



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, GATEMBU & M'INOTI, J.J.A.)

CIVIL APPEAL NO. 621 OF 2019

(Consolidated with Civil Appeal No. 74 of 2020)

BETWEEN

ATTORNEY GENERAL.....1ST APPELLANT

THE SELECTION PANEL,

NATIONAL LAND COMMISSION.....2ND APPELLANT

THE NATIONAL EXECUTIVE.....3RD APPELLANT

AND

OKIYA OMTATA OKOITI.....1ST RESPONDENT

ANTHONY OTIENDE OTIENDE.....2ND RESPONDENT

MOSES KIPTUM SANANGA.....3RD RESPONDENT

SPEAKER, NATIONAL ASSEMBLY.....4TH RESPONDENT

GERSHOM OTACHI BW'OMANWA.....5TH RESPONDENT

ALISTER MURIMI MUTUGI.....6TH RESPONDENT

JAMES K. TUITOEK.....7TH RESPONDENT

GERTRUDE NDUKU NGUKU.....8TH RESPONDENT

REGINALD OKUMU.....9TH RESPONDENT

SAMUEL KAZUNGU KAMBI.....10TH RESPONDENT

HUBBIE HUSSEIN AL-HAJI.....11TH RESPONDENT

ESTHER MURUGI MATHENGE.....12TH RESPONDENT

TIYA GALGALO.....13TH RESPONDENT

KATIBA INSTITUTE.....14TH RESPONDENT

KENYA LAND ALLIANCE.....15TH RESPONDENT

JUDGMENT OF THE COURT

In this appeal, we are first called upon to determine a jurisdictional question, before we can delve into the merits of the appeal. The question is whether the **Employment and Labour Relations Court (ELRC)** has jurisdiction to determine the constitutionality of the appointment of the chairperson and members of the **National Land Commission (the Commission)**.

The appellants and all the respondents, save **Okiya Omtatah Okoiti, Anthony Otiende Otiende, Moses Kiptum Sinanga** and **Katiba Institute**, take the view that the recruitment of the chairperson and members of the Commission is not an employment and labour relations issue as contemplated by **Article 162(2)(a)** of the Constitution and **section 12 (1)** of the **Employment and Labour Relations Court Act**. Accordingly, they contend that any person aggrieved by the mode of appointment of those public officers has recourse to the High Court, which by dint of **Article 165** is vested with unlimited original jurisdiction in criminal and civil matters, as well as jurisdiction to interpret and apply the Constitution. The respondents who take a contrary view, contend on the other hand, that the jurisdictional question is not properly before this Court because the appellants did not file a notice of appeal against a ruling by the ELRC which held that it had jurisdiction in the matter.

By way of background, the Commission is established by **Article 167** of the Constitution with a mandate to, among other things, manage public land on behalf of the national and county governments, recommend a national land policy to the national government, advise the national government on a comprehensive programme for the registration of title in land throughout Kenya, initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress, and to perform any other functions prescribed by national legislation. The Commission is also one of the constitutional Commissions and Independent Offices, which by dint of **Article 249 (1)** of the Constitution, have the mandate to protect the sovereignty of the people, secure the observance of democratic values and principles by all State organs, and promote constitutionalism. **Article 253** constitutes the Commission a body corporate with perpetual succession and seal, capable of suing and being sued in its corporate name.

Pursuant to **Article 249(2)**, the Commission is subject only to the Constitution and the law and is independent and not subject to the direction or control of any person or authority. The remuneration and benefits payable to, or in respect of the members of the Commission are a charge on the Consolidated Fund and cannot be varied to the disadvantage of the member during his or her term of office. (See **Article 250 (7)** and **(8)**). **Article 250 (6) (b)** bars members of the Commission, from holding any other office or employment for profit, whether public or private.

