



REPUBLIC OF KENYA



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Gichana v Gabriel Nyangweso, the AG CEO Chemilil Sugar Co Ltd & 8 others; Auditor General (Interested Party) (Constitutional Petition E016 of 2021) [2022] KEHC 12286 (KLR) (27 July 2022) (Ruling)

Neutral citation: [2022] KEHC 12286 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CONSTITUTIONAL PETITION E016 OF 2021**

JN KAMAU, J

JULY 27, 2022

**IN THE MATTER OF AN APPLICATION UNDER ARTICLE 10, 22, 23, 27,
47 OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF THE PUBLIC SERVICE COMMISSION (PSC) AND
STATE CORPORATION ADVISORY COMMITTEE'S RECOMMENDATION
AS CONTAINED IN THE MWONGOZO CODE OF CONDUCT FOR STATE
CORPORATION**

AND

**IN THE MATTER OF DETERMINATION OF THE QUESTION OF HOW
LONG AN ACTING CEO OF A PARASTATAL REMAINS ACTING MD AND
WHAT HAPPENS IN THE EVENT THE BOARD DOES NOT WANT TO
RENEW HIS CONTRACT**

AND

**IN THE MATTER OF IRREGULAR APPOINTMENT AND CONTINUED NON-
APPOINTMENT OF THE CURRENT CEO, CHEMILIL SUGAR COMPANY
LTD CONTRARY TO MWONGOZO CODE OF CONDUCT AND ETHICS
AND MEMORANDUM AND ARTICLES OF ASSOCIATION**

AND

**IN THE MATTER OF IRREGULARLY HOLDING ONTO DUTY OF RETIRED
AND IN THE MATTER OF POOR PERFORMANCE OF CHEMILIL DUE TO
REPUTATION BY CEO & BOARD**



AND
FINANCE DIRECTOR, CHEMILIL SUGAR COMPANY LTD CONTRARY TO
THE MWONGOZO, CODE OF CONDUCT ETHICS OF PARASTATAL STAFF
(SIC)

AND
IN THE MATTER OF RUNNING DOWN OF CHEMILIL SUGAR COMPANY
LIMITED BY CURRENT AG CEO AND BOARD CURRENTLY IN PLACE
CONTRARY TO THE SPIRIT AND LETTER OF THE MWONGOZO CODE OF
CONDUCT ETHICS FOR PARASTATAL STAFF

AND
IN THE MATTER OF NON-RENEWED TERMS AND NON-GAZETTEMENT
OF THE CURRENT ACTING CEO GABRIEL NYANGWESO, CHEMILIL
SUGAR COMPANY LTD

AND
IN THE MATTER OF FAILURE BY THE INSPECTOR GENERAL,
CORPORATIONS TO DECLARE CHEMILIL SUGAR COMPANY LTD
INSOLVENT FOR ITS INABILITY TO PAY DEBTORS

AND
IN THE MATTER OF THE APPLICATION AND ADHERENCE TO THE
MWONGOZO CODE OF CONDUCT AND ETHICS FOR PARASTATAL
STAFF AND THE APPLICATION OF ARTICLES 10, 47, 27 & 47 OF THE
CONSTITUTION OF KENYA 2010

BETWEEN

CALEB GICHANA PETITIONER

AND

GABRIEL NYANGWESO, THE AG CEO CHEMILIL SUGAR CO
LTD 1ST RESPONDENT
EMMANUEL OBETCH NGARA HEAD OF FINANCE (DIRECTOR) CHEMILIL
SUGAR CO LTD 2ND RESPONDENT
CHEMILIL SUGAR CO LTD 3RD RESPONDENT
PUBLIC SERVICE COMMISSION 4TH RESPONDENT
STATE CORPORATION ADVISORY COMMITTEE 5TH RESPONDENT
CABINET SECRETARY, MINISTRY OF AGRICULTURE 6TH RESPONDENT



