



**Wataka & 3 others v Attorney General & 3 others (Petition E011 of 2022)
[2023] KEELRC 3173 (KLR) (29 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3173 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
PETITION E011 OF 2022
JW KELI, J
NOVEMBER 29, 2023**

BETWEEN

**FRANCIS MBORORA WATAKA 1ST PETITIONER
CENTRINE NAFULA WEKESA 2ND PETITIONER
BENSON MILIMO MAKHINDE 3RD PETITIONER
PETER WANJALA PEPELA 4TH PETITIONER**

AND

**THE ATTORNEY GENERAL 1ST RESPONDENT
DEPUTY COUNTY COMMISSIONER BUNGOMA WEST ... 2ND RESPONDENT
EVANS OKARIKODI EMUKULE 3RD RESPONDENT
NELSON OPILI OKISAI 4TH RESPONDENT**

JUDGMENT

1. The Petitioners who are residents of the Nambuya area in the Tamulega Location, Malakisi Division in Bungoma West District, Bungoma County vide Petition dated 26th June 2023 challenged the procedure and process used in the selection and appointment of the Chief Tamulega Location and the Assistant Chief of Nambuya sub-Location, alleging violation of Articles 1,2,3, 10, 22,35 & 47; Section 4,5(1) & (2)a, b, c, e & h, 6,7(1)a,b,c & d, 9(1) (2)d, 10(1)(2)a,b,c & d and (3) of the [Public Service \(Values and Principles\) Act](#), No. 1 A 2015 and seeking the following reliefs: -
 - a. A Declaration do issue, that the 1st Respondent's and its panel's action of appointment and Employment of Evans Okarikodi Emukule and Nelson Opili Okisai as Chief Tamulega Location and Assistant Chief Nambuya Sub-Location did not follow due process therefore null and void.



- b. An order that this Honourable Court be pleased to direct the Deputy County Commissioner Bungoma West and his Panel to repeat the process of selecting and Employment of positions of Chief and Assistant Chiefs of Tamulega and Nambuya Units in accordance with the set out legal requirements
 - c. That there be no orders as to costs as this is a public interest matter.
 - d. Any other relief amenable in the circumstances.
2. The Petition was brought under certificate of urgency dated 26th June 2023 with Notice of Motion application supported by a Supporting affidavit sworn on 26th June 2023. The court granted interim orders and ordered that the issues in the Notice of Motion seeking similar orders as in the Petition be canvassed for determination under this judgment.
 3. The Petition was accompanied by a verifying affidavit sworn by the 1st Petitioner on behalf of the other Petitioners on 26th June 2023. Additionally, they also filed a List of witnesses dated on even date and statements by each of the Petitioners all dated 26th June 2023 accompanied by their bundle of documents.
 4. Only the 1st Respondent entered appearance for itself and the 2nd Respondent on 26th September 2023, but did not file any response to the petition. The Petition was thus unopposed.

Written submissions

5. The court directed that since the Petition was unopposed the same be canvassed by way of written submissions. The Petitioners' written submissions drawn by Akenga Kimutai & Associates Advocates were dated 16th October 2023 and received in court on even date. The Petitioners filed authorities relied on together with the written submissions.

PETITIONER'S CASE IN SUMMARY

The case as per statements by the Petitioners dated 26th June 2023 and supporting affidavit to application.

6. The Petitioners are residents of the Nambuya area in the Tamulega Location, Malakisi Division in Bungoma West District(FMW Ia, Ib,1c & 1d) and filed the instant petition to challenge what they termed as the unconstitutional appointment of the chief for Tamulega Location and the Assistant Chief Nambuya Sub-location by the 2nd Respondent and his panel, who failed, ignored or refused to heed to all the information provided by the members of the public on the suitability of the selected candidates to act as Chief and Assistant chief.
7. The Petitioners stated that the candidates so selected as Chief(3rd Respondent)and Assistant Chief (4th Respondent) come from the same Tribe and clan and are Blood-related by virtue of being brothers; from the Komolo Clan, Iteso tribe thus offending the laws of Kenya.
8. That the said 2nd Respondent and his panel disregarded the law on gender balance, regional balance, inclusivity, fairness, promptness, and use of public participation in arriving at the appointment of the 3rd and 4th respondent.
9. The Petitioners argue that the 2nd Respondent in disregard to gender equality appointed men only from the Iteso Group when the Area is comprised of Bukusu, Sabaoti, and Iteso Habitants offending [the Constitution](#).



