



Odongo v Nakuru County Public Service Board & 5 others; Kiplangat & 20 others (Interested Parties) (Employment and Labour Relations Petition E017 of 2022) [2022] KEELRC 13319 (KLR) (29 November 2022) (Ruling)

Neutral citation: [2022] KEELRC 13319 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS PETITION E017 OF 2022**

DN NDERITU, J

NOVEMBER 29, 2022

IN THE MATTER OF ARTICLES 2, 3, 12, 19, 20, 21, 22, 35, 43, 47, 48, 50, 54, 73, 75, 159, 165, 174, 175, 176, 196, 201 AND 232 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE COUNTY GOVERNMENT ACT, 2012

AND

**IN THE MATTER OF PUBLIC APPOINTMENTS
(COUNTY ASSEMBLIES) APPROVAL ACT. NO. 5 OF 2017**

AND

**IN THE MATTER OF THE ILLEGAL AND UNLAWFUL NOMINATIONS OF PERSONS TO
THE POSITIONS OF CHIEF OFFICERS TO THE COUNTY GOVERNMENT OF NAKURU**

BETWEEN

KENNETH ODONGO PETITIONER

AND

NAKURU COUNTY PUBLIC SERVICE BOARD 1ST RESPONDENT

COUNTY GOVERNMENT OF NAKURU 2ND RESPONDENT

GORVERNOR, NAKURU COUNTY GOVERNMENT 3RD RESPONDENT

CLERK, NAKURU COUNTY ASSEMBLY 4TH RESPONDENT

SPEAKER, NAKURY COUNTY ASSEMBLY 5TH RESPONDENT

COUNTY ASSEMBLY OF NAKURU 6TH RESPONDENT

AND

CHERUIYOT MICHEL KIPLANGAT INTERESTED PARTY



ABUKI ALICE MANYONGE	INTERESTED PARTY
NDEGWA SAMUEL NJOROGE	INTERESTED PARTY
KAKAI EVERLINE BUNUSU	INTERESTED PARTY
ALEX MAINA MUHORO	INTERESTED PARTY
KOECH JOHN KIPKORIR	INTERESTED PARTY
MALINDA JOSEPH MUTUA	INTERESTED PARTY
MWAURA NEWTON KAMAU	INTERESTED PARTY
NCECE JOYCE	INTERESTED PARTY
ABDALLAH SALIM SWALEH	INTERESTED PARTY
KIMANI ROSEMARY WAMBUI	INTERESTED PARTY
BARASA KENNEDY MUNGAI	INTERESTED PARTY
KURGAT RICHARD KIBET	INTERESTED PARTY
KINYANJUI MARGARET WANJIRU	INTERESTED PARTY
KOECH CHARLES KIPNGETICH	INTERESTED PARTY
MWANGI JOHN MURIMA	INTERESTED PARTY
KURIA DAVID KAMAU	INTERESTED PARTY
SANG BENARD KIPKIRUI	INTERESTED PARTY
MWAURA STELLA MBAIRE	INTERESTED PARTY
CHANGWANY CATHERINE	INTERESTED PARTY
MUGO KENNEDY KAMBO	INTERESTED PARTY

RULING

I. Introduction

1. In a Petition dated November 11, 2022 filed in court on even date the Petitioner prays for the following against the Respondents –
 1. A declaration that the process leading to the nomination of the Interested Parties herein was unconstitutional, irregular and illegal for flouting clear provisions of the law and hence null and void ab initio.
 2. A declaration that the Nakuru County Public Service Board in the form of the panels conducting interviews for the nomination of the Interested Parties between the 24th and October 28, 2022 was not properly constituted and the decision nominating the Interested Parties herein is null and void ab initio and of no consequence whatsoever.
 3. A declaration that the process leading to the Approval hearings of the nominations of the Interested Parties herein by Committees of the 6th Respondent scheduled for the 14th to November 17, 2022 is unlawful for



flouting relevant statutory provisions and any approval hearings conducted pursuant thereto are null and void.

