



Republic v Kenya Ports Authority Board Of Directors & 2 others; Public Service Commission (Exparte); Genesis For Human Rights Commission (Applicant) (Judicial Review Application 001 of 2022) [2022] KEELRC 1362 (KLR) (8 July 2022) (Ruling)

Neutral citation: [2022] KEELRC 1362 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

JUDICIAL REVIEW APPLICATION 001 OF 2022

B ONGAYA, J

JULY 8, 2022

IN THE MATTER OF ARTICLES 1, 2, 3, 10, 22, 23, 34, 35, 46, 75, 156, 165, 201, 232, 233, 234, 235, 236, AND 258 OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF THE LAW REFORMS ACT CAP 26

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES 2010

IN THE MATTER OF STATE CORPORATIONS (MWONGOZO)

IN THE MATTER OF THE KENYA PORTS AUTHORITY ACT CAP 391 LAWS OF KENYA

-AND-

IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI AND PROHIBITION

BETWEEN

REPUBLIC APPLICANT

AND

KENYA PORTS AUTHORITY BOARD OF DIRECTORS 1ST RESPONDENT

CABINET SECRETARY MINISTRY OF TRANSPORT. 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

AND

PUBLIC SERVICE COMMISSION EXPARTE

AND

GENESIS FOR HUMAN RIGHTS COMMISSION APPLICANT



RULING

1. The ex-parte applicant filed a notice of motion on 20.05.2022 through Shabaan Associates LLP and Mr. Masake Advocate appeared in their behalf. The notice of motion is brought under sections 1A and 3A of the Civil Procedure Act Cap 21, Order 53 rules 1 and 2 of the Civil Procedure Rules 2010, and sections 4,7,8,9 and 11 of the Fair Administrative Action Act 2015, sections 8,9 and 10 of the Law Reform Act Cap 26, Laws of Kenya and all other enabling provisions of law. The applicant prays for orders:
 - 1) That this Honourable court be pleased to grant the ex-parte applicant herein an order of *certiorari* to remove into this court and quash the decision of the 1st respondent *vide* a resolution dated 20th day of April 2022 to purportedly implement the proposed revised Human Resource Instruments of the Kenya Ports Authority and effect new staff appointments or deployments.
 - 2) That the Honourable court be pleased to grant the ex-parte applicant herein an order of prohibition to remove into this court and prohibit the 1st respondent to implement through a resolution dated 20th day of April 2022 the proposed revised Human Resource Instruments of the Kenya Ports Authority and effect new staff appointments or deployments.
 - 3) That the costs of this application be provided for.
2. The 1st respondent appointed Mohammed Muigai LLP advocates and Professor Githu Muigai, SC, Mr. G. Kaseke and Ms. Wambui Advocates appeared in that behalf. The 1st Respondent filed a notice of preliminary objection on 07.06.2022 upon the following grounds:
 - 1) The Human Resource Instruments, the subject of the ex-parte applicant's application, were considered, approved and adopted on 3rd June 2021. Pursuant to Section 9(3) of the Law Reforms Act as read together with Order 53 Rule 2 of the Civil Procedures Rules, the ex-parte applicant's application is thus time barred.
 - 2) The applicant lacks the requisite locus standi to institute the proceedings herein to quash the 1st Respondent's internal management instruments governing its employment and human resource management
3. The Interested party through Mrs Manani Advocate indicated that it would not participate in the preliminary objection.

Submissions on the preliminary objection were filed for the 1st Respondent on 23.06.2022 and for the Ex-parte Applicant on 20.06.2022. Counsel for the 1st respondent and the ex-parte applicant highlighted the submissions on 30.06.2022.
3. The 1st ground of the preliminary objection is whether the application by the ex-parte applicant is time barred. Its is submitted for the 1st respondent that the applicant has invoked section 9(3) of the Law Reforms Act which provides;

“In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may



be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.”

4. It is further submitted that the ex-parte applicant invoked Order 53, rule 2 of the [Civil Procedure Rules](#) and which is in like terms as section 9(3) of the [Law Reforms Act](#) in stating:

“Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.”

5. The 1st respondent submits that the decision sought to be challenged by the ex-parte applicant was made on 3rd June 2021. It should therefore follow that pursuant to section 9(3) of the [Law Reform Act](#) and Order 53 Rule 2 of the [Civil Procedure Rules](#), 2010, the ex-parte applicant ought to have instituted judicial review proceedings within 6 months of the said decision being on or around 06.12.2021. It is further submitted that the ex-parte applicant filed the instant proceedings on 20.05.2022, well outside that statutory time frame of 6 months from the date of the impugned decision.
6. The 1st respondent prays that the application by the ex-parte applicant be dismissed with costs as it is time barred.
7. It was submitted that in *Ako v Special District Commissioner Kisumu & another [1989]* eKLR it was held as follows:

“It is plain that under sub-section (3) of section 9 of the [Law Reform Act](#) Cap 26 leave shall not be granted unless application for leave is made inside six months after the date of the judgment. The prohibition is statutory and is not therefore challengeable under procedural provisions of the Civil Procedure Rules, more specifically order 49 rule 5 which permits for enlargement of time. That is the basis of the contention that the prohibitive nature of sub-section (3) of section 9 of the Act is capable of bearing such a liberal interpretation as would make it permissible for the court to enlarge time beyond the period of six months. We have no doubt that the prohibition is absolute and any other interpretation or view of the particular provision would be doing violence to the very clear provision of subsection (3) of section 9 of the [Law Reform Act](#).”

