

KENYA / JUDGMENT

# Ombok & another v Commission on Administrative Justice & another [2026] KEHC 13557 (KLR)

**[2026] KEHC 13557 (KLR)**

COURT

High Court

BEFORE

D Mburu

CASE / FILE NUMBER

Petition E408 of 2026

Source: new.kenyalaw.org · Research copy typeset by Esheria. Not court-issued or certified.

**REPUBLIC OF KENYA****IN THE HIGH COURT OF KENYA AT MILIMANI CONSTITUTIONAL AND HUMAN RIGHTS  
DIVISION****MILIMANI LAW COURTS****PETITION NO. E408 OF 2026****OTIENO OMBOK... .....1ST PETITIONER****SULWE COMMUNITY-BASED ORGANIZATION .....2ND PETITIONER****-VERSUS-****THE COMMISSION ON ADMINISTRATIVE JUSTICE. ....1ST RESPONDENT****NAISIAE PALOSHE TOBIKO .....2ND RESPONDENT****R U L I N G****INTRODUCTION**

1. The Court is called upon to determine a preliminary objection raised by the 2nd Respondent dated 1st July, 2026. The objection challenges the jurisdiction of this Court to hear and determine the Petition filed by the Petitioner on the ground that the matters raised therein fall within the exclusive jurisdiction of the Employment and Labour Relations Court (ELRC) established under Article 162(2)(a) of the Constitution.

2. The 2nd Respondent(hereinafter “the commission”) contends that the Petition, which impugns a recruitment exercise by the 1st Respondent of the 2nd Respondent, is in substance an employment and labour relations dispute requiring adjudication by the specialized court.
3. The Petitioner opposes the preliminary objection, maintaining that his case is not an employer-employee dispute but a constitutional challenge mounted in the public interest to enforce the values and principles enshrined in Articles 1,2,3,10,19,20,21,22,23,162 (2) and 258 (1)of the Constitution, The Petitioner, who is not an employee of the 1st Respondent asserts that this court has unlimited original jurisdiction to hear among others matters of whether a fundamental right or freedom in the bill of rights has been denied, violated, infringed or denied as well as questions concerning interpretation of the constitution.

## BACKGROUND

1. The factual background of the petition is that, the 1st Respondent on 9th June, 2026 published an announcement indicating it had shortlisted 10 candidates for the position of Commission Secretary and Chief Executive Officer after receiving 40 applications and listed the interview dates. This caused the Petitioner to research on when the positions were declared vacant on the 1st Respondents website and newspapers, where he did not get any which caused him to write to the 1st Respondent requesting for the dates of the advert, job qualifications, copy of long list of applicants, minutes of the shortlisting panel and reasons for shortlisting 10 candidates, a copy of the resolutions approving mode of advertisement of the vacancies and a copy of resolutions authorizing the recruitment for the position.
2. The petitioner asserts that he did not receive a response to this inquiry and on 16th June, 2026, the day of the interviews, at night, the commission announced the appointment of the 2nd Respondent as the Chief Executive Officer despite the concerns on the recruitment process and therefore the process was inconsistent with constitutional provisions on accountability, fairness, openness and transparency.
3. The Petition, dated 24th June, 2026, seeks declaratory reliefs that the recruitment process violated Articles 10, 41, and 232 of the Constitution and Sections 21 (1) of the Commission on Administrative Justice Act, Article 7 of the United Nations Convention against Corruption together with restraining orders against the 2nd Respondent from performing any functions in the Commissions office pending hearing of the Petition.
4. In response, the Respondents filed a Notice of Preliminary Objection, Grounds of opposition and written submissions in support of the objection.

## The Petitioner’s Case

1. The Petitioner contends that this this court has jurisdiction and by the doctrine of *\*stare decisis\** requires the court to be bound by the Supreme court decision in **Moi Teaching and Referral Hospital and 3 others-Vs-Dr. Magare Gikenyi & 76 Others (Petition No. E030 as**

**Consolidated with E033 of 2025)** [2026] eKLR which has recently settled the controversy on whether the jurisdiction to determine disputes relating to 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, lies with the Employment and Labour Relations Court (ELRC) or the High Court.