4. That an order of certiorari do issue to bring to this Honourable court for purpose of being quashed the decision by the 1st Respondent nominating the 1st to the 21st Interested Parties for the positions of the County Chief Officers, Nakuru Country Government in the respective Departments thereof on the October 29, 2022.
 5. THAT this Honourable court be pleased to issue an order of permanent injunction as against the Respondents jointly and severally, restraining them, and its members, agents, employees and/or any person acting at their behest from conducting any sittings and/or acts of approving hearings, vetting, appointment, gazzetment and/or swearing in of any of the persons nominated through the interview process purportedly held by the County Public Service Board, Nakuru County Government, between the 24th and October 28, 2022 for the positions of Chief Officers following the advertisement made on the September 27, 2022.
 6. THAT this Honourable court be pleased to issue any other relief amenable in the circumstances.
 7. THAT this Honourable court be pleased to order that the costs of this petition be borne by the Respondents.
2. Alongside the Petition the Petitioner filed a Notice of Motion of even date under a certificate of urgency seeking the following –
1. THAT this application be certified as urgent and be heard ex-parte in the first instance.
 2. THAT pending the hearing of this application inter-partes, this Honourable Court be pleased to issue a temporary injunction directed as the 4th, 5th, and 6th Respondents and /or its members from in any manner whatsoever conducting the approval hearings of the Committees of the Nakuru County Assembly scheduled for the 14th to the November 17, 2022 or any other hearings for the approval of the nomination of the 1st to the 21st Interested parties to the position of Chief officers, Nakuru County Government.
 3. THAT pending the hearing of this application inter-partes, this Honourable Court be pleased to issue an order of temporary injunction directed at the 4th, 5th, and 6th Respondents and/or its members from in any manner whatsoever vetting, considering and/or approving the nomination of the 1st to the 21st Interested Parties to the positions of Chief Officers, Nakuru County Government.
 4. THAT pending the hearing inter-partes of this application inter-partes, the Honourable Court be pleased to issue an order of temporary injunction restraining the Respondents herein jointly and severally and/or any of its members from in any manner whatsoever appointing and/or swearing in the 1st to the 21st Interested Parties to the position of Chief Officers, Nakuru County Government pursuant to the nominations of October 29, 2022.
 5. THAT pending the final hearing and determination of this Petition, this Honourable Court be pleased to issue a temporary injunction directed at the 4th, 5th, and 6th Respondents and/or its members from in any manner whatsoever conducting the approval hearings of the Committees



of the Nakuru County Assembly scheduled for the 14th to the November 17, 2022 or any other hearings for the approval of the nomination of the 1st to the 21st Interested parties to the positions of Chief Officers, Nakuru County Government.

6. THAT pending the final hearings and determination of this Petition, this Honourable Court be pleased to issue an order of temporary injunction directed at the 4th, 5th, and 6th Respondents and/or its members from in any manner whatsoever vetting, considering and/or approving the nomination of the 1st to 21st Interested Parties to the positions of Chief officers, Nakuru County Government.
 7. THAT pending the final hearing and determination of this Petition, the Honourable Court be pleased to issue an order of temporary injunction restraining the Respondents herein jointly and severally and/or swearing in the 1st to the 21st Interested Parties to the position of Chief Officers, Nakuru County Government pursuant to the nominations of October 29, 2022.
 8. THAT this Honourable Court be pleased to issue an order directed at the 1st Respondent compelling it to supply to this court for scrutiny, records of applications received from members of the public pursuant to the advertisement of September 27, 2022 interview attendance register, documents submission forms as submitted by the interviewees, minutes of the 1st Respondent for the selection of the 21 nominees including the individual scorecards for each of the 21 nominees within 30 days from the date of the order.
 9. THAT cost of this application be provided for.
3. On November 14, 2022 this Court made the following orders –
1. THAT the said application be and is hereby certified urgent.
 2. THAT pending the hearing and determination of the said application inter-partes an interim order of injunction be and is hereby issued against the 4th, 5th, and 6th Respondents and/or their members, agents and or other howsoever from conducting the approval hearings of the committee of the Nakuru County Assembly scheduled for 14th to November 17, 2022 or any other hearings for the approval of the nomination of the 1st to the 21st Interested parties to the position of the Chief Officers, Nakuru County Government.
 3. THAT pending the hearing inter-partes of this application an interim order of injunction be and is hereby issued stopping the 4th, 5th, and 6th Respondents or members thereof or their agents from in any manner whatsoever vetting, considering and or approving the nomination of the 1st to the 21st Interested Parties to the positions of Chief Officers, Nakuru County Government.
 4. THAT pending the hearing inter-parties of the application the Respondents, jointly and severally, and through any of its members or gents, or others howsoever are enjoined by way of interim order from appointing and or swearing of the 1st to 21st Interested Parties to the position of Chief Officers, Nakuru County Government pursuant to the Nominations of October 29, 2022.
 5. THAT a copy of this order together with all the pleadings herein be served upon the Respondents and the Interested parties by close of business today, November 14, 2022.
 6. THAT all the parties and or their Counsel appear before this court on Thursday November 17, 2022 for further orders and or directions.