**CHAIRMAN, BOARD OF DIRECTORS CHEMILIL SUGAR CO
LTD 7TH RESPONDENT
INSPECTOR GENERAL, STATE CORPORATION 8TH RESPONDENT
ATTORNEY GENERAL 9TH RESPONDENT**

AND

AUDITOR GENERAL INTERESTED PARTY

RULING

Introduction

1. On 22nd October 2021, the Petitioner herein filed his Petition dated 21st October 2021. He sought the following eight (8) reliefs:-
 - a. An order to be made quashing all the new appointments and promotions of senior managers made contrary to Mwangozo Code of Conduct and Ethics and Public Service Commission's Regulations, Policies and Rules without a Kenya gazette notice as required by the law.
 - b. A declaration that the continued Ag CEO Chemelil Sugar Company Limited, the Retired Head of Finance's continued stay in office in the service of the said state corporation without proper appointment through Kenya Gazette Notice(s) were unconstitutional for violating Articles 10 and 232 of the Constitution and are therefore invalid.
 - c. A declaration that the Ag CEO Gabriel Nyangweso, Immanuel Ngara, head of Finance and all other senior managers of Chemelil Sugar Company Limited be surcharged what they had been earning over and above the normal salaries and allowances due to the illegal promotions and appointments.
 - d. An order directing the Cabinet Secretary Ministry of Agriculture to advertise the recruitment of a new CEO and Board of Directors of Chemelil Sugar Company within the period the honourable court shall deem fit and appropriate in the circumstances of this case.
 - e. That an order be issued directing and/or recommendation be given to the relevant bodies to take necessary disciplinary action against those officers of Chemelil Sugar Company who may be found to have embezzled, misappropriated and or been overpaid government funds irregularly and illegally within a time frame to be given by this court during the years 2018/2019, 2019/2020, 2020/2021 financial years for this court and public to be satisfied that the company is worth continued funding by the state.
 - f. A declaration that those people found to have flouted Public Procurement Laws, Public Finance Management, abused public office and mismanaged government properties be arrested and charged for the relevant crimes they may have committed to plant sense and sanity into state corporations.
 - g. An order directing the acting Chief Executive Officer, Gabriel Nyangweso and the retired Head of Finance who were still illegally in office be surcharged the salaries and allowances they had taken from the company irregularly and illegally as they were in office contrary to law.



- h. An order that all those found to have embezzled public funds and run down Chemelil Sugar Company either as MD, Former MD, manager and or board of directors unfit to hold public office as well as run for elective positions in Kenya and are guilty under Chapter 6 of the Constitution of Kenya.
2. On 2nd December 2021, the 1st, 2nd and 3rd Respondents filed a Preliminary Objection dated 1st December 2021 on the ground that the Petitioner’s Petition herein offended Article 162 of the Constitution of Kenya, 2010 on the jurisdiction of this court as the same related to employment matters.
3. The Petitioner’s Written Submissions were dated 28th January 2022 and filed on 31st January 2022 while those of the 1st, 2nd and 3rd Respondents were dated 12th January 2022 and filed on 13th January 2022. The 4th, 5th, 6th, 7th, 8th and 9th Respondents did not file Written Submissions but adopted the 1st, 2nd and 3rd Respondents’ Preliminary Objection and submissions.
4. This Ruling is therefore based on the said Written Submissions which parties relied on in their entirety.

