



Ogutu v Governor of Nakuru County & 3 others; Kiplangat & 20 others (Interested Parties) (Petition E16 of 2022) [2022] KEELRC 13334 (KLR) (29 November 2022) (Ruling)

Neutral citation: [2022] KEELRC 13334 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
PETITION E16 OF 2022
DN NDERITU, J
NOVEMBER 29, 2022**

**IN THE MATTER OF NOMINATIONS AND INTENDED VETTING OF
COUNTY CHIEF OFFICERS, NAKURU COUNTY GOVERNMENTS**

AND

**IN THE MATTER OF SECTION 45 AND 46 OF
THE COUNTY GOVERNMENT OF NAKURU**

AND

**IN THE MATTER OF ALLEGED CONRAVENTION OF ARTICLE
2, 3, 10, 27, 47, 73, 75 AND 232 OF THE CONSTITUTION (2010)**

AND

**IN THE MATTER OF ARTICLES 1, 2, 3, 10, 19, 20, 21, 22, 23, 27, 28,
41, 73, 75, 159, 162, 232, 258 AND 259 OF THE CONSTITUTION**

AND

**IN THE MATTER OF RIGHT TO INCLUSIVITY, NON-
ETHNIC MARGINALIZATION AND NON DISCRIMINATION**

BETWEEN

STEPHEN MICHAEL ODUOR OGUTU PETITIONER

AND

GOVERNOR OF NAKURU COUNTY 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

SPEAKER OF THE COUNTY ASSEMBLY OF NAKURU 3RD RESPONDENT

NAKURU COUNTY PUBLIC SERVICE BOARD 4TH 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 10, 2022 filed in court on November 11, 2022 the Petitioner prays for the following against the respondents –
 1. A declaratory order that the process of recruitment and recommendation of the 1st to the 21st Interested Parties, by the 4th Respondent, for their nomination by the 1st Respondent was unconstitutional, illegal, null and void.
 2. A declaration that the 1st Respondent’s act of nominating the 1st to 21st Interested Parties and presentation of their names to the County Assembly for approval was unconstitutional, illegal, null and void and of no effect whatsoever.
 3. An order or *certiorari* to remove to this court for purposes of being quashed the decision by the 4th Respondent of picking the 1st to 21st Interested Parties as the successful candidates and recommending them for nomination and appointment by the 1st Respondent.



4. An order declaring the intended vetting and approval by the County Assembly of Nakuru County of the 1st to 21st Interested Parties and their ultimate appointment as Chief Officers as irregular, unconstitutional and a nullity.
 5. A declaration that the rights of persons with disability and the marginalized were violated and were not afforded equal opportunity by the Respondents.
 6. Cost of the Petition.
2. Alongside the Petition the Petitioner filed a Notice of Motion of even date under a certificate of urgency seeking the following –
- a. That this application be certified as urgent, service of the same be dispensed with and ipso facto heard *ex-parte* in the first instance.
 - b. That pending the hearing and determination of the application inter-partes, this Honourable court be pleased to issue a conservatory order of injunction against the County Assembly of Nakuru, restraining it and/or them from considering, approving and/or vetting the listed Chief Officers named by the Clerk, Nakuru County Assembly as listed in the Daily nation Newspaper dated the November 9, 2022.
 - c. That pending the hearing and determination of the petition herein, this Honourable court be pleased to issue conservatory order of injunction against the County Assembly of Nakuru, restraining it and/or them from considering, approving, and/or vetting the listed Chief Officers name by the Clerk, Nakuru County assembly as listed in Daily nation Newspaper dated the November 9, 2022.
 - d. That the 4th Respondent be directed to avail and/or supply to the Petitioner with the scores, merit list and final report of the interviews for the positions of the Nakuru Chief Officers, within Seven (7) days of service of the order.
 - e. That pending the hearing and determination of this application inter-parties, this Honourable court be pleased to issue conservatory order, by way of injunction restraining the nominated Chief Officers, named by the Clerk, Nakuru County Assembly, as listed in the Daily Nation Newspaper dated the 9th November, 2022, and presented for approval by the County Assembly of Nakuru, their officers, staff, agents, servants, and/or any other persons acting at their behest, howsoever from taking up office, or performing any actions that would otherwise be performed by the holder of the office.
 - f. That pending the hearing and determination of the petition herein, this Honourable court be pleased to issue a conservatory order, by way of injunction restraining the nominated Chief Officers, named by the Clerk, Nakuru County Assembly, as listed in the Daily Nation Newspaper dated the November 9, 2022, and presented for approval by the County Assembly of Nakuru, their officers, staff, agents, servants, and/or any other persons acting at their behest, howsoever from taking up office, or performing any actions that would otherwise be performed by the holders of the office.
 - g. That this honourable court gives certain directions as it may deem just.
 - h. That the Respondents be condemned to pay costs.
3. On November 11, 2022 this court made the following orders –



