



**Okoti v Parliamentary Service Commission & 2 others; Speaker of the National Assembly & another (Interested Parties) (Petition E166 of 2022) [2023] KEELRC 252 (KLR) (7 February 2023) (Ruling)**

Neutral citation: [2023] KEELRC 252 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E166 OF 2022  
JK GAKERI, J  
FEBRUARY 7, 2023**

**BETWEEN**

**OKIYA OMTATAH OKOITI ..... PETITIONER**

**AND**

**THE PARLIAMENTARY SERVICE COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**MR. DISHON NJOKA NYAGA ..... 2<sup>ND</sup> RESPONDENT**

**MS. ROSELYNN OMOLLOH ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**SPEAKER OF THE NATIONAL ASSEMBLY ..... INTERESTED PARTY**

**SPEAKER OF THE SENATE ..... INTERESTED PARTY**

**RULING**

1. Before the court for determination are two Notices of Preliminary Objection by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents dated 30<sup>th</sup> September, 2022 challenging the jurisdiction of the court on various grounds.
2. The 1<sup>st</sup> Respondent urges that;
  - a. Appointment of officers in the Parliamentary Service is the mandate of the Parliamentary Service Commission (PSC) under Article 127(6) of the [Constitution](#) and the Petition raises no employment and labour relations issues as envisioned by Section 12(1) and (2) of the [Employment and Labour Relations Court Act](#), 2011.



- b. The court’s jurisdiction to interpret and apply the Constitution is not original but limited to Constitutional issues in the context of disputes on employment and labour relations.
  - c. The Petitioner lacked locus standi to institute these proceedings under section 12(1) and (2) of the Employment and Labour Relations Court Act.
  - d. Any dispute touching on violation of the Constitution or the bill of rights must fall within the category of disputes that the court has jurisdiction over by virtue of Section 12(1) and (2) of the Employment and Labour Relations Court Act as stated by the Court of Appeal in Attorney General & 2 others v Okiya Omtata Okiiti & 14 others (2020) eKLR.
3. The 2<sup>nd</sup> Respondent relied on the grounds of lack of locus standi as the Petitioner was a member of the Parliamentary Service Commission and could have raised the issue against the resolutions and decisions of the 1<sup>st</sup> Respondent and having not done so, he is barred by the doctrine of exhaustion.
  4. The issue ought to have been ventilated internally first.
  5. That under Article 249(2)(b) of the Constitution, the 1<sup>st</sup> Respondent had independence to evaluate or vary the terms of engagement of its employees and the orders sought if granted would render the court the Supervisor of the internal business of the 1<sup>st</sup> Respondent and the impugned resolutions were passed when the Commissioners were constitutionally in office.
  6. That the suit herein does not raise constitutional issues that merit consideration in the application.
  7. When the matter came up for hearing of the Notice of Motion Application dated 16<sup>th</sup> September, 2022, the court was informed that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had filed a Preliminary Objection that required determination before the application be heard as they raised the issue of jurisdiction of the court.
  8. The parties agreed that the Preliminary Objection be canvassed by way of written submissions, the filing of which was confirmed on 26<sup>th</sup> October, 2022 and a ruling date set.

### **1<sup>st</sup> Respondent’s submissions**

9. According to the 1<sup>st</sup> Respondent, the first issue for determination was when a Preliminary Objection may be raised and reliance was made on the locus classicus decision of the Court of Appeal in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) 1 EA 696 to urge that the question of jurisdiction raised by the Preliminary Objections required determination in limine.
10. Reliance was also made on the decisions in Owners of the Motor Vessel “Lillians” v Caltex Oil Kenya Ltd (1989) 1 KLR and Samuel Kamau Macharia v Kenya Commercial Bank & 2 others (2011) eKLR to urge the essence of jurisdiction and its source.
11. It was submitted that Section 12(1) and (2) of the Employment and Labour Relations Court Act, 2011 limited the jurisdiction of the court to disputes between persons set out in the Act and the Petitioner had no locus standi to institute the Petition herein. That failure to satisfy the requirements of Section 12(1) and (2) of the Act denied the court jurisdiction.
12. It was urged that the Petitioner was challenging the exercise of powers granted to the Parliamentary Service Commission under Article 127(6) of the Constitution, an issue not related to employment.



