



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KERICHO**

**PETITION NO. 9 OF 2021**

**PAUL CHIRCHIR.....PETITIONER**

**VERSUS**

**HARON ROTICH .....1<sup>ST</sup> RESPONDENT**

**COLLINS BIEGON .....2<sup>ND</sup> RESPONDENT**

**ALBERT KIPKOECH .....3<sup>RD</sup> RESPONDENT**

**HEZRON NGETICH .....4<sup>TH</sup> RESPONDENT**

**GILBERT NGETICH .....5<sup>TH</sup> RESPONDENT**

**SAMMY RONO .....6<sup>TH</sup> RESPONDENT**

**PHILIP RONO .....7<sup>TH</sup> RESPONDENT**

**ERICK KORIR .....8<sup>TH</sup> RESPONDENT**

**THE SPEAKER, COUNTY ASSEMBLY**

**OF KERICHO.....9<sup>TH</sup>RESPONDENT**

**THE CLERK, COUNTY ASSEMBLY**

**OF KERICHO.....10<sup>TH</sup>RESPONDENT**

**RULING**

1. The Petition herein was first filed in the High Court but the Judge declined jurisdiction on ground that the petition involved an employment dispute. Consequently, the Judge on her own motion transferred the suit to this court for hearing and determination.
2. When the matter was mentioned before me on 9.12.2021, I directed the parties to address me on the issue of jurisdiction before I could go to the merits of the petition and the interlocutory application. Only the petitioner and the 9<sup>th</sup> and 10<sup>th</sup> respondents filed written submissions. Thereafter counsel for the said parties highlighted the submissions on 15.12.2021.
3. The petitioner submitted that he is an employee of the County Assembly of Kericho, having been elected as a member of the County Assembly. He contended that under Article 162 (2) of the Constitution and section 12 of the Employment and Labour Relations Act, this court has original and appellate jurisdiction to determine employment and labour relations disputes. Consequently, he urged that this court is the correct court with jurisdiction to determine the dispute in the petition herein.
4. For emphasis, he relied on the case of **Owners of the MV Lilian S v Caltex Oil (Kenya) Ltd [1989] eKLR, Samuel Kamau Macharia v Kenya Commercial Bank & 20 others [2017] eKLR, and Clerk, Nairobi City County Assembly v Speaker Nairobi City County**

**Assembly & others [2019] e KLR** where the issue of jurisdiction was discussed.

5. The 9<sup>th</sup> and 10<sup>th</sup> respondents, on the other hand, submitted that this court lacks jurisdiction to determine the petition herein because the dispute involved is not one of employment and labour relations. They denied that the petitioner is an employee of the County Assembly and contended that he is an elected member of the county Assembly representing Kapsoit Ward since 2017.

6. They further submitted that the dispute involved concerns removal of the petitioner from the position of Chairman of the select committee of Public Works Roads and Transport on a vote of no confidence pursuant to Standing Order of the County Assembly of Kericho. They contended that the removal of the petitioner by a vote of no confidence by his committee was done procedurally in accordance with the standing orders.

7. They maintained that, since there is no employment relationship between the parties herein, the court lacks jurisdiction to determine the petition. In their view, the court endowed with jurisdiction to determine the matter is the High Court by didn't of Article 165 of the Constitution. For emphasis, they relied on the case of **Owners of the MV Lilian S v Caltex Oil (Kenya) Ltd [1989] eKLR** and **Attorney General & 2 others v Okiya Omtata Okoiti & 4 others [2020] e KLR**.

8. The 9<sup>th</sup> and 10<sup>th</sup> respondents further submitted that since this court lacks jurisdiction to determine the petition, it cannot transfer the same to any other court. They also contended that only the High Court has the jurisdiction to transfer suits to other courts under section 17 and 18 of the Civil Procedure Act. Therefore they urged me to strike out the petition with costs.

9. For emphasis, they relied on **West Kenya Sugar Co. limited v Matayo Ingoshe & others [2021] eKLR**, **Phoenix of EA Assurance Company Limited v SM Thiga t/a Newspaper Service [2019] eKLR** and **Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour Travel [2016] eKLR**.

10. The issue for determination is whether this court has jurisdiction to hear and determine the petition herein. The answer to the question lies in the Constitution and the ELRC Act. I gather support from the case of **Samuel Kamau Macharia, supra** where the Supreme Court Held that:

***“A court’s jurisdiction flows either from the Constitution or legislation or both. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by the law... It cannot expand its jurisdiction through judicial craft or innovation.”***

11. Article 162(2)(a) of the constitution conferred power upon the Legislature to establish a specialized court with jurisdiction to determine employment and labour relations disputes. The legislature did so by enacting the ELRC Act. Section 12 of the Act sets out the correct jurisdiction of this court which mainly concerns disputes between employer and employee on the one hand, and labour relations disputes on the other hand.

12. Employment relationship refers to a relations founded on a contract of service while labour relations refers to a relationship where the terms of the contract of service are negotiated collectively through trade unions and employers or employers’ associations. Consequently, for the court to exercise jurisdiction over any dispute, it must be shown that there exists employer-employee relationship, or labour relationship between the parties to the suit.

13. The petitioner submitted that he is an employee of the County Assembly of Kericho but I am of a contrary view because he has no contract of service with the said Assembly or the respondents herein. If anything, he is a Ward representative who cannot be removed from that substantive position by the respondents herein or the County Assembly.

14. As already observed herein, the dispute herein springs from the removal of the petitioner from the position of chairperson of the Public Works Roads and Transport select committee of the County Assembly of Kericho. The committee members are the ones sued as 1<sup>st</sup> to 8<sup>th</sup> respondents. There is no employment relationship between the petitioner and the members of the committee. He was only elected chairperson by the same members who removed him after losing confidence in him.

15. Standing Order 188(1) permits the said action in the following terms:

***“A Committee may, [sic] a resolution supported by a majority of members, resolve that it has no confidence in the chairperson or vice-chairperson and a member designated for that purpose shall thereupon report the resolution to the Liaison Committee which shall as soon as it is practicable, direct the Clerk to conduct a [sic] election for the Chairperson or Vice-chairperson, as the case may be, in accordance with Standing Order 174 (Conduct of election).”***

16. Section 2 of the Employment Act defines employee and contract of service as follows:

***“contract of service means an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve an employee for a period of time, and includes a contract of apprenticeship and indentured learnership but does not include a foreign contract of service to which part XI of this Act applies.”***

***“employee means a person employed for wages or salary and includes an apprentice and indentured learner.”***

17. In my view the relationship between the petitioner and the select committee of Public Works Roads and Transport of the County Assembly does not fall within the above definitions. Accordingly, any dispute between him and the members of his committee should not be

brought to this court because the court lacks unlimited original jurisdiction on matters that do not fall within its specialized jurisdiction as conferred by section 12 of the ELRC Act.

18. Besides, the select committees of a County Assembly are creature of the Standing Orders of Assembly and as such the disputes between members of the said committees ought to be dealt with exhaustively under the Standing Orders because of the political nature of the process involved. As observed above, the suit involves the alleged unlawful, unprocedural and politically instigated removal of the petitioner from the Chairmanship of the select committee of Public Works Roads and Transport by fellow committee members on 5.10.2021. The suit seeks basically for nullification of the proceedings that removed the petitioner from that office and reinstate him as the committee chair until his term expires in 2022.

19. The said matters are not justiciable and no court has jurisdiction over such matters. Ordinarily the court should not interfere with the said internal procedures unless there is breach of the constitution or another law. Those matter are best left to the internal procedures which can accommodate even political reasons and goals. Descending into that arena would amount to piercing through the veil of separation of powers which is firmly established in our constitutional architecture.

20. I gather support in **Advisory No. 3 of 2013, Speaker of the Senate & another v the Attorney General and others [2013] e KLR** the Supreme Court observed that: -

***“If the parliament violates the procedural requirements of the supreme law of the land, it is for the courts of law, not the least the Supreme Court to assert the authority and supremacy of the Constitution. It would be different if the procedure in question were not constitutionally mandated. This Court would be averse to questioning parliamentary procedures that are formulated by the house to regulate their internal workings as long as he same do not breach the constitution”.***

21. Having made the foregoing finding and observations, I decline jurisdiction in the petition herein and proceed to down my tools. I do so guided by the **Owners of the MV Lilian S v Caltex Oil (Kenya) Ltd [1989] eKLR**, where the Court of Appeal held that:

***“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.”***

22. The question that arises is what should be done to the matter after downing my tools. The submission by the respondents is that, under section 17 and 18 of the Civil Procedure Act only the High Court can transfer a suit to another court. They further submitted that, since the court lacks jurisdiction over the petition, it cannot transfer it to another court.

23. I do not agree with the former view because the said provisions were passed pre-Constitution 2010 and therefore they must be interpreted in the context of the Schedule six to the Constitution 2010. Section 7 of the said Schedule provides that all laws in force immediately before the effective date of the Constitution shall be construed with alterations and adaptation to bring it into conformity with the new Constitution. This court can transfer suits before it to other courts or from other courts to itself since it enjoys equal status with high Court.

24. However I agree with the second view that where a suit is instituted in a court which has no jurisdiction, it cannot be transferred to another court because the suit is incompetent *ab initio*. I gather support from **West Kenya Sugar Company Limited v Matayo Igoshe & others [2021] eKLR** where the Court of Appeal held that: -

***“Filing of a suit before a court without jurisdiction makes the suit itself incompetent, which renders the suit useless or dead for the court cannot possibly proceed to dispose of it since it would be a dead suit, there would be no legal foundation for its transfer to another court, where it would then acquire a life.”***

25. Again in **Phoenix of EA Assurance Company Limited v SM Thiga t/a Newspaper Service [2019] eKLR**, the Court of Appeal held that: -

***“It is clear from the foregoing that the claim by the respondent was filed before a court devoid of jurisdiction. The suit was a nullity *ab initio* and was not transferable to another court; jurisdiction cannot be conferred by consent and ultimately, all orders emanating from that suit are null and void.”***

26. This suit was first filed in the High Court and the Respondents are of the view that the proper court to determine the suit is the High Court. In the circumstances, I do not think that the suit is incompetent since it was not first filed before this court but in the High Court. Consequently, having made the opinion that this court lacks jurisdiction to determine the dispute, I forthwith down my tools and return the Petition to the High Court at Kericho for directions.

27. Any aggrieved party is at liberty to appeal against this ruling as provided by the relevant law. I will not condemn anyone to pay costs.

**Dated, signed and delivered at Nakuru this 21<sup>st</sup> day of December, 2021.**

**ONESMUS N MAKAU 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 15<sup>th</sup> April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.**

**ONESMUS N. MAKAU**

**JUDGE**