4. When the matter came up in court for directions on November 17, 2022 the following Counsel appeared for the parties - Mr Kibet for the Petitioner, holding brief for Mr Kihoro Kimani Mr Nyamwange for the 2nd Respondent and holding brief for Mr Kihoro for the 1st Respondent, Mr Munene for the 3rd Respondent, Mr Karanja for the 4th, 5th, and 6th Respondents, and Mr Bitok for the Interested Parties.
5. Mr Karanja informed the Court that the Respondents had filed notices of preliminary objection (PO) in regard to the jurisdiction of this court over the subject matter. He informed the court that the order of November 14, 2022 had been served upon the Respondents on Monday, November 14, 2022 in the afternoon and that the vetting stopped immediately upon service of the said order.
6. All Counsel for the Respondents and the Interested Parties indicated that they were in support of the PO and upon listening to all Counsel, including counsel for the Petitioner, the court directed that the PO be heard and disposed of first before any other business in the matter. It was further directed by the court, with concurrence of all counsel for the parties, that the said PO be heard by way of written submissions.
7. The POs raised by the Respondents are contained in the notice filed by the 3rd Respondent dated November 16, 2022, that of the 4th Respondent of even date, and that of 2nd Respondent dated November 17, 2022 and all of them, in summary, raise the following three issues for determination by this court –
 - a. THAT this Honourable Court has no jurisdiction to deal with matters raised in the Petition and the application (the Notice of Motion dated November 11, 2022)
 - b. THAT the Petition(er) has no locus to bring this petition
 - c. THAT the Petitioner has not exhausted the administrative and other legal avenues available before approaching the court.
8. Counsel for the 4th, 5th, and 6th Respondents filed written submissions on November 18, 2022 while Counsel for the 1st, 2nd, and 3rd Respondent filed on November 17, 2022. Counsel for the Petitioner filed submissions in opposition to the PO on November 21, 2022.

II. Submissions By The Respondents' Counsel

9. Mr Karanja for the 4th, 5th, and 6th Respondents submits that the Petitioner is challenging the constitutionality of the nomination of the Interested Parties as chief officers by the 3rd Respondent on the recommendation of the 1st Respondent. Counsel notes that the Petitioner was not an applicant for any of the said positions and he is not an employee of the 2nd Respondent or indeed any other of the Respondents.
10. Counsel submits that the jurisdiction and mandate of this Court (ELRC) is marked and delineated under Article 162(2)(a) of the Constitution and Sections 2 and 12(1) & (2) of the Employment and Labour Relations Court Act. Counsel submits that for a matter to properly come before this Court there has to exist an employment and or labour relationship between the parties in the subject matter.
11. Counsel has cited various cases among them Republic v Karisa Chengo & Another (2017) eKLR and Attorney General & 2 Others v Okiya Omtata Okoiti & 14 Others (2020) eKLR to buttress the argument that this court must down its tools at this point for lack of jurisdiction and vacate the interim orders issued on November 11, 2022.