13. That the jurisdiction of the court was demarcated by the Court of Appeal in *Attorney General & 2 others v Okiya Omtata Okiiti & 14 others* (2020) eKLR that the court had jurisdiction to interpret the Constitution only in the context of an employer-employee relationship dispute.
14. Reliance was also made on the Court of Appeal decision in *Public Service Commission and 4 others v Cheruiyot & 20 others* (2022) to reinforce the submission on jurisdiction of the court.

## **2<sup>nd</sup> Respondent's submissions**

15. The 2<sup>nd</sup> Respondent isolated two issues for determination on the Petitioner's locus standi, doctrine of exhaustion and jurisdiction of the court to hear and determine the Petition.
16. The 2<sup>nd</sup> Respondent submitted that the Petitioner had sued the 1<sup>st</sup> Respondent for varying the terms of engagement of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents from partisan contracts to non-partisan fixed term contracts renewable once. It was urged that the decision was made by a duly constituted Commission constitutionally in office and acted within its mandate under Articles 249(2) and 127(6) of the *Constitution* of Kenya, 2010 and Section 11(1) (b) of the *Parliamentary Service Act*.
17. As regards Locus Standi, the 2<sup>nd</sup> Respondent urged that since the Petitioner was a member of the Senate, he was a member of the 1<sup>st</sup> Respondent and had the right to raise complaints against the Commission under the *Parliamentary Service Act* and Article 117 of the *Constitution* and the Petitioner had not exhausted the internal mechanisms.
18. Reliance was made on the decision in Constitutional Petition No. 159 of 2018 Consolidated with Petition No. 201 of 2019 (2020) eKLR to reinforce the submission.
19. As regards jurisdiction, reliance was made on the decision in *Olive Mwihaki Mugenda & another v Okiya Omtata Okiiti & 4 others* (2016) eKLR to urge that the court had no jurisdiction to hear and determine the Application herein as was the decision in *Judicial Service Commission V Gladys Boss Shollei & another* (2014) eKLR.
20. It was submitted that if the orders sought were granted, it would render the court a supervisor of internal business of the 1<sup>st</sup> Respondent.

## **3<sup>rd</sup> Respondent's Submissions**

21. The 3<sup>rd</sup> Respondent addressed the singular issue of jurisdiction of the court to entertain the matter.
22. Reliance was made on Article 127 (6)(b) of the *Constitution* to urge that the Parliamentary Service Commission (PSC) was acting within its powers and the resolution it passed did not fall within the disputes contemplated by Article 162(2)(a) of the *Constitution* and Section 12 of the *Employment and Labour Relations Court Act*, 2011.
23. The decision in *Kenya Council of Employment and Migration Agencies & another v Samuel Mwongera Arachi & 2 others* (2015) eKLR was cited in support of the submission as was the decision in *Allan Wanyonyi Wafula v County Government of Trans-Nzoia & another* (2022) eKLR.

## **Determination**

24. The issues for determination are;
  - i. Whether the Preliminary Objection before the court is competent.
  - ii. Whether the court has jurisdiction to entertain the matter before it.



iii. Whether the Petitioner had exhausted internal mechanisms.

