



**Nyagah v Governor Nairobi City County & 4 others (Employment and Labour Relations Cause E135 of 2022) [2023] KEELRC 2064 (KLR) (8 August 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2064 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E135 OF 2022**

**AN MWAURE, J  
AUGUST 8, 2023**

**BETWEEN**

**MARTIN GITAU NYAGAH ..... CLAIMANT**

**AND**

**THE GOVERNOR NAIROBI CITY COUNTY & 4 OTHERS & 4  
OTHERS ..... RESPONDENT**

**RULING**

1. The court herein is handling three preliminary objections which are similar. They are as follows
  - i. Preliminary objection of 5<sup>th</sup> interested party dated February 14, 2023.
    1. That the petition as filed in its entirety, offends section 58(5) of the County Government Act as read with article 251 of the Constitution, 2010.
    2. That this honourable is divested of jurisdiction to hear and determine the petitions as held in Attorney General & 2 Others vs Okiya Omtata Okoiti & 14 others (2020) eKLR.
    3. That in view of the express provisions of section 58(5) of the County Government Act as read with article 251 of the Constitution 2010 an the doctrine of legal precedence espoused in Attorney General & 2 Others vs Okiya Omtata Okoiti & 14 Others (2020) eKLR this honourable court is divested of jurisdiction to hear and determination the petition and;



4. That owing to paragraphs 1, 2, and 3 herein above the petition as laid is a legal nullity; a non starter in law, incompetent and hopelessly defective craving to be dismissed *ex debito justitiae*.
- ii. Preliminary objection by 2<sup>nd</sup> interested party as follows and dated November 8, 2022.
1. This honourable court lacks jurisdiction to remove members of the County Public Service Board from office as it is the preserve of the County Assembly as clearly expressed under section 58(5) of the [County Governments Act](#), No 17 of 2012.
- iii. 1<sup>st</sup> Interested Party's preliminary objection dated February 9, 2023 also challenging the jurisdiction of this honourable court.
2. 2<sup>nd</sup> respondent and 1<sup>st</sup> interested party preliminary objection dated October 14, 2022 which states that the honourable court has no jurisdiction to hear and determine this suit. They aver the suit against 2<sup>nd</sup> respondent and 1<sup>st</sup> interested party is an abuse of the court process. The 2<sup>nd</sup> respondent and 1<sup>st</sup> interested party in the preliminary objection has not preferred the grounds that they assert the suit is an abuse of the court process and further why this honourable court lacks jurisdiction to hear this case.
  3. The court has nothing to consider on that particular preliminary objection.
  4. Meanwhile the court has considered the petitioner submissions dated February 17, 2023 and as relates to the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> interested parties preliminary objection.
  5. Section 58(5) of [County Government Act](#) provides as follows:
 

“That members of the board may only be removed from office on grounds set out of the removal of members of constitutional commission under article 251(1) of the [constitution](#).”
  6. The court has considered the pleadings and the submissions by the respective parties. The court has observed this is a case that touches on constitutional issues and until it is heard and evidence is adduced it will not be possible to tell if there are any constitutional violations. That is why it will be important to submit the case for hearing before a court which has mandate to hear constitutional matters related to employment disputes.
  7. The case of [International Centre of Insect Physiology and Ecology \(ICIPE\) vs Nancy McNally](#) (2018) eKLR the Court of Appeal held:
 

“There cannot be any argument that ELRC is clothed with jurisdiction to hear and determine such constitutional issues as and when they arise from employment and labour relations. Any doubt on that jurisdiction were settled in case of *United States International University (USIU) vs Attorney General* (2012) which was upheld by this court in *Daniel N Mugendi vs Kenyatta University & 3 Others* (2013) case.

“We are not in doubt too that the relationship between the appellant and the respondent was not a private matter between the two parties but a public ..... intrinsically connected to the operation of the appellant.”
  8. The issue of a preliminary objection is a point of pure law that will normally not need to be proved or to call the court to exercise its discretion. In this case there are issues for court's consideration because



the points raised by the respondents and interested parties are not really points of law as they require evidence to be adduced.

9. The court is not satisfied this is a pure point of law and secondly the court is not satisfied there is no employer and employee relationship. Therefore the preliminary objections raised by the respondents and interested parties are not merited. Rather they are all dismissed and the court orders the main petition proceed for hearing. Costs will be in the cause.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 8<sup>TH</sup> DAY OF AUGUST 2023.**

**ANNA NGIBUINI MWAURE**

**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 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.

A signed copy will be availed to each party upon payment of Court fees.

**ANNA NGIBUINI MWAURE**

**JUDGE**