12. On the issue of locus standi Counsel submits that the Petitioner has failed to demonstrate the legal capacity in which he has filed this petition. Counsel argues that since the Petitioner has not demonstrated that there exists an employment and or labour relationship between him and the Respondents, and bearing in mind the jurisdiction of this court as stated above, then the Petitioner lacks the legal standing on which to file this petition.
13. In support of the foregoing argument Counsel has cited *Nick Gitthinji Ndichu v Clerk Kiambu County Assembly & Another (2014) eKLR* and urges this Court to find in absence of an employment and or labour relationship between the Petitioner and the Respondents or any of them the Petitioner lacks the requisite legal foundation on which to stand in filing this petition.
14. On the third issue of failure by the Petitioner to exhaust all administrative and legal avenues available to him before filing this petition, Counsel submits that on November 1, 2022 the County Assembly of Nakuru put up a notice in two local dailies with national circulation calling for members of the public to submit any information, memorandum, or petition under oath that may have a bearing on the suitability of the nominees (Interested Parties herein) for appointment as chief officers. Counsel submits that since the Petitioner is not one of the nominees, and in any event, he had not applied for any of the positions, that was the opportunity for him to express his displeasure and support the same with evidence before the County Assembly.
15. Counsel cites Section 7(10) of the *Public Appointments (County Assemblies Approval) Act* as providing for a channel through which the Petitioner should have written to the County Assembly Clerk forwarding whatever evidence and or protestations that he has against any, some, or all of the nominees.
16. Counsel has cited *The Speaker of the National Assembly v The Hon James Njenga Karume, Civil Application No 192 of 1992 (UR)* and *Geoffrey Muthiga Kabiru & 2 Others v Samuel Munga Henry & 1776 Others (2015) eKLR* in driving home the point that where the law provides for administrative channels to be applied in resolving an issue parties shall follow those channels to the end before resorting to court process. Counsel argues that the Petitioner has clearly and evidently failed and or refused to follow and apply the administrative channels before coming to court.
17. Counsel has urged this court to apply the doctrines of exhaustion, constitutional avoidance, and judicial restraint hence refrain from dealing with a matter whose administrative procedures and processes have not been exhausted.
18. For all the foregoing arguments Counsel for the 4th, 5th, and 6th Respondents submits that the PO should succeed and the Petition be struck out with costs.
19. Mr Munene for the 3rd Respondent premised his submissions on a PO by the 3rd Respondent dated November 16, 2022. The said PO raised similar and or the same issues raised by the 4th, 5th, and 6th Respondents as summarized in the foregoing paragraphs.
20. Counsel submits that the Petitioner has not exhausted the administrative and legal procedures provided for in Sections 4, 7, & 8 of the *Public Appointments (County Assemblies Approval) Act*, Sections 8(1)(a) and 45(1)(b) of the *County Governments Act*, and Standing Order 97 of the Nakuru County Assembly Standing Orders.
21. Counsel further argues that the issues raised in this Petition are not in the purview of this court by virtue of the provisions of Section 12 of the *Employment and Labour Relations Court Act* as no employer-employee relationship has been disclosed or an employment and or labour issue identified. He submits that this court must restrain from stopping the Respondents from performing and executing their constitutional and legal duties and mandates.



22. Counsel has cited *Mukhisa Biscuits & Co Ltd v West End Distributors Ltd (1969) EA 696* on what constitutes a proper PO and has submitted that the PO by the 3rd Respondent meets the criteria.
23. Urging this court to down its tools for lack of jurisdiction Counsel has cited [*Owners of Motor Vessel 'Lilian S' v Caltex Oil \(Kenya\) LTD \(1989\) 1 KLR.*](#)
24. Counsel submits that this court cannot take the role of the County Assembly in determining the suitability of the Interested Parties to be nominated and vetted for the various dockets of chief officer. Counsel emphasizes on the doctrine of separation of powers and urges this court to be very restrained.
25. He submits that there is not yet an employer-employee relationship between the Respondents and the Interested Parties and hence the issues raised by the Petitioner do not fall within the jurisdiction of this court as delineated under Article 162(2) of the [*Constitution*](#) and Section 12 of the [*Employment and Labour Relations Court Act.*](#)
26. Counsel submits that the Petitioner should have forwarded and submitted his grievances to the Clerk of the County Assembly for legal and administrative action. According to Counsel that is the avenue that the Petitioner should have taken. Counsel has cited [*Shadrack Koskei & Another v Governor of Nakuru County & 2 Others \(2016\) eKLR*](#), [*Kenya National Council of Employment and Migration Agency & Another v National Police Service Commission & 6 Others \(2016\) eKLR*](#), and [*Trusted Society of Human Rights Alliance v Attorney General & Others \(2013\) eKLR*](#) to drive the point home.
27. On the issue of exhaustion, Counsel has cited [*Christopher Mutinda Mutua & Another v Alfred Nganga Mutua & 11 Others \(2019\) eKLR*](#), [*Anthony Miano & Others v Attorney General & Others \(2021\) eKLR*](#), and *Speaker of National Assembly v Hon Njenga Karume (2008) 1 KLR 425* among many other decisions to illustrate that since the Petitioner has failed to exhaust the legal and administrative procedures provided for the Petitioner should have no audience with this court as he is in abuse of the court process.
28. Counsel argues that the nomination of the Interested Parties by the 3rd Respondent does not amount to appointment and that some or all of the nominees may be rejected by the County Assembly. He argues that there is as yet no employer-employee relationship between the Interested Parties and the Respondents or any of them and as such the matter is without the jurisdiction of this court. On this argument Counsel has cited [*Public Service Commission & 4 Others v Cheruiyot & 20 Others \(2022\) eKLR.*](#)
29. Counsel argues that just like the National Government, County Governments are independent organs which should not be subjected to unnecessary interference in performance of their constitutional, legal, and administrative functions. He has cited [*Simon Wachira Kagiri v County Assembly of Nyeri & 2 Others \(2013\) eKLR*](#) among several other decisions in support of that proposition.
30. On the basis of the foregoing Counsel for the 3rd Respondent has asked the court to strike out this petition with costs.
31. Mr Nyamwange for the 2nd Respondent submits that the Petitioner has not exhausted the administrative and legal avenues available to him before filing this petition in court. He has cited *Attorney General & 2 Others v Okiya Omtata & 14 Others (2020) eKLR* in support of that submission.
32. Counsel has associated himself with the submissions made by Counsel for the other Respondents in support of the PO and pleaded that this petition be struck out with costs.



