



REPUBLIC OF KENYA



**Agava v Otiichlo & 2 others (Employment and Labour Relations
Petition 6 of 2023) [2023] KEELRC 1099 (KLR) (4 May 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1099 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
EMPLOYMENT AND LABOUR RELATIONS PETITION 6 OF 2023**

JW KELI, J

MAY 4, 2023

**IN THE MATTER OF ARTICLES 1,3,6,10,19,20,21,22,23,27,28, 32,
35,41,43,45,47,65,165,176,179,180,184, 185(3) 195,230(5),232,235,236,
258A AND 259 OF THE CONSTITUTION OF KENYA IN THE
MATTER OF: THE CONTRAVENTION AND OR APPREHENDED
CONTRAVENTION OF THE FUNDAMENTAL RIGHTS AND FREEDOMS**

BETWEEN

CHRYSOSTOM MUKHUMBIRI AGAVA PETITIONER

AND

HON. DR. WILBUR OTIICHLO 1ST RESPONDENT

COUNTY GOVERNMENT OF VIHIGA 2ND RESPONDENT

COUNTY PUBLIC SERVICE BOARD, VIHIGA 3RD RESPONDENT

RULING

(On notice of preliminary objection dated March 27, 2023 and notice of motion application dated 18th April 2023 both by the Respondents)

1. The respondents in objection to the instant petition dated March 13, 2023 filed notice of preliminary objection dated March 27, 2023 seeking to strike out the petition together with the applications therein on the following grounds:-
 - i. The honorable court is bereft of the required jurisdiction to continue entertaining the matter by dint of section 77 of the *County Governments Act* and section 87(2) of the *Public Service Commission Act*.
 - ii. The petition violates the principle of exhaustion in dispute resolution.



- iii. The petition does not meet the required threshold of a constitutional petition as it is in pursuit of personal goals that do not fall within the boundaries of constitutional petitions and would be better be presented as employment claim.
 - iv. The petition violates rule 10(2)(d) of the Mutunga Rules (*Constitution of Kenya (Protection of Rights and fundamental Freedoms)Practice and Procedure Rules, 2013.*)
 - v. The petition and all applications therein are incompetent and gross abuse of the process of the Honorable Court.
2. The respondents further filed substantive response to the petition and the application of even date *vide* replying affidavit of Ezekiel Ayiego sworn on the April 3, 2023 and answer to the petition dated April 17, 2023.
 3. The court on the March 28, 2023 having heard the parties issued a temporary conservatory order. At this stage no substantive response had been filed.
 4. The respondents aggrieved by the aforesaid temporary conservatory order brought to court under certificate of urgency notice of motion application dated April 18, 2023 seeking substantive order of the court to set aside the temporary conservative order of March 28, 2023 and a fresh order be issued restraining the petitioner from claiming right to occupy or to be reinstated to the office of County Chief officer in the County Government of Vihiga pending determination of the petition.
 5. The court directed the notice of preliminary objection dated March 27, 2023 and the notice of motion application dated April 18, 2023 be canvassed together by way of written submissions. The parties complied. The respondents/objector written submissions were drawn and filed by Aggrey B L Musiega, the County Attorney on the April 27, 2023. The petitioner's/respondent written submissions on the preliminary objection were drawn and filed by James Aggrey Mwamu instructed by Mwamu & Company Advocates. The court noted both parties filed submissions in relation to the notice of preliminary objection only. The court will nevertheless pronounce itself in this ruling on the application dated April 18, 2023 as directed.

Issues for determination.

6. The courts discerned that the issues for determination under the notice of preliminary objection and the application as are follows:-
 - a. Whether the Preliminary objection was properly raised.
 - b. Whether the court has first instance jurisdiction to entertain the petition and the application thereunder taking into consideration the provisions of section 77 of the *County Government Act* and section 87(2) of the *Public Service Commission Act.*
 - c. Whether the petition met threshold of a constitutional petition.
 - d. Whether the application dated April 18, 2023 was merited.



Issue a. Whether the Preliminary objection was properly raised.

