supra) were that the petitioners were interviewed for a prospective employment and they received notification of successful recruitment informing them that they would be issued with letters of offer and employment contracts. This was not done prompting them to sue. In their petition, they sought for declarations inter alia that the failing to conclude the recruitment process and issue them with letters of appointment and employment contracts violated their right to legitimate expectation and therefore unconstitutional. These were prospective employees since they had been informed that they were successful and that they would be issued with employment contracts. The facts in the instant case highlighted earlier are totally different.

58. This Court (differently constituted) in *County Assembly of Kisumu & 2 Others vs. Kisumu County Assembly Service Board & 6 Others* [2015] eKLR addressing a similar issue has this to say:

“As Nduma J correctly observed in *Nick Githinji Ndichu vs. Clerk Kiambu County Assembly & Another*, a decision followed by Sitati J. in *Peter Kingoina vs. County Assembly of Nyamira*, employer-employee relationship exists when there is a “contract of service” as



defined by Section 2 of the *Employment Act*, 2007. We concur with the learned Judge that the law is not concerned with the manner of engagement or assumption of the position of employee. What is important is the existence of a contract of service “whether oral or in writing, and whether expressed or implied to employ or to serve as an employee for a period of time...for wages or a salary.” On this additional criterion, we once again concur with the learned Judge that there exists a contract of service between a Speaker of a County Assembly and the County Assembly concerned.”

59. As we search for the answer to the question when does an employer-employee relationship come into existence, it is useful to refer to the definition of the words “employer” and “employee” in the ELRC Act. This is because definition Sections in statutes are meant to clarify and define the specific terms used within that legislation, ensuring a clear and consistent understanding of the law. These definitions are typically intended to apply only to the specific Act in which they are found, unless the context suggests otherwise. Definition Sections are provided to prevent ambiguity and ensure a consistent interpretation of key terms throughout the statute.
60. Section 2 of the *Employment Act*, 2007 defines the word employee as follows: “employee” means a person employed for wages or a salary and includes an apprentice and indentured learner. The same provision defines an employer as follows: “employer” means any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company.
61. Clearly, bearing in mind the above definitions and the provisions of Section 12 of the ELRC Act which requires the existence of an employer-employee relationship, it cannot be said that a person challenging the constitutional validity of a recruitment process like in this case falls within the definition of an employee. In any event, not every applicant for a job gets employed, therefore, the employee-employer relationship cannot be deemed to exist before it is formally created. It’s a contractual relationship that must be created legally either orally or in writing. To suggest that a person who sees an advertisement in a publication and applies, becomes a prospective employee, therefore, falling within the above definition is in our view assigning the above definitions an unintended meaning.
62. We have read all the pleadings in the consolidated petitions. The 1st to 7th respondents in their petition are challenging what they view to be an opaque recruitment process, the requirement for boards of state corporations to seek concurrence of their appointments with the chief of staff head of the public service, appointment of chief executive officers of the said agencies during a period the statutory instruments had expired all being contrary to Article 1, 2, 3, 10, 27, 28, 35, 41, 43, 54, 55, 56, 73, 75, 94, 201 and 232 of *the Constitution*. The 1st to 7th respondents originated the petition not as employees of the four parastatals but as citizens seeking to enforce the Rule of law. There being no employer-employee relationship as required by Section 12 of the Act, we are persuaded that the issues raised in the petition fall within the jurisdiction of the High Court. Therefore, we find no reason to fault the learned judge for dismissing the objection based on this ground. As the High Court correctly noted, the grievance is not a dispute between employer and employee but rather an unconstitutional recruitment in contravention of *the Constitution* based on ethnic considerations and not meritocracy. In so finding we are guided by the Supreme Court decision in the KTGA Case that:

“79. In our view, there is nothing in *the Constitution*, the ELRC Act, or indeed in our decision in the Karisa Chengo Case to suggest that in exercising its jurisdiction over disputes emanating from employment and labour relations, the ELRC court is precluded from determining the constitutional validity of a statute. This is especially so if the statute in question lies at the centre



of the dispute. What it cannot do, is to 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 and labour relations within the context of the ELRC Act. But, if at the commencement or during the determination of a dispute falling within its jurisdiction, as reserved to it by article 162 (2) (a) of *the Constitution*, 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. Otherwise, how else would it comprehensively and with finality determine such a dispute? 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 employment and labour pursuant to article 165(5)(b). We are therefore in agreement with the appellants' submissions regarding this issue as encapsulated in paragraph 69 of this Judgment.”