8. Further, in *Republic v Githunguri Land Disputes Tribunal [2003]* eKLR, the court quoted with approval as follows; -

“It is clear from the provisions of the [Law Reform Act](#) (Cap. 26) and from the case law, in particular *Re An Application by Gideon Waweru Gathunguri [1962]* E.A. 520 and *Mahaja v Khutwalo [1983]* KLR 553, that all actions in quest of the discretionary Order of Certiorari, must be commenced either within the six-months limit following the taking of the decision impugned, or outside this limit when the Court’s leave has been secured during that time limit. It is beyond doubt that the present application has not complied with these procedural limits; and, therefore, the prayers sought cannot be granted.”



9. The 1st respondent submits that at the time of instituting the instant proceedings, the ex-parte applicant had not filed an application for extension of time. Further, there remains no application before the Court in respect of the effluxion of time within which the ex-parte applicant was statutorily obligated to institute the present proceedings. The 1st respondent has extensively quoted the case of *Republic v Kiambu Land Dispute tribunal & 2 others ex-parte Wambui Chege Macharia 7 2 others* [2016] eKLR in respect of limitation of time in instituting judicial review applications and the possibility of extending time in that regard.
10. It is further submitted that while the applicant seeks to quash the decision of 20.04.2022, that the decision of 20.04.2020 is in of itself, a decision on the substance of the (5) SCAC Watermarked Kenya Ports Authority Human Resource Instrument. Accordingly, a challenge by the ex-parte applicant against the decision of 20.04.2022 is a challenge against the substance of the (5) SCAC Watermarked Kenya Ports Authority Human Resource Instrument which is a challenge outside the realm of the judicial review proceedings. It follows that the ex-parte applicant's application as framed seeks to challenge the merits, substance, and the contents of the (5) SCAC Watermarked Kenya Ports Authority Human Resource Instruments and not the decision-making process through which the said instruments came to be.
11. For the ex-parte applicant it is submitted that, the 1st Respondent is seeking the quashing of the resolution of the 1st respondent's board made in its 400th special Board Meeting held on 20.04.2022 to purportedly implement the proposed revised Human Resource Instruments of the Kenya Ports Authority and effect new staff appointments or deployments. It is further submitted for the ex-parte applicant that the argument as laid down by the 1st respondent, it is alleged that the adoption of the (5) SCAC Watermarked Kenya Ports Authority Human Resource Instrument in its 393rd sitting on the 03.06.2021. Further, from the said argument, the said instrument was a report made by the State Corporations Advisory Committee (SCAC) and that at that period it was being tabled for discussion by the 1st Respondent. The ex-parte applicant submits that the 1st respondent interrogated the said document in subsequent board sittings thus 394th, 395th, 396th, 397th, 398th and 399th before the final approval and implementation was made through a resolution in its 400th sitting. The impugned decision under review herein was therefore made on the 20.04.2022. The resolution is what created, made appointments and deployed various staff in one sitting. It is further urged for the ex-parte applicant that the 1st respondent has a duty to produce minutes of the subsequent board sittings in order to disprove the submission and assertion as made by the ex-parte applicant but it has conveniently chosen to leave the said minutes out of these proceedings.
12. The ex-parte applicant in its submissions, states that without prejudice to the foregoing, in any event, the situation presented defeats the essence of a preliminary objection as it entails production of evidence to disprove the facts. The case of *Republic v Speaker of the Nairobi County Assembly & 4 others Ex parte Maurice Otieno Gari [2021]* eKLR, Nyamweya J (as she then was) held:

“27. Before determining the issues raised in the instant application and preliminary objections, it is necessary to clarify the circumstances in which a preliminary objection may be raised. The purpose and nature of a preliminary objection was explained by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696, as follows:

“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 the 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.”

13. It is therefore submitted for the ex-parte applicant that a preliminary objection cannot therefore be raised if any fact requires to be ascertained. Further, in the case of *Oraro v Mbaja*, [2005] 1 KLR 141, the court held thus,

“Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed.”