7. It was the position of the petitioner that raising of preliminary objections in constitutional petitions was not proper and to buttress that point relied on the threshold of preliminary objection as set out in the classic decision of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors* (1969)EA 696. The petitioner relying on the said Mukisa Biscuits decision submits that the facts presented in the petition needed to be ascertained before a preliminary objection can be entered and since there are no facts from the respondents the court cannot waste precious judicial time considering the issues and to buttress these submissions relied on the decision *Hassan Nyanje Charo v Khatib Mwashetani & 3 others* (2014)e KLR which upheld holding in *Hassan Ali Jobo & another v Sulleimna Said Shabbal & 2 others* (2014)e KLR where the court restated the principles in the Mukisa Biscuits case as follows:-

‘a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to 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 the dispute to arbitration ... [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’ . . .” The court finds that as at time of giving ruling date on April 27, 2023 a substantive response *vide* replying affidavit by Ezekiel Ayiego had been filed by the respondents on the April 4, 2023. The petitioner filed his submission on the April 27, 2023. There is no merit on the said submission.

8. The petitioner further submits that it was clear a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts leads to but one conclusion:- that the facts are incompatible with that point of law and relied on decision in *Hassan Mwanje Charo case(supra)*.
9. In the instant case, the court holds that clear point of law is raised being whether the court has jurisdiction to entertain a petition on employment dispute and violation of constitutional rights of employee (county chief officer) of the county government by dint of provisions of section 77 of the *County Governments Act* and section 87(2) of the *Public Service Commission Act*. The court perused the petition and the response and found it was not in dispute the petitioner’s case arose out of his employment as County Chief Officer of the Vihiga County Government. The court then finds that the notice of preliminary objection was on a pure point of law and properly raised.

Issue b: -Whether the court has first instance jurisdiction to entertain the petition and the application thereunder taking into consideration the provisions of section 77 of the County Government Act and section 87(2) of the *Public Service Commission Act*

10. The court considered the petitioner’s submissions to be that the court had jurisdiction by dint of article 162(2)(a) of the *Constitution*. Article 162 of the *Constitution* provides that – ‘1. The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2).
2. Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to –
- a. Employment and labour relations.”



11. The Petitioner relied on the decision in *United States International University (USIU) v Attorney General & 2 others* (2012)e KLR where Justice Majanja (High Court) upheld the jurisdiction of this court to deal with violation of constitutional labour rights as follows:- ‘41. Labour and employment rights are part of the Bill of Rights and are protected under article 41 which is within the province of the Industrial Court. To exclude the jurisdiction of the Industrial Court from dealing with any other rights and fundamental freedoms howsoever arising from the relationships defined in section 12 of the Industrial Court Act, 2011 or to interpret the *Constitution* would lead to a situation where there is parallel jurisdiction between the High Court and the Industrial Court. This would give rise to forum shopping thereby undermining a stable and consistent application of employment and labour law.’ The decision was upheld by the Court of Appeal in *Prof Daniel N Mugenda v Kenyatta University and 3 others* Civil Appeal No. 6 of 2012 where the court stated : ‘The question now is whether the appellant should go back and “sever” the composite petition alleging violation of his fundamental rights and breach of contract of employment. Much as such a severance would entail time and resources to effect the necessary amendments and make due motions, we are of the view that with necessary amendments, which appear imperative to make out a clear use of breach of rights being effected, the appellant can and should be heard by the Industrial Court on the two claims i.e. violation of rights and breach of contract of employment. The position that the Industrial Court can and should entertain the claim as laid by the appellant, is in line with the decision of Majanja, J. in Petition No.170 of 2012 – *United States International University (USIU) v The Attorney General & others*.’
12. It was not in dispute that this court has constitutional mandate and jurisdiction to deal with constitutional petitions so long as such proceedings concern matters within the jurisdiction of this court as enumerated and delineated above by the petitioner. The petitioner submitted there was exception to the doctrine of exhaustion and relied on several decisions of the court and High Court. Those decisions were only persuasive. The petitioner further relied on a decision of the court of Appeal to submit that the petitioner raised issues borne out of he respondents’ malice and disrespect of the *Constitution* and statutes and rule of natural justice *inter alia* being decision in *Chief Justice and President of the Supreme Court of Kenya & another v Khaemba* (2021)e KLR where the Court of Appeal held that the doctrine of exhaustion notwithstanding the court retained residual jurisdiction to intervene in exceptional circumstances despite the existence of alternative remedies where the action complained of is marred by illegality and procedural irregularities. The Court of Appeal observed :- ‘35. This position notwithstanding, courts still retain the residual jurisdiction to intervene in exceptional circumstances despite the existence of an alternative remedy, as was explained by this court in *Fleur Investments Limited v Commissioner of Domestic Taxes & another*, [2018] eKLR: “Whereas courts of law are enjoined to defer to specialized Tribunals and other Alternative Dispute Resolution Statutory bodies created by Parliament to resolve certain specific disputes, the court cannot, being a bastion of Justice, sit back and watch such institutions ride roughshod on the rights of citizens who seek refuge under the *Constitution* and other legislations for protection. The court is perfectly in order to intervene where there is clear abuse of discretion by such bodies, where arbitrariness, malice, capriciousness and disrespect of the rules of natural justice are manifest. Persons charged with statutory powers and duties ought to exercise the same reasonably and fairly. 36. Were there circumstances in this appeal that justified an intervention by the court? It has been demonstrated and found that the disciplinary process by the 1st appellant against the respondent was marred from the start with illegality and procedural irregularity. It is also evident that the Chief Justice had already made a finding in the letter dated June 13, 2019 that the respondent’s actions amounted to gross misconduct, and therefore, as regards the respondent’s culpability. Lastly, the respondent was also subjected to extreme hardship having been illegally and indefinitely suspended with nil pay. Continuing with the disciplinary process in the circumstances would essentially have been an exercise in futility, and aid in the continued violation of



