



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Koome; CJ & P, Mwilu; DCJ & VP, Ibrahim, Njoki & Lenaola, SCJJ)

APPLICATION NO. E053 OF 2023

—BETWEEN—

KENNETH ODONGO.....APPLICANT

—AND—

THE CLERK, NAKURU COUNTY ASSEMBLY1ST 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, & L. Achode JJA) in Civil Appeal (Application) No. E001 of 2023 at Nakuru dated 14th April 2023 declining grant of certification)

Representation:

Ms. Mwaniki for the Applicant
(Kihoro Kimani & Associates)

Mr. Mwangi for the 1st, 2nd and 3rd Respondents
(Mirugi Kariuki & Co. Advocates)

RULING OF THE COURT

[1] UPON perusing the Originating Motion by the Applicant dated 28th December, 2023 and filed on 8th February 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 28th December 2023 and filed on 7th February 2024 and written submissions dated 7th February 2024 and filed on 7th February 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) vs. Attorney General*** [2012] eKLR, ***Ali Jarso Wako & Another vs. Ministry of Interior & Coordination of National Government & 5 Others; Public Service Commission & 5 Others (Interested parties)*** [2020] eKLR and ***Daniel. N. Mugendi vs. Kenyatta University & 3 Others*** (2013) eKLR, ***Okoiti vs. 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 27th February 2024 and filed on 11th March 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 27th February 2024 and filed on 1st March 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 vs. 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 Okioti & 14 others [2020] eKLR** and **National Social Security Fund Board of Trustees vs 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** S.C. 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) S.C. 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** S.C. 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 Okiiti & 2 Others versus 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 AFORESTATED REASONS we make the following orders:

- i. The Originating motion dated 28th December 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.

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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