Once appointed to office, members of the Commission enjoy security of tenure and cannot be removed from office except for the specific grounds set out in **Article 251** of the Constitution, namely serious violation of the Constitution or any other law, gross misconduct whether in the performance of duty or otherwise, physical or mental incapacity to perform the functions of the office, incompetence or bankruptcy. The Constitution prescribes a specific procedure for removal of a member of the Commission, which is largely similar to the procedure for removal of a judge of the Superior Courts. Upon receiving a petition for the removal of a member of the commission and being satisfied that it is merited, the National Assembly refers the same to the President, who in turn is required to appoint an independent tribunal to investigate the matter and make recommendation to the President. Under **Article 251(6)**, the recommendations of the Tribunal are binding.

By dint of **section 7** of the **National Land Commission Act, No. 5 of 2012**, the Commission is made up of a chairperson and eight members appointed in accordance with the procedure prescribed in the **First Schedule** of the Act. That procedure requires the President, whenever a vacancy arises in the Commission, to constitute a seven members selection panel to interview and recommend suitable persons for appointment as chairperson and members of the Commission. The members of the selection panel are nominated by six specified Government and civil society organisations, among them the **Non-Governmental Organisations Council (NGO Council)**.

The Act further requires the panel to invite applications from qualified persons through advertisements in at least two newspapers of national circulation and after interviewing the applicants, to shortlist two persons for appointment as chairperson and sixteen as members of the Commission. Thereafter the list of nominees is presented to the President, from which he is to nominate the chair and seven members of the Commission. The President's nominees are next vetted by the National Assembly before being formally appointed by the President. In making the appointments, the President is required to ensure that not more than two-thirds of the members of the Commission are of the same gender.

It is common ground that vacancies occurred in the Commission on or about 20th February 2019 after the expiry of the terms of the inaugural chairperson and members of the Commission and the President, vide **Gazette Notice No. 3758** dated 23rd April 2019, appointed a selection panel. At the conclusion of the process involving interview and shortlisting of applicants by the panel, their nomination by the President and vetting by the National Assembly, the President, on 2nd October 2019, appointed **Mr. Gershom Otachi Bw'omanwa (Mr. Otachi)** chairperson, and **Ms. Esther Murugi Mathenge (Ms. Mathenge), Mr. James K. Tuitoek, Ms. Gertrude Nduku Nguku, Mr. Reginald Okumu, Mr. Samuel Kazungu Kambi, Ms. Hubbie Hussein Al-Haji, Mr. Alister Murimi Mutugi** and **Ms. Tiya Galgalo (Ms. Galgalo)** members of the Commission.

The process of appointment of the chairperson and members of the Commission was immediately challenged through three different suits. The first, Petition No 162 of 2019, was filed by **the 1st respondent, Okiya Omtatah Okoiti (Mr. Omtatah)** in the Employment and Labour Relations Court on 29th August 2019 and amended on 25th September 2019. Mr. Omtatah contended that the selection process was in violation of the Constitution and the National Land Commission Act and therefore null and void because the selection panel did not have the two representatives of the Non-Governmental Organisations Council; the panel failed to advertise in daily newspapers the names of the candidates it had shortlisted, those that were qualified, as well as those it had recommended to the President; the President nominated Ms. Mathenge and Ms. Galgalo as members of the Commission, yet neither had applied nor been interviewed for that office; and that the appointments disregarded the principle of regional and ethnic balance. He prayed for a raft of declarations and orders, in particular, an order

quashing the report of the National Assembly Departmental Committee on Land that recommended the appointment of the chairperson and members of the Commission.

The second suit was **Petition No. 344 of 2019**, filed in the High Court on 30th August 2019 by **the 2nd Respondent, Anthony Otiende Otiende (Mr. Otiende)**. Mr. Otiende's complaint was that Ms. Mathenge and Ms. Galgalo applied, were shortlisted, and interviewed for chairperson of the Commission but were unlawfully recommended for appointment as members of the Commission, and that the appointment process was not transparent, fair, and accountable as demanded by the Constitution and the Act. The last suit, **Petition No. 346 of 2019** was filed on 2nd September 2019, also filed in the High Court, by **the 3rd Respondent, Moses Kiptum Sananga (Mr. Sananga)**. This respondent's complaint, like Mr. Otiende's, related to the nomination of Ms. Mathenge and Ms. Galgalo for the office of member of the Commission, positions for which it was contended they never applied, were not shortlisted or interviewed.

