



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

ELRC PETITION NO. E07 OF 2021

IN THE MATTER OF CONSITUTION OF KENYA 2010.

IN THE MATTER OF ARTICLES 1,2,3,10,20,21,22,23,75,165,177, 196,232 OF THE CONSTITUTION OF KENYA.

AND

IN THE MATTER OF SECTION 13 OF THE COUNTY GOVERNMENT ACT.

AND

IN THE MATTER OF THE FILLING OF THE VACANCY OF THE OFFICE OF THE CLERK OF THE COUNTY ASSEMBLY OF NYANDARUA.

AND

IN THE MATTER OF SOVEREIGNTY OF THE PEOPLE OF KENYA.

AND

IN THE MATTER OF THE PRICIPLES OF LEADERSHIP AND INTEGRITY.

BETWEEN

ELIZABETH WANJIKU MUTHUI.....PETITIONER/APPLICANT

-VERSUS-

MUKIRI MUCHIRI.....RESPONDENT

AND

THE SPEAKER,

COUNTY ASSEMBLY OF NYANDARUA.....1ST INTERESTED PARTY

THE COUNTY ASSEMBLY OF NYANDARUA.....2ND INTERESTED PARTY

COUNTY GOVERNMENT OF NYANDARUA.....3RD INTERESTED PARTY

RULING

INTRODUCTION

1. The Petition herein was filed together with a Notice of Motion Application both dated 4th March, 2021 under Certificate of urgency which court proceeded to issue interim exparte Orders on 8th March, 2021 and certified the matter urgent and further issued interim injunctive orders against the respondent from interfering with the functions of the petitioner in discharging her duties as the acting clerk of Nyandarua

County assembly. In response to the Petition and the Application by the Petitioner, the Respondent filed an Application dated 10th March 2021, seeking inter alia to stay execution the exparte Orders issued on 8th March, 2021, as well as the instant Notice of Preliminary Objection of even date which was based on the following grounds;

a) THAT the Honourable Court lack the requisite jurisdiction to hear and determine the petition herein.

b) That there is no employer/employee relationship between the petitioner and the Respondent and a dispute to be heard and determined before the Court.

c) That the petition is fatally defective, inept and an abuse of Court process

2. The Ruling herein is therefore in respect of the said Preliminary Objection which the court found ought to be heard before the aforementioned Notice of Motion as the same touched on its jurisdiction.

3. The respondent filed his submissions on 16th April, 2021 while the petitioner filed hers on 18th May, 2021.

Respondent's submissions

4. The respondent submitted that the petitioner has described herself as the current acting clerk of the county Assembly of Nyandarua having been appointed and approved as such, under section 21 of the County Assembly Service Act, while the respondent is described as the former acting clerk of Nyandarua County Assembly. He argues that the relationship between the petitioner and the Respondent is not that of employer/employee contemplated under section 12 of the Employment and Labour Relations Court Act as there exist no employment agreement between the petitioner and the respondent to warrant the issuance of the reliefs sought in the petition herein.

5. Counsel buttress his arguments by citing the case of **Nick Githinji Ndichu-v- Clerk Kiambu county Assembly and Another [2014] eKLR** where the Court insisted that applicant has to prove that there is an employer /employee relationship before they can invoke the jurisdiction of this Court.

6. Accordingly, counsel submitted that the petitioner and the Respondent herein are both employee of the County Assembly of Nyandarua therefore the petition together with the application as filed is incompetent and ought to be struck out.

Petitioner's submissions

7. The petitioner through her counsel on record submitted that this Court has jurisdiction to hear and determine this petitioner by dint of Section 12(1)(a) of the Employment and Labour Relations Court Act which provides that this court has jurisdiction to hear disputes relating to or arising out of employment between an employer and an employee.

8. He argued that a close reading of the pleadings indicate that the dispute herein arose out of appointment of the petitioner to the post of the Acting clerk of the Nyandarua County Assembly and her ability to discharge the functions of the said position. Therefore, the issue raised on recruitment and suspension of employee are elements of employment therefore this Court has jurisdiction to adjudicate on these issues. He relied on the case of **Trusted society of Human Rights Alliance –v- Nakuru Water and sanitation company and another [2013] eKLR**. Where Justice Ongaya held that;

“that jurisdiction attaches to this court with respect to disputes relating to employment and labour relations. In the instant case relates to jurisdiction by subject matter, Article 162(2) (a) of the Constitution and section 12(1) of the Act are elaborated in the 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.”

9. It was further submitted that as much as there is no direct employer-employee relationship between the petitioner and the Respondent, the issue raised in the petition are incidental to employment and cited the case of **Abdullahi Ali Mohammed –v- Kenya ports authority and another [2016] eKLR** where the Court held that;

“The submission that the Claimant is no longer an Employee of the 1st Respondent, and therefore not eligible to present a dispute between an Employee and an Employer under Section 12, is incorrect. As discussed above, the Court takes cognizance of disputes between Employers and Employees, and disputes incidental or relating to employment and labour relations matters. The personal jurisdiction is not restricted to the Employers, Employees or their respective Combinations, but extends to the other Parties implicated in the employment and labour relations disputes.”