25. As to whether the objection meets the threshold of a Preliminary Objection, the homeport is a discussion on the nature of a Preliminary Objection as enunciated in judicial decisions.
26. It requires no gainsaying that since a Preliminary Objection raises a threshold question which must be disposed of at the earliest possible instance as it has the potential to dispose of the suit.
27. In the words of Law J.A in *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors* (1969) EA 696;

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

28. In *John Musakali v Speaker County Assembly of Bungoma & 4 others* (2015) eKLR, the court stated as follows;

“The position in law is that a Preliminary Objection should arise from the pleadings and on the basis that the facts are agreed by both sides. Once raised, the Preliminary Objection should have the potential to disposing of the suit at that point without the need to go for trial. If, however, facts are disputed and remain to be ascertained that would not be a suitable Preliminary Objection on a point of law.”

29. Similar sentiments were expressed by Ojwang J. (as he then was) in *Oraro v Mbaja* (2005) KLR 141,

“ . . . Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence. . .”

30. Granted that 1<sup>st</sup> and 2<sup>nd</sup> Respondents raise the issue of jurisdiction which is a question of law as exemplified by Law J.A in *Mukisa Biscuits Manufacturing Co. Ltd V West End Distributors Ltd* (*Supra*), the court is satisfied that Preliminary Objection meets the threshold. (See *Mary Wambui Munene v Peter Gichuki Kingara & 6 others* (2014) eKLR).

31. As to whether the court has jurisdiction to entertain the matter before it, the starting point is the concept of jurisdiction.

32. *Halsbury’s Law of England* (4 Ed. Vol. 9) defines jurisdiction as;

“ . . . the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision.”

33. A similar definition is provided by the *Words and Phrases Legally Defined*, Vol 3, John Beecroft Saunders.



34. The essence of jurisdiction has been articulated in countless decisions as aptly captured by Nyarangi JA in *Owners of Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* (1989) KLR as follows;

“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 obligated 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 a court has no jurisdiction, there would be no basis for continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

35. As regards the source of jurisdiction, the decision in *Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & others* (*Supra*), the Supreme Court of Kenya expressed itself as follows;

“A court’s jurisdiction flows from the Constitution or legislation or both thus, a court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law . . .

Where the Constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the Constitutional limit. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by the Constitution. Where the Constitution confers powers upon Parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute.”

36. Article 162 of the *Constitution* of Kenya, 2010 provides –

1. . . .
2. Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to –
  - a. employment and labour relations; . . .
  - b. . . .
3. Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).

37. This provision is clear that the Parliament of Kenya was given power to establish a court to hear and determine disputes relating to employment and labour relations and in exercise of the foregoing authority, Parliament enacted the *Employment and Labour Relations Court Act*, 2011 whose Section 4 establishes the *Employment and Labour Relations Court* and prescribes its composition under Section 5.

38. Significantly, Section 12 of the *Act* prescribes the jurisdiction of the court as follows;

1. The court shall have original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the court relating to employment and labour relations including;
  - a. disputes relating to or arising out of employment between an employer and an employee;



- b. disputes between an employer and a trade union;
- c. disputes between an employer's organization and a trade union's organisation;
- d. disputes between trade unions;
- e. disputes between employer organisations;
- f. disputes between an employer's organisation and a trade union;
- g. disputes between a trade union and a member thereof;
- h. disputes between an employer's organisation or a federation and a member thereof;
- i. disputes concerning the registration and election of trade union officials; and
- j. disputes relating to the registration and enforcement of collective agreements.

39. The provisions of Section 12(2) and (3) detail who may lodge or make an application to the court and the orders the court may make respectively.

40. Evidently, Section 12(1) of the *Employment and Labour Relations Court Act*, 2011 is not exhaustive on the types of disputes the court has jurisdiction to entertain in the context of employment and labour relations as provided by Article 162(2)(a) of the *Constitution* of Kenya.

41. In the instant case, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents urge that the court has no jurisdiction to determine the Notice of Motion before it and rely on several persuasive authorities.

42. The jurisdiction of the court to enforce infringements of rights and fundamental freedoms is well settled.

43. In *Daniel N. Mugendi v Kenyatta University & 3 others* (2013) eKLR, the Court of Appeal stated;

“ . . . the Employment and Labour Relations Court has jurisdiction to enforce labour rights in Article 41 of 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.”

