



**Lekakimon v Speaker, County Assembly of Baringo & 3 others (Employment and Labour Relations Petition E010 of 2024) [2024] KEELRC 1605 (KLR) (25 June 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1605 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
EMPLOYMENT AND LABOUR RELATIONS PETITION E010 OF 2024**

**HS WASILWA, J  
JUNE 25, 2024**

**BETWEEN**

**HO. WESLEY LEKAKIMON ..... APPLICANT**

**AND**

**THE SPEAKER, THE COUNTY ASSEMBLY OF BARINGO ... 1<sup>ST</sup> RESPONDENT**

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

**HON SHADRACK MAILUK ..... 3<sup>RD</sup> RESPONDENT**

**THE CLERK, COUNTY ASSEMBLY OF BARINGO ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. The Petitioner instituted this suit by a Petition dated 7<sup>th</sup> May, 2024. Contemporaneously, he filed a Notice of Motion dated 7<sup>th</sup> may, 2024, pursuant to Article 22 and 23 of *the Constitution*, sections 12(1) and (3) of the *Employment and Labour Relations Court Act*, 2011, Rules 3,4 and 23 of *the Constitution* of Kenya (Protection of rights and Fundamental Freedoms) Practice and procedure Rules, 2013, Rules 17 of the Employment and Labour Relations Court(Procedure) Rules and all other enabling provisions of the law, seeking for the following Orders; -
  - a. Spent.
  - b. That pending the hearing and determination of this Application inter partes, the Honourable Court be and is hereby pleased to grant an order of status quo ante staying the decision made by the 1<sup>st</sup> Respondent on 20<sup>th</sup> March, 2024 to remove and/or uphold the removal the Applicant as a member of Baringo County Assembly Service Board and to replace the Applicant with the 3<sup>rd</sup> Respondent.
  - c. In the alternative, pending the hearing and the determination of this Application inter partes, the Honourable Court be and is hereby pleased to issue an interim order of mandatory



injunction compelling the 1<sup>st</sup> Respondent to immediately reinstate the Applicant to his position as a member of Baringo County Assembly Service Board.

- d. Pending the hearing and determination of the Petition, the Honourable Court be and is hereby pleased to grant an order of status quo ante staying the decision made by the 1<sup>st</sup> Respondent on 20<sup>th</sup> March, 2024 to remove and/or uphold the removal the Applicant as a member of Baringo County Assembly Service Board and to replace the Applicant with the 3<sup>rd</sup> Respondent.
  - e. In the alternative, an interim order of mandatory injunction be and is hereby issued compelling the 1<sup>st</sup> Respondent to immediately reinstate the Petitioner/ Applicant to his position as a member of Baringo County Assembly Service Board pending the hearing and determination of the Petition.
  - f. The Honourable Court grants any other relief that it deems fit and just to grant in the interest of justice.
  - g. The costs of the Application be provided for.
2. The Application is based on the grounds on the face of it and the supporting affidavit sworn by the petitioner on 7<sup>th</sup> May, 2024.
  3. The petitioner stated that he is a member of Baringo County Assembly Service Board, having been appointed pursuant to the provisions of section 12 of the [County Governments Act](#), and section 9 of the County Assembly Service Act.
  4. That as a member of the Board, his duties and responsibilities are outlined under section 11 of the [County Assembly Services Act](#) with the key mandate being to direct and supervise the administration of the services and facilities and exercise budgetary control over the County Assembly Service. In return, he is entitled to remuneration and allowances pursuant to section 15 of the [County Assembly Services Act](#).
  5. That on 20<sup>th</sup> March, 2024, a motion was tabled before the 2<sup>nd</sup> Respondent Assembly seeking the removal of the Applicant as a member of Baringo County Assembly Service Board and to replace him with the 3<sup>rd</sup> Respondent allegedly on a decision passed by the minority party members in the Assembly.
  6. This decision was made, presided over by the 1<sup>st</sup> Respondent, who gave directions on the said motion and upheld the alleged minority party's decision to remove the Applicant and effectively replaced the Applicant with the 3<sup>rd</sup> Respondent who has since been attending the sittings of the Board.
  7. He stated that he was neither present when the alleged minority party's decision was made nor was he in the Assembly when the notice of motion for his removal was tabled, having fallen ill and hospitalized. Hence, he did not have notice of the allegations levelled against him or the reasons given by the minority party for his removal. Therefore, he was condemned unheard.
  8. He stated that the tenure of office of the Applicant is specifically provided for under section 12(5) of the County Government's Act and the Applicant legitimately expected that he would vacate office only at the end of his term as a member of county assembly or if he ceased being a member of the county assembly. Additionally, that he would only be removed on the grounds stipulated under section 10 of the [County Assembly Services Act](#), i.e. violation of [the Constitution](#), inability to discharge duties, bankruptcy or conviction and sentence by imprisonment of more than six months.
  9. He stated that the basis for the removal of the Applicant as a member of the Baringo County Assembly Service Board was on alleged "lack of representation at the Board" which is not one of the grounds for



removal of a member of the county assembly service board under section 10 of the [County Assembly Services Act](#).

