**Public Service Commission & 4 others v Cheruiyot & 20 others (Civil Appeal 119 & 139 of 2017 (Consolidated)) [2022] KECA 15 (KLR) (8 February 2022) (Judgment)**

Neutral citation: [2022] KECA 15 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NAKURU**

**CIVIL APPEAL 119 & 139 OF 2017 (CONSOLIDATED)**

**DK MUSINGA, W KARANJA & AK MURGOR, JJA**

**FEBRUARY 8, 2022**

**BETWEEN**

**PUBLIC SERVICE COMMISSION ..... 1ST APPELLANT**

**THE HON. ATTORNEY GENERAL ..... 2ND APPELLANT**

**CHIEF OF STAFF AND HEAD OF PUBLIC SERVICE ..... 3RD APPELLANT**

**AND**

**ERIC CHERUIYOT ..... 1ST RESPONDENT**

**RAYMOND KINYUA ..... 2ND RESPONDENT**

**EMILY THAARA NJUKI ..... 3RD RESPONDENT**

**MONICA CYOMBUA GITARI ..... 4TH RESPONDENT**

**DR. PETER KOROS ..... 5TH RESPONDENT**

**RACHEAL KEINO ..... 6TH RESPONDENT**

**JEOFFREY LANGAT ..... 7TH RESPONDENT**

**PHILEMON KIPNGETICH ..... 8TH RESPONDENT**

**SIMON KIPLAGAT ..... 9TH RESPONDENT**

**STANLEY K. SOI ..... 10TH RESPONDENT**

**CHERONO MUSONIK ..... 11TH RESPONDENT**

**DR. KIPLAGAT KOSKEI ..... 12TH RESPONDENT**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .... 13TH RESPONDENT**

**EMBU COUNTY GOVERNMENT ..... 14TH RESPONDENT**

**THE GOVERNOR, EMBU COUNTY ..... 15TH RESPONDENT**

**COUNTY GOVERNMENT OF BOMET ..... 16TH RESPONDENT**

**BOMET COUNTY ..... 17TH RESPONDENT**

**AS CONSOLIDATED WITH**

**CIVIL APPEAL 139 OF 2017**

**BETWEEN**

**COUNTY GOVERNMENT OF EMBU ..... 1ST APPELLANT**

**HON. MARTIN NYAGAH WAMBORA ..... 2ND APPELLANT**

**AND**

**ERIC CHERUIYOT ..... 1ST RESPONDENT**

**RAYMOND KINYUA ..... 2ND RESPONDENT**

**EMILY THAARA NJUKI ..... 3RD RESPONDENT**

**MONICA CYOMBUA GITARI ..... 4TH RESPONDENT**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .... 5TH RESPONDENT**

**ATTORNEY GENERAL ..... 6TH RESPONDENT**

**PUBLIC SERVICE COMMISSION ..... 7TH RESPONDENT**

**CHIEF OF STAFF AND HEAD OF PUBLIC SERVICE ..... 8TH RESPONDENT**

**PETER KOROS ..... 9TH RESPONDENT**

**RACHEAL KEINO ..... 10TH RESPONDENT**

**JEOFFREY LANGAT ..... 11TH RESPONDENT**

**PHILEMON KIPNGETICH ..... 12TH RESPONDENT**

**SIMON KIPLAGAT ..... 13TH RESPONDENT**

**STANLEY SOI ..... 14TH RESPONDENT**

**CHERONO MUSONIK ..... 15TH RESPONDENT**

**DR. KIPLAGAT KOSKEI ..... 16TH RESPONDENT**

***(An appeal from the Judgment and Decree of the Employment and Labour Relations Court of Kenya at Kericho (D. K. Marete, J.) dated 29th March 2017 in Petition No. 1 of 2017 Consolidated with Petition No. 2 of 2017.)***

**The Employment and Labour Relations Court did not have the jurisdiction to determine issues on the constitutionality of the Elections Act.**

*The court held that the Employment and Labour Relations Court had no jurisdiction to entertain a dispute where former public officers whose resignation notices had crystalized sought to be reinstated, as there was no employer-employee relationship. The resignations were in conformity with section 43(5) of the Elections Act, under which a public officer who intended to contest an election under the Act had to resign from public office at least six months before the date of election. The court held that the proper forum for the resolution of the dispute was the High Court. As to whether the issue about the constitutionality of section 43(5) and 43(6) of the Elections Act was res judicata, the court set out the elements to be satisfied for res judicata to be successfully pleaded. The court noted that the issues in the dispute before it and those determined in the case of Charles Omanga and Another vs. Independent Electoral and Boundaries Commission and Another were similar but the parties were different and hence plea res judicata could not be raised. Additionally, the court held that section 43 of the Elections Act preserved the impartiality of public servants as a value recognized in article 232(1)(a) of the Constitution and also statutes such as section 23 of the Leadership and Integrity Act and section 12(1) of the Political Parties Act. Furthermore, the court added that section 43(5) and 43 (6) also promoted good governance and the value of integrity as recognized under article 10 of the Constitution. The court added that the political rights and labour rights were not absolute and they could be limited where the limitation was justifiable. Therefore, the provisions of sections 43(5) and 43(6) of the Elections Act were not discriminatory or unconstitutional as they were reasonable and justifiable. Lastly, the court held that article 118 (1)(b) of the Constitution had been suspended under the provisions of section 2(1)(b) of the Sixth Schedule to the Constitution and therefore public participation was not a constitutional prerequisite in the enactment of Elections Act, 2011.*

Reported by Ribia John

***Jurisdiction*** *– jurisdiction of courts of equal status – jurisdiction of the Employment and Labour Relations Court – jurisdiction to determine the constitutionality of a provision of law - whether the Employment and Labour Relations Court had the jurisdiction to determine issues on the constitutionality of the Elections Act – Constitution of Kenya, 2010 articles 162(2) and 165; Employment and Labour Relations Court Act, 2011 section 21(1).*

***Constitutional Law*** *– fundamental rights and freedoms – equality and freedom from discrimination – provision of the law that required public officers running for elective posts to resign save for the President, the Deputy President; a member of parliament, a county governor, a deputy county governor and a member of a county assembly – whether the provisions of section 43(5) and (6) of the Elections Act, 2011 were discriminatory in the sense that they required all public officers running for elective posts to resign before six months to a general election, save for the President, the Deputy President; a member of parliament, a county governor, a deputy county governor and a member of a county assembly contemplated under section 43(6) of the Elections Act – whether the fact that section 43(6) of the Elections Act listed persons to whom the provisions of section 43(5) was not applicable afforded preferential treatment to those officers – Constitution of Kenya, 2010 articles 24 and 27; Elections Act, 2011 sections 43(5) and (6).*

***Constitutional Law*** *– fundamental rights and freedoms – limitation of rights and freedoms – political rights – labour rights – right to vie for an elective post – limitation of right to public and/or state officers – whether political or labour rights of state or public officers that sought to join elective politics had absolute rights that could not be limited – Constitution of Kenya, 2010 articles 24 and 25; Elections Act, 2011, sections 43(5) and (6).*

***Constitutional Law*** *– national values and principles – public participation – provision that suspended provisions of public participation until the results of the first general election – whether public participation suspended by section 2(1)(b) of the sixth schedule of the Constitution (suspended article 118 (1)(b)) of the Constitution) until the first elections for Parliament under the Constitution were conducted and final results announced was a constitutional prerequisite in the enactment of Elections Act which was assented to by the*

*President one year before the first general election under the Constitution – Constitution of Kenya, 2010, articles 10, 118, 257 and sixth schedule, section 2 (1)(b).*

***Civil Practice and Procedure*** *– res judicata – principles that guided the court in applying res judicata - whether the issue on the constitutionality of section 43(5) and (6) of the Elections Act, 2011 was res judicata in the circumstances where it had been dealt with in another cases – Civil Procedure Act, Cap 21 section 7.*

***Words and Phrases*** *– resignation – definition of – act or an instance of surrender or relinquishing an office, right or claim – formal notification of relinquishing an office or position – an official announcement that one had decided to leave one's job or organization, often in the form of a written statement – Black's Law Dictionary (tenth Edition).*

**Brief facts**

Subject to the provisions of section 43(5) and (6) of the Elections Act, 2011, the respondents had resigned from the County Government of Meru to vie for elective posts. However 31 days after their resignation, they sought to have their resignation notices quashed and to resume work. The County Government of Meru declined to revoke their resignation notices as their resignations had already been accepted by the governor and the resignation had crystallized because a period of 30 days had lapsed.