33. Mr Kihoro for the 1st Respondent has associated himself with Counsel for the other Respondents in support of the PO. He submits that the Petitioner is free to submit a petition or protest to the County Assembly through the Clerk thereof for consideration in case he has any objection to any or all of the Interested Parties being vetted and or appointed to the office of chief officer. Counsel submits that this petition is premature and not ripe for court adjudication as the Petitioner has not exhausted the administrative process.
34. Mr Bitok for all the Interested Parties indicated that he was not filing any submissions but that his clients were in full support of the PO. He associated himself with the submissions by Counsel for the Respondents.

III. Submissions By The Petitioner's Counsel

35. On the issue of jurisdiction of this court (ELRC) Counsel for the Petitioner Mr Kihoro Kimani has submitted that the court deals with matters of employment and labour relations and for connected purposes. Counsel has cited Article 162(2) of the Constitution and Section 12(1) of the Employment and Labour Relations Court Act. Counsel submits that the use of the word 'including' in Section 12(1) above clearly indicates that this court's jurisdiction is not limited to only the matters listed thereunder but also to any other disputes relating to or arising out of employment and labour relations.
36. Counsel in not so few words argues that a narrow interpretation of law as suggested by the Respondents, to the effect that there has to exist an employer-employee relationship in a dispute for this court to adjudicate, would lead to absurdity where genuine claimants and or Petitioners would be left without a remedy as they swing between this court and the High Court seeking for audience.
37. Counsel submits that what the Petitioner is challenging is not necessarily and or restricted to the suitability of the Interested Parties for nomination but the legality and constitutionality of the entire process from invitation of applications, shortlisting, interviewing, and now vetting that should lead to appointment.
38. Counsel submits that the Petitioner has raised the issue that there are no vacancies to be filled by the Interested Parties as there are already serving chief officers whose contracts have not expired and hence double appointments shall lead to wastage of meagre public resources. The Petitioner is also questioning the composition and legality of the panels that carried out the interviews and that of lack of diversity in the nominated persons which excludes persons with disabilities and other minority and or marginalized groups. The Petitioner argues that the interviews, for example, were hurried and carried out at a speed that is either impracticable or simply as a conveyor belt to rubber-stamp and reward some predetermined and preferred candidates.
39. Counsel has cited Trusted Society of Human Rights Alliance v Nakuru Water and Sanitation Services Company & Another (2013) eKLR in support of what constitutes jurisdiction of this court and delineating the boundaries and limits of that jurisdiction. Counsel submits that the process being undertaken by the Respondents is intended to create an employer-employee relationship at the end of the day and it is wrong and misleading to suggest that this court has no jurisdiction over that issue.
40. On the issue of locus standi for the Petitioner Counsel argues that this is a constitutional petition and not an ordinary cause. It is submitted that this is public interest litigation and that the Petitioner has filed the same as a resident of Nakuru County, a citizen of Kenya, and hence a tax-payer. Counsel has cited Articles 22 and 258 of the Constitution in support of the argument that the Petitioner clearly has legal standing in which he has filed this petition.



