



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

PETITION NO.E062 OF 2021

OKIYA OMTATAH OKOITI.....PETITIONER

VERSUS

PARLIAMENTARY SERVICE COMMISSION.....1ST RESPONDENT

MICHAEL ROTICH SIALAI.....2ND RESPONDENT

RULING

The ruling herein relates to Notices of Preliminary Objections filed by the respondents vide notices dated 5th May, 2021 and 10th May, 2021 respectively. Such are hereby consolidated for determination.

The grounds of objections are that;

1. *This court lacks jurisdiction to determine the matter because;*

a. Appointment and removal from office of the Clerk of the National Assembly is not a labour and employment issue, but a special constitutional innovation, a sui generis devise to address challenging governance need and gaps. Under Article 128 of the Constitution, the final word rests not with the 1st respondent but with the House.

b. Appointment of the Clerk of the National Assembly does not involve any of the parties or raise any employment and labour relations issues envisioned by section 12(1) and (2) of the Employment and Labour Relations Court Act.

c. The jurisdiction of this court to interpret and apply the constitution is not original or unlimited like the High Court. This court's jurisdiction is limited to constitutional issues that arise in the context of disputes on employment and labour relations.

d. Under the doctrine of ?exhaustion?, where there is an alternative method of dispute resolution established by legislation, courts must exercise restraint in exercising their jurisdiction conferred by law and must give deference to such dispute resolution mechanisms established by law with the mandate to deal with such specific disputes in the first instance.

e. Section 14(1) of the Access to Information Act grants the Commission on the Administrative Justice Original jurisdiction, in the first instance, to review a decision on release or denial of access to information.

2. *The court lacks jurisdiction to entertain this matter because the petitioner lacks locus standi to institute these proceedings;*

a. Under section 12(1) and (2) of the Employment and Labour Relations Court Act or otherwise.

b. The petitioner has annexed to his supporting affidavit a number of confidential documents obtained illegally and irregularly from the 1st respondent contrary to article 50(4) of the Constitution and section 49

(1)and (2) of the Parliamentary Service Act, No.22 of 2019. The latter provisions protect the privilege of the 1st respondent's documents and mandatorily require that ?Special leave? be first obtained from the Chairperson or Vice-Chairperson of the 1st respondent, before any documents can be produced as

evidence.

c. By illegally and irregularly obtaining and thereafter filing the said documents in court as evidence, the petitioner is not acting in good faith. The petitioner therefore lacks locus standi to institute these proceedings in the public interest.

The objections by the 2nd respondent are that;

1. *The petitioner's petition and application are prematurely and presumptuously filed.*
2. *The orders sought, in so far as they seek to have this court dictate the ode of hiring and management of its staff, the suit herein offends the provisions of Article 252(c) of the Constitution are not capable of being granted.*
3. *The orders sought amount to final orders as similarly sought in the petition.*
4. *The orders sought if granted, would unfairly prejudice the 2nd respondent's personal rights and amount to a premature termination of his employment.*
5. *Considering that the 2nd respondent is not the holder of a state office, the petitioner has no locus standi to interfere with his current, or indeed, future employment.*
6. *No constitutional issues are raised in the petition herein to warrant grant of any conservatory orders.*
7. *Granting the orders herein would amount to discrimination against the 2nd respondent's current and future right to work.*
8. *The petition and application as filed are in bad faith and is directed to the person of the 2nd respondent and not the office as is therefore, clouded with bad faith.*
9. *The documents exhibited by the court being; 9.1 undated Memo; and*
 - 9.2 *Letter dated 1st march 2021; be struck off the proceedings for having been obtained and or utilised unlawfully and therefore inadmissible.*
10. *This court lacks jurisdiction to grant the orders sought herein.*

On the objections the 1st respondent submitted that the petitioner's case is anchored on the facts that the 2nd respondent was appointed as clerk of the national assembly on contract without the approval of the House and upon attaining 60 years mandatory retirement age in the Parliamentary Service and this is in violation of the petitioner's right to information on the appointment process and which information he had formally requested for. This court lacks jurisdiction to hear the petition, the petitioner has no *locus standi* and has failed to exhaust alternative dispute resolution mechanisms under the Access to Information Act.

