



**Benjamin v Cabinet Secretary, Ministry of Information Communication
and Digital Economy & 4 others; Juma & 60 others (Interested Party)
(Petition E027 of 2023) [2023] KEELRC 1246 (KLR) (23 May 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1246 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E027 OF 2023**

JK GAKERI, J

MAY 23, 2023

BETWEEN

DR. MAGARE GIKENYI J. BENJAMIN PETITIONER

AND

**CABINET SECRETARY, MINISTRY OF INFORMATION COMMUNICATION
AND DIGITAL ECONOMY 1ST RESPONDENT**

**SELECTION PANEL FOR THE APPOINTMENT OF THE MEDIA COUNCIL OF
KENYA 2ND RESPONDENT**

THE NATION MEDIA GROUP 3RD RESPONDENT

THE MEDIA COUNCIL OF KENYA 4TH RESPONDENT

THE HON. ATTORNEY GENERAL 5TH RESPONDENT

AND

EMMANUEL JUMA & 60 OTHERS INTERESTED PARTY

RULING

1. Before me for determination is the 1st and 5th Respondent's Preliminary Objection dated 17th March 2023.
2. That the Honourable court lacks jurisdiction to hear and grant the orders sought both in the application and petition under section 12(1) of the *Employment and Labour Relations Court Act*. The Court lacks jurisdiction to hear and determine matters on appointment of selection panel for the members of the Media Council of Kenya done under *Media Council of Kenya Act*. The members of the selection panel are not employees of the Respondents herein do not fall in the category of employees



hence this Honourable Court has no Jurisdiction to hear and determine the issues raised herein. This position is set out in the Court of Appeal No.61 of 2015, [*Rift Valley Water Services Board & 3 others v Geoffrey Asanyo & 2 others*](#) (2022).

Respondent's submissions

3. In support of the Preliminary objection the Respondent relied in the Court of Appeal holding in Civil Appeal No. 61 of 2015, [*Rift Valley Water Services Board & 3 others V Geoffrey Asanyo & 2 Others*](#) (2022) eKLR where the court held;

“Section 2 of the [*Employment Act*](#) defines an employee in no uncertain terms as “A person employed for wages or a salary and includes an apprentice and an indentured learner.” Conversely an employer is defined as “a person, public body, firm, cooperation or company who or which has entered into a contract of service to employ any individual and includes an agent, foreman, manager or factor of such person, public body, firm or cooperation company.”

4. The respondent submitted that the interested parties were not employed by the 2nd Respondent for wages or salary and neither are they apprentice or indentured learners hence the Honourable Court had no jurisdiction.
5. The respondent urged that in Civil Appeal No. 61 of 2015, [*Rift Valley Water Services Board & 3 others v Geoffrey Asanyo & 2 Others*](#) (2022) eKLR, the Court of Appeal drew a clear distinction between an employee and a member of a board of directors of a corporate entity and cited *McMillan v Guest* (1942) AC p.561 where the court held that a company Director is an office- holder who is not, without more an employee of the company. In the absence of a contract of service in terms of which director is engaged as a full-time employee of a company it cannot be presumed that such director is an employee of the company.
6. The respondents further submitted that the 1st -13th Interested parties were only a selection panel appointed pursuant to section 7(2) and (3) of the [*Media Council Act*](#), 2013 and thus cannot be deemed as employees for purposes of the [*Employment Act*](#), 2007.
7. The respondent submitted that the Interested Parties 14 to 61 are persons who have expressed their interests in being appointed to be members of the Media Council as such cannot qualify to be employees as defined in Section 2 of the [*Employment Act*](#), 2007.
8. The respondents urge that the court to be guided by the *locus classicus* on jurisdiction Owners of [*Motor vessel “Lilian S” v Caltex Oil \(Kenya Limited\)*](#) 1998 that held;

“Jurisdiction is everything without it the court has no power to make one more step.”

9. The respondents urge the court to dismiss the Application and Petition with costs as it has no jurisdiction to issue orders sought.