44. The court expressed similar sentiments in *Public Service Commission & 4 others v Cheruiyot and 32 others* (Consolidated)(2022) eKLR as follows;

“This is therefore to mean that the jurisdiction of the Employment and Labour Relations Court is not limited to the determination of disputes arising out of a contract of employment between an employee and an employer, the court can also determine and constitutional violations of the rights of any party arising from an employee-employer relationship. However, for the court to entertain a petition premised on the breach of a party's fundamental rights under the Constitution, the alleged constitutional breach must be ancillary and incidental to the matters contemplated under Section 12 of the Act. Our view is fortified by the preamble to the *Employment and Labour Relations Court Act*, 2011.”

45. Contrary to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents submissions, the jurisdiction of the court is not limited to the examples provided under Section 12(1) of the *Employment and Labour Relations Court Act*, 2011



or the persons identified by Section 12(2). The two provisions use the words “including” and “may” respectively which suggest that the list is inexhaustive.

46. Significantly, the Petitioner herein is challenging the exercise of powers by the Parliamentary Service Commission. Needless to emphasize, the Parliamentary Service Commission is one of the Commissions established by the Constitution of Kenya, 2010. The Commission is established by Article 127(1) of the Constitution.

47. Article 127(5) defines the tenure of the Commission as follows;

Despite Clause (4) when the term of a House of Parliament ends, a member of the Commission appointed under Clause (2)(c) shall continue in office until a new member has been appointed in the member's place by the next house.

48. Under Article 127(6)(b)

The Commission is responsible for constituting offices in the Parliamentary Service and appointing and supervising office holders among other functions including functions necessary for the well-being of the members and staff of Parliament.

49. The Commission is a legal person and an independent entity.

50. Since the Petitioner is questioning the exercise of powers by the Parliamentary Service Commission in relation to members of staff, the court is of the view that it has jurisdiction in this matter as it involves employment.

51. As regards exhaustion of internal mechanisms, the court is guided by several decisions.

52. In Jamlick Mureithi Mwendwa v Law Society of Kenya & 10 others (unreported), the court stated as follows;

“The doctrine of exhaustion appears to be closely intertwined with the doctrine of constitutional avoidance which doctrine is also referred to as constitutional avoidance rule. The doctrine is part of the wider doctrine of non-justiciability.

Speaking to the doctrine of constitutional avoidance, the Supreme Court in Communications Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others (2014) eKLR observed thus:-

We shall now turn to the Constitutional Avoidance Doctrine. The doctrine is at times referred to as the Constitutional-Avoidance-Rule.

*Black's Law Dictionary*, 10<sup>th</sup> Edition page 377 defines it as;

The doctrine that a case should not be resolved by deciding a constitutional question if it can be resolved in some other fashion.

The doctrine interrogates whether there are other ways of resolving a dispute outside a Constitutional Petition . . .

On Applicability of the doctrine of exhaustion in Kenya suffice to say that the doctrine traces its origin from Article 159(2)(c) of the Constitution which recognizes and entrenches the use of alternative mechanisms of dispute resolution in the following terms:-



159(2) in exercising judicial authority, the courts and tribunals shall be guided by the following principles –

- a. . . .
- b. . . .
- c. alternative forms of dispute resolution including mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3) . . .”

53. The doctrine of exhaustion was also addressed by a 5-Judge Bench in *William Odhiambo Ramogi & 3 others v Attorney General & 4 others, Muslim for Human Rights and 2 others (Interested Parties)* (2020) eKLR as follows;

“The question of exhaustion of administrative remedies arises when a litigant aggrieved by an agencies action seeks redress from a court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. This encourages alternative dispute resolution mechanisms in line with Article 159 of the *Constitution* and was aptly elucidated in the High Court in *R v Independent Electoral and Boundaries Commission (I.E.B.C) Ex-Parte National Super Alliance (NASA), Kenya and 6 others* (2017) eKLR . . .”