14. The ex-parte applicant submits on the issue of a suit being statute barred and cites the case of *Peter Gicharu Ngige v Kiiru Chomba & 3 others* [2004] eKLR thus,

On the issue of time to file the declaratory suit, I have not been addressed and informed that the suit itself is statute barred. The counsel for the respondent has only stated that the time started running from the date of adoption of the Tribunal’s decision by the lower court. In case counsel for the respondent considers that the suit is statute barred, he can raise it in the defence to the suit, and it will be dealt with at the appropriate time.’

The ex-parte applicant relies on Order 53 rule 2 of the Civil Procedure Rules and its earlier quoted case of *Republic v Speaker of the Nairobi County Assembly & 4 others ex parte Maurice Otieno Gari* [2021] eKLR, for the holding thus:

“.... the main reason for the leave as explained by Waki J (as he then was), in *Republic v County Council of Kwale & Another Ex Parte Kondo & 57 others*, Mombasa HCMCA No 384 of 1996, is to ensure that an applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case fit for further consideration.

37. While in most cases it is self-evident that the matter should proceed to judicial review, there are a number of preliminary factors that a Court considers and addresses at the leave stage. These factors have been enumerated in *Judicial Review: Principles and Procedure* by Jonathan Auburn et al at paragraph 26.05 as follows:

- (1) whether the enactment, action, decision, or failure to act that is being challenged is amenable to judicial review;
- (2) whether the claimant has capacity to bring a claim for judicial review;
- (3) whether the claimant has a sufficient interest to bring a claim for judicial review;
- (4) whether the particular challenge brought by the claimant is one that may be brought by the judicial review procedure, and whether it is appropriate to bring it by that procedure;
- (5) whether the claim is otherwise an abuse of process;
- (6) whether all or some of the grounds of challenge relied upon by the claimant are sufficiently meritorious to justify the grant of permission;



- (7) whether the claim has been brought promptly;
- (8) whether there are any discretionary grounds that justify the refusal of permission in the exercise of the court's discretion.”

15. The ex parte applicant prays that this honourable court be satisfied that the application for leave as granted on 19.05.2022 ticked all boxes and the matter was ripe for consideration of the substantive motion.
16. The Court has considered the parties' respective submissions on the 1st ground in the notice of preliminary objection. The Court returns as follows.
17. First, on the face of the notice of motion as filed for the ex-parte applicant, the order of certiorari is prayed for within the scope of the terms of the prayer being a proposal to quash the 1st respondent's resolution dated 20.04.2022 to implement the proposed revised Human Resource Instruments of the 1st respondent and effecting new staff appointments or deployments. The Court returns that parties are bound by their own pleadings and it is not for the Court or the respondents to redraw and redraft the ex-parte applicant's case. By its pleading, the ex-parte applicant has designed its case to quash the 1st respondent's decision made on 20.04.2022 as prayed. The judicial review proceedings were commenced when the ex-parte applicant applied for leave and subsequently filed the substantive notice of motion on 20.05.2022. The 6 months prescribed in section 9(3) of the Law Reform Act and rule 2 of Order 53 of the Civil Procedure Rules would lapse on or about 20.10.2022. The Court therefore returns that the ex-parte applicant is not trapped by the time of limitation attached to the remedy of the judicial review order of certiorari. The resolution of the 400th 1st respondent's Special Board meeting of 20.04.2022 is duly exhibited as required under Order 53 of the Civil Procedure Rules and there is no suggestion that the prayer for certiorari is with respect to a fictitious decision.
18. Second, it is submitted for the 1st respondent that the decision of the 1st respondent subject of the order of certiorari is a decision on 20.04.2022 which approved the 5 SCAC Watermarked Kenya Ports Authority Human Resource Instruments which had already been adopted by the 1st respondent's regular Board meeting held on 03.06.2021 and appointment of certain senior staff of the 1st respondent and KFSL as a start in implementation of the Instruments. It is submitted for 1st respondent that challenging the decision of 20.04.2022 amounts to a challenge against the 5 SCAC Watermarked Kenya Ports Authority Human Resource Instruments in substance but which falls outside the scope of judicial review proceedings which should look at the process through which the Instruments came into being but not their merits or substance. For the ex-parte applicant it is submitted the submission as made for the 1st respondent invites the Court to get into an analytical consideration to find out whether the challenge of the decision of 20.04.2022 is essentially a challenge in procedural considerations or substance of the preceding decisions thereto, such as relates to the Instruments in issue. The Court finds for the ex-parte applicant that on the basis of *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696*, “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 the 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.”
19. In the instant case the parties are at dispute as to whether the challenge to the decision of 20.04.2022 raises a procedural challenge or substantive challenge of the Instruments from which the decision of 20.04.2022 appears to have germinated or blossomed. Such disputed facts render the preliminary objection as urged to fail to pass the test of a valid preliminary objection being founded upon the assumption that the facts as pleaded by the other side are correct. The Court finds that the submissions



as urged for the 1st respondent are that in fact, the facts as pleaded by the ex-parte applicant are not correct - that the impugned resolution as made on 20.04.2022 is not, in the 1st respondent's submissions, the proper decision that should fall as the impugned decision for purposes of the instant proceedings. The 1st respondent's submission therefore falls short of rendering the preliminary objection as valid since a further, deeper, and wider inquiry is relevant towards making the finding on the scope and impact of the remedy of certiorari as prayed for in view of the earlier 1st respondent's Board decisions on the Instruments in issue.

