



REPUBLIC OF KENYA



KENYA LAW
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Omwoyo v Independent Electoral & Boundaries Commission & 3 others (Petition E019 of 2023) [2023] KEELRC 2821 (KLR) (9 November 2023) (Ruling)

Neutral citation: [2023] KEELRC 2821 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION E019 OF 2023
CN BAARI, J
NOVEMBER 9, 2023

BETWEEN

MICHELLE KEMUMA OMWOYO PETITIONER

AND

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION 1ST RESPONDENT

THE SPEAKER, NYAMIRA COUNTY ASSEMBLY 2ND RESPONDENT

NYAMIRA COUNTY ASSEMBLY SERVICE BOARD 3RD RESPONDENT

DOLPHINE NYANG'ARA ONKOBA 4TH RESPONDENT

RULING

1. This ruling relates to the 4th respondent's Preliminary Objection against the applicant/petitioner's Application dated June 24, 2023 based on the following grounds that:
 - a. This honourable court is devoid of jurisdiction to entertain an election matter.
 - b. The present petition violates rule of *sub judice* in view of Nairobi Election Petition Appeal No E014 of 2023 and Nyamira HCC Petition No E005 of 2023, between the same parties over the same subject matter
 - c. The present application and petition is an abuse of the court process and the same has been instituted for forum shopping with ulterior motive to gain some collateral advantage which is illegitimate use of the court process.
2. The preliminary objection was canvassed through Written Submissions and Submissions were filed for all the parties.



The 4th Respondent's Submissions

3. It is submitted for the 4th respondent that this court derives its jurisdiction from both the [Constitution](#) and the statute. It is submitted further that section 12 of the [Employment and Labour Relations Court Act](#), provides for the jurisdiction of this court which should be exercised in accordance with article 162(2) of the [Constitution of Kenya](#).
4. It is the 4th respondent's submission that the petitioner/applicant herein, lodged an election petition against her at Nyamira Chief Magistrates Court *vide* Election petition No E00I of 2022. It is her further submission that the 1st and 4th respondents herein, were parties in that suit.
5. The 4th respondent further submits that the 1st and 4th respondent being disgruntled with the decision of the trial court, appealed to the High Court at Nyamira *vide* Election Petition Appeal No E00I & E003 of 2023. She submits that the two appeals were consolidated and Election petition appeal No E001 Of 2023 was the lead file, and that the High Court upheld the decision of the trial court and dismissed the appeal.
6. It is her submission that she further appealed to the Court of Appeal at Kisumu *vide* Election Petition Appeal No E014 of 2023, and which appeal is pending determination.
7. It is the 4th respondent's submission that the application and petition before this court, though brought as an employment issue, is an issue which can only be resolved by an electoral court. The respondent had reliance on the decision in [Thuo Mathenge v Nderitu Gachagua & 2 others](#) (2013) eKLR to support this position.
8. The 4th respondent further submits that this honourable court cannot arrogate to itself jurisdiction through the craft of legal interpretation or by way of endeavours to discern or interpret the intentions of parliament where the wording of legislation is clear and there is no ambiguity. Reliance was placed on the decision in [Faith Wairimu Gitau v Wanjiku Mubia & another](#) (2017) eKLR to buttress this position.
9. It is submitted that the purpose of the *sub-judice* rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter, so as to avoid abuse of the court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter.
10. It is her submission that the application and petition before this Court was filled on June 26, 2023, whereas the notice of appeal was filed on June 5, 2023. She submits further that the application and petition are an abuse of the court process.

Submissions by the 3rd Respondent

11. The 3rd respondent supports the preliminary objection, and submits that the application and petition herein, is an abuse of the process of this court owing to the existence of Nyamira High Court Petition No E005 of 2023, which raises similar issues.

The Petitioner/Applicant's Submissions

12. It is submitted for the petitioner that she is not seeking any relief that can be sought in an election petition, but she instead, is seeking declaratory reliefs, general damages for violation of her constitutional rights, payment of all of her emoluments and benefits from September 2020, to date and the costs of the petition.



13. The petitioner further submits that under the Notice of Motion application, she is seeking a prohibition order restraining the 3rd respondent from remitting any salaries, allowances, per diems and other related benefits to the 4th respondent, pending the hearing and determination of the application and Petition.
14. It is the petitioner's submission that from the reliefs sought in the petition and application, it is easily discernible that the dispute between her and respondents principally revolve around payments made to the 4th respondent, instead of her. She further submits that a dispute relating to emoluments, salaries, allowances, per diems and other related benefits is clearly an employment dispute and not an election matter as contended by the 4th respondent.
15. It is submitted that the *Employment and Labour Relations Court Act* does not limit or preclude the Employment and Labour Relations Court from hearing applications for redress of a denial or violation of any other right, if that right is in furtherance of a dispute relating to employment and/or labour relations.
16. It is submitted for the petitioner that the issue of sub judice cannot be raised by way of a Preliminary Objection. A party who pleads *sub judice* ought to file a formal application accompanied by a Supporting Affidavit to introduce the other pending matter as an annexure to the Supporting Affidavit. Reliance was had to the holding in *Margaret Wachu Karuri v John Waweru Ribiro* [2021] eKLR to support this position.
17. It is the petitioner's submissions that the present application and petition are not an abuse of the Court process. She submits that the two are meritorious and have been brought by the petitioner in exercise of her constitutional rights.
18. The petitioner urges that the court hears and determines both the application and petition on merit as allowing the Preliminary Objection would be a most draconian act of removing the petitioner from the seat of justice.

