



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 9 OF 2020

(Before Hon. Lady Justice Maureen Onyango)

IN THE MATTER OF: ARTICLES 3(1), 22(1) & (c), 48, 50(1), 159 (1), AND 258 (1) & (2)(c) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: THE ALLEGED CONTRAVENTION AND VIOLATION OF ARTICLES 1(1), 2(1-4), 3(1), 10, 24, 73, 75, 29, 131(2)(a), 153 (4), AND 232 OF THE CONSTITUTION

AND

IN THE MATTER OF: THE ALLEGED VIOLATION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 27, 41 (1), AND 47 OF THE CONSTITUTION

AND

IN THE MATTER OF: THE ALLEGED ABUSE OF EXECUTIVE POWERS IN THE IRREGULAR APPOINTMENT OF THE CHAIRMAN AND MEMBERS OF THE BOARD OF THE CAPITAL MARKETS AUTHORITY

AND

IN THE MATTER OF: ALLEGED CONFLICT OF INTEREST IN THE APPOINTMENT OF JAMES NDEGWA AS THE CHAIRMAN OF CAPITAL MARKETS AUTHORITY

AND

IN THE MATTER OF: THE DOCTRINES OF LEGITIMATE EXPECTATION AND VOID AB INITIO

BETWEEN

OKIYA OMTATAH OKOITI..... PETITIONER

VERSUS

THE NATIONAL EXECUTIVE OF

THE REPUBLIC OF KENYA.....1ST RESPONDENT

THE PUBLIC SERVICE COMMISSION.....2ND RESPONDENT

STATE CORPORATIONS ADVISORY COMMITTEE....3RD RESPONDENT

THE HON. ATTORNEY GENERAL.....	4 TH RESPONDENT
JAMES NDEGWA.....	5 TH RESPONDENT
JOHN KIPKOSGEI BIRECH.....	6 TH RESPONDENT
FRESHIA MUGO WAWERU.....	7 TH RESPONDENT
GEORGE MOSE MOIBI.....	8 TH RESPONDENT
THOMAS NZIOKI KIBUA.....	9 TH RESPONDENT
CHRISTINE OKOTH.....	10 TH RESPONDENT
PETER M. MUNGAL.....	11 TH RESPONDENT

AND

THE CAPITAL MARKETS AUTHORITY (CMA).....INTERESTED PARTY

RULING

The 5th, 6th, 7th, 8th, 9th, 10th and 11th Respondents herein referred to as the Objectors lodged a preliminary objection dated 4th May 2020 seeking the striking out of this petition on grounds that it is misconceived, improperly before this court on account that the court lacks jurisdiction. The grounds as set out in the notice of preliminary objection are the following –

(1) *This Court lacks the requisite jurisdiction to hear and determine the. Petition in light of the provisions of Article 162 of the Constitution as read with Section 12 of the Employment and Labour Relations Court Act; the Petition touches on the powers of the President and the Cabinet Secretary for the National Treasury and Planning to appoint and remove the Chairman and board members of the Capital Markets Authority, and further seeks to question the constitutionality of Sections section 5(3) (a) & (b) of the Capital Markets Act, Cap 485A Laws of Kenya.*

(2) *The Petition raises a pure question of statutory and constitutional interpretation which is a preserve of the High Court of Kenya under inter alia Article 165 of the Constitution and there is neither employer-employee relationship between the parties nor any issue touching on employment or labour related issues particularly because:-*

(a) *The Petition is challenging constitutionality of the decision, and the powers of the President of the Republic of Kenya to appoint the 5th Respondent pursuant to the provisions of Section 5(3)(a) of the Capital Markets Act, Cap 485A Laws of Kenya.*

(b) *The Petition is challenging constitutionality of the decision and the powers of the Cabinet Secretary for the National Treasury and Planning to appoint the 6th, 7th, 8th, 9th, 10th and 11th Respondents pursuant to the provisions of section 5(3) (b) of the Capital Markets Act, Cap 485A Laws of Kenya.*

(3) *The Petitioner has lodged this petition in contravention of the doctrine of sub judice; there is a pending court case in the Court of Appeal between the Petitioner and the Office of the Attorney General (parties to this case) namely; **Civil Appeal No. 62 of 2019 The Hon Attorney General v Okiyah Omtatah & 13 others** in which the Court of Appeal is set to determine the question of the jurisdiction of this Court in matters relating to the appointment and revocation of Appointments of State Officers.*

(4) *There is a real and eminent legal risk that this Court may suffer embarrassment if it were to proceed and determine the petition herein notwithstanding the pending **Civil Appeal No. 62 of 2019 The Hon Attorney General v Okiyah Omtatah & 13 others**.*

Submissions by the Objectors

In the submissions in support of the preliminary objection, the Objectors submit that the preliminary objection meets the requirement as set out in the case of **Mukisa Biscuits Manufacturing Company Limited v West End Distributors Limited (1969) EA 696**.