63. We will next address the argument faulting the trial judge for entertaining the petition despite lacking territorial jurisdiction to hear and determine the case. The appellants' argument is that the petition should have been filed where the respective State agencies sued are headquartered. Territorial jurisdiction is the power of a court to hear and determine a case based on the geographical location of the events or individuals involved in the suit. It refers to the court's competence to exercise its authority within a specific geographical area. However, an objection to territorial jurisdiction and pecuniary jurisdiction is different from an objection to jurisdiction over the subject-matter. An objection for want of territorial jurisdiction does not travel to the root of or to the inherent lack of jurisdiction of a civil court to entertain the suit. (See the Supreme Court of India decision Kiran Singh [Kiran Singh vs. Chaman Paswan, AIR 1954 SC 340). Therefore, when objections to territorial jurisdiction are raised, courts must carefully weigh the potential impact on the constitutionally guaranteed right to access justice. Courts recognize the importance of providing a platform for individuals to seek legal redress, and this consideration weighs heavily in decisions about whether to dismiss cases based solely on territorial jurisdiction arguments, a ground that should not be confused with the competence of the court. Consequently, the court must carefully consider the peculiar facts of the case bearing in mind that Rule 8 of the Mutunga Rules cannot override the provisions of Articles 48 and 50 of *the Constitution*. Determining this issue, the learned Judge stated:

“This court observes that the 1st, 14th, 21st, 23rd, and 25th Respondents are State Corporations and a Commission whose geographic sphere of operation is Kenya and cannot be heard to be lamenting of the matter not having been filed in Nairobi. Constitutional petitions against State Corporations can be filed in any high court in Kenya.”

64. Rule 8 (1) of the Mutunga Rules provides:

“8.

- (1) Every case shall be instituted in the High Court within whose jurisdiction the alleged violation took place.
- (2) Despite sub Rule (1), the High Court may order that a petition be transferred to another court of competent jurisdiction either on its own motion or on the application of a party.



65. Courts must always strive to strike a balance between the principles of territorial jurisdiction, the right to access justice and the right to have any dispute determined by the Court, a key cornerstone of the Rule of law. Decisions on objections citing territorial jurisdictional should be made on a case-by- case basis, taking into account the specific circumstances of the case and the potential impact on the party's ability to access justice. Turning to the facts of this case, it is common ground that the 1st appellant is based in Eldoret while the 3rd appellant is based in Nairobi, and the 30th respondent is based in Mombasa. The said parties are all State agencies and there is no dispute that they all have presence in many parts of the country nor are their operations strictly confined to the areas they are located. Going by the appellants' argument, it means that a strict interpretation and application of Rule 8 (1) would mean that the 1st to 7th respondents ought to have filed their petitions before the High Courts in the three jurisdictional areas where the said entities have their headquarters because the alleged violations took place in the said jurisdictions. Such an interpretation, if upheld would lead to an absurdity or undesired results because it means three petitions will be filed in three different High Courts by the same petitioners against the same respondents based on the same subject matter. This will vex the respondents with multiplicity of suits, coupled with the risk of issuance of contradictory decisions by the courts seized of the matters. The law does not permit a litigant to file different suits in different courts on the same subject matter against the same party or their privies. We are persuaded by the decision rendered by the Environment and Land Court in *Chrispinus Munyane Papa & Ano. vs. National Environment Management Authority & Ano.* [2018] eKLR, where, the court opined that:

“...The Practice and Procedure Rules 2013 are subordinate to *the Constitution*, they do not limit the Court’s jurisdiction to deal with the issues raised in the Petition but provide guidance on where matters should be filed for the Court’s good governance and operations...”

66. This Court in *Musa vs. Mustafa & Ano.* [2025] KECA 677 (KLR) on geographical jurisdiction held:

“ 55. ..there is only one High Court in Kenya which enjoys unlimited geographical limitations but has different administrative units and sits in different places. As such, there is no legal difficulty whatsoever in the High Court sitting in one place to transfer a suit or appeal to be heard at the High Court sitting in another place if the ends of justice are better served that way.”