10. That the Petitioners supplied information relating to the unsuitability of the 3rd and 4th Respondents based on their blood relations through the Assistant County Commissioner, Malakisi Division, and requested the 3rd and 4th Respondents to submit their response regarding the Petitioners' information, but the same was ignored or shelved necessitating the Petitioners to come to court(FMW 4(a) and 4(b).
11. The Petitioners state that the 3rd Respondent, who is the Chief of Tamulega Location, Evans Okarikodi Emukule, is a son of Luke Emukule Opagala while the 4th Respondent, the Assistant Chief of Nambuya in Tamulega Location, Nelson Opili Okisai was the son of John Okisai Opagala, both whom are sons of the Late Joram Opagala.
12. The Petitioners state that the Bungoma West Deputy County Commissioner and his panelists are rife with offending the law as they recently canceled and re-advertised the position of Assistant Chief of Tamulega Sub-Location whom the Petitioners state was a son of an immediate retired Assistant Chief, the same having being necessitated by public outcry. The Petitioners stated that the said positions have never been filled since January 2022 when the same fell vacant.(FMW 2a, 2b, 3a & 3b)
13. The Petitioner seeks for the Court to revoke or cancel the appointment of the chief for Tamulega (3rd Respondent) and that of the Assistant Chief for Nambuya sub-location (4th Respondent) and the entire decision of the Deputy County Commissioner Bungoma West and his panel.
14. The Petitioners pray that the Court directs the 2nd Respondent to start afresh the process of selecting and employing the Chief and Assistant Chief by the law and under a newly constituted panel.

DETERMINATION

Issues for determination.

15. The Petitioner addressed the following issues in their joint written submissions:-
 - a. Whether due process was followed in the recruitment of the Chief and Assistant Chief of the Tamulega location and Nambuya Sub-Location.
 - b. Whether the petitioners are entitled to the reliefs sought.
16. The Respondents did not file any submissions.
17. The Court discerned that the issues for determination under the Petition are as follows:-
 - a. Whether the Court has jurisdiction to handle and determine the matter.
 - b. If (a) in the affirmative Whether due process was followed in the recruitment of the Chief and Assistant Chief of the Tamulega location and Nambuya Sub-Location.
 - c. Whether the Petitioners are entitled to the reliefs sought.

Whether the Court has jurisdiction to handle and determine the matter.
18. The jurisdiction of the Court flows from *the Constitution* and any written law. The court cannot assume jurisdiction. The Petition is unopposed leaving the court to decide suo-moto whether or not it has jurisdiction.
19. The Petitioners describe themselves as residents of Nambuya Area, Tamulega Location Malakisi Division in Bungoma West District, Bungoma County. They contest the process of appointment of the Chief and Assistant Chief Tamulega Location and Nambuya sub-location respectively. The Petitioner



allege that 3rd and 4th Respondents appointed as Chief and sub-Chief Respectively are from the same jurisdiction, same tribe, blood related as brothers which all offend the laws of the land.

