



**Cheptarus v County Secretary, Elgeyo Marakwet County & 4 others;  
Kotut & another (Interested Parties) (Constitutional Petition  
E001 of 2024) [2025] KEHC 569 (KLR) (29 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 569 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ITEN  
CONSTITUTIONAL PETITION E001 OF 2024  
E OMINDE, J  
JANUARY 29, 2025**

**BETWEEN**

**PHILEMON KIPKEMBOI CHEPTARUS ..... PETITIONER**

**AND**

**COUNTY SECRETARY, ELGEYO MARAKWET COUNTY ... 1<sup>ST</sup> RESPONDENT**

**COUNTY GOVERNOR, ELGEYO MARAKWET COUNTY .. 2<sup>ND</sup> RESPONDENT**

**COUNTY ASSEMBLY, ELGEYO MARAKWET COUNTY ..... 3<sup>RD</sup> RESPONDENT**

**THE SELECTION PANEL, ELGEYO MARAKWET COUNTY .... 4<sup>TH</sup>  
RESPONDENT**

**THE COUNTY ATTORNEY, ELGEYO MARAKWET COUNTY .... 5<sup>TH</sup>  
RESPONDENT**

**AND**

**LORETTA C KOTUT ..... INTERESTED PARTY**

**SAMUEL CHEPKOLE ..... INTERESTED PARTY**

**RULING**

1. The Applicant approached this court vide a Notice of Motion Application dated 28<sup>th</sup> October 2024 seeking the following orders;
  1. That the Court be pleased to certify this application as urgent and be heard ex parte in the first instance.



2. That the Honourable Court be pleased to grant a temporary injunction restraining the 3<sup>rd</sup> Respondent from deliberating on the report by the 4<sup>th</sup> respondent and or vetting the nominees for the position of Member of the County Service Board pending the hearing and determination of this application inter parties.
  3. That the Honourable Court be pleased to grant a temporary injunction restraining the 3<sup>rd</sup> Respondent from deliberating on the report by the 4<sup>th</sup> respondent and or vetting the nominees for the position of Member of the County Service Board pending the hearing and determination of this petition.
  4. That the Honourable Court be pleased to grant a temporary injunction restraining the 2<sup>nd</sup> Respondent from assenting to and or appointing any nominee for the position of Member of the County Service Board pending the hearing and determination of this application.
  5. That the Honourable Court be pleased to grant a temporary injunction restraining the 1<sup>st</sup> Respondent from assenting to and or appointing any nominee for the position of Member of the County Service Board pending the hearing and determination of this petition.
  6. That costs of this application be provided for.
2. The Application is premised on the grounds set out on the face of it and the contents of the supporting affidavit sworn by Philemon Kipkemboi Kiptarus, the Petitioner.

#### **Applicants' supporting affidavit**

3. The Applicant deponed that vide a notice dated 18<sup>th</sup> April 2024, the Office of the County secretary advertised for three positions namely:
  - (a) Chair: County Public Service Board (1) one post.
  - (b) Member: County Public Service Board (1) one post; and
  - (c) County Attorney- Job group 'T' (1) one post. (Annexed and marked PKC1 is a copy of the notice)
4. He stated that as per the advert signed by the chair of the selection panel, Mr. Patrick Kiprop, interested candidates were instructions to apply on or before 6<sup>th</sup> May 2024 at 5: 00p.m and being interested in the opportunity, he put in his application for member of the County Public Service Board. He received positive feedback from the 4<sup>th</sup> Respondent and was invited for an interview that was undertaken on 25<sup>th</sup> July 2024. However, since then, he has never received any feedback. He stated that he was duly informed that on 9<sup>th</sup> October 2024, His Excellency the Governor forwarded a list of nominees to the 3<sup>rd</sup> Respondent for purposes of vetting. He deponed that he has since tried to seek more information from the 1<sup>st</sup> Respondent on the outcome and results from the 1<sup>st</sup> Respondent to no avail.
5. The applicant contends that by denying him the information sought, the 1<sup>st</sup> Respondent has breached several constitutional provisions including Articles 10 (2), 27 (1), (4), 35(1) and 47 (1) of *the Constitution* of Kenya. Further, that he is well informed that the 3<sup>rd</sup> Respondent might begin the process of vetting of the nominees on 30<sup>th</sup> October 2024 leading up to their appointment. There is therefore need for this Court to intervene and halt any further proceedings with respect to the nomination, vetting and appointment of the position of Member of County Public Service Board pending the hearing and determination of this petition. He prayed the court to allow the application.



## Hearing of the Petition

6. On 18<sup>th</sup> November 2024 when both Counsel Mr. Githaiga for the Applicant and Counsel Mr. Tororei appeared before the Court, the record reflected that Counsel Mr. Tororei had entered appearance for the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents and filed a Preliminary Objection challenging the jurisdiction of this Court to hear and determine this matter. There was no appearance and/or any pleadings filed by and/or on behalf of the 3<sup>rd</sup> Respondent and the Interested Parties.
7. The Court therefore directed that each party files very skeletal submissions with respect to the Preliminary Objection and that these submissions were to be filed within seven days from the date of 18<sup>th</sup> November 2024 with a mention on 27<sup>th</sup> November 2024 to confirm compliance and fix a date for Ruling.
8. The Preliminary Objection is to the following effect;
  1. That there is no suit properly filed before the Court for determination
  2. That the present Petition has commenced through un-procedural means and thus is fatally defective and incapable of obtaining the orders sought
  3. That the High Court lacks the requisite jurisdiction to hear and determine the Petition and the Application dated 28<sup>th</sup> October 2024 by dint of Article 165 of *the Constitution* of Kenya
  4. That the subject matter is based on issues arising from an employment cause
  5. That the Petition is fatally defective, incompetent, bad in law and should be struck out with costs to the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents.
9. Counsel for the Petitioner filed their submissions on the morning of 27<sup>th</sup> November 2024. Counsel for the Respondent did not file any.

