



Okoiti v Attorney General; Njenga (Interested Party) (Petition E101 of 2020) [2022] KEELRC 2 (KLR) (17 February 2022) (Judgment)

Okiya Omtatah Okoiti v Attorney-General; Adrian Kamotho Njenga(Interested Party) [2022] eKLR

Neutral citation: [2022] KEELRC 2 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E101 OF 2020**

J RIKA, J

FEBRUARY 17, 2022

IN THE MATTER OF: ARTICLES 3[1] 22, 48, 50[1], 162 [2] [A], 165[5] [B], 258 & 259[1] OF THE CONSTITUTION OF KENYA, 2020.

IN THE MATTER OF: THE OBLIGATION AND CHECKS PLACED ON THE PRESIDENT TO ENSURE THAT PERSONS HE/SHE APPOINTS AS JUDGES FULFIL THE ELIGIBILITY CRITERIA SET IN ARTICLE 166[2] [3] [4] AND [5] OF THE CONSTITUTION OF KENYA, 2010.

IN THE MATTER OF: THE ALLEGED THREAT TO AND CONTRAVENTION OF ARTICLE 132 [2] [F] OF THE CONSTITUTION OF KENYA, 2010.

IN THE MATTER OF: THE EXERCISE OF THE PRESIDENT’S POWER TO APPOINT PUBLIC OFFICIALS [STATE OFFICERS] WHOM THE CONSTITUTION REQUIRES OR EMPOWERS THE PRESIDENT TO APPOINT.

IN THE MATTER OF: THE JURISDCITION OF THE EMPLOYMENT AND LABOUR RELATIONS COURT, OVER THE EMPLOYMENT OF PUBLIC OFFICIALS, INCLUDING JUDGES OF SUPERIOR COURTS.

IN THE MATTER OF: COMPELLING THE PRESIDENT TO SUBMIT TO THE NATIONAL ASSEMBLY THE NAMES OF THE 41 PERSONS RECOMMENDED BY THE JUDICIAL SERVICE COMMISSION FOR APPOINTMENT AND EMPLOYMENT AS JUDGES OF SUPERIOR COURTS.

IN THE MATTER OF: DOCTRINE OF LEGITIMATE EXPECTATION.

BETWEEN

OKIYA OMTATAH OKOITI PETITIONER

AND

ATTORNEY GENERAL RESPONDENT



AND

ADRIAN KAMOTHO NJENGA INTERESTED PARTY

Jurisdiction of the Employment and Labour Relations Court to determine disputes over the appointment and terms of service of judges of superior courts.

The Employment and Labour Relations Court made determinations about its jurisdiction with respect to state officers, especially judges. The court held that judges of superior courts were state officers who were appointed as such. It also held that as state officers, the judges were workers whose appointments could be the subject of proceedings before the Employment and Labour Relations Court which had jurisdiction to adjudicate on such disputes. The court also made findings that amongst the judges of the superior courts, it was only the Chief Justice and the Deputy Chief Justice whose appointments required vetting and approval by the National Assembly.

Reported by John Ribia

Jurisdiction – jurisdiction of the Employment and Labour Relations Court – where an issue presented to the ELRC was pending at the Court of Appeal – whether the Employment and Labour Relations Court had the jurisdiction to determine a matter/issue that was pending at the Court of Appeal.

Jurisdiction – jurisdiction of courts of equal status to the High Court – jurisdiction of the Employment and Labour Relations Court and the Land and Environment Court vis-à-vis the High Court – jurisdiction to interpret the Constitution – jurisdiction to determine a question on the violation of human rights – whether courts of equal status to the High Court (specialised courts) had the jurisdiction to interpret the Constitution and to determine a question on the violation of human rights – Constitution of Kenya, 2010, articles 162 (1) and (2) and 165.

Jurisdiction – jurisdiction of the Employment and Labour Relations Court – scope of the jurisdiction of the Employment and Labour Relations Court – whether the Employment and Labour Relations Court had the jurisdiction to determine employment disputes relating to judges of the superior courts – whether the ELRC had jurisdiction over the appointment/election and dismissal/impeachment of elected state officers – whether the Employment and Labour Relations Court had the jurisdiction to determine disputes over the appointment and terms of service of judges of superior courts – Constitution of Kenya, 2010, articles 162(2)(a), 165 172 and 230; Employment and Labour Relations Court Act, 2011, section 12.

Constitutional Law – separation of powers – role of the judiciary vis-à-vis the role of the legislature in the appointment of the Chief Justice and the Deputy Chief Justice – where candidates for the above positions were to be vetted by both the Judicial Service Commission and the National Assembly – whether the requirement that the Chief Justice and the Deputy Chief Justice were to be vetted and approved by both the Judicial Service Commission and the National Assembly was a violation of the doctrine of separation of powers.

Constitutional Law – executive – Office of the President – power of the President in nominating, appointing and dismissing state and public officers – judges – whether the power of the President in nominating, appointing and dismissing state and public officers also applied to the appointment of judges of superior courts – Constitution of Kenya, 2010, article 132(2) and 166(1).

Constitutional Law – judiciary – appointment and dismissal of judges of superior courts – role of the Judicial Service Commission – role of the President – role of the Judicial Service Commission vis-à-vis the role of the President – whether the recommendations of the Judicial Service Commission on appointment of judges bound the President – whether the recommendations of the Tribunal for Removal of a Judge on the dismissal of a judge bound the President – Constitution of Kenya, 2010, articles 132(2), 166(1) and 168(7) and (8).

Words and Phrases – state officer – distinguishing of the term state officer – whether a state officer could be distinguished from a worker or an employee – Constitution of Kenya, 2010, article 77.

Words and Phrases – employment – definition of – the act of employing someone; the state or act of being employed; and work, occupation or profession in which one earned a living – Collins Dictionary.



Words and Phrases – labour relations – definition of – the collective relations between management of an organization and its employees, and employees’ representatives. A set of such relations, in a wider context, such as an industry, or a national economy – Collins Dictionary.

Brief facts

The petitioner was aggrieved that after a period of more than a year, the President had failed/refused/neglected to appoint 6 of the 41 persons as Judges, in accordance with the recommendations of the Judicial Service Commission (JSC). Following the President’s refusal to appoint 41 nominees of the JSC as judges of various superior courts of Kenya, several suits had been filed that sought for the President to act in accordance with the recommendations of the JSC, by making the appointments.

The petitioner filed the instant suit seeking for the President to forward the names of JSC judgeship nominees to Parliament for approval and for orders that claims of the appointment and terms of service of judges of superior courts were well within the jurisdiction of the Employment and Labour Relations Court.

The respondent opposed the petition on grounds that the ELRC lacked the jurisdiction to determine the instant matter as there was no trace of an employer-employee relationship. The respondent also contended that the matter was *res judicata* and *sub judice* as the same or similar issues were determined at the High Court and some of the issues were pending determination by the Court of Appeal.

Issues

- i. Whether the Employment and Labour Relations Court had the jurisdiction to determine a matter that was pending at the Court of Appeal.
- ii. Whether the power of the President in nominating, appointing and dismissing state and public officers also applied to the appointment of judges of superior courts.
- iii. Whether the requirement that the Chief Justice and the Deputy Chief Justice were to be vetted and approved by both the Judicial Service Commission and the National Assembly was a violation of the doctrine of separation of powers.
- iv. Whether the recommendations of the Judicial Service Commission on appointment of judges bound the President.
- v. Whether the recommendations of the Tribunal for Removal of a Judge on the dismissal of a judge bound the President.
- vi. Whether courts of equal status to the High Court (specialised courts) had the jurisdiction to interpret the Constitution and to determine a question on the violation of human rights.
- vii. What was the scope of the jurisdiction of the Employment and Labour Relations Court?
- viii. Whether the Employment and Labour Relations Court had the jurisdiction to determine employment disputes relating to judges of the superior courts.
- ix. Whether the ELRC had jurisdiction over the appointment/election and dismissal/impeachment of elected state officers.
- x. Whether the Employment and Labour Relations Court had the jurisdiction to determine disputes over the appointment and terms of service of judges of superior courts.
- xi. Whether a state officer could be distinguished from a worker or an employee.
- xii. Whether by not appointing judges to superior courts as nominated by the Judicial Service Commission, the President had violated the legitimate expectation of the petitioner.

Held

1. Live issues at the Court of Appeal were issues that the Supreme Court could not to consider. The court had to defer to the appellate jurisdiction.
2. Article 132 of the Constitution stated that the President was to nominate, and with the approval of the National Assembly appoint and could dismiss the Cabinet Secretaries, the Attorney-General, High Commissioners, Ambassadors and Diplomatic and Consular Representatives and any other state or public officers in accordance with the Constitution. Article 132(2)(f) was not intended to apply in the



- appointment of judges. If it was intended that the appointment of all judges, other than the Chief Justice and the Deputy-Chief Justice, was subject to approval of the National Assembly, nothing would have been easier than for the Constitution to say so under article 166(1).
3. The officers the President was granted a freehand to nominate, and with the approval of National Assembly to appoint, and dismiss, under article 132(2) were principally officers of the Executive Branch of the Government. The Constitution was careful in maintaining clear lines on separation of powers. To read the provisions of article 132(2)(f) into article 166(1)(b) would result in disturbing those lines on separation of powers.
 4. The role of the peoples' watchdog in appointment of judges of the superior court, was vested in the Judicial Service Commission, not in the National Assembly. Unlike other officers who were subject to the approval of the National Assembly, all judges were subjected to rigorous vetting and interviewing by the Judicial Service Commission (JSC).
 5. Sovereign power of the people was exercised through the Judicial Service Commission. The candidates to judgeship, unlike officers in the executive, applied for their positions. They were vigorously interviewed by the Judicial Service Commission, which called for public views on individual candidates in that process. They did not just crawl out of the woodwork.
 6. The fact that the Chief Justice and Deputy Chief Justice went through the vetting by the JSC and another round of vetting and approval by the National Assembly, was a constitutional aberration, which was not to lead to a justification for vetting of other judges of the Superior Courts by the National Assembly. The requirement that the Chief Justice and Deputy Chief Justice were vetted and approved by the National Assembly, was an assault on the doctrine of separation of powers, judicial independence, and failed to appreciate the role of the JSC in the process, as the organ reposed with the sovereign power of the people, in appointment of all judges. There was no persuasive reason why the Chief Justice and Deputy Chief Justice, were to be taken through the approval process of the National Assembly.
 7. The involvement of the National Assembly in appointment of the Chief Justice and the Deputy Chief Justice, was not an idea which should have been extended to other judges as proposed by the petitioner. It was an aberration. To the contrary, the Chief Justice and Deputy Chief Justice had to be extricated from that requirement through constitutional reform. The proposal for vetting of judges by the National Assembly could only lead to politicisation of the judiciary, more so in the context of Kenya's fractious politics, and not enhance separation of powers and judicial independence.
 8. Cabinet Secretaries, the Attorney-General, Secretary to the Cabinet, Principal Secretaries, High Commissioners, Ambassadors, Diplomatic and Consular Representatives, did not apply for those positions. They did not sit interviews and were not vetted publicly by the Public Service Commission. They were not recruited competitively. The President had the prerogative in their appointment. Many came out of the woodwork. They were appointed through executive prerogative, with no set constitutional standards on their qualifications for the positions. Article 166 had set clear standards for appointees to judgeship. State Officers were appointed through presidential fiat, and rightly subjected to the approval of the National Assembly upon nomination by the President.
 9. The nominees for judgeship, did not have to be taken to the National Assembly for approval. The argument that the National Assembly was the sole peoples' representative, and therefore mandated to vet all state officers was flawed. There were various organs designated by the Constitution as repositories of the peoples' sovereign power. They, and not the National Assembly alone, could exercise the role of public watchdog in appointment of officers serving in the respective arms of the Government. Article 132(2)(f) of the Constitution extended to any other state or public officer whom the Constitution required or empowered the President to appoint or dismiss.
 10. While the power of the President to appoint was a live issue at the Court of Appeal, article 132(2)(f) of the Constitution referred to the power to appoint or dismiss. The President did not have the power to