20. The Court is created under Article 162(2)(a) of *the Constitution* to wit:- “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; and (b) the environment and the use and occupation of, and title to, land. (3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).”
21. Pursuant Article 162(3)(supra) Parliament enacted the *Employment and Labour Relations Court Act* No. 20 of 2011. Section 12 of the Act provides for the Jurisdiction of the Court to wit:- “(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 the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including — (a) disputes relating to or arising out of employment between an employer and an employee; (b) disputes between an employer and a trade union; (c) disputes between an employers' organisation and a trade unions organisation; (d) disputes between trade unions; (e) disputes between employer organizations; (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; and (j) disputes relating to the registration and enforcement of collective agreements. (2) An application, claim or complaint may be lodged with the Court by or against an employee, an employer, a trade union, an employer's organisation, 8 [Rev. 2020] *Employment and Labour Relations Court* No. 20 of 2011 a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose.”
22. The Court of Appeal has had opportunity to interpret the jurisdiction of the Court and in various decisions held that the jurisdiction of the Court stems from the existence of employer employee relationship in employment or labour relations disputes. An applicant being a potential employee can also bring their case to this court to challenge the recruitment process, an employee being defined to include an applicant under section 5(8)(1) of the Employment to wit:- ‘ a "employee" includes an applicant for employment.’ In the instant Petition the Petitioners were not applicants in the recruitment and brought the Petition in public interest.
23. The Court finds no employer employee relationship in the instant petition. The Court upholds the Court of Appeal decision in *Public Service Commission & 4 others v Cheruiyot & 20 others* (Civil Appeal 119 & 139 of 2017 (Consolidated)) [2022] KECA 15 (KLR) (8 February 2022) (Judgment) where the Court pronounced itself on the jurisdiction of the Court as follows:- ‘2.The jurisdiction of the Employment and Labour Relations Court was granted by article 162(2) of *the Constitution* and section 12(1) *Employment and Labour Relations Court Act*, 2011. Subject to section 12, the Employment and Labour Relations Court had jurisdiction to entertain any dispute or any contemplated dispute under section 12(1) but the dispute between the parties had to be related to their employment and/or touching on labour relations. The jurisdiction of the Employment and Labour Relations Court was not limited to the determination of disputes arising out of a contract of employment between an employee and an employer, the court could also determine any constitutional violations of the rights of any party arising from an employee-employer relationship. However, for the court to entertain a petition premised on the breach of a party's fundamental rights under *the Constitution*, the alleged constitutional breach had to be ancillary and incidental to the matters contemplated under section 12 of the Act. 3. None of the petitioners demonstrated an



existing employee-employer relationship with any of the respondents or with any public entity. The 1st petitioner at the hearing conceded that he did not have an employee-employer relationship with any of the respondents. 7. In the absence of an employee-employer relationship, the court that had jurisdiction to entertain and determine the issues raised in the consolidated petitions was the High Court. The High Court had jurisdiction to determine the question of whether a right or fundamental freedom in the Bill of Rights had been violated, infringed or threatened. Under article 165(d)(i), the High Court had jurisdiction to determine whether any law was inconsistent with or in contravention of *the Constitution*.”(emphasis given) The Court of Appeal is binding on this court pursuant to hierarchy of courts and the doctrine of stare decisis. The Court upholds the foregoing decision of the Court of Appeal to apply to the instant petition.

24. The Court on finding it lacks jurisdiction it must down its tools and I hereby do. However to temper justice with mercy and in pursuit of substantive justice I hereby order the transfer of the petition to the High Court Bungoma which has unlimited original jurisdiction to determine constitutional violations under Article 165 of *the Constitution*. I am guided by the Court of Appeal decision in Daniel N Mugendi v Kenyatta University & 3 others [2013] eKLR where (Nambuye, Mwera & Kiage, JJ.A) held that:-

“Believing as we do that the approach taken by Majanja J is the correct one, and in endeavouring to meet the ends of justice untrammelled by procedural technicalities, we set aside the order striking out the appellant’s petition and direct that the High Court do transfer it to the Industrial Court which also has jurisdiction and authority to consider the claims of breach of fundamental rights as pertain to industrial and labour relations matters. It is only meet and proper that the Industrial Court do exclusively entertain those matters in that context and with regard to Article 165(5)(b). And in order to do justice, in the event where the High Court, the Industrial Court or the Environment & Land Court comes across a matter that ought to be litigated in any of the other courts, it should be prudent to have the matter transferred to that court for hearing and determination. These three courts with similar/equal status should in the spirit of harmonization, effect the necessary transfers among themselves until such time as the citizenry is well-acquainted with the appropriate forum for each kind of claim. However, parties should not file “mixed grill” causes in any court they fancy. This will only delay dispensation of justice.”

25. In conclusion the Court holds that it lacks jurisdiction to handle and determine the Petition.
26. The Petition dated 26th June 2023 and Notice of Motion of even date is hereby transferred to High Court Bungoma for hearing and determination. The Interim orders in place are vacated for want of jurisdiction.
27. No order as to costs.
28. It is so ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 29TH DAY OF NOVEMBER 2023

JEMIMAH KELI

JUDGE

In The Presence of:

For Petitioner: -Komora



For Respondent: -Absent