## Analysis and Determination.

10. The submissions by Counsel for the Applicant and in a nutshell is as follows; That the applicant having attended the interview the subject matter of this cause, and having not received any feedback from the Selection Panel on the outcome of the interview was duly notified that the 2<sup>nd</sup> Respondent had forwarded the names of nominees for purposes of vetting and appointment after the conclusion of the interviews.
11. That in the exercise of his Constitutional Right on access to information, the Applicant wrote to the 1<sup>st</sup> Respondent requesting for information on the outcome of the interview but his efforts have since proved futile. That the substratum of the Applicant's Petition lies with the question of the violation of his Constitutional Right on Access to Information as provided under Article 35 of *the Constitution* amongst other Rights which falls well within the jurisdiction of this Court.
12. That in this regard, he has the right to institute these proceedings as provided under Article 22 of *the Constitution*, and before the High Court as provided under Article 23 of the same said Constitution for any remedy (ies) as provided under Sub-Article 3 thereof. That Article 165(3)(b) grants the High Court the jurisdiction to determine whether a right or a fundamental freedom under the Bill of Rights has been denied, violated infringed or threatened.
13. On the Objection that the matter falls within the realm of the Employment and Labour Relations Court, Counsel submits that the said assertion is premature and premeditated for the reason that



there is yet to be established an employer-employee relationship between the Petitioner and any of the Respondents. Counsel invited the Court to apply the Predominant Test in determining whether it has jurisdiction or not and cited the case of Kisekem Limited v [\*National Bank of Kenya Limited \(Land Case E014 of 2023\*](#)(2024) KEELC 5233 (KLR)

14. In this regard Counsel urged the Court to look at the orders sought by the Petitioner in the main Petition and submitted that the key one is an order directing that the 1<sup>st</sup> to 4<sup>th</sup> Respondents furnish the Petitioner with the results of the interviews and other information sought for the position of Member of the County Service Board.
15. Having summarised the submissions as above, what I need to point out at this stage is that what is before the Court at this moment in time is an application brought by way of a Notice of Motion and dated 28<sup>th</sup> October 2024. The prayers sought in this Application are as already herein above summarised. In plain language, the import of these prayers is that the Applicant sought for employment at the Elgeyo Marakwet Public Service Board. He was shortlisted and he attended an interview and having not gotten any feedback, he is apprehensive that he may not be successful and therefore prays to Court to issue an order of injunction restraining the Respondents from proceeding further with the processes of recruitment and appointment of any person until he gets to interrogate the process hence his request for information.
16. The substratum of the Application therefore, as in the primary reason why the applicant has filed this suit, contrary to Counsel's submission as herein above summarised, is therefore all about the employment of the Applicant to the Elgeyo Marakwet County Service board and is not about access to information under Article 35 of [\*the Constitution\*](#). This is more particularly because nowhere in the entire Application is there any prayer that information be availed to the Applicant even just so as to tie the application to the Petition.
17. In Actual fact, having acted on Counsel's invitation that the Court looks at the prayers in the Petition itself to confirm that the Application is under Article 35 of [\*the Constitution\*](#), the Court has noted that the Application and the Petition at first glance would seem to be totally at variance with absolutely no nexus whatsoever because the grievance in the Petition is over the Applicant's right of access to information whereas his grievance in the application is over his right to employment.
18. The Court can therefore safely presume that the information that the applicant seeks under Article 35 of [\*the Constitution\*](#) is tied to the employment that he sought with the County Government of Elgeyo Marakwet. By his conduct, the Applicant in the Notice of Motion has prioritized his need for employment over his request for information. As such, as drawn, the Notice of motion squarely places the instant application under the jurisdiction of the Employment and Labour Relations Court in the exercise of its mandate as provided under Articles 162(2) and 165(5) of [\*the Constitution\*](#) and Section 12 of the [\*Employment and Labour Relations Court Act\*](#), CAP 8E Laws of Kenya.
19. In this regard then, I would agree with the exposition of the Court in the above cited case of Kikesem Limited v [\*National Bank of Kenya Limited \(Land Case E014 of 2023\*](#)(2024) KEELC v5233(KLR) that in determining whether a Court has jurisdiction using the Predominant Test ".....what is important is not so much the purpose of the transaction, but the subject matter or the issue before the Court..."
20. In the instant case, being satisfied that the subject matter before the Court in the instant application is about employment, it is my finding that the Court with the requisite jurisdiction to handle this matter is not the High Court but the Employment and Labour Relations Court which too has the power and mandate to give reliefs akin to those of the High Court as envisaged under Article 23 of [\*the Constitution\*](#) under the provisions of Section 12(3) of The Employment and Labour Relations Court CAP 18E LOK.



21. I therefore find merit in the Preliminary Objection to the effect that this Court does not have the jurisdiction to hear and determine this matter. The suit is therefore struck out in its entirety with costs to the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents.

**READ DATED AND SIGNED AT ELDORET ON 29<sup>TH</sup> JANUARY 2025**

**E. OMINDE**

**JUDGE**