10. He contends that the design and architecture of the law on removal from office of any officeholder of the offices established under the [County Governments Act](#) and the [County Assembly Services Act](#) is such that the speaker has no decisive role but the power to remove vests in the members of the County Assembly. Therefore, the 1<sup>st</sup> Respondent acted ultra vires to the County Government Act, the [County Assembly Services Act](#) and Baringo County Assembly Standing Orders. Further that, his removal flouted the provisions of Standing Order 67 of Baringo County Assembly Standing Orders, which required the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to constitute a select committee to consider the matter of the Applicant's removal and the Applicant to be accorded an opportunity to be heard and to be furnished with the report of the select committee, together with any other evidence adduced and such notes or papers presented to the Committee at least 3 days before the debate on the Motion.
11. Based on the circumstances, it is his position, that his removal was procedurally and substantively unfair, unreasonable, illegal, and a gross violation of his constitutional rights and fundamental freedoms and his legitimate expectation. In any event, that his position had not fallen vacant to necessitate the appointment of the 3<sup>rd</sup> Respondent to replace him. Thus the appointment of the 3<sup>rd</sup> Respondent is a nullity.
12. He stated that his removal and immediate replacement was maliciously scheduled to coincide with the Applicant's illness and hospitalization so that the Applicant would not have time and strength to take reasonably immediate legal action to prevent his illegal removal.
13. He stated that this Court has jurisdiction to redress the violation of the Applicant's rights and fundamental freedoms by granting the reliefs sought both in the interim and in the Petition, as he is legitimately apprehensive that his rights and fundamental freedoms will continue being infringed, violated and/ or denied as long as the 3<sup>rd</sup> Respondent continue to occupy his position illegally.
14. That unless the orders sought are granted in the interim, the Petition, if successful, would be rendered nugatory, otiose and an academic exercise. In any case that the balance of convenience tilts in favour of the orders sought and the harm to be suffered by the Applicant is irreparable and far outweighs any damage the Respondents may suffer.
15. That the Application has been brought timeously, in good faith and in the interest of justice.
16. In response to the Application herein, the Respondents filed separate replying affidavits and Notice of Preliminary Objections. The first Preliminary Objection was filed by the 3<sup>rd</sup> Respondent, through the firm of Gordon Ogola and Kipkoech and Company Advocates, dated 31<sup>st</sup> May, 2024 and based on the following grounds; -
  1. That the Honourable Court expressly lacks requisite jurisdiction to hear and determine the instant petition for the following reasons:
    - i. A member of a County Service Board is not an employee and as such, this Court cannot hear and determine the instant petition. By dint of Section 3 of the [Employment and Labour Relations Court Act](#) which outlines the Principal objective of the Act, the governing statute of this Honorable Court restricts it to hear and determine disputes relating to employment and labour relations and for connected purposes.
    - ii. Reliance is placed on the Court of Appeal's ruling while making reference to its earlier decision on the jurisdiction of the Employment and Labour Relations Court. In Civil Appeal E001 of 2023 Odongo v Clerk, Nakuru County Assembly & Others, the



Court stated at para 27. This court held that the ELRC did not have jurisdiction to deal with the matter, as no contract of employment had been entered into between the County Government and the nominees, and the dispute was not an employment and labour dispute in nature; there was no employer-employee relationship between the applicant and any of the respondents, and therefore the applicant lacked the locus to institute the proceedings; and that the 6<sup>th</sup> respondent did not act in isolation but together with the 4<sup>th</sup> respondent, hence Sections 77 and 87 of the County Government Act were applicable, and the petition was premature for failing to exhaust the mechanisms provided therein. From the findings of the impugned judgment, we are satisfied that the applicant has not set out in any form why these elements of settled law require consideration by the Supreme Court and how they impact on third parties or other cases.

- iii. Contextually, the County Assembly does not have an employer-employee contract of employment with the petitioner herein and thus this Court does not have the requisite jurisdiction to entertain the petition brought before it.
  2. That the Petitioner lacks locus standi to bring the instant petition before this Honourable Court for its hearing and determination. By virtue of the foregoing reasons and the absence of the contract of employment, the employer-employee relationship fails to attain the elements set under the Employment and *Labour Relations Act*. The Petitioner therefore failed to discharge the threshold required to bring this petition.
  3. That the Petition by the petitioner citing the violation of the constitutional right to fair administrative action, violation principles and national values among other assertions by the Petitioner is, therefore, incompetent, frivolous, vexatious, fatally defective and bad in law and should be struck out for the same reasons.
17. On the same day, Macharia, Burugu and Company Advocates acting for the 1<sup>st</sup> Respondent, filed another Preliminary Objection dated 31<sup>st</sup> May, 2024, based on the following grounds; -
- a. That this dispute does not fall under Section 12 of the *Employment and Labour Relations Court Act* for the reason that the Petitioner, who is a former member of the Baringo County Assembly Service Board, was not an employee of either the said County Assembly Service Board or any of the Respondents. There is no employer-employee relationship or any other relationship that would bring this dispute within the ambit of this Honourable Court's jurisdiction.
  - b. Pursuant to Section 12 (3)(c) of the *County Governments Act* Cap 265, the Petitioner was a political nominee of his respective party into the membership of the Baringo County Assembly Service Board ("the Board"). His nomination into the said Board and his removal is a matter solely in the hands of his political party which makes such removal a matter of adjudication within the Internal Dispute Resolution Mechanism of the political party that nominated him and removed him from membership of the Board as contemplated by Section 40(1)(b) of the *Political Parties Act* and thus the dispute is not only prematurely brought before the Court, but it is also a non-justiciable matter before this Court.
18. Directions were taken for these Preliminary Objections to be heard first, which were canvassed by written submissions.



