



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**PETITION NO. 44 OF 2017**

*(Before Hon. Justice Mathews N. Nduma)*

VINCENT ENDEKWA MAHASI.....1<sup>ST</sup> PETITIONER/APPLICANT

JULIUS MASIVA OBUGA .....2<sup>ND</sup> PETITIONER/APPLICANT

VERSUS

FRANCIS ANGUEYAH OMINDE ..... 1<sup>ST</sup> RESPONDENT

VIHIGA COUNTY ASEMBLY.....2<sup>ND</sup> RESPONDENT/1<sup>ST</sup> CONTEMNOR

THE GOVERNOR VIHIGA COUNTY ..... 2<sup>ND</sup> CONTEMNOR

**RULING**

1. The Respondents filed a response to the application dated 15<sup>th</sup> November, 2017 and the petition and raised a preliminary objection to the petition to the effect that the court lacks jurisdiction to entertain this matter as it is not founded on an employee/employer relationship.

2. The question of jurisdiction of Employment and Labour Court was resolved conclusively in the following cases:-

**Professor Daniel Mugendi v Kenyatta University and 3 others Court of Appeal at Nairobi Civil Appeal No.6 of 2012** in which the Court of Appeal determined that the Employment and Labour Relations Court has exclusive jurisdiction to hear and determine all matters relating to Employment and Labour including any constitutional issues that may arise thereof as follows:-

*“49 – A correspondent court of the High Court that is the industrial court has now been established to deal with employment and labour matters. It follows that all employment and labour relations matters pending in the High Court shall now be heard by the industrial court which is now a court of the status of the High Court. The High Court thereof lack jurisdiction to deal with matters of employment and labour whether filed at the High Court before or after the establishment of the industrial court.”*

3. This position was elaborated and re-affirmed by the Court of appeal in **Judicial Service Commission v Gladys Boss Shollei and another, Civil Appeal No. 50 of 2014, [2014] eKLR** at page 15 as follows:-

*“Labour and employment rights are part of the Bill of Rights and are protected under Article 41 which is within the province of the Industrial Court. To exclude the jurisdiction of the Industrial Court from dealing with any other rights and fundamental freedoms whatsoever arising from the relationship defined in section 12 of the industrial court Act 2011 or interpret the constitution would lead to a situation where there is parallel jurisdiction between the High Court and the Industrial Court. This would give rise to forum shopping thereby undermining a stable and consistent application of employment and labour law”*

4. Whether or not the issue in dispute in this petition is related to employment and labour and/or is a legal or constitutional issue arising from an employment and labour relationship is self evident from the record and the decision of the court in **Nick Githinji Ndichu v Clerk, Kiambu County Assembly and another [2014] eKLR** cited with approval in **County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others [2015] eKLR** affirms this finding.

5. The petitioners raise factual, legal and constitutional issues related to employment of the 1<sup>st</sup> Respondent as the County Secretary of Vihiga County by the 2<sup>nd</sup> Respondent.

6. The Petitioners argue that the ‘unclean’ record of the 1<sup>st</sup> Respondent disqualifies him from such appointment.

7. The petitioners claim that the constitution was violated by the 2nd Respondent in denying the petitioners their right to public participation in the vetting process of the 1<sup>st</sup> Respondent hence the wrongful appointment.

8. From the foregoing, the court has jurisdiction to entertain the petition and the preliminary objection is not upheld. The issue of non-joinder raised by the Respondents is not misplaced. The Vihiga County Public Service Board is a necessary party to these proceedings and is joined accordingly.

**Dated and Signed in Kisumu this 22<sup>nd</sup> day of February, 2018**

**Mathews N. Nduma**

**Judge**

**Appearances**

Osabwa Sandys & Co. Advocates for the Petitioners

Mr. Sore & Co. Advocates for the 1<sup>st</sup> Respondent

M/s Khasiala Noeline for the 2<sup>nd</sup> Respondent

Chrispo – Court Clerk