41. Counsel reiterates that this petition is based on serious threats, violations, and breach of various provisions in the *Constitution*, including Articles 54, 56, 73, 75, 201, and 232. Counsel has cited *Okoiti v Attorney General (2020) eKLR* in emphasizing the place and importance of public litigation, among other decisions.
42. On the issue of whether the Petitioner had other avenues to address and have the issues in the petition addressed before approaching this court, Counsel reiterates that the Petitioner is not necessarily or solely concerned with the suitability of the Interested Parties to occupy the positions of chief officer but the legality and the constitutionality of the entire process up to and including the now court-halted vetting and approval by the County Assembly awaiting appointment. Counsel argues that the Respondents have acted in concert, jointly and severally, and it would be absurd for this court to order and or direct the Petitioner to apply to or request the said Respondents to right their wrongs which they committed knowingly. It is submitted that the Respondents denied the Petitioner and or any member of the public ample time, as provided for in the law, to file any petitions that they may have wished to present. It is alleged that the time given was deliberately shortened in contravention of the law.
43. In any event, Counsel argues, the provisions of the law cited by the Respondents, to wit, Section 12 of the *Public Appointments (County Assemblies Approval) Act*, Section 88 of the *County Governments Act*, and the County Standing Orders are not in mandatory terms, and further that they are inferior to the Constitutional provisions that the Petitioner has cited and premised his petition. In support of this argument Counsel has cited *Evans Ladtema Muswabili v Vihiga County Public Service Board & 2 Others (2021) eKLR*.
44. Based on the foregoing arguments Counsel for the Petitioner has asked this court to dismiss the POs and order that the petition be heard on merits.

IV. Issues For Determination

45. This court has carefully gone through the pleadings and the submissions by Counsel for all the parties as analyzed and summarized above. In the considered view of this court there is only one issue for determination in the POs raised by the Respondents – Does this court possess the requisite jurisdiction to hear and determine the petition and any other proceedings pursuant thereto?
46. To paraphrase Nyarangi JA in *Owners of Motor Vessel 'Lilian S' V Caltex Oil Kenya Limited* (supra) jurisdiction is everything to a court; it is the clothing that enables and allows a court to rise to the occasion and sit in the sacred arena of justice to hear and determine a matter. Without jurisdiction a court labours in vain and any orders and or pronouncements made by a court without jurisdiction amount to nothing and are mere nullities. Once the issue of jurisdiction is raised in a matter, and the court realizes that the issue is prima facie probative, the court has to deal with the same immediately before dealing with any other issues in the matter. If upon consideration of the issue of jurisdiction the court makes the finding that it has no jurisdiction in the matter, the court must down its tools and make no further step in the matter.
47. The issue of lack of jurisdiction of the court should be raised at the earliest opportunity to arrest a situation whereby the court may labour in vain by issuing orders that turn out to be mere nullities and amounting to nothing. The issue of jurisdiction is mainly raised in the pleadings and or by way of a notice of PO as it has happened in this petition.
48. The jurisdiction of a court flows from the *Constitution* or the statutes – See *Samuel Kamau Macharia & Another v Kenya Commercial Bank & 2 Others (2012) eKLR*. The limitations in jurisdiction may



be based on the subject matter or by territory. The latter does not apply in this petition as this court has unlimited territorial jurisdiction similar to that of the High Court.

