



**Chere v Board of Directors Lake Basin Development Authority & 4 others;
Lake Basin Development Authority & 120 others (Interested Parties)
(Petition E048 of 2024) [2025] KEELRC 1815 (KLR) (23 June 2025) (Ruling)**

Neutral citation: [2025] KEELRC 1815 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION E048 OF 2024
NZIOKI WA MAKAU, J**

JUNE 23, 2025

**IN THE MATTER OF ARTICLES 2, 3, 22, 50, 159, 162,
165 AND 258 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF ALLEGED VIOLATIONS 10, 27(1), 41(1), 47(1)(2), 73(1)(2),
75(1), 153(4A), 201(D), 226(5) AND 232(1) (2) OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF THE LEADERSHIP & INTEGRITY ACT, 2012

AND

IN THE MATTER OF PUBLIC SERVICE (VALUES AND PRINCIPLES) ACT, 2015

AND

IN THE MATTER OF THE PUBLIC SERVICE COMMISSION ACT, 2017

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF THE EMPLOYMENT ACT, 2007

AND

**IN THE MATTER OF HUMAN RESOURCES POLICIES AND PROCEDURE MANUAL
AND CODE OF GOVERNANCE FOR STATE CORPORATIONS (MWONGOZO)**

BETWEEN

CPA FREDRICK ONYANGO CHERE PETITIONER

AND



**BOARD OF DIRECTORS LAKE BASIN DEVELOPMENT AUTHORITY & 4
OTHERS & 4 OTHERS RESPONDENT**

AND

**LAKE BASIN DEVELOPMENT AUTHORITY & 120 OTHERS & 120
OTHERS INTERESTED PARTY**

RULING

1. There is a preliminary objection to the hearing of the Petition dated 5th November 2024 and the Notice of Motion dated 27th November 2024 be determined in limine on the ground that this Honourable Court lacks jurisdiction to hear and determine both the Petition and the Notice of Motion on the grounds that: -
 - a) The appointment and removal from office of the 1st Interested Party's members of the Board whose appointment and removal is provided in statute is not a labour and employment issue envisaged under section 12 of the Employment and Labour Relations Act as settled by the Court of Appeal in the case of Attorney General & 2 others v Okiya Omtata Okoiti & 14 others [2020] eKLR.
 - b) The Petitioner is not an employee of the 1st Interested Party and the appointment of the 1st Interested Party's member of the Board did not involve the Petitioner and as such no employee and employee relation issues that arises in this Petition.
 - c) The suit against some of the members of the Board of the 1st Interested Party is time barred having been instituted after three (3) years from the date the appointments were made.
 - d) The Petitioner has not exhausted the statutory dispute resolution mechanism provided under Access to Information Act and the regulations made thereto in respect of his request to access the information prior to filing the Notice of Motion dated 27th November 2024 to enforce the right of access to information under Article 35 of the Constitution.
 - e) Enforcement of right to access of information under Article 35 of the Constitution can only be by way of a Constitutional Petition instituted in the High Court and not through a Notice of Motion as filed by the Petitioner herein.
 - f) The Petition does meet the threshold of a constitutional petition as settled in the case of Anarita Karimi Njeru v Republic [1979] eKLR.
2. 1st and 2nd Respondents and the 1st Interested Party thus apply to have the said Notice of Motion and the Petition struck out in limine with costs.
3. The Petitioner filed a notice of withdrawal of the motion dated 27th November 2024 seeking access to information. He filed submissions to the preliminary objection and in them he asserts that he had identified the following issues for determination by this Honourable Court;
 - a) Whether the firm of M/s V.A. Nyamodi & Company is properly on record for 1st and 3rd Respondents.
 - b) Whether this Honourable Court has Jurisdiction to hear and determine the Petition dated 4th November 2024.