Interested parties' submissions

10. The Interested Parties submitted that Employment and Labour Relations Court enjoys equal status as the High Court but being a specialized court, its jurisdiction is limited to include only matters contemplated under Article 162 (2) of the [*Constitution*](#) of Kenya relating to resolution of employer-employee relationship.



11. The Interested Parties relied in the holding in *National Social Security Fund Board of Trustees v Kenya Tea growers Association & 14 others* (2023) KECA 80 KLR where the court held that

“The intention of parliament is clear both in the preamble and Section 12 of the *Employment and Labour Relations Court Act* that the court was enacted to resolve employer-employee disputes as provided under Article 162(a) of the *Constitution* . The purpose of the context that cannot be ignored in interpreting the provisions of the *Constitution* . Decided cases are in agreement that constitutional issues can be determined by the Employment and Labour Relations Court only if they arise from employer-employee dispute.”
12. They also relied on the holding in *Attorney General & 2 others v Okiya Omutata Okoiti & 14 others* (2020)eKLR,

“We have no doubt that the Employment and Labour Relations Court and Environment and Land Court have jurisdiction to interpret the *Constitution* and apply the *Constitution* as was held in *USIU v the Attorney General & 12 others* (2012) eKLR and in *Daniel N. Mugendi v Kenyatta University & 3 Others* (2013) eKLR “However the jurisdiction of those specialized courts to interpret and apply the *Constitution* is not original or unlimited like that of the High Court. It is limited to constitutional issues that arise in the context of disputes on employment and labour relations or environment and land matters.”
13. The Interested Parties submitted that the process of selection of members of the Media Council of Kenya is not an employment issue and as such not adjudicable before the Honourable Court.
14. The Interested Parties urged the court to find that it had concurrent jurisdiction with the High court and then find that the matter is barred by the rule of sub judice Section 6 of the *Civil Procedure Act*. A court is barred from proceeding with a suit which the subject matter is also substantially an issue in a previous instituted suit or proceeding, where the previous suit is instituted has jurisdiction to grant the relief claimed.
15. The Interested Parties submitted that the instant suit reveals a similarity with two suits filed at the High court that is Kajiado Petition 3 of 2023 and Milimani Petition E040 of 2023.
16. The Interested Parties rely on the holding in *Republic v Paul Kihara Kariuki, Attorney General & 2 others* where Mativo J stated as follows;

“The test for applicability of the sub judice rule is whether on a final decision being reached in the previously instituted suit, such decision would operate as res-judicata in the subsequent suit.”
17. The Interested Parties urged the court to find that the court lacked jurisdiction and that the matter offended the rule of sub judice and strike out the petition with costs.
18. They further submitted that the petitioner should bear the cost as he filed the petition knowing so well that the Honourable Court lacked jurisdiction.

Petitioner’s Submissions

19. In response to the Preliminary Objection dated 17th March, 2023, the Petitioner filed submissions in which she distilled the following issues for determination;
 - a. Whether the court has jurisdiction to hear and determine the petition