## Petitioner's Submissions

19. The Petitioner identified 4 issues for determination; whether the 1<sup>st</sup> and 3<sup>rd</sup> Respondents' notices of preliminary objection raises pure points of law worthy of consideration by this Court, whether this Court has the requisite jurisdiction to hear and determine the Application and the Petition, whether the Petitioner/ Applicant has locus standi to bring the present Application and Petition and who bears the cost of the Preliminary Objection.
20. On the first issue, it was submitted that the Court's jurisdiction turns on two factual contestations; first, whether there exists a contract of service between the Applicant and Baringo County Assembly Service Board and second, whether the removal of the Applicant was done at the instance of the political party that nominated the Applicant to County Assembly Service Board so as to bring the dispute within the provisions of section 40 of the *Political Parties Act*. He argued that it is trite law that a preliminary objection can only be raised on a pure question of law as stated in the case of *Mukisa Biscuits Manufacturing Ltd –vs- West End Distributors (1969) EA 696*. Similarly, in the case of *Oraro v. Mbaja [2005] eKLR*, it was held that a preliminary objection must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence rather than it should be such a point which disposes off the whole action if upheld.
21. The Court of Appeal in the case of *Bashir Haji Abdulahi –vs- Adhan Mohamed Mooru & 3 Others [2014] Eklr* made the following distinction between points of law and matters of fact;

“Matter of fact’ is a matter involving a judicial inquiry into the truth of alleged facts; a ‘matter of law’; is a matter involving judicial inquiry into the applicable law.”
22. He argued that it follows that the Court's first duty in dealing with a preliminary objection is to determine whether the objection raised is a pure point of law and to discern a point of law, the Court has to be satisfied that there is no contest as to the facts on record. The facts have to be deemed as agreed as prima facie presented on record as preliminary objection cannot be premised on contested facts as is the case herein.
23. On that basis, it was argued that the existence of an employer-employee relationship is a question of fact which can only be concluded by the Court after considering the facts and the evidence placed before the Court. hence, the first ground of preliminary objection is not a pure point of law. Similarly, that the second ground of preliminary objection has some factual contestations because on the Applicant's part, it is the 1<sup>st</sup> Respondent's ruling and/or directions approving the Applicant's removal that marked the removal of the Applicant as a member of Baringo county assembly service board but on the part of the 1<sup>st</sup> Respondent's, he was just communicating a decision of the minority party. Therefore, that the preliminary objections raised by the 1<sup>st</sup> and 3<sup>rd</sup> Respondents do not raise pure points of law and therefore fall short of the test established in the case of *Mukisa Biscuits Manufacturing Ltd (supra)*.
24. On whether this Court has the requisite jurisdiction to hear and determine the Application and the Petition, it was submitted that the Respondents contests the jurisdiction of this Court to hear and determine both the Application and the Petition on two grounds, namely; that there is no employer-employee relationship between the Applicant and Baringo County Assembly Service Board, and that the Applicant is a political nominee and that disputes arising his removal are resolved under section 40(1) of the *Political Parties Act*. However, that since the promulgation of the current *Constitution of Kenya, 2010* and the subsequent enactment of the *Employment and Labour Relations Court Act* in 2011, there has been a remarkable jurisprudential development on what falls under the jurisdiction of this Court under Article 162(2) of *the Constitution*. In this, he relied on the interpretation as seen in the



Supreme Court in the cases of *In Re the Matter of the Interim Independent Electoral Commission, S.C., Constitutional Application No. 2 of 2011*; [2011] eKLR, and in *Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others, S.C. Application No. 2 of 2012*; [2012] eKLR, where the court held that the assumption of jurisdiction by courts in Kenya is a subject regulated by *the Constitution*, statute law, and judicial precedent. Incidentally, therefore, a determination of this issue involves the analysis of the Constitutional provisions, the relevant statutes and the decided cases.

