



**Odongo v Clerk, Nakuru County Assembly & 5 others (Civil Appeal (Application)
E001 of 2023) [2023] KECA 1554 (KLR) (15 December 2023) (Ruling)**

Neutral citation: [2023] KECA 1554 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL (APPLICATION) E001 OF 2023
MSA MAKHANDIA, FA OCHIENG & WK KORIR, JJA
DECEMBER 15, 2023**

BETWEEN

KENNETH ODONGO APPLICANT

AND

THE CLERK, NAKURU COUNTY ASSEMBLY 1ST RESPONDENT

THE SPEAKER, NAKURU COUNTY ASSEMBLY 2ND RESPONDENT

COUNTY ASSEMBLY OF NAKURU 3RD RESPONDENT

**NAKURU COUNTY GOVERNMENT PUBLIC SERVICE BOARD 4TH
RESPONDENT**

THE COUNTY GOVERNMENT OF NAKURU 5TH RESPONDENT

GOVERNOR, NAKURU COUNTY GOVERNMENT 6TH RESPONDENT

(Being an application for certification and leave to appeal to the Supreme Court of Kenya from the Judgment of the Court of Appeal at Nakuru (Sichale, Ochieng & Achode, JJ. A) dated 14th April, 2023 in Civil Appeal No. E136 of 2022)

RULING

1. The application before us is dated 28th April, 2023. The application is brought under Article 163(4) of *the Constitution*, rules 24 and 26 of the *Supreme Court Rules* and rule 40 of the *Court of Appeal Rules*. The applicant prays for orders that:
 - a) There be a stay of proceedings and the dismissal of Nakuru ELRC Petition No. E017 of 2022; and Nakuru ELRC Petition No. E001 of 2023 pending the hearing and determination of this application and the intended appeal.



- b). Certification of Nakuru CACA No. 136 of 2022 as being of great public interest and grant leave to the applicant to appeal to the Supreme Court.
 - c). Costs abide the outcome of the intended appeal.
2. The applicant's affidavit supports the application, which is based on the following grounds:
- a) On or about 29th October 2022 the 6th respondent nominated 21 persons for appointment to the position of chief officer of the 5th respondent in exercise of her powers under Section 45 of the [County Governments Act](#). The names were then forwarded to the 3rd respondent for approval.
 - b). Following a recruitment process conducted by the 4th respondent, which process was unconstitutional, a sham, and a nullity, the 6th respondent nominated people whose names were in the list recommended by the 4th respondent while other nominees came from nowhere.
 - c). The 3rd respondent advertised for approval hearings on 14th to 17th November 2022 in blatant violation of statutory timelines stipulated under Section 7 of the [Public Appointments \(County Assemblies Approvals\) Act](#), which requires such notice to be issued at least 7 days before the approval hearing and published in at least two dailies of national circulation.
 - d). The applicant instituted Nakuru ELRC Petition No. E017 of 2022 as a resident of Nakuru and in the interest of the public to protest the illegalities of the 3rd, 4th, and 6th respondents; and for the nominations to be quashed.
 - e). The respondents raised a preliminary objection because the ELRC lacked the requisite jurisdiction as the matters in question were not employment in nature; the applicant lacked the locus standi to institute the suit as he was not an employee; and the applicant had not exhausted the dispute resolution mechanisms contemplated under Sections 77 and 88 of the [County Governments Act](#) and Section 7(10) of the [Public Appointments \(County Assemblies Approvals\) Act](#).
 - f). The preliminary objection was dismissed on 29th November 2022. Aggrieved, the 1st, 2nd, and 3rd respondents lodged CACA 136 of 2022.
 - g). The appeal was allowed because the ELRC did not have jurisdiction to deal with the matter, as no contract of employment had been entered into between the County Government and the nominees, and the dispute was not an employment and labour dispute in nature; there was no employer-employee relationship between the applicant and any of the respondents, and therefore the applicant lacked the locus to institute the proceedings; and the 6th respondent did not act in isolation but together with the 4th respondent, hence Sections 77 and 87 of the [County Government Act](#) were applicable, and the petition was premature for failing to exhaust the mechanisms provided therein.
 - h). The impugned judgment was grossly in error and the applicant is desirous of appealing to the Supreme Court on the grounds that:
 - i. The decision was not based on sound principles of law.



