



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kamau v Gichana & another (Petition E073 of 2021)  
[2023] KEELRC 1769 (KLR) (25 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1769 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E073 OF 2021**

**JK GAKERI, J**

**JULY 25, 2023**

**BETWEEN**

**PAUL MURIITHI KAMAU ..... PETITIONER**

**AND**

**EDWARD OMBWORI GICHANA ..... 1<sup>ST</sup> RESPONDENT**

**THE NAIROBI CITY COUNTY ASSEMBLY SERVICE**

**BOARD ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Before the court for determination is a Preliminary Objection by the 2<sup>nd</sup> Respondent in opposition to the Petition dated 21<sup>st</sup> April, 2021 on the ground that;

The court has no jurisdiction over the matter under Article 162(2) of *the Constitution* of Kenya, 2010 and Section 12 of the *Employment and Labour Relations Court Act*, 2011 by reason of the Court of Appeal decision in Civil Appeal No. E136 of 2022 Clerk of Nakuru County Assembly & 2 others V Kenneth Odongo & 3 others.

**Applicant's submissions**

2. Counsel for the 2<sup>nd</sup> Respondent addressed the singular issue of jurisdiction and relied on the decision in *Okiya Omtatah Okoiti & another V Attorney General & 2 others* (2015) eKLR on the concepts of personal and subject matter jurisdiction.
3. Counsel submitted that although the Petitioner had right under Article 22(1) of *the Constitution*, he had none before the court as there was no employer/employee relationship between him and the 2<sup>nd</sup> Respondent.



4. Reliance was made on the provisions of Section 12(1) and (2) of the Employment and Labour Relations Court, 2011 to urge that the Petitioner had no locus standi as the provisions cited as the foundation of the petition did not reveal an employer/employee relationship.
5. Counsel urged that by virtue of the definition of employee and employer in Section 2 and 12(2) of the *Employment and Labour Relations Court Act*, 2011, the Petitioner lacked standing to file the petition.
6. Counsel urged that the Court of Appeal decision in Clerk, Nakuru County Assembly & 2 others V Kenneth Odongo & 3 others applied to the instant petition on all fours.
7. The sentiments of Nduma J. in Nick Githinji Ndichu V Clerk, Kiambu County Assembly & another (2014) eKLR were also relied upon to reinforce the submission.
8. Counsel submitted that the Petitioner had not demonstrated that the petition raised an employment and labour issue.
9. Counsel placed substantial reliance on the sentiments of the Court of Appeal in The Clerk, Nakuru County Assembly & 2 others case (Supra) to urge that since there was no employer-employee relationship between the Petitioner and the 1<sup>st</sup> and 2<sup>nd</sup> Respondent nor an employment and labour relations issue, the court had no jurisdiction to entertain the petition.
10. That the petition herein was a veiled attempt to re-litigate ELRC Petition No. 194 of 2019 and ELRC Petition No. 71 of 2020 which were determined with finality though previous attempts had been made but to no avail, such as in Gavin Romeo Castro V The Clerk, Nairobi City County Assembly & another.
11. Similarly, the provisions of Section 7 of the *Civil Procedure Act* and the decision in Njangu V Wambugu & another NRB HCCC No. 2340 of 1991 were cited to urge that the matter raised by the petition as res judicata.
12. Finally, the sentiments of Odunga G.V.J. (as he then was) in Republic V Attorney General and another ex parte James Alfred Koroso as well as those of the Court of Appeal in Uhuru Highway Development Ltd V Central Bank of Kenya Exchange Bank Ltd (In Liquidation) & Kamlesh Mansukhlal Pattni were relied upon to reinforce the submission that the petition was res judicata.
13. The court was urged to dismiss the petition.

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

14. Counsel for the 1<sup>st</sup> Respondent addressed the issue of jurisdiction exclusively and urged that the gravamen of the petition was whether the appointment of the 1<sup>st</sup> Respondent by the 2<sup>nd</sup> Respondent fell within the provisions of Section 12 of the *Employment Act* and Labour Relations Court Act, 2011 read with Article 162(2) of *the Constitution* of Kenya, 2010 and whether it can be deemed to be an employment dispute.
15. Counsel urged that it had already been determined that the legitimacy and appointment of the 1<sup>st</sup> Respondent though contested was held to have been in accordance with the provisions of Section 8, 13 and 14 of the County Government Act as read with Section 18 of the Act which lead to a formal Gazettement of the 1<sup>st</sup> Respondent.
16. Reliance was made on Civil Appeal No. E136 of 2022 where the Court of Appeal held that the court had no jurisdiction as the Petitioner had not demonstrated any employer/employee relationship between him and the appellant.