25. Accordingly, it was argued that this court derives its jurisdiction from Article 162(2)(a) and Section 12 of the *Employment and Labour Relations Court Act*, 2014, to hear and determine employment and labour relations disputes. Further, being the Court of similar status as the High Court, this Court is empowered under Article 165(5)(b) of *the Constitution* to exercise supervisory powers over subordinate courts and any other person or body exercising quasi-judicial powers on issues falling within the realm of its mandate under Article 162(2)(a) of *the Constitution*. Therefore, that this court has jurisdiction to handle the issue herein as they emanate from a decision of the Respondent exercising quasi-judicial function.
26. On whether the contract of service is a condition precedent to invocation of this Court's jurisdiction, it was argued that this argument is not only pedantic and baseless but also an unjustified restriction of the broad jurisdictional expanse of this Court under Article 162(2)(a) of *the Constitution*, which empowers this court to not only determine disputes arising from dismissal from employment but also disputes arising from the recruitment process, including recruitment to statutory or constitutional offices, and the removal of constitutional or statutory office holders. In support of this argument, the petitioner relied on the case of *Trusted Society of Human Rights Alliance –v- Nakuru Water and Sanitation Services Company & Another* [2013] eKLR, where Ongaya J. opined as follows:

“The court has considered the provision and finds that under the section, parties to the proceedings before the court are not limited to those in an employer-employee relationship. In particular, under section 12(2,) of the Act, any person can bring before the court a case against an employer, employee, a trade union, an employer's organization a federation. the Registrar of Trade Unions. the Cabinet Secretary or any office established under any written law...As relates to jurisdiction by subject matter, Article 162(2)(a) of *the Constitution* and section 12(1) of the *Employment and Labour Relations Court Act* are elaborate that jurisdiction attaches to this court with respect to disputes relating to employment and labour relations. In the instant case, the dispute is about a recruitment process undertaken by the respondent. The court finds that recruitment is a proper element of employment and therefore the court has jurisdiction in view of that subject matter...”

27. The Petitioner also relied on the decision by Radido, J in the case of *Republic v Clerk County Assembly of Baringo ex parte William Kassait Kamket* (2015) eKLR where the court was more explicit that the absence of a contract of service is not a limitation to the jurisdiction of this Court. The learned Judge held as follows:

“Article 162 of *the Constitution* did not envisage a Court Limited or restricted to dealing with disputes arising out of a contract of service as defined in the *Employment Act*, 2007 which in any case predates *the Constitution*. The primary statute granting this Court universal jurisdiction is the *Employment and Labour Relations Court Act* (previously the Industrial Court Act). The most relevant provision is located in section 12 of the Act. And in granting the Court its jurisdiction, Parliament faithfully observed the command of *the Constitution* by using the phrase disputes relating to employment and labour relations. The jurisdiction granted included disputes relating to or arising out of employment between an employer



and an employee and not only in respect of contract of service as a reading of the *Employment Act*, 2007 may suggest. And in my view, the use of the term including in section 12 is significant as it helps to construe the jurisdiction of the Court over the present proceedings flow from application of Article 162 of the Constitution in establishing a specialist Court to deal with employment and labour relations disputes. The jurisdiction of the Court over the present proceedings flow from application of Article 162 of *the Constitution* and section 12(1)(a) of the *Employment and Labour Relations Court Act* rather than from an interpretation of the provisions of the *employment Act*, 2007. The definition of employer, employee and contract of service in the *Employment Act*, 2007, in my view, is not meant to limit or restrict the jurisdiction granted to the Court by section 12 of the *Employment and Labour Relations Court Act*, office holders are employees who have access to this Court and where a speaker alleges improprieties in the removal process that is a dispute relating to and arising out of employment. It matters not that they are employees or servants of the people or the respective Commissions or County Assemblies.”

28. A similar position was taken by Rika, J. in the case of *Naqvi Syed Qmar –v- Paramount Bank Limited & Another* [2015] eKLR, where he held that;

“The jurisdiction of this court extends to all disputes relating to employment and labour relations. Personal jurisdiction is no longer confined to Employers and Employees as was the case under the Trade Disputes Act Cap 234, but to all persons implicated in an employment and labour relations dispute.”

29. From the foregoing, it was argued that it is clear that this Court has jurisdiction to hear and determine the Petition and Application.

30. On whether the dispute herein falls within the supervisory jurisdiction of this Court, it was argued that from the Hansard annexed to the affidavits in support of the Application and the Petition, it is manifest that the matter of the Applicant’s removal was introduced to the 2<sup>nd</sup> Respondent Assembly as a communication and was subject of the debate by the members. It is further manifest from the Hansard that the 1<sup>st</sup> Respondent pronounced himself by way of a direction upholding the alleged removal of the Applicant as a member of the board. This resulted to an administrative action by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in exercise of their quasi-judicial functions under *the Constitution*, the statute and the standing orders. Thus this court has supervisory powers over such quasi-judicial decisions. In support of this, he relied on the Court of Appeal case of *County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others* [2015] eKLR where the Court upheld the decision of this court, That ELRC is entitled to interrogate the issue of disbandment of a county assembly service board and impeachment of the Speaker of Kisumu County Assembly. The COA pronounced itself at paragraphs 43-55 as here under;-

