



**Clerk, Nakuru County Assembly & 3 others v Odongo & 7 others (Civil Appeal E136 & E137 of 2022 (Consolidated)) [2023] KECA 427 (KLR) (14 April 2023) (Judgment)**

Neutral citation: [2023] KECA 427 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU  
CIVIL APPEAL E136 & E137 OF 2022 (CONSOLIDATED)  
F SICHALE, FA OCHIENG & LA ACHODE, JJA  
APRIL 14, 2023**

**BETWEEN**

**THE CLERK, NAKURU COUNTY ASSEMBLY ..... 1<sup>ST</sup> APPELLANT  
THE SPEAKER, NAKURU COUNTY ASSEMBLY ..... 2<sup>ND</sup> APPELLANT  
THE COUNTY ASSEMBLY OF NAKURU ..... 3<sup>RD</sup> APPELLANT**

**AND**

**KENNETH ODONGO ..... 1<sup>ST</sup> RESPONDENT  
NAKURU COUNTY GOVERNMENT PUBLIC SERVICE BOARD .... 2<sup>ND</sup>  
RESPONDENT  
THE COUNTY GOVERNMENT OF NAKURU ..... 3<sup>RD</sup> RESPONDENT  
GOVERNOR, NAKURU COUNTY GOVERNMENT ..... 4<sup>TH</sup> RESPONDENT**

**AS CONSOLIDATED WITH  
CIVIL APPEAL E137 OF 2022**

**BETWEEN**

**THE SPEAKER, NAKURU COUNTY ASSEMBLY ..... APPELLANT**

**AND**

**THE GOVERNOR OF NAKURU COUNTY ..... 1<sup>ST</sup> RESPONDENT  
STEPHEN MICHAEL ODOUR OGUTU ..... 2<sup>ND</sup> RESPONDENT  
THE HONOURABLE ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT  
THE NAKURU COUNTY PUBLIC SERVICE BOARD ..... 4<sup>TH</sup> RESPONDENT**



*(Being appeals from the Ruling and Orders of the Employment  
and Labour Relations Court at Nakuru D.N Nderitu J dated 29th  
November 2022.) in Nakuru E&LRC Petition No.'s E016 & E17 of 2022)*

**JUDGMENT**

1. The genesis of these two appeals are two petitions that had been filed in the Employment & Labour Relations Court (E&LRC) in Nakuru on 11<sup>th</sup> November and 10<sup>th</sup> November 2022 in which Kenneth Odongo and Stephen Michael Odour Ogotu respectively sought amongst other reliefs a declaration that the process leading to the nomination of the interested parties as Chief Officers of the Nakuru County Government (the 3<sup>rd</sup> respondent's herein), was unconstitutional, irregular, and illegal for flouting clear provisions of the law and hence null and void ab initio.
2. Before the petitions could be heard on their merits or otherwise, the appellants herein filed a Notice of Preliminary Objection dated 16<sup>th</sup> November 2022, on the grounds inter alia that the E&LRC lacked the jurisdiction to deal with the matters raised in the petitions.
3. In a ruling delivered on 29<sup>th</sup> November 2022, Nderitu, J. found the Preliminary Objections to be devoid of merit and consequently dismissed the same thus provoking the instant appeal vide Notices of Appeal dated 30<sup>th</sup> November and 29<sup>th</sup> November 2022 respectively. In the two Memoranda of Appeal both dated 2<sup>nd</sup> December 2022, the appellants raised the following similar grounds of appeal:

- “ 1. That the learned judge erred in law and fact by holding that the court had the requisite jurisdiction to hear and determine the petition and which petition fell way beyond its jurisdiction as provided both under the statute and the constitution.
2. That the learned judge erred in law in failing to be guided by the provisions of Section 12 of the Employment and Labour Relations Court Act and in its place held that the said list is not exhaustive as the preamble of the aforesaid Act provides “...and for connected purposes” and which interpretation is unsupported by the various rules of interpretation of statutes, applicable law on interpretation and the various precedents.
3. That the learned judge erred in law in failing to be guided by the provisions of Section 12 of the Employment and Labour Relations Court Act and in its place held that that the said list is not exhaustive as the said list is preceded by the word “including” and which interpretation is absurd as the list is exhaustive arising from the word “and” prior to last item (i.e. (j) in the aforesaid list.
4. That the learned judge erred in law and in fact by failing to appreciate that jurisdiction cannot be inferred but must be expressly provided for under the Constitution and/or in statute and in the instant petition the said jurisdiction went beyond the provisions of Section 12 of the Employment and Labour Relations Court Act and as such the same could not be inferred from the preamble of the aforesaid Act and/or through interpretation of the use of the word “including” in the said Section.



