



**Mohamed & another v Secretary, Mander County Public Service Board & 2 others (Employment and Labour Relations Petition E008 of 2023 & Employment and Labour Relations Cause E059 of 2023 (Consolidated)) [2025] KEELRC 652 (KLR) (20 February 2025) (Ruling)**

Neutral citation: [2025] KEELRC 652 (KLR)

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**EMPLOYMENT AND LABOUR RELATIONS PETITION E008 OF 2023 & EMPLOYMENT AND LABOUR RELATIONS CAUSE E059 OF 2023 (CONSOLIDATED)**

**K OCHARO, J**

**FEBRUARY 20, 2025**

**IN THE MATTER OF THE CONSTITUTION OF KENYA 2010 AND IN THE MATTER OF VIOLATION, CONTRAVENTION AND CONTINUED THREAT/BREACH OF THE PROVISIONS OF THE CONSTITUTION OF KENYA, 2010 AND IN THE MATTER OF ARTICLES 2,3,10,19,20,21,22,23,35,48,73,129,169,232,258, AND 259 OF THE CONSTITUTION OF KENYA, 2010 AND IN THE MATTER OF THE EMPLOYMENT AND LABOUR RELATIONS ACT, SECTION 80(2) OF THE PUBLIC SERVICE COMMISSION ACT, REGULATION 70(6) AND (7) PUBLIC SERVICE COMMISSION ACT AND IN THE MATTER OF THE ACTIONS OF EXTENSION OF SERVICE BY WAY OF CONTRACT OF RETIRING PUBLIC SERVANTS UPON ATTAINING MANDATORY RETIREMENT AGE IN KENYA**

**BETWEEN**

**BASHIR ADAN MOHAMED ..... 1<sup>ST</sup> PETITIONER**  
**ABDI ALI HASSAN ..... 2<sup>ND</sup> PETITIONER**

**AND**

**THE SECRETARY, MANDERA COUNTY PUBLIC SERVICE BOARD ..... 1<sup>ST</sup> RESPONDENT**  
**THE CHIEF OFFICER, LANDS, SURVEY, AND PHYSICAL PLANNING, MANDERA COUNTY GOVERNMENT ..... 2<sup>ND</sup> RESPONDENT**  
**IBRAHIM MOHAMED ABDI ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

**Introduction**

1. The Petitioners filed a Petition dated 19<sup>th</sup> January 2023, seeking the following reliefs;



- a. A declaration that the approval of the extension of service by way of a contract of the 3rd Respondent upon attainment of mandatory retirement age of sixty (60 years) violates Articles 2, 3, 10,19,20,21,22,23,35,48,73,129,165,232,258,259, of the Constitution of the Republic of Kenya.
  - b. A declaration that the approval of the extension of service by way of a contract of the 3rd respondent upon retirement of mandatory retirement age of sixty (60 years) violates the Constitution of the Republic of Kenya and is therefore null and void.
  - c. A permanent order restraining any further purported approval and processing of extension of service by way of a contract of the 3rd respondent upon attainment of mandatory retirement age of sixty (60 years).
  - d. Such other Orders as this Honourable Court shall deem just.
2. In the Amended Notice of Motion dated 28<sup>th</sup> April 2023, the Applicants/Petitioners sought the following reliefs;
- a. This Application be certified as urgent and be heard ex-parte in the first instance.
  - b. Pending the hearing and determination of this application inter parties, the Honourable Court be pleased to issue a conservatory order restraining the 1st and 2nd respondent from issuing a new contract of service to the 3rd respondent upon retirement of mandatory age of sixty (60) years.
  - c. Pending the hearing and determination of this Petition herein, the Honourable Court will be pleased to issue a conservatory order restraining the 1st and 2nd respondent from issuing a new service contract to the 3rd respondent upon retirement at the mandatory age of sixty (60) years.
  - d. This Honourable Court grants any other relief that it deems fit to grant in the interest of justice.
  - e. Costs be provided for.
3. The application is based on the prime ground that the 3rd Respondent has attained the mandatory retirement age while in Public Service working as an employee of Mandera County Government at the Department of Lands, Survey and Physical Planning. Nevertheless, the 1<sup>st</sup> and 2nd Respondents conspired to extend the 3<sup>rd</sup> Respondent's contract of service illegally.
4. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed a Notice of Preliminary Objection and raised the following objections;
1. That the Application and Petition dated 31<sup>st</sup> March 2023 as drawn and instituted herein are in substance incompetent and fatally defective as they are contrary to Article 162(2) of the Constitution and Section 12(2) of the Employment and Labour Relations Court Act.
  2. That the Honourable Court lacks the requisite jurisdiction to hear and determine the instant petition and which petition fell way beyond its jurisdiction as provided both under the statute and the constitution.
  3. That the petitioners herein don't fall under the exhaustive list of persons who can sue and/or be sued in the Employment and Labour Relations Court Act and therefore lack the requisite locus standi.