“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 2<sup>nd</sup> respondent was a matter that fell squarely within the ELRC’s supervisory mandate...County Assembly Service Boards do not exist at the pleasure of County Assemblies or any other State organ. County Assembly Service Boards are



autonomous State corporations established under Section 12 of the *County Governments Act*. Although, as is clear from Section 12(7) of the *County Governments Act*, they are established to provide services and facilities for the efficient and effective functioning of County Assemblies, they are not subordinate to County Assemblies or any other State organ. County Assemblies have no constitutional or statutory authority to disband, dissolve or even suspend the operations of County Assembly Service Boards. In the circumstances, we find that the Kisumu County Assembly unlawfully purported to suspend the Kisumu County Assembly Service Board.”

31. It was further submitted that the 1<sup>st</sup> and 3<sup>rd</sup> Respondents have desperately sought to hide under the cover of section 40(1) of the *Political Parties Act*, clearly mischaracterizing the dispute as a dispute between the members of the same political party or coalition of parties. While this is not true, it is trite that allegations of violations of right and fundamental freedoms are within the primary jurisdiction of the High Court and courts of the same status, i.e. the ELRC and the ELC. In support of this, he relied on the case of *Didmus Barasa v Inspector General of Police & 3 others* [2021] eKLR, where Mrima, J citing with approval the case of *Kenya Ports Authority v William Odhiambo Ramogi & 8 others* [2019] Eklr, stated as follows:

“Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere “bootstraps” or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court.”

32. Similarly, that the Application and the Petition seek to enforce the Applicant’s rights under Articles 40 and 47 of *the Constitution* and even if the dispute fell under the jurisdiction of the Political Parties Disputes Tribunal (PPDT) under section 40 of the *Political Parties Act*, PPDT would not have jurisdiction to declare the rights of the Petitioner or even to grant the damages sought in the Petition. Hence, the doctrine of exhaustion would not apply to this case. In this, he relied on the decision by Mbaru, J. in the case of *Solomon & 3 others v Speaker County Assembly of Baringo & another*, who, while dismissing the preliminary objection on the ground that the dispute fell under the jurisdiction of Political Parties Disputes Tribunal, held thus:-

“The petition herein being premised on the stoppage of the petitioners’ term and terms for the positions held and noting the connected purposes, the court is clothed with the requisite jurisdiction. With regard to the application of the matter in terms of section 77 County Government Act read with section 74 of the Public Service Act, the findings above constant, such do not apply. Inherently, this then is not a matter for the Political Parties Tribunal. Such mandate is lost noting the provisions of section 58 of the County Government Act noted above, read together with Article 251(1) of *the Constitution*, 2010.”

33. The Petitioner therefore submitted that this Court’s jurisdiction to hear and determine the Applicant’s Application and the Petition is unfettered and not limited by the provisions of 40 of *Political Parties Act*.
34. On whether the Petitioner has locus standi, it was submitted that it is not true that the right to file a petition to enforce the rights and fundamental freedoms (be it before ELRC or the High Court) should necessarily flow from some form of relationship with the Respondent. He argued that the provisions of Article 22 of *the Constitution* are broad and permissive.



35. He distinguished the Court of Appeal case of *Rift Valley Water Services Board & 3 Others vs. Asanyo & 2 Others (Civil Appeal 60 & 61 of 2015)* (Consolidated) (2022) KECA 778 (KLR) relied upon by the 1<sup>st</sup> and 3<sup>rd</sup> Respondents and stated that the case relates to the tenure of the board of directors of water services boards appointed under the provisions of the *Water Act* and the Guidelines of Corporate Governance. The Petition in that case had been instituted on the basis that the Petitioner, being a director, was an employee of Rift Valley Water Services Board. On the contrary, that the present Petition is premised on the ground that the Applicant is a member of a statutory body established under the *County Assembly Services Act* and the *County Governments Act*, with a tenure office and he draws remuneration from the Board. On the contrary that disputes arising from the removal of a member of county assembly service board have been held to fall under this Court's jurisdiction, not only by this Court, but also by the Court of Appeal in the County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others (supra). Hence, a decision on the removal of a member of water service board established under the *Water Act* cannot therefore be applied to oust the jurisdiction of this Court.
36. In conclusion, the Petitioner submitted that the 1<sup>st</sup> and 3<sup>rd</sup> Respondents' respective notices of preliminary objection do not raise pure points of law worthy of consideration by this Court and therefore fall short of the threshold under Mukisa Biscuit Manufacturing Ltd case (supra). The two are therefore incompetent and are for dismissal.