5. That the learned judge erred in law and fact by failing to hold that the said petitioner did not have the requisite locus standi to institute the said petition and that an issue of locus standi goes to the root of the courts' jurisdiction to entertain a matter and it is a pure point of law.
  6. That the learned judge erred in law and fact by failing to be guided by the provisions of Section 12 (2) of the *Employment and Labour Relations Court Act* which provides an exhaustive list of the persons who can sue and/or be sued in the said court and the petitioner herein does not fall under any of the said categories and as such lacks the requisite locus standi.
  7. That the learned judge erred in law and in fact in failing to hold that the petitioner had not exhausted the necessary administrative and other legal avenues and/or remedies expressly provided and available to him prior approaching the Honourable Court as required under the doctrine of exhaustion.
  8. That the learned judge erred in law and in fact by holding that the petitioner was not required to exhaust the administrative and other legal avenues expressly provided under the law on the sole basis that the petitioner was raising issues of legality and constitutionality of the recruitment and which, according to the court can only be heard and determined by the courts alone and in so doing totally ignored the celebrated doctrine of exhaustion and separation of powers.
  9. That the learned judge erred in law and in fact by holding that referring the petition for consideration and/or determination by the County Assembly as the first point of call as provided by the law would amount to the court abdicating its legal and constitutional duty and which finding is totally unsupported by the law and the celebrated doctrine of exhaustion, separation of powers and to exercise judicial restraint.
  10. That the learned judge erred in law and fact by failing to properly evaluate the grounds espoused in the notice of preliminary objection, the applicable law, the petition, the circumstances of the case, the submissions by the respondents and the numerous precedents in support of the aforesaid notice of preliminary objection thus reaching an erroneous decision.
  11. That the learned judge erred in law and fact in failing to consider the evidence on record, the enabling laws, the appellants' submissions and the circumstances of the case prior to making his findings."
4. When the two appeals came up for hearing on 6<sup>th</sup> March 2023, learned counsel, Mr. Karanja appeared for the appellants, learned counsel, Miss Mwaniki appeared for the 1<sup>st</sup> respondent, Mr. Kihoro and Mr. Nyamwange appeared for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents respectively, whilst Prof Ojienda SC and Mr. Biko appeared for the 4<sup>th</sup> respondent. All the respondents save the 1<sup>st</sup> respondent supported the appeal.
  5. In the lead up to the hearing, it transpired that Civil Appeal No. E136 of 2022 was related to Civil Appeal No. E137 of 2022 as the issues raised were similar, and both appeals emanated from the same decision of Nderitu, J. of 29<sup>th</sup> November, 2022. Consequently, and with the consent of all counsel, the two appeals were consolidated with Civil Appeal No. E136 of 2022, being the lead file.



6. The appeal was urged by way of written submissions with oral highlights by counsel. Mr. Karanja for the appellants, while relying on his two sets of written submissions and supplementary submissions dated 13<sup>th</sup> December 2022 and 27<sup>th</sup> February 2023 respectively argued grounds 1, 2, 3 and 4 together. He submitted that the learned trial judge erred in holding that the court had jurisdiction to hear and determine the petition in light of the provisions of Article 162(2) of *the Constitution* of Kenya and Section 12 of the *Employment and Labour Relations Court Act* (hereinafter the E&LRC Act); that Section 12(1) of the *E&LRC Act*, specifies the type of disputes to be heard and determined by the E&LRC; that the limits of the disputes to be heard by the E&LRC were limited by statute which limits must be respected, short of which this would be tantamount to the said court arrogating itself a jurisdiction that it is not seized of contrary to the intention of the drafters of *the Constitution* and the *E&LRC Act*. For the proposition that the jurisdiction of the E&LRC, being a specialized court was circumscribed. Reliance was placed on the decision of *Attorney General & 2 Others v Okiya Omtatah Okoiti & 14 Others* (2020) eKLR for this proposition.
7. He further submitted that the 1<sup>st</sup> respondent was neither an employee of the appellants and/or a shortlisted applicant by the 2<sup>nd</sup> respondent for possible vetting and approval and hence, the relationship of an employer- employee was lacking; that the argument in the impugned ruling that such a relationship will arise in the future was fallacious and only reaffirmed that the court was arrogating itself a jurisdiction it did not possess.
9. As to whether the 1<sup>st</sup> respondent had the requisite locus standi to institute the petition, it was submitted that a cursory perusal of the ruling reveals that the trial judge erred in placing reliance on the provisions of Articles 22 and 258 of *the Constitution* to find that the 1<sup>st</sup> respondent had the legal and constitutional capacity to file and prosecute the petition at the E&LRC.
10. It was further submitted that the provisions of Article 162(3) of *the Constitution* expressly and deliberately stated that it is Parliament that shall determine the jurisdiction of the E&LRC; that indeed, Parliament in line with the letter and spirit of Article 162(3) of *the Constitution* enacted the E&LRC Act and that pursuant to Section 12(2) of the Act, the jurisdiction of the court is expressly provided.
11. Counsel further contended that the trial judge erred in law and fact in failing to find that the filing of the petition without exhausting all statutory dispute resolution mechanisms was an affront to constitutional commands and as such, the petition was premature, null and void; that if the 1<sup>st</sup> respondent had any grievances, if at all, then there were two statutes which provided avenues where he could have registered his grievances before coming to court, these being, the *Public Appointments (County Assemblies Approval) Act* and the *County Governments Act*. (Act No. 17 of 2012).
12. Mr. Kihoro on the other hand for the 2<sup>nd</sup> respondent while fully associating himself with the submissions by Mr. Karanja for the appellants submitted that the E&LRC had no jurisdiction to hear the petition as there was no dispute between employer and employee and further that the 1<sup>st</sup> respondent did not exhaust available legal mechanisms before approaching the court. He gave an example of one such mechanism, being the one provided under Section 77 of the *County Governments Act*, 2012.
13. Mr. Nyamwange for the 3<sup>rd</sup> respondent supported the appeal and fully associated himself with the submissions by the appellants.
14. Prof Tom Ojienda SC while appearing with Mr. Okore together with Mr. Biko for the 4<sup>th</sup> respondent in supporting the appeal submitted that the learned judge erred in holding that the failure by the 1<sup>st</sup> respondent to exhaust statutory remedies did not defeat the constitutional right to file the instant petition. Further, that the doctrine of exhaustion of remedies was accepted in Kenya as a safeguard in preventing floodgates of disputes in courts in instances where Parliament has provided for preliminary