49. The *Black's Law Dictionary, 10th Edition* defines a court's jurisdiction as – A court's power to decide a case or issue a decree; also termed as competent jurisdiction.
50. What I understand all the Respondents to be saying in their respective submissions is that this court lacks the jurisdiction over the subject matter for a number of reasons. One, that the constitutional and statutory jurisdiction of this court does not cover the issues raised in the petition; two, that the Petitioner has not exhausted the administrative and legal avenues available to him before lodging the petition and hence the matter is not ripe for court adjudication; three, that the issues raised by the Petitioner are not justiciable based on the doctrine of separation of powers; and, four, that the Petitioner lacks the locus standi in filing this petition.
51. On the first ground, the Respondents have submitted that this court lacks the jurisdiction to hear and determine this petition. On the other ground the Respondents are submitting that once the Petitioner has exhausted the other administrative and legal avenues provided for in the law, this court may then consider the issues raised. On the third ground, the Respondents are of the view that unless there is prima facie evidence of abuse and or violation(s) of the law by the Respondents, of which none has been evidenced, this court should keep off the business of the Respondents based on the doctrine of separation of powers.
52. Fourthly, the Respondents have raised the issue that the Petitioner lacks locus standi on which to file the petition. They submit that the Petitioner was neither an Applicant for the vacancies of Chief Officer nor is he an employee of the Respondents or any of them.
53. The question of the jurisdiction over a matter before a court of law goes into the core business of the court and if a court finds itself to be without jurisdiction over the subject matter it should down its tools and take no one more step. The Respondents, and rightly so, have raised the issue of jurisdiction at the earliest available opportunity.

IV. The Jurisdiction Of This Court (ELRC)

54. **Article 162 of the Constitution** provides that –
 1. The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2).
 2. Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to –
 - a. Employment and labour relations.
55. To ringfence the jurisdiction of this court Article 165(5) denies the High Court jurisdiction over matters that fall within the jurisdiction of this court.
56. To operationalize this court as a specialized court the Parliament passed the Employment and Labour Relations Court Act. Section 12 of this Act provides for the jurisdiction of this court. The preamble to the Act states that it is An Act of Parliament to establish the Employment and Labour Relations Court to hear and determine disputes relating to employment and labour relations and for connected purposes.



57. For avoidance of doubt Section 12 of the Act provides for the jurisdiction of the court as follows –

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 employer’s organisation and a trade union’s organisation;
 - d. Disputes between trade unions;
 - e. Disputes between employer organisations;
 - f. Disputes between and employer’s 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.

58. There is now a plethora of decided cases that confirm and clarify that this court has constitutional mandate and jurisdiction to deal with constitutional petitions and judicial review proceedings so long as such proceedings concern matters within the jurisdiction of this court as enumerated and delineated above. Such decisions include *United States International University (USIU) v Attorney General (2012) eKLR*, *Daniel N Mugendi v Kenyatta University (2013) eKLR*, *ICIPE v Nancy McNally (2018) eKLR*, among others.

59. In the considered view of this court the identifying mark in a matter that is within the jurisdiction of this court is that there has to be an employer-employee relationship or a process leading to or aimed at creating an employment and or labour relationship. In other words, the central issue, may it be in an ordinary cause, a constitutional petition, or judicial review proceedings, must be of and concerning an employment and or labour relations or matters incidental thereto and or connected therewith.

60. A Claimant, Applicant, or Petitioner need not be an employee or employer, especially in view of the extended boundaries on who can petition on violation, breach, or threat to the Bill of Rights under Articles 22 and 258 of the Constitution. However, regardless of who brings the matter to court, the question must be whether the issues concern employment and labour relations.

61. It is my considered view that while the jurisdiction of this court is limited and specialized to employment and labour relations matters, the preamble to the Employment and Labour Relations Court as reproduced above clearly indicates that the court has jurisdiction to deal with matters or purposes connected to such relations and or appurtenant thereto. What comes to mind is, for example, a recruitment process. If a Petitioner or a Claimant complains about the recruitment process that is intended to create an employer-employee relationship, should this court sit back and tell such a litigant