All the respondents in Mr. Omtatah's petition raised a preliminary objection, primarily on the grounds that the ELRC did not have jurisdiction in the matter because the appointment of the chairperson and members of the Commission did not involve any employer-employee relationship and that in the circumstances, any alleged violation of the Constitution in the recruitment process was a matter for the High Court, not for the ELRC. By a ruling dated 24th September 2019, the court, (Wasilwa, J.) overruled the objection, holding that the chairperson and members of the Commission were remunerated from the Consolidated Fund. The learned judge expressed herself thus:

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

Back in the High Court, a scene was playing out, which vividly underscores why parties are not allowed to play Russian roulette with issues of jurisdiction, and the perils and consequences of filing suits on the same issues before different courts. Korir J., having declined to stay proceedings in Petition Nos. 344 of 2019 and 346 of 2019, consolidated the two, with Petition No. 344 of 2019 as the lead file. The learned judge proceeded to hear objections on jurisdiction and reserved his ruling for the 24th September, 2019, the same date that Wasilwa, J. had set for the ruling in Mr. Omtatah's petition before the ELRC. On 24th September, however, Korir, J. did not deliver his ruling, opting instead to let the ELRC deliver its ruling first. The next day, after stating that the determination by ELRC that it had jurisdiction in the matter meant that the High Court's jurisdiction was ousted, the learned judge transferred the two petitions to the ELRC for hearing and determination. In the ELRC the petitions were consolidated under petition No. 162 of 2019 by an order made on 15th October 2019. Ultimately, Wasilwa, J. heard the petition and by a judgment dated 14th December 2019, the subject of this appeal, held that the Selection Panel was not properly constituted but that did not invalidate the entire process and further that the vetting of Ms. Mathenge and Ms. Galgalo was *ultra vires* the powers of the Parliament. Accordingly, the learned judge quashed the nomination of those two candidates.

Most of the parties to the petition were aggrieved by the judgment in one way or another, and filed appeals and cross-appeals. The Attorney General filed **Civil Appeal No. 621 of 2019** faulting part of the judgment for holding that the ELRC had jurisdiction in the matter, for holding that the nomination and vetting processes were unlawful, for holding that as constituted, the selection panel was incompetent, and for nullifying the nomination of Ms. Mathenge and Ms. Galgalo. The Speaker of the National Assembly filed a cross-appeal primarily faulting the learned judge for holding that the vetting process of Ms. Mathenge and Ms. Galgalo was in excess of the powers of Parliament. In their cross-appeal the nominees for chairperson and members of the commission impugned the judgment of the learned judge for holding that the ELRC had jurisdiction in the matter and for holding that the vetting and approval process was *ultra-vires*. Lastly, Katiba Institute's cross-appeal faulted the learned judge for upholding the recruitment and appointment process, despite finding that the Selection Panel was incompetent; for failing to hold that Panel had not fully complied with the First Schedule and for failing to hold that the vetting by the National Assembly was irrational.

On their part, Mr. Omtatah and Mr. Otiende filed **Civil Appeal No. 74 of 2020** in which they too faulted part of the judgment of the ELRC. It was contended that the court erred by holding that the incompetence of the selection panel did not affect the outcome of the recruitment process, by failing to hold that nomination of members of the Commission must be fair, open and transparent and take into account merit, and diversity; by failing to find that non-compliance with the First Schedule was fatal; by holding that there was public participation in the recruitment process; by ignoring or misapprehending evidence and by taking into account irrelevant considerations and failing to take into account relevant ones.

By an order dated 14th July 2020, the two appeals were consolidated, with Civil Appeal No. 621 of 2019 as the lead file. The appeal was heard through written submissions and oral highlights. Learned counsel, **Mr. Eredi** and **Ms. Kinyua** appeared for the Attorney General, **Prof. Ojienda**, senior counsel, and **Mr. Nderitu** for Ms. Mathenge and Ms. Galgalo, **Mr. Gatonye** for the members of the Commission, **Mr. Kuiyoni** for the Speaker of the National Assembly, **Mr Dudley** for Katiba Institute, **Mr. Omtatah** and **Mr. Otiende** in person, and **Mr. Malenya** for the **National Land Alliance**.