17. That the Petition before the court did not fall within the provisions of Section 12(1)(f) and could not be included by virtue of the words “connected purposes” in the preambular provision of the Act to accord the court the requisite jurisdiction.
18. That the fact that a right had been violated in a competitive recruitment process was insufficient to accord a court of law jurisdiction.
19. Reliance was made on the decision in Samuel Kamau Macharia 7 another V Kenya Commercial Bank Ltd & 2 others (2012) eKLR to underline the sources of jurisdiction as was the decision in the Matter of the Interim Independent Electoral Commission (Applicant) No. 2 of 2011.
20. The court was invited to find that it had no jurisdiction to hear and determine the issue.

### **Petitioner’s submissions**

21. Counsel addressed the issues of locus standi, employer/employee relationship, nature of the issues raised, res judicata and the Court of Appeal decision in Civil Appeal No. E136 of 2022.
22. As regards standing, counsel urged that the argument that the issue in the petition did not fall within Section 12(2) of the *Employment and Labour Relations Court Act*, 2011 was too narrow as the issues raised were constitutional under Article 22(1) and (2) and standing was liberalized. The decision in Karianjahi Waiganjo V Attorney General & 4 others (2013) eKLR was relied upon to reinforce the submission.
23. Counsel urged that the Petitioner was an avolent follower of public matters to ensure constitutionalism.
24. The decision in R V Greater London Council ex parte Blackburn (1976) 3 All ER 184 was also relied upon.
25. Reliance was also made on Article 258 of *the Constitution* of Kenya, 2010 to urge that the Petitioner was acting in the public interest.
26. On jurisdiction, counsel urged that the issue is determined on a case by case basis and Civil Appeal No. E136 of 2022 was inapplicable as
  1. There was an employer/employee relationship between the 1<sup>st</sup> and 2<sup>nd</sup> Respondent.
  2. That in NRB Civil Appeal No. E255 of 2021 Clerk of Nairobi County Assembly V Speaker Nairobi County Assembly & another, the appellant’s appeal was dismissed and the decision of Maureen Onyango J. in Petition 194 of 2019 upheld.
27. That the Court of Appeal in Civil Application No. E305 Edward Obwori Gichana held that the applicant’s appointment was in violation of some court orders and was null and void.
28. Counsel submitted that during the pendency of petition No. 194 of 2019, Hon. Maureen Onyango J. orders made on 5<sup>th</sup> August, 2020 were violated when the 1<sup>st</sup> Respondent was appointed as Clerk of the County Assembly, a position he holds to date having been nullified by the court hence there was an employer/employee relationship between the 1<sup>st</sup> Respondent and the 2<sup>nd</sup> Respondent and the 2<sup>nd</sup> Respondent had by its conduct exposed the court to ridicule for acting in contempt and abusing the court process and the court ought not to make orders in vain.



29. As to whether the issues raised were analogous to employment and labour, counsel urged that since the 1<sup>st</sup> Respondent was the Clerk of the County Assembly, he had a contract and employment law was applicable.
30. On res judicata, counsel urged that the petition was not re judicata as the petitioner feels aggrieved by the acts of the 2<sup>nd</sup> Respondent and his only plea was for the 2<sup>nd</sup> Respondent to follow the law in appointing the Clerk to the County Assembly. Since the 1<sup>st</sup> Respondent's appointment was in contravention of law and thus null and void and the Preliminary Objection was not anchored on res judicata and the requirements as highlighted in Lillian Njeri Muranja V Virginia Nyambura Ndiba and another (2014) eKLR were not demonstrated and the refusal grant of the plea should be exercised cautiously not to lock out persons from access to justice.
31. Finally, no formal application had been brought on res judicata.
32. Finally, as regards Civil Appeal No. E136 of 2022, counsel urged that the factual basis that led to the decision of the Court of Appeal cannot apply to the instant petition.

### **Determination**

33. The issues for determination are whether the Preliminary Objection herein meets the threshold of a Preliminary Objection and whether the court had no jurisdiction by virtue of the Court of Appeal decision in Civil Appeal No. E136 of 2022.
34. In the often cited sentiments of the Court of Appeal in the celebrated decision in Mukisa Biscuits Manufacturing Co. Ltd V West End Distributors Ltd (1969) EA 696, 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 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 . . .”
35. According to Sir Charles Newbold P.  

