



REPUBLIC OF KENYA



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Kinyili & another v Government of Makueni County; Ethics and Ant-Corruption Commission (Interested Party) (Constitutional Petition E003 of 2025) [2025] KEELRC 750 (KLR) (13 March 2025) (Judgment)

Neutral citation: [2025] KEELRC 750 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS
CONSTITUTIONAL PETITION E003 OF 2025

B ONGAYA, J

MARCH 13, 2025

IN THE MATTER OF ARTICLES 22 AND 23 OF THE
CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF RULE 10 OF THE EMPLOYMENT AND
LABOUR RELATIONS COURT (PROCEDURE) RULES 2024

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF
RIGHTS OR FUNDAMENTAL FREEDOMS UNDER
ARTICLE 41(1), AND 27 OF THE CONSTITUTION OF
KENYA, 2010

AND

IN THE MATTER OF ARTICLE 77 OF THE CONSTITUTION
OF KENYA, 2010 AND SECTIONS 26 AND 52 OF THE
LEADERSHIP AND INTEGRITY ACT, 2012

BETWEEN

JACINTA MUNYIVA KINYILI 1ST PETITIONER

PROF BENARD M KIVUNGE 2ND PETITIONER

AND

GOVERNMENT OF MAKUENI COUNTY RESPONDENT

AND



ETHICS AND ANT-CORRUPTION COMMISSION INTERESTED PARTY

JUDGMENT

1. The petitioners filed the petition dated 17.02.2025 through Ongoya & Wambola Advocates. The petitioners prayed for:
 - a. A declaration that the decision of the respondent vide its letters dated 29.01.2025 communicating a decision to effect the decision envisaged in the letter dated 14.01.2025 to stop the petitioners' salaries and allowances is in contravention of section 26(2) of the Leadership and Integrity Act hence a violation of Article 27(1) and (2) of the Constitution of Kenya.
 - b. A declaration that the decision of the respondent vide its letter dated 29.01.2025 to decline to extend the time for the petitioners to make their detailed responses or representations prior to the taking of the said decision in view of the delay by the respondent to make available the letter by the interested party dated 16.05.2024 is a violation of Article 47 of the Constitution.
 - c. A declaration that the decision of the respondent to stop the salaries and allowances of the petitioner's sine die when the petitioners are expected to continue discharging their functions as members of the Makueni County Public Service Board constitutes holding the petitioners in servitude in contravention of Article 30(1) of the Constitution and the same is also an unfair labour practice contrary to Article 41(1) and (2) of the Constitution of Kenya 2010.
 - d. An order of certiorari quashing the decision of vide its letters dated 29.01.2025 communicating a decision to effect the decision envisaged in the letter dated 14.01.2025 to stop the petitioner's salaries and allowances.
 - e. An order of mandamus directing the respondent to reinstate and continue paying the petitioners' retainer and allowances as set out in their respective letters of appointment as members of the Makueni County Public Service Board
 - f. Costs of and incidental to this petition.
 - g. Such other and further orders as this court shall deem just.
2. The petition was based upon the petitioners' supporting affidavit and exhibits thereto filed together with the petition, and, the supplementary affidavit of the petitioners sworn on 01.02.2025. The petitioners' case is as follows:
 - a. That the 1st petitioner is a full time public officer as senior lecturer at the Machakos University while the 2nd petitioner is equally a full time public officer as an associate professor at Kenyatta University.
 - b. That section 57 of the County Governments Act creates the institution of the county public service board for each county.
 - c. That it is instructive that the County Governments Act makes provision for members of a county public service board to serve either on a full time or a part time basis.
 - d. That in its circular dated 08.12.2017 the Salaries and Remuneration Commission emphasized the distinction between full time members and part-time members of the county public service board when it provided for a remuneration (salary) structure and gratuity payment for fulltime



members, on the one hand, and a monthly retainer and sitting allowances structure for part-time members, on the other hand.

- e. On 08.01.2020 the petitioners received offers of appointment as members of the Makueni county public service board by the then governor of Makueni County on a part time basis for a non-renewable term of six (6) years.
- f. The petitioners formally signed their letters of appointment as members of the Makueni County public service board on 15.01.2020.
- g. Prior to their appointment the petitioners went through all the procedures antecedent to their appointment as members of the Makueni county public service board and in their application and interview stages of the appointment process, they disclosed the prevailing engagements as members of teaching faculty in their respective university engagements.
- h. On 16.05.2024 the interested party wrote to the county secretary of the respondent to the effect that it was investigating allegations of double employment on the petitioners' part.
- i. On 14.01.2025 the county secretary of the respondent wrote to the secretary and CEO of the Makueni County public service board referring to the letter by EACC dated 16.05.2024 communicating intention to stop the petitioners' salaries and allowances pending conclusion of the investigations by EACC. The letter also sought the petitioners' response within seven days.
- j. The petitioners argued that the county secretary of the respondent is neither their appointing authority nor their supervisor in discharge of their functions under the Constitution and the law.
- k. On 16.01.2025 the secretary and CEO of the Makueni county public service board wrote to the county secretary of the respondent requesting for a copy of the letter from interested party for ease of reference. It was brought to the attention of the county secretary of the respondent that the next meeting of the Makueni county public service board (CPSB) was scheduled to take place on 20.01.2025 which coincided with the deadline for the response to the letter dated 14.01.2025. The secretary of the Makueni CBSB sought an extension of seven days from 20.01.2025 for purposes of the response to the said letter of 14.01.2025.
- l. That the county secretary of the respondent only forwarded the letter dated 16.05.2024 to the secretary and CEO of the Makueni CBPS on 20.01.2025 after the meeting of the board where the said letter was expected to be discussed.
- m. On 27.01.2025 following consultations between the Chairman of the board, the CEO and the petitioners, the CEO of the county public service board wrote to the county secretary seeking a further extension of 14 days to enable the members to provide a comprehensive response.
- n. On 29.01.2025 the county secretary of the respondent wrote to the CEO of the board declining the request for extension of time and indicating that action had already been taken.
- o. On 10.02.2025 the petitioners wrote to the county secretary of the respondent seeking to know the status of our engagement as members of the Makueni county public service board.
- p. The county secretary responded vide a letter dated 10.02.2025 but received at the board on 11.02.2025. In his response, he did not address the question of the status of the petitioner's engagement as members of the Makueni county public service board, instead, he made references to the letter dated 14.01.2025 and the letter from the interested party and directed



that any inquiries or queries be addressed to the Ethics and Anti-Corruption Commission (EACC), the interested party.