The submissions by the various parties are fairly overlapping and based on the same provisions of the Constitution, statutes and authorities. Considering those submissions separately will serve no useful purpose and will only result in unnecessary tedium and repetition. Accordingly, we propose to consider together all the submissions by the parties in support of the appeal and those by the parties opposing the appeal.

The parties in support of the appeal started by addressing the question whether the ELRC had jurisdiction in this matter. Citing the judgments in **Samuel Kamau Macharia v. Kenya Commercial Bank & 2 Others [2012] eKLR**, and **In the Matter of Interim Independent Electoral Commission [2011] eKLR**, it was contended that jurisdiction flows from the Constitution or statute and cannot be extended by interpretation or craft. We were urged to find that the ELRC did not have jurisdiction in the dispute because there was no employer-employee relationship as contemplated by **Article 162(2) (a)** of the Constitution and **section 12** of the Employment and Labour Relations Court Act. It was contended that being an independent constitutional body, the chairperson and members were not employees of the Commission as understood in law.

On the authority of *The Owners of the Motor Vessel "Lillian S" v. Caltex Oil (K) Ltd [1989] eKLR*, it was submitted that a proper interpretation of **Articles 162(2)(a) and (3) and 165(3)(b) and (d)(i) and (ii) and (5)(b)** of the Constitution as well as **sections 2 and 12(1) and (2)** of the Employment and Labour Relations Court Act, shows that the ELRC did not have jurisdiction in the matter and ought to have immediately downed its tools. Under the Constitution, it was argued, the ELRC is a specialized court whose jurisdiction is limited to hearing and determining disputes relating to employment and labour relations and that none of the three petitioners before the ELRC fell within the definition of employer or employee in the Employment and Labour Relations Court Act. Further, by express statutory provision, the disputes that fall under the jurisdiction of the ELRC are only disputes relating to an employee, an employer, a trade union, an employers' organization or federation or its member, or those relating to registration and election of trade union officials or registration and enforcement of collective agreements. The judgments in *Republic v. Karisa Chengo & 2 Others [2017] eKLR* and *In the Matter of Interim Independent Electoral Commission [2011] eKLR* were cited to emphasise, respectively, the specialised nature of ELRC and the fact that where there is no ambiguity, a court is not allowed to extend its jurisdiction by interpretation.

On the composition and competence of the Selection Panel, it was conceded that the Panel was constituted without the two representatives of the NGO Council, but the omission was justified on the grounds that the Council was embroiled in disputes and litigation which had led to its de-gazettement. **Sections 53 and 55** of the *Interpretation and General Provisions Act* were invoked and it was submitted that a vacancy in the Panel or a defect in the appointment or qualification of its members did not affect the Panel's powers and that a decision could be made by a majority where the law requires the decision to be made by two or more persons.

The parties in support of the appeal faulted the learned judge, on the basis of their cross-appeals, for holding that the Selection Panel was obliged to separately shortlist and interview the applicants for the position of chairperson and member of the Commission and that the Panel should have interviewed Ms. Mathenge and Ms. Galgalo twice, for the position of chairperson and for member of the Commission. In their view, the Panel has discretion under the **First Schedule** to determine its own procedure, and in exercise of that discretion, it elected to interview Ms. Mathenge and Ms Galgalo only once because they had applied for both the position of chairperson and member of the Commission. This was justified on the grounds of efficiency and prudent use of public resources, and the judgments in *Kenya Revenue Authority v. Menginya Salim Murghani (CA No. 108 of 2009)* and *Ex-Chief Peter Odoyo Ogada v. IEBC & Others (CA No. 307 of 2012)* were cited in support of the proposition that statutory bodies have discretion as regards procedure, for which they are their own masters, as long as the procedure is rational and fair. The ELRC was criticized for failing to defer to the discretion of the selection panel even when the petitioners had not demonstrated that the decision was irrational or unreasonable.