2. The Supreme Court at Paragraph 75 of its judgement stated as follows:

\*“[75] The 1 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.”\*

1. The Petitioner emphasizes that similar to the circumstances in the **Moi Teaching and Referral Hospital** case, the petitioners herein did not petition this Honourable Court as employees/employers, trade union officials, employer federation officials, prospective employees, persons seeking employment, Cabinet Secretaries, applicants for employment, persons aggrieved by the decision of the Director of Employment or in any other category of persons recognized in the Employment and Labour Relations Court Act, the Employment Act, the Labour Relations Act, the Labour Institutions Act or any other employment and labour relations laws in Kenya and that he approached this honourable court as patriotic citizens of Kenya and public-spirited individuals as the Petitioners have self-described themselves in Paragraph 24 of the Petition.
2. The Petitioner further submits that Section 12 of the Employment and Labour Relations Court Act, 2011, which delineates the jurisdiction of the ELRC, is confined to disputes arising from employer-employee relationships, trade disputes, and matters concerning employment contracts. Since the Petitioner has no employment relationship with the Respondents and seeks no remedy personal to himself as an employee, the Petitioner contends that the ELRC would lack jurisdiction to entertain this matter. The Petitioner characterizes the case as one concerning administrative law, constitutional compliance, and public accountability falling squarely within the supervisory jurisdiction of the High Court under Article 165(3)(d) of the Constitution.

3. The Petitioner submits that he has brought the Petition in public interest under Article 22(2) (c) and Article 258(2)(c) of the Constitution, seeking to protect the rule of law, enforce human rights and stop the violation and/or contravention of the constitution.

### The 1st Respondent's Case

1. The Respondents contend that the Petition, as framed falls squarely before the Labour Court as it arises from the recruitment process undertaken by the 1st Respondent for the position of Secretary and Chief Executive Officer, in particular, the Petitioners allege that the vacancy was not properly advertised, that the identity of the recruiting constitutional commission was not adequately disclosed, and that additional eligibility criteria were introduced during the recruitment process. The reliefs sought are consistent with that complaint. The Petition seeks declarations impugning the legality of the recruitment process, orders invalidating the appointment of the 2nd Respondent, and consequential orders directing that a fresh recruitment exercise be undertaken in accordance with the Constitution and the law and therefore properly characterized, the Petition is not an abstract constitutional challenge concerning public governance generally, but a dispute arising from a pre-employment recruitment process.
2. The commissions submits that the Constitution establishes a deliberate and carefully demarcated jurisdictional framework for the determination of disputes. Article 162(2)(a) requires Parliament to establish a court with the status of the High Court to hear and determine disputes relating to employment and labour relations. Pursuant to that constitutional command, Parliament enacted the Employment and Labour Relations Court Act, whose Section 12 vests in the Employment and Labour Relations Court jurisdiction to hear and determine disputes relating to employment and labour relations. Correspondingly, Article 165(5)(b) expressly provides that the High Court shall not exercise jurisdiction in respect of matters falling within the jurisdiction of the courts contemplated under Article 162(2). The jurisdiction of the High Court is therefore constitutionally excluded where a dispute properly falls within the mandate of the Employment and Labour Relations Court.
3. The 1st Respondent avers that recruitment is the gateway to employment. Disputes concerning the advertisement of vacancies, eligibility criteria, receipt and consideration of applications, shortlisting of candidates, interviews, selection and appointment are all integral components of the employment relationship at its pre-engagement stage. The fact that an employer-employee relationship has not yet crystallized does not alter the essential character of such disputes as employment and labour relations matters.
4. They rely on Supreme Court in **\*Petition No. E030 as consolidated with Petition No. E033 of 2025\***(Judgment delivered on 3rd July 2026) which states that The Supreme Court authoritatively held that the jurisdiction of the Employment and Labour Relations Court extends to disputes arising throughout the recruitment process, including the advertisement of vacancies, prescription of qualifications, receipt and consideration of applications, shortlisting, interviews and the appointment of successful candidates, hence, to the 1st

Respondent, the present Petition falls squarely within the category of disputes identified by the Supreme Court and this Honourable Court is therefore bound, both by the constitutional allocation of jurisdiction and by the binding pronouncement of the Supreme Court, to decline jurisdiction.