Legal Analysis

5. The 1st, 2nd and 3rd Respondents submitted that jurisdiction is the power, authority and legitimacy of a court to entertain any matter before it and that a court must always satisfy itself that it has authority to hear and determine a matter before it. They added that if a court proceeded to hear a matter without jurisdiction, then the decision that came out of that court would be null and void.
6. They were emphatic that a suit filed in court that lacked jurisdiction was dead on arrival and could not be remedied. In this regard, they placed reliance on the case of Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd (1989) where the court held that jurisdiction was everything and that without it, the court had no power to make one more step.
7. They further submitted that the jurisdiction of the High Court was clearly set out in Article 165 (3) of the Constitution of Kenya and that pursuant to Article 165(5) of the Constitution of Kenya, the High Court had unlimited original jurisdiction in civil and criminal matters apart from matters falling within the jurisdiction of Employment and Labour Relations Court (hereinafter referred to as “ELRC”). They invoked Article 162(2) and Section 12 of the Employment and Labour Relations Court Act which vests jurisdiction to the ELRC.
8. In this respect, they relied on the case of International Centre for Insect Physiology and Ecology (ICIPE) v Nancy McNally [2018] eKLR as cited by Ogola J in Speed Ag Interfeight Limited v Cabinet Secretary For Labour & Social Relations & 2 Others [2019] eKLR where it was held that there cannot be any argument that the ELRC was clothed with jurisdiction to hear and determine constitutional issues as and when they arose from employment and labour relations and that any doubt in respect of that jurisdiction was settled in the case of United States International University (USIU) v Attorney General [2012] eKLR which was upheld by court in Daniel N. Mugendi v Kenyatta University & 3 Others [2013] eKLR.
9. They also placed reliance on the case of Law Society of Kenya, Nairobi Branch v Malindi Law Society & 6 Others [2017] eKLR where the Court of Appeal observed that by parity, although under Article 162 (2) of the Constitution Parliament was mandated to establish courts with equal status of the High Court to hear and determine the specified types of cases, Article 165 (5) was clear that the High Court had no jurisdiction in respect of matters falling within the jurisdiction of the said specialised courts.
10. They argued that in the Petition herein and at Paragraphs (1), (2), and (5) of the Petitioner’s Affidavit in support of his Notice of Motion dated 21st October 2021, the main contentions were



the constitutionality of appointment of a state corporation's CEO, which was an employment and labour issue and issues relating to equality and freedom from discrimination, human dignity and fair administrative justice, which could only be heard and determined by the ELRC as it had the requisite jurisdiction. They contended that the High Court could not therefore confer on itself jurisdiction not conferred to it by the Constitution or other written law.

11. They asserted that the Petitioner had flouted Article 162 and 165 (5) of the Constitution as well as Section 12 of the Employment and Labour Relations Court Act and urged thus this court to strike out his application with costs.
12. On its part, the Petitioner submitted that the 1st, 2nd and 3rd Respondents' Preliminary Objection ought not to be entertained as the same was filed at a time when the response to the Petition had already expired.
13. He further argued that Article 162 (*sic*) dealt with the establishment of the environment and labour courts and therefore the Preliminary Objection did not state or give a Section of the Labour Act or which section (*sic*) of the Article 162 of the Constitution that the Petition offended. He stated that the generality of the Preliminary Objection was not a pure point of law as it called for evidence to be adduced before the same could be said to be an employment issue.
14. He was emphatic that nothing in the Petition related to labour and land courts and that the Preliminary Objection was a delaying tactic to continue keeping the 2nd and 7th Respondents in Chemilil offices irregularly and unconstitutionally.
15. He argued that his Petition related to application of Article 10 and 232 of the Constitution and the Public Service (values and principles) Act, 2015 on employment matters and averred that the Petition was based on the principles of *quo warranto* meaning, under whose authority were the 1st, 2nd and 7th Respondents occupying the offices in the Constitution which were open to competition and merit. It was his contention that the Petition was challenging the continued stay in office of the acting CEO of Chemilil Sugar Company Limited after expiry of the contract period and without any renewal of the contract and the Head of Finance after retiring and having been paid his benefits. He also questioned the Board of Directors who were always on contract and their offices were constitutional offices governed by the Constitution and the Public Service (values and principles) Act 2015 but were not under the Employment Act.
16. He argued that the CEOs, heads of departments and all members of board were appointed under contract terms under Cap 446 of the Laws of Kenya and were not under the Employment Act at all and therefore, their dispute could only be sorted in the High Court which dealt with constitutionality of the offices. He asserted that the Respondents were created by the Constitution and were therefore bound by the values and principles articulated by the Constitution.
17. He invoked Article 10, 232, 235(1) and 258 of the Constitution of Kenya which he submitted brought the Petition herein within the realm of Article 165(3)(ii) (*sic*) with respect to the jurisdiction to interpret the Constitution and specifically in relation to determining the question of whether anything said to be done under the Constitution, or any law, was consistent with or in contravention of the Constitution.
18. He distinguished the argument in United States International University (USIU) v Attorney General (*Supra*) as not being absolute and that it was subject to Article 165(5) (*sic*) which forbade the High Court from exercising jurisdiction over matters falling within the jurisdiction reserved for the courts envisaged in Article 162(2) (*sic*). He added that the fact that the dispute herein fell under Article 162(2) (*sic*) did not take away the jurisdiction of the High Court to exercise jurisdiction under Article 165(3)