- dismiss any judge. Judges were removed from office under article 168 on grounds set thereunder. The process of removal was initiated by the Judicial Service Commission, in exercising the sovereign power of the people, under article 168(2). The Judicial Service Commission acted on its own motion, or on the petition of any person made to the Judicial Service Commission.
11. The Judicial Service Commission sent the petition to the President, if there was ground for removal, under article 168(4) of the Constitution. The President was conferred with the power to suspend the concerned judge acting on the recommendations of the Judicial Service Commission. Under article 168(5)(b), the President was empowered to appoint a Tribunal for the Removal of a Judge (Tribunal) to enquire into the allegations against the judge.
 12. The President's power in the process of dismissal of judges was confined to their suspension and the formation of Tribunals to inquire into the allegations against them. The decision for removal of a judge was made by the Tribunal, not the President. Article 168(7) and (8) of the Constitution referred to a decision of the Tribunal. Reference was also made to binding recommendations of the Tribunal, which was the same thing as a binding decision. Unlike the contested recommendations of the Judicial Service Commission made with regard to appointment of judges, the recommendations of the Tribunal on removal of judges were expressly stated to be binding on the President. The Tribunal made a binding decision, which was appealable at the Supreme Court of Kenya.
 13. Judges of the Superior Court were not among the State Officers the President could dismiss under article 132(2)(f) of the Constitution. The court was not able to discern any justification for requiring the appointment of judges to be approved by the National Assembly.
 14. It would be different if the Constitution required the President to nominate candidates for judgeship, such as in the United States of America (USA), where the President nominated Supreme Court justices, Court of Appeal judges, and District Court judges, and the Senate confirmed the candidates. In such a situation, there would be a strong case for involvement of article 132(2)(f) of the Constitution in appointment of judges, since the role exercised by the Judicial Service Commission, in resourcing the candidates, in vetting and interviewing them, would have been lost in a presidential nomination.
 15. The Judicial Service Commission was mandated to advertise vacancies, vet, interview and nominate. Candidates had to meet the constitutional standards prescribed in article 166 of the Constitution, including academic, professional and moral standards. Officers that the President was allowed to appoint under article 132, were largely appointed at the prerogative of the President, without specific constitutional standards, such as those that informed the process of appointment of judges under article 166. Article 132 did not have any application in the appointment of judges of superior courts.
 16. Whenever an issue of jurisdiction was raised before any court or tribunal, that court or tribunal had the competence, to determine if it was seized of jurisdiction under the principle of *kompetenz kompetenz*. It had a duty to determine whether or not, it had jurisdiction in a particular matter. The duty to determine whether a court had jurisdiction was not affected by what other courts had ruled, or could rule.
 17. Article 159(2)(a) of the Constitution bound all courts and tribunals to do justice to all, irrespective of status. Assuming jurisdiction one did not have, simply because the dispute involved one's colleague, would be in grave violation of article 159(2)(a).
 18. The High Court had exercised its constitutional jurisdiction robustly, on occasions seeming to disregard article 165(5) of the Constitution. It had spread its tentacles like a behemoth, to areas reserved for article 162(2).
 19. Although there was always potential for overlap in material jurisdiction, such overlap was best resolved by having the court with the closest connecting factors to the dispute, assume jurisdiction. If a matter involved the National Land Commission, under the first instinct of a reasonable man, it would be a matter in the jurisdiction of the ELC. Where there seemed to be two courts with concurrent or



- coordinate jurisdiction, the court seized with jurisdiction could decline to exercise jurisdiction, if the other court was more appropriate for deciding the dispute. The High Court did not have jurisdiction.
20. Jurisdiction seemed to have been contested, but at the heart of the dispute, was an employment discrimination dispute. If a matter involved employment discrimination, the first instinct would be that the court with the closest connecting factors, was the ELRC.
 21. There could be a perception within the legal circles that the High Court was assuming jurisdiction, where jurisdiction ought to be exercised by superior specialised courts.
 22. Jurisdiction flowed from the Constitution and legislation. It could not be feigned. Superior specialised courts had jurisdiction to hear and determine disputes in their respective specialized areas. It was important in answering the question on jurisdiction of the ELRC to look into the concept of employment and labour relations.
 23. Article 162(2)(a) of the Constitution allowed Parliament to establish the ELRC. The broad mandate of the ELRC was twin - employment, and labour relations. Employment in most English dictionaries, meant the act of employing someone; the state or act of being employed; and work, occupation or profession in which one earned a living. Employment was the state of having paid work. Jurisdiction of the ELRC extended to the world of paid work. Employment was the fact of someone being paid, to work for a company or organization. The constitutional jurisdiction of the ELRC, extended to employment, the world of paid work, which was not the same thing as employer-employee relationship.
 24. The term employment was not restricted to the narrow contract of service situation. The words employment and employed were susceptible of meanings both large and narrow. Largely read, 'employment' could refer to work, or an activity in which a person received valuable consideration, and 'employed,' may mean occupied or engaged. More narrowly, 'employment,' could refer to the position of a person in the service of another or performance of services under a contract of service, and 'employed' could mean performing the duties of an office, or employment. Employment jurisdiction was not restricted to the narrow employer-employee relationship.
 25. Labour relations were the collective relations between management of an organization and its employees, and employees' representatives. It was a set of such relations, in a wider context, such as an industry, or a national economy labour relation were distinguished by their collectivism - with workers acting in combination, engaging their employers on matters of collective rights and interests. Disputes of a collective nature, relating to article 41 of the Constitution; disputes relating to review of remuneration and benefits of state officers and public officers, made upon advice of the Salaries and Remuneration Commission – all fell within the field of labour relations.
 26. Jurisdiction of the ELRC involved disputes relating to employment, and to labour relations, in their wider context. It was not confined to employer-employee relationship, which was defined in a contract of employment. That relationship of employer-employee, could be regulated entirely by reference to the Employment Act and the relevant contract.
 27. The Employment and Labour Relations Court Act (ELRC Act) itself did not confine the court's jurisdiction to employer-employee relationship. The ELRC Act listed the matters which the court could deal with. It described those matters as, 'including', which simply meant the listed matters were not exclusive.
 28. A person who had been appointed to a position by a company or organization, but did not have a contract or receive regular payment, could be an office holder. Office holders included statutory appointments, such as company directors or secretaries, board members of statutory bodies, or crown appointments, appointments under internal constitutions of an organization, such as club treasurers or trade union secretaries, appointments under trust deed, such as trustees and ecclesiastical appointment, such as members of the clergy.



29. Office holders were neither employees nor workers. However, it was possible for someone to be an office holder if they had an employment contract with the same company or organization that met the criteria of Employee.
30. Judges were classified as state officers under article 260 of the Constitution. Appointment and removal of elected state officers such as the President, Senators, Governors, Members of Parliament, Members of County Assembly, did not fall in the jurisdiction of the ELRC. There was no other State Officer, who came into office through election, whose appointment or removal was amenable to the jurisdiction of the ELRC. Elected officers come into office through electoral processes, governed by the Constitution and election laws. They were dismissed from office through processes created under the Constitution and Statutes, such as impeachment. The ELRC was not involved in electoral processes, such as party primaries and election petitions. Those were disputes within the exclusive jurisdiction of the High Court.
31. Although the ELRC had been involved in impeachment of County Governors, that had been a wrong assumption of jurisdiction which belonged exclusively to the High Court. Whenever the term elected was used with regard to the manner of assumption of office by State Officers, the first instinct was that disputes relating to election or removal from office, lay with the High Court. Disputes on 'appointment' or 'removal' of elected State Officers in the Legislative Assemblies and in the National and County Executives, were not within the jurisdiction of the ELRC, however the concept of employment was enlarged. There was no room for the ELRC to adjudicate impeachment disputes involving elected State Officers.
32. Disputes on the appointment of judges of superior courts were subject matter of the ELRC jurisdiction. Disputes on their terms and conditions of service as reviewed or made by the Judicial Service Commission under article 172 of the Constitution, or disputes on their remuneration as set and regularly reviewed by the Salaries and Remuneration Commission under article 230, were employment disputes, within the larger conceptualization of the term employment, and were in the jurisdiction of the ELRC.
33. Judges were appointed. The terms 'appoint' and 'employ' were used interchangeably, to mean one had taken up a salaried assignment. Letters of employment in the labour market, were commonly styled letters of appointment. Upon assuming office, judges were issued letters of appointment, defining their terms and conditions of employment. Remunerative terms issue on the advice of the Salaries and Remuneration Commission, while other terms and conditions of service, were authored by the judiciary through the Judicial Service Commission. Standard employment benefits such as house allowance, paid leave, and remuneration were advised in the letter of appointment. In event of a dispute on those benefits, the right judicial forum to adjudicate was the ELRC.
34. The terms and conditions of service for judges, like any other contract of employment, attributed rights and responsibilities, between the judge and the judiciary. Disputes on discrimination of judges on recruitment were properly matters within the jurisdiction of the ELRC.
35. There was no reason why a State Officer was to be distinguished from an employee or a worker. Article 77 of the Constitution stated that a full-time state officer was not to participate in any other gainful employment. State officers were in gainful employment. Judges were in gainful employment.
36. The Constitution deemed state officers to be in employment. If they were in gainful employment, exclusive jurisdiction was with the ELRC in disputes involving their employment. In employment law, potential employees, who faced discrimination on recruitment, were considered to be employees. If a candidate for judgeship was in any way discriminated at the point of recruitment, or while in employment, he or she had recourse in the Employment and Labour Relations Court.
37. Judges were subject to pay as you earn (P.A.Y.E) tax. The Employer's Guide to P.A.Y.E in Kenya, 2017, recognized income tax from salaries and wages to all income from any office or employment. Part 1 of the guide, stated that P.A.Y.E applied to all forms of employment.