- q. The petitioners are aware of Article 77(1) of the Constitution which prohibits a full time state officer from participating in any other gainful employment, however, they states that the Article does not define what any other gainful employment means.
- r. Article 80 of the Constitution obligates Parliament to enact legislation establishing procedures and mechanisms for the effective administration of Chapter Six of the Constitution.
- s. That pursuant to Article 80 of the Constitution, Parliament enacted the Leadership and Integrity Act, 2012.
- t. That section 52 of the Leadership and Integrity Act provides that pursuant to Article 80(c) of the Constitution, the provisions of Chapter Six of the Constitution and Part II of the Act, except section 18, shall apply to all public officers as if they were state officers.
- u. Section 26 of the Leadership and Integrity Act provides that subject to subsection (2), a state officer who is serving on a full time basis shall not participate in any other gainful employment. Section 26(2) of the Act states:(2) In this section, “gainful employment” means work that a person can pursue and perform for money or other form of compensation or remuneration which is inherently incompatible with the responsibilities of the State office or which results in the impairment of the judgement of the State officer in the execution of the functions of the State office or results in a conflict of interest in terms of section 16.
- v. The respondent and the interested party have not endeavoured to show how the petitioners’ retention as part time members of the Makueni CPSB while they are serving as university dons, results in the impairment of the judgment of the state officer in the execution of the functions of the state officer or results in a conflict of interest in terms of section 16 of the Leadership and Integrity Act.
- w. The position taken by the respondent and the interested party regarding Articles 77 of the Constitution and Section 26 of the Leadership and Integrity aAct is absurd when considered against comparable practices in public service or judicial service and parliamentary service generally for the following reasons:
 - i. Taken to its logical conclusion, the said position will indicate that the Chief Justice, the Supreme Court Judge, the Court of Appeal Judge, the High Court Judge and the Attorney General who are full time state officers in their own right cannot sit on and earn allowances as members of the Judicial Service Commission pursuant to Article 171(2) of the Constitution.
 - ii. Taken to its logical conclusion the said position will mean that the Speaker of the National Assembly, the members of Parliament and the clerk of the senate who are full time state and public officers in their own right cannot sit on and earn allowances as members of the Parliamentary Sservice Commission pursuant to Article 127(2) of the Constitution.
 - iii. Taken to its logical conclusion the said position will mean that the Principal Secretary of the Ministry for the time being responsible for legal education; the Principal Ssecretary of the Ministry for the time being responsible for finance; the Attorney General; the Chief Justice; and one person who teaches law in a public university



nominated by public universities; cannot sit on and earn allowances as members of the Council of Legal Education pursuant to section 4(5) of the [Legal Education Act](#).

- iv. Taken to its logical conclusion the said position will mean that the Principal Secretary in the Ministry of Finance or his representative; the Principal Secretary in the Ministry for the time being responsible for planning and national development or his representative; the Principal Secretary in the Ministry for the time being responsible for matters relating to trade and industry or his representative; representatives of the Universities and research institutes in Kenya cannot sit and earn allowances as members of the Board of Kenya Institute of Public Policy and Research Analysis pursuant to section 7 of the enabling Act.
- v. Taken to its logical conclusion, the said position will prohibit public university lecturers in the schools of medicine and health sciences from rendering services as consultants and being remunerated as such in our various referral hospitals and other health facilities.
- vi. Taken to its logical conclusion the said position will prohibit public university lecturers in the departments of engineering and the built environment from rendering services and getting paid as consulting engineers, consulting architects in their respective areas of specialization.
- vii. Taken to its logical conclusion the said position will prohibit the Board of the National Council for Law Reporting, a corporation within the Judiciary which comprise of the Chief Justice of Kenya, who chairs the board; the Attorney General; a Judge of the Court of Appeal; a Judge of the High Court; an Advocate and public officer; the Dean of School of Law at the University of Nairobi; the Government Printer from rendering services since these public officers earn allowances for sitting on the board.
- viii. Taken to its logical conclusion the said position will prohibit public university lecturers in the departments of law from rendering services and getting paid as advocates in their respective areas of specialization.
- ix. Taken to its logical conclusion the said position will prohibit public university lecturer in the departments of law from rendering services and getting paid as advocates in their respective areas of specialization.
- x. Taken to its logical conclusion the said position will prohibit public university lecturers in one public university from rendering services and getting paid as part time lecturers in other public universities in their respective areas of specialization.
- x. The decision of the respondent vide its letter dated 29.01.2025 to decline to extend the time for the petitioners to make their detailed responses or representations prior to the taking of the said decision in view of the delay by the respondent to make available the letter by the interested party dated 16.05.2024 is a violation of Article 47 of the [Constitution](#).
- y. The decision of the respondent to stop what he describes as the petitioner's salaries and allowances sine die when they are expected to continue discharging their functions as members of the Makueni CPSB constitutes holding the petitioners in servitude in contravention of article 30(1) of the [Constitution](#) and the same is also an unfair labour practice contrary to article 41(1) and (2) of the [Constitution](#) of Kenya.



