



**Mugo & another v Head of Public Service & 3 others; Kiamba & 5 others (Interested Parties) (Petition E140 of 2022) [2022] KEELRC 14648 (KLR) (13 October 2022) (Ruling)**

Neutral citation: [2022] KEELRC 14648 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E140 OF 2022  
M MBARÚ, J  
OCTOBER 13, 2022**

**BETWEEN**

**MARY MUGO ..... 1<sup>ST</sup> PETITIONER**

**ERICK KINGDOM SILA ..... 2<sup>ND</sup> PETITIONER**

**AND**

**HEAD OF PUBLIC SERVICE ..... 1<sup>ST</sup> RESPONDENT**

**CABINET SECRETARY MINISTRY OF EDUCATION ..... 2<sup>ND</sup> RESPONDENT**

**THE COUNCIL OF KENYATTA UNIVERSITY ..... 3<sup>RD</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**PROFESSOR CHRISPUS KIAMBA ..... INTERESTED PARTY**

**JANE WAMOKO ..... INTERESTED PARTY**

**CARILUS ODERO ODUMBE ..... INTERESTED PARTY**

**BASHIR YUSUF ..... INTERESTED PARTY**

**ANDREW NYANCHOGA ..... INTERESTED PARTY**

**ALICE WARUGURU MUITA ..... INTERESTED PARTY**

**RULING**

1. The ruling herein relates to the respondents Notice of Preliminary Objections dated 4<sup>th</sup> August, 2022 on the grounds that;



1. The petitioners lack locus standi to commence these proceedings as has been clearly set out in the Court of Appeal Civil Appeal No.119 of 2017 – *Public Service Commission & 2 others v Erik Cheruiyot & others* and in that regard the court lacks jurisdiction to hear and determine the issues raised herein.
  2. The court lacks jurisdiction to hear and grant the orders sought both in the application and petition under Section 12(1) of the *Employment and Labour Relations Court Act*.
  3. The Kenyatta university Council Members are not employees of the University or the respondents' herein and do not fall in the category of employees hence this court has no jurisdiction to determine matters concerning appointments or revocation of appointments of Council members.
2. On these objections parties filed written submissions and attended and made oral highlights.
  3. The respondents' submitted that the petitioners filed the petition alleging that the appointment of the interested parties in Gazette Notice No.8049 and No.8230 dated 8<sup>th</sup> and 12<sup>th</sup> July, 2022 respectively to the Council, Kenyatta University was irregular and that the President in making the appointments revoked the appointment of the petitioners and which petition is filed before this court without jurisdiction on the grounds that the petitioners lack locus standi, the court cannot grant the orders sought and there is no employer and employee relationship denying the court jurisdiction to hear and determine this petition.
  4. The objections herein are based on the law and the lack of standing deny the petitioners audience as they have no capacity as defined under Section 12 of the *Employment and Labour Relations Court Act* as held in *Rift Valley Water Services Board & 3 others v Geoffrey Asanyo, Nakuru Water Services Company & John Cheruiyot*, Civil Case No.61 of 2015 where one of the issues that was determined was whether board members were employees of a company and the court held the definition of an employee under Section 2 of the *Employment Act* does not apply to a council member of a public body.
  5. The issue in dispute herein is the revocation of the petitioners' appointment to the Council of Kenyatta University and the appointment of the interested parties. Such are not matters of employers and employee and hence deny the petitioners standing with the court as held in *Alfred Njau & others v City Council of Nairobi* [1982]KAR. In Civil Appeal No.119 of 2017 – *Public Service Commission & 2 others v Eric Cheruiyot & others* [2022] eKLR the court held that the jurisdiction of the Employment and Labour Relations Court is limited to the determination of disputes arising out of contracts of employment and constitutional violations out of employment relationship arising out of Section 12 of the *ELRC Act*.
  6. On this basis, the instant petition does not relate to employer and employee relationship so as to give the court the necessary jurisdiction to hear and determine the same. The petitioners were members of council of the Kenyatta University regulated under section 36 of the *universities Act* and appointed by the Cabinet Secretary and hence not employees as defined under Section 2 of the *employment act* so as to give the court jurisdiction as held in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR.
  7. Under paragraph 23 of the Petition, the petitioners claim that by virtue of the constitutional definition of public service, public officer, public officers and public body under Article 260 of the *constitution* and to that extent section 10 of *State Corporations Act* provides for remuneration of members of Boards from state coffers but persons working in state corporations are employees but board members are not employee as defined in *Fredrick Otieno Outa v Jared Odoyo Okello & 4 others*[204] eKLR and the petitioners being former members of the University Council are not sustained in terms of



remuneration and benefits due to an employee hence denying this court jurisdiction and the objections made should be allowed.