The 1st respondent submitted that jurisdiction of the court to hear the matter is everything as held in **Mukisa Biscuit Co. Ltd v West End Distributors Ltd [1969] EA; Official Receiver v Sukhdev [1070] EA; Kalpana H Rawal & 2 others v Judicial Service Commission & 3 others [2016]** that objections on points of law can be addressed at any point in the proceedings. Question of jurisdiction once raised should be heard first on the evidence before court as held in **Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited [1989] 1 KLR; Nairobi Civil Application No.E121 of 2021.**

A court's jurisdiction flows from either the Constitution or legislation or both as held in **Samuel Kamau Macharia v Kenya Commercial Bank & 2 others [2011] eKLR.**

This court lacks jurisdiction because the appointment of the clerk of the national assembly does not involve any of the parties herein and does not relate to employment and labour relations issues envisaged by section 12(1) and (2) of the Employment and Labour Relations Court Act (ELRC Act). The law provides for a closed category of disputes which the court has jurisdiction over and only such persons/parties have *locus standi* to institute disputes before the court.

The office of the clerk of the national assembly is created by Article 128 of the Constitution and which provides that clerks and staff of Parliament are appointed by the Parliamentary Service Commission (PSC or PSC Act) with approval of the relevant House. The appointment is then operationalized by section 26 and 27 of the PSC Act for appointment for a term of 5 years and is eligible for re-appointment for one further term of 5 years.

The appointment of the clerk is not an employment and labour relations issue but a special constitutional innovation. Under Article 128 of the constitution the final word on the appointment rests with the National Assembly.

Disputes with regard to alleged constitutional violations or the Bill of Rights do not fall under section 12 of the ELRC Act as held by the

Court of Appeal in the case of **Attorney General & 2 others v Okiya Omtatah Okoiti & 14 others [2020] eKLR**.

The 1st respondent also submitted that the court lacks jurisdiction on the grounds that the petitioner has no *locus standi* to institute these proceedings under the provisions of section 12(1) and (2) of the ELRC Act. The petition is not filed in good faith.

Section 12(2) of the ELRC Act define the parties who can lodge claims with the court and the petitioner as a public spirited person is not one such party as held in **Kenya Council of Employment and Migration Agencies & another v Samuel Mwangera Arachi & 2 others [2015] eKLR** that even where the court has jurisdiction to adjudicate constitutional questions, these must only be by persons identified under section 12(2) of the ELRC Act acting in person or through authorised representatives. There must be a public interest and not personal interest as held in **Mumo Matemu v Trusted Society of Human Rights & 3 others [2013] eKLR**.

The petitioner has filed confidential documents obtained illegally and unlawfully from the 1st respondent which demonstrates bad faith on his part and should be expunged as held in **Nairobi Civil Appeal No.13 of 2015 consolidated with Civil Appeal No.10 of 2015, Okiya Omtatah Okoiti & others v the Attorney General** that irregularly obtained documents is evidence obtained without proper procedure. The petitioner is aware of the procedure to obtain documents from the 1st respondent and upon request to the 1st respondent to obtain confidential records and communications between staff; the petitioner opted to obtain the same illegally and irregularly. These documents are inadmissible since they constitute internal correspondence between the 1st respondent's staff and are privileged under section 49(1) and (2) of the PSC Act. Special leave is required before the PSC documents can be produced in court and which was not granted. This demonstrates bad faith as held by the Indian Supreme Court in **Dhakshnamoorthy v The Commissioner** and in this case the petitioner is motivated by unsubstantiated newspaper reports and information from the 'grapevine' and illegally and irregularly obtained documents.

Without proper standing before the court and the court not having the requisite the petition should be struck out.

The 1st respondent also submitted that under section 14(1) of the Access to Information Act the Commission on the Administrative Justice has original jurisdiction in the first instance to review a decision on release or denial of access to information. Under the doctrine of 'exhaustion' where there is an alternative method of dispute resolution established in law, the court must exercise restraint in exercising their jurisdiction and give deference to such dispute resolution mechanism as held in **Albert Chaurenbo Mumba & 7 others (sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Maurice Munyao & 148 others (suing on their own behalf and on behalf of plaintiffs and other members/beneficiaries of the Kenya Ports Authority Pensions Scheme) [2019] eKLR** that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution of an Act of Parliament, that procedure should be strictly followed. In this case the Commission on Administrative Justice has jurisdiction to determine the question of a state's organ refusal to release requested information.