5. The 1st Respondent further submits that Preliminary Objection consequently raises a pure question of law that goes to the competence of this Court. Its determination requires no evidential inquiry but only an examination of the pleadings against the applicable constitutional and statutory framework and they therefore ask court to Uphold the Notice of Preliminary Objection dated 1st July 2026; find and hold that this Honourable Court lacks jurisdiction to hear and determine the Petition by virtue of Articles 162(2)(a) and 165(5)(b) of the Constitution, as read with Section 12 of the Employment and Labour Relations Court Act and; strike out the Petition with costs to the Respondents.

### The 2nd Respondent's Case

1. In their written submissions dated 7TH July, 2026, the 2nd Respondent invokes the principle established in **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1** that jurisdiction is everything and that a court without jurisdiction must down its tools. The Respondents argue that Article 162(2)(a) of the Constitution mandates Parliament to establish a court with the status of the High Court to hear and determine disputes relating to employment and labour relations, and that the ELRC has since been established as that court.
2. The 2nd Respondents supports the preliminary objection by further citing, **\*Njenga v Executive Director, Kenya Institute for Public Policy Research and Analysis (KIPPRA) & another (Judicial Review Application E013 of 2026) [2026] KEHC 145 (KLR) (Judicial Review) (19 January 2026) (Ruling)\*** and **\*Ali Jarso Wako & another v Ministry of Interior & Coordination of National Government & 5 others; Public Service Commission & 5 others (Interested Parties) [2020] KEHC 2971 (KLR)\*** and **\*Republic v Public Service Commission & 2 others; Barasa (Interested Party); Amambia & 4 others (Ex parte) (Judicial Review E006 of 2025) [2026] KEELRC 7 (KLR) (15 January 2026) (Ruling)\***, to drive home the issue of the ELRC Courts jurisdiction.
3. The 2nd Respondent finally submits that the instant Petition is procedurally defective and contravenes provisions of the Constitution as the Petitioners call upon this Court to hear and determine a matter over which it lacks the requisite jurisdiction to do so, the Respondent therefore asks that the Petition be dismissed with costs.

### ANALYSIS AND DETERMINATION

1. From the pleadings and submissions of the parties, two primary issues emerge for determination by this Court:

2. **\*Whether the Respondents' Notice of Preliminary Objection dated 1st July, 2026 meets the legal threshold for a preliminary objection?\***
3. **\*Whether this Court has jurisdiction to hear and determine the Petition\***

**\*Whether the Respondents' Notice of Preliminary Objection dated 1st July, 2026 meets the legal threshold for a preliminary objection\***

1. The **\*locus\* \*classicus\*** on this question remains the decision of the Court in **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (supra)**, where the court defined a preliminary objection as one that raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. The court further held that such an objection cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.
2. The Court in the case **Oraro vs. Mbaja [2005] 1 KLR** on the nature of preliminary objections observed that:

**\*“A preliminary objection is now well identified as and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection and yet it bears factual aspects calling for proof or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary objection anything that purports to be a preliminary objection must not deal with disputed facts and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.”\***