#### **1<sup>st</sup> respondent's submissions**

37. The Respondent herein submitted that the Preliminary Objection is based on undisputed facts, that the Petitioner was nominated to the Baringo County Assembly Service Board by his political party pursuant to section 12(3)(c) of the *County Governments Act* and removed from the same position by the said political party. That the circumstances leading to the Petitioner being a member of the CASB are not in dispute, neither are the terms of engagement. That he remains a nominee of a political party, whose allowances are provided for at Section 15 of the *County Assembly Services Act* and this does not make a politically nominated member an employee.
38. It was submitted that there is no contract of service for a political nominee under Section 12(3)(c) to CASB. Therefore, that the petitioner is not an employee as defined under section 2 of the *Employment Act*.
39. It was also submitted that CASB is also not an employer of the Petitioner as an employer is defined as "any person... who or which has entered into a contract of service to employ any individual". It does not mean, by way of example, a CASB which only has a person like the Petitioner in its membership by virtue of nomination by his political party to a great extent in a power sharing deal to represent the interests of the party. In fact, that the CASB of which the Petitioner was a member is actually the employer of persons in the service of a County Assembly. That it can even be argued that under Section 11 of the *County Assembly Services Act*, the Petitioner and other members of the CASB collectively were the employers of employees in the County Assembly. Thus the Petitioner and other members cannot be both an employer and an employee at the same time. To Support this, the Respondent relied on the case of *Rift Valley Water Services Board & 3 Others V Asanyo & 2 Others (Civil Appeal 60 & 61 Of 2015)* (Consolidated)) [2022] Keca 778 (KLR).
40. On the second limb of the Preliminary Objection, the Respondent submitted that since the Petitioner is a political nominee who was put in the Board by the political party and removed by his party, he can only complain to his own political party and the appeal to the Political Parties Disputes Tribunal pursuant to Section 40(2) of the *Political Parties Act*. In this, he relied on the case of Kieru John



Wambui & Another V Jubilee Party; Secretary General, Jubilee Party & 2 Others (Interested Parties) [2021] Eklr, were a CASB member nominated by his own political party was faced with similar predicament as the one faced by the Petitioner herein and the member filed a complaint against his political party to the Political Parties Dispute Tribunal, which held that it could have admitted the dispute, save that the member had not first submitted to the political parties' internal dispute resolution forum. Hence his dispute was struck out.

41. It was submitted that jurisdiction is everything and without it a Court must down its tools. Therefore, that since the Petitioner is a member of CASB and not an employee, this court lacks jurisdiction to determine the issues raised in the petition.
42. The Respondent reiterated that the current dispute is between a member of a political party and a political party, which is covered by Section 40(1)(b) of the *Political Parties Act*. As such, for the Tribunal to assume jurisdiction, there is need for there to have been an internal dispute resolution mechanism, or an attempt at the same, which is not even demonstrated in this case.
43. The Respondent relied on the case of Clerk, Nairobi City County Assembly v Speaker Nairobi City County Assembly & another; Orange Democratic Party & 4 others(Interested Parties) [2019] eKLR, the Court stated as follows:-

“...The foregoing dispute relating to party nominations arising from decisions by the respective political parties under section 12(3) (c) of the *County Governments Act*. The proponents of the PO cited several precedents which are unanimous that nominations by political parties are not justiciable and they should be left, in the first instance, to the political parties' internal dispute resolution mechanisms and the PPDT were the need to escalate the same arises. In Gabriel Bukachi Chapia Vs ODM & Another (2017)eKLR the Court of Appeal held that;“In effect the PPDT should not entertain disputes between members of a political party, disputes between a member of a political party and a political party, disputes between political parties and disputes between coalition partners, unless such dispute is in the first instance heard and determined by the internal political party dispute resolution mechanism... The foregoing judicial precedent binds this court and in my view, it is a good law which encourages alternative dispute resolution mechanisms as provided under Article 159 of *the Constitution* and also the doctrine of exhaustion. Although the dispute herein does not relate to party list for purposes of a general election, it is akin to that because it relates to nomination of party representatives in to the County Assembly Service Board through political parties' internal processes. In view of the foregoing binding precedent, I am not persuaded by the decision of the House of Lords in Anisminic Limited Vs Foreign Compensation Commission & Another (1969) 2 A.C cited by the petitioner. Consequently, I down my tools on the second aspect of the petition and strike out the petition in so far as it relates to the reliefs sought for and on behalf of the 3rd interested party and Hon. Okumu Elias Otieno. The issue of the party nomination is therefore referred to the respective political parties for resolution using the internal dispute resolution mechanisms within a period of 21 days in line with section 4 of the *Political Parties Act* so that the 2nd respondent board may be fully reconstituted...”