- measures to resolve disputes. For this proposition reliance was placed on the decision of *Albert Chaurembo Mumba & 7 Others v Maurice Munyao & 148 Others* (2019) eKLR.
15. Senior counsel further submitted that the concerns of the 1<sup>st</sup> respondent could have been addressed or at least heard by the County Assembly as a result of the avenue created by Section 7 (10) and 8 of the [Public Appointments \(County Assemblies Approval\) Act](#) of 2017.
  16. On jurisdiction, it was submitted that pursuant to Section 12 (1) of the [E&LRC Act](#), the E&LRC has jurisdiction to hear and determine all disputes referred to it in accordance with Article 162 (2) of [the Constitution](#) and the provisions of the [E&LRC Act](#) or any other written law; that, that jurisdiction relates to employment and labour relations matters and that the 1<sup>st</sup> respondent was not in the relationships contemplated by [the Constitution](#) and /or statute.
  17. Lastly, it was submitted that the 1<sup>st</sup> respondent lacked the locus to institute the petition as he did not fall under the classification set out in Section 12 (2) of the [E&LRC Act](#) but that the 1<sup>st</sup> respondent was a busybody with no interest, leave alone public interest to protect, but his sole mission being to destabilize the workings of the appellants.
  18. Miss Mwaniki for the 1<sup>st</sup> respondent in opposing the appeal relied on her written submissions dated 15<sup>th</sup> December 2022. She submitted that the 1<sup>st</sup> respondent had challenged the nomination of 21 persons named in the petition as interested parties and that among the reliefs sought was that the said nominations be quashed and that an order of permanent injunction be issued preventing the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents from issuing the said nominees with employment contracts. In her view, it was clear that the issues raised by the 1<sup>st</sup> respondent related to employment and labour relations and hence, the jurisdiction of the E&LRC had been properly invoked.
  19. She further submitted that Section 12 (1) of the [E&LRC Act](#) did not restrict the nature of disputes to be referred to the E&LRC and that the court has jurisdiction to determine all disputes referred to it in accordance with Article 162 (2) of [the Constitution](#). Further, that [the Constitution](#) had not restricted matters that may be said to be employment and labour related. On the issue of locus standi, it was submitted that Section 12 (1) of the [E&LRC Act](#) was not exhaustive and that employment disputes had not been limited to the scenarios and parties contained therein.
  20. Regarding the contention by the appellants that the 1<sup>st</sup> respondent had no legal standing to bring a public interest dispute under Article 22 or 258 of [the Constitution](#) in light of Articles 23 and 165 (3) of [the Constitution](#), it was submitted that there was nothing in those Articles that excludes the power of other courts from determining constitutional issues particularly when dealing with matters within their exclusive jurisdiction.
  21. Finally, as to whether the 1<sup>st</sup> respondent had other available alternative legal remedies before invoking the jurisdiction of the E&LRC, it was submitted that the decision being challenged was made by the Governor pursuant to Section 45 of the [County Governments Act](#) and not the County Public Service Board and that Section 77 of the [County Governments Act](#) only talks of challenging a decision of the County Public Service Board but where the decision is made by the Governor, Section 77 of the [County Governments Act](#) was inapplicable.
  22. Regarding the failure by the 1<sup>st</sup> respondent to challenge the suitability of the nominees before the County Assembly as provided for under Section 7 (10) of the [Public Appointments \(Public Assemblies Approvals\) Act](#), it was submitted that the Section only allows members of the public to challenge suitability of nominees and it did not afford an opportunity for challenging the legality of the acts and/or procedures of the County Assembly in conducting its business.



23. Consequently, it was submitted that there were no other legal remedies available to the 1<sup>st</sup> respondent that could resolve the issues raised and besides, neither were the alleged remedies mandatory.
24. We have anxiously considered the record, the rival oral and written submissions by the parties, the cited authorities and the law. We have framed the following 3 main issues as falling for our determination:
1. firstly, whether the learned trial judge erred in holding that the court had requisite jurisdiction to hear and determine the petition in light of the provisions of Article 162 (2) of *the Constitution* of Kenya and Section 12 of the *E&LRC Act*,
  2. secondly, whether the learned trial judge erred in law in holding that the 1<sup>st</sup> respondent had locus standi donated to him by Article 258 of *the Constitution* and finally,
  3. whether the learned judge erred in holding that failure to exhaust the available administrative remedies did not absolve the constitutional right by the 1<sup>st</sup> respondent to file the petition, the subject of this appeal.
25. Regarding the first issue it is now trite law that jurisdiction flows from either *the Constitution* or statute or both and without jurisdiction, a court cannot be seized of the power to hear and determine a matter.
26. See *Samuel Kamau Macharia & Another v Kenya Commercial Bank and Another* [2012] eKLR where the Supreme Court of Kenya stated thus:
- “A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”
27. The E&LRC is a fairly new court having come into place following the enactment of *the Constitution* of Kenya (2010). The same is a creature of Article of Article 162 (2) of *the Constitution* of Kenya which provides:
- “162. System of courts
1. The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2).
  2. Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—
    - a. Employment and labour relations; and
    - b. ....
  3. Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).” (Emphasis supplied).
28. To give effect to the provisions of Article 162 (3) of *the Constitution*, Parliament enacted the *E&LRC Act* No. 20 of 2011 which at Section 4 establishes the E&LRC. Section 12 of the Act sets out the jurisdiction of the Court as follows:
- “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:

- 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 official; and
- j. disputes relating to the registration and enforcement of collective agreements;

29. It is evident that from the provisions of both Article 162 (2) (a) and Section 12 of the *E&LRC Act*, the jurisdiction of the E&LRC is limited to matters relating to employment and labour relations.
30. We have carefully perused the impugned petition and note that the 1<sup>st</sup> respondent was challenging the process leading to the nomination of the interested parties therein as chief officers of the 3<sup>rd</sup> respondent. The said officers had not been appointed as the process was halted before they could be vetted. The appointment was to be done after one is successful in the vetting. Additionally, the 1<sup>st</sup> respondent was neither an employee of the appellants nor had he been shortlisted by the appellants for vetting and possible subsequent approval for appointment.
31. There was therefore no existence of an employer/employee relationship between the appellants and the 1<sup>st</sup> respondent or indeed any other matter akin to the employment nor any labour issue as contemplated by the provisions of Section 12 (1) (a-j) of the *E&LRC Act*.
32. In *Nick Gitinji Ndichu v Clerk Kiambu County Assembly and Another* [2014] eKLR Nduma,J. persuasively stated thus:

“For one to access the jurisdiction at E&LRC he must demonstrate that there exists an employer – employee relationship; that there is an oral or written contract of service or that the issue is a dispute falls (sic) within the provision of Section 12(1) of the *E&LRC Act*. Though Advertisement, Shortlisting, Interviewing are all steps towards recruitment and steps towards creating an employer – employee relationship(emphasis ours), they are not in



my view envisaged in Section 12 and which will place this petition under the jurisdiction of the Employment and Labour Relations Court.”

33. By parity of reasoning, none of the Interested Parties had a contract, be it written or oral and as the process towards creating the relationship of an employer/employee were halted, S. 12 of the E&LRC Act was inapplicable.

34. The Supreme Court of Kenya in Republic v Karisa Chengo & Another [2017] eKLR while considering the jurisdiction of specialized courts (i.e. the E&LRC and the Environment and Land Court (E&LC) viz-viz the High Court established pursuant to the provisions of Article 165 of the Constitution of Kenya rendered itself thus:

“The Constitution of Kenya, 2010 has pronounced itself clearly on the jurisdictional competencies of various courts of law in Kenya. The drafters of the Constitution, it appears, had the intention of clearly demarcating the jurisdictions of the said courts so as to pre-empt lacunae and conflicts. Besides the Constitution, there are several statutes which demarcate the jurisdictions of various Courts and tribunals...

Although the High Court and the specialized Courts are of the same status, as stated, they are different Courts. It also follows that the Judges appointed to those Courts exercise varying jurisdictions, depending upon the particular Courts to which they were appointed. From a reading of the statutes regulating the specialized Courts, it is a logical inference, in our view, that their jurisdictions are limited to the matters provided for in those statutes. Such an inference is reinforced by and flows from Article 165(5) of the Constitution, which prohibits the High Court from exercising jurisdiction in respect of matters “reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or (b) falling within the jurisdiction of the Courts contemplated in Article 162(2)”.

35. Having found that there was no employee/employer relationship between the appellants and the 1<sup>st</sup> respondent, nor an employment and labour relations dispute as contemplated by Article 162 (2) of the Constitution or Section 12 (1) of the E&LRC Act, it is our view that the court fell into error when it proceeded to assume and arrogate unto itself, a jurisdiction that it did not have.

36. In the case of Attorney General & 2 others v Okiya Omtata Okoiti & 14 others [2020] eKLR this Court stated as regards the jurisdiction of the specialized court created pursuant to the provisions of Article 162 (2) of the Constitution and more specially the E&LRC:

“We have no doubt in our minds that the E&LRC did not have any jurisdiction to entertain the three petitions that led to this appeal. A burning and well-founded desire to remedy what are perceived to be violations of the Constitution does not justify seeking redress from a forum in which the Constitution has not vested the power to issue a remedy. It is a sad case of assuming that a wrong can be made right by another wrong. There is no fidelity to the Constitution in seeking to enforce the constitution through unconstitutional means. The issues raised in the petitions were weighty but were misdirected to the wrong forum. The Constitution has granted the High Court the requisite jurisdiction to hear and determine those issues and that is where they ought to have been raised. Having come to that conclusion, we have no basis for venturing into the merits of the appeal.”

37. The 1<sup>st</sup> respondent having filed a petition in a Court that did not possess jurisdiction could not make that wrong right by a court arrogating itself a jurisdiction it did not have.