20. The Court has in so finding, also considered the submission made for the ex-parte applicant on the scope of judicial review as held by Onyango J in *Republic v Communication Authority of Kenya; Information Communication Technology Association of Kenya (ICTAK) (Exparte) (Judicial Review Application 21 of 2020) [2021] KEELRC 7 (KLR)* and citing Lord Diplock in *Council of Civil Service Unions –V- Minister for Civil Service [1984]3 ALL ER 935* thus, “Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call “illegality,” the second “irrationality” and the third “procedural impropriety.” ...By “illegality” as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable. By “irrationality” I mean what can by now be succinctly referred to as “Wednesbury unreasonableness” (*Associated Provincial Picture Houses Ltd, v Wednesbury Corporation [1948] 1 K.B. 223*). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. I have described the third head as “procedural impropriety” rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.”
21. The Court has considered that authority against the 1st respondent's submission that the prayer for certiorari with respect to the decision of 20.04.2022 amounts to challenging the substance of the Instruments on merits. The Court returns that whether the foundation of that submission is correct or otherwise is a matter the Court can decide one way or the other after full hearing of the application. The Court considers that without a full hearing of the petition it would not be possible to determine at this preliminary stage whether the ex-parte applicant has established illegality, irrationality or procedural impropriety to justify the Court's intervention as applied for. It appears to the Court that by that authority cited for the ex-parte applicant, the inquiry in a judicial review proceeding would go beyond procedural impropriety upon which it is urged for the 1st respondent (albeit, prematurely and therefore with no tools for a conclusive finding at this stage) as not existing in the instant case. It is the Court's consideration that upon that authority, independent of existence of procedural impropriety, a proper judicial review case would possibly be founded upon illegality or irrationality (unreasonableness). The consideration of illegality and irrationality or unreasonableness as grounds for judicial review appear to encompass an emergent judicial review jurisdiction upon substance rather than exclusively upon procedural impropriety. Is it the case? It appears to the Court to be the case in the mutating judicial review jurisdiction. The grounds or bases to justify the Court's intervention in judicial review



proceedings appear to therefore be several and establishment of any of the grounds or bases would be sufficient – and procedural impropriety is therefore only one of and not the exclusive such ground. It also appears to the Court that the existence or absence of any of the grounds to justify the Court’s intervention in judicial review proceedings would properly be established after full hearing of the respective cases of the parties before the Court in full consideration of all the relevant evidence and arguments, in that regard.

22. Third, the Court returns that in the present case, the ex-parte applicant has as well prayed for the judicial review order of prohibition. The order of prohibition has not been said to be time barred or impaired in any material respect as to render the applicant’s entire suit untenable. Thus, even if the order of certiorari as prayed for were to be found time barred, the preliminary objection would not thereby render the suit conclusively unsustainable. It may be that the prayer for certiorari would be rendered vestigial in the otherwise surviving suit. In that sense, the desired outcome of a preliminary objection towards effective and efficient application of judicial time through aborting unnecessary full hearings would thereby not be served at all in view of the continued survival of the proceedings.
23. The Court therefore returns that the 1st ground in the notice of preliminary objection collapses.
24. The 2nd ground of the preliminary objection is whether the ex-parte applicant has the requisite locus standi to institute the instant proceedings. It is submitted for the 1st respondent that the term locus standi denotes the legal capacity of a person to institute and maintain court action before a court of law. In the Black’s Law Dictionary 9th Edition, locus standi is defined as “the right to bring an action or to be heard in a given forum” Further, it is submitted that the importance of obtaining leave in a judicial review application was eloquently stated by Waki J (as he then was) in Republic –V- County of Kwale & Another Ex parte Kondo & 57 others, Mombasa HCMISC APP No 384 of 1996 thus, ‘is to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived.’
25. It was submitted for the 1st respondent that the Courts should develop jurisprudence that an applicant for judicial review orders has a real nexus with the issue or grievance they wish the Courts to review. Professor Githu Muigai, SC submitted for the 1st respondent that not even *the Constitution* of Kenya, 2010 interfered with the issue of *locus standi*. Further, locus standi must be determined prior to granting leave. It was submitted that public law matters must be distinct and the ex-parte applicant had failed to demonstrate sufficient interest in the contracts of service between the 1st respondent and its staff or trade union so that the applicant had failed to establish a nexus. Further, the subject matter was the human resource Instruments of the 1st respondent and which constitute contractual terms and conditions governing employment between the 1st respondent and its employees. Senior Counsel also submitted that such were internal documents that are relevant to the 1st respondent, its employees and trade unions. Thus, it was submitted that the subject matter was a private interest and therefore a matter of private law. It was submitted that private and public law matters must therefore be separated. The 1st respondent cited *Humphrey Makokha Nyongesa & Another –V- Communications Authority of Kenya & 2 others [2018]* eKLR where Onyango J held, “In the present case, the applicants have stated that their interest in this application is that they have an obligation to respect, uphold and defend *the constitution* whenever it is under attack, in their capacity as “good Samaritans” and “on behalf of the



greater public interest.” The foregoing begs the question whether the issue before the court is in the public interest or falls within the private law arena.

