



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Mwilu; DCJ & VP, Wanjala, Njoki, Lenaola & Ouko SCJJ)

PETITION NO. E030 AS CONSOLIDATED WITH E033 OF 2025

— BETWEEN —

MOI TEACHING AND REFERRAL HOSPITAL.....1ST APPELLANT
DR. PHILIP KIPTANUI KIRWA2ND APPELLANT
MOI TEACHING AND REFERRAL
HOSPITAL BOARD.....3RD APPELLANT
SIToyo LOPOKOIYOT.....4TH APPELLANT

-VERSUS-

DR. MAGARE GIKENYL.....1ST RESPONDENT
LINAH NYABATE KINGSLEY.....2ND RESPONDENT
PHILEMON ABUGA NYAKUNDI3RD RESPONDENT
PAULINE NDUTA KINYANJUI.....4TH RESPONDENT
SHALLUM KAKA NYAUNDI.....5TH RESPONDENT
JAMLICK OTONDI ORINA6TH RESPONDENT
AGNES WAMBUA WANZUU.....7TH RESPONDENT
PROF ROBERT TENGE KUREMU.....8TH RESPONDENT
DR. WILSON KARUASA 9TH RESPONDENT
ANN CHEMORSIO.....10TH RESPONDENT
PERIS BIRICHLI.....13TH RESPONDENT
JUDITH JEROTICH.....14TH RESPONDENT

MESHACK KOIMA.....	15TH RESPONDENT
JAMES MUCHIRI NDUNGU.....	16TH RESPONDENT
DR. MICHAEL GICHANGI.....	17TH RESPONDENT
DR. GEORGE OMBUA.....	18TH RESPONDENT
DR. ERNEO NYAKIBA.....	19TH RESPONDENT
MR. FELIX KOSKEI.....	20TH RESPONDENT
PUBLIC SERVICE COMMISSION.....	21ST RESPONDENT
HON. ATTORNEY GENERAL.....	22ND RESPONDENT
DR. BENJAMIN KIPCHUMBA TARUS.....	23RD RESPONDENT
DR. OWEN MENACH	24TH RESPONDENT
ENG. JOSEPH MUNGAI KAMAU.....	25TH RESPONDENT
ATHI WATER WORKS	
DEVELOPMENT AGENCY.....	26TH RESPONDENT
AGNES KALEKYE NGUNA.....	27TH RESPONDENT
KENYA BROADCASTING CORPORATION.....	28TH RESPONDENT
ABDALLAH MOHAMMED HATIMY.....	29TH RESPONDENT
KENYA NATIONAL SHIPPING LINE LIMITED.....	30TH RESPONDENT
DR. JOHN CHERUIYOT CHUMBA.....	31ST RESPONDENT
DR. EVANS RONO CHERUIYOT.....	32ND RESPONDENT
DR. SIMON KIPCHIRCHIR KIBIAS.....	33RD RESPONDENT
TITUS TARUS.....	34TH RESPONDENT
DR. ANDALE THOMAS OKWARO.....	35TH RESPONDENT
DR. MAURICE NYONGESA WAKWABUBI.....	36TH RESPONDENT
DR. EVERLINE MUSANGI NYAMAI.....	37TH RESPONDENT
DR. ANDREW JOSEPH OJIAMBO WANDERA.....	38TH RESPONDENT
DR. RICHARD MOGENI MOGAKA.....	39TH RESPONDENT
DR. CHEPTINGA PHILIP KIPKURUI.....	40TH RESPONDENT
PROF. MICHAEL KIPTOO.....	41ST RESPONDENT

KENNEDY ADONGO.....	42 ND RESPONDENT
ARNOLD MANGI MWABILI.....	43 RD RESPONDENT
MACDONALD SABWA.....	44 TH RESPONDENT
JOSPHAT MUTUKU.....	45 TH RESPONDENT
MARTIN ALFRED WEKESA WAFULA.....	46 TH RESPONDENT
EDWARD S. OMONDI.....	47 TH RESPONDENT
ALIO IBRAHIM ADEN.....	48 TH RESPONDENT
DR. STANLEY CHERUYOT.....	49 TH RESPONDENT
DR. NICKSON KIPCHIRCHIR KIPKORIR.....	50 TH RESPONDENT
DR. JUSTA WAWIRA KTURA MWANGI.....	51 ST RESPONDENT
ANANGWE MUNALA SAMSON.....	52 ND RESPONDENT
DR. ISSAAC OBORE OMERT.....	53 RD RESPONDENT
ZETH OUMA OMOLLO.....	54 TH RESPONDENT
DR. ISAIAH TANUI.....	55 TH RESPONDENT
WILLY MUKOMA MUNYUTHE.....	56 TH RESPONDENT
BEN SAMOEI.....	57 TH RESPONDENT
RACHEL MUSYOKI.....	58 TH RESPONDENT
JOSEPH K. CHOGE.....	59 TH RESPONDENT
DR. TARUS FELIX KIPLIMO.....	60 TH RESPONDENT
FRANKLYNE MISIKO OMUHOLO.....	61 ST RESPONDENT
KAUSHIK HALDER.....	62 ND RESPONDENT
BENSON BIWOTT.....	63 RD RESPONDENT
DAVID NAMU KARUIKI.....	64 TH RESPONDENT
DR. ROBERT KIPLAGAT RONO.....	65 TH RESPONDENT
DR. GIDEON KIBET TOROMO.....	66 TH RESPONDENT
DR. EDWARD KIMUTAI SEREM.....	67 TH RESPONDENT
JULIANA SYOWEU TISNANGA.....	68 TH RESPONDENT
WEKESA CHRISTINE NAKHUMICHA.....	69 TH RESPONDENT

DR. SAMSON KIPKURGAT NDEGE.....70TH RESPONDENT
DR. ALEXANDER IRUNGU WANJIRU.....71ST RESPONDENT
LUCY AKOTH OKOTH.....72ND RESPONDENT
DR. NGOITSI HENRY NONO.....73RD RESPONDENT
DR. WILSON KIPTOO SUGUT.....74TH RESPONDENT
DR. VICTOR KIPYEGON MAINA.....75TH RESPONDENT
DR. KANDIE NG'OCHOCH.....76TH RESPONDENT
DR. PHILIP KIPKIRUI TONU.....77TH RESPONDENT

(Being an appeal from the Judgment of the Court of Appeal at Nakuru (Mativo, Gachoka & Korir, JJ. A) delivered on 23rd May 2025 in Nakuru Civil Appeal No. E107 of 2024 (as consolidated with Civil Appeal No E116 of 2024)

Representation:

Mr. Muasya Kiprotich for the 1st and 2nd Appellants
(Katwa and Kemboy Advocates)

Mr. Odera for the 3rd and 4th Appellants
(Odera Obar & Co. Advocates)

1st to 7th Respondents in person

Mrs. Irene Kashindi for the 13th, 14th, 16th, 18th, 31st, 34th, 57th, 60th, 74th and 75th
Respondents
(Munyao, Muthama & Kashindi Advocates)

Mr. Maurice Ogosso for the 21st Respondent
(Public Service Commission)

Mr. Moses Kipkoge & Mr. Mwangi Kungu for the 27th and 28th Respondents
(Nyameta, Mogaka Magiya & Company Advocates)

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] At the heart of this dispute are two appeals which were consolidated by a Consent Order of this Court on 15th August 2025. The appeals were lodged pursuant to the two limbs of Article 163(4)(a) and (b) of the Constitution, quite

contrary to the established jurisprudence of the Court. In the two appeals, the appellants challenge the judgment of the Court of Appeal (*Mativo, Gachoka & Korir JJA*) in **Civil Appeal No. E107 of 2024** (as consolidated with **Civil Appeal No. E116 of 2024**) delivered on 23rd May 2025, which affirmed the decision of the High Court that the latter possessed the requisite jurisdiction to hear and determine a dispute around the recruitment process of some of the respondents, which were alleged to have been conducted purely on the basis of ethnic considerations rather than meritocracy, in violation of the Constitution.