38. More recently in *National Social Security Fund Board of Trustees v Kenya Tea Growers Association & 14 others* (Civil Appeal 656 of 2022) [2023] KECA 80 (KLR) (3 February 2023) this Court stated:

“We have read all the pleadings in the consolidated petitions. As the E&LRC bench correctly noted, the petitions challenged the constitutional validity of the legislative process leading to enactment of a legislation and or some of its provisions. This was not an employer- employee dispute. The E&LRC bench failed to appreciate that laws affect many things in a variety of ways, large and small, but these side winds do not determine what matter a law is in relation to. That is determined by analyzing the central focus of the law, what it is really all about. In order to analyze what matter a challenged law is “in relation to” the court must separate it from matters incidentally affected by the law. The bench failed to appreciate this crucial separation.”

39. In our view, the E&LRC ought to have analyzed the crux of the petition before it. Further and with utmost respect to the learned judge, it is our view that he could not rely on the preamble to the *E&LRC Act* which provides that the court will hear and determine disputes relating to employment and labour relations and “for connected purposes”. He also erred by interpreting the word “including” in Section 12 of the *E&LRC Act* to arrogate himself a jurisdiction that he did not have and handle all and sundry matters before him as the preamble and S. 12 thereof cannot be read in isolation to the other substantive sections of the *E&LRC Act*. We note that as a matter of fact almost every other statute in our laws uses the words “and for connected purposes.” Faced with a similar scenario in the NSSF Case (*supra*), this Court stated as follows:

“The key to the opening of every law is the reason and spirit of the law — it is the ‘*animus imponentis*’, the intention of the law-maker, expressed in the law itself, taken as a whole. Hence, to arrive at the true meaning of any particular phrase in a statute, that particular phrase is not to be viewed detached from its context in the statute. It is to be viewed in connection with its whole context as well as the title and preamble of the statute. It is to the preamble more especially that we are to look for the reason or spirit of every statute; rehearsing this, as it ordinarily does, the evils sought to be remedied, or the doubts purported to be removed by the statute, and so evidencing, in the best and most satisfactory manner, the object or intention of the legislature in making and passing the statute itself. However, two propositions are quite clear — one, a preamble may afford useful light as to what a statute intends to reach, and, two, if an enactment is itself clear and unambiguous, no preamble can qualify or cut down the enactment. For the matters cited by Mr Obura to qualify by implication that they fall within the ambit contemplated by the use of the word “includes,” they must be part of the issue under consideration in the dispute. The issue under consideration in the petitions was the constitutional validity of a statute and or some specific provisions of the act. The constitutional validity of the statute or the targeted provisions did not arise from an employer- employee dispute. The intention of Parliament is clear both from the preamble and section 12 (1) (a)-(f). The E&LRC act was enacted to resolve employer/employee disputes as provided by article 162 (a) of *the Constitution*. That is the purpose and context which cannot be ignored in interpreting provisions of the act. Decided cases are in agreement that constitutional issues can be determined by the E&LRC only if they arise from an employer-employee dispute. The germane issue framed by the court did not arise in an employer- employee dispute nor does it fall under section 12 (1) (a)-(f).”



40. Having found that the E&LRC did not have jurisdiction to handle the petition that was before it, the court ought to have immediately downed its tools and struck out the petition since a decision made by a court without jurisdiction is a nullity in law.
41. Consequently, we find merit in this ground of appeal and hold and find that the E&LRC did not have the jurisdiction to handle the petition before it in light of the provisions of Article 162 (2) of *the Constitution* and Section 12 of the *E&LRC Act*. Having so found, and since jurisdiction is everything, we would have stopped there since in our view it would be superfluous to consider the other issues raised in the appeal but for purposes of completeness, we shall proceed to consider the same.
42. The learned judge was further faulted for holding that the 1<sup>st</sup> respondent had locus standi donated by Article 258 of *the Constitution* of Kenya to file the petition the subject of this appeal and without consideration of the provisions of Section 12 (2) of the *E&LRC Act* in respect of which parties can bring matters to the E&LRC; that Parliament in line with the letter and spirit of Article 162 (3) of *the Constitution* enacted the *E&LRC Act* and pursuant to Section 12 (2) of the Act, the same expressly provided for persons who could approach the court and further, that it was not proper for all these to be watered down on the basis of Articles 22 and 258 of *the Constitution* of Kenya.
43. On the other hand, it was submitted for the 1<sup>st</sup> respondent that there was nothing in Articles 22 or 258 of *the Constitution* that excluded the power of other courts from determining constitutional issues particularly when dealing with matters within their exclusive jurisdiction and that the list contained under Section 12 (1) of the *E&LRC Act* was not exhaustive as employment disputes had not been limited to the scenarios and parties contained therein.
44. Locus standi is defined in *Black's Law Dictionary*, 9<sup>th</sup> Edition (page 1026) as “the right to bring an action or to be heard in a given forum”. From the circumstances of this case and having come to the conclusion that the E&LRC did not have the jurisdiction to handle the petition as there was no employer-employee dispute, it would go without saying by extension that the 1<sup>st</sup> respondent equally did not have the locus standi to file the petition for reasons we shall proceed to demonstrate shortly.
45. The E&LRC while holding that the 1<sup>st</sup> respondent had the requisite locus standi to file the petition relied on the provisions of Articles 22 and 258 of *the Constitution*.
46. Article 22 (1) (2) of *the Constitution* provides as follows:

“ 22. Enforcement of Bill of Rights.

1. Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.
2. In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—
  - a. a person acting on behalf of another person who cannot act in their own name;
  - b. a person acting as a member of, or in the interest of, a group or class of persons;
  - c. a person acting in the public interest; or



- d. an association acting in the interest of one or more of its members.” (Emphasis added)

47. Article 258 on the other hand provides as follows:

“258. Enforcement of this Constitution

1. Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.
2. In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—
  - a. a person acting on behalf of another person who cannot act in their own name;
  - b. a person acting as a member of, or in the interest of, a group or class of persons;
  - c. a person acting in the public interest; or
  - d. an association acting in the interest of one or more of its members”.

48. Further, Article 23 of *the Constitution* provides:

“23. Authority of courts to uphold and enforce the Bill of Rights

1. The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.” (Emphasis supplied).

49. Suffice to state that, Article 165 of *the Constitution* establishes the High Court. Sub Article 3 thereof provides that subject to clause 5, the High Court shall have unlimited original jurisdiction in criminal and civil matters and the jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.

50. Unlike the High Court which has unlimited original jurisdiction in civil and criminal matters, the jurisdiction of the E&LRC is not unlimited both under Article 162(2) of *the Constitution* and Section 12(1) of the *E&LRC Act* which sets out the jurisdiction of the court. Indeed, Section 12 which we have reproduced elsewhere in this judgment expressly provides that the Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of *the Constitution* and the provisions of the Act or any other written law which extends to matters relating to employment and labour relations, hence its specialized nature.

51. Subsection 2 of Section 12 of the *E&LRC Act* further provides for who may bring/institute claims before the court. It states:

“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.”

52. Additionally, Articles 23 and 165 of *the Constitution* give the High Court the jurisdiction to determine the question whether a right or fundamental freedom in the bill of rights has been denied, violated, infringed or threatened.
53. From the constitutional provisions that we have reproduced above, it is evident that the High Court has exclusive original jurisdiction to make a determination whether a right or a fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened or to interpret *the Constitution*. The provisions of Article 22 of *the Constitution* must be read together with the provisions of Article 23.
54. It is now trite law that the specialized courts established pursuant to Article 162 (2) of *the Constitution* have the jurisdiction to interpret *the Constitution* only on issues that arise in the context of employment and labour matters or in environment and land matters, as the case may be.
55. In the *Okiya Omtata* case (*supra*), this Court while considering this issue stated as follows:

“We have no doubt that the E&LRC and the ELC have jurisdiction to interpret and apply *the Constitution* as held by the High Court in *United States International University (USIU) v. The Attorney General & Others* [2012] eKLR and *this Court in Daniel N. Mugendi v. Kenyatta University & 3 Others* [2013] eKLR. However, the jurisdiction of those specialized courts to interpret and apply *the Constitution* is not original or unlimited like that of the High Court. It is limited to constitutional issues that arise in the context of disputes on employment and labour relations or environment and land matters (emphasis added). In *Daniel Maingi Muchiri Jubilee Insurance Co Ltd, CA No 138 of 2016*, this Court expressed the position as follows:

“The Environment and Land Court and the Employment and Labour Relations Court too have jurisdiction to redress violations of constitutional rights in matters falling under their jurisdiction.” (emphasis added)

56. This position was recently restated by this Court in *The NSSF Case (supra)* where the Court stated thus:

“Equally important is the backdrop upon which the act was enacted. *The Constitution* should always be the point of reference by any court while adjudicating disputes. Article 162 (a) of *the Constitution* provided for Parliament to establish courts to determine disputes relating to employment and labour relations. There is a clear definition of these disputes in section 12 (1) (a) – (f). The E&LRC bench failed to appreciate that a claim questioning constitutional validity of a statutory provision is not merely an ancillary claim to the issue before it nor did the issue arise during the adjudication of the dispute (which in any event was not an employer- employee dispute). The germane issue which was identified by the court as early as at paragraph one of its judgment is a substantive claim brought under article 165 (3) (d) (i) of *the Constitution*. This was a stand-alone issue not emanating from a dispute under section 12 (1) (a)-(f). The words “including” or “connected thereto” cannot be deployed to swallow such a substantive issue so as to justify invocation of other claims. While enacting the provisions of article 165 (3)(d) (i) of *the Constitution* which confers on the High Court the jurisdiction to hear any question respecting the interpretation of *the Constitution* including the determination of the question whether any law is inconsistent with or in contravention of *the Constitution*, the drafters of *the constitution* were not acting



on a clean slate. They had before them cognate provisions of articles 162 (1) (2) (a) & (b) & (3) of *the Constitution*. Having identified the germane issue before it as early as at paragraph 1 of the judgment, the E&LRC bench fell into a grave error when It failed to appreciate that the issue before it fell within the jurisdiction of the High Court as prescribed by article 165(3)(d)(i) of *the Constitution*. Further, the bench fell into error when it failed to appreciate that authorities (including the decisions cited by Mr. Obura before us) are replete on the following positions-

- (a) the constitutional issues must arise from an employer-employee dispute for the E&LRC to assume jurisdiction, and
- (b) employment cases are not the appropriate mechanism for the ventilation of grievances of litigant's constitutional issues except where the issues arise in an employer-employment dispute.”