- to wait until there is created an employer-employee relationship for him or her to file the complaint/claim in court? Is recruitment not a matter or a purpose connected with employment and labour relationship?
62. Recruitment is the process of identifying, selecting, hiring, and onboarding employees. It is in the considered opinion of this court that it has jurisdiction to entertain issues of recruitment as such matters are related, connected, and incidental to employment and labour relations. It is a process geared towards creating an employer-employee relationship and hence an employment and labour relation issue. There is no way that this court can run away and abdicate its duty in dealing with such matters.
 63. Applying the above findings to the facts of this petition it is the considered view of this court that the application, shortlisting, interviewing, nominating, vetting, and appointing are all matters connected and incidental to employment and labour relations. The process that the Interested Parties are going through is intended to culminate in their employment as Chief Officers in the County Government of Nakuru.
 64. This court agrees with the holdings in the USIU case(Supra) and Daniel N Mugendi case(Supra) among many others cited by the learned Counsel for the parties herein to the effect that whether in an ordinary cause, a constitutional petition, or judicial review proceedings, this court has jurisdiction to deal with all matters concerning employment and labour relations and matters incidental and or connected therewith and or for related purposes.
 65. In regard to the subject matter, therefore, this court finds and holds that it has the requisite jurisdiction to hear and determine this petition.
 66. On issue of locus standi this court finds and holds that in view of the provisions of Articles 22 and 258 of the Constitution the Petitioner has the legal capacity to file and prosecute this petition. It is not disputed that the Applicant is a Kenyan, a resident of Nakuru County, and hence a tax-payer.
 67. It is in the considered view of this court that the Petitioner has the requisite constitutional and legal standing in filing this petition. He need not to have applied for the positions on offer. It is my view that this petition is in the purview of public litigation and what the Petitioner is complaining about is threat, violation, and breach of the Constitution by the Respondents, to the detriment of the public.
 68. The Respondents have also raised the issue as to whether this matter is properly before this court based on the doctrine of exhaustion. Closely related to this issue is the doctrine of separation of powers and whether this court should interfere with the business of the Respondents in the recruitment process.
 69. It is not in dispute that the Clerk to the County Assembly of Nakuru did issue a notice on November 1, 2022 inviting members of the public, the Petitioner included, to submit any information or evidence, by way of petition or otherwise, bearing on the suitability of the nominees for appointment as chief officers. This fact is not disputed. The Petitioner however argues that the period given for filing of such petitions was deliberately shortened to deny him and the public in general an opportunity of presenting the petitions or objections in whatever form or manner. He states that he wrote to the Secretary of the 1st Respondent on November 4, 2022 seeking for some details ostensibly to enable him prepare his petition to the County Assembly but the said letter has not been replied to this day.
 70. The Petitioner submits that in the circumstances he had no alternative other than to approach this court via this petition. The Petitioner has insisted that his issue is not per se about the suitability of the Interested Parties but rather the legality and constitutionality of the entire process from where it began to where it has now reached. He argues that those legal and constitutional issues cannot be adjudicated upon by or in the County Assembly.



71. This court agrees with Counsel for the Petitioner that the constitutional mandate of this court to adjudicate on the issues raised in this petition cannot be ousted by the statutory provisions cited by Counsel for the Respondents on the administrative process. I agree with the decision in *Evans Ladtema Muswahili v Vihiga County Public Service Board & 2 Others*(Supra) that statutory provisions shall not oust the constitutional mandate of a court of law.
72. As noted elsewhere in this ruling the Petitioner is challenging the constitutional and legal validity of actions taken by the Respondents in allegedly declaring non-existent vacancies, unprocedural shortlisting, illegal and irregular interviewing process, and hence imminent unconstitutional and illegal appointments. The Petitioner has pointed out specific provisions of the Constitution that he alleges to have been violated and he argues that he deserves a hearing on those issues.
73. In the considered opinion of this court the issues raised by the Petitioner cannot be wished away or submitted to the Respondents to deal with. It is for this reason, among others stated, that this court holds the considered opinion that this petition deserves a full hearing and the POs raised are not merited and are therefore hereby dismissed.
74. Referring the constitutional and legal issues raised in this petition for determination and or consideration by the County Assembly and or indeed any of the Respondents, body, or entity would amount to this court abdicating its legal and constitutional mandate, duty, and obligation.

VI. Costs

75. As stated elsewhere in this ruling this court takes the view that this petition is in the nature of public litigation. Clearly, the Petitioner has not filed this petition in personum but in rem. He filed the petition for common public good rather than for personal gain. For that reason, the court orders that the costs be in the cause.

VII. Disposal

76. This court issues the following orders -
 - a. The preliminary objections by the Respondents are hereby dismissed.
 - b. The Petition shall proceed to hearing on merit on priority basis.
 - c. Costs in the cause.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAKURU THIS.29TH DAY OF NOVEMBER, 2022.

DAVID NDERITU

JUDGE