4. That in the premises, the Application and Petition dated 31st March 2023 supported by the Affidavit of one Halima Issack Mahat and Hussein Ibrahim Issack is an abuse of the process of this Honourable Court and as such should be dismissed with costs to the Respondents.

### **Respondent's submissions**

5. The Respondent identified the following issues for determination, thus; whether this Honorable Court has the 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*; whether the Petitioners have locus standi donated by Article 258 of *the Constitution* to institute the Petition herein; and whether the Petition as filed should be struck out in limine.
6. The Respondents submitted that a Court's jurisdiction flows from either *the Constitution* or legislation or both, as was held in the case of Samuel Kamau Macharia & Another versus Kenya Commercial Bank Limited & 2 Others [2012] eKLR.
7. Further, under section 12 of the *Employment and Labour Relations Court Act*, 2011, this Court has exclusive original jurisdiction to hear and determine matters relating to employment and Labour relations. In the present case, there is no existence of an employer/employee relationship between the Petitioners herein and the Respondents or, indeed, any other matter akin to the employment nor any labour issue. To buttress this, the Respondent relied on the case of Nick Githinji Ndichu versus Clerk Kiambu County Assembly and Another [2014] eKLR and the Court of Appeal case in Civil Appeal No. E136 OF 2022 -as Consolidated with- Civil Appeal No. E137 OF 2022.
8. The Petitioners did not have the requisite locus standi to file the present Petition. In the case of the Owners of the motor vessel "Lillian s" Versus Caltex Oil (Kenya Ltd. [1989] KLR1, the Court of Appeal held that, "Jurisdiction is everything. Without it, a court has no power to make one more step... A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."
9. Additionally, the Petitioners herein are not among those persons contemplated by Section 12 (2) of the Act who may lodge a complaint or a claim before this Honourable Court. As such, they lack locus standi. Justice N. R.O Ombija [as he then was ] in Law Society of Kenya -Versus- Commissioner of Lands & 2 Others [2001] eKLR in defining who has locus standi held thus;  

"The first point to be decided is whether the plaintiff has the necessary locus standi to file and prosecute the suit. Locus-standi signified a right to be heard. A person must have a sufficiency of interest to sustain his standing to sue in a Court of law. That was the holding in BV Narayana Reddy vs State of Kamataka Air (1985) Kan 99, 106 (*The Constitution* of India, ARD 226). I adopt the same as a correct proposition of the law, and I so hold." (Emphasis Ours)
10. The Respondents submitted that even if this Honourable Court had jurisdiction to determine the Petition herein, then the same has been prematurely invoked by the Petitioners herein before exhausting the internal dispute resolution in line with the Doctrine of Exhaustions. The Court of Appeal in Geoffrey Muthinja Kabiru & 2 Others versus Samuel Munga Henry & 1756 others [2015] eKLR, held that: -

"It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be for last resort and not the first port of call the moment a storm brews... The exhaustion doctrine



is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts...This is in accordance with Article 159 of *the Constitution*, which commands Courts to encourage alternative means of dispute resolution."

11. Further, Section 77 of the *County Governments Act* provides for appeals to the Public Service Commission for any person dissatisfied or affected by a decision made by the County Public Service Board.
12. The Respondents additionally relied on the cases of Peter Ochara Anam & others -Versus- Constituencies Development Fund Board & others Kisii Petition No.3 of 2010 (unreported) (2011) eKLR, and the case of International Centre for Policy and Conflict & 5 others-Versus- Attorney General & 4 others (2013) eKLR as referred to in the case of Diana Kethi Kilonzo & Another-Versus- IEBC & 10 others 2013 (2013) eKLR.

### **Analysis and determination**

13. I have carefully considered the preliminary objection by the Respondents, the Petitioner's petition herein filed, and the submissions by the Respondents, and distilled the following issues for determination;
  - a. Whether the preliminary objection is properly taken.
  - b. Whether the court has jurisdiction to entertain the Petition herein.
  - c. Whether the petitioners had locus standi to file the instant petition.