- z. The interference with the petitioner's retainer and allowances as members of the Makueni CPSB by the county secretary of the respondent is an interference with their status and an unfair labour practice contrary to article 41(1) and (2) of the Constitution of Kenya, 2010.
 - aa. The stoppage of their retainer and allowances under the guise of a salary as described in the various correspondence of the county secretary of the respondent is a misapprehension of the petitioners' status at the Makueni county public service board hence the same is an illegality.
3. The interested party filed the replying affidavit of Asha Hamis sworn on 26.02.2025, an investigator with the interested party, through Samuel Mwangi Charagu, Advocate. It was stated and urged as follows:
- a. The Commission received a complaint on 08.04.2024 that the petitioners were in violation of Article 77 of the Constitution of Kenya and provisions of section 26 of the Leadership and Integrity Act 2012 amongst other laws of Kenya for holding two public offices and enjoying unlawful remuneration and benefits from the said violation.
 - b. The preliminary findings of investigations being conducted by the Commission established as follows:
 - i. That the first petitioner was a full time senior lecturer at Machakos University and during the period under inquiry being, January 2020 to date.
 - ii. The second petitioner was a full time senior lecturer or associate professor and registrar academic, was employed by Kenyatta University during the period under inquiry.
 - iii. Both petitioners have been serving as part time members of the Makueni CPSB for a non-renewable term of six years from 08.01.2020 to date.
 - iv. The petitioners are employees of the county government of makueni holding the position of a member of the Makueni CPSB, expected to lapse on 08.01.2026.
 - v. The terms of service of the petitioners are for part-time members of the Makueni CPSB.
 - vi. During the period between January 2020 to date and possibly until January 2026 both the petitioners have been holding two public offices and similarly receiving remuneration and benefits from the public exchequer, which amounts to double remuneration from public funds and irregular and unlawful payments out of the public fund.
 - vii. The petitioners have earned remuneration and allowances from the Makueni CPSB from January 2020 to date.
 - viii. Both petitioners have two retirement benefits one as a gratuity for the county government of Makueni and the other as a pension from Machakos University and Kenyatta University respectively during period between January 2020 to when their contracts as members of the Makueni CPSB lapse.
 - ix. Both petitioners by virtue of their contracts with the county government of Makueni have each accrued a gratuity while serving on permanent and pensionable at Machakos University and Kenyatta University respectively.



- x. By virtue of the foregoing, both petitioners are in contravention of Chapter Six of the Constitution of Kenya 2010, the Leadership and Integrity Act, 2012 and the Public Officer Act that restrains state and public officers from engaging in gainful employment.
 - xi. The county government of Makueni through a legal advisory no 1 of 2024 ref GMC/CA/ADM/1-1 Vol(906) informed the petitioners of their contravention of article 77 of the Constitution of Kenya 2010, section 26 of leadership and integrity act, 2012 to which the first and second petitioners elected to ignore.
 - xii. During investigation in the said inquiry, responses were sought from SRC on the issue of double payments under inquiry. The SRC confirmed a public officer is not entitled to allowances or benefit paid by different public entities in the same period as this irregular and illegal.
 - xiii. The SRC confirmed that as per the aforementioned circular, officers appointed to county public service board are provided with gratuity after the end of their term. Such gratuity is only payable to officers on gainful employment as the same is calculated on the basis of monthly income. The implication is that the position of part time member of the county public service board is a gainful employment as its package includes gratuity at the end of the contract.
 - xiv. The SRC confirms that officers serving on permanent and pensionable terms, if appointed as part time members of county public service boards on the provision of the legal instrument establishing the entity that they are appointed, then the appointees may not be eligible for gratuity unless they forfeit their pension with the primary employer for the period for which they serve in the said board.
- c. That although the petitioners went through all procedures antecedent to their appointment, this does not mean that their appointment was not irregular and unlawful.
 - d. Where there is an enabling legislation creating an institution within the legislation that allows certain public or state officers to sit in certain committees or certain specific boards does not envisage a scenario that leads to gainful employment unlike where there is an existing statute like in this case, the said section 58 of the County Government Act restricting or excluding such public officers like the petitioners from being engaged in such public bodies.
 - e. The employment contracts for the petitioners with the Makueni county government had explicit clauses in the contracts that stated that the said contracts shall be governed by all the laws of Kenya. Therefore, section 58 of the County Government Act, the Constitution of Kenya 2010 and section 26 of the Leadership and Integrity Act interpreted holistically specifically excluded the petitioners employment as members of the said board.
4. The respondent filed the Replying Affidavit of Dr. Justine Kyambi, the County Secretary of the respondent, through the office of the County Attorney, Government of Makueni County, and sworn on 26.02.2025. It was urged and stated thus:
- a. The petitioners have not been fired and neither have they been removed from office as they can chose to serve without double remuneration.
 - b. Under clause 17 of the petitioners' contracts of employment, on the conflict of interest and confidentiality, the petitioners were prohibited from engaging or participating directly either alone or in partnership with or as a manager, employee or agent for any other person or



otherwise howsoever in any trade or business other than that of the board during the duration of their employment with the county public service board.

- c. The petitioners are holding two remunerative public offices and drawing salaries and allowances and benefits from two public funds in clear violation of the law.
 - d. That being public officers, the petitioners were not eligible to be appointed as members of Makueni county public service board as the same was prohibited by County Government Act, *Leadership and Integrity Act*, as well as Constitution of Kenya.
 - e. Nothing has been produced to show that the several enumerated officers in the petitioners' analogy are on any retainer in both bodies.
 - f. The petitioners being full time public officers within their respective Universities where they are required to work on daily basis means that it is incompatible for the petitioners to get other time and work for Makueni county from 8am to 1.00pm and 2:00pm to 5pm as required under paragraph 6 of their contract with Makueni county.
 - g. The petitioners' interests to earn retainer fees and allowances conflicted with their official duties where they could not be in two places of work at the same time.
 - h. The petitioners may have supervised or supervise students who would simultaneously or later appear before them for recruitment and promotion thereby giving them undue advantage hence the conflict.
5. Additionally the respondent filed a Notice of Preliminary Objection dated 26.02.2025 and made on the following grounds:
- a. That the court does not have jurisdiction to hear and determine the petition and application in view of the provisions of Article 165(3)(b) of the *Constitution* of Kenya.
 - b. That having admitted that they are fulltime public officers at Machakos and Kenyatta universities, the petitioners engagement with the respondent violates section 58(3)(a) and (b) of the *County Governments Act* no 17 of 2012 as read together with article 2(4) and chapter six of the *Constitution*.
6. The interested party filed the replying affidavit of Asha Hamisi sworn on 16.02.2025 through Asha Hamisi. It was stated that the actions by the interested party herein were per its constitutional and statutory mandate. Further, the petitioners were public officers, ineligible for appointment as board members and it was unlawful for them to earn double as board members and as lecturers in public universities. That their continued earning is improper application of public funds.
7. Final submissions were filed for the parties. The Court has considered all the material on record. The Court returns as follows.
8. First is the jurisdictional issue. The respondent submits that the Court lacks jurisdiction in view of Article 165(3) of the *Constitution*. Article 165 (3)of the *Constitution* states as follows:
- (3) Subject to clause (5), the High Court shall have—
 - (a) unlimited original jurisdiction in criminal and civil matters;
 - (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;