the respondent's rights, as was similarly noted by this court in *Judicial Service Commission & another v Lucy Muthoni Njora* [2021] eKLR." The petitioner submits that whether the Governor has no role in appointment of chief officers is a matter of fact and not law. That the Governor in the instant case having drawn the terms of contract of the petitioner that act was an illegality which must be determined by the court not the Public Service Commission.

13. The petitioner further submitted that the County Attorney of 2nd respondent, Mr. Musiega, having represented the petitioner in Kisumu ELRC Judicial Review No. 9 of 2019 against disciplinary proceedings by the respondents he was conflicted and should be disbarred. The court noted that this issue was improperly raised in the submissions. Submissions are not pleadings and hence the court cannot address the issue of representation in the ruling. The issue in the ruling concerned the Notice of preliminary objection on jurisdiction of the court and the Application to set aside the temporary conservatory order. The application to disbar the County Attorney ought be presented before the court with jurisdiction. The court declines to determine the issue of counsel representation in this ruling.
14. Lastly the petitioner submitted that organization structure changes cannot stop the court from granting orders sought. Again the court could not relate this submission to the notice of preliminary objection.

Response submissions.

15. The respondents relied on the court of Appeal decision in *Secretary County Public Service Board and another -v- Hulbbhai Gedi Abdille* (2017) eKLR to state the court had no jurisdiction under section 77 of the *County Governments Act* to entertain the petition on employment of the petitioner as county chief officer. The court of Appeal held " There is no doubt that the respondent initiated the judicial review proceedings in utter disregard to the dispute resolution mechanism availed by section 77 of the Act. The section provides not only the forum through which the respondent could agitate her grievance at first instance, but the jurisdiction thereof is a specialized one specifically tailored by the legislators to meet needs such as the respondent's. In our view, the most suitable and appropriate recourse for the respondent was to invoke the appellate procedure under the Act rather than resort to the judicial process in the first instance....."

Decision on issue of jurisdiction

16. The jurisdiction of the court flows from the *Constitution* and written law as held by the Supreme court of Kenya in *Samuel Kamau Macharia & another v Kenya Commercial Bank and another* [2012] eKLR thus: "A Court's jurisdiction flows from either 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"
17. The respondents relying on the provisions of section 77 of the *County Governments Act* and section 87 (2) of the *Public Service Commission Act* submitted the court lacks jurisdiction as there exists alternative redress mechanism for grievance by the petitioner on his employment before the Public Service Commission. Section 77 of the *County Governments Act* provides for appeals against decision of the County Public Service Board or any person in the County Government against a county public officer as follows:- "77. Appeals to the Public Service Commission
 - (1) Any person dissatisfied or affected by a decision made by the County Public Service Board or a person in exercise or purported exercise of disciplinary control against any county public officer may appeal to the Public Service



Commission (in this Part referred to as the "Commission") against the decision.

- (2) The Commission shall entertain appeals on any decision relating to employment of a person in a county government including a decision in respect of—
 - (a) recruitment, selection, appointment and qualifications attached to any office;
 - (b) remuneration and terms and conditions of service;
 - (c) disciplinary control;
 - (d) national values and principles of governance, under article 10, and, values and principles of public service under article 232 of the Constitution;
 - (e) retirement and other removal from service;
 - (f) pension benefits, gratuity and any other terminal benefits; or
 - (g) any other decision the Commission considers to fall within its constitutional competence to hear and determine on appeal in that regard.
- (3) An appeal under subsection (1) shall be in writing and made within ninety days after the date of the decision, but the Commission may entertain an appeal later if, in the opinion of the Commission, the circumstances warrant it.”