54. Regarding the functions and operations of the Parliamentary Service Commission, Section 18 of the *Parliamentary Service Act*, 2019 provides that –

1. The Commission shall, to the extent of its Constitutional mandate, be responsible for fulfilment of the provisions under Article 127(6)(a) and (d) of the *Constitution* and in particular shall formulate policies, regulations, strategies and put in place mechanisms for the provision of such services and facilities as necessary for the effective functioning of Parliament and the well-being of members and the staff of the Commission.
2. The Commission shall adopt Comprehensive Strategic Plans that ensure the realization of Article 127(6)(b) and (d) of the *Constitution*.

55. As adverted to elsewhere in this ruling, Article 127(6)(b) relates to *Constitution* of offices in the Parliamentary Service.

56. Finally, the Second Schedule to the *Parliamentary Service Act* deals with the conduct of business and Affairs of the Commission.

57. Briefly, the Commission has a quorum of 6 while (Committees have a quorum of 3) and must meet at least once every month.

58. The Commission is enjoined to endeavour to reach every decision by consensus failing which a majority of all members present.

59. Finally, Article 127(6)(d) of the *Constitution* mandates the Commission to undertake, singly or jointly with other relevant organizations, programmes to promote the ideals of Parliamentary democracy and other functions necessary for the well-being of members and staff of Parliament.



60. The foregoing lay it bare that one of the principal function or responsibility of the Parliamentary Service Commission is to protect and safeguard the well-being of members of Parliament and staff and enhance Parliamentary democratic ideals.
61. It is not in dispute that the Petitioner is a member of the Senate which is one of the Houses of the Parliament of Kenya and participated in the appointment of members of the Commission.
62. The Petitioner's Supporting Affidavit makes no reference to the actions he took to have the complaint herein addressed by the Parliamentary Service Commission. As a Senator, it was incumbent upon the Petitioner to raise the issue in writing with the Commission before seeking the court's intervention.
63. Since he is questioning a decision made by the Commission, it behoved him to approach the Commission in the first instance and if its response was unsatisfactory, raise the issue in the Senate for its intervention, if necessary.
64. Apart from alleging that the application raised substantive question of Constitutionalism and defending the Constitution of Kenya, 2010 and enjoyment of rights and fundamental freedoms, the Application lacks the necessary factual basis and makes no reference to a recruitment or appointment exercise.
65. Relatedly, the Petitioner has not demonstrated that the Commission was not amenable to resolving the complaint amicably or had declined to meet him.
66. It is unclear to the court why the Petitioner could not have approached the Commission even through its members who sit with him in Parliament.
67. As a public institution, the Commission is amenable to receive and consider complaints, petitions and claims from members of the public, staff or members of parliament and obligated to address the same and provide a response after which the aggrieved party is at liberty to seek judicial redress. The Petitioner has not done so. As ordained by the Constitution, other dispute resolution mechanisms are an integral part of the dispute resolution terrain and must be promoted and courts should be the last line of defence.
68. For the above-stated reasons, it is the finding of the court that Petitioner has not previously brought his complaint to the attention of the Commission for remedial action or deliberation.
69. The court is persuaded that it would be inopportune for the court to intervene at this stage.
70. In the end, it is the finding of the court the Notice of Motion dated 16<sup>th</sup> September, 2022 and the Petition of even date are unsustainable.
71. Accordingly, the following Orders commend themselves for issue;
  - a. The court lacks jurisdiction to entertain the Petition on account of the doctrine of exhaustion.
  - b. The Notice of Motion and Petition dated 16<sup>th</sup> September, 2022 are hereby struck out.
  - c. Parties to bear own costs.
72. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 7<sup>TH</sup> DAY OF FEBRUARY 2023**

**DR. JACOB GAKERI**



## **JUDGE**

### **Order**

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