26. What does the public stand to suffer because the Interested Party has been sent on compulsory leave? In the view of the court, the only person who is affected by the compulsory leave is the Interested Party. As the letter sending him on compulsory leave states, he was to hand over his office to the Director/General Compliance and Standards who was appointed to act while the Interested Party is on leave. This means there would be no disadvantage to the public while the Interested Party is away on compulsory leave, as his duties would be adequately covered by the person appointed to act in his position.
27. If there is no loss by the public, then the applicants, as members of the public, stand to suffer no disadvantage. This would mean that this is not a matter that falls in the public interest or arena.” And further, “Before I conclude, I think it is in order to clarify a misnomer that I have noted in the arguments by counsel for the applicants that where a body established by law engages the employment of any person that employment has statutory underpinning and subject to judicial review. It is important to distinguish between a public body acting in its public capacity and a public body acting in a private capacity. A public body like any other employer, enters into private contracts with its employees. In such cases the rights, duties and obligations of the public body is no different from any other private entity that has entered into a private contract with its employees. This is the kind of relationship that the 1st Respondent has with the interested party herein, which should not be confused with employment with statutory underpinning were there is no direct employment relationship between the “employer” and employee.”
28. It was therefore submitted for the 1st respondent that private rights in public employment are not public interests. The case of *Brian Asin & 2 others v Wafula W. Chebukati & 9 others* [2017] eKLR was cited and where Mativo J held, “58. According to *Black’s Law Dictionary* “Public Interest Litigation means a legal action initiated in a court of law for the enforcement of public interest or general interest in which the public or class of the community have pecuniary interest or some interest by which their legal rights or liabilities are affected.
59. While dealing with the question of “bona fides” of a petitioner, especially in the case of a person approaching the Court in the name of Public Interest Litigation, the Indian Supreme Court in the case of *Ashok Kumar Pandey vs. State of West Bengal* held as hereunder: -

“Public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and/or publicity seeking is not lurking. It is to be used as an effective weapon in the armory of law for delivering social justice to the citizens. The attractive brand name of public interest litigation should not be used for suspicious products of mischief. It should be aimed at redressal of genuine public wrong or public injury and not publicity oriented or founded on personal vendetta. As indicated above, Court must be careful to see that a body of persons or member of public, who approaches the court is acting bona fides and not for personal gain or private motive or political motivation or other oblique consideration. The Court must not allow its process to be abused for oblique considerations. Some persons with vested interest indulge in the pastime of meddling with judicial process either by force of habit or from improper motives. Often they are actuated by a desire to win notoriety or cheap popularity. The petitions of such busy bodies deserve to be thrown out by rejection at the threshold, and in appropriate cases with exemplary costs.”



60. The Public Interest Litigation was designed to serve the purpose of protecting rights of the public at large through vigilant action by public spirited persons and swift justice. But the profound need of this tool has been plagued with misuses by persons who file Public Interest Litigations just for the publicity and those with vested political interests. The courts therefore, need to keep a check on the cases being filed and ensure the bona fide interest of the petitioners and the nature of the cause of action, in order to avoid unnecessary litigations. Vexatious and mischievous litigation must be identified and struck down so that the objectives of Public Interest Litigation aren't violated. *The constitution* envisages the judiciary as "a bastion of rights and justice.
61. Public interest litigation is a highly effective weapon in the armory of law for reaching social justice to the common man. It is a unique phenomenon in the Constitutional Jurisprudence that has no parallel in the world and has acquired a big significance in the modern legal concerns."
28. It was submitted for the 1st respondent that the ex-parte applicant was a non-governmental organization challenging the internal human resource instruments governing the 1st respondent, its staff and its trade unions and the applicant lacked a connection or nexus in that regard. That it could not commence the proceedings in exclusion of those directly affected by the Instruments.
- The 1st respondent further submitted that the ex-parte applicant was not one of the contemplated litigants under section 12 of the *Employment and Labour Relations Court Act, 2011* that could move the Court for a remedy. The section provides as follows: "12. (1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of *the Constitution* and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including—
- (a) disputes relating to or arising out of employment between an employer and an employee;
 - (b) disputes between an employer and a trade union;
 - (c) disputes between an employers' organisation and a trade unions organisation;
 - (d) disputes between trade unions;
 - (e) disputes between employer organizations;
 - (f) disputes between an employers' organisation and a trade union;
 - (g) disputes between a trade union and a member thereof;
 - (h) disputes between an employer's organisation or a federation and a member thereof;
 - (i) disputes concerning the registration and election of trade union officials; and
 - (j) disputes relating to the registration and enforcement of collective agreements.
- (2) An application, claim or complaint may be lodged with the Court by or against an employee, an employer, a trade union, an employer's organisation, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose.
- (3) In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders—
- (i) interim preservation orders including injunctions in cases of urgency;