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law . . .”
36. The concept has been explained in other decisions such as John Musakali V Speaker County Assembly of Bungoma (2015) eKLR and Oraro V Mbaja (2005) eKLR among others.
37. From the foregoing, it is clear that since the 2<sup>nd</sup> Respondent is challenging the court's jurisdiction to entertain the petition herein, the objection meets the threshold of a Preliminary Objection as contemplated by law.
38. The gravamen of the Preliminary Objection dated 24<sup>th</sup> April, 2023 is that the court lacks jurisdiction by virtue of the Court of Appeal decision in The Clerk, Nakuru County Assembly and 2 others V Kenneth Odongo and 3 others dated 14<sup>th</sup> April, 2023.
39. In that case, the Petitioner sought a declaration that the process leading to the nomination of the interested parties as Chief Officers of the Nakuru County was unconstitutional, irregular and illegal and hence null and void ab initio.



40. The Employment and Labour Relations Court dismissed a Preliminary Objection and held that the court had jurisdiction to hear and determine the suit.
41. However, the Court of Appeal found that the Employment and Labour Relations Court had no jurisdiction to hear and determine the matter for reasons elucidated in the judgement.
42. After a review of the provisions of Article 162(2) of *the Constitution* of Kenya, 2010 and Section 12 of the *Employment and Labour Relations Court Act*, 2011, the court held inter alia;

“It is evident that from the provisions of both Article 162(2) and Section 12 of the *Employment and Labour Relations Court Act*, the jurisdiction of the Employment and Labour Relations Court is limited to matters relating to Employment and Labour Relations.

We have carefully perused the impugned petition and note that the 1<sup>st</sup> Respondent was challenging the process leading to the nomination of the interested parties therein as Chief Officers of the 3<sup>rd</sup> Respondent. The said officers had not been appointed as the process was halted before they could be vetted. The appointment was to be done after one is successful in the vetting. Additionally, the 1<sup>st</sup> Respondent was neither an employee of the appellants nor had he been shortlisted by the appellants for vetting and possible subsequent approval for appointment.

There was therefore no existence of an employer/employee relationship between the appellants and the 1<sup>st</sup> Respondent or indeed any other matter akin to the employment nor any labour issue as contemplated by the provisions of Section 12(1)(a – j) of the *Employment and Labour Relations Court Act* . . .

By parity of reasoning, none of the interested parties had a contract, be it written or oral and as the process towards creating the relationship of an employer/employee were halted. Section 12 of the Employment and Labour Relations Court was inapplicable . . .

Having found that there was no employee/employer relationship between the appellants and the 1<sup>st</sup> Respondent nor an Employment and Labour Relations dispute as contemplated by Article 162(2) of *the Constitution* or Section 12 of the *Employment and Labour Relations Court Act*, it is our view that the court fell into error when it proceeded to assume and arrogate into itself a jurisdiction that it did not have . . .”

43. The Court of Appeal adopted with approval the sentiments of Nduma J. in *Nick Githinji Ndichu V Clerk, Kiambu County Assembly and another* (Supra) cited by counsel to underline the fact that steps taken towards recruitment, such as advertisement, shortlisting and interviewing were not envisaged under Section 12 of the *Employment and Labour Relations Court Act*, 2011.
44. Reliance was also made on the Supreme Court decision in *Republic V Karisa Chengo* (2017) eKLR as well as the Court of Appeal decisions in *Attorney General and 2 others V Okiya Omtata Okoiti and 14 others* (2020) eKLR and *National Social Security Fund Board of Trustees V Kenya Tea Growers Association and 14 others* (2023) eKLR to underscore the jurisdiction of this court.
45. The court further observed;

“In our view, the Employment and Labour Relations Court ought to have analysed the crux of the petition before it. Further and with utmost respect to the learned judge, it is our view that he could not rely on the preamble to the *Employment and Labour Relations Court Act*



which provides that the court will hear and determine disputes relating to the Employment and Labour Relations and “for connected purposes.” He also erred by interpreting the word “including” in Section 12 of the *Employment and Labour Relations Court Act* to arrogate him a jurisdiction that he did not have . . .”