Aggrieved, they filed a petition in the Employment and Labour Relations Court in which they sought to be reinstated and sought orders that section 43(5) and(6) of the Elections Act, 2011 were discriminatory for requiring public officers running for elective posts to resign before six months to a general election, save for the President, the Deputy President; a member of parliament, a county governor, a deputy county governor and a member of a county assembly. They also contended that their political and labour rights could not be limited.

The trial court held that that section 43(5) of the Elections Act, 2011 was unconstitutional and held that public officers could only leave office to participate in the election process or nomination for general election at the conclusion of the nomination process for the said general election.

Aggrieved, the appellants filed the instant petition on grounds that the Employment and Labour Relations Court had no jurisdiction to determine on the constitutionality of provisions of the Elections Act, 2011 and that the issue of the constitutionality of section 43(5) and (6) of the Elections Act, 2011 was *res judicata* having already been determined in *Charles Omanga and Another vs. Independent Electoral and Boundaries Commission and Another* [2013] eKLR.

**Issues**

i. Whether the Employment and Labour Relations Court had the jurisdiction to determine issues on the constitutionality of the Elections Act.

ii. Whether the provisions of section 43(5) and (6) of the Elections Act, 2011 were discriminatory in the sense that they required all public officers running for elective posts to resign before six months to a general election, save for the President, the Deputy President; a member of parliament, a county governor, a deputy county governor and a member of a county assembly contemplated under section 43(6).

iii. Whether the fact that section 43(6) of the Elections Act listed persons to whom the provisions of section 43(5) was not applicable afforded preferential treatment to those officers.

iv. Whether political and or the labour rights of state and/or public officers that sought to join elective politics were absolute rights that could not be limited.

v. Whether public participation, that was suspended by section 2(1)(b) of the sixth schedule of the Constitution (suspended article 118 (1)(b)) of the Constitution) until the first elections for Parliament under the Constitution were conducted and final results announced, was a constitutional prerequisite in the enactment of Elections Act, 2011 which was assented to by the President one year before the first general election under the Constitution.

vi. Whether the issue on the constitutionality of section 43(5) and (6) of the Elections Act, 2011 was *res judicata* having been determined in *Charles Omanga and Another vs. Independent Electoral and Boundaries Commission and Another [2013] eKLR*

**Relevant provisions of the Law**

**Elections Act, No. 24 of 2011**

**Section 43 - Participation in elections by public officers**

*(5) A public officer who intends to contest an election under this Act shall resign from public office at least six months before the date of election.*

*(5A) A public officer who intends to contest in a by-election under this Act shall resign from public office within seven days of the declaration of a vacancy.*

*(6) This section shall not apply to-*

*(a) the President;*

*(b) deleted by Act No. 36 of 2016, s. 16;*

*(c) the Deputy President;*

*(d) a member of Parliament;*

*(e) a county governor;*

*(f) a deputy county governor;*

*(g) a member of a county assembly.*

**Constitution of Kenya, 2010**

**Article 137 - Qualifications and disqualifications for election as President**

*(2) A person is not qualified for nomination as a presidential candidate if the person—*

*(b) is a public officer, or is acting in any State or other public office.*

**Held**

1. Jurisdiction was everything, it was what gave a court or a tribunal the power, authority and legitimacy to entertain a matter before it. Without it, a court had no power to make one more step. Where a court had no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A decision made by a court of law without proper jurisdiction amounted to a nullity *ab initio*, and such a decision was amenable to setting aside *ex debito justitiae.*
2. The jurisdiction of the Employment and Labour Relations Court was granted by article 162(2) of the Constitution and section 12(1) Employment and Labour Relations Court Act, 2011. Subject to section 12, the Employment and Labour Relations Court had jurisdiction to entertain any dispute or any contemplated dispute under section 12(1) but the dispute between the parties had to be related to their employment and/or touching on labour relations. The jurisdiction of the Employment and Labour Relations Court was not limited to the determination of disputes arising out of a contract of employment between an employee and an employer, the court could also determine any constitutional violations of the rights of any party arising from an employee-employer relationship. However, for the court to entertain a petition premised on the breach of a party's fundamental rights under the Constitution, the alleged constitutional breach had to be ancillary and incidental to the matters contemplated under section 12 of the Act.
3. None of the petitioners demonstrated an existing employee-employer relationship with any of the respondents or with any public entity. The 1st petitioner at the hearing conceded that he did not have an employee-employer relationship with any of the respondents.
4. The 2nd, 3rd and 4th respondents had separately tendered their one-month resignation notices from their respective positions which they held in the County Government of Embu. Their resignation notices were given in conformity with the provisions of section 43(5) of the Elections Act, 2011. Their respective resignation notices dated January 5 and 6, 2017 and were accepted by the Governor,

County Government of Embu. The resignation notices were to take effect on February 5 and 6, 2017. On February 7, 2017 when the resignations were to take effect, the respondents sought to revoke their separate letters of resignation upon learning of the interim court order issued by the trial court that barred the Independent Electoral and Boundaries Commission (IEBC) from disqualifying public servants from participating in the 2017 general election for not vacating office six months prior to the general election. By that time the one-month notice period had already lapsed, their respective resignation notices had already crystallized.

5. A notice of resignation was a notice of termination of employment, given by an employee to the employer. It was a unilateral act. Resignation was the act or an instance of surrender or relinquishing an office, right or claim. A formal notification of relinquishing an office or position, an official announcement that one had decided to leave one's job or organization, often in the form of a written statement.

6. There was no evidence placed before the trial court to show that the resignation by the 2nd to 4th respondents was involuntary. The 2nd to 4th respondents resigned voluntarily in compliance with a section of the law that was in force at the time. The 2nd to 4th respondents having resigned, their resignations having been formally accepted, their dues paid, and their respective positions filled meant that their resignation notices had already crystallized. There was nothing to go back to. The employee-employer relationship between the 2nd to 4th respondents and the County Government of Embu had already come to an end. The Employment and Labour Relations Court ought to have arrived at that finding and immediately downed its tools.

7. In the absence of an employee-employer relationship, the court that had jurisdiction to entertain and determine the issues raised in the consolidated petitions was the High Court. The High Court had jurisdiction to determine the question of whether a right or fundamental freedom in the Bill of Rights had been violated, infringed or threatened. Under article 165(d)(i), the High Court had jurisdiction to determine whether any law was inconsistent with or in contravention of the Constitution.

8. The issues raised in the consolidated petitions, especially the issue relating to the constitutionality of section 43(5) of the Elections Act, 2011 were 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. That was jurisdiction flowing directly from the Constitution.

9. The Constitution recognised that there were matters within the exclusive jurisdiction of the High Court on the one hand and those reserved and/or falling within the jurisdiction of the specialised courts contemplated in article 162(2) on the other hand, notwithstanding the fact that the latter courts enjoyed the same status as the High Court.

10. The status of a court was not synonymous with jurisdiction. Although the Employment and Labour Relations Court exercised the same power as the High Court in the performance of its judicial functions, it had specialized jurisdiction and was not the High Court. For want of an employee-employer relationship, the Employment and Labour Relations Court arrogated itself jurisdiction that exceeded that conferred upon it by law, which rendered its decision a nullity *ab initio*.

11. The doctrine of *res judicata* was aimed at bringing finality to litigation and affording parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that had already been determined by a competent court. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundation of the doctrine rested in the public interest for swift, sure and certain justice.

12. There was a striking similarity between the issues identified and determined in the *Charles Omanga and Another vs. Independent Electoral and Boundaries Commission and Another* [2013] eKLR and the issues identified for determination by the trial court in the consolidated petitions regarding the constitutionality of section 43(5) and (6) of the Elections Act, 2011. The issues in the consolidated petitions could be said to be directly and substantially in issue in the *Charles Omanga and Another vs.*

*Independent Electoral and Boundaries Commission and Another* [2013] eKLR that had already been determined by the High Court.