38. Judges of Superior Courts filed tax returns through form P9, which was a standard form, issued by employers to their employees, indicating total annual emoluments earned by the employee, for purposes of tax returns. State officer, public officer, or the narrow employer - employee relationship, were as correctly characterized by Kenya Revenue Authority (KRA), to be conceptualized within the larger meaning of the term employment, or what KRA in its Guide, innovatively called employments. Employment was a dynamic concept, which could not be simplified to mean an employer -employee relationship.
39. Legitimate expectation was predicated on regular, consistent and predicable conduct, process or activity of the decision-making authority. The petitioner could not invoke the doctrine of legitimate expectation, merely on the ground that the President had a duty to act fairly. The petitioner had not shown, what benefit or advantage which in the past he had been permitted by the President to enjoy, had been frustrated. The court did not think that the petitioner's invocation of the principle of legitimate expectation was sustainable.
40. The Constitution of Kenya 2010, created limited government, which included limited courts. There was no court with unlimited jurisdiction. Judicial authority, like all authority under the Constitution was dispersed amongst the various courts, at different levels. It was not intended to be concentrated in one court. There was no room for constitutional behemoths.

Petition partly allowed.

Orders

- i. *Declaration issued that the Employment and Labour Relations Court had exclusive original jurisdiction as the court of first instance, over all disputes concerning the recruitment and appointment/employment of all state officers, including judges of the superior courts.*
- ii. *Declaration that article 132(2)(f) of the Constitution did not apply and was never to apply, in the appointment of judges of superior courts.*
- iii. *No order on the costs.*

Citations

Cases

Kenya

1. *Africa Centre for Open Governance [AfriCOG] v Hassan & another* Petition 152 of 2013; [2013] KEHC 6064 (KLR); [2013] 1 KLR 483 - (Explained)
2. *Birir v Narok County Government & 2 others* Petition 1 of 2014; [2014] KEELRC 759 (KLR); [2014] 2 KLR 89 - (Explained)
3. *Council of Governors & 47 others v Attorney General & 6 others* Reference 3 of 2019; [2019] KESC 65 (KLR) - (Explained)
4. *County Government of Nyeri & another v Ndungu* Civil Appeal 2 of 2015; [2015] KECA 1011 (KLR) - (Applied)
5. *Katiba Institute v President of Republic of Kenya & 2 others; Judicial Service Commission & 3 others (Interested Parties)* Petition 206 of 2020; [2021] KEHC 442 (KLR) - (Explained)
6. *Kenya Human Rights Commission v Communications Authority of Kenya & 4 others* Constitutional Petition 86 of 2017; [2018] KEHC 7494 (KLR) - (Mentioned)
7. *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)* Advisory Opinion Reference 1 of 2017; [2020] KESC 54 (KLR) - (Mentioned)
8. *Kenya Vision 2030 Delivery Board v Commission on Administrative Justice & 2 others* Petition 42 of 2019; [2021] KESC 35 (KLR) - (Applied)
9. *Kinyanjui v Attorney General & another* Constitutional Petition 74 of 2011; [2016] KEHC 5104 (KLR) - (Explained)



10. *Law Society of Kenya v Attorney General & 10 others* Constitutional Petition 3 of 2016; [2016] eKLR - (Explained)
11. *Law Society of Kenya v Attorney General & another* Petition 4 of 2019; [2019] KESC 16 (KLR) - (Applied)
12. *Macharia & another v Kenya Commercial Bank Limited & 2 others* Application 2 of 2011; [2012] KESC 8 (KLR); [2012] 3 KLR 199 - (Explained)
13. *Macharia v Safaricom PLC* Petition 434 of 2019; [2021] KEHC 462 (KLR) - (Explained)
14. *Mugendi, Daniel N v Kenyatta University & 3 others* Civil Appeal 6 of 2012; [2013] KECA 41 (KLR) - (Explained)
15. *Ndichu, Nick Gitinji v Clerk, Kiambu County Assembly & another* Petition 11 of 2014; [2015] KEELRC 1642 (KLR) - (Explained)
16. *Ngari & another v Judicial Service Commission & another; Law Society of Kenya & 2 others (Interested Parties)* Petition 427 of 2019; [2020] KEHC 8779 (KLR) - (Explained)
17. *Njenga v Attorney General; Judicial Service Commission & 2 others (Interested Parties)* Petition 369 of 2019; [2020] KEHC 9228 (KLR) - (Mentioned)
18. *Owners of the Motor Vessel "Lillian S v Caltex Oil (Kenya) Ltd* Civil Appeal 50 of 1989; [1989] KECA 48 (KLR); [1989] KLR 1 - (Explained)
19. *Phoenix of E.A. Assurance Company Limited v SM Thiga t/a Newspaper Service* Civil Appeal 244 of 2010; [2019] KECA 767 (KLR) - (Mentioned)
20. *Rafiki Enterprises Limited v Kingsway Tyres & Automart Limited* Civil Application 375 of 1996; [1996] KECA 199 (KLR) - (Mentioned)
21. *Republic v Clerk County Assembly of Baringo ex parte William Kassait Kamket* Judicial Review Application 1 of 2015; [2015] KEELRC 567 (KLR) - (Explained)
22. *Republic v Karisa Chengo & 2 others* Petition 5 of 2017; [2017] eKLR - (Mentioned)
23. *Republic v Paul Kihara Kariuki, Attorney General & 2 others ex parte Law Society of Kenya* Judicial Review 45 of 2020; [2020] KEHC 10142 (KLR) - (Mentioned)
24. *Trusted Society of Human Rights Alliance v Nakuru Water and Sanitation Services Company & another* Petition 5 of 2013; [2013] KEELRC 881 (KLR) - (Explained)
25. *United States International University (USIU) v Attorney General* Petition 170 of 2012; [2012] KEHC 5516 (KLR) - (Mentioned)
26. *Waity v Independent Electoral & Boundaries Commission & 3 others* Petition 33 of 2018; [2019] KESC 54 (KLR) - (Explained)

South Africa

1. *Fose v Minister of Safety and Security* [1997] ZACC 6; 1997 (3) SA 786; (7) BCLR 851 - (Applied)
2. *Hoffman v South African Airways* [2000] ZACC 17; 2001 (1) SA 1; 2000 (11) BCLR 1211 ; [2000] 12 BLLR 1365 - (Applied)

United Kingdom

1. *Gilham v Ministry of Justice* [2019] UKSC 44 - (Explained)
2. *Spiliada Maritime Corp v Consulex Ltd* [1986] UKHL 10; [1987] AC 460 - (Explained)

United States

Porter v Commissioner 88 TC 279 (1987) - (Applied)

Canada

Fraser v Vancouver Board of Parks & Recreation 2001 BCCA 214; (2001) 150 BCAC 201 - (Explained)

Texts

Dukelow, DA., Nuse, B., (Eds) (1995), *Dictionary of Canadian Law* Toronto: Carswell Legal Publications 2nd Edn

Statutes



Kenya

1. Constitution of Kenya articles 1(c); 4(2); 10; 22; 23; 25(c), 28; 33(3); 35(2); 47(1); 50(1); 59(2)(f); 73(1); 77(1); 129; 131(2); 132(2)(f)(4); 158(5); 159; 162(2)(a); 165(3)(5); 166(1)(a)(b)(2)-(5); 168(5)(7)(b)(9); 204(4); 216; 217; 218; 251(6); 258; 259(1); 260 - (Interpreted)
2. Employment Act (cap 226) section 5- (Interpreted)
3. Employment and Labour Relations Court Act (cap 8E) section 12- (Interpreted)
4. Judicial Service Act (cap 8A) In general- (Cited)
5. Salaries and Remuneration Commission Act (cap 412D) In general- (Cited)

United Kingdom

1. Employment Rights Act, 1996 (cap 18) In general- (Cited)
2. Equality Act, 2010 (cap 15) In general- (Cited)

Advocates

None mentioned

JUDGMENT

1. In his petition amended on June 22, 2021, renowned Advocate of Constitutionalism, Okiya Omtatah Okoiti, seeks the following declaratory and compelling Orders: -
 - a. That, the Employment & Labour Relations Court [E&LRC] has exclusive original jurisdiction as the court of first instance, over all disputes concerning the recruitment and appointment/employment of all State Officers, including Judges of superior courts.
 - b. That, the President does not perform a ceremonial role in the appointment of Judges of the superior courts.
 - c. That, article 166[2], [3], [4], and [5] of the *Constitution of Kenya*, is expressly directed at the appointing authority, the President, and not at the Judicial Service Commission [JSC], and places a constitutional obligation on the President to cross-check and ensure that he only appoints as judges of the superior courts persons who fulfil the eligibility criteria.
 - d. That, where the appointing authority, the President, is of the view that any person recommended to him/her for appointment as judge, fails any of the eligibility tests in article 166[2], [3], [4] and [5] of the *Constitution of Kenya 2010*, the dispute should be adjudicated by the National Assembly pursuant to article 132[2][f] of the *Constitution of Kenya, 2010*.
 - e. That, the court declares that the President is under constitutional obligation to present to the National Assembly the names of the 6 persons who he declined to appoint, after the Judicial Service Commission recommended them to him for appointment as Judges.
 - f. That, the court gives an order compelling the President to, with immediate effect, present to the National Assembly names of the 6 persons who he declined to appoint after the Judicial Service recommended them to him, for appointment as Judges.
 - g. Costs.
 - h. Any other suitable order.
2. The petition is founded on the affidavit of the petitioner sworn on 22nd June 2021, and on Grounds listed on the face of the Petition.



3. The petitioner Mr Okoiti states, he is a human rights defender, and member of Kenyans for Justice Development [KEJUDE] Trust. The Attorney-General represents the Government of Kenya. The interested party is an Advocate of the High Court of Kenya.
4. The petitioner states, locus standi to present this Petition is given to him, by articles 22, 50[1] and 258 of the Constitution.
5. The jurisdiction of the E&LRC in the matter, is founded on articles 1[c], 4[2], 10, 22, 23, 50[1], 159, 162[2][a], 165[3] and [5] and 259[1] of the Constitution read with section 12 of the E&LRC Act No 20 of 2011.
6. A judge of superior court is a public officer employed in the public office, classified by the Constitution as a 'State Office.' The fact that as state officers, judges are 'employees' is supported by article 77[1] of the Constitution, which restricts the activities of State Officers, as regards 'other gainful employment' using the following terms: " a full-time State Officer, shall not participate in any other gainful employment."
7. As far as the Constitution is concerned, Judgeship is gainful employment, or employment for profit [remuneration which is charged on Consolidated Fund]. Appointment of a judge is an ordinary employment process. Under article 260 of the Constitution, a 'Public Officer' includes any State Officer. A Judge is a Public Officer.
8. The Petition raises issues regarding gainful employment of persons to the public office, as judges of superior courts. The subject matter falls in the jurisdiction of the E&LRC under article 162[2][a] read with articles 165[3][d].
9. The jurisdiction of the E&LRC stems from the fact that under articles 162[1] and 162[2][a] of the Constitution, the E&LRC is a Superior Court, with the same status as the High Court.
10. Moreover, article 165[5][b] completely denies the High Court jurisdiction in respect of matters falling with the jurisdiction of the E&LRC. The article states that, the High Court shall not have jurisdiction in respect of matters falling within the jurisdiction of Courts contemplated in article 162[2] of the Constitution.
11. The petitioner, Mr Okoiti boldly submits that there is a disturbing trend in our Judiciary, " where the High Court Judges decline jurisdiction in all other labour and employment matters, but assume jurisdiction in disputes involving fellow judges, simply because it is one of their own," This is both unconstitutional and untidy.
12. Article 166[1][b] directs the President, not the JSC, " to appoint all other Judges in accordance with the recommendations of the JSC." It further directs that, " Each judge of a superior court shall be appointed from among persons who ... have a high moral character, integrity and impartiality."
13. Accordingly, the expression 'among persons,' implies the President will pick from a group. Even if the JSC will have ensured that it recommends candidates who satisfy eligibility criteria, the President also has an obligation to assure himself or herself that the candidates fulfil eligibility criteria.
14. Article 166[2][3][4] and [5] of the Constitution refers to 'appointment' of persons by the President. It does not refer to the recommendation for appointment by the JSC.
15. The President cannot exercise the powers donated to him under article 166 [2] – [5] arbitrarily. He must submit to the checks and balances provided under article 132[2][f] through the doctrine of separation of powers. The Constitution does not allow any person to exercise absolute power. article