- (c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
- (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
 - (i) the question whether any law is inconsistent with or in contravention of this Constitution;
 - (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
 - (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and, (iv) a question relating to conflict of laws under Article 191; and, (e) any other jurisdiction, original or appellate, conferred on it by legislation.

Article 165(5) on the other hand states as follows:

- (5) The High Court shall not have jurisdiction in respect of matters—
 - (a) 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).

The Employment and Labour Relations Court is one of the Courts contemplated in Article 162(2) of the *Constitution* and operationalised under the *Employment and Labour Relations Court Act*, 2011.

10. It was submitted for the respondent that only the High Court has jurisdiction to hear any question respecting the interpretation of the *Constitution* including determination whether any law is inconsistent with or in contravention of the *Constitution*, whether anything said to be done under the authority of the *Constitution* or of any law is inconsistent with or in contravention of the *Constitution*. It was further submitted that the petitioners have pleaded that they seek to enforce rights in Articles 27, 30, 41, 47 amongst others and the Court would not have jurisdiction to determine if the rights of the petitioners had been so violated.
11. The respondent cites *Governor, County Government of Kakamega & 4 others v Omweno & 12 others* (Civil Appeal E176, E177 & E179 of 2024 (Consolidated)) [2025] KECA 190 (KLR) (7 February 2025) (Judgment) Neutral citation: [2025] KECA 190 (KLR) where the Court of Appeal (H.Okwengu, H. Omondi, and J. Ngugi, JJ.A) in a dispute involving removal of the members of the county public service board held that the issues raised in the petition that was before the ELRC were constitutional in nature and the ELRC did not have jurisdiction to hear and determine them. The Court of Appeal, in reference to provisions of section 12(1) of the ELRC Act further stated, “33. These provisions viewed against the constitutional provisions and exposition we began with to contextualize this dispute make is obvious that the precise and limited jurisdiction of the ELRC was not meant to cover the type of constitutional questions presented in the petition that was before the superior court. These questions related to the constitutional constraints and imprimatur in the procedures and standards for the removal of chairpersons and members of County Public Service Boards. Those are matters which do not fall within the meaning of a dispute relating to employment and labour relations. Consequently, those are matters which were not within the jurisdiction of the ELRC. As this Court



has variously said, the ELRC and ELC certainly have jurisdiction, in appropriate cases, to interpret and apply the Constitution in matters that arise in the context of disputes on Employment and Labour Relations or Environment and Land matters. They, however, have no original or unlimited jurisdiction to interpret and apply the Constitution.” The issue that flows from that holding is whether the instant petition amounts to an appropriate case for the Court to interpret and apply the Constitution in matters in dispute.

12. It is submitted for the respondent that the issue of qualifications of the petitioners to be appointed as members of the CPSB and whether they meet the threshold is not a matter amounting to an employer-employee relationship because section 12 of the ELRC Act does not give the ELRC the jurisdiction to hear and determine constitutional petitions for redress of, denial, violation, or infringement of rights or fundamental freedoms in the Bill of Rights.
13. For the petitioners it was submitted thus “The real question in controversy in this petition is to be found in the correspondence preceding the filing of this petition. The same can also be found at paragraph 4 of the respondent’s Replying Affidavit where the deponent deposes that “the petitioners have not been fired and neither have they been removed from office as they can choose to serve without double remuneration. The real question is not about how the petitioners were appointed or whether they are eligible to hold the offices they hold at the Makueni County Public Service Board. The real question is whether they should continue to receive their emoluments, as they have been receiving while serving as members of Makueni County Public Service Board.”
14. The Court finds that looking at the pleaded case and material on record, there is no dispute that the petitioners have been duly appointed and they are serving on the board. There is also no dispute that the petitioners have not been removed from office as members of the Board and in accordance of the removal procedure prescribed in the County Governments Act. They therefore seek, in the instant petition, to enforce their rights to remuneration and benefits as prescribed by the Salaries and Remuneration Commission and incorporated in their respective letters of appointment. In other words, the Court finds that the claim for payment of remuneration and benefits is clearly in the context of the petitioner’s service or employment as members of the board and petitioners are seeking to enforce their respective rights and freedoms as they evolve from the contracts of service. The Court finds that per contemplation of the Court of Appeal in *County Government of Kakamega & 4 others v Omweno & 12 others* (Civil Appeal E176, E177 & E179 of 2024 (Consolidated)) [2025] KECA 190 (KLR) (7 February 2025) (Judgment) Neutral citation: [2025] KECA 190 (KLR) where the Court of Appeal (H.Okwengu, H. Omondi, and J. Ngugi, JJ.A) in the instant petition amounts to an appropriate case for the Court to interpret and apply the Constitution in matters in dispute. In any event, the Court finds that the instant case is distinguishable from the cited Court of Appeal decision because the cited case related to removal of the board members from office while the instant case is about enforcement of rights and freedoms within a subsisting contract of service between the parties. The parties are not in dispute that the prevailing contracts of service are the root basis of the instant petition.
15. While finding that the Court has jurisdiction and the matter raised involves petitioners as public servants in employment as such, the Court has reflected upon the continuing state of affairs where litigants, at their convenience as they deem fit swing the jurisdictional objection before the Court. The Court of appeal addressed the issue in *County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others* [2015] eKLR (CORAM: MARAGA, MUSINGA & MURGOR, JJ.A) The Court stated thus, “26. The next issue for our determination is whether or not the ELRC had jurisdiction to determine the petition. Before we consider it, we would like to state that we deprecate the conduct of counsel for the appellants in this matter. When it suited them, on 5th November 2014