13. Elements that had to be satisfied conjunctively for *res judicata* to be effectively pleaded were
    1. the suit or issue was directly and substantially in issue in the former suit;
    2. that former suit was between the same parties or parties under whom they or any of them claim;
    3. Those parties were litigating under the same title;
    4. the issue was heard and finally determined in the former suit;
    5. the court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.
14. The parties in the *Charles Omanga and Another vs. Independent Electoral and Boundaries Commission and Another* [2013] eKLR and in the consolidated petitions that gave rise to the consolidated appeals were different. The requirements of section 7 of the Civil Procedure Act and some of the elements laid down had not been satisfied. It could not be said that the matters that were before the trial court were *res judicata*. The absence of the defence of *res judicata* notwithstanding, the Employment and Labour Relations Court was without proper jurisdiction to entertain and determine the issues raised in the consolidated petitions before it.
15. For a person to be eligible for election into public office in a general election, the person that sought to be elected must not have been a state officer or other public officer save for the categories of persons to whom the exclusion applied. By enacting section 43(5) and (6) of the Elections Act, 2011, Parliament sought to give full effect to the provisions of articles 137, 99, 180, and 193 of the Constitution.
16. The provisions of sections 43(5) were not hollow. The impartiality of public servants was a cardinal value enshrined in article 232(1)(a) of the Constitution which provided that the public servant and service had to be responsive, prompt, impartial and equitable in the provision of services. How could a public servant espouse those principles if he was allowed to remain in office until the election date? Suppose a Judge who intended to run for an elective post was allowed to sit on the bench and preside over election-related cases until the election date, where was his impartiality? Similarly, how could a Commissioner of the Independent Election and Boundaries Commission serving his last year in office and with the ambition to run for elective office, be allowed to remain in office and oversee an election in which he was a candidate? The absurdity of both situations merely served to show the justifiability of the need for public servants to leave public office within a reasonable time before the election in which they would be candidates.
17. The requirements for neutrality and impartiality of public officers were also provided for in other relevant statutes and regulatory frameworks related to the conduct of public officers. In particular section 23(2) and (3) of the Leadership and Integrity Act, 2012 provided that an appointed State officer or public officer was not to engage in any political activity that could compromise or be seen to compromise the political neutrality of the office subject to any laws relating to elections. Section 12(1) of the Political Parties Act No. 11 of 2011 on the other hand barred public officers from being eligible to be a founding member of a political party, being eligible to hold office in a political party, engaging in political activity that could compromise or be seen to compromise the political neutrality of the person's office, publicly indicate support for or opposition to any political party or candidate in an election. Clause 24 of the Public Service Code of Conduct and Ethics, 2016 provided, *inter alia*, that a public officer was to remain politically neutral during his term of employment.
18. It was necessary for public officers desirous of running for elective posts to resign in good time. The provisions of sections 43(5) and (6) of the Elections Act also sought to promote the principle of good governance and the value of the integrity contemplated under articles 10 (2)(c) of the Constitution.
19. A general election had very strict timelines which political parties, the IEBC, aspirants and other stakeholders had to adhere to in order to have free and fair election. One of the events that preceded a general election was the nomination of candidates by political parties pursuant to the provisions

of section 13 of the Elections Act, 2011. It was only after the nomination process had taken place that the IEBC could proceed to print the necessary ballot papers which contained information on the candidates vying for a particular seat in a particular electoral area. The resignation of public officers at least six months before the general election therefore ensured that the IEBC had sufficient time to undertake its processes and that the calendar of the general election was not disturbed or interrupted unnecessarily.

20. The political and or labour rights of the state or public officers that sought to join elective politics were not absolute rights that could be limited pursuant to the provisions of article 25 of the Constitution. Those rights could be limited by application of relevant laws provided that the limitation was reasonable and justifiable in an open and democratic society based on*, inter alia*, human dignity, equality, and freedom. The limitation of the right to equal treatment as set out in section 43(5) and (6) of the Elections Act, 2011 did not discriminate against state and/or public officers seeking to join elective politics and was reasonable and justifiable.

21. The principle of equality did not mean that every law had to have universal application for all persons who were not by nature, in attainment or circumstances in the same position and the varying needs of different classes of persons required special treatment. The legislature understood and appreciated the need of its own people, that its laws were directed to problems made manifest by experience and that its discriminations were based upon adequate grounds. The rule of classification was not a natural and logical corollary of the rule of equality, but the rule of differentiation was inherent in the concept of equality. Equality meant priority of treatment under parity of conditions. Equality did not connote absolute equality. For a classification to be constitutional it had to rest upon distinctions that were substantial and not merely illusory. The test was whether it had a reasonable basis free from artificiality and arbitrariness embracing all and omitting none naturally falling into a given category.

22. Equality had to be seen as the parity of treatment under the parity of conditions. It was not desirable that state or public officers intending to join elective politics have one leg in public service and another in elective politics. The fact that section 43(6) of the Elections Act listed persons to whom the provision of section 43(5) was not applicable did not in any way afford preferential treatment to those officers. Government functions could not be suspended during an election period and hence the exclusion of persons contemplated under section 43(6) of the Elections Act, 2011 from resigning from public office at least six months before a general election. The provisions of sections 43(5) and (6) of the Elections Act were justifiable and reasonable and were not in contravention of any provisions of the Constitution.

23. Public participation was one of the national values and principles of governance contemplated under article 10(2)(a) of the Constitution. The instant court disagreed with the findings of the trial court that there was no public participation in the enactment of section 43(5) and even 45(6) of the Elections Act, 2011. Section 2 (1)(b) of the Sixth Schedule of the Constitution had effectively suspended the application of article 118 (1)(b) of the Constitution until the first elections for Parliament under the Constitution were conducted and final results announced. The provisions of section 2(1)(b) of the Sixth Schedule of the Constitution were not in conflict with the provisions of article 10(2)(a) of the Constitution. The trial court in interpreting and applying the provisions of section 2(1)(b) of the Sixth Schedule of the Constitution vis-à-vis the provisions of article 10(2)(a) of the Constitution adopted a narrow interpretation as opposed to a purposive approach of the Constitution as contemplated under article 259(1).

24. The transitional provisions contained in the Sixth Schedule of the Constitution were intended to assist in the transition into the new order but were limited in time and in operation and were to remain in force for the period provided in order to achieve the aspirations of Kenyans in moving into the new order. The transitional provisions were as much part of the Constitution and as much an expression of the sovereign will of the people as the main body.

25. The provisions of article 118 (1)(b) of the Constitution having been suspended by operation of the provisions of section 2(1)(b) of the Sixth Schedule to the Constitution, public participation was not a constitutional prerequisite in the enactment of Elections Act, 2011 which was assented to by the President on August 27, 2011, more than one year before the first general election under the Constitution. The determination of the issue of public participation in relation to the enactment of the Elections Act, 2011 was not within the jurisdiction of the Employment and Labour Relations Court contemplated both in the Constitution and under section 12 of the Employment and Labour Relations Court Act, 2011.

*Consolidated appeals allowed.*

***Orders***

i. *Orders issued by the trial court on March 29, 2017 save for the order declaring that section 43(6) of the Elections Act, 2011 was innocent and harmless as it was a replication of the Constitution on the subject were set aside.*
ii. *Each party was to bear its own costs of the appeal and in the consolidated petitions.*

**Citations**

**Cases**

***East Africa;***

1. *Omanga, Charles & another v Independent Electoral and Boundaries Commission & another* Petition 2 of 2012; [2013] eKLR - (Followed)
2. *Kanyangi, Charles Oyoo & 41 others v Judicial Service Commission of Kenya* Petition 81 of 2018 (Formerly High Court Petition 529 of 2017); [2018] eKLR — (Mentioned)
3. *Mong'are v Attorney General & 3 others* [2011] 2 KLR 168 - (Followed)
4. *Independent Electoral & Boundaries Commission v Maina Kiai & 5 others* Civil Appeal 105 of 2017; [2017] eKLR — (Explained)
5. *Owners of Motor Vessel 'Lillian S'v Caltex Oil (Kenya) Limited* [1989] KLR 1 — (Explained)
6. *Republic v Karisa Chengo* Petition 5 of 2015; [2017] eKLR — (Explained)
7. *In the Matter of the Interim Independent Electoral Commission* Constitutional Application No 2 of 2011; [2011] eKLR — (Explained)
8. *Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] 3 KLR 199 — (Explained)
9. *Selle & another v Associated Motor Boat Co Ltd & others* [1968] EA 123 — (Explained)
10. *Nzuki, Sollo v Salaries and Remuneration Commission & 2 others* Constitutional Petition 18 of 2018; [2019] eKLR — (Mentioned)
11. *Koross, William (Legal personal Representative of Elijah CA Koross) v Hezekiah Kiptoo Komen & 4 others* Petition 223 of 2013; [2015] eKLR — (Mentioned)

***South Africa;***

Executive Council of the Western Cape Legislature & others v President of the Republic of South Africa & 40 others (CCT27/95) [1995] ZACC 8; 1995 (10) BCLR 1289; 1995 (4) SA 877 - (Followed)