Analysis and Determination

19. Upon careful consideration of the 4th respondent's preliminary objection, the petitioner's application and petition, and the submissions by the parties. The following issues commend themselves to me for determination: -
 - i. Whether this Court has jurisdiction to hear and determine the Petition and the Motion
 - ii. Whether the Petition and the Motion offend the *sub judice* rule.
20. Jurisdiction, they say is everything and without it, a court has no power to make one more step. (See *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR).
21. John Beecroft Saunders in "*Words and Phrases Legally Defined*", volume 3 at page 113 defines court jurisdiction as follows:

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of the matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these



characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. 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.”

22. The Supreme Court in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR held 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...”

23. Again, *In the matter of Interim Independent Electoral Commission* [2011] eKLR, the same Court held thus: -

“...a court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of parliament, where the wording of legislation is clear and there is no ambiguity.”

24. This court derives its jurisdiction from both the *Constitution* and the statute. Section 12 of the *Employment and Labour Relations Court Act*, read with article 162(2) of the *Constitution of Kenya*, provides for the jurisdiction of this court

25. Article 162 of the *Constitution* provides for the establishment of the Employment and Labour Relations Court and its jurisdiction thereof. It reads as follows:

“ 162.

- (1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts mentioned in clause (2).
2. Parliament shall establish courts with the status of the High Court to hear and determine dispute 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).”

26. Further, section 12 of the *Employment and Labour Relations Court Act* spells out the jurisdiction of the court as follows: -

- “ 12. The court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to in accordance with article 162(2) of the *Constitution* and the provisions of this Act or any other written law which extend jurisdiction to the court relating to employment and labour relations including



- a. disputes relating to or arising out of employment between and employer and an employee;
- b. disputes between an employer and a trade union;
- c. disputes between employers' organization and a trade union's organisation;
- d. disputes between trade unions;
- e. disputes between employer organisations;
- f. disputes between an employer's organization and trade union;
- g. disputes between a trade union and a member thereof;
- h. disputes between an employer's organization 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."

27. The applicant/petitioner herein, is in a fight with the 4th respondent for a nomination position at the county assembly of Nyamira. It is not disputed that the parties herein, specifically the Petitioner and the 4th respondent, have been before the Magistrate Court at Nyamira, the High Court and are now before the Court of Appeal on the same issue of who the rightful holder of the nomination seat should be. The question then, is whether the Petitioner's case falls within the jurisdiction of this court, going by article 162 of the *Constitution* and section 12 of the *Employment and Labour Relations Court Act*.
28. It is now settled that the Employment Court (ELRC) can determine constitutional issues, but limited only to those arising from an employer-employee dispute. (See *National social Security Fund Board of Trustees v Kenya Tea Growers Association & 14 others* (Civil Appeal 656 of 2022) (2023) KECA 80 (KLR).)
29. The applicant/petitioner is not an employee of any of the Respondents cited in the petition. The Court of Appeal in *Public Service Commission & 4 others v Cheruiyot & 20 others* (Civil Appeal 119 & 139 of 2017 (Consolidated)) [2022] KECA 15 (KLR) (8 February 2022) opined thus: -
- “In the absence of an employee-employer relationship, it is our considered view that the court that had jurisdiction to entertain and determine the issues raised in the consolidated petitions was in fact the High Court. The establishment of the High Court is found at article 165(1) of the *Constitution*. Under article 165(3), the High Court has jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been violated, infringed or threatened. Under article 165(d)(i), the High Court has jurisdiction to determine whether any law is inconsistent with or in contravention of the *Constitution*.”
30. The petition and application herein, does not disclose an employer/employee relationship between the Petitioner and the Respondents. Further, the dispute between the parties is not one that falls within the ambit of section 12 (1) of the *Employment and Labour Relations Court Act*.



31. Further, the issues in the petition concern an electoral process and for which a final verdict is yet to be arrived at, given the pendency of Nairobi Election Petition Appeal No E014 of 2023.
32. In the premise, I return that this Court does not have jurisdiction to hear and determine the applicant/petitioner's application and petition.
33. The 4th respondent's objection succeeds and the applicant/petitioner's application and petition are hereby struck out with costs.
34. The issue of whether or not the petition is *res sub judice*, falls by the way side.
35. Orders accordingly.

SIGNED, DATED AND DELIVERED AT KISUMU THIS 9TH DAY OF NOVEMBER, 2023.

CHRISTINE N. BAARI

JUDGE