57. In the instant case and having found that the issue at hand was not an employer-employee dispute as contemplated by the provisions of Article 162 (2) of *the Constitution* and Section 12 (1) of the *E&LRC Act*, it goes without saying that the 1<sup>st</sup> respondent did not have the requisite locus standi to file the petition. Additionally, the 1<sup>st</sup> respondent was not among those persons contemplated by Section 12 (2) of the *E&LRC Act* who may lodge a complaint or a claim before the court. If the 1<sup>st</sup> respondent was seeking enforcement of the Bill of Rights pursuant to the provisions of Article 22 of *the Constitution* as suggested by the trial court, his recourse lay in the High Court and not in the E&LRC.
58. We think we have said enough to demonstrate that the 1<sup>st</sup> respondent did not have the requisite locus standi to file the petition, the subject of this appeal. Consequently, this ground of appeal is allowed.
58. Finally, the E&LRC was faulted for holding that failure to exhaust available administrative remedies did not absolve the constitutional right by the 1<sup>st</sup> respondent to file the present petition.
59. It was submitted by the appellants that despite the learned judge finding and appreciating that indeed there were other available avenues for the 1<sup>st</sup> respondent to lodge his complaints first before approaching the court, he went ahead and justified why he still entertained the petition despite the fact that the 1<sup>st</sup> respondent had not exhausted the administrative and statutory remedies on the basis that the petition raised constitutional issues. On the other hand, it was submitted for the 1<sup>st</sup> respondent that the decision being challenged was made by the Governor herself (the 4<sup>th</sup> respondent), pursuant to Section 45 of the *County Governments Act* and not the County Public Service Board and that as such Section 77 of the *County Governments Act* did not apply. Further, it was urged that the alleged legal remedies were not mandatory. In other words, a litigant has the option to seek redress in the other available avenues or come to the E&LRC.
60. The 1<sup>st</sup> respondent in the impugned petition had sought a declaration that the process leading to the nomination of the interested parties as county chief officers was unconstitutional, irregular and illegal for flaunting the clear provisions of the law and hence null and void ab initio.
61. He further sought a declaration that the Nakuru County Public Service Board in the form of the panels conducting the interviews for the nomination of the interested parties between the 24<sup>th</sup> and 28<sup>th</sup> October 2022, was not properly constituted and the decision nominating the interested parties was null and void ab initio and of no consequence whatsoever.



62. Section 45 of the *County Governments Act* No.17 of 2012 provides for the appointment of County Chief Officers. It states:

“ 45. Appointment of county chief officers

1. Whenever a vacancy arises in the office of a county chief officer, the respective governor shall within fourteen days —
  - a. nominate qualified and experienced county chief officers from among persons competitively sourced and recommended by the County Public Service Board; and
  - b. with the approval of the county assembly, appoint county chief officers.” (Emphasis ours).

63. Section 77 (1) of the same Act further provides as follows:

“ 77. Appeals to the Public Service Commission

1. Any person dissatisfied or affected by a decision made by the County Public Service Board or a person in exercise or purported exercise of disciplinary control against any county public officer may appeal to the Public Service Commission (in this Part referred to as the "Commission") against the decision.
2. The Commission shall entertain appeals on any decision relating to employment of a person in a County Government including a decision in respect of:
  - a. recruitment, selection, appointment and qualifications attached to any office”. (emphasis added)

64. From the provisions of Section 45 of the *County Governments Act*, it is evident that whenever a vacancy arises in office of a county chief officer, the respective Governor shall within 14 days nominate qualified and experienced county chief officers from persons competitively sourced and recommended by the County Public Service Board and, with the approval of the County Assembly appoint county chief officers.

65. The Governor therefore does not act in isolation as the persons he/ she nominates are competitively sourced and recommended by the County Public Service Board and there has to be approval by the County Assembly prior to the actual appointment by the Governor.

66. The contention by the 1<sup>st</sup> respondent that the decision being challenged was made by the Governor pursuant to the provisions of Section 45 of the *County Governments Act* and not by the County Public Service Board and that as such the provisions of Section 77 of the *County Governments Act* were inapplicable is therefore wholly erroneous and without basis as the Governor does not act in isolation. As a matter of fact, when the matter came up for plenary hearing on 6<sup>th</sup> March 2023, Miss Mwaniki for the 1<sup>st</sup> respondent intimated to court that the 1<sup>st</sup> respondent’s claim was 3 pronged against the Governor, the County Assembly and the Nakuru County Government Public Service Board (i.e. the 4<sup>th</sup> respondent, the 3<sup>rd</sup> appellant and the 2<sup>nd</sup> respondent respectively.)



67. Be that as it may, it is indeed not in dispute that the provisions of Section 77 (1) of the County Governments Act are not couched in mandatory terms as the operative word used is “may.” However, part XV of the Public Service Commission Act No. 10 of 2017, provides for hearing and determination of appeals in respect of County Government Public Service.

68. Section 85 thereof provides:

“ 85. Appeal from County Government Public Service:

The Commission shall, in order to discharge its mandate under Article 234(2) (i) of the Constitution, hear and determine appeals in respect of any decision relating to engagement of any person in a County Government, including a decision in respect of—

(a) recruitment, selection, appointment and qualifications attached to any office”.

69. Section 86 of the same Act provides the procedure of appeal. It states:

“Any person who is dissatisfied or affected by a decision made by any authority or person in respect of a County Government Public Service may appeal to the Commission against that decision”.