***India;***

*State of Kerala & another v NM Thomas& others* 1976 AIR 490, 1976 SCR (1) 906 — (Explained)

**Statutes**

***East Africa;***

Civil Procedure Act (cap 21) section 7 — Interpreted

**Texts**

1. Saunders, JB., (Ed) (1989) *Words and Phrases Legally Defined* London: LexisNexis Butterworth's Vol 3 (Page 113)

2. Garner, BA., (Ed) (2014) *Black's Law Dictionary* Thompson West 10th Edn

**Advocates**

1. Mr Charles Mutinda, Deputy Chief Litigation Counsel for the 1st, 2nd, and 3rd appellants respectively in Civil Appeal No 119 of 2017 and for the 6th, 7th, and 8th Respondents in Civil Appeal No 139 of 2017
2. Mr Simiyu for the 1st respondent in the Consolidated Appeals
3. Mrs Maina, for the two appellants in Civil Appeal No 139 of 2017, the 14th and 15th respondents in Civil Appeal No 119 of 2017
4. Mr Isaac Odhiambo for the 5th respondent in Civil Appeal No 119 of 2017, the 13th respondent in Civil Appeal No 119 of 2017
5. Mr Mugumya for the 10th, 11th, 12th and 13th Respondents in Civil Appeal No 139 of 2017 and the 6th, 7th, 8th, and 9th respondents in Civil Appeal No 119 of 2017
6. Mr Mugumya held brief for Mr Samari for the 15th respondent in Civil Appeal No 139 of 2017, the 11th respondent in Civil Appeal No 119 of 2017
7. Mr Mwathe, held brief for Mr Kibe Mungai for the 2nd, 3rd, and 4threspondents in the Consolidated Appeals.

## JUDGMENT

1. This is an appeal from the judgment of the Employment and Labour Relations Court dated March 29, 2017. In his judgment, the trial judge (Marete, J) issued orders, *inter alia*, that section 43(5) of the *Elections Act, 2011* is unconstitutional and without any legal basis or force *ab initio*.

2. The genesis of the matter culminating into this appeal is a petition, to wit, Petition No 1 of 2017 that was filed at the Employment and Labour Relations Court of Kenya at Kericho on January 16, 2017 by one Eric Cheruiyot, the 1st respondent herein. The named respondents in that petition were the Independent Electoral and Boundaries Commission (IEBC), Public Service Commission, Attorney General and the Chief of Staff and the Head of Public Service as the 1st to 4th respondents respectively.

3. The petition by Eric Cheruiyot, who described himself as a registered voter in Kericho County, sought to, inter alia, challenge the constitutionality of section 43(5) and (6) of the *Elections Act, 2011*. The petition was said to be anchored on article 22(1) of the *Constitution of Kenya, 2010* (the Constitution). In filing the petition, the petitioner was aggrieved by a circular dated 1st December 2016 issued by the Chief of Staff and Head of Public Service to all public officers requiring those of them who were intending to vie for any elective position in the 2017 general election to resign at least six months before the general election, pursuant to the provisions of section 43(5) and (6) of the *Elections Act, 2011*.

4. In his petition, the petitioner firstly argued that enactment of section 43(5) and (6) of the *Elections Act, 2011* was not preceded by public participation as contemplated by article 118 of the *Constitution*. Secondly, the fact that section 43(5) and (6) of the *Elections Act, 2011* obligates public servants who intend to contest for any political seat to resign six months before the date of the general election, while some of them remain in office is discriminatory. Thirdly, that the provisions of section 43(5) and (6) confer undue advantage on members of Parliament, members of county assemblies and Governors over other public officers who are expected to terminate their respective contracts of employment by operation of section 43(5) and (6) of the *Elections Act, 2011*. The provisions of that section were said to be in contravention of the rights of public officers who wished to contest in the 2017 general election guaranteed under articles 27, 38, 41(1) 234 and 236(1) of the *Constitution*.

5. The reliefs sought in the petition were, inter alia:

    a) A declaration that section 43(5) and (6) of the *Elections Act, 2011* is unconstitutional;

    b) A declaration that public officers can only leave office to participate in the election process upon dissolution of Parliament and County Assemblies;

    c) A permanent injunction to restrain the respondents either by themselves, servants, agents, employees, assignees, proxies and/or representatives from disqualifying public servants from the next general election for not vacating public office six months to the election date;

    d) An order of mandamus directed at the IEBC to gazette the date for the next general election;

    e) An order of certiorari to quash the circular by the Chief of Staff and Head of public Service dated December 1, 2016; and

    f) Costs of the petition.

6. The petition was filed contemporaneously with an application seeking orders, inter alia, that pending inter parties hearing and determination of the application, the respondents be restrained either by themselves, servants, agents, employees, assignees, proxies, and or representatives from disqualifying public servants from the next general election for not vacating public office six months to the election date.

7. On January 18, 2017, the trial judge issued interim orders as sought. The interim orders set in motion the ground for the filing of the second petition, to wit, Petition No 2 of 2017 before the same court sitting at Kericho. Raymond Kinyua, Emily Thaaro Njuki and Monica Cyombua Gitari, the 1st to 3rd petitioners in the petition had been employed by the County Government of Embu as County Secretary, County Executive Member for Youth Empowerment and Sports and Chief Officer, Department of Livestock and Fisheries respectively.

8. On January 5, 2017and January 6, 2017, the three petitioners, who intended to run for elective positions in the 2017 general election, handed in their respective one-month resignation notices to the Governor, County Government of Embu. The resignation of the petitioners was pursuant to the provisions of section 43(5) of the *Elections Act, 2011*. The resignations were to take effect on or before February 6, 2017.

9. It was alleged that several days after tendering their resignation notices, the appellants became aware of the interim order issued by the Employment and Labour Relations Court at Kericho on January 18, 2017 in Petition No 1 of 2017.

10. On February 7, 2017, the petitioners, relying on the strength of the aforesaid interim court order, wrote separately to the Governor, County Government of Embu, seeking to revoke their respective resignation notices pending the determination of the application before the trial court, but on February 9, 2017the Governor informed the petitioners that their resignation notices had already taken effect and that their former positions had already been filled. It was therefore not possible for them to revoke their resignation notices.

11. The petitioners contended that section 43(5) of the *Elections Act, 2011*, violated their rights and those of potential candidates, which rights are protected under article 38 of the Constitution. It was argued

that the provisions of section 43(5) of the *Elections Act, 2011* violated their rights to equality and protection of law and freedom from discrimination protected under article 27 of the Constitution. The petitioners also argued that by refusing to act on their revocation of resignation as public officers, the County Government of Embu and its Governor violated their rights under articles 27, 28, 41, 47, and 50 of the Constitution.

12. The orders sought by the petitioners with regard to the constitutionality of section 43(5) and (6) of the Elections were similar to those sought by the petitioners in Petition No 1 of 2017.

13. The jurisdiction of the Employment and Labour Relations Court to entertain and determine the issues raised was challenged by the 2nd to 4th respondents in Petition No 1 of 2017 by way of a Notice of Preliminary Objection dated January 27, 2017. It was argued that the matters raised in the petition were matters under article 165 of the Constitution, which the Employment and Labour Relations Court did not have jurisdiction to handle.

14. By a ruling dated February 14, 2017, the trial court held that it had jurisdiction to hear and determine the issues raised in the petition.

15. The petitions were consolidated through an order of the trial court dated February 27, 2017. By an order of the trial court dated March 10, 2017, eight other persons who were said to be public officers and who were likely to be affected by the outcome of the consolidated petitions were joined in the consolidated petition as Interested Parties. The County Government of Bomet and the County Public Service Board-Bomet County were also joined in the consolidated petition as the 7th to 8th respondents respectively.

16. The trial court delivered its judgment in the consolidated petitions on March 29, 2017. The dispositive orders issued by the court included:

    a) A declaration that section 43(5) of the *Elections Act, 2011* is unconstitutional and without any legal basis or force ab initio.

    b) A declaration that section 43(5) of the *Elections Act, 2011* is innocent and harmless. It is a replication of the Constitution on the subject.

    c) A declaration that public officers can only leave office to participate in the election process or nomination for general election at the conclusion of the nomination process for the said general election.

    d) A permanent injunction retraining the IEBC, Public Service Commission, the Attorney General, and the Chief of Staff and Head of Public Service by themselves, servants, agents, employees, assignees, proxies and or their representatives from disqualifying public servants from the 2017 or any other general election for not vacating office six months to election date.

    e) An order of *certiorari* to bring into the Court and quash the letter by the Chief of Staff and Head of Public Service dated December 1, 2017, requiring the resignation from office by public servants seeking elective posts in the 2017 general election.

    f) The letter by the Governor, County Government dated February 9, 2017, declining the revocation of the resignation notices by the petitioners in petition 2 of 2017 is illegal and contravenes their rights enshrined in articles

27, 28, 41, 47, and 50 of the Constitution and an order of certiorari to quash the said letters dated February 9, 2017was issued.