On the finding by the ELRC that the National Assembly had acted in excess of its powers in the vetting process, it was submitted that the National Assembly had the obligation under the Constitution and the National Land Commission Act to vet nominees and that no procedure was prescribed. In the absence of a prescribed procedure, it was submitted, the National Assembly had leeway on how to conduct the vetting. The decision of the High Court in *Marilyn Muthoni Kamuru & 2 Others v Attorney General & Another (2016) eKLR* was invoked to support the view and it was urged that the Assembly did not err by affording Ms. Galgalo an opportunity to submit her tax clearance certificate, which was not availed at the time of her shortlisting and interview. *The Public Appointments (Parliamentary Approval) Act* was invoked and it was contended that it empowered the vetting committee to consider the nomination process, statutory qualifications and the general suitability of the nominee and that under section 6 thereof, the Committee was responsible for its own schedule of activities, including to extend time.

We were further urged to find that the National Assembly was entitled under its Standing Orders to receive reports on the candidates from various organs, including security organs, and that it was on that basis that it received confirmation from the Kenya Revenue Authority that Ms. Galgalo was indeed tax-compliant. We were therefore urged to find that the learned judge erred in holding that the National Assembly exceeded its mandate. It was also contended that the learned judge waded in this issue on her own because the alleged improper vetting of the nominees was not pleaded in any of the three petitions and that the learned judge erred by determining the issue without affording the parties an opportunity to address the same.

The proponents of the appeal maintained that the chairperson and members of the Commission, having been formally appointed by the President and their appointments officially notified in the Gazette, they could only be removed from office by through the procedure provided in **Article 251** of the Constitution. For that reason, therefore, it was contended that the ELRC did not have jurisdiction to nullify any of the appointments. The decision of this Court in *Speaker of National Assembly v. Karume [1992] KLR 22*, was cited for the proposition that where a specific procedure is prescribed by the Constitution or law, it must be followed. It was further submitted that the nullification of the appointments of Ms. Mathenge and Ms. Galgalo resulted in violation of the gender and ethnic balance required by **Article 250(4)** of the Constitution and **clause 12** of the First Schedule, in the composition of the Commission.

Lastly the ELRC was faulted for allowing the petitioners to enjoin parties to their petitions as interested party without their consent or leave of the court. It was contended that the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* did not contemplate joinder of interested parties without their consent or leave of the Court. Counsel concluded by urging us to allow the appeal and the cross-appeal by the nominees and award costs against the petitioners for abuse of public interest litigation.

For all the foregoing reasons, we were urged to allow the appeal and the cross-appeals challenging the decision of the ELRC, dismiss the appeal and cross appeals by Mr. Omtatah, Mr. Otiende and Mr. Sinanga, and award costs against them.

The appeal was opposed by *Mr. Dudley, Mr. Omtata, Mr. Otiende, and Mr. Malenya*. On jurisdiction, it was their view that since neither of the appellants filed a notice of appeal against the ruling dated 24th September 2019 in which the learned judge held that ELRC had jurisdiction, the issue of jurisdiction of the ELRC could not be raised in this appeal. They relied on the decisions of the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v. IEBC & Others [2014] eKLR* and *Patricia Cherotich Sawe v IEBC & 4 Others [2015] eKLR* and argued that a notice of appeal is a jurisdictional prerequisite. The only notice of appeal, it was contended, related only to the judgment dated 14th December 2019, which did not address the issue of jurisdiction.

On the merits of the appeal, it was submitted that it was mandatory for the selection panel to include the two representatives of the NGO Council and that in the absence of those members the panel was incompetent, and the entire selection process a nullity. *Macfoy v. United Africa Co Ltd [1967] 3All ER 1169* was cited in support, as well as the decisions of the High Court in *Consumer Federation of Kenya v*

Attorney General & 2 Others [2012] eKLR and *Okiya Omtatah Okoiti & 3 Others v. Nairobi City Council & 5 Others [2014] eKLR* to underline that public appointments are infused with constitutional values. *Henry N. Gichuru v Minister for Health [2002] eKLR* and *Peter Muturi Njuguna v. Kenya Wildlife Services [2017] eKLR* were cited to support the view that in the context of this dispute, it was mandatory for the selection panel to have the two representatives of the NGO Council.