they urged Maina, J. to dismiss the petition as the issues raised therein fell within the jurisdiction of the ELRC and not that of the High Court. Maina, J. obliged but instead of dismissing the petition, she transferred it to the ELRC. Before the ELRC, the appellants' counsel did not question that court's jurisdiction to determine the petition. However, when they lost and the petition was granted, they came to this Court up in arms contending that the ELRC lacked jurisdiction to entertain the petition. Counsel, as officers of the court, should be candid and state the correct position of the law even when it affects their clients' cases. They should not approbate and reprobate. Having said that, we now wish to consider the issue of jurisdiction.”

Further, the Court finds that the parties are in employment relationship because they have concluded a contract of service in that respect. Again, to show the guidance by the Court of Appeal the court reproduces the findings and holdings in *County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others* [2015] eKLR (Coram: Maraga, Musinga & Murgor, JJ.A) and extensively so as follows:

- “ 42. Article 178(3) of the *Constitution* as read with Section 11 of the *County Governments Act*, provide an unequivocal procedure to be followed in proceedings for the impeachment of the Speaker of a County Assembly. Article 181 of the *Constitution* and Section 33 of the *County Governments Act* provide for more or less the same procedure for the impeachment of a Governor of a County Assembly. We concur with the High Court decision in the case of *Hon. Martin Nyaga Wambora v. The Speaker, County Assembly of Embu*, that under that procedure, the impeachment of a Governor of a County Assembly is quasi-judicial in nature. It follows that the removal of a Speaker of a County Assembly is equally quasi-judicial in nature.
43. According to Article 162 of the *Constitution*, the ELRC has the status of the High Court. This being the case, it follows that in matters falling within its jurisdiction, the ELRC has supervisory powers over “any person, body or authority exercising judicial or quasi-judicial functions.” We have already found that the removal of a Speaker of a County Assembly is a quasi-judicial function. As we shall shortly demonstrate, the issues raised in the petition fell within the jurisdiction of the ELRC. We therefore find that the challenge of the impeachment of the 2nd respondent was a matter that fell squarely within the ELRC's supervisory mandate.
44. On the second point on the issue of jurisdiction, counsel for the appellants argued that Articles 23(1) and 165(3) of the *Constitution* vest in the High Court, as the constitutional court, and not in the ELRC, the jurisdiction to determine petitions seeking to enforce constitutional rights. He asserted that the ELRC not being the constitutional court, it had no jurisdiction to entertain the petition giving rise to this appeal.
45. In response, Mr. Okongo, learned counsel teaming up with Mr. Njenga for the 1st and 2nd respondents, dismissed this contention. He submitted that there is no court in Kenya known as the constitutional court established to determine constitutional issues. He argued that as Articles 22 and 23 simply talk of a “court”, every court in Kenya has jurisdiction to determine constitutional issues that arise in disputes within its jurisdiction.



46. Having considered the rival submissions on this point, we agree with counsel for the respondents that the Constitution does not establish a stand-alone constitutional court with exclusive jurisdiction to adjudicate upon constitutional issues. There are several authorities in support of this proposition. Suffice it to cite only Prof. Daniel N. Mugendi v. Kenyatta University & Others, in which the main issue for determination was whether or not the Industrial Court had jurisdiction to adjudicate upon issues of violation of constitutional rights. In affirming that the court had such jurisdiction, this Court cited with approval the decision of Majanja, J. in United States International University (USIU) v. The Attorney General & Others in which the learned judge observed that:

“Since the court is of the same status of the High Court, it must have 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 the matter before it.”

47. This Court reiterated this position in the case of Judicial Service Commission v. Shollei, where it held that the ELRC has jurisdiction to determine constitutional issues which arise within the purview of its jurisdiction. The second point on jurisdiction therefore also fails.
48. The third point on the issue of jurisdiction is that there is no employer/employee relationship between the Speaker of any County Assembly and the County Assembly itself to warrant the invocation of the ELRC’s jurisdiction to entertain the petition. Counsel for the appellants cited to us this Court’s recent decision in Jefferson Kalama Kengha & 2 Others v. Republic and argued that the ELRC is a specialized court whose jurisdiction, as is clear from Article 162(2)(a) of the Constitution when read together with Section 12(1)(a) of the Industrial Court Act, is limited to “employment and labour relations” disputes, that is to say “disputes relating to or arising out of employment between an employer and an employee.”
49. In this case, counsel for the appellants further argued, the relationship between the Speaker of a County Assembly and the County Assembly itself is “a quasi-political and procedural one” in that the Speaker of a County Assembly is elected and not appointed. As such, there is no employer/employee relationship between them. In the circumstance, counsel said, in the words of the late Justice Nyarangi in Motor Vessel “SS Lillian”, the ELRC should have “downed its tools” and struck out the petition for lack of jurisdiction.
50. For the respondents, it was submitted that there is a contract of service between the Speaker and the County Assembly and the ELRC had therefore to determine the petition.



