



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

ELRC JR NO. 10 OF 2021

CLIVE NYAAGA OGWORAAPPLICANT

VERSUS

THE GOVERNOR NYAMIRA COUNTY.....1ST RESPONDENT

THE COUNTY GOVERNMENT OF NYAMIRA.....2ND RESPONDENT

THE COUNTY ASSEMBLY OF NYAMIRA.....3RD RESPONDENT

RULING

1. This ruling relates to a Notice of Preliminary Objection dated 28th September, 2021 brought by the 1st and 2nd Respondents. The Preliminary Objection is premised on the following grounds:

i. That the court has no jurisdiction to entertain this suit as the *Ex parte* Applicant, like the Cabinet Secretaries appointed by the President are status employees in a pure presidential system.

ii. That the court has no jurisdiction since there is no employer-employee relationship between the 1st and 2nd Respondents and the *Ex parte* Applicant.

iii. That the court has no jurisdiction to impose a contract between the 1st and 2nd Respondent and the *Ex parte* Applicant.

2. The preliminary objection was heard on the 18th of October, 2021.

3. Mr. Anyoka for the 1st and 2nd Respondent argued that the *Ex parte* Applicant approached the court seeking to compel the 1st Respondent to appoint him as member of the Executive Committee of the 2nd Respondent. It is his position that the court lacks jurisdiction to make the orders sought for reason that the position the *Ex parte* applicant seeks to be appointed to is a state office.

4. The counsel further argues that for reason that the *Ex parte* Applicant was not cleared for appointment by the 3rd Respondent, there is no employee-employer relationship between the 1st and 2nd respondents and the *Ex parte* Applicant per *Section 12 of the Employment and Labour Relations Court Act and Section 2 of the Employment Act, 2007*.

5. It is the counsel's position that the preliminary objection raises pure points of law that are capable of disposing off the suit and therefore, meets the legal principles in respect of Preliminary Objections per *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors ltd (1969) EA 696*. Counsel further sought to rely on the holding in the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR* to buttress his position, that the court lacks jurisdiction and must down its tools.

6. The 1st and 2nd Respondents' further submitted, that the supervisory jurisdiction of the High court under Article 165(6) is unlimited, whereas that of the Employment and Labour Relations Court is limited by the Employment Act, 2007, which governs relationship between employers and employees.

7. The Respondents' further argues that for reason that members of the Executive Committee are defined under Article 260 of the Constitution as State Officers, provisions of the Employment Act do not apply to them. They sought to rely on the holding of the court in the case of *County Government of Nyeri & another v Cecilia Wangechi Ndungu [2015] eKLR*.

8. It is submitted that the prayers sought in the application by the *Ex parte* Applicant, violate the doctrine of separation of powers. The Respondents' position is that by entertaining this matter, the court will be meddling in the affairs of the 3rd Respondent.

9. The 3rd Respondent supported the preliminary objection by stating that Section 12 of the ELRC Act sets the jurisdiction of this court.

10. It is submitted for the 3rd Respondent that this court needs to determine whether there exists an employer-employee relationship between the *Ex parte* Applicant and the Respondents herein. It is argued that in the event the court finds that the employer-employee relationship does not exist between the parties here, then the court lacks jurisdiction to entertain the matter. He sought to rely on the holding in the case of ***Christine Adot Lopeyio v Wycliffe Mwathi Pere [2013] eKLR.***

11. Mr. Godia for the *Ex parte* Applicant opposed the Preliminary Objection. He filed written submissions on the preliminary objection and highlighted the same during the oral hearing.

12. The *Ex parte* Applicant argues that jurisdiction flows from the Constitution and Statutes and that a court cannot abrogate itself that which is not given by law. He argues that this court derives jurisdiction from Article 162 (2) of the Constitution and Section 12 of the ELRC Act. He further states that the *Ex parte Applicant* “was supposed to be appointed as CEC” having undergone all the necessary procedures, save only for appointment by the 1st Respondent, which exercise he termed ceremonial.

13. It is submitted for the *Ex parte* Applicant, that the role of the court is to check the excesses of the Legislature and the Executive and in this case, the 1st and 2nd Respondent did not perform their role and which is the reason the *Ex parte* Applicant is before this court.

14. It is his submission that this case relates to and arises out of an employment dispute and it follows that this court has jurisdiction. He sought to rely on the holding of Nderi J in the case ***Nick Githinji Ndichu v Clerk, Kiambu County Assembly & another [2014] eKLR.***

15. The *Ex parte* applicant concludes by requesting the court to transfer the suit to the High court should it uphold the preliminary objection, instead of striking it out.

16. The Respondents in response, further submitted that where the court finds that it has no jurisdiction, it has no power to transfer the matter to any other court and the only cure, is for the Applicant to withdraw the suit and file it in a court seized with jurisdiction.

Determination

17. The Preliminary Objection is on the jurisdiction of this court to hear and determine the *Ex parte* Applicant’s judicial review application.

18. As correctly submitted by the Counsel for the *Ex parte* Applicant, jurisdiction is conferred by the Constitution, Statute or both and may be limited or unlimited in like manner. In the often-quoted case of ***Owners of Motor Vessel “Lillian S” v Caltex Oil Kenya Limited [1989] eKLR*** the Court stated:

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, 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 other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

19. The issue subject of the *Ex parte* Applicant’s application is appointment to the position of member of the County Executive Committee of the 2nd Respondent. The counsel for the *Ex parte* Applicant submitted that the *Ex parte* Applicant was nominated and vetted by the relevant committee of the 3rd Respondent but that his name was not debated nor approved for appointment by the 3rd Respondent when the other nominees were debated, approved and appointed.

20. Article 162 (2) (a) of the Constitution provides that:

“Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to:

(a) employment and labour relations;”

21. Pursuant to Article 162 (2) (a), Parliament passed the Employment and Labour Relations Court Act, which in addition to establishing the court, sets out the jurisdiction of the court 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;..”

22. Section 12 of the Employment and Labour Relations Court Act, gives this court jurisdiction to hear and determine all disputes, for as long as the dispute relates to employment. The Act goes further to give examples of such disputes to include a disputes between an employer and an employee amongst others.

23. The question for this court, is whether an employment relationship exists between the *Ex parte* Applicant and the Respondents and secondly, whether the dispute between the parties herein relates to employment as per Article 162(2)(a) of the Constitution and Section 12 of the Employment and Labour Relations Act.

24. On the question of whether an employment relationship exists between the *Ex parte* Applicant and the Respondents, I will determine this question vis-vis the definition of an employee and employer under the Employment Act, 2007. The Act defines an “**employee**” as “**a person employed for wages or salary**” and an “**employer**” as “**a person, public body, firm corporation or company which has entered into a contract of service to employ an individual.**”

25. The *Ex parte* Applicant was as his counsel put it “supposed to have been appointed” to the position of County Executive Committee, but was not. There is no doubt in my mind that the *Ex parte* Applicant, is not an employee of the 1st and 2nd Respondents for reason that he was never approved by the 3rd Respondent and hence was not appointed.

26. Further, the relationship between the *Ex parte* Applicant and the Respondents does not meet the tests prescribed by the court in the case of *Christine Adot Lopeyio v Wycliffe Mwathi Pere [2013] eKLR*. The *Ex parte* applicant is not subject to the command of Respondents, he is not subject to the rules and procedures of the Respondents, he is not part of the business of the Respondents and neither does he have mutuality of obligation with the Respondents.

27. The court returns that no employment relationship exists between the *Ex parte* Applicant and the Respondents.

28. The second question for this court, is whether the dispute between the *Ex parte* Applicant and the Respondents relates to employment. It is not disputed that the *Ex parte* Applicant was a candidate in a recruitment process. The evidence before this court is that he was nominated and vetted by a committee of the 3rd Respondent, but that his name was not among those approved by the 3rd Respondent and appointed by the 1st Respondent. He is aggrieved by how things turned out in this process and is the reason he is before this court.

29. Article 162 of the Constitution empowered Parliament to establish Courts with the status of the High Court to hear and determine disputes **relating to employment and labour relations (emphasis mine)**. Consequently, Parliament enacted the Employment and Labour Court Act, whose section 12 provides for the jurisdiction of that Court. According to section 12(1), ELRC has jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of the Act or any other written law which extends jurisdiction to that Court **relating to employment ...**(emphasis mine).

30. It is the opinion of this court that the issues subject of the *Ex parte* Applicant’s application, is an issue relating to employment. I find and hold that this court is clothed with jurisdiction to hear and determine this matter and the same should be heard and determined on merit.

31. The upshot is that the Preliminary Objection dated 28th September, 2021, is dismissed.

32. Costs shall be in the cause.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 25TH DAY OF NOVEMBER, 2021.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Anyoka present for the 1st and 2nd Respondents

Mr. Makori present for the 3rd Respondent

N/A for the Applicant

Christine Omollo – C/A