- b. What are the legal thresholds set out for a matter to qualify as a Preliminary Objection and whether the same has met the said threshold in this Preliminary Objection Application?
 - c. Whether the petitioner has locus standi to initiate/file this instant petition as alleged non applicability of section 12 of the Employment and [Labour Relations Act](#)
 - d. Conclusion summary orders and reliefs.
20. On the first issue the petitioner submitted that the Employment and Labour Relations Court is established under Article 162(2) of the [Constitution](#) as a special court in status of a High Court.
21. The Petitioner relied on the recent holding in [Dr. Magare Gekenyi J. Benjamin v Ministry of Labour and 5 others](#) where Lady Justice Chemutai Ruto held;
- “In deed in my view the drafters of the [Employment and Labour Relations Court Act](#), did not intend to limit the courts Jurisdiction to matters arising within the employment relationship or put it in any other way where the employer-employee contract. I believe it is for the reason that the rider....’and for connected purposes’ was incorporated into the preamble of the [act](#).”
22. The petitioner submitted the applicant’s argument that the Employment and Labour Relations Court does not have jurisdiction except the High court to hear constitutional matters would mean the High Court will be supervising the work of ELRC which is a superior court this is contrary to the provisions of Article 165(6) of the [Constitution](#) .
23. On the 2nd issue, the petitioners submitted that the constituents of a preliminary objection was enumerated by Justice Law in [Mukisa Biscuit Manufacturing Company Limited v West End Distributors limited](#) (1969) EA 696, 700
- “So far as I am aware, a preliminary objection consists of 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 off the suit . . .”
24. The petitioner submitted that a Preliminary Objection must relate to matters that are not contested and are pure points of law. He further submitted that the issue of whether the selection panel is conflicted or not is a matter of fact and not law therefore the preliminary objection does not meet the threshold of a preliminary objection.
25. On the third issue, the petitioner submitted that he had filed this petition as a concerned citizen and was performing his civic duty of ensuring a fair society which does not have an accuser, prosecutor and judge all rolled up into one.
26. He submitted that he had locus standi to file a Constitutional Petition in court pursuant to Articles 1, 3, 22, 23 and 159 of the [Constitution](#) and relied on the holding in [Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others](#) (2013) eKLR.
27. The petitioner urged the court to dismiss the Preliminary Objection as it was frivolous, vexatious and an abuse of the court process.



Analysis and determination

28. The issue for determination are;
- i. Whether the Preliminary Object herein is competent.
 - ii. Whether the court has jurisdiction to hear and determine the Application and petition herein.
29. The gravamen of the objection is whether the court has jurisdiction to hear and determine the application and the petition before it.
30. It is trite that jurisdiction is conferred by the Constitution or statute or both.
31. As enunciated in the celebrated decision in Owners of Motor Vessel "Lilian S" v Caltex Oil (Kenya) Limited [1989] KLR
- “Jurisdiction is everything, Without it, the court has no power to make one more step. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
32. As to whether there is a competent Preliminary Objection, the court relies on the sentiments of the Court of Appeal in *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* where Law JA stated;
- “So far as I am aware, a Preliminary Objection consists of a pure 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. Examples are an objection on the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer dispute arbitration.”
33. According to Newbold P.;
- “A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion . . .”
34. The foregoing threshold has been applied in legions of decisions and has been affirmed by the Supreme Court of Kenya.
35. The Notice of Preliminary Objection by the 1st and 5th Respondents raises the issue of jurisdiction of this court to hear and determine the Application and Petition dated 13th February, 2023, which is a pure point of law and thus meets the threshold of a Preliminary Objection.
36. Typically, a Preliminary Objection raises a threshold issue that demands determination at the earliest possible instance owing to its potential to dispose of the suit before it proceeds to full hearing and determination.
37. The petition before the court is challenging the entire process of appointment of Members of the Board of the Media Council of Kenya by the selection panel initiated by the Cabinet Secretary.



38. The respondents raised a preliminary objection on the grounds that the issues raised in the petition do not fall within the ambit of the jurisdiction of this court.
39. The respondents posit that appointment of the Interested Parties as members of the Media Council of Kenya does not amount to employer-employee relationship and therefore cannot be a cause of action or dispute within the meaning of Section 12 (1) of the *Employment and Labour Relations Court Act*, 2011.
40. They further submitted that the Interested Parties do not fall within the category of an ‘employee’ as defined under Section 2 of the *Employment Act*, 2007.
41. the *Constitution* of Kenya, 2010, which is the primary law provides for the establishment of the Employment and Labour Relations Court under Article 162 of the *Constitution* of Kenya as follows;
- (2) “Parliament shall establish courts with the same status as 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 court contemplated by Clause (2).
42. Section 12 of the *Employment and Labour Relations Court Act* provides the jurisdiction of the court as follows;
1. The court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162 (2) of the *Constitution* and provisions of the 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 organisations;
 - d. disputes between trade unions;
 - e. disputes between employers or organisations;
 - f. disputes between an employers 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;
 - j. disputes relating to the registration and enforcement of collective agreements.
43. The foregoing list though inexhaustive is restricted by the opening paragraph of section 12 (1) of the Act which are explicit that the jurisdiction relates to disputes referred to the court in accordance with Article 162(2) of the *Constitution* and other written laws relating to employment and labour relations.