8. The petitioners submitted that the Article 162 of the constitution give the court jurisdiction over reemployment and labour relations disputes and Section 12 of the ELRC Act define the relationships with regard to employment and labour relations over which the court has jurisdiction as held in Okiya Omtatah Okiiti v Kenyatta University Council & 4 others Nairobi ELRC petition No.89 of 2015 the court held that there was exclusive jurisdiction to hear and determine a petition relating to employment and labour relations including violation of rights and interpretation of the constitution.
9. The petition herein raises issues with regard to violation of constitutional rights following the revocation of the petitioners' appointment from Council of Kenyatta University and pursuant to Article 22 and 258 of the constitution upon which the petition is premised, the petitioners have the requisite standing.
10. In the case of Public Service Commission & 4 others v Eric Cheruiyot & 20 others Civil Appeal 119 & 139 of 2017 the court held that the ELRC Court jurisdiction is not limited to the determination of disputes arising out of contracts of employment and the court can also determine any constitutional violations arising out of an employment relationship. The petitioners' rights are guaranteed under the constitution and the removal from office and appointment to public office is a matter this court has jurisdiction to hear and determine as held in United States University (USIU) v Attorney general [2012] eKLR. in the case o Joseph Mutuura Mberia & another v Cabinet Secretary for Education, Science and Technology & 2 others [2014] eKLR the court faulted the 2<sup>nd</sup> respondent in appointing the Council without adhering to the laid down constitutional and statutory principles and in the case of Okiya Omtatah okiiti 7 another v Cabinet Secretary Ministry of Education & 5 others [2017] eKLR the challenged recruitment of chairpersons and members of council of public universities was determined by this court.
11. On this basis, the objections by the respondents should be dismissed and the petitioners allowed to proceed with the hearing and determination of the petition herein.
12. The interested parties supported the objections and submitted that the issue in dispute relates the revocation and appointment to the Kenyatta University Council which matters do not relate to employment between the parties and the court is without jurisdiction and should stop. The cases relied upon by the petitioners are not relevant to the issue in dispute herein since the appointment of a Vice Chancellor of a university relates to employment unlike the appointment to the Council which is different.

### **Determination**

13. The issues for determination are twofold being;
  1. Whether the petitioners have the requisite standing with the court; and
  2. Whether there is an employer and employee relationship between the parties to justify the invocation of the court jurisdiction.
14. The basis of the respondents' objections as outlined above is that the petitioners appointment to the Kenyatta University Council was revoked and the Interested Parties appointed which they challenge as being unconstitutional and unlawful but the petitioners were not in an employer and employee relationship or as defined under Section 12(1) of the ELRC Act, 2011 to have standing before the court or to give the court jurisdiction to hear and determine the instant petition.



15. This position is supported by the interested parties.
16. The petitioners on their part assert that the petition raise constitutional violations and the court is not restricted under the relationships defined under Section 12 of the [ELRC Act](#), 2011 and there is proper standing and the court is clothed with jurisdiction to hear and determine this petition.
17. With regard to the standing of the petitioner before this court, the petition is premised under the provisions of Articles 2, 3, 10, 19, 20, 21, 22, 23, 165(3), 258 and 259 of the [constitution](#), 2010.
18. At this stage, The petitioners have moved the court under Article 22, 23 and 258 of the [constitution](#), 2010 which provisions allow any party claiming that a right or fundamental freedoms in the Bill of Rights has/have been denied, violated or infringed or is threatened. Such a party has the liberty to file a petition with the court.
19. Article 258 of the [constitution](#) provides as follows;
  1. Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.
  2. In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—
    - a. A person acting on behalf of another person who cannot act in their own name;
    - b. A person acting as a member of, or in the interest of, a group or class of persons;
    - c. A person acting in the public interest; or
    - d. An association acting in the interest of one or more of its members.
20. The petitioners define themselves in the petition as being directly subject to the matters in dispute and also acting under the protections of Article 22 and 258 of the [constitution](#), 2010. This gives them a primary right to file the instant petition as held in of [Sumayya Athmani Hassan v Paul Masinde Simidi & another](#) [2019] eKLR that under Article 22(1) as read with Article 22(3) and the [constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules](#), the Bill of Rights is enforced by filing a petition and by Article 23(3), the Court may grant appropriate relief including a declaration that there is violation of any law and the Bill of Rights.
21. The jurisdiction of the Court is established in terms of Article 162(2) of the [constitution](#), 2010 as succinctly captured in [United States International University \(USIU\) v Attorney General](#) [2012] eKLR and affirmed by the Court of Appeal in [Mugendi v Kenyatta University](#) – Civil Appeal No. 6 of 2012 [2013] eKLR to include interpretation and application of the [constitution](#), 2010 with regard to matters related and or arising from employment and Labour Relations as set out under Article 162(2) read with Section 12 of the [Employment and Labour Relations Court Act](#), 2011. See also [Elias Kibathi & another v Attorney General](#) [2021] eKLR
22. the petition herein is seeking to protect the rights of the petitioners well premised under Articles 22 and 258 of the [constitution](#), 2010 on the revocation of their appointment and the appointment of the interested parties. Whether or not such matters are with merit, these are questions of facts to be addressed at a full hearing since objections of the nature addressed by the respondents’ should only be on points of law as held in [Owners of the Motor Vessel “Lillian S” v Caltex Oil \(Kenya\) Ltd](#) [1989] KLR 1.



