



REPUBLIC OF KENYA



**Masese & another v Speaker County Assembly of Kisii & 3 others; Mogire & 2 others  
(Interested Parties) (Cause E007 of 2025) [2025] KEELRC 919 (KLR) (24 March 2025) (Ruling)**

Neutral citation: [2025] KEELRC 919 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
CAUSE E007 OF 2025**

**JK GAKERI, J  
MARCH 24, 2025**

**BETWEEN**

**MICHAEL MOTUME MASESE ..... 1<sup>ST</sup> CLAIMANT**

**NAFTALI ONKOBA ..... 2<sup>ND</sup> CLAIMANT**

**AND**

**SPEAKER COUNTY ASSEMBLY OF KISII ..... 1<sup>ST</sup> RESPONDENT**

**COUNTY ASSEMBLY OF KISII ..... 2<sup>ND</sup> RESPONDENT**

**HENRY MORACHA LEADER OF MAJORITY, COALITION ... 3<sup>RD</sup>  
RESPONDENT**

**JOHN OMBATI, PARTY WHIP, AZIMIO COALITION ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**EVERLYNE MORAA MOGIRE ..... INTERESTED PARTY**

**WALTER MOCHACHE ..... INTERESTED PARTY**

**JIM KENYANYA ..... INTERESTED PARTY**

**RULING**

1. The Ex Parte applicant filed the instant application on 17<sup>th</sup> February, 2025 under Certificate of Urgency seeking Judicial Review Orders of certiorari, mandamus and prohibition.
2. The ex parte applicant is challenging the respondents move to alter the assignment of a County Assembly Committee as well as membership.



3. The matter was filed and remains designated as a cause and when it came up under Certificate of Urgency, it was neither certified urgent nor leave granted but service was directed which precipitated the instant Notice of preliminary Objection.
4. The 1<sup>st</sup> and 2<sup>nd</sup> respondents Notice of Preliminary Objection raises four grounds as follows:
  1. The application and suit falls under the jurisdiction of the Political Parties Disputes Tribunal pursuant to Section 40 of the [Political Parties Act](#).
  2. The suit is fundamentally defective as there is no employer/employee relationship between the applicants and the respondents and the court lacks jurisdiction to entertain the matter.
  3. The matter does not meet the jurisdictional requirements under Article 162 (2) of the [Constitution](#) of Kenya 2010 and Section 12 of the [Employment and Labour Relations Court Act](#) as it does not involve an employment dispute.
  4. The application and the suit infracts the court's jurisdiction on the doctrine of exhaustion.
5. In sum, the 1<sup>st</sup> and 2<sup>nd</sup> respondents are challenging the court's jurisdiction to hear and determine the Chamber Summons and the suit and the doctrine of exhaustion of remedies.
6. On exhaustion, the sentiments of the Court of Appeal in *Nyaoga V Chairman Kisii County Assembly & 3 Others* [2023] KECA 1540 (KLR) are a worthy introduction:

“The doctrine of exhaustion of remedies was created by courts in order to promote an efficient justice system and autonomous administrative state. It is a principle that requires parties to exhaust all available local administrative remedies before seeking redress in a court of law on a constitutional issue. An aggrieved party must first pursue all avenues of relief found within the administrative agency responsible for the issue at hand. The reason for this is to allow administrative agencies to address, and to potentially resolve the issue before escalating the same to the courts”.
7. Similarly, in *Mutanga Tea and Coffee Company Ltd V Shikara Ltd & Another* [2015] eKLR, the Court of Appeal stated:

“Where there is a clear procedure for redress of any particular grievance prescribed by the [Constitution](#) or an act of parliament that procedure should be strictly followed”.
8. The court expressed similar sentiments in *Geoffrey Muthinja & Another V Samuel Muguna Henry and 1756 Other* [2015] eKLR, that court's ought not to be the first port of call when disputes arise, but of last resort.
9. Similarly, in *William Odhiambo Kamogo & 3 Others V Attorney General & 4 Others* [2020] eKLR, the Court of Appeal stated:

“The question of exhaustion of administrative remedies arises when a litigant aggrieved by an agency's action, seeks redress from a court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure a party is first of all diligent in the protection of his own interest within the mechanism in place for resolution outside the courts”.