46. The court is guided by these sentiments.
47. While counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondent urge that the court had no jurisdiction, the petitioner insists that indeed the court has jurisdiction.
48. Whereas the Respondents urge that there was no employment relationship between the petitioner and the 2<sup>nd</sup> Respondent, the Petitioner’s counsel submitted that there was an employment relationship between the 1<sup>st</sup> and 2<sup>nd</sup> Respondent as he had been appointed and the petitioner was challenging the appointment as opposed to the process which was the issue in Civil Appeal No. E136 of 2022.
49. The decision of the Court of Appeal in Civil Appeal No. E136 of 2023 would appear to suggest that (at page 15) that the 1<sup>st</sup> Respondent had to be an employee of the 2<sup>nd</sup> Respondent and had been shortlisted for vetting, he would have been in a position to sustain the petition.
50. It is common ground that the petitioner herein is not an employee of the 2<sup>nd</sup> Respondent nor is the dispute herein among those contemplated by the provisions of Section 12(1) of the *Employment and Labour Relations Court Act*, 2011 and Article 162(2) of *the Constitution* of Kenya, 2010.
51. It requires no gainsaying as aptly captured by Nyarangi J. A in a celebrated sentiments in Owners of the Motor Vessel “Lillian S” V Caltex Oil (K) Ltd (1989) that,

“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 a 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 . . . Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”
52. As held by the Supreme Court in Samuel Kamau Macharia & another V Kenya Commercial Bank & others (Supra), a court of law derives its jurisdiction from *the constitution* or legislation or both, without which it has no power to make one more step.
53. Although Article 162(2)(a) of *the Constitution* of Kenya, 2010 provides for the establishment of a court to hear and determine disputes relating to employment and labour, Sub-Article (3) is clear that “Parliament shall determine the jurisdiction and functions of the courts contemplated in Clause (2).”
54. Arguably, since Article 162(3) of *the Constitution* of Kenya, 2010 is couched in mandatory terms, the jurisdiction of the Employment and Labour Relations Court is as defined by the provisions of Section 12(1) of the Employment and *Labour Relations Act*, 2011 as contemplated by Article 162(2) (a) with jurisdiction to interpret the provisions of *the Constitution* of Kenya, 2010 on matters arising in employment and labour disputes.
55. Section 12(1) of the Employment and *Labour Relations Act*, 2011 exemplifies the various categories of disputes in respect of which the court has jurisdiction and although the provision is inexhaustive, any additional category of dispute added to the list must be ejus dem generis the list in paragraph (a – j) of Section 12(1) of the *Employment and Labour Relations Court Act*, 2011.



56. The foregoing position finds support in the Supreme Court decision in Republic V Karisa Chengo & another (Supra) as follows;

“ Although the High Court and the specialised courts are of the same status, as stated, they are different courts. It also follows that the judges appointed to those courts exercise varying jurisdiction, depending upon the particular court to which they were appointed. From a reading of the statute regulating the specialized courts, it is a logical inference, in our view, that their jurisdictions are limited to the matters provided for in those statutes . . .”

57. In sum, judicial authority is unambiguous that for a party to invoke the jurisdiction of the Employment and Labour Relations Court, it must ensure that the pith and substance of the dispute falls within the ambit of the provisions of Section 12(1) of the *Employment and Labour Relations Court Act*, 2011 or is incidental thereto failing which the court has no jurisdiction

58. In the instant suit, it is the Petitioner’s case that the 1<sup>st</sup> Respondent was appointed as Clerk, County Assembly of Nairobi in contravention of court orders, a wrong, which in the courts view is remediable by contempt proceedings as opposed to re-litigating the issues that have been in court since 2019 bearing in mind that the Petitioner took no step to prosecute the petition for almost 12 months yet it had been filed under certificate of urgency on 11<sup>th</sup> May, 2021.

59. The Petitioner is thus questioning the circumstances in which the appointment took place analogous to the circumstances in Civil Appeal No. E136 of 2022.

60. Finally, and as adverted to above, the Petitioner’s dispute with the 2<sup>nd</sup> Respondent is essentially violation of court orders which is neither an employment nor labour relations dispute as contemplated by Article 162(2) of *the Constitution* of Kenya and Section 12(1) of the *Employment and Labour Relations Court Act*, 2011.

61. In sum, guided by the Court of Appeal decision in Civil Appeal No. E136 of 2022 and the foregoing analysis, the court is persuaded that this is an opportune moment to down its tools for want of jurisdiction to hear and determine the petition herein.

62. In the premises, it is the finding of the court that the 2<sup>nd</sup> Respondent’s Preliminary Objection dated 24<sup>th</sup> April, 2023 is merited and the same is allowed.

63. Parties shall bear own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 25<sup>TH</sup> DAY OF JULY 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.

**DR. JACOB GAKERI**

**JUDGE**