44. To buttress its argument, he also relied on the case of Musalia Mudavadi & 4 others v Angela Gathoni Wambura & 2 others [2019] eKLR, the following considerations were made by the High Court:-

“...I must however add that though this court in determining appeals such as the present one must have regard to parliament's intention in creating the tribunal, the court must



also be alive to the fact that there may be situations where political parties may for their own reasons refuse to set in motion their IDRMs when called upon to do so by aggrieved parties. If the court were to be confronted by such a situation, it would not be powerless and would be in a position to grant the aggrieved party a remedy that would best serve the ends of justice. Each case must however be considered on its own merits.. taking into consideration the foregoing reasons and the findings in the above cases, and in the absence of any evidence by the Complainants to demonstrate his attempt to invoke internal dispute resolution mechanism, was frustrated, we find that jurisdiction cannot, at this stage vest in this Tribunal. This Tribunal is not properly seized of jurisdiction and we accordingly uphold the Preliminary Objection. Consequentially this Complaint be and is hereby struck out for want of jurisdiction.”

45. In conclusion, it was argued that the alleged violations of *the constitution* can only be argued as violations of the party rules, which can only be done within the context of a political dispute. The Respondent, thus prayed for the petition to be struck out with costs as there is no good reason why this Court should be burdened with political disputes, to the expense of labour disputes while more appropriate fora exist for litigants such as the Petitioner.

### 3<sup>rd</sup> Respondent’s Submissions

46. The Respondent herein submitted on three issues; whether this Honourable Court has jurisdiction to hear and determine the petition herein, whether there existed an employer-employee relationship between the Petitioner and the County Assembly Service Board and whether the petition is therefore an abuse of court process, bad at law and ripe for striking out in its entirety.
47. On the first issue, it was submitted there is no doubt that the principle of jurisdiction of the courts has been numerously addressed and concluded with universal acceptance that the capacity of a court to determine a dispute solely originates from its vestment with jurisdiction as was held in *Owners of Motor Vessel ‘Lillian S’ v Caltex Oil (Kenya) Limited* where Nyarangi J (as he then was) stated thus;
- “I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it, Jurisdiction is everything, without it, a court has no power to make one more step. Where the 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 to the matter before it the moment it holds the opinion that it is without jurisdiction.’
48. It was submitted that, this Court is established under Article 162 (2) of *the Constitution* of Kenya and granted jurisdiction under Article 162 (3) of *the Constitution* of Kenya. Section 3 of the *Employment and Labour Relations Court Act* denotes the Principal Objectives of the Act, whereby it restricts this Court to the hearing and determination of disputes relating to employment and labour relations and for connected purposes. This position was reiterated by the court in the Court of Appeal case of *Odongo v Clerk, Nakuru County Assembly & Others, Civil Appeal E001 of 2023*, the Court stated at para. 27 thus:
- “27. This court held that the ELRC did not have jurisdiction to deal with the matter, as no contract of employment had been entered into between the County Government and the nominees, and the dispute was not an employment and labour dispute in nature; there was no employer-employee



relationship between the applicant and any of the respondent, and therefore the applicant lacked the locus to institute the proceedings.”

49. From the foregoing, it was submitted that this Court is stripped of its capacity to hear and determine this petition as the petitioner is an appointee of a political formation and not an employee.
50. On whether there existed employment relationship between the petitioner and the County Assembly Service Board. This was submitted in the negative and argued that the petitioner has previously served under the County Assembly Service Board Committee, to which he was nominated politically as a member of a particular Political party and by virtue of being a member of the County Assembly. Thus his appointment was not as a result of any competitive employee recruitment process nor as an advertised employment opportunity. Thus no employer-employee relationship existed between the parties to vest this court with jurisdiction. In support of this, they relied on the Court of Appeal decision in *Rift Valley Water Services Board & 3 others v Asanyo & 2 others (Civil Appeal 60 & 61 of 2015)* (Consolidated) where the Court had the following to say with regards to importance of a contract of service in determining an employer-employee relationship, where it was held that; -

“We hasten to draw a clear distinction between an employee and a member of a board of directors of a corporate entity such as the 1<sup>st</sup> appellant. the distinction lies in our answer to the question as whether directors are employees of the Company to whose board they are appointed. They are not. In *McMillan V Guest* [1942] AC P.561, it was held that a company director is an office holder who is not, without more, an employee of the company. That is the position here. In the absence of a contract of service in terms of which a director is engaged as a full-time employee of a company, it cannot be presumed that such a director is an employee of the company. (see *Parsons v Albert J. Parsons and Sons Ltd* (19797 ICR p.271).”
51. Similarly, that in absence of a contract of service which engages the County Assembly Service Board Member as a full-time employee, the Board member cannot be presumed to be an employee of the Board. Therefore, that the petition is not founded on a labour dispute to clothe this court with jurisdiction.
52. On whether the petition is therefore an abuse of court process, bad at law and ripe for striking out in its entirety, it was argued Article 159 (2) (d) of *the Constitution* provides that justice shall not be hindered by procedural technicalities. However, flouting both the substantive and procedural aspects of the law not only offends the entire judicial system but it also presents nullities to the courts for adjudication. In essence, that the Petitioner not only lacks the locus standi to bring this petition by the absence of an employer-employee relationship but has also approached an avenue that is without jurisdiction to handle the petition. Therefore, that the petition is an abuse of Court process and the same should be dismissed in its entirety.
53. I have considered the averments and submissions of the parties herein. In relation to the Preliminary Objection filed herein the respondents have argued that this court lacks the requisite jurisdiction to hear and determine the instant Petition.
54. The Respondents also raised the issue of locus and argued that the petitioner has no locus to file the petition. The 1<sup>st</sup> Respondent also filed a Preliminary Objection on similar grounds as above and also on the ground that the petitioner was a political nominee of his respective party into the Membership of Baringo County Assembly and so his removal and nomination lies in his political party which makes such a removal a matter of adjudication within the Dispute Resolution of the political party.