1. That the said application be and is hereby certified urgent, to be considered *ex-parte* in the first instance.
 2. That pending the hearing of this application inter-partes, or such further or other orders of this court, the County Assembly of Nakuru, through the 3rd Respondent is restrained from considering, approving and/or vetting the listed Chief officers named by the Clerk, to the said County Assembly.
 3. That pending the hearing of this application inter-partes or such further and or other orders and or directions of this court, an interim conservatory order be and is hereby issued injunctioning and restraining the nominated Chief Officers as named by the Clerk, Nakuru County Assembly, as listed in the Daily Nation Newspaper of November 9, 2022 and presented for approval by the County Assembly of Nakuru, from taking up office or performing any work, duty or action that should otherwise be performed by holder of the respective office through the 3rd Respondent.
 4. That the petition herein together with the said application along with a copy of this order be served upon all the Respondents immediately.
 5. That all the parties herein 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 on November 17, 2022 the following Counsel appeared for the parties -Mr Kibet for the Petitioner, Mr Munene for the 1st Respondent, Mr Nyamwange for the 2nd Respondent, Mr. Karanja for the 3rd Respondent, Mr Kihoro for the 4th Respondent with Mr Nyamwange holding his brief, and Mr Bitok for the Interested Parties.
 5. Mr Karanja informed the Court that the 3rd Respondent had filed a notice 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 11, 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 from all counsel for the parties, that the said PO be heard by way of written submissions.
 7. The 1st Respondent also filed a PO of even date raising the same or similar issues to those raised in the 3rd Respondent's PO.
 8. In the PO the 3rd Respondent raised the following three issues for determination by this court –
 - a. That this Honourable Court has no jurisdiction to deal with the 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.



9. Counsel for the 3rd Respondent filed his submissions on November 18, 2022 while Counsel for the 1st, 2nd, and 4th Respondents filed on November 17, 2022. Counsel for the Petitioner filed his submissions in opposition to the PO on 21st November, 2022.