44. Equally, any additional matters must be interpreted ejus dem generis the provisions of Section 12(1) of the Act.
45. As regards the enforcement of rights and fundamental freedoms, the sentiments of Majaja J. in *United States International University (USIU) V Attorney General* (2012) eKLR are instructive;

“In the final analysis, I would adopt the position of the Constitutional Court of South Africa in *Gcaba V Minister of Safety and Security*. The Industrial Court is a specialist court to deal with employment and labour relations matters. By virtue of Article 162 (3), and section 12 of the Industrial Court Act, 2011 has set out matters within the exclusive domain of that court. Since the court is of the status of the High Court, it must have jurisdiction to enforce labour rights in Article 41 and the jurisdiction to interpret the *Constitution* and fundamental rights and freedoms is incidental to the exercise of jurisdiction over matters within its 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 all fundamental rights ancillary and incidental to the employment and labour relations including interpretation of the *Constitution* within a matter before it. The Industrial Court as constituted under the Industrial Court Act, 2011 as court with the status of the High Court is competent to interpret the *Constitution* and enforce matters relating to breach of fundamental rights and freedoms in matters arising from disputes falling within the provisions of section 12 of the Industrial Court Act, 2011.”

46. These sentiments were adopted with approval by the Court of Appeal in *Daniel N. Mugendi v Kenyatta University and 3 others* (2013) eKLR.
47. Section 2 of the *Employment Act*, 2007 provides that employee means;
A person employed for Wages or Salary and includes an apprentice and indentured learner”.
48. Employer on the other hand is defined as;
Any person, public body, firm, corporation or ‘company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person ‘public body, firm, corporation or company.’
49. Finally, section 2 of the *Employment Act* defines contract of service to mean an agreement whether oral or in writing and whether expressed or implied to employ or to serve as an employee for a period of time and includes a contract of apprenticeship and indentured learnership . . .
50. I will now proceed to apply the foregoing provisions and propositions of law to the facts of the instant case.
51. The petitioner submitted that since the Employment and Labour Relations Court is a court of the status of the High Court, it has jurisdiction to handle constitutional issues raised by the petition and the petitioner is a concerned citizen conducting his civic duty.
52. The Petitioner relied on the sentiments of Rutto J. in *Magare Gikenyi I Benjamin v Ministry of Labour (MoL & another; Federation of Kenyan Employers (FKE) & 4 others (Interested Party)* [2022] eKLR as follows,

“In my view, the drafters of the *Employment and Labour Relations Court Act* did not intend to limit the courts jurisdiction to matters arising within the employment relationship or put in another way, where there is an employer-employee relationship. I believe that it is for this



reason that the rider ‘.....and for connected purposes’ was incorporated into the preamble of the *Act*.

To this end it is my finding that the issue in dispute herein is in respect of matters related to employment and labour relations hence the court has jurisdiction to determine the same.”