[2] In a nutshell, the consolidated appeal seeks the interpretation and application from this Court of Article 162(2)(a), 162(3), and 165(5)(b) of the Constitution as read with Sections 5 and 12 of the Employment and Labour Relations Court Act (ELRC Act) as regards the scope of the jurisdiction of the Employment and Labour Relations Court (ELRC). Also to be determined are the questions of whether the Court of Appeal properly found that the High Court at Nakuru had territorial jurisdiction to entertain the petition by the 1st to 7th respondents, and finally, whether the Court of Appeal was in error by upholding the granting of conservatory orders issued by the High Court.

[3] Concomitantly with the consolidated appeal, the 13th, 14th, 16th, 18th, 31st, 34th, 57th, 60th, 74th, and 75th respondents have lodged two notices of cross-appeal, faulting the Court of Appeal's failure to recognize that the jurisdiction to adjudicate disputes arising from recruitment and pre-employment processes falls within the purview of the ELRC.

B. FACTUAL BACKGROUND

[4] The dispute centres on the recruitment and appointment of Chief Executive Officers (CEOs) and Managing Directors (MDs) of various state corporations, namely Moi Teaching and Referral Hospital (1st appellant), Athi Water Works Development Agency (26th respondent), Kenya Broadcasting Corporation (28th respondent), and Kenya National Shipping Line Limited (30th respondent).

[5] Applications from qualified candidates were invited for those positions, and upon the closure of the period provided for the applications, the Government Spokesperson, Isaac Mwaura, issued a press release to announce a series of appointments to state corporations. According to the communication, Philip Kiptanui Kirwa (the 2nd appellant) was appointed Chief Executive Officer of the 1st appellant. Eng. Joseph Mungai Kamau (the 25th respondent), the Chief Executive Officer of the Athi Water Works Development Agency (26th respondent), Agnes Kalekye Nguna (the 27th respondent), Managing Director of the Kenya Broadcasting Corporation (28th respondent), and Abdalla Mohamed Hatimy (the 29th respondent) was appointed Managing Director of the Kenya National Shipping Line Limited (the 30th respondent)

[6] These appointments were challenged by the 1st to 7th respondents, who contended that the recruitment process was marred by blatant constitutional violations, including allegations of ethnic marginalization and a brazen lack of meritocracy. Further, the statutory instrument establishing the four parastatals had lapsed, thereby rendering the process legally untenable. With these concerns, the 1st to 7th respondents petitioned the High Court to nullify the appointments.

C. LITIGATION HISTORY

i. Proceedings at the High Court

[7] In **Nakuru Constitutional Petition No. E011 of 2024**, the 1st to 7th respondents alleged the contravention of Articles 1, 3, 10, 19, 20, 21, 22, 23, 27, 28, 41, 43, 47, 54, 55, 56, 73, 75, 129, 131, 132, 135, 159, 165, 201, 232, 233, 248, 249, 258 and 259 the Constitution. Concurrently with the filing of the petition, they lodged an application for conservatory orders to suspend the issuance and implementation of any instruments or authorities purporting to appoint the four individuals to the offices of the advertised posts.

[8] On 21st May 2024, the court, having certified the matter as urgent, issued *ex parte* conservatory orders in the terms prayed pending the hearing and determination of the petition.

[9] In response, the Attorney General (the 22nd respondent), who also appeared on behalf of the 28th and 30th respondents, raised a preliminary objection in a notice dated 6th May 2024, seeking to have the petition struck out. A similar objection was raised by the 21st respondent. According to the objections, the dispute pertained to recruitment and appointment into employment positions, a matter that fell within the exclusive jurisdiction of the ELRC in terms of Article 162(2)(a) of the Constitution and Section 12 of the ELRC Act.

[10] Several other ancillary objections were raised, including a further challenge to the court's territorial jurisdiction, with allegations of forum shopping, improper joinder of parties, procedural impropriety in the grant of interlocutory orders, and non-compliance with Section 106B of the Evidence Act concerning the admissibility of electronic evidence.

[11] The 1st to 7th respondents, for their part, maintained that the petition did not arise from an employer–employee dispute but rather from alleged constitutional violations affecting public governance, national values, inclusivity, and legality of statutory instruments. They argued that by dint of Articles 23 and 165 of the Constitution, the High Court retained unlimited original jurisdiction in constitutional matters except those expressly ousted.

[12] In determining the preliminary objections, and after restating the settled principles in *Mukisa Biscuit Manufacturers Ltd Vs West End Distributors Ltd* (1969) E.A. 696 on what constitutes a proper preliminary objection, the court (*Muhochi, J*) overruled the objection. To support this conclusion, the court cited the persuasive case of *Orogo Vs Chairman Board of Directors, Kenya Revenue Authority & 2 others* [2023] KEHC 24847 (KLR), where the High Court held that, although the ELRC has jurisdiction to determine constitutional questions, the questions must be within the context of its jurisdiction under Article 162(2) of the Constitution. The questions must therefore relate to employment and labour relations. Secondly, the court ruled that for the jurisdiction of ELRC to be invoked, the existence of an employer–employee relationship between the parties must first be established;

and thirdly, that in the absence of such a relationship, only the High Court by dint of Articles 23 and 165 of the Constitution would have jurisdiction to determine any other constitutional question.

[13] On the facts of the case, the court held that the jurisdiction of the ELRC could not have been invoked because there was no or never had been any employer–employee relationship between petitioners and the respondents; that the substratum of the dispute concerns the alleged infringement or threatened violation of certain specific rights and fundamental freedoms. On the related question of *territorial jurisdiction*, the court rejected the contention that the High Court at Nakuru had no jurisdiction and that by filing the petition there, the 1st to 7th respondents were forum shopping. The court affirmed that constitutional petitions against state corporations could be instituted in any High Court station within Kenya.

[14] In the result, the High Court dismissed the preliminary objections in their entirety, declaring that it had jurisdiction to hear and determine the petition. It further directed that the matter proceeds by way of written submissions and that the interim conservatory orders issued earlier be maintained pending further directions.

ii. Proceedings at the Court of Appeal

[15] Aggrieved by this outcome, the 1st and 2nd appellants and the 25th and 26th respondents separately moved the Court of Appeal by filing, respectively **Civil Appeal No. 107 of 2024** and **Civil Appeal No. 116 of 2024**, premised on the grounds that there was no justification in the trial court dismissing the preliminary objections; that the trial court erred in finding that it had territorial jurisdiction to entertain the petition in Nakuru instead of Eldoret, Nairobi, or Mombasa; and that the conservatory orders issued on 21st May 2024 did not meet the threshold for the relief.

[16] During the virtual hearing of the appeals on 5th March 2025, by a consent order, the two appeals were consolidated and **Civil Appeal No. 107 of 2024** designated as the lead file.