18. The Court of Appeal in Court of Appeal at Nakuru Civil Appeal No. E136 of 2022 between the Clerk Nakuru County Assembly and 2 others v Kenneth Odongo and 3 others as consolidated with Court of Appeal at Nakuru Civil Appeal No E137 o 2022 Speaker Nakuru County Assembly v Stephen Michael Odour Ogutu delivered on April 14, 2023 (UR) as relates to section 77 of the County Government Act observed: ‘Be that as it may, it is indeed not in dispute that the provisions of section 77 (1) of the County Governments Act are not couched in mandatory terms as the operative word used is “may.” However, part XV of the Public Service Commission Act No 10 of 2017, provides for hearing and determination of appeals in respect of County Government Public Service. Section 85 thereof provides: “85. Appeal from County Government Public Service: The Commission shall, in order to discharge its mandate under article 234(2)(i) of the Constitution, hear and determine appeals in respect of any decision relating to engagement of any person in a County Government, including a decision in respect of— (a) recruitment, selection, appointment and qualifications attached to any office”.

19. Section 87 (2) of the Public service Commission Act provides: “(2) A person shall not file any legal proceedings in any Court of law with respect to matters within the jurisdiction of the Commission to hear and determine appeals from county government public service unless the procedure provided for under this part has been exhausted.” On this provision the Court of Appeal at Nakuru in the Nakuru County Assembly case(*supra*)observed: ‘It is imperative to note that the provisions of section 87 (2) of the Act are couched in mandatory terms and the said section expressly ousts the jurisdiction of the courts in the first instance and a party must first exhaust the provisions of part XV of the Public Service Commission Act before approaching the courts.” The court went ahead to pronounce itself on the appeal against judgment of the court at Nakuru in constitutional petition against recruitment of chief officers as follows:-‘In the instant case, it is evident that the 1st respondent did not exhaust the



- procedure for appeal provided for under part XV of the Act and instead opted to rush to court contrary to the express provisions of the said Act and the petition as filed was a non-starter and premature since no decision had even been made by the appellants. The matter was therefore not ripe for hearing.”
20. The Court of Appeal at Nakuru in the *Nakuru County Assembly case*(*supra*) upheld the Court of Appeal decision in *Secretary County Public Service Board and Another v Hulbbhai Gedi Abdille* [2017] eKLR (Makhandia, Ouko & M’Inoti JJA) where the Bench allowed the appeal on basis that the respondent had failed to utilize the process under section 77 of the *County Governments Act* as follows:-
- “There is no doubt that the Respondent initiated the judicial review proceedings in utter disregard to the dispute resolution mechanism availed by section 77 of the Act. The section provides not only the forum through which the respondent could agitate her grievance at first instance, but the jurisdiction thereof is a specialized one specifically tailored by the legislators to meet needs such as the respondent’s. In our view, the most suitable and appropriate recourse for the respondent was to invoke the appellate procedure under the Act rather than resort to the judicial process in the first instance.”
21. The court holds that it is bound by the foregoing Court of Appeal decisions and further upholds the foregoing decisions and holds that the redress mechanisms on employment disputes arising from decision of the county public service board and/ or of any person in the county government against the county government employee under section 87 (2) of the *Public Service Commission Act* is couched in mandatory terms as held by Court of appeal at Nakuru Civil Appeal no. E136 of 2022 between The *Clerk Nakuru County Assembly and 2 others v Kenneth Odongo and 3 others* as consolidated with Court of Appeal at Nakuru Civil Appeal No. E137 of 2022 *Speaker Nakuru County Assembly v Stephen Michael Odour Ogutu* delivered April 14, 2023 (UR). Section 87(2) of the *Public Service Commission Act* reads-‘87(2) A person shall not file any legal proceedings in any Court of law with respect to matters within the jurisdiction of the Commission to hear and determine appeals from county government public service unless the procedure provided for under this Part has been exhausted.’”
22. The court further upholds to apply to the instant petition the decision of the Court of Appeal in *Secretary County Public Service Board and another v Hulbbhai Gedi Abdille* (2017) eKLR to hold the court had no jurisdiction under section 77 of the *County Governments Act* to entertain the petition on employment of the petitioner as county chief officer. The court of Appeal *Secretary County Public Service Board and another* (*supra*) held “ There is no doubt that the respondent initiated the judicial review proceedings in utter disregard to the dispute resolution mechanism availed by section 77 of the Act. The section provides not only the forum through which the respondent could agitate her grievance at first instance, but the jurisdiction thereof is a specialized one specifically tailored by the legislators to meet needs such as the respondent’s. In our view, the most suitable and appropriate recourse for the respondent was to invoke the appellate procedure under the Act rather than resort to the judicial process in the first instance.....”
23. The court was not persuaded that the authority in *Chief Justice and President of the Supreme Court of Kenya & another v Khaemba* [2021]e KLR was relevant to the instant case. In that case the court of Appeal held that the doctrine of exhaustion, notwithstanding, the court retained residual jurisdiction to intervene in exceptional circumstances despite the existence of alternative remedies where the action complained of is marred by illegality and procedural irregularities The Court of Appeal in that decision observed:- ‘35. This position notwithstanding, courts still retain the residual jurisdiction to intervene in exceptional circumstances despite the existence of an alternative remedy, as was explained by this court in *Fleur Investments Limited v Commissioner of Domestic Taxes & another*, [2018] eKLR:“Whereas courts of law are enjoined to defer to specialised tribunals and other alternative dispute resolution