They submit that in the case of **John Mundia Njoroge & 9 others v Cecilia Muthonj Njoroge & Another (2016) eKLR** the court listed some of the grounds on which a preliminary objection may be raised to include the following: -

1. *Lack of jurisdiction over the subject matter of the action or the person of the defendant, improper venue or improper form or service of a writ of summons or a complaint;*
2. *Failure of a pleading to conform to law or rule of court or inclusion of scandalous or impertinent matter;*

3. *Insufficient specificity in a pleading;*
4. *Legal insufficiency of a pleading (demurrer);*
5. *Lack of capacity to sue, non-joinder of a necessary party or mis-joinder of a cause of action; and*
6. *Pendency of a prior action or agreement for alternative dispute resolution.”*

They submit that the issues raised in the submissions are all points of law.

The objectors submit that this court has no jurisdiction to determine the petition herein as the petition does not fit into any categories of persons listed under Section 12 of the Employment and Labour Relations Court Act, relying on the case of **Kenya Council of Employment and Migration Agencies and Another v Samuel Mwongera Arachi and 2 Others (2015) eKLR**. Further, that the petition does not fall under Article 22 of the Constitution as it is not a bill of rights pursuit, and does not specify the bill of rights provisions violated or threatened with violation. That the Petitioner does not plead any specific labour-related complaint to warrant invocation of the jurisdiction of the Employment and Labour Relations Court.

It is submitted that the issue before the court is not an employment dispute but the exercise of executive authority by the President under Article 132 of the Constitution. That the challenge to the same ought to be handled by the High Court which has jurisdiction. The objectors relied on the decision in **Republic v Karisa Chengo and 2 Others (2017) eKLR** and **USIU v Attorney General (2012) eKLR**.

They submit that without jurisdiction this court ought to down its tools, relying on the decision in **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd (1989) eKL** and **USIU v Attorney General (supra)**.

On the third ground of objection, that this petition is *sub judice*, the objector submits that the parties herein are the same as those in **Civil Appeal No. 621 of 2019, The Hon. Attorney General v Okiyah Omtatah and 13 Others** which is spending judgment in the Court of Appeal. That among the grounds raised in the appeal and to be determined by the Court, is this Court’s jurisdiction to determine matters to do with the President’s power to appoint State Officers. The Objector submits that: -

(a) Both the Petitioner, the Attorney General and the National Executive of the Republic of Kenya who are parties to the instant petition are also parties in the said appeal now pending judgment on notice.

(b) The issues touching on the jurisdiction of this court have been raised in the appeal and they have similarly been raised before this court in the instant petition.

(c) The said appeal has already been heard and now is pending is the delivery of the judgement on notice.

(d) The Court of Appeal, being a court of superior jurisdiction

and considering that it has already heard the arguments on the appeal raising similar legal questions, it would be appropriate for this Court down its tools through a stay order so to await the outcome of the pending Court of Appeal judgment.

(e) Any further proceedings in this court ignoring the pending Court of Appeal case is now highly likely to subject this court to unnecessary embarrassment and mortification.

The Objectors submit that proceeding with this matter will subject this court to grave embarrassment in light of the above mentioned appeal. That the decision of the Court of Appeal raises a substantial point of law that would have the effect of terminating these proceedings without any further considerations of the merits of the petition.

The objectors urge the court to be guided by the decision of the Supreme Court in **Law Society of Kenya v Attorney General and Another (2019) eKLR** where it was held that pendency of an appeal on the same issue is sufficient to warrant stay by a lower court.

Submissions by the Petitioner

The Petitioner opposes the preliminary objection. By way of introduction, he submits that the Petition dated 22nd January 2020 is on the enforcement of labour rights and/or laws pursuant to Article 41(1) of the Constitution of Kenya 2010 and interpretation of the constitution and fundamental rights and freedoms incidental to the exercise of this Court’s jurisdiction over labour related disputes which are the preserve of this Court.