[17] In a judgment delivered on 23rd May 2025, the Court of Appeal (*Matavo, Gachoka & Korir, JJ. A*) answered the delineated three issues holding as follows: On *whether the High Court was divested of the jurisdiction to entertain the petition*, the court, guided by the decision of the Court of Appeal in ***National Social Security Fund Board of Trustees Vs Kenya Tea Growers Association & 14 others*** [2023] KECA 80 (KLR) clarified that while the High Court retains residual jurisdiction, the ELRC has the exclusive powers to determine the constitutional validity of a statute in an employment and labour dispute. But that was not the case here, the appellate court found. What the parties in the present case had presented for the court's determination was, unlike the cited case, premised not on the determination of the constitutional validity of a statute arising in an employer-employee relationship, but one challenging the jurisdiction of the High Court to hear and determine a petition contesting the constitutionality of a recruitment process.

[18] In the instant case, the 1st to 7th respondents did not institute the petition in their capacity as employees of the four parastatals as contemplated under Section 12 of the ELRC Act, but did so as spirited citizens seeking to vindicate the rule of law. Therefore, the questions presented could only be determined by the High Court.

[19] In dismissing the argument that the trial judge erred in entertaining the petition despite *lacking territorial jurisdiction*, the appellate court clarified that territorial jurisdiction cannot negate subject-matter jurisdiction and that Rule 8 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice Rules, referred to generally as the *Mutunga Rules*, cannot override the constitutionally guaranteed rights to access to justice and fair hearing. Considering that the respondents' offices span multiple regions, the appellate court found that to require the 1st to 7th respondents to file multiple petitions in different High Court

stations would be impractical, not to mention the risk of contradictory decisions from different courts on the same subject. In addition, the court observed that, with the introduction in the Kenyan judicial system of e-filing, virtual hearings, and electronic service of court documents, the concern over geographic location is no longer a critical issue as it was previously.

[20] Finally, the appellate court rejected the argument that *the High Court improperly exercised its discretion in issuing temporary conservatory orders*, observing that the power to grant conservatory orders is discretionary; and that it was exercised in accordance with the correct principles laid down by court decisions like the ***Centre for Rights Education and Awareness (CREAW) & 8 others Vs Attorney General & another*** [2012] KEHC 2894 (KLR).

[21] Based on the foregoing, the Court of Appeal found the consolidated appeal to be devoid of merit and accordingly dismissed it, directing the parties to bear their own costs.

iii. Proceedings at the Supreme Court

[22] Undeterred, the 1st and 2nd appellants have moved this Court by filing **Petition No. E030 of 2025** dated 10th June 2025, while the 3rd and 4th appellants subsequently instituted **Petition No. E033 of 2025** dated 26th June 2025. By consent of the parties, recorded as an order of the Court, the appeals were consolidated and **Petition No. E030 of 2025** was designated as the lead file with three questions isolated for determination, being, whether the superior courts below erred in their concurrent conclusions concerning the jurisdiction of the ELRC, whether the High Court at Nakuru had territorial jurisdiction to entertain the petition, and whether the grant of temporary conservatory orders was proper.

[23] The appellants have prayed for orders:

- a. *That the appeals be allowed and the judgment of the Court of Appeal delivered on 23rd May 2025 set aside;*
- b. *That a declaration be issued that the Court of Appeal erred in holding that the ELRC lacked jurisdiction; and that the High Court at Nakuru*

- had both subject-matter and territorial jurisdiction to entertain the petition;*
- c. Upholding the preliminary objections dated 6th May 2024 and 30th May 2024 challenging the High Court's subject-matter and territorial jurisdiction;*
 - d. That a declaration be made that the jurisdiction of the ELRC under Article 162(2)(a) of the Constitution and Section 12 of the ELRC Act is not limited to employer–employee relationship only, but extends to disputes arising at the pre-employment stage; and*
 - e. That a declaration be issued that by the time the petition was filed in the High Court, an employer–employee relationship had already crystallised between the relevant parties, thereby placing the dispute within the jurisdiction of the ELRC, in any event.*

[24] The 11th, 12th, 21st, 27th, and 28th respondents have all filed affidavits in support of the petition. In contrast, the 13th, 14th, 16th, 18th, 31st, 34th, 57th, 60th, 74th, and 75th respondents, on the other hand, have filed two notices of cross-appeal, both dated 30th July 2025, which seek the following orders:

- a. The Petition dated 10th June 2025 be allowed and the Judgment of the Court of Appeal made on 23rd May 2025 be set aside.*
- b. A declaration that the Employment and Labour Relations Court has jurisdiction to hear and determine constitutional petitions challenging the constitutionality or legality of pre-employment procedures and processes undertaken by employers such as advertisements of vacancies, shortlisting of candidates, the interview and selection processes.*
- c. The preliminary objections dated 30th May 2024 and 6th June 2024 raised by the 20th respondent at the High Court be upheld.*
- d. The ruling of the High Court at Nakuru (Muhochi, J) delivered on 20th June 2024 be set aside.*
- e. The costs of the petition be provided for.*

[25] In opposing the consolidated appeal, the 1st to 7th respondents have filed two replying affidavits, both sworn by *Dr. Magare Gikenyi Benjamin* on 10th July 2025, wherein they restate their case in the superior courts below.

D. PARTIES' SUBMISSIONS

i. The 1st and 2nd appellants' case

[26] The 1st and 2nd appellants filed submissions dated 11th June 2025 and supplementary submissions dated 5th August 2025 in support of the consolidated appeal and in response to the 1st-7th respondents' submissions. They maintain that the interpretation adopted by the Court of Appeal on the jurisdiction of ELRC unduly restricts the scope of Article 162(2) of the Constitution as read with Sections 5 and 7 of the Employment Act and Section 12 of the ELRC Act; that confining ELRC's jurisdiction strictly to disputes arising from an existing employer-employee relationship is inconsistent with Article 162(2) of the Constitution as well as the holding of the Supreme Court in ***Kenya Tea Growers Association & 2 others Vs The National Social Security Fund Board of Trustees & 13 others*** [2024] KESC 3 (KLR).

[27] On the authority of ***Attorney General & 2 others Vs Okiya Omtata Okiiti & 14 others*** [2020] KECA 30 (KLR), they have submitted that specialized courts retain the authority to interpret and apply the Constitution, provided the dispute falls within their statutory mandate; and further that this Court in ***Republic Vs Chengo & 2 others*** [2017] KESC 15 (KLR) firmly underscored that the jurisdiction of the High Court does not extend to matters expressly reserved for specialized courts.

[28] On the *territorial jurisdiction*, it is the case of the 1st and 2nd appellants that a constitutional petition ought, in the ordinary course, be filed in the court station nearest to where the cause of action arose. They maintain that considerations such as technological advancements or the nationwide presence of state agencies cannot displace this requirement, and that the state corporations involved have their headquarters in Eldoret, Nairobi, and Mombasa, where the recruitments in

question were undertaken and where the petitions ought to have been filed. In their view, the trial court proceeded with undue haste notwithstanding the pendency of a contested jurisdictional question, and proceeded to grant the *ex parte* conservatory orders, besides directing that the petition be determined solely on the basis of affidavit evidence.

ii. 3rd and 4th appellants' case

[29] In their submissions dated 15th September 2025, the 3rd and 4th appellants, like the 1st and 2nd appellants have urged the Court to overturn the Court of Appeal and hold that disputes arising from the recruitment to public office, including the challenges to the processes leading to such recruitment, fall squarely within the ELRC's jurisdiction; that by Section 12 of the ELRC Act, the ELRC is vested with exclusive original and appellate jurisdiction over all employment and labour disputes, encompassing grievances relating to recruitment, selection, and appointment; and that the recruitment process is intrinsically linked to the employment relationship and cannot be treated as a distinct inquiry.

iii. The 13th, 14th, 16th, 18th, 21st, 27th, 28th, 31st, 34th, 57th, 60th, 74th and 75th respondents' case

[30] In support of the consolidated appeal, all the respondents listed above filed submissions dated 28th January 2026 and presented similar arguments like those of the 1st to the 4th appellants whose submissions we have set out earlier, with the following two additional points: that Section 5 of the Employment Act extends protection against discrimination to job applicants and prospective employees; and that, in any event an employment relationship had already crystallized prior to the institution of the petition, as the impugned appointments had taken effect on 17th May 2024, three days before the petition was filed on 20th May 2024.