The court lacks jurisdiction to delve into internal proceedings of the National Assembly in respect of approval of the 2nd respondent as clerk of the National Assembly. The process of approval of the 2nd respondent is an internal working arrangement of parliament in accordance with the standing orders of the House and not opens to the public. The court should be reluctant to intrude into the internal proceedings of Houses of Parliament, unless there is a clear constitutional violation or breach of an applicant's fundamental rights and freedoms as held in **Speaker of Senate & another v Attorney General & 4 others Reference Number 2 of 2013 [2013] eKLR** and in the case of **Peter Ngoge v Francis Ole Kaparo & 4 others [2007] eKLR** that courts should be reluctant to interfere with internal arrangements of parliament unless they violate the constitution.

The issues raised in the petition are yet to crystallise for determination by the court. Although the House has approved the appointment of the 2nd respondent, he is yet to commence under his contract and serving under the current contract which is yet to expire. It is only upon acceptance of the contract that the petitioner's case will be ripe and become justiciable as held in **Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 2 others [2016] eKLR**.

The orders sought if granted will affect the National Assembly, which is not a party to these proceedings and which is the relevant House that approved the 2nd respondent's appointment. Such renders the petition incompetent and goes to the root of the court's jurisdiction and contrary to the rules of natural justice and right to fair hearing protected under article 25(c) and 50(2) of the Constitution. the court cannot issue adverse orders against a parties not before it as held in **National Gender & Equality Commission (NCEC) v Independent Electoral &**

Boundaries Commission (IEBC) & 3 others [2018] eKLR and on these grounds the objections made should be allowed and the petition dismissed with costs.

The 2nd respondent submitted that the court lacks jurisdiction in so as it is being invited to micromanage the employment of the 1st respondent. The office of clerk of the National Assembly is regulated in statute and duties defined under the PSC Act and the constitution permit PSC to recruit the clerk under Article 252(c) of the Constitution like all constitutional commission which are allowed to recruit own staff. Article 127(6)(c) of the Constitution, the PSC is allowed to constitute offices in its service and under section 32 of the PSC Act the Commission is allowed to establish offices as it considers necessary in the parliamentary service. To invite the court to intrude in this mandate renders the court without jurisdiction as the Court cannot manage the human resources of another organisation.

In the case of **Olive Mwhiki Mugenda & another v Okiya Omtatah Okoiti & 4 others [2016] eKLR** the Court of Appeal held that the ELRC is not charged with constitutional or statutory mandate to determine and oversee recruitment of individuals to any employment position. The petitioner is not an employee of the National Assembly or Members of parliament of Senate or a member of the PSC to justify *locus standi* to file the instant petition.

The 2nd respondent submitted that the orders sought are unrealistic, discriminatory and incapable of being enforced and such are meant to injure the 2nd respondent's right and amount to termination by retirement of the National Assembly which is not a party herein and the court has no such power to order a party to terminate employment as held in **Judicial Service Commission v Gladys Boss Shollei & another [2014] eKLR** and on this basis the orders sought amounts to dismissal of the 2nd respondent from employment in a manner which will undermine his rights and should be dismissed with costs.

The petitioner submitted that on the objections made he has the requisite *locus standi* based on articles 22 and 258 of the Constitution which enshrine the concept of public interest litigation and vests all persons including him with standing to move the court in the public interest as held in **Timothy Otuya Afubwa & another v County Government of Trans Zoia & 3 others [2016] eKLR; Khalef Khalifa El-Busaidy v Commissioner of Lands & 2 others (2002) eKLR; John Harum Mwau & 3 others v Attorney General & 2 others [2012]; and Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others Civil Appeal No.290 of 2012** that the intent of article 22 and 23 of the constitution is that person should have free and unhindered access to this court for enforcement of their fundamental rights and freedoms and under article 258 it allows any person to institute proceedings claiming the constitution has been violated or is threatened. The standard guide should be the command in Article 258 of the Constitution.

Article 3(1) of the Constitution bind all person to respect, uphold and defend the constitution and this allow the petitioner to approach the court for redress on *bona fides* grounds where the constitution is under threat and hence given his the standing to move as done herein.