53. In that case, the issue before the judge was the constitutionality of Section 29 of the *Employment Act, 2007* and the court declined the application for the *Constitution* of a bench to determine the issue.
54. In the court’s view, since the issue before the court did not relate to any employee(s) in particular, the case is distinguishable from the instant petition.
55. In the instant suit, by Gazette Notice No. 658 Vol. CXXV-NO. 20 dated 27th January, 2023, the Cabinet Secretary, Information Communication and Digital Economy published a Declaration of Vacancies in the positions of Chairperson and seven (7) members of the Media Council of Kenya in consonance with the provisions of Section 7(2) of the *Media Council Act, 2013*.
56. The declaration invited applications from qualified persons.
57. The applications were to be forwarded to the Selection Panel within 7 days of publication of the notice.
58. The declaration was published in newspapers as provided by the Act.
59. Previously, by letter dated 29th November, 2022, the Principal Secretary of the Ministry had requested nominating institutions under Section 7(3) of the *Media Council Act* to nominate persons to constitute the Selection Panel and from the evidence on record not less than seven (7) institutions had nominated persons to sit in the Selection Panel.
60. Consequently, the Cabinet Secretary sought legal advice from the Office of the Attorney General on the eligibility of employees of medial houses and leadership and public officers to serve as members of the Medial Council.
61. The Attorney General advised that any person who had an interest in a Media house for whatever reason which could occasion conflict of interest and all public officers were precluded from seeking membership of the council.
62. Interested persons applied and the panel shortlisted 41 individuals for the 7 vacancies.
63. According to the Petitioner, the Selection Panel was constituted without following due process and certain individuals are singled out.
64. The gravamen of the Petitioner’s case is that neither the Gazette Notice no nomination of the Selection Panel nor the shortlisting of eligible candidates was conducted in accordance with the law.
65. In other words, the entire process is flawed and ought to be stopped.
66. Regrettably, the Petitioner has not demonstrated that members of the Selection Panel or members of the Media Council are engaged as employees under contracts of service.
67. Under Section 7 of the *Media Council Act, 2013*,
 1. The Council shall consist of –
 - a. A Chairperson appointed in accordance with this section.
 - b. One person nominated by the Cabinet Secretary.
 - c. Seven other members appointed in accordance with this section.



68. Section 8 of the [Act](#) prescribes the qualifications for appointment as Chairperson or member of the Media Council.
69. Under Section 12 of the [Act](#), the Chairperson and members of council hold office for a period of 3 years and are eligible for re-appointment for a further and final term of 3 years and all serve on a part-time basis.
70. The council or board of the Media Council is established by Section 3 of the [Act](#).
71. The First Schedule to the [Act](#) provides for the Conduct of Business and Affairs of the Council.
72. The council must meet not less than four times every financial year and not more than 4 months shall elapse between the date of one meeting and that of the next and quorum is 4 members and decisions are by the majority present and voting at the meeting.
73. The council is mandated to recruit and appoint a secretary who is responsible for the day-to-day management of the affairs of council.
74. Needless to belabour, the council is a board analogous to any other of a state body or company.
75. Moreover, the Media Council of Kenya is a State Corporation as ordained by the provisions of Section 2 of the [State Corporations Act](#), 1986.
76. Finally, Section 7(3) of the [Media Council Act](#), 2013 prescribes the composition of the Selection Panel. The 13 member panel consists of nominees of public and private institutions and bodies including the Ministry responsible for matter relating to Media, National Gender and Equality Commission, Kenya News Agency, Consumer Federation of Kenya, Law Society of Kenya, Kenya Union of Journalists, Kenya Editors Guild, Media Owners Association, Public Relations Society of Kenya and School of Journalism of recognized public and private universities.
77. The panel is empowered to determine its procedure and is facilitated and supported by the Cabinet Secretary as required.
78. The remit of the Selection Panel is to consider applications from eligible and interested candidates, shortlist, publish the names and qualification of shortlisted candidates in the Kenya Gazette and at least 2 daily newspapers of national circulation within 7 days from the date of expiry of the deadline of receipt of applications, interview the shortlisted candidates within 14 days after publication of the names and select one person to be appointed as Chairperson and 7 persons qualified to be members of the council and forward the names to the Cabinet Secretary who must appoint a Chairperson and members of the council within 7 days.
79. In the event the Cabinet Secretary rejects a nominee, the Selection Panel is required to select another person from the shortlisted candidates.
80. Under Section 7(15) of the [Act](#), the Selection Panel stands dissolved upon the appointment of the Chairperson and members of the Media Council.
81. The foregoing demonstrates beyond per adventure that the Selection Panel is adhoc and must operate within very strict timelines.
82. The nominees are neither directors nor employees of the Cabinet Secretary or the Media Council and are nominated for a one-off task.
83. Having demonstrated that the Chairperson and members of the Media Council are members of the board and members of the Selection Panel are neither directors nor employees, and the petition before



