



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT NYERI**

**PETITION NO.17 OF 2020**

**(as consolidated with ELRC Petition Nos.15 and 16 of 2020)**

**(Before D.K.N.Marete)**

**JOE NGATIA MURIUKI.....1ST PETITIONER**

**COUNTY GOVERNMENT OF KIRINYAGA.....2ND PETITIONER**

**VERSUS**

**THE COUNTY ASSEMBLY OF KIRINYAGA.....1ST RESPONDENT**

**SPEAKER OF THE COUNTY ASSEMBLY OF KIRINYAGA.....2ND RESPONDENT**

**RULING**

This is an application by way of preliminary objection dated 18th August, 2020 and comes out as follows;

- 1. THAT the 1st and 2nd Respondents are constitutionally mandated pursuant to Article 185(3) of the Constitution to exercise oversight role over the County Executive Committee and any other County Executive organs.*
- 2. THAT the 1st and 2nd Respondents are further enabled pursuant to Section 8 as read together with Section 39(2) of the County Government mandated to seek the Petitioner to attend and appear before a committee of the 1st Respondent, and in their attendance, answer any question relating to the members responsibilities.*
- 3. THAT in exercise of their powers as above, the 1st and 2nd Respondent or the 1st Respondents committee pursuant to Article 195 of the Constitution is allowed to summon any person to appear before it for the purpose of giving evidence or providing information.*
- 4. THAT in exercise of the 1st and 2nd Respondents Constitutional and Statutory mandate under Section, 39 (2), the same cannot be termed as a deployment of its residual powers of removal of a county executive committee member under Section 40 of the CGA.*
- 5. THAT pursuant to Article 183(3) of the Constitution of Kenya 2010, a duty is created upon the petitioner to provide the 1st Respondent with full and regular reports on matters relating to the County.*
- 6. THAT the 1st Respondent under the leadership of the 2nd Respondent was exercising sovereignty of the people of Kirinyaga as per Article 1(2) of the Constitution when they sought to have the Petitioner attend and answer questions in a sitting of the 1st Respondent committee.*
- 7. THAT in giving the resolutions, the 1st and 2nd Respondent in compliance with Article 47 on Fair Administrative Actions, the Respondents did not summon the Petitioner to attend the 1st Respondent's Committee session vide a letter dated 27th May, 2020 in their exercise of their powers under Section 39(2) of the CGA.*

The Petitioners in a rejoinder dated 30th October, 2020 opposes the preliminary objection for want of substance.

The Respondents case is that this court lacks jurisdiction over this matter. This is on the basis that the application and petition do not fall within the ambit of Section 12 of the Employment Act, 2007 which defines the jurisdiction of court.

The Respondent's case is that the court comes out of action in exercise of her oversight authority. The petitioner was invited to be meeting in which the resolution was made but did not turn up.

Again, there does not exist an employer/employee relationship between the parties per S.12, Employment Act, 2007 and therefore this court lacks the necessary breathe to exercise jurisdiction in the matter.

The Respondent's in her written submissions further provides as follows;

A.

*1. The 1st and 2nd Respondents raised a Preliminary Objection to the 1st and 2nd Petitioners' Application and Petition vide their Ground of Opposition dated 18th August, 2020. The Preliminary Objection is based on the ground that this Honourable court lacks the necessary breathe to exercise not fall within the ambit of Section 12 of the Employment and Labour Relations Act, which provides for matters which this Honourable court may exercise its jurisdiction over.*

She further sought to rely on the authority of **Nick Githinji Ndichu vs. Clerk Kiambu County Assembly and Another (2014) eKLR** the court held thus,

*"For one to access the jurisdiction at ELRC he must demonstrate that there exists an employer- employee relationship; that there is an oral or written contract of service or that the issue as a dispute falls within the provision of Section 12(1) of the ELRC Act..."*

The Petitioner in opposition to the Preliminary Objection seeks to rely on the generic aspects of a preliminary objection as enunciated in the authority of **Mukhisa Biscuits Manufacturing Company Ltd vs West End Distributors Limited (1969) EA 696** as follows;

*"...a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose off the suit..."*

Further,

*"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."*

It is his submission that the preliminary objection raises issues of fact that can only be adequately determined at a full trial.

The Petitioner further seeks to rely on the authority of **International Centre of Insect Physiology and Ecology (ICIPE) v Nancy McNally (2018) eKLR** the Court of Appeal held as follows;

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

The Respondents have submitted that the Petitioner was appointed by the Governor and that they do not have authority to employ and terminate the petitioner. The court agrees that the law provides for checks and balances which the Respondent exercised by passing the resolution report dated 23rd June 2020. The Respondent was exercising its oversight authority as provided by the law. However the Respondent in exercising its oversight authority should not violate the Petitioner's fundamental rights as per by the Bill of Rights.

The Respondent proceeded and make a recommendation that the Respondent lacks confidence on the Petitioner which report is to be tabled to the Governor to further deliberation. The Governor is required to act on the said recommendation to decide whether to terminate the Petitioner's employment or not. This by and large affects Petitioners rights as an employee of the Respondent. The court will not proceed on the substance of the Application as to whether due process was followed during the meeting that led to the a recommendations dated 23rd June 2020 but limit itself on the issue of jurisdiction.

The court concludes that the Petitioner has stated violation of fundamental right provided in Article 50 which the court has the power to protect as provided in the Constitution. The court cannot turn a blind eye when the Petitioner's fundamental Rights are being violated all in the name of protecting the Respondent's right to exercise its oversight authority. For this reason the court finds that the Notice of Preliminary objection is not merited and that the Honourable Court has jurisdiction to hear and determine this matter.

The preliminary objection as it stands therefore becomes unsustainable and must fail.

I am therefore inclined to dismiss the preliminary objection with costs to the petitioner.

**DATED AND DELIVERED AT NYERI THIS 9TH DAY OF MARCH, 2022.**

**D.K.Njagi Marete**

**JUDGE**

Appearances

1. Miss Biacco instructed by Wanyonyi & Muhia Advocates for the Petitioner.
2. Miss Nderi holding brief for Ndegwa instructed by Ndegwa & Ndegwa Advocates for the Respondents.