The petition is *bona fides* public interest litigation which provides access to justice, reforms the law, holds government to account, raises awareness, empowers the disadvantaged and saves costs as held in **Thakur Bahadur Singh & another v Government of Andhra Pradesh [1998]**. Public interest cases cover more than just the party in court by ensuring the public interest and that public bodies and officers act strictly with the law and constitution, and in this regard the petitioner has standing with the court.

The petitioner also submitted that this court has jurisdiction to hear the petition under the provisions of Article 1(1) and (3) of the constitution which grant the court power to adjudicate over disputes and article 159(1) which vests the court with jurisdiction to hear the parties as held in the case of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd 1989 KLR; Re the Matter of the Interim Independent Electoral Commission eKLR; Samuel Kamau Macharia v Kenya Commercial bank & 2 others [2012] eKLR** that jurisdiction must flow from the Constitution or legislation or both.

The jurisdiction of the court is derived from the ELRC Act and Article 162(2) (a) of the Constitution and where the ELRC Act has defriend 'employment' to mean any verbal or written contract of employment and further section 2 of the Employment Act, 2007 has defriend an 'employee' and an 'employer' who is paid a salary or wage is covered under the operative statute giving jurisdiction. the relationships outlined under section 12(1) and (2) of the ELRC Act is not exhaustive as held in **Republic v Clerk County Assembly of Baringo ex parte William Kassait Kamket [2015] eKLR; Trusted Society of Human Rights Alliance v Nakuru Water and Sanitation Services Company & another [2013] eKLR** that recruitment is a proper element of employment and therefore the court has jurisdiction.

In the case of **United States International University v Eric Rading [2012]** the court held that the ELRC has jurisdiction to deal with matters of fundamental rights and freedoms as part of the jurisdiction to resolve labour disputes and in **Civil Appeal No.6 of 2012 Prof. Daniel Mugendi v Kenyatta University & others** the Court of Appeal held that the ELRC has

jurisdiction to determine industrial and labour relations matters alongside claims of fundamental rights and ancillary and incident to these matters and which was reiterated in the case of **Okiya Omtatah Okoiti v Attorney General & 2 others; Francis Muthaura & 5 others (interested Parties) [2019] eKLR** that the recruitment, nomination and appointment of the 2nd respondent is a matter subject to the jurisdiction of this court. The court is not stripped of its jurisdiction with regard to the challenge to the appointment of the respondent to public office as such relates to employment and labour relations and a matter which falls within the jurisdiction of this court.

Appointments under the PSC Act are subject to article 41(1) of the Constitution provisions as fair labour practices include the requirement that appointments must be conducted through an inclusive, competitive, accountable and transparent process as held in **Joseph Mutuura Mbeeria & another v Cabinet Secretary for Education, Science & Technology & 2 others [2014] eKLR; Okiya Omtatah Okoiti v The National Executive of the Republic & 6 others [2019] eKLR** that public officers within the public service are governed by constitutional and statutory provisions on employment of public officers and which fall within the jurisdiction of the court per article 162(2)(a) of the Constitution. The employer-employee relationship is not a condition precedent to the exercise of the court's jurisdiction and labour relations is included.

The petitioner also submitted that Parliament is not immune from judicial oversight as under the constitution, the judiciary has the role to adjudicate individual rights and determine government action as part of the separation of powers. The doctrine of exhaustion does not apply in these proceedings and the court jurisdiction is invoked due to the nature of the orders sought as against the application of the procedures under section 14(1) of the Access to Information Act. a remedy only exists if a petitioner can pursue it without impediment as held in **Okiya Omtatah Okoiti v Nairobi City County & 5 others [2016] eKLR; Federation of Women Lawyers (FIDA-K) & 5 others v Attorney General & another [2011] eKLR**. The jurisdiction

of the court under Article 165 is completely different from that of a tribunal under Article 168. The tribunal jurisdiction kicks in when there is alleged misconduct. The reliefs sought can only be issued by the court and not other tribunal. The allegations that the petitioner has relied upon illegally and irregularly obtained evidence is a matter of fact and cannot be addressed through objections which must relate to questions of law and not facts and the objections should be dismissed with costs.