- c) Whether the issues raised in the Notice of Preliminary objection dated 5th May 2025 have merit.
4. As to whether the firm of M/s V.A. Nyamodi & Company is properly on record for 1st and 3rd Respondents, the Petitioner submits that the Notice of Appointment dated 12th November 2024 and filed by Messrs V.A. Nyamodi & Company indicated that they had been appointed to Act for 1st and 3rd Interested Parties. That during subsequent mentions of 28th January 2025 and 20th March 2025, the firm recorded appearance for 1st and 3rd Interested parties. On 5th May 2025, the firm filed Notice of Preliminary Objection purporting to act for 1st, 3rd Respondents and 1st Interested Party. The Petitioner submitted that Order 9, Rule 9 of Civil Procedures Rules mandates that an advocate must seek leave of court to come on record, file a notice of change of advocate (if applicable), and then be formally appointed. He submitted that an advocate who is not on record may not have the authority to address the court or represent their client in any formal proceedings.
5. The Petitioner relied on the case of *Lalji Bhimji Shangani Builders & Contractors v City Council of Nairobi* [2012] eKLR where it was held that
- A party who without any justification decides not to follow the procedure laid down for orderly conduct of litigation cannot be allowed to fall back on the said objective for assistance and where no explanation has been offered for failure to observe the rules of the procedure the Court may well be entitled to conclude that the failure to comply therewith was deliberate.
6. The Petitioner further relied on the case of *Monica Moraa v Kenindia Assurance Co. Ltd* [2012] eKLR, where the Court held
- ".....there is no doubt in my mind that the issue of representation is critical especially in cases such as this one where the applicant's advocates intend to come on record after delivery of judgment. There are specific provisions governing such change of advocate. In my view the firm of M/s Kibichiy & Co. Advocates should have sought this court's leave to come on record as acting for the applicant...The firm of M/s Kibichiy & Co. Advocates has not complied with the rules and instead, have just gone ahead and filed a Notice of Appointment without following the laid down procedure. The issue of representation is a vital component of the civil practice and the courts cannot turn a blind eye to situations where the rules are flagrantly breached... [Emphasis by Petitioner]
7. The Petitioner submits that the procedure set out under Order 9 Rule 9 above is mandatory and thus cannot be termed as a mere technicality. He submits that view of the fact that the procedure was not followed by M/S V.A. Nyamodi & Company, the said firm is not properly on record, and has no legal standing to move the Court on behalf of 1st and 3rd Respondents and therefore Notice of Preliminary Objection dated 5th May 2025 and all pleadings filed by it ought to be struck out with costs to the Petitioner.
8. As to whether this Honourable Court has Jurisdiction to hear and determine the Petition dated 4th November 2024, the Petitioner submits that the Petition is substantively about matters related to employment and labour relations, as envisaged in Article 162(2) of *the Constitution* and sections 12(1) and (2) of the *Employment and Labour Relations Court Act*. The Petitioner submits that there is nothing in *the Constitution* and the ELRC Act to suggest that in exercising its jurisdiction over disputes emanating from employment and labour relations, the ELRC Court is precluded from making determination on public officers who fail to adhere to the values set out in Constitution.



The Petitioner submits that the drafters of *the Constitution* intended that the ELRC should have jurisdiction on all matters relating to employment and labour relations.

9. The Petitioner submits that that Parliament operationalized the Court vide the *Employment and Labour Relations Court Act* and that the long title to the Act states that it is established “to hear and determine disputes relating to employment and labour relations and for connected purposes.” That further, section 12(1) of the *Employment and Labour Relations Court Act* does not limit the Court to only the disputes set out therein under paragraphs (a) to (j). The Petitioner submits that by the use of the word “including”, the legislature signified that what is set out thereafter is not conclusive or exclusive. That other disputes other than those listed can be heard and determined by the court. The Petitioner submitted that the decision of the Court of Appeal in Attorney General & 2 others v Okiya Omtata Okoiti & 14 others [2020] eKLR cited in the Notice of Preliminary Objection related to independent commissioners only and did not extend to any other appointment. The Petitioner submits the Court of Appeal did not exclude board members and Chairperson who are the subject of this Petition, from the jurisdiction of Employment and Relations Court and therefore the objections to the jurisdiction is not merited. He cited the case of Okumu & 8 others v Badi, Director General Nairobi Metropolitan Services & 15 others; Nairobi City County & 12 others (Interested parties); Okoiti (Ex parte) (Petition 94 of 2020 & Miscellaneous Civil Application 60 of 2020 (Consolidated)) [2022] KEELRC 1 (KLR) (31 January 2022) (Judgment) where Onyango J. held

In that case, the Attorney General made the same argument, that this Court had no jurisdiction to determine cases of appointment of members of the Board of Nairobi City Water Company. They cited the same authority. My finding was that the decision by the Court of Appeal was in relation to members of constitutional petitions and not board members of state corporations. In this case the issue is appointment of council members and the Chief Executive Officer of KEBS which is within the jurisdiction of this Court.

10. The Petitioner submits that one of the reasons provided by the 1st Respondent to support Preliminary objection is that the Petitioner has no employer-employee relationship with 1st Interested Party and that the appointment of 1st Interested Board members did not involve the Petitioner. The Petitioner asserts the law under Article 22 does not limit the enforcement of rights by stating that Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. The Petitioner submits that *the Constitution* under Articles 22, 258 as read together with Articles 3 and 48 grant every person the grant every person not only access to courts but also the right to protect, defend and uphold *the Constitution*. The Petitioner submits that he is therefore within his rights to file the Petition and defend *the Constitution*. He cites the case of Timothy Otuya Afubwa & another v County Government of Trans Nzoia & 3 others [2016] KEHC 4441 (KLR) where the Court held that

That their petition is on behalf of the public and they have invoked the provisions of Article 258(2) (c) and 22(1) of *the Constitution*. Article 22 deals with the Enforcement of Bill of Rights and provides that every person can bring court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed and the same can be brought by a person acting on behalf of the public This Article in my view is so wide and the drafters of *the Constitution* intended that nobody would be locked out of the mercy sit of justice when his interest or those of the public are threatened. Article 258 of *the Constitution* buttresses the provision of Article 22 above. I do find that the petitioners have locus standi. They fall within the class of persons anticipated under Article 258 of *the*



Constitution. They have not in my view brought this petition with ulterior motive or bad faith.