23. With regard to the nature of relations between the parties under Section 12(2) of the *Employment and Labour Relations Court Act*, 2011 the law contemplates a situation where the court may be required to hear and determine matters under Article 165(3) b. or (d) of the *constitution* as held in *International Centre for Insect Physiology and Ecology (ICIPE) v Nancy McNally* [20158] eKLR that the ELRC has jurisdiction to hear and determine constitutional issues as and when they arise from employment and labour relations. The respondents in their objections have relied on the relationship defined under Section 12 of the *Employment and Labour Relations Court Act*, 2011. Save, before the relationship thereof are outlined, the preamble to Section 12 is that;

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—

24. The court is given exclusive jurisdiction to hear and determine all disputes referred to under Article 162(2) of the *constitution*, 2010 as read together with Section 12 of the *Employment and Labour Relations Court Act*, 2011 read in its entirety being employment and labour relations disputes or any other disputes under any written law which extends jurisdiction to the court relating to employment and labour relations.
25. Section 12(1) of the *Act* part ends with including which, properly put into context gives the court wide jurisdiction with regard to employment and labour relations disputes and for connected purposes. To read these provisions otherwise would be to seek a separation of the various components and apply each without the connecting factors being employment and labour relations and for connected purposes.
26. In the case of *Republic v Clerk County Assembly of Baringo ex parte William Kassait Kamket* [2015] eKLR the court held that the use of the term ‘including’ in Section 12(1) of the *Employment and Labour Relations Court Act*, 2011 is significant as it helps the court to construe the jurisdiction of the court in a way that promotes the purpose, values and principles of the *constitution* in establishing a specialist court to deal with employment and labour relations disputes and for connected purposes under the preamble to the Act.
27. This was reiterated in *Okiya Omtatah Okoiti v Attorney General; Njenga (Interested Party)* Petition No.E101 of 2020 [2022] eKLR where the court held that;

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.

The *ELRC 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.

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.



28. Given the above, a reading of Article 162(2) of the constitution, 2010 and section 12(1) of the Employment and Labour Relations Court Act, 2011 leave no doubt in my mind that the jurisdiction of the Court encompasses and includes all disputes relating or arising out of employment and the definition of an employee under the Employment Act, 2007 is with regard to rights and benefits of such person under the Act and defined to be any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company.
29. Many other employees and remunerated officer are not defined under the Employment Act, 2007. Majority fall under the constitution and other statutes and cannot be turned away from this court simply because they are not listed under the Employment and Labour Relations Court Act, 2011 or the Employment Act, 2007. In my humble view, Article 162(2) of the constitution, 2010 did not envisage a Court limited or restricted to dealing with disputes arising out of a contract of service only as defined in the Employment Act, 2007 which in any case predates the constitution.
30. The respondent has heavily relied on the case of Court of Appeal Civil Appeal No.119 of 2017 – Public Service Commission & 2 others v Erik Cheruiyot & others which in my view related to election of officers who come into office through the electoral process governed by the constitution and election laws over which the court lacks jurisdiction as such matters are directly to be heard by the High Court but in this case, the recruitment, appointment and holding of public office, terms and conditions of service and remuneration thereof and the application of Articles 232 of the constitution, 2010 as relied upon by the petitioners, these are disputes, within the larger conceptualization of the term ‘employment,’ and are in the Jurisdiction of this Court.
31. The issue at hand hence being the revocation of appointment of the petitioners cannot be removed and placed before any other court. Such would deny the petitioner a fundamental right to urge their case before the right forum, this court.

Accordingly, objections by the respondents’ are found without merit and are hereby dismissed. The petitioners have proper standing before this court and the court is clothed with jurisdiction to hear and determine the instant petition on the merits.

**DELIVERED IN COURT AT NAIROBI THIS 13<sup>TH</sup> DAY OF OCTOBER, 2022.**

**M. MBARŪ**

**JUDGE**

In the presence of:

Court Assistant: Okodoi