Determination

Whether the court has jurisdiction;

Whether the petition has *locus standi* to file the instant petition;

Whether there is exhaustion of alternative methods of dispute resolution under section 14(1) of the Access to Information Act;

Whether the petition offends the provisions of Article 252(c) of the Constitution, 2010;

Whether by granting the orders sought herein the same will amount to discrimination against the 2nd respondent.

The petitioner's case is that the 1st respondent has contravened section 6(2) and 36 of the PSC Act with regard to the employment contract and by appointing the 2nd respondent as the clerk of the National Assembly on contract without approval of the House and after he has attained the mandatory retirement age of 60 years in the parliamentary service. That the petitioner's right to information has been violated by the 1st respondent withholding information about the appointment of the 2nd respondent. The 2nd respondent is alleged to be an accessory to the contravention by the PSC of section 26(2) and 36 of the PSC Act by accepting to be appointed as the clerk of the National Assembly on contract without approval of the House and after attaining 60 years mandatory retirement age in the parliamentary age.

The respondents objections in this regard relates to the standing of the petition to file the instant petition and the court jurisdiction to hear and determine the petition herein.

The parties are agreed to the extent that jurisdiction is everything. Without it, the court must stop.

In the case of **Owner of the Motor Vessel Lillian "S" V Caltex oil Kenya Ltd. (1989) 1 KLR** where the Court of Appeal held that;

Without jurisdiction a Court has no power to make one more step. Where a Court has no jurisdiction there would be no basis for a continuation of proceedings pending before it. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

The Supreme Court in the case of **Samuel Kamau Macharia v Kenya Commercial Bank & 2 others [2012] eKLR** held that;

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

In this regard, this court's jurisdiction flows from Article 162(2) (a) and (3) of the Constitution, 2010 that;

(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

And

(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2)

In this regard, Parliament enacted the ELRC Act, 2011;

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

The court is granted constitutional jurisdiction over *employment, labour relations and for connected purposes*. The relationship outlined under section 12(1) and (2) should reflect the preamble of the constitutive Act. The relations outlined therein *relating to employment and labour relations including relations for connected purposes and further any office established under any written law for such purpose*.

Such relations though not particularised under the ELRC Act where they reflect the provisions of Article 162(2) (a) and *including the connected purpose* all fall under the jurisdiction of the court.

Under Article 128 of the Constitution, 2010 the PSC is allowed to appoint a Clerk for each House of Parliament.

128. (1) there shall be a Clerk for each House of Parliament, appointed by the Parliamentary Service Commission with the approval of the relevant House

The procedural requirements for such appointment under Article 128 are addressed under section 26 and 27 of the PSC Act and for this purpose and jurisdiction of the court, section 27(1) thereof requires that;

(1) The nomination of a person for appointment as a Clerk for each House of Parliament pursuant to Article 128 of the Constitution shall be done through an open, transparent and competitive recruitment.

Whereas the court should not micromanage any entity, private or public in the

conduct of its affairs as held in the case of **Olive Mwhaki Mugenda & another v Okiya Omtatah Okoiti & 4 others [2016] eKLR**, where the process is challenged as being a clear constitutional violation or breach of an applicant's fundamental rights and freedoms the jurisdiction of the court is invoked.

In **Speaker of Senate & another v Attorney General & 4 others Reference Number 2 of 2013 [2013] eKLR** the court held that;

... When there is even a scintilla of a threat to devolution, and the Senate approaches the Court to exercise its advisory jurisdiction under Article 163 (6) of the Constitution, the Court has a duty to ward off the threat. The Court's inclination would not be any different if some other State organ approached it. Thus, if the process of devolution is threatened, whether by Parliamentary or other institutional acts, a basis emerges for remedial action by the Courts in general, and by the Supreme Court in particular.

At the core of the petition is the alleged contravened section 6(2) and 36 of the PSC Act with regard to the employment contract and appointment of the 2nd respondent as the clerk of the National Assembly without approval of the House and after he has attained the mandatory retirement age of 60 years in the parliamentary service.

Where the appointing body does not comply with the applicable procedures as far as recruitment or approval is concerned, the disadvantaged party has recourse to the Courts not only under public law and judicial review but also upon the application of constitutional provisions since the dispute is about a recruitment process undertaken by the 1st respondent with the direct involvement of the 2nd respondent.