statutory bodies created by Parliament to resolve certain specific disputes, the court cannot, being a bastion of Justice, sit back and watch such institutions ride roughshod on the rights of citizens who seek refuge under the Constitution and other legislations for protection. The court is perfectly in order to intervene where there is clear abuse of discretion by such bodies, where arbitrariness, malice, capriciousness and disrespect of the rules of natural justice are manifest. Persons charged with statutory powers and duties ought to exercise the same reasonably and fairly.” The court understood the said decision to be with connection to the statutory bodies like Judicial Service Commission exercising its quasi-judicial powers tainted with illegalities or procedural irregularities. The instant case is distinguished as the petitioner relied on the exceptional circumstances being that his petition raised facts of illegalities by the respondents which could only be addressed by the court and not the commission. The petitioner had not challenged the procedures of the Public Service Commission as being tainted by illegalities. The Governor is further not a quasi judicial body.

24. The court holds that the Petitioner did not comply with the law and approached the court in the first instance when there is a clear redress statutory process on his grievance. This is improper as was held by the Court of Appeal in Speaker of the National Assembly v Karume (Civil Application 92 of 1992) [1992] KECA 42 (KLR) (29 May 1992) (Ruling) ‘In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed...” The court holds that it is mandatory to exhaust the redress mechanism under section 77 of the County Governments Act as read together with section 87(2) of the Public Service Commission Act. The court holds it has no jurisdiction to entertain the petition and the application filed thereunder.

Issue c. Whether the petition met threshold of a constitutional petition

25. The petitioner was an employee of the Vihiga County Government as County Chief Officer under the expired term of the 1st respondent *vide* contract dated 21st March 2018 which was for term of 3 years. The petitioner sued the respondents *vide* ELRC Kisumu Petition No. 34 of 2019 where the court held that the term of 3 years set by the Governor without involving the County Public Service Board was an illegality. That the term of the petitioner was tied to the term of the governor unless lawfully removed from the office. The court ordered the County Public Service Board to set the terms of office of the County Chief Officers who included the petitioner(CAM3). Pursuant to the decree of the court the terms of the petitioner as County Chief Officer were revised under the Vihiga County Chief Officers terms and condition of service 2020 to serve from date of appointment to remainder of term of governor(CMA4). The governor(1st respondent) who was re-elected for 2nd term *vide* letter of January 25, 2023 gave the petitioner notice of expiry of contract on March 30, 2023. The petitioner was *vide* the letter to proceed on terminal leave in the month of March and it was stated to be per paragraph (h) .11 of the County Public Service Human Resources Manual.
26. The petitioner seeks the following reliefs under his petition dated March 13, 2023:-
1.
 - a. A declaration that the 1st and 2nd respondents have violated the Constitution and the County Governments Act.
 2. A permanent injunction be issued stopping the recruitment process and employment.
 3. Declaration that the petitioner term was renewed upon the re-election of the Governor.
 4. That in the alternative the petitioner be compensated for the remaining 5 years.
 5. The respondents to pay the petitioner costs of the petition in any event.