[31] It is for all the foregoing reasons that the appellants believe that the present dispute, being one grounded in recruitment and appointment within a public institution, ought to have been filed in the ELRC, and that the High Court had no jurisdiction to entertain it.

iv. 1st to 7th respondents' case

[32] The 1st to 7th respondents filed written submissions dated 10th July 2025 opposing the consolidated appeal. They submit that the present appeal is interlocutory in nature and forms part of a broader pattern of piecemeal litigation calculated to delay the substantive determination of the petition. On the central question of subject-matter jurisdiction, the 1st to 7th respondents reject the appellants' contention that the dispute falls exclusively within the remit of the ELRC under Articles 162(2) and 165(5)(b) of the Constitution. They maintain that the High Court properly assumed jurisdiction, as the petition raises substantive constitutional questions of general application, rather than a dispute grounded in an employer-employee relationship.

[33] They contend that the dispute is not one of private law between an employer and employee, but rather a public law contest between citizens and state organs concerning alleged constitutional violations, which can only and properly be raised before the High Court under Article 165(3)(b) and (d) of the Constitution. Seeking to persuade the Court to underscore the jurisdictional distinction between the High Court and specialized courts, the respondents have cited the Court's decision in ***Attorney General & 2 others Vs Okiya Omtata Okioti & 14 others*** (*supra*). That distinction confines the jurisdictional remit of two specialized courts, ELRC and ELC, to the interpretation and application of the Constitution in disputes arising from employment and labour relations or from environment and land, respectively. The jurisdiction does not extend to any other constitutional questions. Beyond those, remains the exclusive jurisdiction of the High Court. They rely on this Court's decision in ***Kenya Tea Growers Association & 2 others Vs The National Social Security Fund Board of Trustees & 13 others*** (*supra*), to buttress this point, and submit further that in the present case, no employer–employee relationship exists between the parties, and consequently, no employment dispute can be said to arise.

[34] On *territorial jurisdiction*, the 1st to 7th respondents defend the institution of the petition before the High Court at Nakuru, notwithstanding Rule 8(1) of the

Mutunga Rules. Since the Rules are subsidiary to the Constitution, they must be construed in harmony with Articles 48 and 159 of the Constitution. In the circumstances, procedural technicalities must give way to substantive justice. At any rate, they argue, the four state corporations involved in this case have nationwide coverage and cannot be confined to particular court stations. After all, there is only a single High Court of Kenya exercising nationwide jurisdiction, but sitting in different court stations. In support of this position, they rely on the persuasive case of ***Orogo Vs Chairman Board of Directors, Kenya Revenue Authority & 2 others*** (*supra*) where the High Court affirmed that constitutional petitions against national state corporations may be filed in any High Court station within Kenya.

[35] With regard to *recusal of the trial Judge*, the 1st to 7th respondents submit that the issue is not properly before the Court. They note that the High Court dismissed the recusal application and that no substantive appeal was lodged against that decision. Consequently, they argue that it would be improper for an appellate court to grant recusal in the absence of a direct challenge, as such an approach would undermine judicial independence, guaranteed under Article 160 of the Constitution, and foster the risk of judge-shopping.

[36] Finally, the 1st to 7th respondents contend that *the grant of temporary conservatory relief* was not the subject of an appeal and is therefore not properly before the Court for determination. In the end, the 1st to 7th respondents assert that the High Court properly exercised its original constitutional jurisdiction under Article 165 of the Constitution.

E. ISSUES FOR DETERMINATION

[37] Having carefully evaluated the arguments in this appeal, the pleadings, and the decisions of the two superior courts below, as well as the useful authorities cited in respect of either party's case, we consider the following two broad issues to fall from those submissions for determination:

- i) *Whether this Court has jurisdiction to hear and determine the appeal herein, and if so;*
- ii) *Whether the High Court had jurisdiction to entertain the petition before it.*

F. ANALYSIS AND DETERMINATION

i. On Jurisdiction of the Supreme Court

[38] As a preliminary point, we observe that the appellants have instituted the consolidated appeal under Article 163(4) (a) and (b) of the Constitution. The cross-appeals, on the other hand, do not at all specify the provision upon which they are anchored. When invited during the virtual hearing of this appeal to address the implications of invoking both limbs to Article 163(4) of the Constitution, learned counsel for the appellants offered no response. Conversely, counsel for the cross-appellants, after admitting that indeed no specific provision was cited in the cross-appeal, responded from the Bar that it was premised on Article 163(4)(a) of the Constitution.

[39] This Court, being a multi-jurisdictional forum in character, has time without number reminded counsel and parties who wish to invoke its jurisdiction under Article 163(4) to clearly and expressly identify the specific limb, whether (a) or (b), upon which the appeal is predicated. And we are not merely being overly technical, but the requirement is vital as it determines the Court's very power to act and shapes the scope of permissible coordinates, for different rules and considerations apply when determining whether the Court has jurisdiction to entertain an appeal from the Court of Appeal under Article 163(4) (a) or (b) of the Constitution. Remember, not all grievances from the Court of Appeal lie to the Supreme Court, on appeal. That should explain why, as a matter of principle, before the Court embarks on the consideration of any matter, it, *in limine*, exercising its constitutional discretion, filters the motion or petition to satisfy itself that the matter before it meets the constitutional muster in Article 163(4)(a) or (b) of the Constitution.

[40] It is therefore utterly baffling that the mistake continues to be repeatedly committed, with counsel bringing omnibus petitions pursuant to both limbs (a) and (b) or not citing any limb at all. We shall seize every opportunity to explicate this Court's appellate jurisdiction.

[41] As a refresher, it will be recalled that way back in its inaugural ruling in 2011 in the case of ***Sum Model Industries Ltd Vs Industrial & Commercial Development Corporation*** [2011] KESC 5 (KLR), the Court deprecated the practice of, as it were, throwing a matter at Court without establishing its jurisdictional foundation and expecting the Court to fill in for itself the jurisdiction being invoked. The case emphasised the need for procedural precision, stating that:

“4....We are surprised to note that Counsel for the applicant has not cited Article 163 (4) (b) of the Constitution as the basis for the application before us. Instead, the application has been brought (with the exception of rule 30 of the Supreme Court Rules), under either general provisions of the Constitution, or provisions that bear no relevance to the application.”

[42] This decision was followed in ***Steyn Vs Ruscone*** [2013] KESC 11 (KLR), one of the earliest decisions of this Court, where, in delineating the limits of its jurisdiction, the Court said:

“23. ...It is unfortunate that the applicant has not cited Article 163(5) of the Constitution, as a basis for the proceedings. This is the provision of the law that clearly gives the applicant locus standi before this Court, by referring to ‘review’....