67. In any event, the introduction of e-filing system and the virtual hearing of cases, means the parties can file court documents and attend online hearings from the comfort of their offices or homes. Therefore, no prejudice will be suffered by the appellants if these proceedings are heard and determined in the Nakuru High Court. In fact, we heard this appeal virtually and all the parties logged into the sessions from the comfort of their offices. Also, court documents are now served electronically, making it cheaper and real time. It is also important to mention that Rule 3 (5) (d) of the Mutunga Rules permits use of appropriate technology in order to achieve the overriding objective of the Rules stipulated in Rule 5. A litigant cannot pick Rule 8 alone and run away with it without considering the overriding objective of the Rules as stipulated in Rule 3. This is because an interpretation of the Rules that stifles the objectives of the Rules as opposed to achieving the overriding objective as provided in Rule 3 ought to be avoided. Lastly, as provided under Rule 3 (2) the overriding objective of the Rules is to facilitate access to justice for all persons as required under Article 48 of *the Constitution*. Interpreting Rule 8 in the manner suggested by the appellants is a clear affront to this Rule in the circumstances of this case. We have said enough to demonstrate that there is no basis upon which we can fault the learned judge’s finding on the objection premised on territorial jurisdiction.



68. Next, we will address the appellants' contestation that the temporary orders issued on 21st May 2024 do not meet the threshold for conservatory orders. It is trite law that the High Court has powers to issue ex parte interim orders within the framework of Article 23 of *the Constitution*. A party seeking an ex parte conservatory order is required to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of *the Constitution*. (See Centre For Rights Education and Awareness (CREAW) & 8 Others vs. Attorney General & Ano. [2012] eKLR).
69. The power to grant conservatory orders is a discretionary one. Hence the question for determination is whether the High Court exercised its discretion correctly. This Court will not interfere with a discretionary decision of a judge simply because its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that heshe misapprehended the facts; thirdly, that the trial judge took into account irrelevant matters; fourthly, that heshe failed to take into account considerations which he should have taken into account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong. (See United India Insurance Co Ltd., Kenindia Insurance Co Ltd. & Oriental Fire & General Insurance Co Ltd. vs. East African Underwriters (Kenya) Ltd [1985] eKLR).
70. The critical issue in this appeal is whether the learned Judge erred in granting the temporary conservatory orders. The appellants have maintained that the 1st- 7th respondents failed to discharge their burden of proof since the petition was a mere plea of allegations and speculations that showed no prima facie case. In Attorney General & Ano. vs Coalition for Reform and Democracy & 7 Others [2015] eKLR; Civil Application Nai 2 of 2015 (UR 22015), this Court, in declining to set aside conservatory orders issued by the High Court suspending operation of some laws, held that:
- “...When weighty challenges against a statute have been raised and placed before the High Court, if, upon exercise of its discretion, the Court is of the view that implementation of various Sections of the impugned statute ought to be suspended pending final determination as to their constitutionality, a very strong case has to be made out before this Court can lift the conservatory order. The State would have to demonstrate, for example, that suspension of the statute or any part thereof has occasioned a lacuna in its operations or governance structure which, if left unfilled, even for a short while, is likely to cause very grave consequences to the general populace. We do not think that the applicant has made out such a case. The Court was not told that the grant of the conservatory orders has brought about a vacuum in our laws which makes it impossible or difficult to investigate and prosecute terror suspects or such other persons who may be targeted by the SLAA. Apart from the eight (8) Sections of the SLAA whose operationalisation has been temporary suspended, all other laws of Kenya are still in full operation. We entertain no doubt that as we await either the hearing of the appeal before this Court, or, the finalization of the petitions before the High Court, the country's security agents and law enforcement organs can still make full use of the existing laws to keep the country and its people safe.”
71. There is no doubt that the High Court had the requisite jurisdiction to issue the conservatory orders. It has not been demonstrated to our satisfaction how the learned judge improperly exercised his discretion or misdirected himself in law. We find that the appellants and the respondents in support of the appeals did not demonstrate how the learned judge in exercise of his discretion misapprehended the facts. The appellants failed to demonstrate that the learned judge took into account irrelevant matters



or failed to take account of relevant considerations. Lastly, it was not demonstrated that the learned judge's exercise of his discretion, is plainly wrong.

72. Regarding the invitation to this Court to order the recusal of the learned judge from the proceedings, we note that the ruling on recusal referred to earlier is not the subject of this appeal. We say no more on that.
73. Having arrived at the above findings, the inevitable conclusion is that these consolidated appeals are devoid of merit and are hereby dismissed. Since this is a matter of public interest, the parties will bear their own costs.

DATED AND DELIVERED AT NAKURU THIS 23RD DAY OF MAY, 2025.

J. MATIVO

.....

JUDGE OF APPEAL

M. GACHOKA CIARB, FCIARB.

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed.

DEPUTY REGISTRAR