- (sic). He was emphatic that one could not therefore oust the jurisdiction of the High Court since it was the guardian of the Constitution which could not be taken to the labour court.
19. He also relied on Article 259 of the Constitution of Kenya and argued that the ELRC Act did not create procedure, values, advertisements, shortlisting and eventual appointment of public officers in employment. He averred that that was the preserve of the Public Service Commission (PSC). He pointed out that the Public Service Commission was not subject to ELRC nor was the Public Service Act.
 20. He explained that the ELRC only dealt with disputes between employees and employers and not being an employee of any Respondent and his claim not being an employment dispute but a constitutional interpretation and assessment of whether the Respondent's continued holding of offices met the constitutional threshold as spelt out in Article 10, 47, 232 and 165 of the Constitution as well as the relevant provision and terms in the Public Act 2015 (*sic*), he was entitled to bring a constitutional petition to allege its contravention at the High Court. He relied also on Article 22 and 23 of the Constitution.
 21. It was his averment that any person who was aggrieved by any acts of the Respondents whether done under the Constitution or any other law had a right to challenge the said conduct under Article 165 (3)(b)(d) by dint of Article 258.
 22. He added that the case of Daniel N. Mugendi v Kenyatta University & 3 Others (*Supra*) was irrelevant as it did not touch on public officers being in office unconstitutionally but that the case Law Society of Kenya, Nairobi Branch v Malindi Law Society & 6 Others (*Supra*) supported his Petition. He relied on the case of Petition No 331 of 2016 High Court Nairobi (eKLR citation not given) and urged this court to dismiss the Preliminary Objection with costs.
 23. Article 165(5) of the Constitution of Kenya 2010 states that:-
 - “ 5. The High court shall not have jurisdiction in respect of matters –
 - (a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or
 - (b) falling within the jurisdiction of the courts contemplated in Article 162 (2).”
 24. Article 162(2) of the Constitution of Kenya, further provides that: -
 - “Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to
 - a. Employment and labour relations....
 - Parliament shall determine the jurisdiction and functions of the Courts
 - (3) contemplated in clause (2).”
 25. In addition, Section 12(1) and (2) of the Employment and Labour Relations Court Act (ELRC Act), Chapter 234B (Laws of Kenya) provides that:-
 1. “The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the court relating to employment and labour relations including-