- 132[2] limits the President in exercise of the power to appoint Public Officials. The President shall nominate, and with the approval of the National Assembly, appoint, and may dismiss any other State or Public Officer whom the Constitution requires or empowers the President to appoint or dismiss. The National Assembly, representing the People, exercises oversight over the President's power to appoint, ensuring that the President does not strike a deal, to saddle Kenyans with his henchmen, in Public Office.
16. It is untenable under the Constitution, for the President to appoint any State or Public Officer, without parliamentary approval.
 17. On July 23, 2019 and August 13, 2019, the JSC recommended persons for appointment as judges of the Court of Appeal, Environment and Land Court, and the E&LRC. The names were forwarded to the President for appointment.
 18. The petitioner is aggrieved that more than a year later, the President has failed/refused/neglected to appoint 6 of the 41 persons as judges. Nothing ousts the application of article 132[2][f] on appointment of judges, and there is no reason why the President has not submitted the names of 6 persons, he has declined to appoint, to the National Assembly. He has no capacity to condemn the 6 persons unheard. The appointment is not an event and mere formality; it is a hallowed and obligatory process, involving vetting and approval of prospective appointees by the National Assembly. The President has failed to act within a reasonable time, in the performance of a critical constitutional function.
 19. Administrative failure to act, contravenes the Bill of Rights, to the extent that it violates article 47[1] of the Constitution, which states that, "every person has the right to administrative action that is expeditious, efficient, lawful and procedurally fair."
 20. The President has violated article 129, which states that executive authority derives from the People, and shall be exercised in accordance with the Constitution, and in a manner compatible with the principle of service to the People of Kenya, and for their well-being and benefit.
 21. The President has also violated article 131 [2] [a], which demands that he respects, upholds and safeguards the Constitution. The President has no room to appoint Judges in an opaque and unaccountable manner by sidestepping Parliament, which represents the People.
 22. The petitioner founds his petition on articles 1 and 2, on sovereignty of the People and supremacy of the Constitution respectively. Other articles relied on include articles 3, 10, 22, 23, 25[c], 28, 33[3], 35 [2], 50[1], and 73[1]. Article 77[1] provides that a full-time State Officer, shall not participate in any other gainful employment.
 23. He also invokes articles 132, 162[2][a], 165[3][d][ii], and 165[5][b]. The petitioner further submits that article 172[1] provides that the JSC shall facilitate the independence and accountability of the Judiciary and the efficient, effective and transparent administration of justice. Article 258 allows the petitioner to institute the Petition, while article 259[1] provides that the Constitution shall be interpreted in a manner that promotes its purposes, values and principles; advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; permits the development of the law; and contributes to good governance.
 24. In response to the respondent's position that the petition is *res judicata* and/ or *sub judice*, the petitioner submits that no Court has determined the effect of article 132[2] of the Constitution, on appointment of judges. The question of jurisdiction of the E&LRC, in determining disputes on appointment of judges, has not been determined.



25. In *J Harrison Kinyanjui v Attorney-General & another [2016] e-KLR*, the issue in dispute was whether the JSC should present 1 or 3 names of the respective nominees, to the President, for appointment as Chief Justice and Deputy Chief Justice. In *Law Society of Kenya v Attorney-General & 2 others [2016] e-KLR* and *Adrian Kamotho Njenga v Attorney-General; Judicial Service Commission; & 2 others [Interested Parties] [2020] e-KLR*, the issue was whether the names recommended by the JSC under article 166[1][b], are binding on the President. In *Nairobi HC Petition No 427 of 2019, David Kariuki Ngari & Another v Judicial Service Commission & another*, the issue was whether the President's role in appointment of Judges, is purely ceremonial. Lastly, in *Nairobi HC Petition No 206 of 2020, Katiba Institute v President of the Republic of Kenya & others*, the issue was whether the President must appoint from the entire list of nominees, delivered to him by the JSC.
26. The issues in the current petition have not been determined in another court, and are not pending determination before another court. The doctrines of *res judicata* and *sub judice*, are not implicated.
27. The petitioner therefore prays the court to Find that: -Judges are Workers, under the Constitution. The E&LRC has exclusive original jurisdiction in disputes relating to appointment of State Officers including Judges. Article 132[2] mandates the President to forward the names of JSC Judgeship nominees, to Parliament for approval. The expression 'in accordance with' binds the President to act on JSC recommendations. Recommendations of the JSC to the President, do not oust the National Assembly from the appointment process. The President does not play a ceremonial role in the appointment of Judges. The President is under obligation to present the names of the 41[6] persons recommended by the JSC to the National Assembly for appointment as Judges. The honourable court should compel the President to present to the National Assembly all the 41 [6] names of persons recommended by the JSC for appointment as judges. The President has violated the petitioner's legitimate expectations. The President to pay costs of the petition to the petitioner. Any other appropriate relief.
28. It is emphasized by the petitioner, that judges, are Employees of the People. They receive remuneration and benefits set by the Salaries and Remuneration Commission, as provided for under article 230[4] [a] and the SRC Act No 10 of 2011. Salary and remuneration include "the basic or minimum wage or pay and any additional emoluments and benefits whatsoever payable, directly or indirectly, whether in cash or in kind, by an Employer to an Employee, and arising out of the employment of that Employee."
29. The SRC inquires into, and advises on the salaries and remuneration to be paid out of public funds. Article 160[4] of the Constitution prohibits the variation of remuneration, benefits and retirement benefits payable to Judges to their disadvantage. The advertisement placed by the JSC for the positions of Chief Justice, Judge of the Supreme Court, Judges of the Court of Appeal and other superior courts in 2019- 2021, gave the terms and conditions of service as contemplated in the articles of Constitution and Provisions the Law, discussed above. From the Constitution and the Law, Judges are not self-employed.
30. Many judgments of the E&LRC and other superior court, have concluded that the E&LRC is the right forum for hearing disputes relating to appointment of State Officers. In *Owners of the Motor Vessel Lillian 'S' v Caltex Oil [Kenya] Limited* 1989 KLR 1, it was held that jurisdiction is everything. In *Samuel Kamau Macharia v KCB & 2 Others* Civil Application No 2 of 2011, the Supreme Court of Kenya held that a court's jurisdiction flows from the Constitution or Legislation, or both. The E&LRC in *Republic v. Clerk County Assembly of Baringo ex parte William Kassait Kamket* [2015] e-KLR; *Trusted Society of Human Rights Alliance v Nakuru Water and Sanitation Water Services Company & another* [2013] e-KLR; and *Nick Ndichu v Clerk Kiambu County Assembly and Another* [2014] e-KLR, restated its exclusive jurisdiction in disputes relating to employment and labour relations. This is the



- right forum, under articles 162[2][a] and 165[5][b], in hearing and determination of disputes relating to employment of State Officers.
31. Other leading decisions outside the E&LRC, establishing the E&LRC exclusive jurisdiction on employment and labour relations matters, include High Court in *United States International University v The Attorney- General* [2012] e-KLR and Court of Appeal in *Daniel N Mugendi v Kenyatta University & 3 Others* [2013] e-KLR.
 32. Article 166[1][a] of the *Constitution* requires the President to appoint the Chief Justice and Deputy in accordance with the recommendations of the Judicial Service Commission, and subject to the approval of the National Assembly. The proper fulfilment by the President, of the duty required of him, under article 132[2][f] of the *Constitution*, in relation to appointment of all other judges, poses no threat to independence of the Judiciary. All judges of the superior courts, not just the Chief Justice and the Deputy Chief Justice, must be appointed with the approval of the National Assembly.
 33. The petitioner submits that while the President retains the duty to appoint judges in accordance with the *Constitution*, he does not have the power or discretion to dismiss those appointees, upon their assumption of office outside the provisions of the *Constitution*. Any process of removal outside article 168, would not be in accordance with the *Constitution*.
 34. It is reiterated that the phrase ‘in accordance with,’ binds the President to act on recommendations of the JSC. ‘Recommendation’ is defined in the Oxford Dictionary as, “Put forward with approval as being suitable for a purpose or role; advise as a course of action; make appealing or desirable,” while the Black’s Law Dictionary defines the term as, “a specific piece of advice about what to do, especially if given officially; a suggestion that someone should choose a particular thing or person that one thinks particularly good or meritorious.” While the *Constitution* does not define the term, the framers of the *Constitution* intended that recommendations bind those who receive them. The petitioner submits that once the JSC has nominated candidates for Judgeship, the President must initiate the appointment process set out in article 124[4] and 132[2][f] of the *Constitution*.
 35. The petitioner postulates that there are recommendations which are binding and non-binding in the *Constitution*. He identifies binding ones to include recommendations of the Public Service Commission [PSC] on establishment of an Office in the Public Service [article 132[4][1a]; recommendations of a tribunal on removal of the Director of Public Prosecutions [article 158[5] of the *Constitution*; recommendations of the JSC under article 166[1][a] and [b]; recommendations of the JSC on appointment of a Tribunal for removal of a Judge [article 168[5] 168[7][b] and [9]; recommendations of the National Police Commission, on appointment of 2 Deputy Inspector-Generals of the National Police Service [article 245[3]; and recommendations of a Tribunal on removal of members of Constitutional Commissions [article 251[6] of the *Constitution*.
 36. Non-binding recommendations include those of the Kenya National Human Rights Commission under article 59[2]and [f]; recommendations of the National Land Commission under article 67[2] [d]; recommendations of a Parliamentary Committee on approval of nominees, under article 124[4] [b]; recommendations on exercise of power of mercy [article 133[4]; JSC recommendations on terms and conditions of service of Judges, Judicial Officers and Staff of the Judiciary; recommendations of the Commission of Revenue on under articles 204[4], 216,217 and 218; and recommendations of the PSC on terms and conditions of service of Officers in the Public Service.
 37. In Supreme Court Reference No 3 of 2019, *Council of Governors & 47 others v Attorney-General & 3 Others [Interested Parties; Katiba Institute & 2 others [Amicus Curiae]*, it was established that unless expressly stated to be binding, recommendations are not obligatory on the recipient. In Supreme Court Petition Number 42 of 2019, *Kenya Vision 2030 Delivery Board v Commission on Administrative*



Justice, Attorney-General and Engineer Judah Abekah, it was held that recommendations of the Commission are not binding on a recipient body, whose actions or inactions were found to contravene article 47 of the Constitution.