The question then is, whether this omission is fatal to the applicant’s case. It is trite law that a Court of law has to be moved under the correct provisions of the law. We note that this

Court is the highest Court of the land. The Court, on this account, will in the interest of justice, not interpret procedural provisions as being cast in stone. The Court is alive to the principles to be adhered to in the interpretation of the Constitution, as stipulated in Article 259 of the Constitution. Consequently, the failure to cite Article 163(5) will not be fatal to the applicant’s cause.” [our Emphasis]

[43] The principle has since been restated, with a degree of consistency in a long line of cases. While the Court has repeatedly found that petitions brought without identifying the correct provision may ordinarily be fatal, and indeed the Court has in those instances gone ahead to dismiss or strike out such matters, it has nonetheless in certain exceptional instances exercised discretion and proceeded to consider the merits of the motion or petition in order to provide interpretive guidance on the question(s) raised in a given matter.

[44] The Court has now authoritatively and with finality settled this question in its recent judgment of 15th May 2026 in ***Kibinu Kinuthia (Suing as the Legal/Personal Representative of the Estate of Loise Gachiku Kinuthia (Deceased)) Vs Rugiri & 3 others*** [2026] KESC 35 (KLR). After reviewing the previous decisions of the Court on the issue, the Court stated as follows:

“[44] ...That leaves us with the issue of the omission by the appellant to specifically invoke the provisions of Article 163 (4) (a), and whether such failure renders the appeal fatally defective. Depending on the answer to the foregoing question, we shall then consider whether the appeal raises issues involving the interpretation or application of the Constitution.

.....

[57] From the foregoing list of authorities, it is clear that, as a general rule, the Supreme Court will not admit an appeal brought under Article 163 (4) of the Constitution, unless the intending appellant has unequivocally indicated the specific limb pursuant to which the Court’s jurisdiction is being invoked.....

[58] Failure by a litigant to move as above prescribed, is fatal to the intended appeal unless, the Court is persuaded, or determines on its own motion, that there exist certain reasons/circumstances as to warrant exceptional treatment of the appeal, pursuant to the provisions of Article 159 (2) (d) of the Constitution. Applying this principle to this appeal, we begin by observing at the outset that, Counsel for the appellant indicated that the appeal had been brought as of right under Article 163 (4) (a) of the Constitution. Secondly, the pleadings disclose that the gist of the appeal is a jurisdictional question.”

[45] Applying the above *ratio* to the present case, it is conceded that the appellants invoked both limbs of Article 163(4), while counsel for the cross-appellants stated from the Bar that they were relying on Article 163(4)(a) of the Constitution. On our own assessment of the pleadings and the judgments of the two courts below, we are in no doubt that the appeal raises a jurisdictional question implicating the application of Articles 162(2) and 165(3)(d) of the Constitution on the powers of the High Court and ELRC with regard to the facts presented in this dispute. We are, for these reasons, satisfied that the threshold under Article 163(4)(a) has been met and the Court is properly seized of this appeal.

ii. *On the Jurisdiction of the High Court to entertain the petition before it.*

[46] This appeal turned on a genuine area of judicial tension regarding jurisdictional boundaries between the High Court and ELRC. The situation has been exacerbated by a lack of definitive unanimity from the courts on the issue, leaving litigants to muddle through the confusion, not knowing in which court, between the High Court and ELRC, to file their claims. This appeal, therefore, presents a chance for this Court to provide interpretive guidance on the question. The second part of the question relates to the territorial jurisdiction of the High Court at Nakuru.

[47] The gravamen of the first part of the question was summarized in the judgment of the Court of Appeal as to ***“whether determining the constitutionality or legality of pre-employment procedures and processes undertaken by a prospective employer such as the manner in which the advertisement of the vacancy is done, the manner in which the shortlisting of the applicants who qualify for the interview is done, the interview process and the selection of the successful candidates, falls within the jurisdiction of the ELRC or the High Court”***.

[48] The Court of Appeal, in answer to the question, upheld the High Court, in agreement with the 1st to 7th respondents, that the High Court had jurisdiction to hear and determine the petition challenging pre-employment processes of appointing the CEOs and MDs of the 1st appellant, 26th, 28th, and 30th respondents. According to the appellate court, the Petition before the High Court was not instituted by the 1st to 7th respondents in their capacity as employees of the four parastatals as envisaged by Section 12 of the Act, but as citizens, simply seeking to reinforce the rule of law by challenging a recruitment process which, in their opinion, contravened the Constitution.

[49] The appellants, for their part, however, maintain that the dispute before the High Court fell squarely within the jurisdiction of ELRC in terms of Article 162(2) of the Constitution as read with Section 12 of the ELRC Act; and that by an express

provision, Article 165(5) of the Constitution excludes the High Court's jurisdiction in matters reserved for specialized courts.

[50] As we have stated above, the second limb to the question of jurisdiction of the High Court is whether the court at Nakuru had territorial jurisdiction over disputes emanating from other parts of the country. The third limb deals with the exercise of discretion by the High Court in granting conservatory orders. The arguments on each point by the parties have been set out in the preceding paragraphs.

[51] Before considering the principal challenge in this appeal, it is apposite to settle the question of the jurisdiction of the ELRC to entertain issues concerning the interpretation and application of the Constitution. This, for a long time, has been a vexing question. By the judgment of the Supreme Court in ***Kenya Tea Growers Association & 2 others Vs The National Social Security Fund Board of Trustees & 13 others*** (*supra*), it has finally been settled when the Court declared that:

“79. In our view, there is nothing in the Constitution, the ELRC Act, or indeed in our decision in the Karisa Chengo Case to suggest that in exercising its jurisdiction over disputes emanating from employment and labour relations, the ELRC court is precluded from determining the constitutional validity of a statute. This is especially so if the statute in question lies at the centre of the dispute. What it cannot do, is to sit as if it were the High Court under article 165 of the Constitution, and declare a statute unconstitutional in circumstances where the dispute in question has nothing or little to do with employment and labour relations within the context of the ELRC Act. But, if at the commencement or during the determination of a dispute falling within its jurisdiction, as reserved to it by article 162(2)(a) of the Constitution, a question arises regarding the constitutional

validity of a statute or a provision thereof, there can be no reason to prevent the ELRC from disposing of that particular issue. Otherwise, how else would it comprehensively and with finality determine such a dispute? Stripping the court of such authority would leave it jurisdictionally hum-strung; a consequence that could hardly have been envisaged by the framers of the Constitution, even as they precluded the High Court from exercising jurisdiction over matters employment and labour pursuant to article 165(5)(b). We are therefore in agreement with the appellants' submissions regarding this issue as encapsulated in paragraph 69 of this Judgment.

.....

87. For the avoidance of doubt, and so as to stop the pendulum of jurisdictional re-jigging that has characterised this case from the beginning, we hereby restate that the ELRC has jurisdiction to determine the constitutional validity of a statute in matters employment and labour. Suffice it to say that the statute in question must be in focus and at the centre of the dispute in question...”

[52] We say no more on this and instead now turn to Article 162, which establishes the system of courts in Kenya. Those courts, referred to as superior courts, are five, but for the purpose of this judgment, we identify three: the High Court and two other courts with the status of the High Court. The two courts would, respectively:

“(2)hear and determine disputes relating to—

(a) employment and labour relations; and

(b) the environment and the use and occupation of, and title to land.