- ii. The decision was motivated by other extraneous matters, not related to the dispute at hand.
 - iii. The decision was a serious affront to Article 259 of *the Constitution*.
 - iv. The decision was retrogressive, parochial, and very restrictive about the jurisdiction of the ELRC.
 - v. The decision was unfair and biased against the applicant.
- i). The applicant intends the following six (6) questions to be determined by the Supreme Court:
- i. Whether the learned Judges erred in finding that the ELRC lacked jurisdiction to entertain disputes relating to recruitment, selection, nomination, and appointment of employees.
 - ii. Whether the learned Judges erred in finding that the ELRC erred in its application of the provisions of the Employment and *Labour Relations Act*, particularly the use of the words ‘for connected purposes’ in the preamble and the word ‘including’ in Section 12.
 - iii. Whether the learned Judges violated the applicant’s fundamental right of access to justice, in finding that the applicant lacked the locus standing to institute the suit before the ELRC; in blatant disregard of Articles 23 and 258 of *the Constitution* and Rule 4(2) as read with rule 2 of *the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*.
 - iv. Whether the learned Judges erred in interpreting the decision of the 6th respondent on 29th October 2022 as falling under the acts contemplated under Section 77 of the *County Governments Act*.
 - v. Whether the learned Judges fell into grave error in the application of Sections 77, 85, and 87 of the *County Governments Act*, concerning the nominations of 29th October 2022.
 - vi. Whether the learned Judges demonstrated immense bias and prejudice, by finding that the applicant was liable to pay the costs of the appeal and the petition.
- j). The matter is of great public interest, and it relates to the interpretation and application of the pertinent constitutional provision, being Article 162(2), on the demarcation of the jurisdiction of the ELRC.
- k). The precise jurisdiction of the ELRC has not been agreed upon since the promulgation of *the Constitution*, leading to a plethora of contradictory precedents.



- l). The impugned judgment was of less jurisprudential value, as it severely constricted the jurisdiction of the ELRC, and if allowed to stand, it would result into serious conflicts of law.
 - m). Matters of employment are of great public interest and they affect the entire workforce and the economy of the country. The Supreme Court needs to get a chance to demarcate the jurisdiction of the ELRC and interpret the rights of public interest litigators to access the court in light of Article 48 of the Constitution on the right to access justice.
 - n). The matters sought to be determined by the Supreme Court transcend the current dispute and interests of the applicant, as the intended appeal is motivated by public interest.
 - o). The respondents have sought to have Nakuru ELRC Petition No. E017 of 2022 and Nakuru ELRC Petition No. E001 of 2023 was dismissed on the strength of the impugned judgment.
 - p). It would be prudent for the said proceedings and dismissal thereof to be stayed pending the certification sought and pending the hearing of the intended appeal.
 - q). The applicant has filed a notice of appeal in compliance with rule 36 of the Supreme Court Rules.
 - r). It is in the public interest and the interest of substantive justice that the application is allowed."
3. The 1st, 2nd, and 3rd respondents stated the following in their replying affidavit, which was sworn by Jane Njoki Waweru, the clerk for the 3rd respondent's clerk:
- " a). The application is fatally defective and grossly incompetent, and the same ought to be struck out.
 - b). The application is an all-cure omnibus, a mongrel of rules 42(b) and 43 of the Court of Appeal Rules, 2022 and Section 15B(2) of the Supreme Court Act, and as such it is incapable of proper adjudication because the reliefs sought are subject to different judicial principles.
 - c). It is an established practice that an application cannot seek more than one substantive prayer, and the present application seeks substantive orders guided by different rules, being the prayer for certification and the prayer for the stay of proceedings.
 - d). The prayers sought ought to have been filed separately and not as an omnibus application. The application herein is therefore incurably defective.
 - e). The applicant relied on the wrong principles of law as rules 24 and 26 of the Supreme Court Rules and rule 40 of the Court of Appeal Rules are inapplicable.
 - f). The applicant has failed to demonstrate the threshold for the application for certification is of general public importance.