That the Petition seeks to challenge the abuse of executive powers in the irregular appointment of the Chairman and members of the board of the Capital Markets Authority.

The Petitioner submits that he is aggrieved by the violation of rights and fundamental freedoms under Articles 27, 41(1) and 47 of the Constitution, conflict of interest in the appointment of James Ndegwa as the Chairman of Capital Markets Authority as well as the doctrine of legitimate expectation.

He submits that this court has jurisdiction to hear this matter relying on the decision in **Samuel Kamau Macharia v KCB and 2 Others**,

Supreme Court Civil Application No. 2 of 2011.

The Petitioner submits that the court's jurisdiction is set out in Article 162(2)(a) and Section 12 of the Employment and Labour Relations Court Act. That Article 165(5) provides that the High Court has no jurisdiction on matters falling within the jurisdiction of the Employment and Labour Relations Court and Environment and Land Court.

The Petitioner submits that, under Section 12 of Employment and Labour Relations Court Act, the Court can deal with any matter arising out of an employment relationship. In the instant case issues being raised in this petition emanate from an employment relationship.

He relies on the case of **Republic v Clerk County Assembly of Baringo ex parte William Kassait Kamket (2015) eKLR**, where Radido J. held that:

“Article 162 of the Constitution did not envisage a Court Limited or restricted to dealing with disputes arising out of a contract of service as defined in the Employment Act, 2007 which in any case predates the Constitution. The primary statute granting this Court universal jurisdiction is the Employment and Labour Relations Court Act (previously the Industrial Court Act). The most relevant provision is located in section 12 of the Act. And in granting the Court its jurisdiction, Parliament faithfully observed the command of the Constitution by using the phrase disputes relating to employment and labour relations. The jurisdiction granted included disputes relating to or arising out of employment between an employer and an employee and not only in respect of contract of service as a reading of the Employment Act, 2007 may suggest. And in my view, the use of the term including in section 12 is significant as it helps to construe the jurisdiction of the Court over the present proceedings flow from application of Article 162 of the Constitution in establishing a specialist Court to deal with employment and labour relations disputes. The jurisdiction of the Court over the present proceedings flow from application of Article 162 of the Constitution and Section 12(1)(a) of the Employment and Labour Relations Court Act rather than from an interpretation of the provisions of the employment Act, 2007. The definition of employer, employee and contract of service in the Employment Act, 2007, in my view, is not meant to limit or restrict the jurisdiction granted to the Court by section 12 of the Employment and Labour Relations Court Act, office holders are employees who have access to this Court and where a speaker alleges improprieties in the removal process that is a dispute relating to and arising out employment. It matters not that they are employees or servants of the people or the respective Commissions or County Assemblies.”

The Petitioner further relied the case of **Trusted Society of Human Rights Alliance v Nakuru Water and Sanitation Services Company & Another (2013) eKLR** where Ongaya J. held that:

“The court finds that the court has jurisdiction under section 12(2) because the petitioner not being in an employer-employee relationship with the respondent, the respondent has been moved against in its capacity as an employer. As relates to jurisdiction by subject matter, Article 162(2)(a) of the Constitution and Section 12(1) of are elaborate that jurisdiction attaches to this court with respect to disputes relating to employment and labour relations. In the instant case, the dispute is about a recruitment process undertaken by the respondent. The court finds that recruitment is a proper element of employment and therefore the court has jurisdiction in view of that subject matter. As for jurisdiction based on remedy, the court finds that the petitioner has substantially prayed for declarations which are remedies the court is authorized to make under Section 12(3)(iv) of the Act. Thus, the court has jurisdiction on that account. Further, on jurisdiction by subject matter, the court holds that it is vested with constitutional jurisdiction to protect the Constitution under Article 258 and to enforce the Bill of Rights in disputes relating to employment and labour relations pursuant to provisions of Article 22(3) as read with Article 23 and 165(3)(b) of the Constitution. Thus, Rule 2 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and procedure Rules, 2013 — High Court” means the High Court of Kenya established by Article 165 of the Constitution and includes courts with the status of a High Court established under Article 162(2) of the Constitution.”