(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2)". (Our emphasis).

[53] In contrast, Article 165 (3) of the Constitution provides for the jurisdiction of the High Court thus:

“(3) the High Court shall have—

(a) unlimited original jurisdiction in criminal and civil matters;

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.

.....

d) jurisdiction to hear any question respecting the interpretation of this Constitution

.....

e) any other jurisdiction, original or appellate, conferred on it by legislation...”.

[54] As compared to the other superior courts, the High Court exercises pervasive authority under the Constitution both as a first instance or appellate court. It is the primary interpreter of the Constitution, enforces the Bill of Rights and supervises all subordinate courts, tribunals, any person, body or authority exercising a judicial or quasi-judicial function. That authority is, however limited only in two instances, by Article 165(5) and (6) to the extent that all matters explicitly reserved for the exclusive mandate of the Supreme Court, or the specialized courts of equal status are outside the scope of the High Court. Secondly, the High Court has no supervisory authority over superior courts.

[55] Pursuant to Article 162(3) set out in the preceding paragraph, the ELRC was operationalized by the ELRC Act. The purpose of the Act is expressed to **“establish the Employment and Labour Relations Court to hear and determine disputes relating to employment and labour relations”**. In view of its centrality in the question before us, we reproduce *in extenso* Section 12(1) of the Act, which delineates the jurisdiction of the ELRC as follows:

“12. Jurisdiction of the court

1. The court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the court relating to employment and labour relations including—

- a. disputes relating to or arising out of employment between an employer and an employee;**
- b. disputes between an employer and a trade union;**
- c. disputes between an employers' organisation and a trade unions organisation;**
- d. disputes between trade unions;**
- e. disputes between employer organizations;**
- f. disputes between an employers' organisation and a trade union;**
- g. disputes between a trade union and a member thereof;**
- h. disputes between an employer's organisation or a federation and a member thereof;**
- i. disputes concerning the registration and election of trade union officials; and**
- j. disputes relating to the registration and enforcement of collective agreements.”** (Our emphasis).

[56] We emphasise two points from the above provision. The jurisdiction of ELRC is exercised in accordance with Article 162(2) of the Constitution and the ELRC Act as set out above, **“or any other written law”**. Besides the ELRC Act, we must consider the Employment Act in answer to the question posed. Indeed, besides applying and interpreting Articles 162 (2)(a) and (3), and 165 of the Constitution, both courts below also engaged these two statutes. While the language in Section 12 of the ELRC Act may be plain, as a rule of statutory interpretation, courts must ensure that the interpretation of legislation leads to a fair and just outcome, aligning with the Constitution and the purpose of the legislation. Secondly, it is a well-established legislative interpretative principle that statutes dealing with the same subject matter, or which are in *pari materia*, should be construed together and harmoniously, in order to avoid inconsistencies. This principle was articulated by the South African Constitutional Court in the case of ***The Independent Institute of Education (Pty) Limited Vs Kwazulu-Natal Law Society and Others*** [2019] ZACC 47) on which the Court of Appeal relied in its decision in ***Njuguna Vs Republic*** [2025] KECA 850 (KLR). We shall return to apply these principles to the question under consideration.

[57] The second point we have highlighted from Section 12 is the concurrent holding by the two superior courts below, that, because there was no employer-employee relationship as required by Section 12 aforesaid, the issues raised in the petition fell within the jurisdiction of the High Court. The appellate court, and indeed the trial court too adopted a technical and restrictive interpretation of Section 12, which, even on the face of it, lists more than just employees and employers. Indeed, subsection (2) provides for persons who can institute proceedings and those against whom proceedings before the ELRC may be instituted. It provides that:

“An application, claim, or complaint may be lodged with the court by or against an employee, an employer, a trade union, an employers’ organization, a federation, the Registrar of Trade

Unions, the Cabinet Secretary or any office established under any written law for such purpose.

[58] Beyond an employee and employer, a host of other persons, offices, and organizations have access to the ELRC. That should explain the use of the word “***including***” in Section 12(1) to signify that the category of disputes that may be referred to the ELRC is not limited to those listed. It was therefore an error for both courts to restrict the jurisdiction of the ELRC only to industrial disputes involving employers and employees.

[59] The centrepiece of the dispute to which we now turn seeks to resolve the question whether the ELRC has jurisdiction to entertain a petition on the constitutionality of pre-employment procedures and processes, like the advertisement of the vacancy, the shortlisting of qualified applicants, the interview process, and the selection of the successful candidates.

[60] We start with the ELRC Act, which was passed in 2011 to provide for the establishment of the court and to define its jurisdiction. It is recognized in Section 12 that the court will exercise exclusive original and appellate jurisdiction in accordance with Article 162(2) of the Constitution, the ELRC Act, or “*any other written law which extends jurisdiction to the Court relating to employment and labour relations.*”

[61] We consider three statutes as constituting “*any other written law which extends jurisdiction to the Court relating to employment and labour relations*”. The relevant provision of the Labour Institutions Act, 2007 is Section 56, which provides for the manner of making an application for the registration of an employment agency. By subsection (8), “*Any person aggrieved by a decision of the Director [of Employment] made in the exercise of his functions under this section may appeal against such decision to the Employment and Labour Relations Court*”. Needless to say, the Director and the applicant [the aggrieved

person and prospective employee] are not employees or employers, yet their grievance can only be referred to the ELRC.

[62] The Labour Relations Act 2007 is another law that relates to employment and labour relations. According to its long title, it is described as a statute that consolidates the law relating to trade unions and trade disputes. It provides for the registration, regulation, management, and democratisation of trade unions and employers' organisations or federations. Its foundational purpose is to promote sound labour relations through the protection and promotion of freedom of association, the encouragement of effective collective bargaining and promotion of orderly and expeditious dispute settlement, conducive to social justice and economic development and for connected purposes.

[63] Section 5 thereof extends protection to both employees and prospective employees against all forms of discrimination, and states:

“2. Without limiting the general protection conferred by subsection (1), no person shall do, or threaten to do any of the following—

(a) require an employee or a person seeking employment not to be or become a member of a trade union or to give up membership of a trade union;

(b) prevent an employee or person seeking employment from exercising any right conferred by this Act or from participating in any proceedings specified in this Act;

(c) dismiss or in any other way prejudice an employee or a person seeking employment—...

(3) No person shall give an advantage, or promise to give an advantage, to an employee or person seeking employment in exchange for the person not exercising any right conferred by

this Act or not participating in any proceedings in terms of this Act.” (Our emphasis).

[64] Disputes arising under this section, involving either an employee or a person seeking employment, are resolved by the ELRC. Similarly, under Section 65, the Cabinet Secretary has the power, in case of a trade dispute, to appoint a conciliator to attempt to resolve the dispute. If the Cabinet Secretary refuses or fails to exercise that power without reasonable cause, a party aggrieved may refer the matter to the ELRC under a certificate of urgency. The action will be against the Cabinet Secretary, even though the Cabinet Secretary is not an employer.

[65] Finally, in our evaluation of related statutes, we turn to the Employment Act, 2007, which repealed the Employment Act, Cap 226. Its purpose is declared to be an *“Act of parliament to repeal the Employment Act, declare and define the fundamental rights of employees, to provide basic conditions of employment of employees, to regulate employment of children, and to provide for matters connected with the foregoing”*. All disputes relating to employment and labour relations under this Act are, by the provisions of Section 50, to be determined by the ELRC.