1. In the instant case, the Respondent assert that this matter is to be heard and determined by the Employment and Labour Relations Court. This contention raises a question of constitutional interpretation concerning the delineation of jurisdiction between the High Court and the specialized courts established under Article 162 of the Constitution. That question is quintessentially a pure point of law, for it requires the Court to examine the pleadings, identify the substance of the dispute, and determine whether, as a matter of law, the matter falls within one jurisdictional sphere or another.
2. No evidence is required to discern a question of law. As stated by Bahati Mwamuye J in **Ngaira v Nairobi City County Government 6 others (Constitutional Petition E413 of 2025) 2026KEHC6824 (KLR) (Constitutional and Human Rights) (29 April 2026) (Ruling) (2)**

**\*“The Court does not need to determine whether external candidates were indeed included in the internal recruitment process, nor whether the recruitment violated specific constitutional provisions. The jurisdictional inquiry is antecedent to those factual determinations and turns entirely on the nature and character of the dispute as disclosed by the pleadings.”\***

1. In this case, even if it were ultimately proved that external individuals were included in the recruitment process or that the process lacked transparency, those facts would not change the character of the dispute for jurisdictional purposes. The dispute would still be about a recruitment exercise. Accordingly, the presence of some factual contestation does not invalidate the preliminary objection.
2. I therefore find the Respondents' preliminary objection meets the threshold established in **Mukisa Biscuit Manufacturers' case**. It raises a pure point of law concerning the constitutional division of jurisdiction between the High Court and the ELRC. The objection can be determined on the basis of the pleadings and legal framework without requiring the Court to make factual findings on the merits of the Petition. The Court therefore proceeds to the second issue.

**\*Whether this Court has jurisdiction to hear and determine the Petition\***

1. The question of jurisdiction is fundamental, for as the Court famously declared in **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd (supra)**,

**\*"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."\***

1. The Supreme Court addressing its mind on the issue of jurisdiction in the case of **Samuel Kamau Macharia & another vs. Kenya Commercial Bank Limited & others (2012) eKLR** opined as follows:

**\*"A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsels for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings ... where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."\***

1. Article 165(3) of the Constitution confers upon the High Court unlimited original jurisdiction in criminal and civil matters. However, this broad grant of jurisdiction is expressly subject to the carve-out created by Article 162(2), which provides that Parliament shall establish courts with the status of the High Court to 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. Parliament gave effect to Article 162(2)(a) through the Employment and Labour Relations Court Act, No. 20 of 2011.

2. The question that arises in this case is whether the dispute concerning the recruitment of the 2nd Respondent qualifies as a dispute relating to employment and labour relations falling within the exclusive jurisdiction of the ELRC. Section 12(1) of the ELRC Act provides that 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 the Act.
3. Section 12 (1)(a) specifically includes disputes “arising out of or relating to an employment relationship.” The phrase “employment relationship” is broad enough to encompass the entire spectrum of interactions between employers and employees, including recruitment, selection, appointment, terms and conditions of service, and termination.
4. The Petitioner argues that his case is not an employer-employee dispute because he is not an employee of the 1st Respondent and seeks no relief personal to himself as an employee. The Respondents counter that the substance of the dispute is about recruitment, which is quintessentially an employment and labour relations matter, and that the Petitioner’s status as a non-employee or public-spirited citizen cannot confer jurisdiction upon a court that otherwise lacks it.
5. The Court of Appeal in **Registrar of Trade Unions v Nicky Njuguna & 4 others [2017] eKLR** held as follows:

**\*“This is not the first time an issue of jurisdiction of the Employment Labour Relations Court (ELRC) to determine matters involving the interpretation of the Constitution has been raised. Indeed, way back in 2012, the same issue was before the High Court in United States International University (USIU) v Attorney General & 2 Others [2012] eKLR and Majanja J., took the following position:-\*"**

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

1. From clear reading of Section 12(1) of the Employment and Labour Relations Court Act there is no relationship that has been established to exist between the Petitioner and the Respondents herein falling to what can be referred to employment and Labour Relationship between Petitioner and the Respondent. The constitutional questions raised in the Petition and relief sought in the Petition do not in any way fall within any of the categories or classes

as captured by Section 12 of the Employment and Labour Relations Court Act No. 20 of 2011. I find that no issue has been demonstrated to arise as labour relations between the Respondents and the Petitioner.