The Petitioner also relied on the case of **Nick Githinji Ndichu v Clerk Kiambu County Assembly and Another (2014) eKLR** where the court held as follows:

“It is clear from the foregoing that the law is not concerned with the method of acquiring an employment. The law does not concern itself with whether the person was appointed or elected.

Rather the person must:

Be having an oral or written contract of service,

Be receiving a wage/salary for the services rendered...”

The Petitioner submits that the conditions stated in the case of **Nick Githinji Ndichu (supra)** exist in this present Petition and hence this Court has the jurisdiction under Section 12(1) of Employment and Labour Relations Court Act to hear and determine this case as an employment relationship exists in this particular case.

The Petitioner submits that in the case of **Okiya Omtatah Okoiti v Kenyatta University Council and 4 Others Nairobi ELRC Pet No. 89 of 2015** the court held as follows:

*“Numerous case law has also addressed this issue. In the **Industrial Court of Kisumu Cause No. 81/2014 Evans Kaiga Inyangala & 2 Others vs. County Government of Vihiga & 2 Others**, this issue was also raised and I held that this Court has jurisdiction to handle any employment related issue.*

That this position was upheld in **Civil Appeal No. 6 of 2012, Prof. Daniel N. Mugendi v Kenyatta University and Others.**

The petitioner submits that in the case **Okiya Omtatah Okioti v Attorney General & 2 others; Francis K. Muthaura (AMB) & 5 others (Interested Parties) [2019] eKLR**, the Court held:

“The Court holds that state corporations may and are usually established as corporate bodies by statute but the constitutional and statutory provisions do not confer the board members a distinctive status separate from that of other public officers including those serving as staff in the state corporations - the difference amongst public officers being distinctiveness in the role played as vested by the Constitution, statute or terms and conditions of service and as based on the public or state office held by the individual. They are all governed by the general statutory and constitutional provisions on public or state service and paid out of monies provided by the taxpayer so that such “board members” are clearly different from or unlike the board members under the Companies Act whose service is clearly distinct from staff of a company registered under the Companies Act. The Court considers that the board members in a state corporation would not hold any better stakes in the state corporation (like KRA or its Board) than is held by other citizens and the allegiance of such board members is to the best public interest as provided in the applicable provisions of the Constitution and statute or lawful policies and practices. The Court finds accordingly.”

The Petitioner submits it is well settled that by dint of the Constitution, the Employment and Labour Relations Court Act, and case law, this Court has requisite jurisdiction to hear and determine the present Petition.

The Petitioner submits that the issues raised in this Petition arise out of an employment relationship and also concern Article 41(1) of Constitution of Kenya 2010, dealing with fair labour practices for which this Court has jurisdiction to hear and determine.

On the averments by the Objectors that the petition herein is *sub judice* by virtue of **Civil Appeal No. 621 of 2019, The Attorney General v Okiya Omutatah and 13 Others**, the petitioner submits that the said suit does not involve the parties herein and does concern the same subject matter save that the petitioner and the Attorney General are parties in both. That there is no other suit pending before any court of competent jurisdiction over the dispute herein between the parties herein.

Further, that an appeal in the Court of Appeal does not operate as an automatic stay of the proceedings in this court. That there are no orders of the Court of Appeal staying these proceedings.

The Petitioner submits that in **Okiya Omtatah Okioti v Attorney General and 2 Others: Francis K. Muthaura (AMB)** supra, the court held that –

*“The doctrine of res sub judice in Latin “means under judgment”. The doctrine aims at preventing courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations with respect to the same cause of action, same subject matter and same relief claimed - with the consequence that the court should stay the proceedings or the suit. Thus the **Black's Law Dictionary, 10th Edition** defines “sub judice” as “under a judge; Before the Court or judge for determination.”*

He submits that **Civil Appeal No. 62 of 2019** was not filed in respect of this petition.

On whether the preliminary objection meets the threshold of a valid preliminary objection, the petitioner submits that the objectors have mixed up issues of law and fact, which offends all principles of a valid preliminary objection. That the issue whether or not an employer-employee relationship exists is matter of fact, not law.

The Petitioner submits that the matters raised in the preliminary objection go to the root of the merits of the case which the Court cannot determine from the face value unless the Court delves deeper into the merits of the Petition. That to this extent it does not raise matters of law within the understanding of Preliminary Objection as was held in the locus classicus case of **Mukisa Biscuit Manufacturing Company Ltd. v West End Distributors** at page 701 and in **Nancy MacNelly v ICIPE**.