[66] An employee is defined in Section 2 of the Employment Act, 2007, to mean a person engaged for wages or salary, and expressly includes an apprentice or indentured learner.

[67] Like the Labour Relations Act, the Employment Act outlaws discrimination in employment. Section 5(1) imposes a duty on the Cabinet Secretary, labour officers, and the ELRC itself to promote equality of opportunity in employment in order to eliminate discrimination. One of the national values and principles of governance under Article 10 of the Constitution that binds all State organs, State officers, public officers, and all persons is equality. As a constitutional imperative, equality and freedom from discrimination demand that every person be treated equally before the law and have the right to equal protection and equal benefit of

the law. Equal opportunity in employment is a broad concept that encompasses equal employment opportunities in recruitment and selection processes, just as it applies to equal opportunity to those already employed. The process of filling vacancies with existing employees through promotions or lateral transfers must be based on the principle of equality. The right guarantees, in the case of a potential employee, that job advertisements and descriptions are not discriminatory and that those seeking employment are protected from discrimination during recruitment and selection.

[68] Sections 5(3) & (8) and 9(9) of the Employment Act, variously use the words *prospective employee, recruitment, and applicant for employment*. For instance, Section 5 (3) prohibits an employer from discriminating against an employee or prospective employee, or harassing an employee or prospective employee on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, marital status or HIV status. It is equally unlawful for an employer to discriminate in the process of recruitment, training, promotion, terms and conditions of employment or termination of employment. For the purposes of Section 5, the Act defines “employee” to include an applicant for employment. This definition is also found in Section 9(9). One of the longest definitions of a term in the Act is the meaning of “employment policy or practice”, which “includes any policy or practice relating *to recruitment procedures, advertising and selection criteria, appointments and the appointment process.....*”

[69] The Employment (General) Rules, Legal Notice No. 28 of 2014, made pursuant to Section 90 of the Act by the Cabinet Secretary, after consultation with the Board, enjoins an employer to put in place at every workplace, policies which promote equality of opportunity in employment. The rules further direct that “*a vacancy for a job shall be advertised in such a manner as to encourage applications from suitable candidates irrespective of their race, colour, sex,*

language, religion, political or other opinion, nationality, ethnicity or social origin, disability, pregnancy, marital status or HIV status”.

[70] Based on our own interpretation and application of Articles 162 (2)(a) and 165(3)(b) of the Constitution, read together with the provisions of the relevant statutes dealing with employment and labour relations, we entertain no doubt that pre-employment labour disputes involving parties identified in Section 12 of the ELRC Act and those in related laws are in the exclusive domain of the ELRC. The jurisdiction of the ELRC therefore goes beyond resolving employer-employee disputes. The list in Section 12 of ELRC is not exhaustive. Apart from listing persons, entities, and offices that by definition do not qualify as employees or employers, the Act, in explicit terms, extends the jurisdiction of the ELRC as may be conferred by any other law in respect of employment and labour relations. The three written laws, the Employment Act, the Labour Relations Act, and the Labour Institutions Act, create additional categories of persons and offices who have access to the court but who are neither employees nor employers. They provide in plain language that this category of persons and offices can sue or be sued before the ELRC. The statutes further provide that pre-employment grievances involving those categories are justiciable in the ELRC. Any dispute beyond those explicitly stated class must be instituted in the High Court.

[71] Having so stated, we reiterate the *ratio decidendi* in ***Republic Vs Chengo & 2 others*** (*supra*), that courts of equal status exercise *sui generis* jurisdiction; that by being equated in status with the High Court does not imply that either the ELC or the ELRC is the High Court or vice versa. The three are different and autonomous courts and exercise different and distinct jurisdictions; the High Court is precluded from entertaining matters reserved for the Supreme Court, ELC, and the ELRC. By the same token, the ELC and the ELRC, too, cannot hear matters reserved for the High Court by the Constitution.

[72] As we conclude on this aspect of the appeal, we restate our determination at the beginning of this judgment that the appeal has been brought as of right under

Article 163(4)(a) of the Constitution. The question being, whether the Court of Appeal properly interpreted and applied the relevant provisions of the Constitution in arriving at the determination in the impugned judgment; namely whether the 1st to 7th respondents qualified as parties in terms of Section 12 of the ELRC Act, or the other written laws. Did they petition the High Court as employees/employers, trade union officials, employers' federation officials, prospective employees, persons seeking employment, Cabinet Secretaries, applicants for employment, or persons aggrieved by a decision of the Director of Employment? No. Not in any of those capacities.

[73] The 1st to 7th respondents described themselves in the High Court Petition as human rights activist, patriotic citizens of Kenya, law-abiding citizens, public-spirited individuals, and human rights defenders. They did not petition the High Court on behalf of any of the applicants to the positions of CEO or MD of the four parastatals. We reiterate, they were acting in the public interest.

[74] At paragraphs 30, 31, and 32 of the Petition, they have specifically described the capacity in which they moved the High Court, thus:

“B. LOCUS STANDI

30. THAT The Petitioners institute this Petition on the strength of Article 3(1) which provides that every person has an obligation to respect, uphold and defend the Constitution of Kenya 2010;

31. THAT The Petitioner is a person envisaged under Article 22(1) of the Constitution Article which states that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has - 20 been denied, violated or infringed, or is threatened.

32. THAT The Petitioner bring this Petition on their pursuant to article 22(2)(c) which states that in addition to a person acting in their own interest, court proceedings under clause (I) may be instituted by person acting in the public interest”. (sic)

[75] The 1st to 7th respondents’ petition points to alleged constitutional violations in respect of ethnic and gender considerations in the employment process, the marginalization and discrimination of women and people with disability. Nowhere do they plead on behalf of those who applied for the positions of CEOs or MDs and were not successful. The respondents moved the High Court for the vindication of the alleged breach of specified constitutional rights. The dispute as presented and prosecuted was clearly not one of private law between an employer and employee, but one implicating a contest in the public law regime between citizens and state organs concerning alleged constitutional violations. Those questions could and can only be properly raised for determination before the High Court under Article 165(3)(b) and (d) of the Constitution.

[76] From our analysis of the ELRC Act and other laws relevant to the matter under our consideration, there can be no doubt that the jurisdiction of the ELRC goes beyond resolving solely employer-employee disputes. The two courts below, in the result, erred in their restrictive interpretation of Articles 162(2)(a) and 165(3)(b) of the Constitution, and by limiting their consideration of the question of jurisdiction of ELRC to the ELRC Act only and leaving out other statutes. Our conclusion resonates and is relatable with some of the cases, properly decided on the subject, such as *Mohammed Vs National Mining Corporation & another; Kitilit (Interested Party)* [2025] KEELRC 2101 (KLR) and *Njenga Vs Executive Director, Kenya Institute for Public Policy Research and Analysis (KIPPRA) & another* [2026] KEHC 145 (KLR). In the latter, the High Court declined jurisdiction over a case involving an employment recruitment dispute, stating that the ELRC was the court with the competence and exclusive jurisdiction for such matters in view of Articles 162(2)(a) and 165(5)(b) of the

Constitution. See also *Alex Mrefu Vs Rural Electrification & 3 others* [2022] KEELRC 14707 (KLR).