38. The recommendations of the JSC on appointment of judges, do not oust the National Assembly from the appointment process. Recommendations of the JSC under article 166[1][b] of the Constitution, are also subject to article 132[2][f]. The framers of the Constitution were careful not to vest the powers of appointment of Judges, to 11 JSC Commissioners. It is untenable to hold that JSC alone, to the exclusion of the People through their elected representatives, have a say in the matter. The President does not exercise a ceremonial role, but must exercise his executive role. The President is checked in exercise of this power, by the National Assembly. Not all persons recommended by the JSC, must be appointed judges. To interpret the role of the JSC this way, would mean the President acts under the command of the JSC. The President does not have the capacity to accept or reject recommended nominees on his own; that power is exercised through the National Assembly. There is a system of checks and balances, which is central to the doctrine of limited power.
39. The court is enjoined to uphold and enforce Bill of Rights under article 23 of the Constitution. It is allowed to compel the President to submit the names of the 41 [remaining 6 nominees] for appointment as Judges of the various superior courts. The Petitioner had legitimate expectation the President would exercise his functions within the law. This expectation has been violated by the President, in failure to submit the nominees for Judgeship, to the National Assembly for vetting and approval.
40. The petitioner lastly submits that the respondent should be compelled to pay costs of the Petition. He cites Kenya Human Rights Commission v Communications Authority of Kenya & 4 others [2018] eKLR, endorsing payment of costs on constitutional litigation, to a private party who succeeds against the State. On the other side of the coin, he argues that in the unlikely event the petition is declined, he should not be condemned to pay costs. The petitioner urges the court to consider other appropriate reliefs it may deem fit to grant, guided by the principle that the court has a duty to grant reliefs required to protect and enforce the Constitution. He cites among other decisions, South African Constitutional Court in Fose v Minister of Safety and Security [1997] [3] SA 786 [CC] 1997[7] BCLR 851 and Hoffman v South African Airways [CCT 17/00] 2000, ZAAC 17, in his quest for any other effective remedy.
41. The respondent filed grounds of opposition dated 16th February 2021, and July 14, 2021 respectively. The respondent's position is that by dint of articles 162 [2] [a] and 165[5][6] of the Constitution, read with section 12 of the Employment and Labour Relations Court Act, the honourable court lacks jurisdiction to hear and determine this Petition. There is no trace of any of employer-employee relationship. It is the High Court, by dint of article 165[3][d][ii] [iii] of the Constitution seized of jurisdiction. The petition is sub judice. Same or similar issues were argued by the parties, and determined by the court, the Attorney-General; Judicial Service Commission & 2 others [interested parties] 2020 eKLR. Subsequently, an Appeal was filed by the Attorney-General in NRB CoA Civil Appeal No 286 of 2020. The appeal is pending. The petition is scandalous, vexatious and frivolous and amounts to an abuse of the court process. The respondent prays for dismissal of the Petition.
42. The respondent filed a list of decisions from various courts, on jurisdiction. They include Nick Gitbinji Ndichu v Clerk Kiambu County Assembly & another; Republic v. Karisa Chengo & 2 Others [2017] eKLR; Republic v Paul Kariuki Kibara, Attorney-General & 2 Others ex parte Law Society of Kenya [2020] e-KLR; Independent Electoral & Boundaries Commission & 16 Others [interested parties] [2020] eKLR; and Phoenix of EA Assurance Company Limited v SM Thiga t/a Newspapers Service [2019] eKLR.



43. The court has not seen any submissions accompanying these decisions. Very sadly, it is difficult to relate the decisions, to the position advanced by the respondent.
44. The petitioner filed supplementary submissions, in answering the grounds of opposition. There are no submissions filed by the respondent, mentioned in the supplementary submissions filed by the petitioner. The decisions filed by the respondent, were not elaborated by the respondent, through submissions. Good literary gems as they are, they are for purposes of establishing the legal position taken by the respondent in this petition, as worthless as the sea weeds.
45. Learned Counsel Adrian Kamotho Njenga, was joined to the petition upon his application, in a ruling of the court dated October 16, 2020.
46. He was granted 14 days on July 16, 2021, to file his Reply to the amended petition, and submissions. The court has not traced any Reply to the amended petition, and submissions, filed by the interested party.
47. The issues as understood by the court, are whether: -The Petition is sub-judice.The E&LRC has original and exclusive jurisdiction on the subject matter.Whether article 132[2] of the Constitution applies to appointment of Judges of superior courts.Whether the recommendations of the JSC on appointment of Judges, bind the President or whether the President's role is purely ceremonial.Whether the President should be compelled to submit the names of the 41 [remaining 6] nominees for appointment as Judges of superior courts, to the National Assembly for vetting and approval.Whether the President has violated the petitioner's legitimate expectation; whether the President should pay costs; and whether any other suitable relief should issue.

The Court Finds: -

Decided Cases / pending Appeals on the subject.

Following the President's refusal to appoint 41 nominees of the JSC as Judges of various superior courts of Kenya, several legal suits were filed against the President, seeking that he acts, in accordance with the recommendations of the JSC, by making the appointments.

48. It is important to note that 1 nominee to the E&LRC passed on while the dispute unfurled in the courts, while 34 nominees were appointed while this Petition was pending in court. The nominees pending appointment are at the time of preparing this Judgment, 6 nominees.
49. As acknowledged by the petitioner, the dispute revolving around the President's refusal to appoint the nominees, has been the subject of various court challenges. Among these is Adrian Kamotho Njenga v Attorney-General; Judicial Service Commission & 2 others [interested parties] [2020] eKLR. Mr Njenga is the interested party in the current Petition.
50. A considerable number of the issues raised by Mr Okoiti were dealt with by the High Court, in the Njenga Petition and in other Petitions on the subject.
51. Whether the President is bound by the recommendations of the JSC, was central to the Njenga Petition. It was argued at length, analysed by the High Court at length, and resulted in declaratory orders that: -
 - a. The President is constitutionally bound by the recommendation made the 1st interested party [JSC], in accordance with article 166[1] as read with article 172[1][a] of the Constitution, on persons to be appointed as Judges.



- b. The President’s failure to appoint persons recommended for appointment as judges, violates the Constitution and Judicial Service Act.
 - c. Continued delay to appoint persons recommended as Judges of the respective courts is a violation of articles 2[1], 3[1], 10, 73 [1][a], 131[2][a], 166[1], 172[1][a] and 249[2] of the Constitution.
52. Nairobi High Court Petition No 206 of 2020, Katiba Institute v President of Republic of Kenya & 2 others; Judicial Service Commission & 3 other [interested parties], arose from the declaratory Judgment in the Njenga Petition. The petitioner sought enforceable orders against the President, and the High Court, crafted the following orders, that: -
- a. An order of mandamus is hereby issued, directing the 1st respondent [President] to appoint the 6 nominees as Judges to their respective courts, within the next 14 days.
 - b. Upon the lapse of the 14 days in [a] above, without the 1st respondent having made the appointments, it shall be presumed that his power to make them has expired, and his office shall become functus, so far as appointments are concerned, and the 6 nominees shall be deemed duly appointed, effective from the date of default, as Judges of the superior courts for which they were recommended.
 - c. Subsequent to their being deemed appointed under [b] above, the 3rd respondent [Chief Justice], in conjunction with the 1st interested party, shall be at liberty to take all the necessary steps to swear the 6 Judges.
53. In the Katiba Petition, again the High Court looked into the power of the President to appoint Judges vis-à-vis the legal force of the recommendations made by the JSC to the President in the appointment of Judges, under article 166 [1] of the Constitution. The court held that, “It follows, in our view, that in appointing the Chief Justice and the Deputy Chief Justice, the function of the 1st respondent is to receive the recommendations of the 1st interested party, and the approval of the National Assembly, and appoint them as such. As for other Judges, the 1st respondent is only to receive the recommendations of the 1st interested party, and appoint the nominees as such. In our view, the 1st respondent has no powers to look anywhere outside...”
54. The Attorney- General and the President, lodged an Application at the Court of Appeal, in Civil Application E365 & E368 of 2021 [Consolidated], for stay of execution of the orders made at the High Court in the Katiba Petition. Orders of stay of execution issued in a Ruling delivered on 19th November 2021.
55. In the application before the Court of Appeal, it is noted that an Appeal against the decision of the High Court in the Njenga Petition, has already been filed at the Court of Appeal, registered as Nairobi Civil Appeal No 286 of 2020.
56. The following prayers in the current Petition [Okoitii Petition], relate to the same issues which are pending hearing and determination at the Court of Appeal: -
- A1. Declaration that the President does not perform a ceremonial role in the appointment of Judges of the superior courts.
 - A2. Declaration that article 166 [2] [3] [4] and [5] of the Constitution is expressly directed at the appointing authority, the President and not the JSC, and places constitutional obligation on the President to cross-check and ensure that he only appoints as Judges of the superior courts, persons who fulfil the eligibility criteria therein.



57. In the respectful view of the court, these are not issues that the court should consider and determine. These are live issues at the court of Appeal, and the court must defer to the appellate jurisdiction, in dealing with these novel constitutional questions.
58. There are however 2 remaining issues in the Petition, which the court does not think, were the primary issues at High Court, and the principal issues subject matter of the Appeal at the Court of Appeal. These are: jurisdiction of the E&LRC in the subject matter; and, involvement of the National Assembly in the appointment of Judges, pursuant to article 132 of the Constitution.

Article 132 of the Constitution

59. The court wishes to deal with the second issue first, and close with the second. Article 132 of the Constitution addresses Presidential Functions. The petitioner submits that appointment of Judges of superior courts, is subject to article 132[2][f].
60. Article 132[2] states that, “ The President shall nominate, and with the approval of the National Assembly appoint and may dismiss-
- a. the Cabinet Secretaries in accordance with article 152;
 - b. the Attorney-General in accordance with article 156;
 - c. the Secretary to the Cabinet in accordance with article 154;
 - d. Principal Secretaries in accordance with article 155;
 - e. High Commissioners, Ambassadors and Diplomatic and Consular Representatives; and,
 - f. in accordance with this Constitution, any other State or Public Officer whom this Constitution requires the President to appoint or dismiss.
61. The petitioner submits that article 166[1][b], which mandates the President to appoint “all other judges in accordance with the recommendations of the Judicial Service Commission,” should be read with article 132[2][f] above.
62. His conclusion is that the President should therefore submit to the National Assembly, the names of recommended/ nominated candidates for the positions of Judges of superior courts, for approval.
63. The court does not think that article 132[2] [f] is intended to apply in the appointment of judges. If it is intended that the appointment of all Judges, other than the Chief Justice and the Deputy-Chief Justice, is subject to approval of the National Assembly, nothing would have been easier than for the Constitution to say so, under article 166 [1].
64. The Officers the President is granted a freehand to nominate, and with the approval of National Assembly to appoint, and dismiss, under article 132 [2] are principally Officers of the Executive Branch of the Government. The Constitution is careful in maintaining clear lines on separation of powers, and to read the article 132[2][f] into article 166[1] [b], would result in disturbing these lines on separation of powers.
65. The role of the peoples’ watchdog in appointment of judges of the superior court, is vested in the Judicial Service Commission, not in the National Assembly.
66. Unlike other Officers who are subject to the approval of the National Assembly, all Judges are subjected to rigorous vetting and interviewing by the Judiciary watchdog, the Judicial Service Commission.