51. As is clear from these submissions, both sides of the divide in this appeal agree that pursuant to the provisions of Article 162(2)(a) of the *Constitution* as read with Section 12(1) of the Industrial Court Act, the jurisdiction of the ELRC stems from the existence of employment and labour relations. The main issue in this appeal therefore is whether or not such relationship exists between a Speaker and a County Assembly. The appellants contended that employer/employee relationship arises on appointment and not on election and since the position of a Speaker is elective, such relationship does not exist. The respondents contended otherwise arguing that the determinant factor is remuneration.
52. The position of the Speakers of the National and County Assemblies should be distinguished from those of the Members of the National and County Assemblies. The Members of National and the County Assemblies are elected by the public at large to represent them and urge their interests in their respective assemblies. The Speakers, on the other hand, are not elected to represent any constituency. They are elected by their respective Assemblies to assist the Assemblies conduct their businesses in an orderly and lawful manner. Their responsibilities include managing House business and facilitating the operations of the National or County Assemblies. To provide for seamless support for the workings of the County Assembly, the Speakers of the County Assemblies also chair the County Assembly Service Boards which are responsible for the provision of services and facilities, including the appointment of office holders such as the Clerks and the Deputy Clerks of the County Assemblies to ensure the effective and efficient operations of the County Assemblies. In a sense therefore, the Speakers' roles are akin to those of managing directors of body corporates answerable to their Boards of Directors on the day-to-day operations of the companies. The Speakers' elections are therefore akin to appointments which create employer/employee relationships.
53. As Nduma J correctly observed in *Nick Githinji Ndichu v. Clerk Kiambu County Assembly & Another*, a decision followed by Sitati J. in *Peter Kingoina v. County Assembly of Nyamira* employer/employee relationship exists when there is a "contract of service" as defined by Section 2 of the *Employment Act*, 2007. We concur with the learned Judge that the law is not concerned with the manner of engagement or assumption of the position of employee. What is important is the existence of a contract of service "whether oral or in writing, and whether expressed or implied to employ or to serve as an employee for a period of time...for wages or a salary." On this additional criterion, we once again concur with the leaned Judge that there exists a contract of service between a Speaker of a County Assembly and the County Assembly concerned.
54. On the basis of these points, we therefore uphold Wasilwa, J's finding that the ELRC had jurisdiction to determine the petition. We accordingly dismiss the ground on jurisdiction."
16. The Court returns that in view of the findings and holdings of the foregoing Court of Appeal decision, the chairperson and members of the county public service boards appear to invariably



- be in employment relationship and disputes about exercise of the human resource functions such as recruitment, appointment, disciplinary control, removal, terms and conditions of service, and including remuneration and benefits like in the instant case fall within the jurisdiction of the ELRC.
17. While finding that the Court has jurisdiction, the Court has considered and been guided by the judgment of the Supreme Court in Kenya Tea Growers Association and 2 others -Versus- The *National Social Security Fund Board of Trustees and 7 others Petition E004 of 2023* as consolidated with Petition No. E002 of 2023 (Koome CJ & P; Mwilu DCJ & V-P; Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ) delivered on 21.02.2023. At paragraph 75 of the Judgment, the Supreme Court with reference to section 12(2) of the *Employment and Labour Relations Court Act* concluded thus, “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.” Further, “[83] Can it be said that the parties herein are not among the disputants contemplated under Section 12(2) of the ELRC Act? Even where the Act stipulates that a complaint, application or suit may be lodged against the Cabinet Secretary for Labour or any office established by law for that purpose? Or that the nature of the dispute is not one that falls within the jurisdiction of the ELRC, even where, as in this case, both employers and employees, trade unions, and workers associations are decrying what they consider to be the adverse effect of a new law on their working conditions? We are in agreement with the Court of Appeal to the effect that this dispute did not arise strictly from an employer-employee relationship. But what about the other aspects of the dispute? What meaning is to be ascribed to the phrase “labour relations”?” Further, “[79] In our view, there is nothing in the *Constitution*, the ELRC Act, or indeed in our decision in the Karisa Chengo Case to suggest that in exercising its jurisdiction over disputes emanating from employment and labour relations, the ELRC Court is precluded from determining the constitutional validity of a statute. This is especially so if the statute in question lies at the centre of the dispute. What it cannot do, is to sit as if it were the High Court under Article 165 of the *Constitution*, and declare a statute unconstitutional in circumstances where the dispute in question has nothing or little to do with employment and labour relations within the context of the ELRC Act. But, if at the commencement or during the determination of a dispute falling within its jurisdiction, as reserved to it by Article 162 (2) (a) of the *Constitution*, a question arises regarding the constitutional validity of a statute or a provision thereof, there can be no reason to prevent the ELRC from disposing of that particular issue. Otherwise, how else would it comprehensively and with finality determine such a dispute? Stripping the Court of such authority would leave it jurisdictionally hum-strung; a consequence that could hardly have been envisaged by the framers of the *Constitution*, even as they precluded the High Court from exercising jurisdiction over matters employment and labour pursuant to Article 165 (5) (b). We are therefore in agreement with the appellants’ submissions regarding this issue as encapsulated in paragraph 69 of this Judgment.”
18. Again in Okiya Omtatah Okoiti –Versus- The National Executive of the Republic and 6 Others [2019]eKLR, thus, “The Court has also held that in the public service under the *Constitution* of Kenya 2010, there are no masters and servants so that in public service in the new Republic, the test of master – servant does not obtain towards establishing existence of employment. In Paul Nyadewo Onyango –Versus- Parliamentary Service Commission and Another [2018]eKLR the Court stated, “In the present case, the Court will not therefore place emphasis on the relationships between individual public or state officers. None was a servant or master of the other. What is paramount, in the opinion of the Court, is that the officers interrelate and work together within the lawful prescription of the standards of a good public service delivery. They have no private treaties binding one officer to the other but only the constitutional, statutory and lawful policies or practices that are applicable to the public service and incorporated in the individual officer’s contract of service.”