17. The Public Service Commission, the Attorney General, and the Chief of Staff and Head of Public service, all aggrieved and dissatisfied by the decision of the trial court filed a joint appeal before this court, to wit, Nakuru Civil Appeal No 119 of 2017 on August 14, 2017. The County Government of Embu and its Governor also dissatisfied by the decision filed a separate appeal before this court, Nakuru Civil Appeal No 139 of 2017.

18. The grounds of appeal raised in the two appeals are cross-cutting. The same can be summarized as follows:

    a) That the learned judge acted without jurisdiction in purporting to exercise a jurisdiction reserved for the High Court under article 165(3)(b) and (d) of the *Constitution*.

    b) The learned judge erred in law and in fact by failing to find the issue of constitutionality of section 43(5) and (6) of the *Elections Act, 2011* had already been determined by a court of competent jurisdiction in *Charles Omanga & another v Independent Electoral and Boundaries Commission & another* [2013] eKLR and was therefore *res judicata*.

    b) That the learned judge erred in law in finding that there was no public participation in the enactment of section 43(5) and (6) of the *Elections Act, 2011* despite evidence placed on record that the requirement for public participation under article 118 of the Constitution had been suspended by dint of section 2(1)(b) of the Sixth Schedule of the Constitution until the first elections of 2013.

    c) That the learned judge erred in law by applying wrong principles of constitutional and statutory interpretation thereby reaching an erroneous finding that section 43(5) and (6) of the *Elections Act, 2011* was unconstitutional.

    d) That the learned judge erred in law and in fact by finding that an employee can retract a resignation notice tendered voluntarily and acted upon by an employer.

19. This court (GBM Kariuki, Sichale & Kantai, JJA) on September 27, 2017 granted orders of stay of execution of the trial court's judgment pursuant to an application dated May 30, 2017 by the County Government of Embu and its Governor in Nyeri Civil Application No 62 of 2017 (UR 43/2017).

20. On February 15, 2020when Nakuru Civil Appeal No 139 of 2017 came up for hearing, this court (Makhandia, Gatembu & Sichale, JJA) by consent of the parties ordered that the appeal be consolidated with Nakuru Civil Appeal No 119 of 2017.

21. The appeals as consolidated on 15th February came up for hearing before us on 24th January 2022. At the hearing, Mr Charles Mutinda, Deputy Chief Litigation Counsel, appeared for the 1st, 2nd, and 3rd appellants respectively in Civil Appeal No 119 of 2017 and for the 6th, 7th, and 8th respondents in Civil Appeal No 139 of 2017. Mr Simiyu, learned counsel, appeared for Eric Cheruiyot, the 1st respondent in the consolidated appeals. Mrs Maina, learned counsel, appeared for the two appellants in Civil Appeal No 139 of 2017, the 14th and 15th respondents in Civil Appeal No 119 of 2017,

while Mr Isaac Odhiambo appeared for the 5th respondent in Civil Appeal No 119 of 2017, the 13th respondent in Civil Appeal No 119 of 2017. Mr Mugumya was present for the 10th, 11th, 12th and 13th respondents in Civil Appeal No 139 of 2017 and the 6th, 7th, 8th, and 9th respondents in Civil Appeal No 119 of 2017. He also held brief for Mr Samari for the 15th respondent in Civil Appeal No 139 of 2017, the 11th respondent in Civil Appeal No 119 of 2017. Mr Mwathe, learned counsel, held brief for Mr Kibe Mungai for the 2nd, 3rd, and 4th respondents in the consolidated appeals.

22. Highlighting his submissions, Mr Mutinda urged us to find that pursuant to the provisions of articles 165(3)(d) of the *Constitution*, the Employment and Labour Relations Court did not have jurisdiction to entertain the consolidated petitions. He relied on the decision of the Supreme Court in *Samuel Kamau Macharia and another v. Kenya Commercial Bank Limited & 2 others* [2012] eKLR where it was held, inter alia, that the Constitution provides for the jurisdiction of a court of law and the court cannot expand its jurisdiction through judicial craft or innovation. Counsel also relied on the case of *Republic v. Karisa Chengo and 2 others* [2017] eKLR to emphasize the separate roles played by the High Court and courts of equal status and their distinct jurisdiction.

23. On the question whether the issue raised in the consolidated petitions touching on the constitutionality of section 43(5) of the *Elections Act, 2011* was *res judicata*, counsel submitted that the issue had already been determined by the High Court in Charles Omanga & another v Independent Electoral & Boundaries Commission & Others, (*supra*). Therefore, pursuant to the provisions of section 7 of the *Civil Procedure Act*, the trial court was barred from entertaining the same issue again as it was *res judicata*.

24. Regarding constitutionality of section 43(5) of the *Elections Act, 2011*, counsel submitted that the provisions of section 43(5) of the *Elections Act, 2011* ought to be read together with articles 10, 99(2), 193(2) (a) and 232 of the *Constitution* as well as section 23(3) of the *Leadership and Integrity Act* and section 5 of the *Political Parties Act*. Counsel further submitted that the provisions of section 43(5) of the *Elections Act, 2011* were not discriminatory but merely stipulated different treatment of appointed and elected leaders on the issue of their resignation before offering themselves for competitive politics.

25. It was also submitted that the requirement for public participation had been suspended by section 2(1)(b) of the Sixth Schedule of the Constitution at the time Parliament enacted the *Elections Act, 2011*.

26. Mrs Maina reiterated to a large extent the submissions of the three appellants in Civil Appeal No 119 of 2017. Learned counsel submitted on a different issue of the resignation notices that had been issued by the 2nd to 4th respondents in the consolidated appeals which she asked us to find had already taken effect by the time the 2nd to 4th respondents wrote their respective revocation letters in respect of the resignation notices. She faulted the trial judge for failing to hold that the resignation notices were not capable of retraction.

27. Mr Odhiambo on behalf of the IEBC chose to rely entirely on the submissions made by Mr Mutinda and Mrs Maina respectively.

28. Mr Simiyu on behalf of the 1st respondent in the consolidated appeals argued that the issue of public participation had not been raised in the Charles Omanga petition (*supra*) and therefore the issues which the two courts were invited to determine regarding constitutionality of section 43(5) of the *Elections Act, 2011* were distinct. The issues raised in the consolidated petitions were therefore not *res judicata*.

29. On the jurisdiction of the trial court to entertain the consolidated petitions, counsel argued that his client's petition was anchored on the provisions of article 22(1) of the Constitution which makes it open for any person to institute court proceedings. Counsel submitted that a reading of article 22(1)

and article 23 can only lead to the conclusion that the trial court had jurisdiction to entertain the consolidated petitions.

30. Counsel conceded that his client did not have an employer-employee relationship with any of the respondents or with any public entity but reiterated that he was entitled to bring his petition under article 22(1) of the *Constitution*.

31. Counsel for the 2nd to 4th respondents did not highlight the written submissions dated February 23, 2021. In their written submissions, the 2nd to 4th respondents argues that the dispute between the respondents and the appellants was anchored on an employment relationship and that their claim arose from the alleged violation of their fundamental rights to fair labour practices, protection of the law et al. For this reason, therefore, the Employment and Labour Relations Court had competent jurisdiction to hear the determine the issues raised in the consolidated petition and more so the issue of the constitutionality of section 45(3) of the *Elections Act, 2011*. Reliance was placed on the cases of *Sollo Nzuki v Salaries and Remuneration Commission & 2 others* [2019] eKLR and *Charles Oyoo Kanyangi & 41 others v Judicial Service Commission of Kenya* [2018] eKLR to buttress this argument.

32. On the constitutionality of section 45(3) of the *Elections Act, 2011*, the 2nd to 4th respondents contended that the same is unconstitutional for contravening article 24 (1) and (2) of the *Constitution* by obligating a seven-month resignation period without any reasonable and justifiable bases thereby limiting the respondent's rights under article 41 read with articles 27 and 38 of the Constitution.