67. Sovereign power of the people in this instance, is exercised through the Judicial Service Commission. The candidates to Judgeship, unlike Officers in the Executive, apply for their positions. They are vigorously interviewed by the Judicial Service Commission, which calls for public views on individual candidates in that process. They do not just crawl out of the woodwork. What would be the rationale for a second round of vetting and approval by the National Assembly?
68. The fact that the Chief Justice and Deputy Chief Justice go through the vetting by the JSC and another round of vetting and approval by the National Assembly, is a constitutional aberration, which should not lead to a justification for vetting of other Judges of the superior courts by the National Assembly. The requirement that the Chief Justice and Deputy Chief Justice are vetted and approved by the National Assembly, is an assault on the doctrine of separation of powers, judicial independence, and fails to appreciate the role of the JSC in the process, as the organ reposed with the sovereign power of the people, in appointment of all Judges. Does vetting and approval of the Chief Justice and the Deputy Chief Justice by the National Assembly add value to the process already carried out by the JSC? There is no persuasive reason why the Chief Justice and Deputy Chief Justice, should be taken through the approval process of the National Assembly.
69. On October 4, 2019, it was reported in [www. Irishlegal.com](http://www.Irishlegal.com), that UK Prime Minister Boris Johnson had proposed a change in the law governing appointment of judges in the UK, with candidates for Judgeship being vetted by Parliament. The proposal was criticised by former Deputy President of the UK Supreme Court, Lord Hope, as being misguided. Lord Hope explained that parliamentary vetting risked politicising the Judiciary in the minds of the public, and would be contrary to the fact that political opinion plays no part in the work the judges do. Parliamentary vetting would open the door to political interference in the process of appointment of Judges. It would damage public confidence in judicial independence and impartiality.
70. Lord Hope and his venerable colleagues explained that the American model, where Judges are appointed through the approval of Senate -
 “ demonstrates the malign effect of a system dependent on political or doctrinaire allegiance, on nomination by a politician, the President, and approval by politicians- the Senate. Many important issues are decided by a five-to-four majority, depending on who appointed the justices.”
71. The involvement of the Kenyan National Assembly in appointment of the Chief Justice and the Deputy Chief Justice, is not an idea which should be extended to other Judges as proposed by the Petitioner. It is an aberration. To the contrary, The Chief Justice and Deputy Justice must be extricated from this requirement through constitutional reform. As pointed out by Lord Hope, the proposal for vetting of Judges by the National Assembly can only lead to politicisation of the Judiciary, more so in the context of our fractious politics, and not enhance separation of powers and judicial independence.
72. Cabinet Secretaries, the Attorney-General, Secretary to the Cabinet, Principal Secretaries, High Commissioners, Ambassadors, Diplomatic and Consular Representatives, do not apply for these positions. They do not sit interviews and are not vetted publicly by the Public Service Commission. They are not recruited competitively. The President has the prerogative in their appointment. Many come out of the woodwork. They are appointed through executive prerogative, with no set constitutional standards on their qualifications for the positions. Article 166 sets clear standards for appointees to Judgeship. State Officers are appointed through presidential fiat, and rightly subjected to the approval of the National Assembly upon nomination by the President.
73. Article 1[3] donates sovereign power of the people of Kenya to various organs of the State. Sub-article [a] donates sovereign power of the people to Parliament and Legislative Assemblies in the



- County Governments. Sub-article [b] does so with respect to the National Executive and the Executive Structures in the County Governments. Sub-article [c] donates the sovereign power of the people to the Judiciary and Independent Tribunals
74. It is flawed to argue that the nominees for Judgeship, must be taken to the National Assembly for approval. The petitioner submits at paragraph 35 of his petition, that, “The President has no room to make appointments in an opaque and unaccountable manner by sidestepping Parliament, which represents the people. The people, through their representatives, must have a say in the appointment of their Judges.”
75. Do not the people have a say in this process, through the Judicial Service Commission? Is not the Judicial Service Commission an accountable and transparent watchdog of the people, in the process of appointment of Judges of superior courts? Does not the Constitution donate sovereign power of the people to the Judiciary, and hence the Judicial Service Commission? The argument that the National Assembly is the sole peoples’ representative, and therefore mandated to vet all State Officers, appears to the court flawed. There are various organs designated by the Constitution as repositories of the peoples’ sovereign power. They, and not the National Assembly alone, can exercise the role of public watchdog in appointment of Officers serving in the respective arms of the Government.
76. Article 132[2][f] furthermore extends to any other State or Public Officer whom the Constitution requires or empowers the President to appoint or dismiss.
77. While the power of the President to appoint is a live issue at the Court of Appeal, it is noted that article 132[2][f] refers to the power to appoint or dismiss. The court does not think that the President has the power to dismiss any Judge.
78. Judges are removed from Office under article 168, on grounds set thereunder. The process of removal is initiated by the Judicial Service Commission, in exercising the sovereign power of the people, under article 168[2]. The Judicial Service Commission acts on its own motion, or on the petition of any person made to the Judicial Service Commission.
79. The Judicial Service Commission sends the petition to the President, if there is ground for removal, under article 168[4]. The President is conferred with the power to suspend the concerned judge acting on the recommendations of the Judicial Service Commission. Under article 168[5][b] the President is empowered to appoint a Tribunal to enquire into the allegations against the judge.
80. The President’s power in the process of dismissal of Judges is confined to their suspension and in formation of Tribunals to enquire into the allegations against them.
81. The decision for removal of a Judge is made by the Tribunal, not the President. Article 168[7][8] refers to a decision of the Tribunal. Reference is also made to binding recommendations of the Tribunal, which the court understands to be the same thing as a binding decision. Unlike the contested recommendations of the Judicial Service Commission made with regard to appointment of Judges, the recommendations of the Tribunal on removal of Judges are expressly stated to be binding on the President. The Tribunal makes a binding decision, which is appealable at the Supreme Court of Kenya.
82. Judges of the superior court are therefore not among the State Officers the President may dismiss under article 132[2] [f] of the Constitution. The court is not able to discern any justification for requiring the appointment of Judges to be approved by the National Assembly.
83. It would perhaps be different if the Constitution requires the President to nominate candidates for Judgeship, such as in the US, where the President nominates Supreme Court Justices, Court of Appeal Judges, and District Court Judges, and the Senate confirms the candidates. In such a situation, there



would a be strong case for involvement of article 132[2][f] in appointment of Judges, since the role exercised by the Judicial Service Commission, in resourcing the candidates, in vetting and interviewing them, would have been lost in a presidential nomination.

84. As stated above however, the Judicial Service Commission is mandated to advertise vacancies, vet, interview and nominate. Candidates have to meet the constitutional standards prescribed in article 166, including academic, professional and moral standards. Officers the President is allowed to appoint under article 132, are largely appointed at the prerogative of the President, without specific constitutional standards, such as inform the process of appointment of Judges under article 166.
85. The court is not persuaded that article 132 has any application in the appointment of Judges of superior courts. Prayers A3, B and C of the Amended Petition are declined.
86. The petitioner's submissions on article 132, while not the main issue in dispute at the High Court and in subsequent Appeals, indirectly touch on the issues pending at the Court of Appeal. It would confuse the President, if this court made an order, that he forwards the names of the 6 nominees for Judgeship to the National Assembly for appointment, while the President is in receipt of other orders of the High Court, asking him to appoint the same nominees, within a given period, or cede his appointing power to the Judicial Service Commission. Courts are averse to making inconsistent orders.
87. The petitioner would perhaps be of assistance to the Court of Appeal, in examining these issues from another perspective, if he prefers an Appeal against the Judgment of this Court on article 132.

Jurisdiction of the E&LRC

88. The petitioner argues that the E&LRC has the exclusive, original jurisdiction as the court of first instance, over all disputes concerning the recruitment and appointment/employment of all State Officers, including Judges of the superior courts.
89. From the outset, the court would like to note, that whenever an issue of jurisdiction is raised before any court or tribunal, that court or tribunal has the competence, to determine if it is seized of jurisdiction under the principle of kompetenz kompetenz. It has a duty to determine whether or not, it has jurisdiction in a particular matter as held in the Court of Appeal decision, [*Rafiki Enterprise Limited v Kingsway Tyres & another*](#), Civil Application No 375 of 1996 [UR] [Unreported].
90. In the Njenga Petition, the respondent [Attorney-General] objected to the jurisdiction of the High Court, arguing like the petitioner herein, that the right forum is the E&LRC. The High Court ruled that the dispute fell squarely within its mandate, explaining that the High Court was clothed with jurisdiction to protect and safeguard the Constitution. Does not article 3 make it an obligation of every person to respect, uphold and defend the Constitution? Are not other courts clothed with jurisdiction to protect and safeguard the Constitution? It was further explained by the High Court that its jurisdiction is constitutional unlike the E&LRC's, which was stated to be statutory. Lastly it was explained that the dispute did not relate to an employer-employee relationship.
91. This finding on jurisdiction may well be part of the issues under consideration by the Court of Appeal. Unlike the other issues however, the E&LRC has no reason to refrain from broaching the issue, because under the principle of kompetenz kompetenz, it has a duty to determine whether it has jurisdiction. This duty is not affected by what other courts have ruled, or may rule.
92. The petitioner boldly submits at paragraph 18 of the Amended Petition, that "The disturbing trend where High Court Judges decline jurisdiction in all other labour and employment matters, but assume jurisdiction over labour and employment disputes involving fellow Judges, simply because it is one of their own, is both unconstitutional and untidy."