10. However, courts of law retain residual jurisdiction to intervene by way of exception to the doctrine of exhaustion, where the action complained of falls within the exceptions to the doctrine as held in Chief Justice and President of the Supreme Court and Another V Bryan Madila Khaemba [2021] eKLR.  
See also Republic V National Environmental Management Authority Ex Parte Sound Equipment Ltd [2011] eKLR
11. The doctrine of exhaustion of reliefs is contained in Section 9 of the [Fair Administrative Action Act](#) that:
  - (1) Subject to subsection:
  - (2) A person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of the [Constitution](#).
  - (2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.
  - (3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under subsection (1).
  - (4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.
12. In the instant case, the applicants have not sought exemption from the obligation to exhaust all other mechanisms under Section 9(2) of the [Fair Administrative Action Act](#).
13. The applicants are challenging the contents of the letter dated 12<sup>th</sup> February, 2025 from Azimio Coalition, Kisii County Assembly to the Speaker of the Kisii County Assembly discharging them from serving in Trade and Labour, Budget and Appropriation respectively.
14. Although the applicant's state that they were elected as independent candidates and Jubilee Party respectively, and are not subject to directives of party coalitions, their pleadings are silent on which coalition fronted their names for appointment to the respective committees and there is no evidence that they sought an explanation from the Azimio Coalition or the signatories to the letter or any of them.
15. More significantly, Section 40 of the [Political Parties Act](#), Cap 7D, on the Jurisdiction of the Political Parties Tribunal established under Section 39 of the Act provides:
  - (1) The Tribunal shall determine—
    - (a) disputes between the members of a political party;
    - (b) disputes between a member of a political party and the political party;
    - (c) disputes between political parties;
    - (d) disputes between an independent candidate and a political party;
    - (e) disputes between coalition partners;



- (f) appeals from decisions of the Registrar under this Act; and
  - (g) disputes arising out of party nominations.
- (2) Notwithstanding subsection (1), the Tribunal shall not hear or determine a dispute under paragraphs (a), (b), (c), (e) or (f) unless a party to the dispute adduces evidence of an attempt to subject the dispute to the internal political party dispute resolution mechanisms.
  - (3) A coalition agreement shall provide for internal dispute resolution mechanisms.
16. Analogous to the Provisions of the *Fair Administrative Action Act*, the foregoing provision is explicit that internal dispute resolution mechanisms must be invoked before the tribunal's assistance is sought.
  17. Whereas the 2<sup>nd</sup> applicant is a member of Jubilee which is part of the Azimio Coalition, his dispute is with the Jubilee Party and Azimio Coalition the 1<sup>st</sup> applicant has a dispute with the Azimio Coalition and should have approached it.
  18. There is no evidence to show that any of the applicants attempted to have the issue resolved using other mechanisms. Indeed, the instant application was filed 5 days later.
  19. In the court's view, the applicants have not exhausted other dispute resolution mechanisms and the instant application is premature.
  20. Concerning jurisdiction, the provisions of Article 162(2) (a) of the *Constitution* of Kenya 2010 and Section 12 of the *Employment and Labour Relations Court Act* prescribe the jurisdiction of the court.
  21. Article 162(2)(a) of the *Constitution* mandates parliament to establish a superior court to hear and determine disputes relating to employment and labour relations.
  22. Part III of the *Employment and Labour Relations Court Act* under the heading 'Jurisdiction of the Court' prescribes the jurisdiction of the court.
  23. Section 12 provides:
    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...
  24. Courts have weighed in on the question of jurisdiction of the ELRC in a catena of decisions.
  25. In *United States International University (USIU) V Attorney General* [2012] eKLR Majanja J. stated