33. Mr Mugumya on his part indicated that his clients would be fully adopting the submissions by the 1st respondent.

34. In a brief rejoinder, Mr Mutinda reiterated that the requirement for public participation by Parliament in enacting the *Elections Act* had been suspended by section 2(1)(b) of the Sixth Schedule of the *Constitution*. Mrs Maina on her part by way of a rejoinder submitted that the issue of public participation was not within the jurisdiction of the trial court.

35. We have considered the record, submissions by counsel as well as the law. Our jurisdiction as a first appellate court is to reappraise the evidence adduced before the trial court in its entirety and make our own conclusion. See *Selle & another v Associated Motorboat Co Ltd & others* [1968] EA 123. Thefollowing four issues commend themselves to us for determination in this appeal:

    i. Whether the Employment and Labour Relations Court had jurisdiction to entertain and determine the matters raised in the consolidated petitions;

    ii. Whether the proceedings before the trial court were *res judicata*;

    iii. Whether section 43(5) of the *Elections Act, 2011* is unconstitutional; and

    iv. Whether the trial judge made the correct findings on the requirement of public participation during the enactment of the *Elections Act, 2011*.

36. Jurisdiction is everything, it is what gives a court or a tribunal the power, authority and legitimacy to entertain a matter before it. John Beecroft Saunders in " Words and Phrases Legally Defined", Volume 3 at Page 113 defines court jurisdiction as follows:

> " By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of the matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction

or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."

37. The locus classicus on jurisdiction is the celebrated case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1. Nyarangi, JA relying, inter alia, on the above cited treatise by John Beecroft Saunders held as follows:

> "...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 downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

38. A decision made by a court of law without proper jurisdiction amounts to a nullity ab initio, and such a decision is amenable to setting aside ex debito justitiae.

39. The Supreme Court *In the Matter of Interim Independent Electoral Commission*[2011] eKLR, Constitutional Application No 2 of 2011 held that jurisdiction of courts in Kenya is regulated by the Constitution, statute, and principles laid out in judicial precedent. The Supreme Court at paragraph 30 of its decision held in part as follows:

> "...a court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of Legislation is clear and there is no ambiguity."

40. In Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR, Application No 2 of 2011, the Supreme Court reiterated its holding on a court's jurisdiction. In the matter of the Interim Independent Electoral Commission (supra) at paragraph 68 of its ruling, the Supreme Court held as follows:

> "(68). 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 itself jurisdiction exceeding that which is conferred upon it by law."

41. Article 162 of the Constitution provides for the establishment of the Employment and Labour Relations Court and its jurisdiction thereof. It reads as follows:

> "162. (1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts mentioned in clause (2).
>
> 2. Parliament shall establish courts with the status of the High Court to hear and determine dispute 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).

4. ...."

42. It is pursuant to the provisions of article 162(2) of the Constitution that Parliament enacted the *Employment and Labour Relations Court Act, 2011*.

43. The jurisdiction of the Employment and Labour Relations Court is provided for under section 12 of the *Employment and Labour Relations Court Act, 2011*. The provisions of section 12(1) of this Act provides as follows:

" 12.

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

a. disputes relating to or arising out of employment between and employer and an employee;

b. disputes between an employer and a trade union;

c. disputes between employers' organization and a trade union's organisation;

d. disputes between trade unions;

e. disputes between employer organisations;

f. disputes between an employer's organization and trade union;

g. disputes between a trade union and a member thereof;

h. disputes between and employer's organization 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." [Emphasis supplied]

44. Our interpretation of the provisions of section 12 of the *Employment and Labour Relations Court Act* is that the Employment and Labour Relations Court has jurisdiction to entertain any dispute or any contemplated dispute under section 12(1) but the dispute between the parties must be related to their employment and/or touching on labour relations. This is therefore to mean that the jurisdiction of the Employment and Labour Relations Court is not limited to the determination of disputes arising out of a contract of employment between an employee and an employer, the court can also determine any

constitutional violations of the rights of any party arising from an employee-employer relationship. However, for the court to entertain a petition premised on the breach of a party's fundamental rights under the Constitution, the alleged constitutional breach must be ancillary and incidental to the matters contemplated under section 12 of the Act. Our view is fortified by the preamble to the *Employment and Labour Relations Court Act, 2011* which provides that it is

> "An Act of Parliament to establish the Employment and Labour Relations Court to hear and determine disputes relating to employment and labour relations and for connected purposes."

45. In the two consolidated petitions filed before the Employment and Labour Relations Court at Kericho, none of the petitioners demonstrated an existing employee-employer relationship with any of the respondents or with any public entity. Eric Cheruiyot, the 1st petitioner in the consolidated petitions, described himself as a registered voter in Kericho County. At the hearing of this appeal, Mr Simiyu, learned counsel for Eric Cheruiyot conceded that indeed his client did not have an employee-employer relationship with any of the respondents but insisted that his client had a right under article 22(1) of the Constitution to institute the petition and that the same articleconferred jurisdiction upon the Employment and Labour Relations Court to hear and determine the petition.

46. The 2nd, 3rd and 4th petitioners in the consolidated petitions (2nd to 4th respondents in the consolidated appeals) had separately tendered their one-month resignation notices from their respective positions which they held in the County Government of Embu. Their resignation notices were given in conformity with the provisions of section 43(5) of the *Elections Act, 2011*. Their respective resignation notices dated January 5, 2017 and 6th January were accepted by the Governor, County Government of Embu; the respondents were asked to hand over their respective dockets to their appointed successors; they were cleared, and their respective dues processed. The resignation notices were to take effect on 5th February 2017 and on 6th February 2017 respectively. On February 7, 2017 when the resignations were to take effect, the respondents sought to revoke their separate letters of resignation upon learning of the interim court order issued by the trial court on 18th January 2017 barring the IEBC from disqualifying public servants from participating in the 2017 general election for not vacating office six months prior to the general election. By this time the one-month notice period had already lapsed, meaning that their respective resignation notices had already crystallized.

47. A notice of resignation is basically a notice of termination of employment, given by an employee to the employer. It is a unilateral act. The Black's Law Dictionary (tenth Edition) defines resignation as follows:

> " The act or an instance of surrender or relinquishing an office, right or claim. A formal notification of relinquishing an office or position, an official announcement that one has decided to leave one's job or organization, often in the form of a written statement."

48. There was no evidence placed before the trial judge to show that the resignation by the 2nd to 4th respondents was involuntary. The 2nd to 4th respondents resigned voluntarily in compliance with a section of the law that was in force at the time. The 2nd to 4th respondents having resigned, their resignations having been formally accepted, their dues paid, and their respective positions filled meant that their resignation notices had already crystallized. There was nothing to go back to. The employee-employer relationship between the 2nd to 4th respondents and the County Government of Embu had already come to an end. The Employment and Labour Relations Court ought to have arrived at this finding and immediately downed its tools.

49. 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.

50. 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).

51. 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."

52. This court in the Karisa Chengo case (supra) held that status of a court is not synonymous to jurisdiction. In this context therefore, although the Employment and Labour Relations Court exercises the same power as the High Court in performance of its judicial functions, it has specialized jurisdiction and is not the High Court. It is important to point out that the finding of this court in the Karisa Chengo case was upheld by the Supreme Court.

53. Therefore, for want of an employee-employer relationship, we find and hold that the Employment and Labour Relations Court arrogated itself jurisdiction that exceeded that conferred upon it by law, which renders its decision a nullity ab initio.

54. The above finding on the jurisdiction of the Employment and Labour Relations Court would have been sufficient to dispose of the consolidated appeals. However, owing to the gravity of the remaining issues and the public interest touching on the consolidated appeals, we feel inclined to determine each of the remaining issues.

55. It was argued in these consolidated appeals that the question whether section 43(5) and (6) of the *Elections Act*, 2011 was unconstitutional had already been determined by the High Court *vide* Charles Omanga and another v Independent Electoral and Boundaries Commission and another (supra) and was therefore *res judicata*.

56. The doctrine of *res judicata* as a common law doctrine finds anchorage in our law under section 7 of the *Civil Procedure Act* which provides as follows:

> "No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

57. The doctrine of res judicata is aimed at bringing finality to litigation and affording parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundation of this doctrine thus rests in the public interest for swift, sure and certain justice. This was a holding by this court in Independent Electoral and Boundaries Commission v. Maina Kiai & 5 others [2017] eKLR. See also *William Koross v Hezekiah Kiptoo Komen & 4 others* [2015] eKLR.

58. In the Charles Omanga petition, which was heard and determined by Lenaola, J (as he then was), the two petitioners were identified as Charles Omanga and Patrick Njuguna respectively. The respondents were the Independent Electoral and Boundaries Commission and the Hon Attorney General as the 1st and 2nd respondents respectively. The Union of Kenya Civil Servants was an Interested Party. One of the issues that had been raised in the petition and which the court was called upon to determine was:

> "Whether the provisions of section 43(5) of Election Act, 2011 requiring the resignation of State officers seven (7) months prior to the elections while at the same time excluding other categories of State or public officers is discriminatory, accords an unfair advantage to some, breaches the requirement for fairness, equality and proportionality and therefore unconstitutional."

59. The learned judge in a judgment dated 2nd August 2012 held that the requirement that public officers seeking elective posts should resign from public service seven months before the date of elections was reasonable and, in this connection, therefore, that the provisions of section 43(5) and (6) were not in contravention of the Constitution. The petition was accordingly dismissed.

60. In the consolidated petitions giving rise to these consolidated appeals, one of the issues identified by the trial judge for determination was whether section 43(5) of the *Elections Act, 2011* and the period of six months for resignation of public officers intending to contest in the general election is justifiable, reasonable and rational under the Constitution. Closely related to this issue was whether section 43(5) is discriminatory or a limitation of a public officer's rights under article 27, 38 and 41 of the Constitution.

61. There is a striking similarity between the issues identified and determined by Lenaola, J in the Charles Omanga petition and the issues identified for determination by the trial judge in the consolidated petitions regarding the constitutionality of section 43(5) and (6) of the *Elections Act, 2011*. The issues in the consolidated petitions can therefore be said to be directly and substantially in issue in the Charles Omanga petition that had already been determined by the High Court.

62. This court in Independent Electoral & Boundaries Commission v Maina Kiai & 5 others (supra) put forth several elements that must all be satisfied conjunctively for *res judicata* to be effectively pleaded. These are:

a) The suit or issue was directly and substantially in issue in the former suit;

b) That former suit was between the same parties or parties under whom they or any of them claim;

c) Those parties were litigating under the same title;

d) The issue was heard and finally determined in the former suit;

e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.

63. The parties in the Charles Omanga petition and in the consolidated petitions that gave rise to the consolidated appeals are different. The petitioners in the consolidated petitions were Eric Cheruiyot, Raymond Kinyua, Emily Thaara Njuki and Monica Cyombua Gitari as the 1st to 4th petitioners respectively. The Public Service Commission, the Chief of Staff and Head of Public Service, Embu County Government, the Governor-Embu County, County Government of Bomet, County Public Service Commission Board-Bomet County who were the 2nd, 4th, 5th, 6th, 7th, and 8th respondents in the consolidated petitions were not parties in the Charles Omanga petition. In addition, the consolidated petitions had eight Interested Parties who were not parties in the Charles Omanga petition.

64. The requirements of section 7 of the *Civil Procedure Act* and some of the elements laid down by this court in the Independent Electoral and Boundaries Commission v Maina Kiai & 5 others (supra) have not been satisfied. Therefore, it cannot be said that the matters that were before the trial court were res judicata. We however hasten to reiterate that the absence of the defence of res judicata notwithstanding, the Employment and Labour Relations Court was without proper jurisdiction to entertain and determine the issues raised in the consolidated petitions before it.

65. The trial court had been asked to make a declaration that section 43(5) of the *Elections Act, 2011* was inconsistent with and violates the rights of the 1st to 4th respondents and other public officers seeking elective office to fair labour practice enshrined in article 41 of the Constitution.

66. The trial judge made a finding that section 43(5) of the *Elections Act, 2011* was unjustifiable, irrational, most unreasonable and oppressive. The learned judge observed in the impugned judgment as follows:

> " The rights of public servants under article 38 guarantees them equal political rights with other citizenry and this must be honoured. Article 41 rights are equally the entitlement of public servants and any law that purports to interfere with this must pass the test of reasonableness, justification and rationality. This is not demonstrated by the respective cases of the respondents. Neutrality and political activity by public servants is not enough justification for the lockout envisaged by section 43(5)...The hardship of the disqualification for public servants seeking elective positions was intended to be mitigated by Parliament in its legislation as directed by article 82 of the Constitution. It was not anticipated that Parliament would enhance this disqualification by coming out with legislation that is unfriendly and limiting to the enjoyment of fundamental rights of public servants."

67. Section 43(5) of the *Elections Act, 2011* provides as follows:

> " 43.
>
> (5) A public officer who intends to contest an election under this Act shall resign from public office at least six months before the date of the election."

68. Section 43(6) of the *Elections Act, 2011* provides the category of persons to whom the provisions of section 43(5) of the *Elections Act, 2011* do not apply. They include the President, the Prime Minister, and the Deputy President, a Member of Parliament, a county governor, a deputy county governor and a member of county assembly.

69. To understand the import of section 43(5) of the *Elections Act, 2011*, it is necessary that we examine the relevant constitutional provisions regarding the qualification for election to a public office. Article 137(2)(b) of the Constitution provides that a person is not qualified for nomination as a presidential candidate if the person is a public officer or is acting in any State or other public office. The provisions of this clause do not apply to the President, Deputy President or a member of Parliament.

70. Article 99(2)(a) of the Constitution provides that a person is disqualified from being elected as a member of Parliament if the person is a State officer or public officer other than a member of Parliament. Article 180(2) of the Constitution provides that to be eligible for election as a County Governor, a person must be eligible for election as a Member of County Assembly. The qualification for election as a member of County Assembly is provided for in article 193 of the Constitution. Article 193(2)(a) provides that a person is disqualified from being elected as a member of county assembly if the person is a State officer or other public officer, other than a member of a county assembly.

71. A reading of the above provisions makes it abundantly clear that for a person to be eligible for election into public office in a general election, the person seeking to be elected must not be a State Officer or other public officer save for the categories of persons to whom the exclusion applies. In our view, by enacting the *Elections Act, 2011* and more specifically section 43(5) and (6) thereof, Parliament sought to give full effect to the provisions of articles 137, 99, 180, and 193 of the Constitution.

72. The provisions of sections 43(5) are not hollow Lenaola, J in the Charles Omanga petition (supra) observed as follows at paragraph 26 of his judgment:

> " 26. I also wish to state the impartiality of public servants is a cardinal value enshrined in article 232(1)(a) of the Constitution which provides that the public servant and service must be responsive, prompt, impartial and equitable in the provision of services. How can a public servant espouse those principles if he is allowed to remain in office until the election date?
>
> Suppose a Judge who intends to run for an elective post (it is his right) is allowed to sit on the bench and preside over election related cases until the election date, where is his impartiality? Similarly, how can a Commissioner of the Independent Election and Boundaries Commission serving his last year in office and with ambition to run for elective office, be allowed to remain in office and oversee an election in which he is a candidate? The absurdity of both situations merely serves to show the justifiability of the need for public servants to leave public office within a reasonable time before the election in which they will be candidates."

73. The requirements for neutrality and impartiality of public officers are also provided for in other relevant statutes and regulatory framework related to the conduct of public officers. Section 23(2) and (3) of the *Leadership and Integrity Act, 2012* provides that:

> " 23 (2) An appointed State officer or public officer shall not engage in any political activity that may compromise or be seen to compromise the political neutrality to the office subject to any laws relating to elections.
>
> (3) Without prejudice to the generality of subsection (2) a public officer shall not-
>
> a. engage in the activities of any political candidate or act as an agent of a political party or a candidate in an election.
>
> b. publicly indicate support for or opposition against any political party or candidate participating in an election."

74. Section 12(1) of the *Political Parties Act* No 11 of 2011 on the other hand bars public officers from being eligible to be a founding member of a political party, being eligible to hold office in a political party, engaging in political activity that may compromise or be seen to compromise the political neutrality of the person's office, publicly indicate support for or opposition to any political party or candidate in an election. Clause 24 of the Public Service Code of Conduct and Ethics, 2016 provides, inter alia, that a public officer shall remain politically neutral during his term of employment.

75. The importance of political neutrality and impartiality of public officers during the term of employment cannot be overemphasized. We therefore fully agree with the findings of Lenaola, J in the Charles Omanga petition on the necessity for public officers desirous of running for elective posts to resign in good time. The provisions of sections 43(5) and (6) also seek to promote, inter alia, the principle of good governance and the value of the integrity contemplated under articles 10(2)(c) of the Constitution.