27. The court finds that the instant petition is an employment claim whose prayers fall under the Employment Act as per the prayers outlined above. The award for compensation under contract can only be done applying the criteria under section 49 of the Employment Act. The issue of unsuitable constitutional petitions has been addressed in a plethora of decisions as cited by my brother Justice Rika in George S Onyango OGW v Board of Directors of Numerical Machining Complex Limited Minister for Industrialization Attorney- General to wit:- ‘30. It is generally accepted through a catena of judicial precedents, that the Constitution should not be used for settlement of everyday litigation, as discussed in High Court Petition Number 564 of 2004, Alphonse Mwangemi Munga & 11 others v. Africa Safari Club. The Industrial Court adopted this approach in the Petition involving East African Portland Cement Company Limited v. the Attorney- General & another [2013] e-KLR, concluding that Courts must guard against the distortion or manipulation of the constitutional jurisdiction. To characterize everyday dispute as a constitutional violation, transforms the Constitution from a blueprint of fundamental freedoms and rights to a document for litigating everyday disputes. Its moral force is diminished. This is the thread running through the decisions cited by the respondents, in particular Uhuru Muigai Kenyatta v. Nairobi Publications Limited [2013] e-KLR and Alex Malikhe Wafubwa & 7 others v. Elias Nambakha Wamita & 4 others [2012] e-KLR. Where a fundamental right is regulated by legislation such as the Employment Act 2007, such legislation and not the underlying constitutional right becomes the primary means of giving effect to the constitutional right. The principle was discussed by this Court in the recent decision involving GMV v. the Bank of Africa Limited [2013] e-KLR. If an employer adopts a labour practice thought to be unfair, an aggrieved employee would at first instance seek remedy under the relevant legislation. If the employee finds no remedy there, the legislation might come under scrutiny for not giving adequate protection to a constitutional right. The dominant principle in cases where a wrong is thought to touch on the Constitution, Common Law and Legislation, is that the remedy should be pursued from the first port of entry. The first impression to be made from these decisions is that, the Petitioner Mr. Onyango wrongly invoked the constitutional jurisdiction, and should have searched for remedy from his contract of employment and the legislation governing that contract.” These are just but among other decisions by the superior courts.
28. The court while upholding the a foregoing decisions (para 27)holds that instant petition falls in the category of everyday claim of employment dispute as the said declaratory orders can be also issued in a claim under section 12 of the Employment and Labour Relations Court Act No. 20 of 2011 to wit:-
 “12(3) In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders-
- (i) interim preservation orders including injunctions in cases of urgency;
 - (ii) a prohibitory order;
 - (iii) an order for specific performance;
 - (iv) iv) a declaratory order;
 - (v) an award of compensation in any circumstances contemplated under this Act or any written law;
 - (vi) an award of damages in any circumstances contemplated under this Act or any written law;
 - (vii) an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law; or



(viii) any other appropriate relief as the Court may deem fit to grant.”.

Issued:- Whether the application dated 18th April 2023 was merited

29. The application dated April 18, 2023 by the respondents sought to set aside the temporary conservatory order by the court of March 28, 2023. The court having found it has no first instance jurisdiction then the conservatory order issued on March 28, 2023 before filing of response is devoid of jurisdiction hence a nullity and is set aside. The application is allowed. No order as to costs.
30. In the upshot the notice of preliminary objection dated March 27, 2023 by the respondents is upheld and the petition dated March 13, 2023 and the application thereunder of even date hereby dismissed for lack of jurisdiction by the court. The application of April 18, 2023 is allowed and the temporary conservatory order issued on the March 28, 2023 set aside. Each party to bear own costs in the petition and application.
31. It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 4TH DAY OF MAY 2023.

JEMIMAH KELI,

JUDGE.

In The Presence Of :-

Court Assistant: Lucy Macheso

Petitioner:- Mwamu Advocate

Respondent: Mukabi, Vihiga County Solicitor

Application By Mr. Mwamu For The Petitioner

The petitioner applies for typed and certified copies of the proceedings and of the ruling. We also seek leave of the court to appeal against the ruling.

Mr. Mukabi

The leave should not be construed as stay.

Court Order

The petitioner to be supplied with typed and certified copies of the proceedings and the ruling on payment of requisite fees as may be applicable.

The petitioner is granted leave to appeal against the ruling. No stay ordered.

It is so ordered.

JEMIMAH KELI,

JUDGE.