- g). The intended appeal does not raise any point of law of general public importance.
- h). The dispute has been overtaken by events as the recruitment process for the county chief officers has since been finalized.
- i). The prayer for a stay of proceedings and dismissal of Nakuru ELRC Petition No. E017 of 2022 and Nakuru ELRC Petition No. E001 of 2023 is baseless and devoid of merit.
- j). The order issued in Nakuru ELRC Petition No. E017 of 2022 was negative, and therefore incapable of being stayed.
- k). Nakuru ELRC Petition No. E001 of 2023 was not subject to the appeal and no order can be made concerning the said case.
- l). The applicant failed to provide reasons for the stay of proceedings and did not meet the necessary conditions for it."

4. In response, the 4th, 5th and 6th respondents relied on the replying affidavit sworn by Dr. Samuel Mwangi Mwaura, the acting County Secretary of the 5th respondent. He stated as follows:

- " a). The process of appointment of chief officers of the 5th respondent was beyond reproach. The respondents had followed the due recruitment process by placing an advertisement, which was followed by the 6th respondent recommending names on 29th October, 2022 for approval by the 3rd respondent in adherence with the County Government Act, Public Appointments (County Assemblies Approvals) Act, and the Constitution.
- b). The respondents raised a preliminary objection at the onset of the proceedings herein, which objection was dismissed by the trial court. However, the respondents' appeal was allowed.
- c). The consequence of the impugned judgment was that Nakuru ELRC Petition No. E017 of 2022 was dismissed for lack of jurisdiction.
- d). During the pendency of the appeal, the applicant instituted Nakuru ELRC Petition No. E001 of 2023, seeking to restrain the appointed chief officers from receiving remuneration on the strength of the temporary orders, which had been issued in Nakuru ELRC Petition No. E017 of 2022.
- e). The applicant aims to keep the proceedings in Nakuru ELRC Petition No. E001 of 2023 alive, even after the dismissal of Nakuru ELRC Petition No. E017 of 2022.
- f). The present application is fatally defective, misconceived, and an abuse of the court process, and it ought to be dismissed with costs.
- g). The Court of Appeal has already rendered itself through the impugned judgment, and it is therefore functus officio. This prevents the court from hearing any prayer for stay orders pending an appeal to the Supreme Court.



- h). The applicant has failed to demonstrate the grounds for certification under article 163(4)(b) of the Constitution and why this Court should certify the matter as of great general importance.
 - i). The Supreme Court in the case of Republic v Karisa Chengo & 2 others [2017] eKLR determined with finality the jurisdiction of the ELRC.
 - j). A mere apprehension of a miscarriage of justice is not a proper basis for granting certification for an appeal to the Supreme Court.
 - k). The matter at hand does not involve the interpretation of the constitution, is not of general public importance, and therefore does not warrant the attention of the Supreme Court.”
5. At the hearing of the application, Ms. Mwaniki, learned counsel appeared for the applicant whereas Mr. Karanja, learned counsel appeared for the 1st, 2nd, and 3rd respondents and Mr. Jayalo appeared for the 4th, 5th, and 6th respondents. Counsel relied on their respective written submissions, which they briefly highlighted.
 6. Ms. Mwaniki submitted that the intended appeal raises a matter of general public importance, and it is on this ground that the applicant seeks leave to appeal to the Supreme Court. Counsel faulted this court for holding that the ELRC lacked jurisdiction where there was no signed contract at the time of recruitment. Counsel contended that the ELRC had jurisdiction to determine issues arising during recruitment, and any constitutional matters arising therefrom.
 7. Counsel pointed out that rules 2 and 4 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules stipulate that a public litigant may move the ELRC. This matter transcends the applicant’s interest.
 8. The applicant submitted that he instituted Nakuru ELRC Petition No. E017 of 2022 for purposes of safeguarding public interest about the recruitment and intended employment of chief officers. The matter affects a wide array of employment matters, especially those involving County Governments and other public bodies.
 9. The applicant pointed out that the main issue to be determined in the intended appeal is the interpretation of Article 162(2) of the Constitution vis-à-vis Section 12(1) of the Employment and Labour Relations Court Act. The aim is for the Supreme Court to determine whether recruitments, especially where employment contracts had not been entered into, are labour related and whether the ELRC has jurisdiction to determine the same.
 10. The applicant submitted further that the Supreme Court will be called upon to examine the import of Section 45 of the County Governments Act and the decisions made thereunder; as well as Section 4 as read with Section 2 of the Constitution (Protection of Rights and Fundamental Freedoms Practice and Procedure) Rules in the context of Article 22 of the Constitution. The applicant was of the view that employment matters are of great public importance, as they affect every sector of the commerce industry.
 11. The applicant pointed out that although this was the first case to be determined by this Court on the jurisdiction of the ELRC; Trusted Society of Human Rights Alliance v Nakuru Water and Sanitation Services Company & Another [2013] eKLR, Evans Ladtema Muswahili v Vihiga County Public Service Board & 2 others [2021] eKLR and Okiya Omtatah Okoiti v Attorney General [2022] KEELRC 2 are