76. It is also not lost on us that a general election has very strict timelines which political parties, the IEBC, aspirants and other stakeholders must adhere to in order to have free and fair election. One of the events that precedes a general election is the nomination of candidates by political parties pursuant to the provisions of section 13 of the *Elections Act, 2011*. It is only after the nomination process has taken place that the IEBC can proceed to print the necessary ballot papers which contain information on the candidates vying for a particular seat in a particular electoral area. The resignation of public officers at least six months before the general election therefore ensures that the IEBC has sufficient time to undertake its processes and that the calendar of the general election is not disturbed and/or interrupted unnecessarily.

77. An argument was made before the trial court that the provisions of section 43(5) and (6) of the *Elections Act, 2011* were discriminatory in the sense that they require all public officers running for elective posts to resign before six months to a general election, save for those contemplated under section 43(6); that to this extent section 43(5) and (6) of the *Elections Act, 2011* contravenes the 1st to 4th respondents' rights to equality and protection of the law and freedom from discrimination guaranteed under article 27 and qualified under article 24 of the Constitution.

78. Article 24(1) of the Constitution provides that a right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom and taking into account the relevant factors highlighted under this article. Article 25 on the other hand provides

the specific rights and fundamental freedoms that shall not be limited despite any other provisions to the Constitution.

79. Our reading of articles 24 and 25 of the Constitution yields the interpretation that the political and or the labour rights of the State and/or public officers seeking to join elective politics are not absolute rights that cannot be limited pursuant to the provisions of article 25 of the Constitution. These rights can be limited by application of relevant laws provided that the limitation is reasonable and justifiable in an open and democratic society based on, inter alia, human dignity, equality, and freedom. In our view, the limitation of the right to equal treatment as set out in section 43(5) and (6) of the *Elections Act, 2011* does not discriminate against State and/or public officer seeking to join elective politics and is therefore reasonable and justifiable.

80. The principle of equality was espoused by Khanna, J in the Indian case of State of Kerala & another v NM Thomas & others 1976 AIR 490, 1976 SCR (1)906 thus:

> " The principle of equality does not mean that every law must have universal application for all persons who are not by nature, attainment or circumstances in the same position and the varying needs of different classes of persons requires special treatment. The legislature understands and appreciates the need of its own people, that its Laws are directed to problems made manifest by experience and that its discriminations are based upon adequate grounds.
>
> The rule of classification is not a natural and logical corollary of the rule of equality, but the rule of differentiation is inherent in the concept of equality. Equality means priority of treatment under parity of conditions. Equality does not connote absolute equality. A classification in order to be constitutional must rest upon distinctions that are substantial and not merely illusory. The test is whether it has a reasonable basis free from artificiality and arbitrariness embracing all and omitting none naturally falling into category." [Emphasis added]

81. We adopt the exposition on the principle of equality by Khanna, J. Equality must be seen as the parity of treatment under parity of conditions. It is not desired that State and/or public officers intending to join elective politics have one leg in public service and another in elective politics. The fact that section 43(6) of the *Elections Act* lists persons to whom the provisions of section 43(5) do not apply does not in any way afford preferential treatment to those officers. We agree with Lenaola, J in *Charles Omanga* petition (supra) that Government functions cannot be suspended during an election period and hence the exclusion of persons contemplated under section 43(6) of the *Elections Act, 2011* from resigning from public office at least six months before a general election.

82. Our view therefore is that the provisions of sections 43(5) and 6 are justifiable and reasonable and are not in contravention of any provisions of the Constitution.

83. The fourth issue for our determination is whether the debate and enactment of section 43(5) and (6) of the *Elections Act, 2011* was preceded by public participation as contemplated by article 118 of the Constitution. Public participation is one of the National Values and Principles of Governance contemplated under article 10(2)(a) of the Constitution. Article 10(2) provides as follows:

> " 10. (2) The national values and principles of governance include-
>
> (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people."

84. Article 118 of the Constitution provides for public access and participation in parliamentary business which includes the legislative function. The article provides:

> " 118 (1) Parliament shall-
>
> (a) conduct its business in an open manner, and its sittings and those its committees shall be open to the public; and
>
> (b) facilitate public participation and involvement in the legislative and other business of Parliament and its committees.
>
> (2) Parliament may not exclude the public, or any media, from any sitting unless in exceptional circumstances the relevant Speaker had determined that there are justifiable reasons for the exclusion."

85. The argument by the 1st to 3rd appellants before the trial court was that the provisions of article 118(1)(b) of the Constitution at the time the *Elections Act, 2011* was being enacted had been suspended by the provisions of section 2 (1)(b) of the Sixth Schedule of the Constitution on Transitional and Consequential Provisions. The trial court noted that this argument had been countered by an argument by the 1st to 4th respondents in this appeal that article 10(2)(a) of the Constitution placed an obligation on Parliament to partake in public participation in the enactment of *Elections Act, 2011*. In the end, the trial judge held as follows:

> "I therefore agree with the petitioners' case and submissions that there was no public participation in the enactment of section 43(5) and even 45(6) of the *Elections Act, 2011*. It therefore lacks any iota of Constitutionality and I hold as such."

86. We respectfully disagree with the findings of the trial judge on this issue. Section 2 (1)(b) of the Sixth Schedule on Transitional and Consequential Provisions provides as follows:

> "2(1) The following provisions of this Constitution are suspended until the final announcement of all the results of the first elections for Parliament under this Constitution-
>
> (a) ...;
>
> (b) Chapter Eight, except that the provisions of the Chapter relating to the election of the National Assembly and the Senate shall apply to the first general elections under this Constitution."

87. It is clear that the provisions of section 2(1)(b) of the Sixth Schedule of the Constitution had effectively suspended the application of article 118(1)(b) of the Constitution until the first elections for Parliament under the 2010 Constitution were conducted and final results announced. The provisions of section 2(1)(b) of the Six Schedule of the Constitution are not in conflict with the provisions of article 10(2)(a) of the Constitution. We find that the trial judge in interpreting and applying the provisions of section 2(1)(b) of the Sixth Schedule of the Constitution *vis-à-vis* the provisions of article 10(2)(a) of the Constitution adopted a narrow interpretation as opposed to a purposive approach of the Constitution as contemplated under article 259(1) of the Constitution.

88. In Dennis Mogambi Mong'are v Attorney General & 3 others [2011] eKLR, the High Court expressed itself as followson the transitional provisions:

> " The transitional provisions contained in the Sixth Schedule are intended to assist in the transition into the new order but are limited in time and in operation and are to remain in force for the period provided in order to achieve the aspirations of Kenyans in moving into the new order. The transitional provisions are as much part of the Constitution and as much an expression of the Sovereign will of the people as the main body." [Emphasis added]

89. In Executive Council of the Western Cape Legislature & others v President of the Republic of South Africa & 40 Others (CCT27/95) [1995], the South African Constitutional Court expressed itself as follows on transitional provisions:

> "...Section 232(4) is not conclusive on the issue of the exact status of the Constitutional Principles in relation to other provisions in the current Constitution. The section is of general application to all Schedules to the Constitution. It ensures that they are treated for all purposes as if they formed part of the main body of the Constitution, and makes it clear that they do not have a lesser status than provisions located elsewhere in the Constitution." [Emphasis added]

90. The provisions of article 118(1)(b) of the Constitution having been suspended by operation of the provisions of section 2(1)(b) of the Sixth Schedule to the Constitution, it is our view that public participation was not a constitutional prerequisite in the enactment of *Elections Act, 2011* which was assented to by the President on August 27, 2011, more than one year before the first general election under the new Constitution.

91. The above finding notwithstanding, it is clear in our minds beyond any peradventure that the determination of the issue of public participation in relation to the enactment of the *Elections Act, 2011* was not within the jurisdiction of the Employment and Labour Relations Court contemplated both in the Constitution and under section 12 of the *Employment and Labour Relations Court Act, 2011*.

92. For all the above reasons, we find that the consolidated appeals are merited and are hereby allowed as prayed. We accordingly set aside the orders issued by the trial court on March 29, 2017 save for the order declaring that section 43(6) of the *Elections Act, 2011* is innocent and harmless as it is a replication of the Constitution on the subject. Since these consolidated appeals involve issues of great public interest and importance, we order that each party shall bear its own costs of the appeal and in the consolidated petitions. Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 8TH DAY FEBRUARY, 2022.**

**D. K. MUSINGA (P)**

**.....**

**JUDGE OF APPEAL**

**W. KARANJA**

**.....**

**JUDGE OF APPEAL**

**A. K. MURGOR**

**.....**

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**