- (ii) a prohibitory order;
 - (iii) an order for specific performance;
 - (iv) a declaratory order;
 - (v) an award of compensation in any circumstances contemplated under this Act or any written law;
 - (vi) an award of damages in any circumstances contemplated under this Act or any written law;
 - (vii) an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law; or
 - (viii) any other appropriate relief as the Court may deem fit to grant.
- (4) In proceedings under this Act, the Court may, subject to the rules, make such orders as to costs as the Court considers just.”

29. It was submitted for the 1st respondent that under the section, the parties capable of instituting claims before the Court are employers, employees, a trade union, an employers’ organisation, a federation, the Registrar of Trade Unions, the Cabinet Secretary or their representative.
30. For the ex-parte applicant it was submitted that in judicial review matters the question of ‘locus standi’ is now settled. One need not show a personal and direct interest in the matter. It was submitted that in *Humphrey Makokha Nyongesa & Another v Communications Authority of Kenya & 2 others* [2018] eKLR it was held that it was sufficient to show there was a threatened breach and that there was no intention to stop functioning of a public body. Further, it was sufficient to show that there exists a threatened breach or contravention of law, which requires the intervention of the court. Thus, the court must be satisfied that the claim is not vexatious, or intended to stall the functions of the public body concerned. In other words, the court must satisfy itself that the applicant is not acting in bad faith. Counsel for the ex-parte applicant submitted that the 1st respondent was a public body mandated to discharge public function. The ex-parte applicant was a human rights watch body and taking care of public interests. The Court must therefore have jurisdiction to investigate how the 1st respondent as a public body made the impugned decision; the procedural propriety of the impugned 1st respondent’s decision. Further, there was no privacy in dealings of a public body. There was deployment and hiring of staff and that opened the 1st respondent to scrutiny. It was the ex-parte applicant’s case that the 1st interested party is mandated to regulate the delivery of human resource functions by the 1st respondent so that the public was entitled to interrogate the process. It was submitted that the ex-parte applicant had filed the application in the public interest in promotion of access to justice and, in a pure arena of public law duties whereby the public generally has a legitimate expectation that the 1st respondent shall act openly and without bias.
31. The Court has considered the respective submissions on the 2nd ground in the notice of preliminary objection and returns as follows.
32. First, is the present judicial review application about public law interest and obligation (duty) or about a private law contract and right? In the Court’s opinion, to answer that question the Court has to delve deep into the pleadings and iron out the parties’ contesting facts and opinions. The facts about the issue being contested, the Court readily returns that once again the preliminary point as urged on such limb of private and public law interest or rights fails to pass the test that a preliminary objection be based



upon a presumption that the facts as pleaded are correct and not disputed between the parties. Further, it appears to the Court that the substance of the dispute as urged for the ex-parte applicant is not to challenge the 1st respondent's prerogative as an employer to enter and conclude individual employee contracts of service or collective bargaining agreements which would pass for a private law contract and right issue as was envisaged in the holding by Onyango J in *Humphrey Makokha Nyongesa & Another -V- Communications Authority of Kenya & 2 others [2018]* eKLR. In the instant case, the grounds on the face of the application are that the ex-parte applicant is concerned about whether the impugned human resource Instruments have been concluded in accordance with applicable procedures such as participation of stakeholders and with relevant approvals such as allegedly by the interested party. On the face of the replying affidavit for the 1st respondent sworn by Elijah Kitur, the Head of Board Affairs Regulatory Compliance and Governance filed on 07.06.2022, it is the 1st respondent's case that the impugned instruments were concluded in accordance with the relevant law and involvement of the stakeholders. On the other hand, the replying affidavit for the interested party by Simon Rotich, the Commission Secretary and CEO filed on 06.06.2022 shows that the interested party's case is that its constitutional mandate under Article 234 of *the Constitution* of Kenya, 2010 as read with the *Public Service Commission Act*, 2017 apply to the 1st interested party. At paragraph 18 thereof it is stated, the interested party has not been requested by the 1st respondent and granted the necessary approval of the interested party with respect to the impugned human resource Instruments and further, "17. Implementation of any establishment or organisation structure without the approval of the interested party is unconstitutional and unlawful for violating the express provisions of Article 234 (2) (a) (i) of *the Constitution* as read with Sections 26, 27, and 58(1) of the *PSC Act*." The Court is alert that in deciding a proper preliminary objection the Court needs not delve into the issues. Nevertheless, that highlight of the parties' respective positions shows that indeed the dispute relates to and is primarily about the process and authority in law for establishment or organisation of the 1st respondent's human resource structure which on the face of pleadings appears to be founded upon certain underpinning constitutional and statutory provisions whose interpretation by the parties appears to be at variance or even at conflict. The Court finds that in such circumstances and at this preliminary stage, it is irresistible to find that the dispute is about public law, interest, obligation, or duties as well as about interpretation and determination of applicable constitutional and statutory provisions. The Court returns that the primary root of the dispute is not the private contracts or rights and obligations between the 1st respondent and its staff and trade unions but, whether the 1st respondent has properly invoked and applied the relevant constitutional and statutory provisions in concluding the impugned human resource Instruments. The preliminary objection will therefore collapse as urged on the basis of the dichotomy of public law, interest or duty as against, private law, rights and contract.