The ELRC was faulted for relying on the sections 53 and 55 of the Interpretation and General Provisions Act to cure the omission and it was submitted, on the authority of *Republic v. Communications Appeals Tribunal & Another ex-parte Safaricom Ltd [2011] eKLR*, that a body must first be lawfully established before section 53 can be invoked to cure subsequent defects. These respondents also faulted the learned judge for relying on correspondence between the Office of the President and the *Non-Governmental Organisations Co-Ordination Board* to conclude that there were wrangles in the NGO Council, which is a different body from the Board. They added that by the time the selection panel was appointed, the wrangles had been sorted out pursuant to a court order recorded in the High Court on 5th March 2019.

Next, it was urged that the selection panel acted beyond its powers by failing to publish the names of the qualified candidates and by interviewing Ms. Mathenge and Ms. Galgalo for member of the Commission, whilst it had shortlisted them for chairperson of the Commission. These respondents submitted that the First Schedule required in mandatory terms publication of the names of qualified applicants in at least two daily newspapers of national circulation, which the selection panel failed to do. The panel was also faulted for failing to submit to the President two lists as required by the Schedule. These respondents further contended that Ms. Mathenge and Ms. Galgalo could not be validly interviewed for positions for which they had not been short-listed, namely that of member for the commission and that to do so was a violation of the constitutional principles of accountability and transparency. In all this, it was contended that the panel violated the respondents' legitimate expectations that the law would be complied with in the recruitment of the chaperon and members of the Commission.

Lastly, turning to the vetting decision by the National Assembly, it was contended that the vetting was irrational for failure to take into account relevant considerations. While conceding that the issue was not pleaded, it was submitted that the parties addressed it and left the court to decide. It was also argued that vetting is a constitutional edict which must be performed strictly and seriously and that the National Assembly had acted unlawfully when it facilitated Mr. Otachi and Ms. Galgalo to obtain tax clearance certificates which they did not have at the time of interview and nomination and also by ignoring integrity allegations against another nominee, *Mr. Kazungu Kambi*. We were therefore urged to dismiss the appeal and allow the cross appeals by the four respondents as well as CA No 621 of 2019, with costs, to the end that the recruitment process should start afresh.

As we adverted at the beginning of this judgment, we must determine the jurisdictional question first, before we can delve into the merits of this appeal. Whilst appellants in *Civil Appeal No. 621 of 2019* and the respondents who support them contend that the ELRC had no jurisdiction in this matter, those in *Civil Appeal No. 74 of 2020* and the respondents who support them contend that the issue on jurisdiction is not before us because there is no notice of appeal against the ruling dated 24th September 2019 which determined the question of jurisdiction.

There are many decisions of our courts that emphasise that due to its importance, an issue of jurisdiction may be taken at any time and stage of proceedings. Thus for example, in *Adero v Ulinzi Sacco Ltd [2002] 1 KLR 577*, the question was whether the High Court had jurisdiction to hear a dispute that by statute was reserved for the Co-operative Tribunal. *Ringera, J.* (as he then was), expressed himself as follows on the issue of jurisdiction:

“On whether the High Court could have had jurisdiction at the time the suit was instituted on the grounds that the Co-operative Tribunal had not been constituted, my view is that jurisdiction either exists or does not exist ab initio and the non-constitution of the forum created by statute to adjudicate on specified disputes could not of itself have the effect of conferring jurisdiction on another forum which otherwise lacked jurisdiction. And as regards the consent order of 1.3.00, it is trite law that jurisdiction cannot be conferred by the consent of the parties. Much less can it be assumed on the grounds that parties have acquiesced in actions which resume the existence of such jurisdiction. And jurisdiction is such an important matter that it can be raised at any stage of the proceedings and even on appeal.”