II. Submissions by the Respondents' Counsel

10. Mr Karanja for the 3rd Respondent submits that the Petitioner is challenging the constitutionality of the nomination of the Interested Parties as chief officers by the 1st Respondent on the recommendation of the 4th Respondent. Counsel notes that the Petitioner was not an applicant for any of the said positions and he is not an employee of the 4th Respondent or indeed any other of the Respondents.
11. 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.
12. 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.
13. 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, that the Petitioner lacks the legal standing to file this petition.
14. 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 that there existing no employment and or labour relationship between the Petitioner and the Respondents or any of them and hence the Petitioner lacks the requisite legal foundation on which to stand in filing this petition.
15. On the third issue of failure by the Petitioner to exhaust all the administrative and legal avenues available to him before filing this petition, Counsel submits that on November 1, 2022 the County Assembly of Nakuru, which is not a party in this petition, 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 objections to the suitability for nomination of any, some, or all of the nominees and support the same with evidence before the County Assembly.
16. 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.
17. 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, refused, and or neglected to follow and apply the administrative channels before coming to court.
18. Counsel has urged this court to apply the doctrines of exhaustion, constitutional avoidance, and judicial restraint and hence refrain from dealing with a matter whose administrative procedures and processes have not been exhausted.
 19. In winding up his submissions, Counsel argues that the interim order issued by court on November 11, 2022 was directed at stopping the County Assembly of Nakuru from carrying out the vetting of the Interested Parties yet the County Assembly is not a party in this Petition. He argues that the Speaker of the Assembly, the 3rd Respondent, is only the leader of the Assembly but cannot be equated to the Assembly.
 20. For all the foregoing Counsel for the 3rd Respondent submits that the PO should succeed and the Petition be struck out with costs.
 21. Mr. Munene for the 1st Respondent premised his submissions on a PO dated November 16, 2022. The said PO raises similar and or the same issues raised by the 3rd Respondent as summarized in the foregoing paragraphs.
 22. 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.
 23. 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 relations issue identified. He submits that this court must restrain from stopping the Respondents from performing and executing their constitutional and legal duties and mandates.
 24. 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 1st Respondent meets the criteria.
 25. 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) KLR 1.
 26. 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.
 27. 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](#).
 28. 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.



29. On the doctrine 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 process.
30. Counsel argues that the nomination of the Interested Parties by the 1st 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.
31. 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.
32. On the basis of the foregoing Counsel for the 1st Respondent has asked the court to strike out this petition with costs.
33. 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 this submission.
34. 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.
35. Mr Kihoro for the 4th Respondent associated himself with Counsel for the other Respondents in support of the PO. He submits that the Petitioner is free to present a petition or protest to the County Assembly through the Clerk thereof for consideration in case he has any objection to any, some, or all of the Interested Parties being vetted and or appointed to the office of chief officer. Counsel prays that this petition is premature and not ripe for court adjudication as the Petitioner has not exhausted the administrative process.
36. Mr Bitok for all the Interested Parties indicated that he was not filing any submissions and 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

37. Mr Kibet for the Petitioner sets out the facts that in September, 2022 the County Secretary invited applications for persons suitably qualified for the position of chief officer in various dockets. Applicants were shortlisted and interviewed and thereafter the 21 Interested Parties were recommended to the 4th Respondent for nomination who in turn forwarded their names to the County Assembly, which is not a party in these proceedings, for vetting and approval. The vetting was to take place between 14th and 17th of November, 2022.
38. Counsel submits that the Petitioner is of the view that the process leading up to the nomination of the 21 persons was neither fair nor transparent and credible. He submits that the 9th, 15th, and 18th Interested Parties were nominated for dockets that they neither applied for, shortlisted, nor interviewed



for. Further, counsel submits that no person(s) living with disabilities was nominated and that no person(s) from marginalized communities was nominated.