In the final analysis, I would adopt the position of the Constitutional Court of South Africa in *Gcaba V Minister of Safety and Security* (Supra). The Industrial Court is a specialist court to deal with employment and labour relations matters. By virtue of Article 162(3), Section 12 of the Industrial Court Act, 2011 has set out matters within the exclusive domain of that court. Since the court is of the status of the High Court, it must have the jurisdiction to enforce labour rights in Article 41 and the jurisdiction to interpret the *Constitution* and fundamental rights and freedoms is incidental to the exercise of jurisdiction over matters within its exclusive domain. In any matter falling within the provisions of Section 12 of the Industrial Court Act, then the Industrial Court has jurisdiction to enforce not only Article 41 rights but also all fundamental rights ancillary and incidental to the employment and labour relations including interpretation of the *Constitution* within a matter before it".



26. The foregoing sentiments of the learned Judge were cited with approval by the Court of Appeal in Daniel N. Mugendi V Kenyatta University & 3 Others [2013] eKLR.
27. In Kenya Tea Growers Association & 2 Others V National Social Security Fund and 13 Others [2023] KESC 63(KLR) the Supreme Court expressed itself as follows:

From the above provisions of the Constitution and the Act, it is clear that the jurisdiction of the ELRC is limited in terms of the types of disputes and the parties...

In our view, there is nothing in the Constitution, the ELRC Act, or indeed in our decision in the Karisa Chengo Case to suggest that in exercising its jurisdiction over disputes emanating from employment and labour relations, the ELRC court is precluded from determining the constitutional validity of a statute. This is especially so if the statute in question lies at the centre of the dispute. What it cannot do, is to sit as if it were the High Court under article 165 of the Constitution, and declare a statute unconstitutional in circumstances where the dispute in question has nothing or little to do with employment and labour relations within the context of the ELRC Act. But, if at the commencement or during the determination of a dispute falling within its jurisdiction, as reserved to it by article 162(2)(a) of the Constitution, a question arises regarding the constitutional validity of a statute or a provision thereof, there can be no reason to prevent the ELRC from disposing of that particular issue. Otherwise, how else would it comprehensively and with finality determine such a dispute? Stripping the court of such authority would leave it jurisdictionally humstrung; a consequence that could hardly have been envisaged by the framers of the Constitution..."

28. Needless to emphasize, jurisdiction is a threshold question and must be disposed of at the earliest possible instance after it is raised because of its potential to terminate proceedings at that stage.
29. As exquisitely captured by Nyarangi JA in Owners of the Motor Vessel "Lillian S" V Caltex Oil (Kenya) Ltd [1989] eKLR.

Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...

Jurisdiction must be acquired before judgment is given..."

30. The sources of jurisdiction of a court were explained by the Supreme Court in Samuel Kamau Macharia and another V Kenya Commercial Bank & 2 Others [2012] eKLR and it is either the Constitution, or an act of parliament or both.
31. In the instant suit neither of the applicants has grounded the application on a contract of service nor have the issues being litigated crystallized as employment and/or labour relations related.
32. The pith and substance of the applicant's case is that they have been removed from being chair persons of the committees of the Kisii County Assembly whose leadership and member is generally determined by haggling between political parties and/or coalitions represented in the County Assembly after an election or by the majority party if it enjoys a commanding majority.
33. The entire application is based on the provisions of Articles 47, 50 and 236 of the Constitution and Standing Order No. 63, 154, 155 and 157 of the Kisii County Assembly.



34. In the courts view, neither of these provisions nor the Standing Orders demonstrate the applicability of the provisions of Article 162(2)(a) of the Constitution or Section 12 of the Employment and Labour Relations Court Act.
35. Flowing from the foregoing, it is discernible that the court lacks jurisdiction to hear and determine the suit herein and the same is struck out.
36. Parties shall bear their own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 24<sup>TH</sup> DAY OF MARCH, 2025.**

**DR. JACOB GAKERI**

**JUDGE**

**Order**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**DR. JACOB GAKERI**

**JUDGE**