The court finds that recruitment is a proper element of employment and therefore the court has jurisdiction in view of that subject matter and the remedies sought in the petition are substantially declarations which are remedies the court is authorized to make under section 12(3) (iv) of the ELRC Act.

With regard to challenge on jurisdiction on the subject matter, the court is vested with constitutional jurisdiction to protect the Constitution under Article 258, 41 and 22 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, 2010.

The Court of Appeal in **Daniel N Mugendi v Kenyatta University & 3 others [2013] eKLR** held that;

*... The Industrial Court [Employment and Labour Relations Court] which also has jurisdiction and authority to consider the claims of breach of fundamental rights as pertain to industrial and labour relations matters. It is only meet and proper that the Industrial Court do exclusively entertain those matters in that context and with regard to **Article 165(5) (b)**.*

This decision by the Court of Appeal reiterated the findings by the High Court in the case of **United States International University (USIU) v The Attorney General & Others** that;

By virtue of Article 162(3), section 12 of the Industrial Court Act 2011 has set out matters within the exclusive domain of that court. Since the court is of the same status of the High Court, it must have the jurisdiction to enforce labour rights in Article 41 and the jurisdiction to interpret the Constitution and fundamental rights and freedoms, is incidental to the exercise of jurisdiction over matters within its exclusive domain. In any matter falling within the provisions of Section 12 of the Industrial Court Act, then the Industrial Court has jurisdiction to enforce, not only Article 41 rights but also all fundamental rights ancillary and incidental to the employment and labour relations including interpretation of the Constitution within the matter before it.

The court has the requisite constitutional and statutory jurisdiction to hear the instant petition and the subject matter. There exist no special circumstances by application of article 128 or under the PSC Act to remove the original jurisdiction of the court herein.

With regard to the standing of the petitioner, the petition is anchored under the provisions of Article 22, 23, 48, 50, 165, 258 of the Constitution, 2010. The petitioner has defined himself as acting in the capacity of a law abiding citizen, a public spirited individual and a human rights defender.

As addressed above, the court is under Article 22(3) as read with Article 23 and 165(3) (b) of the Constitution, 2010 given power to enforce the constitution. A party whose petition is anchored under the provisions of Article 258 of the Constitution enjoys special standing with the court to attend and urge the matters set out therein. The petitioner not only contends that there is a threat to the violation of the Constitution but that the Constitution has in fact been violated by the Respondents.

Article 258 of the Constitution provides as follows;

(1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

(a) A person acting on behalf of another person who cannot act in their own name;

(b) A person acting as a member of, or in the interest of, a group or class of persons;

(c) A person acting in the public interest; or

(d) An association acting in the interest of one or more of its members.

In light of the allegations comprised in the petition, the court finds the petitioner meets the threshold of Article 258 and 22 of the Constitution, 2010 and cannot be faulted for instituting these proceedings and I hold that he is within his right to commence the same. See **Mumo Matemu versus Trusted Society of Human Rights Alliance & 5 Others Civil Appeal No. 290 of 2012**.

Under such findings, the jurisdiction of the court properly invoked, the subject matter, and the issue of an employer-employee relationship is not necessary. The petitioner well within his right to move the court as done, the nature of orders sought, there is right to urge the petition in the public interest and under Article 22, 23 read together with 258 of the Constitution, 2010.

Further to the above, the petition is that the 1st respondent has denied the petitioner right to information by withholding information about the appointment of the 2nd respondent. The 1st respondent in counter urge the court that the petitioner has illegally and irregularly obtained information which is ordinarily privileged and has not obtained leave to use such information herein and further that under the Access to Information Act he has failed to exhaust the dispute resolution mechanism therein and this court is denied jurisdiction.

The first aspect of alleged illegally and irregularly obtained information from the PSC and which has been used herein is strictly a matter of fact the import of which can only be addressed upon an evaluation of such matter as to do so at this instance would deny the parties and the court a fair chance to urge and or examine each party on its allegation and position.

The second aspect with regard to exhaustion of alternative dispute resolution mechanism under section 14(1) of the Access to Information Act.

It is trite that the exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. This encourages alternative dispute resolution mechanisms in line with Article 159 of the Constitution, 2010 as held in **Anthony Miano & others v Attorney General & others [2021] eKLR** and in **Speaker of National Assembly v Karume [1992] KLR 21** the court held that;

Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.