- a. disputes relating to or arising out of employment between an employer and an employee
 - b. disputes between an employer and a trade union
 - c. disputes between an employer's organisation and a trade union's organization
 - d. disputes between trade unions
 - e. disputes between employer organisations
 - f. disputes between an employer's organisation and a trade union
 - g. disputes between a trade union and a member thereof
 - h. disputes between an employer's organisation or a federation and a member thereof
 - i. disputes concerning the registration and election of trade union officials; and
 - j. disputes relating to the registration and enforcement of collective agreements.
2. An application, claim or complaint may be lodged with the Court by or against an employee, an employer, a trade union, an employer's organisation, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose.”
26. Notably, the list of disputes set out in Section 12(2) of the ELRC Act is not exhaustive. The key word is “including” meaning that any employment dispute ought to be dealt with by the ELRC. Whereas the jurisdiction to determine whether or not there has been a violation of any of the rights under the Bill of rights is vested in the High Court under Article 165(3)(b) of the *Constitution* of Kenya, the said jurisdiction is subject to clause (5) which prohibits the High Court from exercising jurisdiction over matters that fall within the province of the courts established under Article 162(2) of *Constitution* of Kenya.
27. Notably, Section 12(2) of the *ELRC* Act is clear that a claim of complaint against any employee, employer, a trade union, an employee's organization, a federation, the Registrar of Trade Union, the Cabinet Secretary or any office established under any written law should be lodged at the *ELRC*. The provision of the law does not specify who can lodge the complaint or claim as aforesaid. The court is therefore asked to have a purposive interpretation of that provision.
28. Interpretation of who this person who can lodge a claim under Section 12(2) of the ELRC Act is by deferring to Article 22(1) of the *Constitution* of Kenya that states as follows:-
- “Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.”
29. Article 258(1) of the *Constitution* of Kenya further provides that:-
- “Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.”
30. The Petitioner herein invoked the provisions of Article 22 of the *Constitution* of Kenya as he was apprehensive of a violation of the *Constitution* of Kenya. He was therefore a person envisaged within the ambit of Section 12(2) of the ELRC Act. He had argued that the procedure, values, advertisement,



shortlisting and eventual appointment of public officers in employment was a preserve of the PSC and not the ELRC. Notably, the question of the continued stay of a CEO or Head of Finance in office, their appointment and surcharging of monies earned above the normal salaries and allowances were best dealt with by the ELRC. Whether the promotions and appointments were illegal were best interrogated by the ELRC despite there having been some issues that the High Court could also enquire into. Issues relating to recruitment and employment of public servants or the constitutionality thereof therefore belongs to the Employment and Labour Relations Court.

31. This court fully associated itself with the holding in case of *United States International University v Attorney General (Supra)* where it was stated that:-

“Labour and employment rights are part of the Bill of Rights and are protected under Article 41 which is within the providence of the Industrial Court. To exclude the jurisdiction of the Industrial Court from dealing with any other rights and fundamental freedoms howsoever arising from the relationships defined in section 12 of the Industrial Court Act, 2011 or to (so) interpret the constitution would lead to a situation where there is parallel jurisdiction between the High Court and the Industrial Court. (Emphasis court).

32. Accordingly, having critically analysed parties’ submissions, this court was persuaded that it lacked the requisite jurisdiction to hear and determine this matter because the reliefs that had been sought by the Petitioner related to an employment dispute which was a preserve of the ELRC as provided under Article 162(2)(a) of the *Constitution* of Kenya and Section 12 of the ELRC as it is thus clothed with jurisdiction to hear and determine such constitutional issues as and when they arise from employment and labour relations.

33. The Petitioner argument that the 1st, 2nd and 3rd Preliminary Respondents’ Objection was filed after pleadings closed was not merited as a Preliminary Objection can be raised at any time before Judgment is delivered.

34. Once the court found that it had no jurisdiction to hear and determine this matter, it was called upon to down its tools as was held in the case of *Owners of the Motor vehicle “Lillian S” v Caltex Oil Kenya Ltd (Supra)*. The downing of tools could include striking out of pleadings.

35. Having said so, striking out of pleadings as was prayed by the 1st, 2nd and 3rd Respondent is a draconian act which should only be resorted to in plain cases and as a last resort as was held in the case of *GBM Kariuki v Nation Media Group Limited and 3 Others* [2012] e KLR. This court found it prudent to transfer this matter to the appropriate court for hearing and determination as it was in the interests of justice to do so.

Disposition

36. For the foregoing reasons, the upshot of this court’s decision was that the 1st, 2nd and 3rd Respondent’s Preliminary Objection dated 1st December 2021 and filed on 2nd December 2021 was merited and the same be and is hereby upheld.

37. It is hereby directed that this file be and is hereby transferred to ELRC Kisumu and the same be mentioned before the Judge of that court on 19th September 2022 for further directions and orders.

38. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 27TH DAY OF JULY 2022

J. KAMAU



JUDGE