11. As to whether the issues raised in the Notice of Preliminary objection dated 5th May 2025 have merit, the Petitioner submit that they do not. He submits that the leading authority on preliminary objections is the case of Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696 where Law JA rendered himself as follows:

“ A preliminary objection consists of a 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.
12. The Petitioner submits that further Newbold P. cautioned,

“ A preliminary objection cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.
13. The Petitioner submits that other than the preliminary objection raised challenging the jurisdiction of this Court, the other reasons in the Notice of Preliminary Objection bears factual aspects calling for proof or seeks to adduce evidence and therefore do not raise pure points of law. He submits that for example, stating that the suit against some of the Board members of 1st Interested Party is time barred is a contestable fact which cannot be a ground for preliminary objection or the allegation that the Petition does not meet threshold of a constitutional petition is not a pure point of law and a matter for substantive hearing of the petition which cannot be raised at preliminary stage. He thus urges the dismissal, with costs, of the objection raised.

2nd and 5th Respondents’ submissions

14. The 2nd and 5th Respondent submit that vide a petition dated 5th November 2024, the Petitioner prays for declarations that the appointment of the Board of Directors of Lake Basin Development Authority was done in breach of the Constitution and seeks orders that the Chairman and Board of Directors appointed via various gazette notices be declared unfit to hold offices. He seeks to quash their appointment and that of the 3rd Respondent as the Managing Director. The Petitioner also prays that the board be constituted afresh. The 2nd and 5th Respondent support the preliminary objection as the 1st Interested Party is a State Corporation. The 2nd and 5th Respondents submit that the appointment of Chairman and Board Members are a preserve of the President under section 6 of State Corporation Act. It was submitted that under section 6(e) these members are required not to be employees of the state corporation. It was submitted that the 1st Interested Party is a state corporation under the 1st Respondent and that its appointment of board members is governed by the articles of association of the corporations and by the Act. Such persons are public officers but do not have an employment relationship. The 2nd and 5th Respondents thus urged the dismissal of the Petition for the foregoing grounds.

Disposition

15. The Court has considered the preliminary objection and the submissions of the parties, the law and authorities cited in coming to this decision. The objection is to the jurisdiction of the Court and the Petitioner in response asserts the firm of M/s VA Nyamodi & Company are not properly on record for the objectors. Having had regard to the Rules of this Court there is no bar for the firm of M/s VA Nyamodi & Company being on record for the 1st and 3rd Respondents as well as the 1st Interested



Party. The Civil Procedure Rules are only invoked where there is lacunae in the Rules of this Court and the Employment and Labour Relations Court (Procedure) Rules 2024 do not have any gap as to the appearance of parties by counsel or in person. As such any objections to the firm being on record are misplaced and dismissed outrightly.

16. The gravamen of the Petition before the Court is the seeking to enforce Article 22 rights inter alia. As urged by the Respondents, the Court has no jurisdiction as there is no employee-employer relationship between the Petitioner and the Respondents and Interested Parties and that there is no employment dispute that can be addressed in the Petition. The Petitioner on his part asserts that the Court had jurisdiction.
17. The Petition has been brought seeking for a declaration that the shortlisting and subsequent interviews by the Board of Directors of the 1st Respondent were done in an opaque manner, devoid of transparency, public participation and in total breach of *the Constitution* of Kenya in particular Articles 10, 41, 47 and 232 which dictate that the appointments to public offices must be done through a competitive process, transparent and consultative process among others.
18. In as far as *the Constitution* is alleged to have been infringed in the process of recruitment of employees of a State Corporation, it has been held that there is jurisdiction to enforce those rights before this Court. In the case of *Okumu & 8 others v Badi, Director General Nairobi Metropolitan Services & 15 others; Nairobi City County & 12 others (Interested parties)* (supra) it was held that

....their petition is on behalf of the public and they have invoked the provisions of Article 258(2)(c) and 22(1) of *the Constitution*. Article 22 deals with the Enforcement of Bill of Rights and provides that every person can bring court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed and the same can be brought by a person acting on behalf of the public

This Article in my view is so wide and the drafters of *the Constitution* intended that nobody would be locked out of the mercy seat of justice when his interest or those of the public are threatened. Article 258 of *the Constitution* buttresses the provision of Article 22 above. I do find that the petitioners have locus standi. They fall within the class of persons anticipated under Article 258 of *the Constitution*. [Emphasis provided]

19. The Court is of the firm view the Petitioner has locus standi to bring this Petition. There are aspects of the Petition that will call for the establishment of facts and those cannot be determined in limine. The Court declines the invitation to dismiss the Petition as sought by the 1st and 3rd Respondents and the 1st Interested Party. Objection dismissed albeit with no order as to costs.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF JUNE 2025

Nzioki wa Makau, MCIArb.

JUDGE