93. This court is not aware of cases where Honourable Judges of the High Court have assumed jurisdiction simply because the litigant before them, is one of their own. Article 159[2][a] binds courts and tribunals to do justice to all, irrespective of status. Assuming jurisdiction one does not have, simply because the dispute involves one's colleague, would be in grave violation of this article.
94. Article 165[3][b] confers the High Court with jurisdiction to determine the question whether, a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. Sub-article [d] broadens this jurisdiction, to hearing of any question regarding the interpretation of the Constitution.
95. Article 165[5] attempts to limit the broad jurisdiction granted to the High Court, excluding from the jurisdiction of the High Court, matters reserved for the exclusive jurisdiction of the Supreme Court, and those falling within the jurisdiction of courts contemplated in article 162[2] of the Constitution.
96. The petitioner argues that disputes relating to appointment of Judges of Superior Courts, fall outside the jurisdiction of the High Court under article 165[5], and fall within the jurisdiction of the E&LRC, a court contemplated in article 162[2] of the Constitution.
97. The High Court has exercised its constitutional jurisdiction robustly, on occasions seeming to disregard article 165[5]. It has spread its tentacles like a behemoth, to areas reserved for article 162[2] courts.
98. Patrick Musimba v National Land Commission & 4 others [2015] eKLR, poignantly brings this point home. The petitioner, a Member of Parliament for Kibwezi West Constituency, filed his Petition initially at the Environment and Land Court [ELC]. He sought constitutional remedies on behalf of his people of Kibwezi for alleged encroachment of their right to property, right to just compensation, right to fair administrative action, and right to clean and healthy environment. The encroachment allegedly happened through the construction of the Standard Gauge Railway [SGR], which passed through Kibwezi West Constituency.
99. The ELC certified the Petition as raising substantial questions of law under article 165 [4], and referred the Petition to the Chief Justice for appointment of uneven number of judges, not less than 3, to hear the substantial questions of law.
100. Bewilderingly, the Chief Justice proceeded to appoint a 5- Judge bench, comprising entirely of Judges from the High Court, notwithstanding that the Petition was filed at the ELC, and that the dispute, was clearly an environment and land matter, involving the National Land Commission. This strange decision by the Chief Justice, did not strengthen public confidence in the ELC, or the Judiciary as a whole.
101. The respondents raised preliminary objection on the jurisdiction of the High Court, when the matter came up before the High Court. The High Court affirmed its jurisdiction. It went on to justify its assumption of jurisdiction, on the basis that neither the High Court nor the ELC could be viewed to have exclusive jurisdiction in the matter, concluding rather startlingly, that jurisdiction in the Petition was concurrent and coordinate. It was also the view of the High Court that due to the need to determine the Petition expeditiously, and on account of public interest generated by the subject matter [SGR], it was more appropriate to determine the Petition at the High Court, rather than the ELC.
102. Do articles 162[2] and 165[5] contemplate concurrent and coordinate jurisdiction of the High Court and courts of Equal Status? Is jurisdiction to be assumed because it is expeditious to do so, or because public interest is alleged to demand that a matter is best heard in a particular court?



103. Although there is always potential for overlap in material jurisdiction, such overlap is best resolved by having the court with the closest connecting factors to the dispute, assume jurisdiction. If a matter involves the National Land Commission, the first instinct of a reasonable man, would be that this a matter in the jurisdiction of the ELC. The High Court in Patrick Musimba Petition acknowledged this principle on closest connecting factors, citing an English decision, *Spiliada Maritime Corp v Consulex Ltd*, [1987] AC 460, where it was held that, where there seems to be 2 courts with concurrent or coordinate jurisdiction, the court seized with jurisdiction may decline to exercise jurisdiction, if the other court is more appropriate for deciding the dispute. The High Court did not have jurisdiction, but if it was convinced there was concurrent or coordinate jurisdiction, it ought to have, in the respectful view of this court, ceded ground to the ELC, as the more appropriate jurisdiction. There was no persuasive reason stated by the High Court in the end, why the ELC, from where the Petition originated, was not the more appropriate court to hear and determine the Petition.
104. In *Wilson Macharia v. Safaricom Plc* [2021] e-KLR, the dispute revolved around employment discrimination. The petitioner alleged he was denied employment by the respondent, on account of his disability. He invoked among others article 27 of the *Constitution* and section 5 of the *Employment Act*, on discrimination. The High Court heard the petitioner, concluding that the petitioner did not establish employment discrimination, but demonstrated that he was denied his right to dignity, and was compensated in the sum of Kshs 6 million.
105. Jurisdiction does seem to have been contested, but at the heart of this dispute, was an employment discrimination dispute. If a matter involves employment discrimination, the first instinct would be that the court with the closest connecting factors, is the E&LRC.
106. There could be a perception within the legal circles, such as expressed by the petitioner Mr Okoiti, that the High Court is assuming jurisdiction, where jurisdiction ought to be exercised by article 162[2] Courts.
107. The Supreme Court in *Samuel Kamau Macharia v Kenya Commercial Bank Ltd & others* [2012] e-KLR, established that jurisdiction flows from the *Constitution* and Legislation. It cannot be feigned. The High Court itself, in *Africa Centre for Open Democracy [AFRICOG] v Ahmed Isaack Hassan & another* [2013] e-KLR, declined jurisdiction to hear a dispute on matters it considered to involve the process leading to declaration of a successful presidential candidate. Jurisdiction on such matters is reserved for the Supreme Court. The High Court on this occasion upheld that its jurisdiction is constitutionally limited.
108. Early decisions of the High Court post- 2010, such as *United States International University v Attorney-General* [2012] e-KLR, established that article 162[2] courts, have jurisdiction to hear and determine disputes in their respective specialized areas.
109. In *Daniel N Mugendi v Kenyatta University & 3 others* [2013] e-KLR, the Court of Appeal endorsed the decision of the High Court in USIU Petition, transferring a matter that had been struck out by the High Court for want of jurisdiction, to the Industrial Court [now E&LRC]. The Court of Appeal restated that the E&LRC has exclusive jurisdiction, on employment and labour relations disputes. The Court of Appeal also advanced the view that if the High Court or the article 162[2] Courts come across a matter that ought to be litigated in any other courts, it should be prudent to have that matter transferred to the other court, for hearing and determination.



110. In Petition Number 33 of 2018, *Sammy Ndungu Waity v IEBC & 3 others* [2019] e-KLR, the Supreme Court held: -

“Where the Constitution or any other law establishes an organ, with a clear mandate for the resolution of a given genre of disputes, no other body can lawfully usurp such power, nor can append [upend?] such organ from the pedestal of execution of its mandate. To hold otherwise would be to render the constitutional provision inoperable, a territory into which no judicial tribunal, however daring would dare to fly.”

111. This position was restated in Supreme Court, *Law Society of Kenya v Attorney- General & another* [2019] eKLR.

112. The Supreme Court in its seminal decision on jurisdiction of the High Court and article 162 [2] courts, *Republic v Karisa Chengo & 2 others* [2017] e-KLR, examined the historical context of the article 162[2], and in particular the jurisdictional tension between the High Court and the Industrial Court [now E&LRC], upholding the earlier decision of the Court of Appeal in the Chengo Appeal, that the 3 superior courts of Equal Status, are different and autonomous courts, exercising different and distinct jurisdictions. The Supreme Court emphasized that article 165 [5] of the Constitution, precludes the High Court from entertaining matters reserved for the ELC and the E&LRC. By the same token the ELC and the E&LRC, cannot hear matters reserved for the High Court. This decision appears to discount the idea that the 3 courts have concurrent and coordinate jurisdiction.

113. There is therefore no shortage of binding, Supreme Court, Court of Appeal, and other superior court decisions, delineating constitutional jurisdiction for the High Court and the article 162[2] courts.

114. The problem appears to be in the 3 courts’ inability to identify their exclusive subject matter jurisdiction. In other words, judgessitting in these courts do not always agree that a matter is employment, labour relations, land, environment or a matter of general constitutional concern. It is therefore important in answering the question on jurisdiction of the E&LRC posed by the petitioner herein, to look into the concept of employment, and two, labour relations.

115. Article 162[2][a] allows Parliament to establish the E&LRC. The broad mandate of the E&LRC is twin- employment, and labour relations.

116. Employment in most English Dictionaries, means the fact of employing someone; the state or act of being employed; and work, occupation or profession in which one earns a living [Collins Dictionary]. Employment is the state of having paid work. Jurisdiction of the E&LRC extends to the world of paid work. Cambridge Dictionary defines employment as the fact of someone being paid, to work for a company or organization. The constitutional jurisdiction of the E&LRC, extends to employment, the world of paid work, which is not the same thing as employer-employee relationship. In the Canadian decision *Fraser v Vancouver Board of Parks & Recreation*, 2001 BCCA 214 [CanLII] the court held that the term ‘employment,’ is not restricted to the narrow contract of service situation. Citing the *Dictionary of Canadian Law* 2d. ed., the court held that the words ‘employment’ and ‘employed,’ are susceptible of meanings both large and narrow. Largely read, ‘employment’ may refer to work, or an activity in which a person receives valuable consideration, and ‘employed,’ may mean occupied or engaged. More narrowly, ‘employment,’ may refer to the position of a person in the service of another or performance of services under a contract of service, and ‘employed’ may mean performing the duties of an office, or employment. Employment jurisdiction is not restricted to the narrow employer-employee relationship.



117. Labour Relations have been defined as the collective relations between management of an organization and its Employees, and Employees' representatives. It is a set of such relations, in a wider context, such as an industry, or a national economy [Collins Dictionary].
118. Labour relations are distinguished by their collectivism- with workers acting in combination, engaging their Employers on matters of collective rights and interests. Disputes of a collective nature, relating to article 41 of the [Constitution](#); disputes relating to review of remuneration and benefits of State Officers and Public Officers, made upon advice of the Salaries and Remuneration Commission – all fall within the field of labour relations.
119. Jurisdiction of the E & LRC, involves disputes relating to employment, and to labour relations, in their wider context. It is not confined to employer-employee relationship, which is defined in a contract of employment. That relationship of employer-employee, can be regulated entirely by reference to the *Employment Act* and the relevant contract.
120. The E&LRC Act itself does not confine the court's jurisdiction to employer-employee relationship. The Act confers jurisdiction on the court-to hear and determine all disputes referred to it in accordance with article 162[2] of the [Constitution](#). These disputes, going back to the article, are not restricted to employer-employee disputes, but to employment, and labour relations.to hear and determine disputes in accordance with the Act.to hear and determine disputes under any other written law, which extends jurisdiction to the court, relating to employment, and labour relations.
121. The Act lists the matters which the court can deal with. It describes those matters as, 'including', which simply means the listed matters are not exclusive.
122. Does the court have jurisdiction over State Officers, and more particularly Judges of the Superior Courts? Are Judges Workers?
123. In [Gilham v Ministry of Justice](#), 2019 UKSC 44, the Supreme Court UK, was confronted with the question whether a judge qualified as a 'Worker' or 'Person in Crown Employment.'
124. Judge Gilham had complained to the Judiciary Leadership about lack of appropriate and secure court room accommodation, severely increased workload placed upon the judges and administrative failures. These are grievances judges in Kenya, are all too familiar with.
125. She was subjected to a number of detriments, following her complaints: delay in investigating her grievance; being seriously bullied, ignored and undermined by her fellow judges and court Staff; being informed that her workload and concerns were simply a 'personal working style choice'; and inadequate steps to support her in her work. The judgeclaimed that she suffered severe degradation in her health, resulting in psychiatric injury and disability, under the [Equality Act 2010](#).
126. The judge filed a Claim at the Employment Tribunal for disability discrimination. Her Claim depended on her being a 'Worker.' The Employment Tribunal found that the Judge was not a 'Worker.' The matter went before the Employment Appeals Tribunal. It was again held that the Judge was not a 'Worker.' The dispute found its way up to the Court of Appeal, which again upheld the finding that the Judge was not a 'Worker.'
127. The judge filed an Appeal at the Supreme Court, which disagreed with the Court of Appeal, the Employment Appeals Tribunal and the Employment Tribunal, finding that judgeswere analogous to limb [b] Workers, entitled to the protections offered by the Employment Rights Act. The matter was remitted to the Employment Tribunal, for retrial, founded on the conclusion that the judgewas deemed a 'Worker.'