39. Counsel submits that the Petitioner has taken issue with the nomination of the 9th, 15th, and 18th Interested Parties who were nominated for dockets that they neither applied for nor interviewed for. Counsel submits that the process of application, shortlisting, interviewing, nomination, and vetting shall eventually lead to appointment and hence employment of the Interested Parties by the County Government of Nakuru and thus, according to the Petitioner, this is a matter within the jurisdiction of this court.
40. Counsel submits that the issues raised in the Petition relate to and are actually matters of employment. He has cited *Clive Nyaaga Ogwara v Governor Nyamira County & 2 others* (2021) eKLR, *Spedag Interfreight Kenya Limited v Labour & Social Relations & 2 others* (2019) eKLR, *International Centre for Insect Physiology & Ecology (ICIPE) v Nancy McNally* (2018) eKLR, *United States International University (USIU) v Attorney General* (2012) eKLR, and *Daniel N. Mugendi v Kenyatta University & 3 others* (2013) eKLR, among others to buttress the argument that so long as a matter relates to employment and or labour this court has jurisdiction over the same.
41. Counsel submits that mutatis mutandis this court has constitutional jurisdiction over any matter that relates to rights in employment and or labour relations and issues connected therewith.
42. While insisting that this court has jurisdiction in this petition, Counsel argues that in the unfortunate event that the court finds that it has no jurisdiction it should not strike out the petition but rather order a transfer of the same to the appropriate court. He has cited the *Spedag Interfreight* case (*supra*) and *Daniel N Mugendi* case (*supra*) in support of that proposition.
43. On the issue of *locus standi* of the Petitioner in bringing this petition to court Counsel has cited the enlarged scope of persons who can file a constitutional petition for violation, breach, or threat to the Bill of Rights under articles 22 and 258 of the *Constitution*. He has cited *International Community of Women Living with HIV Registered Trustees v Co-ordination Board & 2 others* (2021) eKLR and *Jonathan Munene v Attorney General & 2 others* (2021) eKLR in support of that position.
44. On the allegations that the Petitioner has not exhausted the administrative process and options on the issues raised in the petition before coming to court, Counsel submits that the Petitioner is complaining about the designation and inclusion of the 9th, 15th, and 18th Interested Parties as nominees for dockets that they neither applied for nor interviewed for and that the entire process is contaminated with irregularities and illegalities. He argues that those are constitutional and legal issues that beg for the intervention of this court.
45. For the foregoing reasons Counsel for the Petitioner argues that the issues raised in the petition are ripe for hearing and that this court has the requisite jurisdiction to hear and determine the same. He prays that the POs be dismissed with costs.

IV. Issues For Determination

46. 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?
47. 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 in a matter. Without jurisdiction a court labours in vain;



any orders and or pronouncements made by a court without jurisdiction amount to nothing and are mere nullities.

48. 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 issue(s) 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.
49. 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 should primarily be raised in the pleadings and or by way of a PO as it has happened in this petition.
50. 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.
51. 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.
52. What I understand all the Respondents to be saying in their submissions by Counsel 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 or legal avenues available to him before lodging the petition and hence the matter is not ripe for adjudication by court, 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.
53. On the first ground, the Respondents have submitted that this court lacks the constitutional and statutory jurisdiction to hear and determine this petition. On the other ground the Respondents are submitting that once the Petitioner has exhausted the 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 this court should keep off the business of the Respondents based on the doctrine of separation of powers.
54. 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.
55. Now, 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 shall down the tools and take no more step. The Respondents, and rightly so, have raised the issue of jurisdiction at the earliest opportunity available.

IV. The Jurisdiction of this Court (ELRC)

56. 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.
57. 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.
58. 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.
59. 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.
60. There is now a plethora of decided cases to 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 [USIU v Attorney General \(supra\)](#), [Daniel N Mugendi v Kenyatta University \(supra\)](#), [ICIPE v Nancy McNally \(supra\)](#), among others.
61. 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 and matters connected therewith. In other words, may it be in an ordinary employment and labour relations cause, a constitutional petition, or judicial review proceedings, the subject must be concerning an employment and or labour relations for this court to have jurisdiction.



62. In such proceedings, in my view, the 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.
63. 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 Act as reproduced above clearly indicates that the court has jurisdiction to deal with matters connected and or incidental to such relationships. What comes to mind is, for example, 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 to file the complaint/claim in court? Is recruitment not a matter or a purpose connected with and or incidental to employment and labour relations?
64. In human resource management 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 employer-employee relationship and hence an employment and labour relations issue. there is no way that this court can run away and abdicate its duty in dealing with such matters. In any event the list of the matters spelt out under Section 12 (1) of the Employment and Labour Relations court Act on the jurisdiction of this court is not exclusive and or exhaustive, and the word “including” has been deliberately used preceding the list.
65. 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 undergoing is intended to culminate in their employment as chief officers in the County Government of Nakuru.
66. 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, constitutional petition, or judicial review proceedings, this court has jurisdiction to deal with all matters connected or incidental to employment and labour relations.
67. In regard to the subject matter, therefore, this court finds and holds that it has the requisite jurisdiction to hear and determine this petition.
68. 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 and constitutional capacity to file and prosecute this petition. It is not disputed that the Applicant is a member of an organization of persons living with disabilities, a constituency he alleges has been ignored and or marginalized in the recruitment process. He states that he is a citizen of Nakuru County and a Kenyan and of necessity a tax-payer for that matter.
69. It is the considered view of this court that the Petitioner has the requisite constitutional and legal standing in filing this petition. He needs not to have applied for the positions on offer. It is my view that this petition is in the purview of public litigation.
70. However, the Respondents have 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.