That other than the issue of jurisdiction, the other grounds in the preliminary objection cannot be raised by way of preliminary objection as they require the court to interrogate evidence. He relied on the decision in **Oraro v Maja (2005) 1 KLR 141** where the court observed that a preliminary objection cannot be raised where any fact is to be ascertained or the matter concerns the exercise of judicial discretion. That the preliminary objection herein is misconceived and devoid of merit and should be dismissed with costs.

Analysis and Determination

The preliminary objection herein raises the following issues –

- 1) Whether this court is clothed with jurisdiction hear and determine this petition.
- 2) Whether the petition is *sub judice* and
- 3) Whether the petition meets the threshold of a valid preliminary objection.

Jurisdiction

The jurisdiction of this court has been the subject of a good number of decisions from this court, the High Court and the Court of Appeal. As was held by the Supreme Court in **Samuel Kamau Macharia v KCB & 2 Others (supra)**

“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.”

The jurisdiction of this court is derived from Article 162(2) of the Constitution and Section 12 of the Employment and Labour Relations Court Act.

Article 162(2) of the Constitution

(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

- (a) employment and labour relations; and**
- (b) the environment and the use and occupation of, and title to, land.**

Section 12(1) of the Employment and Labour Relations Court Act

12. Jurisdiction of the Court

(1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including—

- (a) disputes relating to or arising out of employment between an employer and an employee;**
- (b) disputes between an employer and a trade union;**
- (c) disputes between an employers’ organisation and a trade union’s organisation;**
- (d) disputes between trade unions;**
- (e) disputes between employer organisations;**
- (f) disputes between an employers’ organisation and a trade union;**
- (g) disputes between a trade union and a member thereof;**
- (h) disputes between an employer’s organisation or a federation and a member thereof;**
- (i) disputes concerning the registration and election of trade union officials; and**
- (j) disputes relating to the registration and enforcement of collective agreements.**

Further Article 165(5) provides as follows –

(5) The High Court shall not have jurisdiction in respect of matters—

- (a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or**
- (b) falling within the jurisdiction of the courts contemplated in Article 162 (2).**

The objectors submit that the petition does not fit into any of the categories of persons listed under Section 12(2) which is an employer-employee, trade union, employer’s organisation, a federation, Registrar of Trade unions, employer’s organisation, a federation, Registrar of Trade Unions, the Cabinet Secretary or any office established under any matter law for such purpose.

While addressing a similar issue in **Republic v Clerk County Assembly of Baringo (supra) Radido J.** held that:

“Article 162 of the Constitution did not envisage a Court Limited or restricted to dealing with disputes arising out of a contract of service as defined in the Employment Act, 2007 which in any case predates the Constitution. The primary statute granting this Court universal jurisdiction is the Employment and Labour Relations Court Act (previously the Industrial Court Act). The most relevant provision is located in section 12 of the Act. And in granting the Court its jurisdiction, Parliament faithfully observed the command of the Constitution by using the phrase disputes relating to employment and labour relations. The jurisdiction granted included disputes relating to or arising out of employment between an employer and an employee and not only in respect of contract of service as a reading of the Employment Act, 2007 may suggest. And in my view, the use of the term including in section 12 is

significant as it helps to construe the jurisdiction of the Court over the present proceedings flow from application of Article 162 of the Constitution in establishing a specialist Court to deal with employment and labour relations disputes. The jurisdiction of the Court over the present proceedings flow from application of Article 162 of the Constitution and section 12(1)(a) of the Employment and Labour Relations Court Act rather than from an interpretation of the provisions of the employment Act, 2007. The definition of employer, employee and contract of service in the Employment Act, 2007, in my view, is not meant to limit or restrict the jurisdiction granted to the Court by section 12 of the Employment and Labour Relations Court Act, office holders are employees who have access to this Court and where a speaker alleges improprieties in the removal process that is a dispute relating to and arising out of employment. It matters not that they are employees or servants of the people or the respective Commissions or County Assemblies.”

The same position was held in **Trusted Society of Human Rights Alliance v Nakuru Water and Sanitation Services Company and Another (supra)** where Ongaya J. held that recruitment is an element of employment and therefore this court has jurisdiction.