55. The Petitioner Respondent opposed these Preliminary Objections and cited Mukisa Biscuit case which set parameters for a Preliminary Objection which is based on pure points of law but submitted that the Preliminary Objection raised goes into factual matter and falls outside the perview of the Mukisa Biscuits case.
56. It is indeed true that if this court gets into party nomination and which party has the strength, issue of facts have to be presented to this court and therefore will fall outside the Mukisa Biscuits parameter.
57. On issue of locus the Petitioner indeed is mandated as “any person” claiming infringement of his rights to file this petition and the locus is donated by Article 22 (1) of the Constitution which states as follows:-
22. Enforcement of Bill of Rights.
- (1) 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.
58. The submission that the Petitioner lacks locus to file this petition has no basis and is disregarded.
59. As concerns this court’s jurisdiction, the Respondents Applicants have relied on Section 12 of the Employment and Labour Relations Court Act which sets out this court’s jurisdiction. They submitted that the Petitioner and Respondents haveno employer-employee relation and so this court lacks jurisdiction to handle the matter.
60. For the court to determine whether the Petitioner and Respondents have an employer-employee relationship, this court will also have to rely on evidence and facts which will go beyond the perview of Mukisa Biscuit Case.
61. Still on the same issue, the issue of this court’s jurisdiction is no longer confined to employer-employee relationship.
62. The Supreme Court of Kenya, Kenya Tea Growers & others VS. NSSF Supreme Court of Kenya Petition No. E002 of 2023 resolved the issue of the Employment and Labour Relation Court’s jurisdiction by holding as follows:-
81. “We now come to specific question whether the ELRC correctly assumed jurisdiction to determine the constitutional validity of the NSSF Act 2013. Towards this end, we are persuaded by the appellants’ argument that the Court of Appeal adopted a rather restrictive view of the reach of the NSSF Act 2013, in holding that the matter before the ELRC did not emanate from an “employer-employee” dispute. The extensive provisions of the Act, requiring employers and employees to contribute specific amounts of money to a Social Security Fund cannot be said to have nothing to do with an employer-employee relationship. Even if the matter did not emanate from an employer-employee dispute within the confines of the ELRC Act, to the extent that it introduces enhanced and mandatory contributory amounts of employee earnings, the Act has potential to ignite justiciable grievances from certain cadre of employees. No doubt this grievances would end up at the ELRC which would likely be called upon, as it was in this case, to determine the constitutional validity of the same. But even beyond the employer-employee dispute resolution regime, the NSSF Act 2013, seeks to expansively regulate a wide array of labour relations especially the Social Security of the employed cadre when they finally exit formal employment. Should it then surprising that an employee should be concerned about what his/her future would look like after salaried employment?



82. We must ask, who were the parties to this dispute? From the pleadings on record, before and after the consolidation of the various petitions, it is clear that the dispute pitted trade unions, workers associations, employer’s associations and certain employees, against the Cabinet Secretary for Labour, the NSSF Board of Trustees, and the Attorney General. The dispute roped in organizations and authorities as diverse as the Central Organization of Trade Unions (COTU), Federation of Kenya Employers (FKF), the Retirement Benefits Authority (RBA), and the Competition Authority. What were the appellants complaining about? From the proceedings as re-enacted in this Judgment, whether rightly or wrongly, they complained among others, about the burdensome nature of the new contributions to the Scheme that had been introduced by the NSSF Act 2013. They complained about the enhanced powers of the Cabinet Secretary for Labour over the management of their scheme. They complained about the legality of a Fund premised on an employer and employee relationship. They complained about the negative effect the new law would have on the existing Collective Bargaining Agreement (CBAs).
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 maybe 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 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?”
63. From the Supreme Court of Kenya’s decision, the jurisdiction of this court is not restrictive to employer-employee relationship but also extends to matters that may affect an employer and an employee.
64. Having said this, I find the Preliminary Objection as set out lacks merit and is therefore dismissed accordingly. Costs in the Petition.

**RULING DELIVERED VIRTUALLY THIS 25<sup>TH</sup> DAY OF JUNE, 2024.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

In the presence of: -

Bett for Petitioner – Present

Macharia holding brief Burugu for 1<sup>st</sup> Respondent

Chepkulul holding brief Chepkoech for 3<sup>rd</sup> Respondent - Present

Court Assistant - Fred