71. It is not in dispute that the Clerk to the National 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 has not in any way demonstrated that he submitted any complaint or petition in whatever form raising the issues and complaints that he is now raising through this petition. The Petitioner has not given any explanation why he has not done so.
72. Be that as it may, does the fact that the Petitioner did not file his misgivings, on the nominations, with the County Assembly invalidate his constitutional right to approach this court by way of this petition? In my opinion the answer is an emphatic no. The Constitution is the supreme law of the land and in any event the provisions cited by the Respondents in Section 7 of the Public Appointments (County Assemblies Approval) Act and the Nakuru County Standing Orders allowing the Petitioner to lodge his complaints with the County Assembly for an appropriate administrative action are not couched in mandatory terms and cannot in any way override the Constitution.
73. In his petition, the Petitioner is raising constitutional and legal issues concerning the process leading to the nomination of the Interested Parties. The issues relate to discrimination against and or neglect of persons with disabilities and marginalized communities in the said nominations. He is also alleging that some of the nominees were nominated for dockets that they neither applied for nor interviewed for. The alleged illegalities and irregularities were allegedly committed by the Respondents. It would be improper and illegal for this court to order the Petitioner to lodge his constitutional and legal concerns with the same Respondents who are alleged to have committed the acts complained of. It would amount to calling upon the Respondents to sit in their own case and or on their appeal. That would be against the rules of natural justice, Article 47 of the Constitution, and the various provisions of the Fair Administrative Action Act.
74. While this court is aware of the decisions in the Speaker of National Assembly v Hon. James Njenga Karume (*supra*) and Geoffrey Muthiga Kabiru & 2 others v Samuel Munga Henry & others (*supra*) among many other decisions cited by Counsel for the Respondents, this court takes the view that where the issues raised in a petition concern threat, violation, or breach of constitutional provisions, and that is the case here, then the supreme law takes the lead and precedent.
75. This court agrees with the decision in Evans Ladtema Muswahili v Vihiga County Service Board & 2 others (2021) to the effect that the administrative action envisaged in the above cited statutory provisions are not mandatory and cannot override the right of the Petitioner herein to approach this court for the adjudication of the legal and constitutional issues raised in this petition.
76. Inasmuch as this court agrees with Counsel for the Respondents that courts should not unduly and unnecessarily interfere with the operations and functioning of the Respondents, in the same token, courts should not sit back in the face of alleged violations of the legal and constitutional provisions by any person or body as adjudication of such breach, violation, or threat is the duty and obligation of the courts. The doctrine of separation of powers does not operate in a vacuum.
77. This court notes that the County Assembly which is carrying out the vetting and is supposed to recommend appointment of the Interested Parties is not party in these proceedings. However, that may not be fatal to this petition as this court can still adjudicate on the matters as between the parties before it. Moreover, the parties are free to apply to amend their pleadings at any time along the way and such applications shall be considered on merits.



78. In the circumstances and for the reasons of the foregoing, the POs raised by the Respondents are found to have no merits and are hereby dismissed.

VI. Costs

79. As stated elsewhere in this ruling this court takes the view that this petition is in the nature of public litigation. Clearly, the petitioner did not file this petition in personum but in rem, so to say. He filed the petition for common public good rather than for personal gain. For that reason this court orders that costs be in the cause.

VII. Disposal

80. This court issues the following orders-

- a. The preliminary objections by respondents are found to have no merits and are hereby dismissed accordingly.
- b. The petition and the other proceedings shall proceed to hearing on merit and on priority basis.
- c. Costs in the cause.

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

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DAVID NDERITU

JUDGE