While this case was decided before the Constitution of Kenya 2010 was promulgated, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution. We can do no better in this regard than cite another Court of Appeal decision which provides the Constitutional rationale and basis for the doctrine.

This is **Geoffrey Muthiga Kabiru & 2 others – vs- Samuel Munga Henry & 1756 others [2015] eKLR ...**

There are exceptions to the rule, outlined as follows;

... two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. ..., in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake.

... that the exhaustion requirement would not serve the values enshrined in the Constitution or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.

The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court's jurisdiction must be construed restrictively.

In this case, as set out above, at the core of the petition is the recruitment of the 2nd respondent by the 1st respondent. Such is challenged by the petitioner as well as the contravention of section 26(2) and 36 of the PSC Act and paragraphs 2(b) & (c) of the employment contract. The petition is also that the petitioner's right to information by the respondents withholding information about the appointment of the 2nd respondent from him and refusal to divulge the same when formally requested to do so is at the core of his petition.

The petitioner moved the court under Certificate of Urgency and seeking urgent orders with regard to the recruitment of the 2nd respondent and on the grounds that he was due to attain 60 years on 25th May, 2021 and which application was placed in abeyance so as to hear the objections by the respondents.

The primacy of the orders sought in the petition being the recruitment of the 2nd respondent by the 1st respondent, to separate the issue of access to information required to urge the petition and be placed with a separate body other than the court is not only abdication of the constitutional and statutory jurisdiction of the court but to set up in motion parallel procedures to negate the very essence of the courts objectives outlined under section 3 of the ELRC Act and further mar issues contrary to the principles of Article 159 of the Constitution, 2010. Such is not the duty of the court.

The court properly seized of the petition, the same should be heard on the merits.

See **Kenya Vision 2030 Delivery Board v Commission on Administrative Justice & 2 others [2021] eKLR** and where the Supreme Court in addressing the question *Whether the recommendations of CAJ are binding on public bodies* held that;

it is our finding that whereas CAJ has the requisite mandate to make recommendations to a public officer or a public body, the same is not binding. A recommendation can only be binding when the same is specifically provided for in the Constitution or in law. Neither the Constitution nor the CAJA states that CAJ's recommendations are binding. Consequently, the Board had the discretion to determine the manner in which they were to implement CAJ's recommendations. Towards that end, we find and affirm that the CAJ's recommendations to inter alia: pay the 3rd Respondent an equivalent of twelve months' salary and allowances in compensation for a one-year period of the reviewed contract; facilitate the 3rd Respondent to access his personal effects from his former office; and

offer him an unconditional apology for the treatment meted out to him, were not binding upon the Board. We therefore fault the appellate court's conclusion that CAJ's recommendations were binding on the Board.

Whatever outcome is rendered by the process outlined under section 14(1) of the Access of Information Act, the non-binding nature thereof, to subject the petitioner to such mechanism before proceeding to the court on the face of the core issue in dispute would not meet the ends of justice.

The other issue which was addressed though in a subtle manner was the that The National Assembly is not a party to these proceedings. That the appointment of the 2nd respondent must be approved by the House and which is not a party to these proceedings.

A petitioner must be allowed to decide who is a respondent in his case. Where there is non-joinder of an appropriate and relevant respondent, upon the court hearing the petition, such can only crystallise on the remedies sought. at this instance, the petitioner cannot be faulted.

The remedies sought in the petition are against the respondents herein. Such shall suffice. Even in a case where there is no joinder of a necessary party, such is not fatal as such can be appropriately addressed in accordance with the Rules 5(b) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 that;

(b) A petition shall not be defeated by reason of the misjoinder or nonjoinder of parties, and the Court may in every proceeding deal with the matter in dispute.

Before conclusion, the issue of costs is addressed. Under section 12(4) of the ELRC act, costs before this court can be awarded save such are discretionary. At this instance, costs shall abide the petition.

Accordingly, objections made by the respondents are found without merit and are hereby dismissed. the court shall address the petition herein on the merits.

DELIVERED IN OPEN COURT AT NAIROBI THIS 8TH DAY OF JUNE, 2021.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Okodoi

..... and