33. Second, it is urged for the 1st respondent that the ex-parte applicant is not an employee or an employer or any of the other conceivable parties to a legal proceeding as stipulated under section 12 of the *Employment and Labour Relations Court Act*, 2011. The applicant appears not to have elaborately answered to that concern by the 1st respondent.
34. The Court returns that the parties to the proceedings per section 12(2) of the Act include any person suing against an employer like in the instant case whereby the ex-parte applicant being a human rights watch organisation is suing the 1st respondent, an employer. The 1st interested party by provisions of Article 234 of *the Constitution* is as well, invariably, an employer. The Court considers that the proceedings have satisfied provisions of section 12(2) of the Act which provides, "An application, claim or complaint may be lodged with the Court by or against an employee, an employer, a trade union, an employer's organisation, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose." The Court construes the subsection to mean that under that provision, any person may sue or be sued before the Court as long as one of the



mentioned categories of the parties is included as a party. In the ruling delivered on 23.10.2020 in [Mike Sonko Mbuvi Gidion Kioko v The Clerk, Nairobi City County Assembly and 4 others \[2020\]](#) eKLR the Court held, “Section 12(1) of the [Employment and Labour Relations Court Act, 2011](#) is clear that the Court has exclusive original and appellate jurisdiction to hear and determine disputes referred to it in accordance with Article 162(2) of [the Constitution](#) and the provisions of the Act or any other written law. Section 12(2) of the Act (which the parties appear to have failed to refer to) further provides that an application, claim or complaint may be lodged with the Court by or against an employee, an employer, a trade union, an employer’s organisation, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose – and by that provision, it is clear that in the instant petition the petitioner (as an employee) has by way of the petition lodged a complaint against the respondents. The Court further holds that by reason of section 12(2) of the Act the proceedings are not limited to parties listed in section 12(1) of the Act but the jurisdiction spreads to disputes about employment even by and against persons not being employees or employers or parties to the contract of service. The Court finds that to be the case especially in view of Article 162(2) as read with Article 165 (5) (b) of [the Constitution](#).”

35. Further, the Court finds that in the instant case the circumstances are that the Court enjoys jurisdiction upon territorial, party, subject matter, and remedy. In particular, the subject matter is about making of the impugned human resource Instruments in issue and which is undisputedly an employment and labour relations issue falling within the Court’s constitutional and statutory jurisdiction.
36. The Court follows its holding and opinion in [Trusted Society of Human Rights Alliance –V- Nakuru Water and Sanitation Services Company and Another \[2013\]](#) eKLR thus,

“Jurisdiction is the authority to decide a case or a dispute in issue. It is founded outside the court or the decision maker but maps out the court’s or decision maker’s internal boundaries. Thus, jurisdiction is given by [the Constitution](#) or by statute or the legitimate authority empowered to impose or define jurisdiction. The court upholds the holding in *The Owners of Motor Vessel “Lillian S” –Versus- Caltex Oil Kenya Limited (1989)* KLR1 that without jurisdiction, all is void; a nullity. However, in the opinion of this court, one exception exists to that glorified and singular truth. It is the opinion of the court that every court or decision maker has jurisdiction to determine whether it has jurisdiction in any particular case. Thus, in the opinion of the court, the only valid decision that can be made by the court or other decision maker without jurisdiction to determine the substantive dispute in issue is that the court or decision maker lacks the jurisdiction. In that sense, jurisdiction is more times than not a preliminary issue for determination by the court or other decision makers.”
37. However, the issue of jurisdiction like in the instant case may not be obvious and may only be resolved after significant consideration of the issues in dispute. In such instances, the court holds that the issue of jurisdiction ceases to be a preliminary point and it becomes a substantive issue for determination alongside the other substantive issues in dispute. Thus, whether jurisdiction is a substantive or preliminary issue will depend upon whether the circumstances leading to jurisdictional dispute are largely obvious or largely intricate.
38. The court further holds that in mapping out the boundaries to determine jurisdiction, the court must consider the four crucial traditional elements of jurisdiction namely parties, territory or geographical area, remedies that may issue and subject matter in dispute. The court holds that the authority to decide will relate to the parties, the territory or geographical area of the dispute, the remedies that may issue and the subject matter involved. Depending on the authority to decide as may be conferred, all the