some of the decisions where the court has held that the ELRC has jurisdiction on matters recruitment and selection.

12. Mr. Karanja was of the view that the matter was not for certification, but rather the interpretation of Section 12(2) of the Employment and [Labour Relations Act](#), regarding the persons who can move the ELRC. Counsel pointed out that there was no challenge to the constitutionality of Section 12, and any person could move the High Court with public interest litigation. No law has been enacted by parliament to give the ELRC jurisdiction to handle public interest litigation. Counsel submitted that there was no uncertainty, as there is no different decision by this court, constituted differently.
13. The 1st, 2nd, and 3rd respondents relied on the cases of [Hermanus Phillipus Steyn v Giovanni Gneccbi-Ruscone](#) [2013] eKLR, [Malcolm Bell v Daniel Toroitich Arap Moi & Another](#) [2013] eKLR and [Goldenlime International Limited v Bluesea Shopping Mall Limited & 3 others](#) [2021] KESC 2 in submitting that the applicant had failed to demonstrate that he had satisfied the threshold for certification of the intended appeal as one of general public importance. That notwithstanding, they pointed out that the dispute had since been overtaken by events and the chief officers are in office.
14. They also submitted that the applicant had failed to satisfy the two limbs as required by rule 5(2)(b) of the [Court of Appeal Rules](#). They pointed out that this is an omnibus application, incapable of being adjudicated by this Court.
15. Mr. Jayalo reiterated the submissions by Mr. Karanja.
16. The 4th, 5th, and 6th respondents submitted that the doctrine of functus officio bars this Court from entertaining any application for stay. They pointed out that any consideration for orders of stay would amount to the court re-examining the matter on merit, yet it has already determined it conclusively through the impugned judgment. They relied on the cases of [Telkom Kenya Limited v John Ochanda](#) [2014] eKLR, and [Dickson Muricho Muriuki v Timothy Kagonde Muriuki & 6 others](#) [2013] eKLR in support of this submission.
17. On whether the applicant has demonstrated general public importance or not, the respondents cited the case of [Hermanus Phillipus Steyn v Giovanni Gneccbi-Ruscone](#), (supra), which laid down the principles that a court ought to consider when determining whether a matter is of general public importance.