128. Section 230[3] of the *Employment Rights Act, 1996*, defines the word ‘Worker,’ in 2 limbs, as an individual who has entered into or works under [or where the employment has ceased, worked under] –
- (a) a contract of employment; or,
 - (b) any other contract, whether express or implied, and [if it is express] whether oral or in writing, whereby the individual undertakes to do, or perform personally any work or services for another party to the contract, whose status is not by virtue of that contract, a client or customer of any profession or business undertaking carried on by the individual.
129. The judge argued throughout the courts, that she did not claim to work under a contract of employment, but fell within the definition of limb [b], a position which the Supreme Court upheld in its Judgment.
130. Notably, Judge Gilham sought protection from the employment jurisdiction, before finding her way up to the Supreme Court.
131. In the US decision *Porter v Commissioner*, 88 TC 279 [1987] the Tax Court held that Judges are not Employees, and were not qualified participants in Plans, established by the US for its Employees. It was observed that there are 3 common law employee classifications – employer-employee relationship; employee or independent contractor; and officer.
132. The court listed 5 indispensable elements of an Officer: -The Office must be created by the *Constitution* or Legislature, or municipality or other body with authority conferred by legislature. There must be a delegation or a portion of the sovereign power of government to be exercised for the benefit of the public. The power conferred and the duties to be discharged, must be defined either directly or indirectly by the Legislative authority. The duties must be performed independently and without control of a superior power other than the law. The office must have some permanency and continuity and an officer must take an official oath.
133. It was concluded therefore that judges are not Employees, but classified as Officers of the United States.
134. UK public information GOV.UK site, offers some helpful insights on employment status and in particular, with regard to the concept of office holders. A person who has been appointed to a position by a company or organization, but does not have a contract or receive regular payment, may be an office holder. The list includes statutory appointments, such as company directors or secretaries, board members of statutory bodies, or crown appointments, appointments under internal constitutions of an organization, such as club treasurers or trade union secretaries, appointments under trust deed, such as trustees and ecclesiastical appointment, such as members of the clergy.
135. The site states that office holders are neither Employees nor Workers, but that it is however possible, for someone to be an office holder, if they have an employment contract with the same company or organization that meets the criteria of Employee.
136. Judges in Kenya are classified as State Officers, under article 260 of the *Constitution*.
137. In *County Government of Nyeri & another v Cecilia Wangechi Ndung'u* [2015]eKLR, the Court of Appeal restated the classification of State Officers under article 260, while observing that the *Employment Act* does not apply to State Officers. It was stated that State Officers’ terms and condition of service are regulated by the *Constitution* or the relevant Statute, principles of fair administrative action and rules of natural justice. The Court of Appeal unlike the court in *Gilham* decision which affirmed the Judge’s right to be protected under the Employment Rights Act, 1996, held that State



- Officers are not covered under the *Employment Act*. The Court of Appeal did however, uphold the decision of the E&LRC in the dispute, which involved dismissal of a County Executive Committee Member, a State Officer, by the County Governor.
138. In *Republic v Clerk County Assembly of Baringo ex parte William Kassait Kamket* [2015] eKLR, the court was emphatic that jurisdiction of the E&LRC, includes disputes relating to or arising out of employment between an Employer and Employee and not only in respect of a contract of service, as the *Employment Act, 2007* would suggest. The court held that office holders have access to the E&LRC and it matters not that they are Employees, or Servants of the People, or the respective Commissions or County Assemblies. The court adopted the broader concept of employment.
 139. In *Trusted Society of Human Rights Alliance v Nakuru Water and Sanitation Services Company & another* [2013] eKLR, the court found that the dispute was about recruitment, a proper element of employment, and therefore the E&LRC was seized of subject matter jurisdiction.
 140. In *Richard Bwogo Birir v Narok County Government & 2 others* [2014] e-KLR, the court stated that the idea of servants of the crown, was substituted with servants of the people under the new Republic of Kenya, as nurtured in the *Constitution of Kenya, 2010* . The court held that the E&LRC is seized of jurisdiction whether it is about employment law or policy, or about individual Public Officer's grievances.
 141. *Nick Githinji Ndichu v Clerk Kiambu County Assembly & another* [2014] e-KLR, went further, stating that the law is not concerned with the method of recruitment or whether a person was appointed or elected; rather the person must have an oral or written contract of service, and be receiving wages/ salary for the services rendered .
 142. Appointment and removal of elected State Officers such as the President, Senators, Governors, Members of Parliament, Members of County Assembly, does not fall in the jurisdiction of the E&LRC. The court can think of no other State Officer, who comes into office through election, whose appointment or removal is amenable to the jurisdiction of this Court. Elected Officers come into office through electoral processes, governed by the *Constitution* and election laws. They are dismissed from office through processes created under the *Constitution* and Statutes, such as impeachment. The E&LRC is not involved in electoral processes, such party primaries and election petitions. These are disputes within the exclusive jurisdiction of the High Court
 143. Although the E&LRC has been involved in impeachment of County Governors, this, in the humble view of this court has been a wrong assumption jurisdiction which belongs exclusively to the High Court. Whenever the term 'elected' is used with regard to the manner of assumption of office by State Officers, the first instinct is that disputes relating to election or removal from office, lies with the High Court. Disputes on 'appointment' or 'removal' of Elected State Officers in the Legislative Assemblies and in the National and County Executives, are not within the jurisdiction of the E&LRC, however much we enlarge the concept of 'employment.' There is no room for the E&LRC to adjudicate impeachment disputes involving elected State Officers.
 144. But having read through the various decisions cited by the parties with regard to judges of superior courts, the court has formed the view that disputes on their appointment, are subject matter of the E&LRC jurisdiction. Disputes on their terms and conditions of service as reviewed or made by the Judicial Service Commission under article 172 of the *Constitution* , or disputes on their remuneration as set and regularly reviewed by the Salaries and Remuneration Commission under article 230, are employment disputes, within the larger conceptualization of the term 'employment,' and are in the Jurisdiction of the E&LRC.



145. Judges are appointed. The terms ‘appoint’ and ‘employ’ are used interchangeably, to mean one has taken up a salaried assignment. Letters of employment in the labour market, are commonly styled letters of appointment.
146. Upon assuming office, judges are issued letters of appointment, defining their terms and conditions of employment. Remunerative terms issue on the advice of the Salaries and Remuneration Commission, while other terms and conditions of service, are authored by the Judiciary through its functional arm, the Judicial Service Commission. Standard employment benefits such as house allowance, paid leave, and remuneration are advised in the letter of appointment. In event of dispute on these benefits, the right judicial forum to adjudicate is the E&LRC.
147. The terms and conditions of service for Judges, like any other contract of employment, attribute rights and responsibilities, between the judge and the Judiciary.
148. Disputes on discrimination of judges on recruitment are properly matters within the jurisdiction of the E&LRC.
149. Terms such as State Officer, Officer of the Crown, or Officers of the United States, mentioned in this judgment, seem to this court to historically, be used by the State, to limit access to employment and labour relations rights, enjoyed by other Workers. The Gilham Judgment brought this to the fore. The judge was found at the Employment Jurisdiction and the Court of Appeal, not to be a Worker, and therefore not entitled to certain rights and protections under the Employment Rights Act. In the US case *Porter v Commissioner*, judges were denied an employment benefit on the ground that they were Officers of the United States. States are always concerned whenever their key Officers, are allowed to freely access these rights, and in particular, the rights under article 41 of the [Constitution](#), concerning workers acting in combination. It is thought that access of these rights, by these cadre of Employees, can destabilize statecraft.
150. When viewed holistically, there is in fact, no reason why a State Officer should be distinguished from an Employee or a Worker. Article 77 of the [Constitution](#) states that, “ a full-time State Officer shall not participate in any other gainful employment.”
151. This is sufficient, to enable the court conclude, that State Officers are indeed in gainful employment. Judges are in gainful employment. All other arguments are resolved by this article. The [Constitution](#) deems State Officers to be in employment. If they are in gainful employment, exclusive jurisdiction is with the E&LRC in disputes involving their employment. In employment law, potential Employees, who face discrimination on recruitment, are considered to be Employees. If a candidate for Judgeship is in any way discriminated at the point of recruitment, or while in employment, he or she has recourse in the Employment and Labour Relations Court.
152. Judges are subject to PAYE tax. The Employer’s Guide to PAYE in Kenya, revised edition, 2017, recognizes income tax from salaries and wages to all income from any office or employment. Part 1 of the Guide, states that PAYE applies to all ‘Employments.’ The mandarins at Times Tower characterize employment and office, as different types of ‘Employments.’
153. Judges of superior courts file tax returns through form P9, which is a standard form, issued by Employers to their Employees, indicating total annual emoluments earned by the Employee, for purposes of tax returns.
154. In the view of the court, State Officer, Public Officer, or the narrow employer- employee relationship, are as correctly characterized by Kenya Revenue Authority, to be conceptualized within the larger meaning of the term ‘Employment,’ or what KRA in its Guide, innovatively calls ‘ Employments.’



Employment, is a dynamic concept, which cannot be simplified to mean an employer-employee relationship.

155. Legitimate expectation is predicated on regular, consistent and predicable conduct, process or activity of the decision-making authority. The petitioner cannot invoke the doctrine of legitimate expectation, merely on the ground that the President had a duty to act fairly. The petitioner has not shown, what benefit or advantage which in the past he had been permitted by the President to enjoy, has been frustrated. The court does not think that the petitioner's invocation of the principle of legitimate expectation is sustainable.
156. The [Constitution of Kenya 2010](#), creates limited government, which includes limited Courts. There is no court with unlimited jurisdiction. Judicial authority, like all authority under the [Constitution](#) is dispersed amongst the various courts, at different levels. It is not intended to be concentrated in one court. There is no room for constitutional behemoths.
157. In concluding this judgment, the court would wish to restate that all courts have a duty, to determine questions of their jurisdiction, under the principle of kompetenz kompetenz, even where another court, has declared its own exclusive jurisdiction.

It is so Ordered:

- a. Prayer A. in the amended petition, seeking declaration that, the Employment and Labour Relations Court has exclusive original jurisdiction as the court of first instance, over all disputes concerning the recruitment and appointment/ employment of all State Officers, including judges of the superior courts, is allowed.
- b. Prayers A1. and A2. of the amended petition relate to issues that are before the Court of Appeal. The court defers to the appellate jurisdiction, by declining to adjudicate on the specific issues.
- c. It is declared that article 132[2][f] of the [Constitution of Kenya](#), does not apply, and should never apply, in the appointment of judges of superior courts, and prayers A3 B C of the Amended Petition are declined.
- d. No order on the costs.

**DATED, SIGNED AND DELIVERED TO THE PARTIES ELECTRONICALLY, AT NAIROBI,
UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 17TH
DAY OF FEBRUARY, 2022**

JAMES RIKA

JUDGE