[77] Before we conclude on this issue, it is essential to distinguish *Odongo Vs Clerk, Nakuru County Assembly & 5 others* [2024] KESC 29 (KLR) from this appeal. *Odongo* was a ruling of this Court where it was observed that the jurisdiction of the ELRC, in accordance with Article 162 of the Constitution as read with Section 12 of the ELRC Act, would arise from an employee-employer relationship and/or affect its status. We stress that this finding was based on an application and did not involve substantive consideration of the arguments on merit, as the Court ultimately found that the issues raised did not meet the threshold for certification as matters of general public importance and proceeded to dismiss the application.

[78] Regarding the territorial jurisdiction of the High Court at Nakuru, and the exercise of its discretionary authority to grant conservatory orders, we do not think, given the constitutional place of the High Court, that these questions should detain us longer than they ought to. The first argument is premised on the provisions of both the Civil Procedure Act and the Mutunga Rules. Section 15 of the former and Rule 8 of the latter require that suits be filed in as much as possible where the cause of action arose, among other considerations. Although the Rules have been made pursuant to Article 22(3) of the Constitution, it is our view that the question of territorial jurisdiction does not constitute a matter relating to the interpretation or application of the Constitution, and hence falls outside the purview of this Court's jurisdiction under Article 163(4)(a). Similarly, this Court cannot, given its circumscribed jurisdiction, be drawn into deciding questions around the exercise of discretionary powers by the High Court in granting interim conservatory orders. Conservatory orders are not ordinary civil law remedies but are remedies provided for under the Constitution. Just as we reiterated in *Bia Tosha Distributors Limited Vs Kenya Breweries Limited & 6 others* [2023] KESC 14 (KLR), in the course of issuing the ruling, the appellants should

have demonstrated, as they have failed to, that the learned judge made certain pronouncements touching on the interpretation and application of the Constitution, in the interim conservatory orders as to find their way to this court by way of appeal, as of right, within our confined jurisdiction.

[79] On the facts, the Constitution, and the applicable law, we finally arrive at the conclusion that the High Court was properly seized of the petition. The Court of Appeal, in upholding the High Court, was equally right on the point. To that extent, the consolidated appeal succeeds. However, both courts, with respect, fell into error in their conclusion that the jurisdiction of ELRC did not extend to pre-employment disputes; that, irrespective of their nature, such matters fell exclusively within the jurisdiction of the High Court; and that the jurisdiction of the ELRC is confined purely to disputes arising from an existing employer–employee relationship. The cross appeals therefore succeed to the extent explained in this judgment, that ELRC has jurisdiction to hear and determine constitutional petitions challenging the constitutionality or legality of pre-employment procedures and processes such as advertisements of vacancies, shortlisting of candidates, the interview and selection processes.

[80] We accordingly partially allow both the consolidated appeals and the cross appeals.

G. COSTS

[81] Bearing in mind the principles on the award of costs enunciated in *Rai & 3 others Vs Rai & 4 others* (*supra*), we find, in light of the public interest the matter has engendered, that the just and appropriate order to make is that each party shall bear its own costs.

H. FINAL ORDERS

[82] Consequently, upon our conclusion above, we issue the following orders:

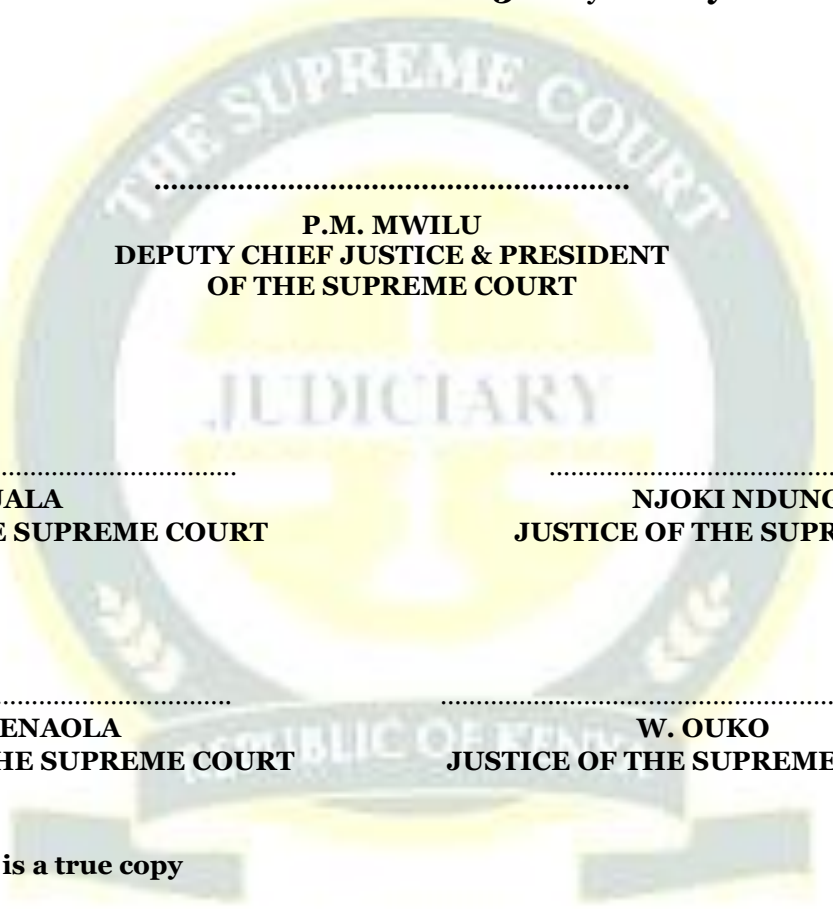
- i. The consolidated petitions of appeal dated 10th June 2025 and 26th June 2025 are hereby partially allowed as follows: The Judgment of the Court of Appeal dated 23rd May 2025 is set aside to the extent that;***
- a. It found that the jurisdiction of the ELRC does not extend to pre-employment disputes; and***
 - b. The jurisdiction of the ELRC under Article 162(2)(a) of the Constitution and Section 12 of the ELRC Act is limited to employer–employee relationships only and does not extend to pre-employment disputes.***
- ii. The cross-appeals, both dated 30th July 2025, are hereby partially allowed to the extent that:***
- a. The Judgment of the Court of Appeal dated 23rd May 2025 is set aside for holding that the ELRC’s jurisdiction does not extend to the determination of constitutional petitions challenging the constitutionality or legality of pre-employment procedures and processes undertaken by employers, such as advertisements of vacancies, shortlisting of candidates, the interview and selection processes.***
- iii. We, however, uphold the Judgment of the Court of Appeal to the extent that it found that the High Court, on the facts before it, had jurisdiction over the dispute; and***
- iv. It is ordered that Nakuru HC Constitutional Petition No. E011 of 2024 be allocated a hearing date on priority basis, in view of the period of time that has passed since the challenge on jurisdiction was made.***

v. Each party to bear their own costs.

vi. We hereby direct that the sum of Kshs. 6,000/= deposited as security for costs upon lodging of these appeals be refunded to the appellants.

It is so ordered.

DATED and DELIVERED at NAIROBI this 3rd day of July 2026



.....
P.M. MWILU
DEPUTY CHIEF JUSTICE & PRESIDENT
OF THE SUPREME COURT

.....
S.C WANJALA
JUSTICE OF THE SUPREME COURT

.....
NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT

.....
I.LENAOLA
JUSTICE OF THE SUPREME COURT

.....
W. OUKO
JUSTICE OF THE SUPREME COURT

**I certify that this is a true copy
of the original**

REGISTRAR
SUPREME COURT OF KENYA