Section 87 (2) of the same Act provides:

(2) A person shall not file any legal proceedings in any Court of law with respect to matters within the jurisdiction of the Commission to hear and determine appeals from county government public service unless the procedure provided for under this Part has been exhausted”

70. It is imperative to note that the provisions of Section 87 (2) of the Act are couched in mandatory terms and the said section expressly ousts the jurisdiction of the courts in the first instance and a party must first exhaust the provisions of part XV of the Public Service Commission Act before approaching the courts.

71. In the instant case, it is evident that the 1<sup>st</sup> respondent did not exhaust the procedure for appeal provided for under part XV of the Act and instead opted to rush to court contrary to the express provisions of the said Act and the petition as filed was a non-starter and premature since no decision had even been made by the appellants. The matter was therefore not ripe for hearing.

72. Faced with a similar situation in the case of Secretary, County Public Service Board & another v Hulbbhai Gedi Abdille [2017] eKLR this Court held:

“There is no doubt that the respondent initiated the judicial review proceedings in utter disregard to the dispute resolution mechanism availed by Section 77 of the Act. The section provides not only a forum through which the respondent could agitate her grievance at first instance, but the jurisdiction thereof is a specialized one, specifically tailored by the legislators to meet needs such as the respondent’s. In our view, the most suitable and appropriate recourse for the respondent was to invoke the appellate procedure under the Act rather than *resort to the judicial process in the first instance. In terms of Republic v National Environment Management Authority (supra)*, we discern no exceptional circumstances in this appeal that would have warranted the bypassing of the statutory appellate process by the respondent. Her contention that she disregarded the appeal because it could not afford



her an opportunity to question the procedure followed by the appellant is in our view, without basis because Section 77 has placed no fetter to the jurisdiction of the Public Service Commission. There is no requirement for instance that reasons for the decision be availed to an aggrieved party before he can prosecute an appeal before it.”

73. In our view, the 1<sup>st</sup> respondent failed to take advantage of the clear provisions of the law as to where to institute his grievance. He opted to rush to court, clearly, an option not available to him in the first instance. He has himself to blame for failure to adhere to the well laid out Constitutional and Statutory provisions.

74. In the persuasive decision of *Peter Ochara Anam & others v Constituencies Development Fund Board & others* Kisii Petition No.3 of 2010 (unreported) (2011) eKLR, Makhandia J, (as he then was) held: -

“The provision is couched in mandatory terms and has no exceptions and or provisos. Coming to court by way of a constitutional petition is not expected either as much as *the constitution* is superior law to the statute aforesaid. In view of this provision and there being no allegations or evidence that the petitioners exhausted these remedies, in bringing this petition, the petitioners have deliberately avoided the procedure and remedy provided for under the Act. They have not proffered any explanation as to why they did not refer any of the complaints they have raised to the 1<sup>st</sup> respondent as required by law. It has been stated constantly that where there exists sufficient and adequate Legal Avenue, a party ought not to trivialize the jurisdiction of the court pursuant to *the constitution*. Indeed, such a party ought to seek redress under the relevant statutory provision; otherwise such available statutory provisions would be rendered otiose...”

We agree.

75. Again, in *International Centre for Policy and Conflict & 5 others v Attorney General & 4 others* (2013) eKLR as referred to in the case of *Diana Kethi Kilonzo & Another v IEBC & 10 others* 2013 (2013) eKLR, the court stated:

“An important tenet of the concept of the rule of law is that this court before exercising its jurisdiction under Article 165 of *the constitution* in general must exercise restraint. It must first give an opportunity to the relevant constitutional bodies or state organs to deal with the dispute under the relevant provision of the parent statute. If the court were to act in haste, it would be presuming bad faith or inability by that body to act. For instance, in the case of IEBC, the court would end up usurping IEBC’s powers. This would be contrary to the institutional independence of IEBC granted by Article 249 of *the constitution*.” Where there exists sufficient and adequate mechanism to deal with a specific issue or dispute by other designated constitutional organs, the jurisdiction of the court should not be invoked until such mechanisms have been exhausted.....”

76. If parties/ litigants were allowed to rush to courts in blatant disregard and wanton disregard of statutorily established dispute resolution mechanisms, the same will erode public confidence in such institutions and render them otiose, a situation that this court frowns upon.

77. Accordingly, it is in view of our above conclusions that we find this appeal to be meritorious and we accordingly allow the same and set aside the entire ruling of Nderitu, J dated 29<sup>th</sup> November 2022 and all the consequential orders thereon and accordingly strike out the petition dated 11<sup>th</sup> November 2022, with costs and uphold the appellants notice of preliminary objection dated 16<sup>th</sup> November 2022. The costs of this appeal shall also be borne by the 1<sup>st</sup> respondent.



78. Since the issues in this appeal are similar to Civil Appeal No. E137 of 2022, the orders issued in this appeal shall apply mutatis mutandis to Civil Appeal No. E137 of 2022.

It is so ordered.

**DATED AND DELIVERED AT NAKURU THIS 14<sup>TH</sup> DAY OF APRIL, 2023.**

**F. SICHALE**

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**JUDGE OF APPEAL**

**F. OCHIENG**

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**JUDGE OF APPEAL**

**L. ACHODE**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