### **Whether the preliminary objection is properly taken**

14. As to what constitutes a properly taken Preliminary Objection, the Court in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd.* (1969) EA 696, aptly stated:

"So far as I am aware, a Preliminary Objection consists of a pure point of law, which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection on the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

The Court further held:

"A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increases costs and, on occasion, confuse the issues. This improper practice should stop"

15. The Court in *Civil Application No. 36 of 2014 Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others* [2015] eKLR held:

"The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objections. The true preliminary objection



serves two purposes of merit: firstly, it serves as a shield for the originator of the objection against the profligate deployment of time and other resources. Secondly, it serves the public cause of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

16. I have carefully considered the three points, the basis for the Respondents’ preliminary objection, and conclude that they are neither points of fact nor a mixture of fact and law. To render myself on them, I would not require an interrogation of facts. Hence, my finding is that the preliminary objection is properly taken.

#### **Whether this Court has jurisdiction to entertain the Petition.**

17. From the onset, I find it imperative to point out that the Respondents’ preliminary objection demonstrates how misguidedly litigants and Advocates alike have perceived and continue to perceive the jurisdiction of the Employment and Labour Relations Court. In my view, the jurisdiction of the Court isn’t as narrow as some could suggest. However, it requires a broad and liberal look, not only at the *Employment and Labour Relations Court Act*, but the *Employment Act*, the *Labour Relations Act*, the relevant stipulations of *the Constitution* of Kenya, 2010, and the progressive judicial precedents, both local and those from other jurisdictions, to see this point.
18. The Respondents argue that the Petitioners didn’t have the necessary locus standi to initiate the instant petition. They have none to prosecute the petition. Locus standi means the possession of the legal right by an individual or a group of individuals to present a grievance to a court of law, tribunal, or administrative body with authority hear and be heard by the Court of law, tribunal and or administrative body on, the grievance.
19. The Respondents contended that there isn’t any employer-employee relationship between the 1<sup>st</sup> Respondent and the Petitioners, and as such, the latter could not have the locus standi to sue the Respondent, as they have done. Further, section 12 of the *Employment and Labour Relations Court Act*, lists down persons and organizations contemplated by the Act to initiate proceedings thereunder. The Petitioners do not fall under the list.
20. In their argument, the Respondents have ignored two vital matters: the applicability of the stipulations of Article 258 of *the Constitution* and that section 12 of the stated Act first, does not provide an exhaustive list, and second, it predates *the Constitution* of Kenya, 2010.
21. Article 258 of *the Constitution* provides;
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.



22. Inarguably, section 12 of the *Employment and Labour Relations Court Act* must be read and interpreted in a manner aligned with the postulations of Article 258 of *the Constitution*. Appreciation must be had that Article 258 relaxed the shackles of the doctrine of locus standi, as they used to be, pre-inauguration of the 2010 Constitution.
23. In my view, the Petitioners, and more importantly, being the residents of Mandera County and considering the matters they have raised in the petition, had the requisite standi to initiate the instant petition under Article 258 of *the Constitution*.
24. The thinking, as possessed by the Respondents, that the Employment and Labour Relations Court doesn't have the jurisdiction to entertain constitutional litigations, in my view, is in ignorance of the purpose for which Kenyans craved for Court specialization, the reason why the framers of *the Constitution* heed to the demand by the Citizenry, the objective for the creation of the Court under *the Constitution*, and the import of Articles 162[2] and 165 of *the Constitution*. It is enough for the petitioner to demonstrate that he has approached the Court for the adjudication on a matter, constitutional in nature, relating to an employment and labour relation issue[s]. Put in another way, relating to an industrial matter[s]. Also, see *Okiya Omtatah Okoiti v Parliamentary Service Commission & another* [2021] eKLR and *Daniel N Mugendi v Kenyatta University & 3 others* [2013] eKLR.
25. Retirement is an essential aspect of employment; therefore, the court has jurisdiction over this subject matter.

### **Conclusion**

26. By reason of the foregoing premises, I hold that this Court has jurisdiction to hear and determine the petition.
27. The petition shall be placed before any Judge of the Employment and Labour Relations Court, Judicial Review and Labour Rights Division, Nairobi, for directions on further proceedings in this matter.

**READ, SIGNED, AND DELIVERED THIS 20<sup>TH</sup> DAY OF FEBRUARY 2025.**

**OCHARO KEBIRA**

**JUDGE**