10. Counsel also cited the case of **Geoffrey Oriaro –v- Cabinet secretary ministry of Labour social security and services & 4 others [2015] eKLR**. Which Court held as follows;

“It follows that there does not exist an employer and employee relationship between the Appointees and the Respondents nor is there an employment relationship between the members of the NSSF and the Fund itself or the Cabinet Secretary. This is not the end of the matter though.²⁹ With regard to Section 12(2), it is the Court’s considered view that, the provision deals with Locus Standi of persons named therein to bring suits to this Court and does not deal with the issue of jurisdiction of the Court as it were.³⁰ This provision does not therefore confer jurisdiction on this Court in respect of this suit merely because the 1st Respondent is the Cabinet Secretary named under Sub-section 12(1).³¹ The subject matter of the dispute, the ultimate implication of which is the lawful oversight and management of funds invested by the employees of this country in

NSSF Fund brings this matter closer home in that the dispute falls within Subsection 12(1)(a) which confers jurisdiction on this Court in respect of; “a dispute relating to or arising out of employment between an employer and an employee;” 32. It is not far-fetched to see that a dispute concerning oversight over pension funds contributed and invested pursuant to contracts of employment between employees and their employers, is a matter arising out of employment between an employer and an employee;

33. This Court is best suited to determine the suit and in fact, has jurisdiction to deal with the matter though it is a borderline case in my view.”

11. Counsel submitted that the prayers sought include reprieve for violation of the petitioner fundamental rights protected under the constitution which this Court has been clothed with the requisite jurisdiction to hear issue relating to enforcement of fundamental rights arising out of or incidental to employment. He equally cited the Court of Appeal case of **prof Daniel N. Mugendi- v Kenyatta University & others** and the case of **Abdikadir Suleiman –v- County Governemtn of Isiolo and Another**.

12. Counsel concluded by urging this Court to spare the petition and the Application herein and dismiss the P.O by the Respondent.

13. I have examined the averments of the parties herein. The dispute herein relates to the appointment of the respondent in cognition with other players the interested parties herein which appointment has interfered with the work of the petitioner herein.

14. It is also true that indeed the petitioner and respondent do not share an employer-employee relationship. Section 12 of ELRC Act sets out the jurisdiction of this court in relation to employment and labour relations matters as follows;

“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.

(2) An application, claim or complaint may be lodged with the Court by or against an employee, an employer, a trade union, an employer’s organisation, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose.

(3) In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders—

(i) interim preservation orders including injunctions in cases of urgency;

(ii) a prohibitory order;

(iii) an order for specific performance;

(iv) a declaratory order;

(v) an award of compensation in any circumstances contemplated under this Act or any written law;

(vi) an award of damages in any circumstances contemplated under this Act or any written law;

(vii) an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law; or

(viii) any other appropriate relief as the Court may deem fit to grant.

(4) In proceedings under this Act, the Court may, subject to the rules, make such orders as to costs as the Court considers just.

(5) The Court shall have jurisdiction to hear and determine appeals arising from—

(a) decisions of the Registrar of Trade Unions; and

(b) decisions of any other local tribunal or commission as may be prescribed under any written law.”

15. As submitted by the respondent applicant, this court has jurisdiction to handle disputes relating to or arising out of employment relationship between an employer and an employee.

16. This petition arises out of the appointment of the petitioner to the post of Ag Clerk of the Nyandarua County Assembly.

17. It also relates to another employee who was suspended from office.

18. This petition is incidental to an employment matter.

19. In the case of **Trusted Society of Human Rights Alliance Vs. Nakuru Water and Sanitation Services Company & another (2013) eKLR**, Hon. J. Ongaya 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.”

20. The same position was taken by Onyango J in **Kisumu ELRC Cause No. 81 of 2014 Evan Kaiga Inyangala & 2 others VS County Government of Vihiga & 2 others** where the court held that it has jurisdiction to handle any employment related issue.

21. This instant petition relates to an employment issue and that is why the interested parties have been enjoined in this case and respondent do not have a direct employer-employee relation as long as the issue at hand emanates out of an employment situation.

22. That being the case I return the verdict that this court has jurisdiction to handle the matter and the argument that the court lacks jurisdiction is rejected.

23. Costs of this application to be in the cause.

RULING DELIVERED VIRTUALLY THIS 22ND DAY OF JUNE, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Miss Kamau holding brief Ngaruiya for petitioner for interested parties – present

Waichingo for respondent – present

Court Assistants – Wanyoike/Fred