In *Lemita Ole Lemein v. Attorney General & 2 Others [2020] eKLR, Karanja, J.A.* took a similar view and stated:

In my view, jurisdiction is primordial and must exist right from the filing of a case to determination. The issue of jurisdiction need not be raised by the parties to a suit for the court to address its mind to it. It is incumbent upon every judicial or quasi judicial tribunal or court to satisfy itself that it has jurisdiction to entertain a matter before settling down to hear it. In essence therefore, a court or tribunal should not wait for a party to move it on the issue of jurisdiction for it to determine the issue. The Court can suo motu determine the issue even without being prompted by a party. Just like you cannot confer jurisdiction even by consent of the parties, you cannot confer jurisdiction by ignoring the issue or sidestepping it. It is omnipresent and cannot be wished away. Moreover, it being a point of law, the issue of jurisdiction can also be raised at any stage; in the trial court, first appeal or even on second or third appeal. [Emphasis added].

The Supreme Court of Nigeria, in *Petrojessica Enterprises Ltd & Another v. Leventis Technical Co. Ltd [1992] 5 NWLR, (Pt. 244) 675*, which has been cited with approval by our courts, rendered itself thus, on jurisdiction:

“Jurisdiction is the very basis on which any tribunal tries a case? it is the lifeline of all trials. A trial without jurisdiction is a nullity...[A]Court cannot arrogate to itself a jurisdiction it has not got. This importance of jurisdiction is the reason why it can be raised at any stage of a case, be it at the trial, on appeal to Court of Appeal or to this Court, a fortiori the court can suo motu raise it. It is desirable that preliminary objection be raised early on the issue of jurisdiction? but once it is apparent to any party that the Court may not have jurisdiction, it can be raised, even viva voce as in this case. It is always in the interest of justice to raise issue of jurisdiction so as to save time and costs and to avoid a trial in nullity.” [Emphasis added].

(See also *Jamal Salim v. Yusuf Abdi & Another* [2018] eKLR, and *Local Authorities Provident Fund v. Joseph Njogu Gathu & Another* [2016] eKLR. In *Nyangau v. Nyakwara* [1986] KLR 712, one of the holdings states that:

“though the new point had not been taken up earlier and was raised for the first time in the Court of Appeal, the Court would allow it because it was an issue going to the issue of jurisdiction.”

Similarly, in *Kenya Commercial Bank v. Osebe* [1982] KLR 296, it was held that although an appeal must be confined to the points of law raised and determined by the trial court, there were two exceptions to that rule, namely, where the trial court commits an illegality or acts without jurisdiction. In our view, the basis of all these decisions is that jurisdiction flows from the often stated truth that jurisdiction is everything and without jurisdiction, a court must down its tools (See *The Owners of the Motor Vessel “Lillian S” v. Caltex Oil (K) Ltd* (*supra*)). The question of jurisdiction has been live right from the start of the litigation giving rise to this appeal and we are satisfied that it is properly before us and no party has been taken by surprise or otherwise prejudiced.

The term ‘jurisdiction’ is defined as follows in *Words and Phrases Legally Defined* Vol. 3, page 113:

“By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognisance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing.” (Emphasis added)

It is common ground that the ELRC is one of the two specialized courts established by **Article 162(2)** of the Constitution as superior courts that have equal status to the High Court. That provision reads as follows:

“162 (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) the environment and the use and occupation of, and title to, land.

(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).” (Emphasis added)

The **Final Report of the Committee of Experts (CoE)** that prepared the draft that ultimately became the Constitution of Kenya 2010, leaves no doubt that the ELRC and its twin sibling, the ELC, were intended to be “specialized courts” with certain, specific and precise jurisdiction, in contradistinction to the High Court which enjoys *unlimited original* jurisdiction in criminal and civil matters and the jurisdiction to interpret and apply the constitution, including enforcement of fundamental rights and freedoms. The report expressly refers to the two courts as “specialised” courts and further explains that the CoE rejected a proposal to remove the two courts from the Constitution and leave it to Parliament to establish “other courts” with such jurisdiction as it may determine. The CoE reasoned that to do so would give Parliament an opportunity to establish courts with broad jurisdiction capable of supplanting that of the other superior courts established by the Constitution, which “would not signal establishment of specialised courts” on employment and labour and land/environment, and might lead to competing jurisdiction with the High Court.

The Supreme Court emphasised this background in *Republic v Karisa Chango & Another* [2017] eKLR, when it stated as follows:

“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...” [Emphasis added] Later on in the same judgment, the Supreme Court concluded as follows:

“[A]lthough 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)”.