four parameters may be pertinent or one or two of them may apply. In the opinion of the court, unless any of the four results into a bar to jurisdiction in the given case or circumstance, presence of any of the four as permitting jurisdiction will be sufficient for the court to assume jurisdiction and proceed to entertain and determine the case at hand.” In the instant case the Court returns that there is no established bar to jurisdiction at this preliminary stage. Further, it appears that the jurisdictional issues as raised for the 1st respondent require going into the evidence and other disputed matters in issue so that the efficient and complete determination of the jurisdictional issue becomes more of a substantive than a preliminary matter for determination by the Court.

39. Third, on the issue of sufficient interest, the Court upholds the submission made for the 1st respondent that not even *the Constitution* of Kenya, 2010 interferes with the requirement for an applicant to show sufficient interest with a real nexus or connexion with the issue the applicant wishes to be judicially reviewed. The Court also holds that in appropriate cases, a party suing in the public interest needs not establish “sufficient interest” but must show the stakes that constitute public interest to justify locus standi. In that regard the Court upholds its opinion in *Trusted Society of Human Rights Alliance –V- Nakuru Water and Sanitation Services Company and Another [2013]* eKLR thus,

“The court has considered the wording of the Article and is of considered opinion that under Sub-Article 258(1) any person can initiate the proceedings to enforce or protect *the Constitution* provided that the person establishes that he or she is acting in own interest. In such proceedings, the person initiating must show what has traditionally been called “sufficient interest” which acts as the sieve to determine the proper party. The person initiating the proceedings must establish actual or threatened injury revolving upon the person’s legal right or interest. Thus, in the opinion of the court, under Sub-Article 258 (1), “every person” means a person who can establish “sufficient interest”.

40. On the other hand, a person who cannot establish “sufficient” interest can initiate the proceedings to protect or enforce *the Constitution* under provisions of Sub-Article 258(2). Such a person without sufficient interest will establish standing only and only if the person establishes any of the prescribed conditions namely:
- a) that the person is acting on behalf of another person who cannot act in their own name (such as the traditional incapacities of insanity, age of minority or disabling statutory prescriptions as may for example be suffered by those belaboring under bankruptcy or insolvency);
 - b) a person acting as a member of, or in the interest of, a group or class of persons (for example as it happens in the traditional representative suits);
 - c) a person acting in public interest (in which event, in the opinion of the court, the person initiating the proceedings must establish the public interest, meaning, in the opinion of the court, that thing in which the general public has stakes as is protected by constitutional provision, executive policy, legislative provision, judicial determination or such other legitimate regulation like international law); or
 - d) an association acting in the interest of one or more of its members.
41. It is the opinion of the court that the foregoing analysis of Article 258 applies to Article 22 of *the Constitution* which is worded in exactly similar language save that, as already found, Article 22 proceedings would strictly and exclusively relate to enforcement of the Bill of Rights.
42. Thus, the court holds that Articles 22 and 258 of *the Constitution* codify the traditional standing rules based on sufficient interest while at the same time expanding and liberalizing standing rules by



conferring standing upon those without sufficient interest within an objective sieving system. The provisions do not therefore demolish all the walls of navigating access to courts and which sieving regime, in the opinion of the court, is a necessary safe-guard to fortify due process of the court that insulates proper parties to proceedings and removes persons who invariably would be improper parties in court proceedings. In the opinion of the court, the sieving regime enhances access to the courts and therefore justice by prescribing a simple objective criteria or standard for measuring presence or absence of standing.”

43. In the instant case, the court has found that the ex-parte applicant has established that it has brought the application in the public interest; it is such a person acting in public interest, in which event, and in the opinion of the court, the applicant has pleaded that it initiated the proceedings in the public interest - being that the general public has stakes in the manner the 1st respondent institutes and reviews its human resource organisation and structure as such review or institution is said to be protected by the constitutional provisions, statutory provisions, executive policy, judicial determinations or such other legitimate regulation as the applicant seeks to show at the full hearing.
44. In conclusion, the notice of preliminary objection filed for the 1st respondent dated 06.06.2022 and filed on 07.06.2022 is hereby determined with orders:
1. The notice of preliminary objection is dismissed with costs in the cause.
 2. The parties to take steps towards directions for expeditious hearing and determination of the substantive motion of judicial review herein.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 8TH JULY, 2022.

BYRAM ONGAYA

JUDGE