19. In *Narok County Government and Another–Versus- Richard Bwogo Birir and Another* (2015) 5JELR 104466 (CA) the Court of Appeal found that state and public officers are all servants of the people (they are in employment of the people, as servants of the people) when the Court upheld the trial Court’s findings thus, “39. It is upon consideration of those and other provisions that the trial court reached the following compelling conclusion:

“...all persons holding public or state office in Kenya in the executive, the legislature, the judiciary or any other public body and in national or county government are servants of the people of Kenya. The court holds that despite the level of rank of state or public office as may be held, no public or state officer is a servant of the other but all are servants of the people. Thus, the court holds that the idea of servants of the crown is substituted with the doctrine of servants of the people under the new Republic as nurtured in the *Constitution* of Kenya, 2010. The hierarchy of state and public officers can be complex, detailed and conceivably very long vertically and horizontally but despite the rank or position held, the court holds that they are each a servant of the people and not of each other as state or public officers. They are all servants of the people. The court holds that there are no masters and servants within the hierarchies of the ranks of state and public officers in our new Republic. The court further finds that the string that flows through the constitutional provisions is that removal from public or state office is constitutionally chained with due process of law. In the opinion of the court, at the heart of due process are the rules of natural justice. Thus, the court finds that the pleasure doctrine for removal from a state or public office has been replaced with the doctrine of due process of law. Article 236 is particularly clear on the demise of the pleasure doctrine in Kenya’s public or state service... In the new Republic, the court holds that public service by public and state officers is guided by the doctrine of servants of the people and the doctrine of due process and not by the doctrines of the servants of the crown and the pleasure doctrine. In the opinion of the court, the demise of the pleasure doctrine and the demise of the doctrine of servants of the crown in the new Republic’s constitutional framework constitute the very foundation of the Republic, namely, Kenya is a sovereign Republic and all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with the *Constitution*.”

20. In *Paul Nyadewo Onyango –Versus- Parliamentary Service Commission and Another* [2018]eKLR the Court stated, “In the present case, the Court will not therefore place emphasis on the relationships between individual public or state officers. None was a servant or master of the other. What is paramount, in the opinion of the Court, is that the officers interrelate and work together within the lawful prescription of the standards of a good public service delivery. They have no private treaties binding one officer to the other but only the constitutional, statutory and lawful policies or practices that are applicable to the public service and incorporated in the individual officer’s contract of service.” The Court considers that to fully explain the circumstances of a contract of employment for public and state officers.
21. Finally, in *Havi v Judicial Service Commission & another (Petition E039 of 2024)* [2024] KEELRC 798 (KLR) (8 April 2024) (Ruling) the Court held thus, “12.The Court holds that within universal approaches to access to justice, public and state officers are all servants of the people, employed by the people or working for the people within prevailing provisions of the *Constitution*, statute, lawful public service policies and practices, and, the individual public officer or state officer contracts of service. The designations of the public officers and their nomenclature in establishment are diverse as the complexity of the state and public service such as judge, president, cabinet secretary, secretary, managing director, director, director general, clerk, commissioner, member, tutor, lecturer, counsel,



- magistrate, and many others in their numeracy, species or cadres, and numbers. The Court holds that the nomenclature and designation or cadre does not impair the fact of their working for the people as servants of the people as envisaged in Articles 10, 232 and chapter 6 of the Constitution.”
22. The Court has stated more than enough to show that the parties are in employment relationship and, the Court has jurisdiction to enforce rights and freedoms in the Bill of Rights and to interpret the Constitution for disputes whose subject matter falls within its subject matter jurisdiction, namely, formulation, interpretation and implementation of contract of employment and work relationships irrespective the situ or formal instrument involved be it oral arrangements, constitutional provisions, statutory provisions, collective bargaining agreements, individual contracts of service, policies, and lawful usages or practices that may be in issue. It appears to the Court to be the essence of Article 165 (5) (b) on the negative jurisdiction of the High Court.
23. Second, the Court finds for the petitioners that the meaning of gainful employment for purposes of Article 77(1) that a full-time State officer shall not participate in any other gainful employment is per the meaning in section 62(2) of the Leadership and Integrity Act thus: (2) In this section, “gainful employment” means work that a person can pursue and perform for money or other form of compensation or remuneration which is inherently incompatible with the responsibilities of the State office or which results in the impairment of the judgement of the State officer in the execution of the functions of the State office or results in a conflict of interest in terms of section 16.
24. It has not been shown that service as part-time members of the CPSB of Makueni while petitioners are as well serving as full time public officers as lecturers in public universities is inherently incompatible with responsibilities as lecturers, or even as part-time board members on the converse consideration with respect to their service as full time lecturers. Further, it has not been shown that such service amounts to conflict of interest as defined in the Public Officer Ethics Act, 2003 or the Leadership and Integrity Act. The respondent and interested party have not provided evidence in that respect such as a complaint by the board or the public universities in issue. The respondent has urged speculative arguments to suggest that such conflict may arise such as where the petitioners may be involved in recruitment, selection for appointment, appointment or even disciplinary control or promotion of their former or current students. The Court considers that such are matters that should be considered in the initiated administrative proceedings and determined one way or the other by the relevant authority as prescribed in the County Governments Act. As submitted for the petitioners, it appears that gainful employment is then to be construed as a term of art as defined in the said section 62(2) and it is not any remunerative or gainful employment that would fall to be trapped by the Article 77(1) prohibition, and the Court finds accordingly. Further, the Court holds that whether gainful employment exists is circumstantial and to be determined on case by case basis in view of the evidence and facts of individual cases. It is in that consideration that the Court finds that a summary decision against the petitioners would not be proper and it is fair that the initiated administrative process is given a chance.
25. Third, it is not in dispute that the petitioners were duly appointed in accordance with the procedure provided for in the County Governments Act. It is also true that section 58 (3) (a) and (b) provides that a person shall be qualified to be appointed as a member of the Board under subsection (1) of the Act, if that person satisfies the provisions of Chapter Six of the Constitution; and, is not a state officer or public officer. As to the appointment and whether the petitioners were so qualified, it appears to be a completed decision by the relevant appointing authorities. As to whether their lack of the qualifications can lead to their removal, the relevant provisions of the Act will have to be invoked. It appears to the Court that the petitioners’ remuneration and benefits have been stopped in circumstances that they are in office and working as duly appointed. The stoppage appears to be unfair as amounting to unfair



administrative action and to require them to work without due remuneration and benefits would amount to violation of rights and freedoms as urged for the petitioners. It appears to the Court that due procedure would need to apply in resolving the concerns raised for the respondent and the interested party. While an administrative procedure was initiated, it appears that the same has not been properly prosecuted because the petitioners have not been given an opportunity to explain or exculpate within the provisions of the [County Governments Act](#). The Court finds that the orders as prayed for will issue because the petitioners are entitled to due process under which all issues of fact and law surrounding their service as members of the board will have to be considered and determined as provided in the Act.