2. The Petition raises important questions concerning the values and principles of public service under Article 232, including the requirements of transparency, accountability, and fair, merit based appointments. These are weighty constitutional questions that deserve this Courts consideration. Notwithstanding the concurrent jurisdiction between the High Court and Labour Court, the Employment and Labour Relations Courts Jurisdiction where there exists and employment relationship, which is inexistent in the instant case.
3. The Court of Appeal in **Public Service Commission & 4 others v Cheruiyot & 20 others** [2022] KECA 15 (KLR) further stated as follows:

**\*“In the absence of an employee-employer relationship, it is our considered view that the court that had jurisdiction to entertain and determine the issues raised in the consolidated petitions was in fact the High Court. The establishment of the High Court is found at article 165(1) of the Constitution. Under article 165(3), the High Court has jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been violated, infringed or threatened. Under article 165(d)(i), the High Court has jurisdiction to determine whether any law is inconsistent with or in contravention of the Constitution. The issues raised in the consolidated petitions, especially the issue relating to the constitutionality of section 43(5) of the Elections Act, 2011 are the kind of issues contemplated under article 165(3(d) of the Constitution determination of which would be within the exclusive constitutional mandate of the High Court. This is jurisdiction flowing directly from the Constitution, which the Supreme Court alluded to in the matter of Interim Independent Electoral Commission (supra) and Samuel Kamau Macharia & another (supra). The Constitution appreciates that there are matters within the exclusive jurisdiction of the High Court on the one hand and those reserved and/or falling within the jurisdiction of the courts contemplated in article 162(2) on the other hand, notwithstanding the fact that the latter courts enjoy the same status as the High Court. This court in *Karisa Chengo & 2 others v Republic* [2015] eKLR held thus:\***

**\*“...The jurisdiction of the High Court as established under Article 165 of the Constitution is limited in two fronts. First, it shall not exercise jurisdiction on matters reserved for the Supreme Court and matters falling within the jurisdiction of the two courts contemplated in article 162(2). It is therefore clear that the High Court no longer had the original and unlimited jurisdiction in all matters as it used to have under the repealed Constitution. It cannot deal with matters set out under section 12 of the ELRC Act and Section 13 of the ELC Act. Conversely, the courts contemplated in Article 162(2) of the Constitution cannot deal with matters reserved for the High Court.”\***

1. More recently in **Moi Teaching and Referral Hospital & another v Gikenyi B & 76 others** [2025] KESC 78 (KLR), the Supreme Court while dismissing observed;

\*“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.”\*

1. Further, the court re-affirmed the High Court’s jurisdiction, stating:

“\*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.”

\*

1. Therefore, as far as the jurisdiction of the Employment and Labour Relations Court is concerned, it is confined to matters where a relationship of employer/employee exists, and if constitutional questions arise because of that relationship, that is what is to be exclusively dealt with by the Employment and Labour Relations Court.
2. In the instant case, it is apparent that the Petition is raising questions touching on transparency, accountability, and fair, merit-based appointments without being tied to any specific employer-employee relationship. This matter falls within the exclusive jurisdiction of the High Court under Article 165(3) (d) (ii) of the Constitution. 34. The Court thus finds that the Respondents’ Notice of Preliminary Objection lacks merit and is hereby dismissed with no orders as to costs.
3. Parties can take directions on the main petition.

\*Dated, signed and delivered virtually at Nairobi this 17th day of September, 2026.\*

.....

DAVID MBURU

---

**JUDGE**

---

**Source & reproduction note**

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

**ORIGINAL SOURCE**      <https://new.kenyalaw.org/akn/ke/judgment/kehc/2026/13557/eng@2026-09-17>

**CASE PAGE**              <https://chat.esheria.ai/case-law/kenya/ombok-and-another-v-commission-on-administrative-justice-and-another-2026>

Prepared on 28 October 2026 · Esheria