- the court relates to the actions taken by the Cabinet Secretary, Information, Communication and the Digital Economy, nomination of members of the Selection Panel and the shortlisted candidates, it is clear to the court that the petitioner’s complaints relate to neither employment nor labour relations.
84. The foregoing notwithstanding, the Petitioner appear to be arguing that his complaint falls squarely within the jurisdiction of the court by virtue of the preambular provision of the [Employment and Labour Relations Court Act](#), 2011 whose preamble provides that it is;
- “An act of Parliament to establish the Employment and Labour Relations Court to hear and determine disputes relating to employment and labour relations and for connected purposes.”
85. The phrase “connected purposes” used in the preamble to the Act is a standard addition to virtually all statutes of Parliament that establish state bodies and many others. For instance, [Capital Markets Act](#), [Controller of Budget Act](#), 2016, [Accountants Act](#), 2008, [Anti-Doping Act](#), 2016, [Work Injury Benefits Act](#), 2007, [Retirement Benefits Act](#), 1997 and many others.
86. In the court’s view, the phrase relates to matters connected to employment and labour relations as opposed to matters where neither employment nor labour relations are implicated.
87. As mentioned earlier, the Petitioner relied on the decision in [Magare Gikenyi J. Benjamin V Ministry of Labour and another Federation of Kenya Employees \(FKE\) and 4 others \(Interested Parties\)](#) (Supra).
88. The Respondents relied on the Court of Appeal decision in [Rift Valley Water Services Board & 3 others V Geoffrey Asanyo & 2 others](#) (2022) to urge that the court had no jurisdiction.
89. In this case, which this court cited with approval in Petition No. E029 of 2022, [James Gacheru & 3 others v Kiambu Water & Sewerage Co. Ltd and 13 others](#), the Court of Appeal held as follows;
- “The question as to whether the 1st Respondent was an employee of the 2nd Respondent with the right of claim as such in the Industrial Court has a simple answer to it. He was not . . . In our considered judgement, the 1st Respondent was not employed by the 2nd Respondent . . . for wage or salary. Neither was he an apprentice or indentured learner. We find nothing on record to suggest that the 2nd Respondent had entered into a contract of service to employ the 1st Respondent as its employee within the meaning of the Act. Accordingly, the [Employment Act](#) did not apply to him.”
90. In [Katiba Institute & another v Attorney General & another; Julius Waweru Karangi and 128 other \(Interested Party\)](#) (2021) eKLR, the court expressed itself as follows;
- “. . . Positions of chairpersons and members of boards of state corporations and parastatals are not office in the Public Service. In arriving at this conclusion, we are further guided by the decision of the Supreme Court in [Fredrick Otieno Outa V Jared Odoyo Okello & 4 others](#) (2014) eKLR . . .”
91. The court is guided by the foregoing provisions.
92. From the foregoing, it is clear that neither the nomination of members of the Selection Panel or publication of the declaration of vacancies by the Cabinet Secretary, nor the nomination of persons for appointment as Chairperson and members of the Media Council is remotely connected or related to employment and labour relations or violation of rights connected therewith.



93. It would appear to follow that this court has no jurisdiction to hear and determine the Application and Petition herein and has no option but to down its tools as by law required.
94. The fact that the Petitioner is by filing the petition performing a civic duty, which is a personal choice and credible, cannot confer jurisdiction on the court.
95. Finally, although the Interested Parties raised the issue of res judicata on the premise that, there were two other petitions filed before the High Court on the same subject matter, Petition Kajjado 3 of 2023 and Milimani Petition No. E040 of 2023, no tangible material was presented to the court to demonstrate that the res judicata rule had been infringed or how the petitions related to the instant petition.
96. In the event that that is the state of affairs, it would follow that the petitioner is abusing the court process by forum shopping.
97. More significantly, however, the issue was raised before the trial court on 27th February, 2023 and disposed off.
98. In the upshot, Notice of Preliminary Objection dated 17th March, 2023 is merited.
99. Consequently, the Application and Petition dated 13th February, 2023 are hereby dismissed.
100. Being a public interest matter, it is only fair that parties bear own costs.
- 101 It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 23RD DAY OF MAY 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 15th March 2020 and subsequent directions of 21st 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.