They were of the view that the issue of conflicting jurisprudence concerning the jurisdiction of the ELRC was a matter of general public importance. However, they submitted that this case did not meet the guidelines set out by the Supreme Court. They were of the view that the applicant was self-seeking and that this matter did not in any way transcend the parties' application for leave nor did it affect the public. They pointed out that the questions raised demonstrated that the intended appeal is aimed at the appointment conducted by the 3rd, 4th, and 6th respondents, which is a matter within the purview of an employment dispute and does not affect the general public in any manner as to invoke the appellate jurisdiction of the Supreme Court.
18. The said respondents were of the view that the applicant had failed to demonstrate the precedents he claims are contradictory. The applicant should specify and demonstrate the elements of general public importance; and that merely stating that there is contradicting jurisprudence does not suffice. Citing the cases of [Benson Makori Makworo v Nairobi Metropolitan Services & 2 others](#) [2022] eKLR, [Okiya Omtatah Okoiti & 2 Others v Attorney General & 4 others](#) [2020] eKLR and [Malcolm Bell v Daniel Toroitich Arap Moi & Another](#) (supra), the reiterated that the Supreme Court had rendered itself with finality concerning the jurisdiction of the ELRC in the case of [Republic v Karisa Chengo](#), (supra). They urged that the application be dismissed with costs.



19. In her rejoinder, Ms. Mwaniki stated that Section 12 of the Employment and *Labour Relations Act* cites matters that can be referred to the ELRC. However, that list is not exhaustive, as it uses the word ‘including’. CACA 136 of 2022 is the first case before this court. However, there are several inconsistent decisions before the High Court and the ELRC.
20. We have carefully perused the application, the affidavits by both parties, submissions by counsel, the authorities cited, and the law. The issue for determination is whether or not the application before us is merited.
21. Article 163(4) of *the Constitution* succinctly states that appeals shall lie to the Supreme Court from this Court as of right in any case involving the interpretation or application of *the Constitution* and in any matter where it is certified that the appeal involves a matter of general public importance. The article provides the following:
- “Appeals shall lie from the Court of Appeal to the Supreme Court—
- a. as of right in any case involving the interpretation or application of this Constitution; and
 - b. in any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5).”
22. The issue before us is to determine whether indeed there is a matter of general public importance that is raised and disclosed. In the case of *Hermanus Phillipus Steyn v Giovanni Gnecchi-Ruscone*, (supra), the Supreme Court stated thus:
- “The requirement for certification by both the Court of Appeal and the Supreme Court is a genuine filtering process to ensure that only appeals with elements of general public importance reach the Supreme Court.”
23. It is common ground that the applicant seeks to have this matter certified as one of general public importance. The Supreme Court in the case of *Hermanus Phillipus Steyn v Giovanni Gnecchi-Ruscone*, (supra), laid down the following principles to be what constitutes matters of general public importance:
- i. for a case to be certified as one involving a matter of general public importance, the intending appellant must satisfy the Court that the issue to be canvassed on appeal is one the determination of which transcends the circumstances of the particular case, and has a significant bearing on the public interest;
 - ii. where the matter in respect of which certification is sought raises a point of law, the intending appellant must demonstrate that such a point is a substantial one, the determination of which will have a significant bearing on the public interest;
 - iii. such question or questions of law must have arisen in the Court or Courts below, and must have been the subject of judicial determination;
 - iv. where the application for certification has been occasioned by a state of uncertainty in the law, arising from contradictory precedents, the Supreme Court may either resolve the uncertainty, as it may determine, or refer the matter to the Court of Appeal for its determination;



- v. mere apprehension of a miscarriage of justice, a matter most apt for resolution in the lower superior courts, is not a proper basis for granting certification for an appeal to the Supreme Court; the matter to be certified for a final appeal in the Supreme Court must still fall within the terms of article 163 (4)(b) of *the Constitution*;
- vi. the intending applicant should identify and concisely set out the specific elements of “general public importance” that he or she attributes to the matter for which certification is sought;
- vii. determinations of fact in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court.”

24. What then constitutes a matter of general public importance?

The court in *Hermanus Phillipus Steyn v Giovanni Gneccchi- Ruscone*, (supra), held that:

“...a matter of general public importance’ warranting the exercise of the appellate jurisdiction would be a matter of law or fact, provided only that: its impacts and consequences are substantial, broad-based, transcending the litigation-interests of the parties, and bearing upon the public interest. As the categories constituting the public interest are not closed, the burden falls on the intending appellant to demonstrate that the matter in question carries specific elements of real public interest and concern.”