The Petitioner relied on the case of **Nick Githinji Ndichu v Clerk Kiambu County Assembly and Another (2014) eKLR** where the court held as follows:

“It is clear from the foregoing that the law is not concerned with the method of acquiring an employment. The law does not concern itself with whether the person was appointed or elected.

Rather the person must:

Be having an oral or written contract of service,

Be receiving a wage/salary for the services rendered ...”

In **Abdikadir Seleiman v County Government of Isiolo and Another (supra)** the court held that jurisdiction of this court spreads to all issues in the employment relationship and related matters including the enforcement of the fundamental rights and freedoms under Article 22 of the Constitution and enforcement of the Constitution under Article 258 as far as issues in dispute are, evolve, revolve or relate to employment and labour relations.

In **Okiya Omtatah Okoiti v National Executive of the Republican 6 Others (supra)** the court held that holders of office in the public or state office in Kenya in the executive, the legislative, the judiciary or any other public body and in National or County Government are servants of the people of Kenya and this court has jurisdiction whether the issue is about employment law or policy or about individual public officer’s grievances.

In **Okiya Omtatah Okoiti v Attorney General and 2 Others; Francis K. Muthaura (Amb) and 5 Others Interested Parties)**, the court held that a dispute that concerns employment in the public sector, including the appointment of the Chairman and members of the Board of KRA, like Chairperson and members of the Boards of other state corporations or boards of other public bodies, are public offices bound by applicable constitutional and statutory provisions, as well as lawful policies and practises that govern public employment. That the substantive law applicable to such employment ranging from declarations of vacancy, recruitment and procedure would be the applicable public service constitutional and statutory provisions and such other lawful policies and practices.

In **Margaret Lorna Kariuki v Embu County Government**, the court held that if an office is excluded from application of the Employment Act, the court’s jurisdiction is not thereby ousted. That the court will hear and determine that excluded employment dispute on the basis of the terms of service as provided in the special arrangement.

Again as was held in **Okiyah Omtata Muthaura** sitting allowances and reimbursements amount to a “wage”. That **Black’s Law Dictionary 19th Edition** defines “Wage” as payment for labour or services and based on the time worked or quantity produced; compensation of any employee based on time worked or output of production. “Wage” includes every form of remuneration payable for a given period to an individual for personal services, including salaries, commissions, vacation pay, bonuses, and the reasonable value of board, lodging, payments in kind, tips, and any similar advantage received from the employer.”

From the foregoing, it is clear that this court has jurisdiction to hear the petition herein, the same being a matter that concerns recruitment to a position that is remunerable and that would fall under the definition on an employee under Section 2 of the Employment Act.

Sub judice

It is the position of the objectors that this suit is *sub judice* as the issues are similar to those in **ELRC Petition 162 of 2019** currently pending determination before the Court of Appeal. No pleadings filed in the Court of Appeal have been availed to this court. In fact, other than the averments of the Respondents there is no evidence that any such appeal exists.

The foregoing notwithstanding, I have perused the judgment in **ELRC Petition No. 162 of 2019** and note that the same was contesting appointments of the persons named therein as the 1st to 9th Interested Parties as members of the National Land Commission on grounds that the same were unconstitutional. Apart from the Petitioner and the Attorney General, the other parties are all different from those in the instant petition. In the instant Petition the subject matter is the appointment of the 5th Respondent as Chairperson to the Board of the Capital Markets Authority.

The appeal has since been decided and the Court of Appeal decision is that this court has no jurisdiction to determine issues on appointment of Commissioners to Constitutional Commissions. It is therefore not relevant to this decision.

Conclusion

Having found that this court has jurisdiction and further that the Respondents have not established that the issues herein are *sub judice*, the preliminary objection fails and is accordingly dismissed. Costs shall be in the cause.

Before I pen off, I wish to acknowledge the application dated 10th August 2020 filed by the 1st to 4th Respondents through the Office of the Attorney General. Same seeks the stay of the proceedings herein pending determination of **Civil Appeal No. 621 of 2019**. Essentially, the application is raising the grounds of *sub judice* which is one of the grounds in the preliminary objection filed by the 5th to 9th Respondents. Having already determined the issue in the application, I find that the application has been compromised by this ruling and there are no further issues for determination by this court arising from the application. Parties are therefore directed to move to the hearing of the substantive issues in the Petition.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22ND DAY OF JANUARY 2021

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE