



Odongo v Clerk, Nakuru County Assembly & 5 others (Application E053 of 2023) [2024] KESC 29 (KLR) (Civ) (28 June 2024) (Ruling)

Neutral citation: [2024] KESC 29 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA**

CIVIL

APPLICATION E053 OF 2023

**MK KOOME, CJ & P, PM MWILU, DCJ & VP,
MK IBRAHIM, N NDUNGU & I LENAOLA, SCJJ**

JUNE 28, 2024

BETWEEN

KENNETH ODONGO APPLICANT

AND

THE CLERK, NAKURU COUNTY ASSEMBLY 1ST RESPONDENT

THE SPEAKER, NAKURU COUNTY ASSEMBLY 2ND RESPONDENT

THE COUNTY ASSEMBLY OF NAKURU 3RD RESPONDENT

**NAKURU COUNTY ASSEMBLY PUBLIC SERVICE BOARD 4TH
RESPONDENT**

THE COUNTY GOVERNMENT OF NAKURU 5TH RESPONDENT

THE GOVERNOR, NAKURU COUNTY GOVERNMENT 6TH RESPONDENT

(Being an application for review of the Ruling of the Court of Appeal (F. Sichale, F. Ochieng, & Achode JJA) in Civil Appeal (Application) No.E001 of 2023 at Nakuru dated 14th April 2023 declining grant of certification)

Necessity for a case to raise an issue of general public importance to merit certification for an appeal to the Supreme Court

The application sought a review of the Court of Appeal's decision which declined to certify an appeal as raising issues of general public importance. The Supreme Court held that the ELRC's jurisdiction was limited to disputes between employers and employees as provided under article 162 of the Constitution and section 12 of the ELRC Act. The recruitment process of county officers did not fall within that category.

Reported by John Ribia



Civil Practice and Procedure – appeals – appeals to the Supreme Court – whether the case on the jurisdiction of the Employment and Labour Relations Court over disputes involving the recruitment and appointment of county officers raised issues of general public importance, meriting certification for an appeal to the Supreme Court - Constitution of Kenya, 2010 articles 159, 162, 163(4) and (5); Supreme Court Act (Cap 9B) section 15(b); Supreme Court Rules, 2020 (Cap 9B Sub Leg) rule 33(2 and 3).

Jurisdiction – jurisdiction of the Employment and Labour Relations Court – jurisdiction to determine involving the recruitment and appointment of county officers - whether the Employment and Labour Relations Court had jurisdiction over disputes involving the recruitment and appointment of county officers - Constitution of Kenya, 2010 articles 159, 162, 163(4) and (5); Employment And Labour Relations Court Act (cap 8E) section 12.

Brief facts

The applicant sought the Supreme Court's intervention after the Court of Appeal declined to grant certification of an appeal. The underlying dispute revolved around the recruitment of 21 Chief Officers of Nakuru County by the respondents. The Employment and Labour Relations Court (ELRC) initially took jurisdiction over the matter, but the Court of Appeal later found that the ELRC had overstepped its jurisdiction, as the dispute did not fall within the scope of employer-employee relationships outlined in article 162 of the Constitution and section 12 of the ELRC Act.

The applicant contended that the recruitment and appointment process of county officers, and the interpretation of related constitutional and statutory provisions, were matters of general public importance requiring further clarification from the Supreme Court.

Issues

- i. Whether the case on the jurisdiction of the Employment and Labour Relations Court over disputes involving the recruitment and appointment of county officers raised issues of general public importance, meriting certification for an appeal to the Supreme Court.
- ii. Whether the Employment and Labour Relations Court had jurisdiction over disputes involving the recruitment and appointment of county officers.

Held

1. The ELRC's jurisdiction was limited to disputes between employers and employees as provided under article 162 of the Constitution and section 12 of the ELRC Act. The recruitment process of county officers did not fall within that category. A dispute falling within the purview of the ELRC should emanate from an employee-employer relationship and/or affect its status. That was different from the High Court, which had unlimited jurisdiction in civil and criminal matters while the specialized courts under article 162 of the Constitution were limited in terms of their jurisdiction and the persons who might approach it. The Court of Appeal decision correctly interpreted the provisions of section 12 of the ELRC Act.
2. The statutory provisions under the County Governments Act were correctly interpreted by the lower courts, and no substantial point of law was raised that required constitutional interpretation by the Supreme Court.
3. The issues raised did not meet the threshold for certification as matters of general public importance, as there were no conflicting decisions or substantial points of law that required the Supreme Court's intervention.

Application dismissed.

Orders

Each party to bear their costs.

Citations

Cases

Kenya



1. *Attorney General & 2 others v Okiya Omtata Okiiti & 14 others* Civil Appeal 621 of 2019 & Civil Appeal 74 of 2020; [2020] eKLR (Consolidated) - (Applied)
2. *Bell, Malcolm v Daniel Toroitich Arap Moi & another* Application 1 of 2013; [2013] KESC 23 (KLR) - (Followed)
3. *Evans Ladtema Muswabili v Vihiga County Public Service Board & 2 others; Marley Ezekiel Ayiego (Interested Party)* Constitutional Petition 1 of 2021; [2021] KEHC 12793 (KLR) - (Followed)
4. *Goldenlime International Limited v Bluesea Shopping Mall Limited & 3 others* Motion 21 of 2016; [2021] KESC 2 (KLR) - (Followed)
5. *Kenya Tea Growers Association & 2 others v The National Social Security Fund Board of Trustees & 13 others* Petition E004 & E002 of 2023 (Consolidated); [2024] KESC 3 (KLR) - (Applied)
6. *Mugendi, Daniel N v Kenyatta University & 3 others* Civil Appeal 6 of 2012; [2013] KECA 41 (KLR) - (Followed)
7. *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 Munyao & 148 others (Suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme)* Petition 3 of 2016; [2019] KESC 83 (KLR) - (Applied)
8. *National Social Security Fund Board of Trustees v Kenya Tea Growers Association & 14 others* Civil Appeal 656 of 2022; [2023] KECA 80 (KLR) - (Applied)
9. *Okiiti & 2 others v Attorney General & 14 others* (Petition (Application) 2 (E002) of 2021) [2023] KESC 31 (KLR) - (Followed)
10. *Okiiti v Attorney General; Njenga (Interested Party)* Petition E101 of 2020; [2022] KEELRC 2 (KLR) - (Followed)
11. *Rai & 3 others v Rai & 4 others* Petition 4 of 2012; [2014] eKLR; [2014] 2 KLR 12 - (Followed)
12. *Republic v Chengo & 2 others* (Petition 5 of 2015) [2017] KESC 15 (KLR) - (Applied)
13. *Steyn v Ruscone* Application 4 of 2012; [2013] KESC 11 (KLR) - (Explained)
14. *Thika Coffee Mills v Rwama Farmers Co-operative Society Limited* Application 11 of 2020; [2020] KESC 17 (KLR) - (Followed)
15. *Trusted Society of Human Rights Alliance v Nakuru Water and Sanitation Services Company & another* Petition 5 of 2013; [2013] KEELRC 881 (KLR) - (Followed)
16. *United States International University (USIU) v Attorney General* Petition 170 of 2012; [2012] eKLR; [2012] 2 KLR 357 - (Followed)
17. *Wako, Ali Jarso & another v Ministry of Interior & Coordination of National Government & 5 Others; Public Service Commission & 5 Others (Interested parties)* Constitutional Petition 2 of 2020; [2020] KEHC 2971 (KLR) - (Followed)

Statutes

Kenya

1. Constitution of Kenya articles 23, 159, 162, 163(4)(5); 258- (Interpreted)
2. Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Constitution of Kenya Sub Leg) rules 2, 4(2) - (Interpreted)
3. County Governments Act (cap 265) sections 45, 77, 85, 87, 88 - (Interpreted)
4. Employment Act (cap 226) sections 5(1)(8); 9; 12(2) - (Interpreted)
5. Employment and Labour Relations Court Act (cap 8E) section 12- (Interpreted)
6. Parliamentary Service Act (cap 186) sections 77, 87- (Interpreted)
7. Supreme Court Act (cap 9B) section 15B - (Interpreted)
8. Supreme Court Rules, 2020 (cap 9B Sub Leg) rule 33(1)(2)(3) - (Interpreted)

Advocates

Ms. Mwaniki for the applicant

Mr. Mwangi for the 1st, 2nd and 3rd respondents



RULING

ARGUMENTS

Representation:

Ms Mwaniki for the Applicant (Kihoro Kimani & Associates)

Mr Mwangi for the 1st, 2nd and 3rd Respondents

(Mirugi Kariuki & Co. Advocates)

Mr Okere h/b for Prof Tom Ojienda sC for the 4th, 5th and 6th Respondents (Tom Ojienda & Co. Advocates)

1. Upon perusing the originating motion by the applicant dated December 28, 2023 and filed on February 8, 2024 pursuant to articles 159, 163(4) of the Constitution, section 15 (b) of the supreme Court Act, 2011 and rules 33(2) and (3) of the supreme Court Rules, 2020 seeking inter alia; a review of the Court of Appeal decision declining to grant certification of the intended appeal as a matter of general public importance, and leave to appeal to the Supreme Court against the judgement of the Court of Appeal; and.
2. Upon perusing the proposed issues for consideration, the grounds on the face of the application, supporting affidavit sworn by Kenneth Odongo, the applicant herein dated December 28, 2023 and filed on February 7, 2024 and written submissions dated February 7, 2024 and filed on February 7, 2024 wherein he submits that the intended appeal raises 13 issues of general public importance, which can be summarised as follow;
 - i. Whether the Employment and Labour Relations Court (ELRC) lacks jurisdiction to entertain disputes relating to recruitment, selection, nomination and appointment of employees; and whether such acts are of general public importance requiring further input by this Court.
 - ii. Whether the list of disputes set out under section 12 of the Employment and Labour Relations Act No 20 of 2011 (ELRC Act) can be said to be limited and restrictive or whether the Act contemplates other employment questions not captured thereunder.
 - iii. Whether in light of the provision of articles 23 and 258 of the Constitution of Kenya as well as rule 4 (2) as read together with rule 2 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedural Rules of Kenya the jurisdiction of the Employment and Labour Relations Court is only limited to parties before it.
 - iv. Whether the learned judges erred in law and fact and fell into grave error in their application of sections 77, 85 and 87 of the County Governments Act particularly in so far as it relates to nomination of County Chief Officers by the Governor under section 45 of the County Governments Act.
 - v. Whether it is a grave miscarriage of justice and violation of right to access to justice in public litigation to order the applicant to pay costs of the suit particularly where the suit has been shown to raise serious issues of law for determination.
3. The applicant reiterates that article 162 of the Constitution as read with the preamble and section 12 of the ELRC Act is not exhaustive and anticipates the existence of other labour disputes not necessarily



captured under the Act. He has also asserted that, section 12(2) also tends to suggest that a dispute can be brought as against any one of the parties by anybody else and not necessarily amongst the one listed, and in any event, sections 5(1), 5(8) and 9 of the *Employment Act* recognises that an employee includes a prospective employee or an applicant to employment. Further, that this Court will be called upon to examine the import of sections 45, 77 and 88 of the *County Governments Act* and more particularly, whether an appointment by a County Governor under section 45 can be interpreted to include the disputes stipulated under section 77 of the Act and which are required to undergo dispute resolution mechanisms prior to instituting the matter in court. He relied on the High Court decisions in *United states International University (UsIU) v Attorney General* [2012] eKLR, *Ali Jarso Wako & Another v Ministry of Interior & Coordination of National Government & 5 Others; Public service Commission & 5 Others (Interested parties)* [2020] eKLR and *Daniel N Mugendi v Kenyatta University & 3 others* (2013) eKLR, *Okoti v Attorney General; Njenga (Interested Party)* [2022] eKLR, *Evans Ladtema Muswahili v Vihiga county Public service Board & 2 others; Marley Ezekiel Ayiego (Interested Party)* [2021] eKLR, *Trusted society of Human Rights Alliance v Nakuru Water and sanitation services Company & Another* [2013] eKLR being decisions where courts have held that the ELRC is the only valid court to entertain disputes relating to recruitment, selection, nomination and appointment of employees; and

4. Upon perusing the 1st, 2nd and 3rd respondent's replying affidavit sworn by Joel Kariuki Mwangi, the 2nd respondent herein, and submissions both dated February 27, 2024 and filed on March 11, 2024 wherein it is submitted that the applicant has not satisfied the threshold for certification of the appeal as being one that a point of law of general public importance is involved as set out in *Hermanus Phillips steyn v Giovanni Gneechi- Ruscone* [2013] eKLR, *Thika Coffee Mills v Rwama Farmers Cooperative society Limited* [2020] eKLR, *Malcom Bell v Daniel Torotich Arap Moi & Another* [2013] eKLR and *Goldenlime International Limited vs Blue sea shopping Mall Limited & 3 others* (Motion 21 of 2016) [2021] KESC 2 (KLR) (CIV) (8th October 2021) (Ruling). The said respondents further urge that, in the instant appeal, the issues in contest did not concern constitutionality of the said section 12 of the *ELRC Act* and the Court of Appeal merely gave the provision of the law a literal interpretation. In addition, there is now settled precedence for the ELRC to rely upon on the subject at hand, and as such, there is no need for this Court's intervention. Lastly, they submit that the dispute has since been overtaken by events since the recruitment process for the county officers has been finalised and the said officers have already been enrolled to the payroll; the Court will thus be engaged in an appeal that has since been rendered moot; and
5. Upon equally perusing the 4th, 5th and 6th respondent's replying affidavit sworn by Dr samuel Mwangi Mwaura, acting County secretary of the 5th respondent and their submissions both dated February 27, 2024 and filed on March 1, 2024 wherein it is submitted that the applicant has failed to effectively set out the elements of general public importance that would require our attention; secondly, that the supreme Court has already rendered itself with finality with regard to the jurisdiction of the ELRC which was the only possible element of general public importance that was raised in the application and they relied on the same authorities as the 1st to 3rd respondents to buttress this point; and
6. Noting that the dispute involved the recruitment of 21 Chief officers of the County Government of Nakuru by the respondents, the ELRC in Pet No E017 OF 2022 (Nderitu J) held that it had jurisdiction to handle the same while the Court of Appeal found that there was no employee/employer relationship between the applicant and the 1st respondent, nor an employment and labour relations dispute as contemplated by article 162(2) of the *Constitution* or section 12(1) of the *ELRC Act*. And further noting that the Court of Appeal took the view that the ELRC fell in error when it proceeded to assume and arrogate upon itself, a jurisdiction that it did not have and furthermore that, by extension



the 1st respondent did not have the locus standi to file the petition nor was the 1st respondent amongst the persons contemplated by section 12(2) of the ELRC Act who may lodge a complaint or a claim before the Court. Lastly, appellate court held that the Governor did not act in isolation of the County service Board hence the provisions of sections 77 and 87 of the Parliamentary Service Commission Act are couched in mandatory terms ousting the jurisdiction of the Court in the first instance; and

7. Bearing in mind article 163(5) of the Constitution, section 15B of the supreme Court Act and rule 33(1) and (2) of the supreme Court Rules, 2020 which grants this court jurisdiction to review the Court of Appeal's decision on an application for Certification, as one of general public importance; and this Court's guiding principles on certification of a matter as one involving general public importance set out in Hermanus Phillipus steyn vs. Giovanni- Ruscone Sup Application No 4 of 2013 [2013] eKLR and the additional guidelines in Malcom Bell v Daniel Toroitich Arap Moi & Another, SC Application No 1 of 2013; [2013] eKLR;
8. We have considered the totality of the application, submissions put forth, and We opine as follows:
 - i. The Court of Appeal in dismissing the application for certification found that the applicant had not set out why its decision on settled principles required consideration by the supreme Court and how it impacts third parties or other cases. The appellate court also held that the applicant had not set out any contradictory decisions, and further had failed to demonstrate that the court's reasoning took a trajectory that warrants constitutional interpretation. The court additionally took the view that a matter cannot be reopened before the Supreme Court simply because a litigant is of the view that the decision should have been different or a certain weight ought to have been given to a particular piece of evidence.
 - ii. The decisions cited by the applicant and relied upon during the appeal, as a basis to seek certification, now repeated in this application, were decisions emanating from the High Court. The Court of Appeal subsequently, and in light of the High Court decisions, rendered its decisions in Attorney General & 2 others v Okiya Omtata Okoiti & 14 others [2020] eKLR and National Social Security Fund Board of Trustees v Kenya Tea Growers Association and 14 others (Civil Appeal 656 of 2022) [2023] KECA 80 (KLR) which determined the jurisdiction of the ELRC and the capacity of the parties who might approach it. The applicant has not advanced any cases that are distinguishable from these decisions of the Court of Appeal.
 - iii. The Supreme Court has equally rendered decisions in respect to the provisions of article 162 and section 12 of the ELRC Act. In Republic v Karisa Chengo & 2 others SC Petition No 5 of 2015 [2017] eKLR for example, we determined that the ELRC and High Court are different and autonomous courts and exercise different jurisdictions; the jurisdiction of the ELRC being limited to matters provided for in the statute regulating the same; and in Albert Chaurembo 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 the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme) SC Petition No 3 of 2016 [2019] eKLR the court held that nowhere in the ELRC Act is there jurisdiction conferred on the ELRC to resolve issues between trustees of a pension scheme and members of the scheme (pensioners) nor does a pensioner fall within the listed category of persons and parties that can make an application or institute proceedings before the ELRC.
 - iv. Similarly, in Kenya Tea Growers Association & 2 others versus National social security Fund Board of Trustees & 13 others SC Petition No E004 of 2023 as Consolidated with Petition No E002 Of 2023, a case that challenged the validity of the NSSF Act, the court held that the



dispute roped in disputants contemplated under section 12(2) of the ELRC Act; and that the ELRC has jurisdiction to determine the constitutional validity of a statute in matters relating to employment and labour. suffice to say, the statute in question must be in focus and at the centre of the dispute in question.

- v. The above cases demonstrate that this court has demarcated the jurisdiction of the Employment and Labour Relations Court in line with the provisions of article 162 of the Constitution as read with section 12 of the ELRC Act. The common theme in all the cases is that a dispute falling within the purview of the ELRC should emanate from an employee-employer relationship and/or affect its status. This is different from the High Court, which has unlimited jurisdiction in civil and criminal matters while the specialized courts under Article 162 are limited in terms of their jurisdiction and the persons who might approach it. The Court of Appeal decision therefore correctly interpreted the provisions of section 12 of the *ELRC Act* and arrived at a proper interpretation of that section in the circumstances of the present case.
 - vi. As for the application of sections 77, 85 and 87 of the *County Governments Act* particularly in so far as it relates to nomination of County Chief Officers by the Governor under section 45 of the same Act, the Court of Appeal gave a literal interpretation to this sections; and the applicant has not distinguished how the same is contradictory or has a significant bearing upon the public interest; the same is equally premised on factual dispositions of which we held in *Hermanus* that a determination of fact in contests between parties cannot be in itself, a basis for granting certification for an appeal before the Supreme Court.
 - vii. The applicant, lastly, decries the Court of Appeal's order directing him to pay costs of the suit. Again, in *Hermanus* we held that a mere apprehension of miscarriage of justice, a matter most apt for resolution in the lower superior courts, is not a proper basis for granting certification. We have equally settled the issue of costs in public interest litigation in *Okiya Omtatah Okioti & 2 others v Attorney General* SC Appl No 2 (E002) of 2021 which follows a determination that the public interest in any litigation in the matter must be obvious; and that costs shall follow the event principle is however not disbarred in such proceedings-each case being looked at in its peculiar circumstances.
9. On costs in the present application, award of the same is discretionary, given the nature of the issues set out and guided by this court's decision *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* SC Petition No 4 of 2014; [2014] eKLR. In the present application, we find that the order that would best apply to the circumstances is that each party bears their costs.
 10. For the aforesaid reasons we make the following orders:
 - i. The originating motion dated December 28, 2023 is hereby dismissed.
 - ii. Each party shall bear its costs of this application.
 11. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JUNE, 2024.

.....
M. K. KOOME

CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT OF KENYA
.....

P. M. MWILU



DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT

.....

M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT

.....

NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR

SUPREME COURT OF KENYA