26. In the instant case, the interested party has within its proper constitutional and statutory powers and functions recommended that an administrative action should be taken against the petitioners. The respondent has initiated the process. The evidence is that the petitioners have not been given a fair opportunity to answer the allegations or issues as levelled or alleged. The Court considers that it is just and proper for the initiated disciplinary process to be given a chance to conclude as is expected under the [County Governments Act](#). The pending administrative process, in the Court's opinion, distinguishes the instant case from *Gatama v Ethics and Anti Corruption Commission & 2 others; Salaries & Remuneration Commission (Interested Party) (Cause 3 of 2022)* [2023] KEELRC 3330 (KLR) (20 December 2023) (Judgment). Further, the Court is guided by the holding of Onesmus N Makau J in that case thus, "53.I must however state that the claimant should not bear the blame for receiving the remuneration and allowances under the contract between her and the County Board. She applied for the job and she was competitively recruited by the County Assembly, while fully aware that she was a public officer. The Board then continued to pay her all the retainer, and allowances for five (5) years and thereafter paid her gratuity. This case can be distinguished from the Nicholas Rono case, supra, because in the said case the public officer concealed his status to the County Board during the recruitment process but in this case the claimant was allegedly recruited for her expertise in policy, education and status as senior lecturer in the university."
27. In the instant petition, the petitioners have shown that they responded to the advertisement by the respondent published in the Daily Nation of 15.04.2019 inviting applicants for vacancies in the offices of Chairperson; Members; and Secretary of the Makeni CPSB. Each petitioner applied for Member position and provided a full CV disclosing that each was a serving lecturer in a public university. The Court observes that while stated qualifications included satisfying the requirements of leadership and integrity in Chapter Six of the [Constitution](#) of Kenya, 2010, the advertisement did not specifically state the statutory qualification in section 58(3) (b) of the [County Governments Act](#) thus, "is not a state or public officer". The advertisement stated that interested candidates were to obtain clearance documentation from, inter alia, the Ethics and Anti-Corruption Commission, the interested party. The petitioners have shown that they went through the interviews and vetting by the County Assembly per the [Public Appointments \(County Assemblies Approval\) Act](#), 2017. Section 8 of the Act on matters to be considered by the County Assembly at the approval hearing states as follows:

- "8. The issues for consideration by the relevant County Assembly in relation to any nomination shall be—
- a. the procedure used to arrive at the nominee including the criteria for the short listing of the nominees;
 - b. any constitutional or statutory requirements relating to the office in question; and,
 - c. the suitability of the nominee for the appointment proposed having regard to whether the nominee's credentials, abilities,



experience and qualities meet the needs of the body to which the nomination is being made.”

28. The respondent and interested party have not denied that the petitioners applied for board member positions, were nominated, attended the County Assembly approval hearing, and, were appointed by the Governor per the procedure in the [County Governments Act](#). The allegation in the replying affidavit for the respondent that the petitioners failed to disclose their being lecturers in public universities is found incredible in view of the CVs exhibited for the petitioners. Further, the interested party has curiously failed to address its role in clearing the petitioners for the appointment. The petitioners are now serving as duly appointed. As urged for them, the statute provides for full time and part-time members of the board, and, no provision for volunteer board members – meaning those who serve with no payment. Accordingly, the Court finds that the petitioners’ prevailing service as board members should be handled in a fair manner, with due process per the applicable law particularly the [County Governments Act](#), and not be summarily interfered without balancing all the involved interests, rights, and obligations. The Court considers that by allowing the administrative process to its logical conclusion, the petitioners’ private interests, rights and freedoms will better get balanced with the ensuing public interest and obligations.
29. The Court has considered all circumstances of the case including that parties are in a continuing employment relationship and each party to bear own costs of the proceedings.
30. In conclusion, judgment is entered for the petitioners against the respondent with orders as follows:
- a. The declaration that the decision of the respondent vide its letters dated 29.01.2025 communicating a decision to effect the decision envisaged in the letter dated 14.01.2025 to stop the petitioners’ salaries and allowances is in contravention of section 26(2) of the [Leadership and Integrity Act](#) hence a violation of Article 27(1) and (2) of the [Constitution](#) of Kenya.
 - b. A declaration that the decision of the respondent vide its letter dated 29.01.2025 to decline to extend the time for the petitioners to make their detailed responses or representations prior to the taking of the said decision in view of the delay by the respondent to make available the letter by the interested party dated 16.05.2024 is a violation of Article 47 of the [Constitution](#).
 - c. The declaration that the decision of the respondent to stop the salaries and allowances of the petitioner’s sine die when the petitioners are expected to continue discharging their functions as members of the Makueni County Public Service Board constitutes holding the petitioners in servitude in contravention of Article 30(1) of the [Constitution](#) and the same is also an unfair labour practice contrary to Article 41(1) and (2) of the [Constitution](#) of Kenya 2010.
 - d. The order of certiorari quashing the decision of vide the letters dated 29.01.2025 communicating a decision to effect the decision envisaged in the letter dated 14.01.2025 to stop the petitioner’s salaries and allowances.
 - e. The order of mandamus directing the respondent to reinstate and continue paying the petitioners’ retainer and allowances as set out in their respective letters of appointment as members of the Makueni County Public Service Board until the employment relationship is otherwise lawfully terminated in accordance with the provisions of the [County Governments Act](#).
 - f. The declaration that the petitioners are entitled to due process under which the issues of fact and law surrounding their service as members of the Makueni County Public Service Board,



and in view of the initiated administrative process, will have to be considered and determined as provided in the *County Governments Act*.

- g. Each party to bear own costs of the proceedings.
- h. The Deputy Registrar to return the case file to Machakos Sub-Registry forthwith.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 13TH MARCH, 2025.

**BYRAM ONGAYA
PRINCIPAL JUDGE**