25. The Supreme Court further defined what a matter of general public importance is, in the same case as follows:

“In litigating on matters of “general public importance”, an understanding of what amounts to ‘public’ or ‘public interest’ is necessary. “Public” is thus defined: concerning all members of the community; relating to or concerning people as a whole; or all members of a community; of the state; relating to or involving government and governmental agencies; rather than private corporations or industry; belonging to the community as a whole, and administered through its representatives in government, e.g. public land.”

26. The applicant has moved this court that a matter of general public importance is involved. In a bid to advance his case, the applicant has identified six questions in his application, to demonstrate that this matter is of general public importance. The applicant places more emphasis on the jurisdiction of the ELRC to entertain disputes relating to the recruitment, selection, nomination, and appointment of employees.

27. This court held that the ELRC did not have jurisdiction to deal with the matter, as no contract of employment had been entered into between the County Government and the nominees, and the dispute was not an employment and labour dispute in nature; there was no employer-employee relationship between the applicant and any of the respondents, and therefore the applicant lacked the locus to institute the proceedings; and that the 6th respondent did not act in isolation but together with the 4th respondent, hence Sections 77 and 87 of the *County Government Act* were applicable, and the petition was premature for failing to exhaust the mechanisms provided therein. From the findings of the impugned judgment, we are satisfied that the applicant has not set out in any form why these elements of settled law require consideration by the Supreme Court and how they impact on third parties or other cases.



- 28. It is common ground that this is the first decision by this court touching on the jurisdiction of the ELRC about selection, recruitment, and appointments. The applicant did not cite any of the contradictory decisions referred to in his grounds and affidavit in support of the application. It is not enough for the applicant to merely state that there are contradictory decisions. We have also not found any express pronouncements by the judgments of the High Court and the ELRC addressing this issue.
- 29. It is not enough for the applicant to state that the Supreme Court is to interpret Article 162(2) of *the Constitution* vis-à-vis section 12(1) of the *Employment and Labour Relations Court Act*, and the import of section 45 of the *County Governments Act*, and section 4 as read with section 2 of *the Constitution (Protection of Rights and Fundamental Freedoms Practice and Procedure) Rules* in the context of article 22 of *the Constitution*, in determining that all employment matters are of general importance. In the case of *Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others* [2014] eKLR the court held:

“That where no constitutional provisions relied upon are readily identifiable from the body of the Judgment of the Appellate Court, a party only needs to show that the reasoning and the conclusions of the Court took a constitutional trajectory. The import is that where specific constitutional provisions cannot be identified as having formed the gist of the cause at the Court of Appeal, the very least an appellant should demonstrate is that the court’s reasoning, and the conclusions that led to the determination of the issue, put in context, can properly be said to have taken a trajectory of constitutional interpretation or application.”

- 30. In this instance, the applicant has failed to demonstrate that the court’s reasoning took a trajectory that warrants constitutional interpretation. Be that as it may, this court considered all the issues raised by the respondents on appeal and found no merit in them. It is trite that all litigation must sooner than later, come to an end and its conclusion must have a finality. A matter cannot be reopened before the Supreme Court simply because a litigant is of the view that the decision should have been different or a certain weight ought to have been given to a particular piece of evidence. To our minds, that is exactly what the applicant is trying to do.
- 31. Having carefully considered the grounds in support of certification, we cannot deduce any substantial issue of law to be determined or any matter that affects the general public interest.
- 32. As for the prayer seeking a stay of proceedings and stay of dismissal in Nakuru ELRC Petition No. E017 of 2022 and Nakuru ELRC Petition No. E001 of 2023 of this Court’s judgment pending the hearing of the intended appeal to the Supreme Court, the prayer is not available, as this court is functus officio and lacks the jurisdiction to grant such orders.
- 33. In the result, we find that the application lacks merit and it is dismissed. Each party is to bear their costs.

Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 15TH DAY OF DECEMBER, 2023.

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ASIKE-MAKHANDIA
JUDGE OF APPEAL

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F. OCHIENG
JUDGE OF APPEAL



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W. KORIR

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