Pursuant to **Article 162(2)** of the Constitution, Parliament enacted the **Employment and Labour Relations Court Act**, whose purpose, as the long title states, is to “establish the Employment and Labour Relations Court to hear and determine disputes relating to employment labour relations”. By section 12 (1) of the Act, the jurisdiction of the Court is to hear disputes “relating to employment and labour relations”, including:

(a) disputes relating to or arising out of employment between an employer and an employee;

(b) disputes between an employer and a trade union;

(c) disputes between an employers organisation and a trade union's organisation;

(d) disputes between trade unions;

(e) disputes between employer organisations;

(f) disputes between an employer's organisation and a trade union;

(g) disputes between a trade union and a member thereof;

(h) disputes between an employer's organisation or a federation and a member thereof;

(i) disputes concerning the registration and election of trade union officials; and

(j) disputes relating to the registration and enforcement of collective agreements.

The Act further specifies the parties who may lodge or against whom may be lodged before the court, applications, claims, or complaints, to be 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.

From the above provisions of the Constitution and the Act, it is obvious that the jurisdiction of the ELRC is precise and limited rather than unlimited. The straight forward jurisdictional question in this appeal therefore is whether recruitment of members of the National Land Commission falls within the meaning of a dispute relating to employment and labour relations. We have already set out the provisions of the Constitution regarding the Commission which indicate that it is an independent constitutional Commission whose members are appointed in accordance with a special procedure provided by the Constitution and the Act; upon appointment they are only subject to the Constitution and the law and not subject to the direction or control of any person or authority; they enjoy security of tenure and cannot be removed from office except for cause and following a specific procedure entailing recommendations of an independent tribunal as is the case with judges; and their terms and benefits cannot be varied to their prejudice, again just like judges.

In the *Matter of the Interim Independent Electoral Commission [2011] eKLR*, the Supreme Court emphasised that the Constitution established the independent commissions alongside the Judiciary and entrusted them with special governance mandates of critical importance in the new dispensation. The Commissions are custodians of the fundamental ingredients of democracy such as the rule of law, integrity, transparency, human rights and public participation and are intended to serve as "people's watchdogs". To perform that role efficiently, they must operate without undue influence, fear or favour. Subsequently, in its advisory opinion in *In the Matter of the National Land Commission*, the Supreme Court adverted to the fact that the independent commissions are generally considered a fourth arm of government.

What all this suggests to us is that the appointment and removal from office of the commissioners of these independent commissions is not a labour and employment issue as the ELRC erroneously held, but a special constitutional innovation, a *sui generis* devise to address challenging governance needs and gaps. The appointment of the chairperson and members of the Commission did not involve any of the parties or raise any of the employment and labour relations issues contemplated by **section 12** of the Act. With due respect, it was completely off the mark for the learned judge to hold that the recruitment of the chairperson and members of the commission raised employment and labour relations issues merely because they were to be remunerated from the Consolidated Fund. On the parity of that reasoning, the election or removal from office of the President of the Republic or appointment and removal of Judges of the Superior Courts would amount to employment and labour relations issues, merely because they are remunerated from the consolidated fund.

We have no doubt in our minds that the ELRC 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.

We have no doubt that the ELRC 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. In *Daniel Mainigi 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).

We do not think there is justification to direct the three petitioners to bear the costs of this litigation. Two of them went to the right court, but pursuant to orders of the court, they were misdirected to a court that clearly had no jurisdiction. The issues raised in the petition were not frivolous and the order that commends itself to us is to direct each party to bear its own costs.

Our final orders are that *Civil Appeal No. 621 of 2019* together with the cross appeals in support are hereby allowed to the extent that the ELRC did not have jurisdiction. The judgment of the ELRC dated 14th December 2019 is set aside and substituted with an order dismissing

Petition No. 162 of 2019 consolidated with *Petition Nos. 344 of 2019* and *346 of 2019*.

Civil Appeal No. 74 of 2020 and the cross appeals in support are hereby dismissed. Each party to bear its own costs. It is so ordered.

Dated at Nairobi this Mombasa this 18th day of December, 2020.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIARB

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JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR