



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 326 OF 2019

IN THE MATTER OF: ARTICLES 22 AND 23 OF THE CONSTITUTION OF KENYA;

AND

IN THE MATTER OF: ALLEGED THREATS TO AND CONTRAVENTION OF RIGHTS UNDER ARTICLE 27, 31, 36, 41 AND 46 OF THE CONSTITUTION OF KENYA;

AND

IN THE MATTER OF: LABOUR RELATIONS ACT, 2007;

AND

IN THE MATTER OF: EMPLOYMENT ACT, 2007;

AND

IN THE MATTER OF: CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTISE AND PROCEDURE RULES, 2013;

-BETWEEN-

LONDON DISTILLERS KENYA LIMITED.....1ST PETITIONER/APPLICANT

MOHAN GALOT.....2ND PETITIONER/APPLICANT

VERSUS

KENYA UNION OF COMMERCIAL

FOOD ALLIED WORKERS UNION.....RESPONDENT

RULING

THE PETITION

1. The Petitioner through a petition dated 15th August, 2019, and filed on 16th August, 2019, seeks the following orders :-

a) AN ORDER OF DECLARATION declaring that the Respondent is engaged in unfair trade practices;

b) AN ORDER OF DECLARATION declaring that the Respondent actions of forcefully recruiting the employees of the 2nd Petitioner is unlawful and the Respondent lacks locus standi to represent the employees of the 2nd Petitioner in any action and is engaged in unfair trade practices;

- c) **AN ORDER terminating all court proceedings commenced/instituted by the Respondent against the 1st and 2nd Petitioner;**
- d) **AN ORDER OF DECLARATION terminating the Recognition Agreement between the 1st Petitioner and the Respondent;**
- e) **AN ORDER OF DECLARATION declaring that all matters commenced before exhaustion of the dispute resolution process contravenes the provisions of the Labour Relations Act and the Constitution of Kenya, 2010 and is contrary to the employee's legitimate expectation;**
- f) **AN ORDER OF DECLARATION declaring that the actions of the Respondent of constantly visiting the 2nd Petitioner's home, and surreptitious surveillance of the 2nd Petitioner's residence have violated and continue to violate the 2nd Petitioner's right to security of his person and privacy under Article 29(a), (d) & (f) and Article 31 (a), (c), & (d) of the constitution respectively;**
- g) **AN ORDER OF DECLARATION declaring that the actions of the Respondents have threatened and continue to threaten the 1st Petitioner's right to property and economic rights under Article 40 and 43 of the Constitution.**
- h) **AN ORDER OF DECLARATION declaring that the 2nd Petitioner's personal employees are not unionisable members of the Respondent;**
- i) **Costs;**
- j) **Such other orders that the Honourable court shall deem just to grant.**

THE PRELIMINARY OBJECTION

2. The Respondent in opposition of the Petition filed grounds of opposition dated 2nd October 2019 raising several grounds in opposition. Further thereto the Respondent filed Replying Affidavit sworn by Andrew Kinyua dated 10th December 2019. In addition to the grounds of opposition the Respondent filed Notice of Preliminary Objection dated 28th October 2019 raising three grounds in support of the preliminary objection seeking:-

- a) **That the issues raised in the petition relate to or arise out of employment between an employer and its employees which squarely falls under the jurisdiction of the Employment and Labour Relations Court as provided for under Section 12 of the Employment & Labour Relations Court Act, 2007, Section 87 (1) & (2) of the Employment Act, 2007 and Articles 162(2)(a) of the Constitution of Kenya, 2010;**
- b) **That all the Court cases cited in the Petition and upon which the Petitioners seek stay orders are all filled at the Employment & Labour Relation Court and are pending before the said court, save for cause No. 1639 of 2016 which has been finalized and settled pursuant to the orders of that court;**
- c) **That in the circumstances, this matter is not properly before this court for hearing and determination;**
- d) **Costs be to the Respondent.**

THE PETITIONERS' RESPONSE TO THE PRELIMINARY OBJECTION

3. In response to the preliminary objection the Petitioners through their further submissions dated **14th December, 2020** averred that this Honourable Court has jurisdiction to hear and determine this Petition.

4. The Petitioner's argued that **Article 23 of the Constitution** gives this Court the jurisdiction to hear and determine matters involving violation of fundamental rights under the Bill of Rights.

5. Reliance was placed in the case of **Samuel Kamau Macharia v Kenya Commercial Bank Limited & 2 others [2012] eKLR**, which states in part that jurisdiction flows from either the constitution, or legislation or both, thus the court can only exercise jurisdiction conferred upon it by law.

6. It was Petitioners argument that the High court by dint of Article 165 of constitution is a constitutional court with authority to address and determine violations of constitutional rights and where the same has been contravened.

7. Further the Petitioner contended that there has been a breach of the Petitioners fundamental rights, by being coerced to recognize strangers as their employees and pay their dues in violation of the law.

8. It is Petitioners position that in the absence of a valid Recognition Agreement between the Respondent and the 2nd Petitioner, the Respondent lacks *locus standi* to institute any action before any adjudicative body for and on behalf of the 2nd Petitioner's Personal and Domestic employees.

9. According to the Petitioners the issues raised in the instant petition do not fall within the jurisdiction of the Employment and Labour

Relations Court and they prayed that the Notice of Preliminary objection be dismissed with costs.

THE RESPONDENT'S CASE

10. The Respondent through their submissions dated **22nd July, 2020**, supported their Preliminary Objection.

11. According to the Respondent the Petition sought among other prayers to cure unfair trade practices on the part of the Respondent union as well as the Respondent union forcefully recruiting the 2nd Petitioner's employees, contending that there exists lack of *locus standi* for Respondent to represent the employees.

12. It is further contended that the tenet and purport of the Petition was to terminate all Court proceedings commenced by themselves in the Employment and Labour Relations Court and revoke the recognition agreement between the 1st Petitioner and Respondent.

13. It is additionally averred by the Respondent that all the issues raised in the petition arose out of an employment relationship between employees and the Petitioners. In addition it is argued that all matters commenced in Employment and Labour Relations Court are pending hearing. The Respondent averred further that **Employment Cause no. 1639 of 2016** has been concluded by the Employment Court and the matter is now settled as exhibited in the Petitioners affidavit in support.

14. It is Respondent's case that **Article 162(2) of the Constitution** establishes courts with equal status of the High Court, to hear and determine disputes relating to the Employment and Labour Relations which is the Employment and Labour Relations Court. Further it is submitted that under **Section 12 of the Employment and Labour Relations Court Act, 2011**, it is provided that the Employment court shall have exclusive, original and appellate jurisdiction to hear and determine all disputes referred to under **Article 162(2)** 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; and (c) disputes between an employers' organization and a trade union's organization among other.

15. Additionally it is submitted that **Section 87 of the Employment Act, 2007** covers complaints and jurisdiction in cases of disputes between employers and employees which can only be determined by the Employment Court.

16. The Respondent submitted that **Nairobi ELRC Cause No. 912 of 2018** is on negotiation of Collective Bargaining Agreement for the period of 2017-2019 and is filed between **Kenya Union of Commercial, Food and Allied Workers and London Distillers (K) Ltd**- Respondent and the same is covered by **Part (vii) of the Labour Relations Act, 2007** in particular **Section 54(1) and 57(1)** which covers Recognition of Trade Unions and Collective Bargaining.

17. According to the Respondent **Article 41 of the Constitution of Kenya**, on Labour Relations, protect the right of every person to fair labour practices and right among others, to join a trade union which in turn has a right to determine its activities. Further it is submitted that **Article 258(2) (d)**, provides that an association acting in the interests of one or more of its members may institute proceedings where the constitution is contravened or threatened.

18. It is further submitted that **Article 36 of the Constitution**, guarantees the right of freedom of association to every person, which includes the right to form, join or participate in the activities of an association of any kind. Further it was Respondent's position that personal and domestic employees are still employees by the definition of **Section 2(1) of the Employment Act, 2007**, by virtue of being paid consistent wages and salaries, therefore they qualify to be members of the Respondent's trade union.

19. In a nutshell, the Respondent contended that the Petitioners did not want any of their actions, however unlawful, challenged by workers through the trade union and prayed that the Honourable Court do allow the preliminary objection dated 28th October, 2019.

BACKGROUND OF THE PETITION

20. The background of the Petition is that on the 18th March, 2010, the 1st Petitioner and the respondent executed an agreement relative to Recognition and Negotiating Procedure to govern the terms of negotiation and recognition of the Respondent by the 1st Petitioner.

21. The 1st Petitioner averred that it always acted in good faith in all negotiations, however, the respondent has always been motivated by malice to extort monies from the 1st Petitioner.

22. The 1st Petitioner argued that it was engaged in a series of negotiations regarding a salary increment of 17% to all its employees including increment in other benefits such as house allowance, leave travelling allowance, night shift, safari allowance and transport allowance.

23. The 1st Petitioners averred that repeatedly and during the pendency of the negotiations, the Respondent has always remained defiant on some terms regarding payment which are excessive and unreasonable to the sound financial standing of the 1st Petitioner, owing that the 1st petitioner has employed a total of 538 persons who would be rendered jobless should the Petitioner be rendered insolvent.

24. The 1st Petitioner contended to further paralyze the operations of the 1st petitioner and coerce it to give in to its unreasonable demands, the respondent vide a strike notice dated 9th August 2016, wrote to the 1st and 2nd Petitioners notifying them of a fourteen (14) days' notice to withdraw labour from the 1st Petitioner by way of a strike.

25. The 1st Petitioner stated that dissatisfied with the unlawful acts of the Respondent, it wrote a letter dated 19th June, 2017, notifying the labour office of the intention to terminate the recognition agreement between itself and the Respondent.

26. The 1st Petitioner further argued that there does not exist any recognition agreement or collective bargaining agreement between the 2nd petitioner and the respondent touching on the 2nd petitioner's domestic and personal employees.

27. The 1st Petitioner stated that unknown to the 2nd Petitioner, the Respondent had in a clandestine manner commenced recruitment drive of the personal and domestic employees to be members of the Respondent, and thereafter, started to demand that the terms of the Recognition Agreement, as executed between them and the 1st Respondent do also apply to the 2nd Petitioner's personal domestic employees and that the same would also cater for their interest and welfare.

28. As a result some of the 2nd petitioner's domestic and personal employees absconded duty for a period of over two weeks without any good cause thus forcing the 2nd Petitioner to terminate their services as well as further carry out a redundancy of the domestic and personal employees.

29. The Petitioners averred that the consequence of this was the respondent filing a trade dispute before the Ministry of Labour, by their letter dated 29th June, 2017, on behalf of the 2nd petitioner's domestic and personal employees and in response thereto, the 2nd petitioner by letter 11th July, 2007, informed the respondent that the workers were domestic and personal to the 2nd Petitioner.

30. The Petitioner stated that the Respondent directed its members, to proceed on strike on the, 22nd August, 2017, compelling them to file a suit **Nairobi ELRC Cause No. 1639 OF 2016; LONDON DISTILLERS K LIMITED –VS- KUCFAW**, seeking orders to have the strike declared unlawful.

31. It is stated that they then proceeded to negotiate a settlement out of court to the effect that there would be a 17% salary increment to its employees.

32. It is affirmed that they then effected the said increment but the Respondent, however equally demanded payment of the salary increment to the 2nd Petitioner's Domestic and Personal workers as well.

33. The 1st Petitioner declined, on grounds that there does not exist any contractual relationship between the 1st Petitioner and the domestic and personal employees of the 2nd Petitioner, further, the 2nd Petitioner's personal and domestic employees are paid by the 2nd Petitioner from the 2nd Petitioner's director's account.

34. It was the Petitioner's averments that the 2nd Petitioner's domestic and personal workers are not employed in any of the sectors of the Respondent's constitution, and were thus ineligible for membership with the union.

35. The Petitioners contended that upon termination of the 2nd petitioner's personal and domestic employees, the respondent filed a plethora of suits namely;

a) Nairobi ELRC Cause No.192 Of 2016; Kenya Union Of Commercial Food And Allied Workers –Vs- London Distillers (K) Limited;

b) Nairobi ELRC Cause No.913 Of 2018; Kenya Union Of Commercial Food And Allied Workers –Versus- London Distillers (K) Limited;

c) Nairobi ELRC Cause No.912 Of 2018; Kenya Union Of Commercial Food And Allied Workers –Versus- London Distillers (K) Limited;

d) Nairobi ELRC Cause No.127 Of 2018; Kenya Union Of Commercial Food And Allied Workers –Versus- London Distillers (K) Limited;

e) Nairobi ELRC Cause No. 1362 Of 2018; Kenya Union Of Commercial Food And Allied Workers –Versus- London Distillers (K) Limited;

f) Nairobi ELRC Cause No. 1639 Of 2016; Kenya Union Of Commercial Food And Allied Workers –Versus- London Distillers (K) Limited;

g) Nairobi ELRC Cause No. 120 Of 2019; Kenya Union Of Commercial Food And Allied Workers –Versus- London Distillers (K) Limited;

h) Nairobi ELRC Cause No. 161 Of 2019; Kenya Union Of Commercial Food And Allied Workers –Versus- London Distillers (K) Limited;

i) Nairobi ELRC Cause No. 163 Of 2019; Kenya Union Of Commercial Food And Allied Workers –Versus- London Distillers (K) Limited;

36. In view of the foregoing reasons the Petitioners now seek among other prayers an order from this Court terminating all Court proceedings instituted by the Respondent against the 1st and 2nd Petitioners, as well as an order, declaring that the Respondent is engaged in unfair trade practices. The Petitioner also seeks an order declaring the Respondent's actions of forcefully recruiting the employees of the 2nd Petitioner, is unlawful and the respondent lacks *locus standi* to represent the employees of the 2nd Petitioner in any Court action.

ANALYSIS AND DETERMINATION

37. Having carefully considered the Petition dated **16th August, 2019**, the Respondent's Preliminary Objection dated **28th October, 2019** and the Petitioners' response and submissions by all the parties, there arise only one issue for consideration in respect of the Respondent's Preliminary Objection:-

a) Whether this honorable court has jurisdiction to hear and determine the Petition herein as drawn and filed.

38. In the Respondent's Preliminary Objection dated **28th of October, 2019**, the Respondent averred that the issues raised in the Petition relate to or arise out of employment, between an employer and its employees, which squarely falls under the jurisdiction of the Employment and Labour Relations Court, as provided for under **Section 12 of the Employment & Labour Relations Court Act, 2007, Section 87 (1) & (2) of the Employment Act, 2007** and **Articles 162(2)(a) of the Constitution of Kenya, 2010**. This issue therefore necessitates a determination on the issue of jurisdiction.

39. The Courts have time and again considered the issue of jurisdiction before hearing any matter when question of jurisdiction is raised. The Respondents sought reliance in the celebrated case of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1** where Justice Nyarangi of the Court of Appeal held;

"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."

40. The jurisdiction of the High Court is well established under **Article 165 of the Constitution of Kenya** which states;

"(1) There is established the High Court, which—

(a) shall consist of the number of judges prescribed by an Act of Parliament; and

(b) shall be organised and administered in the manner prescribed by an Act of Parliament.

Sub article 3 states; Subject to clause (5), the High Court shall have—

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

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

(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government;"

41. Further the jurisdiction of the High Court is clearly stated under **Article 23(1) of the Constitution** which provides;

"The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights."

42. The Supreme Court dealing with issue of jurisdiction in the case of **Republic v Karisa Chengo & 2 others [2017] eKLR** held as follows with regard to jurisdiction:-

"[35] In the above regard, we note that in almost all the legal systems of the world, the term "jurisdiction" has emerged as a critical concept in litigation. Halsbury's Laws of England (4th Ed.) Vol. 9 at page 350 thus defines "jurisdiction" as "...the

authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision.” John Beecroft Saunders in his treatise Words and Phrases Legally Defined Vol. 3, at page 113 reiterates the latter definition of the term ‘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 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 like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the 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 both these characteristics.... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given”.

From these definitions, it is clear that the term “jurisdiction”, as further defined by The Black’s Law Dictionary, 9th Edition, is the Court’s power to entertain, hear and determine a dispute before it.”

43. It is therefore trite law that jurisdiction is everything and without it a court of law has no mandate to proceed further with the determination of any other matter before it. Where the issue of jurisdiction is raised, it has to be determined first and once a court of law comes to the conclusion that it has no jurisdiction, it has to down its tools. This cardinal principle was well articulated in the case of *Owners of Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1*.

44. It is evidently clear from the above authorities and provisions of the Constitution, the jurisdiction of this Court has been well established under the constitution to hear and determine matters pertaining to the violations and infringements of fundamental rights and freedoms.

45. Looking at the Petition herein, and issues raised thereto, it is clear, the dispute herein is mainly focused between the 2nd Petitioners’ personal and domestic employees and the Respondent.

46. The respondent is a trade union registered within the meaning of the Labour Institutions Act and carries the business of Trade Union within the Republic of Kenya.

47. The Petitioners have vehemently contended that as a result of the respondent’s interference of the 2nd petitioner personal and domestic employees, they have been compelled to terminate their services which has resulted to a plethora of suits that have been filed in the Employment and Labour Relations Court and they therefore seek among other prayers an order declaring the Respondent’s actions of forcefully recruiting the employees of the 2nd Petitioner is unlawful and the Respondent lacks *locus standi* to represent the employees of the 2nd Petitioner in any Court action.

48. In view of the Prayers and issues raised, this Honourable Court is under obligation to examine what the law says on the nature of the dispute between the Petitioners and Respondent to be able to make a proper determination in this Petition.

49. *Section 12(1) of the Employment and Labour Relations Court Act, 2011* which the respondent relies on provides for the jurisdiction of the ELRC in the following terms:-

“Jurisdiction of the Court

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

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

50. I have further to consider who is an “employee” and “employer”. The definition under the relevant act OF; An ‘employee’ is defined in **Section 2 of the Employment and Labour Relations Court Act, 2011** as “a person employed for wages or a salary and includes an apprentice and indentured learner” while an ‘employer’ has been defined as “any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company.” The same definitions are replicated in **Section 2 of the Employment Act, 2007**.

51. Upon perusal and consideration of the Petition herein, the Petitioners have attached several letters of employment between themselves and members of the Respondent. This is exhibited from annexures marked “MG 12” on pages 77-120. From the above letters of employment between the 2nd Petitioner and members of Respondent, there is a clear demonstration of an employer / employee relationship as stipulated under **Section 2 of the Employment and Labour Relations Court Act, 2011**.

52. In addition thereof the dispute herein is a dispute between an employer and a trade union, the Respondent, which squarely falls under the definitions of **Section 12(1)(a) and (b) of the Employment and Labour Relations Court Act, 2011**.

53. The Petitioners in the Petition equally submitted that there are several suits filed between themselves and the Respondent in the Employment and Labour Relations Court. I note that the Petitioners have attached evidence of the suits in their Petition marked “MG 15” on Pages 157-229 of Petition.

54. I have very carefully considered the nature of the Petitioners claim, issues raised by both sides, as well as, the relevant constitutional provisions, relied upon by the parties and it is clear, from the pleadings, that the nature of the dispute herein is an employment dispute and further all the suits filed between the same parties are over the same subject matter in the **Employment and Labour Relations Court**, which is a Court of equal status, to this Court, as per **Article 162(2)**. It is further noted that the Petitioners proceeded to file this Petition in the High Court, a Court of equal and concurrent jurisdiction to that of the Employment and Labour Relations Court.

55. I now turn to consider, the issue of whether the High Court has jurisdiction to entertain the alleged breaches of constitutional provisions related to Employment and Labour Relations Court. Such an issue was settled in the case of **United States International University versus Eric Outa [2012] eKLR** where the High Court held that the **Employment and Labour Relations Court** is a Court of the same status as the High Court and that disputes touching on employment and labour relation involving alleged breach of rights and fundamental freedoms must be referred to the **Employment and Labour Relations Court** and not the High Court. The decision in the **United States University case** was eventually followed by the Court of Appeal with approval in the case of **Prof. Daniel N. Mugendi versus Kenyatta University [2013] eKLR**.

56. In addition to the aforesaid and in the case of **Sollo Nzuki v Salaries and Remuneration Commission & 2 others [2019] eKLR**, the question of the jurisdiction of this Court was challenged and Hon. Odunga, J held as follows:-

“Similarly, pursuant to Article 23(3) of the Constitution as read with section 12(3) of the Employment and Labour Relations Court Act, it is my view that the Employment and Labour Relations Court can grant reliefs in a constitutional petition. However, the jurisdiction to do so is confined to matters falling within Article 41 of the Constitution as read with section 12 of the Employment and Labour Relations Court Act. The Court cannot therefore purport entertain petitions outside the aforesaid matters as its jurisdiction is limited only in so far as employment matters and matters related thereto are concerned. In my view the matters which fall within the ambit of Article 162(2) of the Constitution must be matters within the exclusive jurisdiction of the said specialized Courts. However, as stated above, the Employment and Labour Relations Court may not embark on a generalized handling of petitions but is entitled to and is jurisdictionally empowered to address such matters if they arise directly and in relation to the matters within the court’s jurisdictional competence and specialization. Accordingly, where the matters raised fall both within their jurisdiction and outside, it would be a travesty of justice for the High Court to decline jurisdiction since it would mean that in that event a litigant would be forced to institute two sets of legal proceedings. Such eventuality would do violence to the provisions of Article 159 of the Constitution....The Employment and Labour Relation’s Court’s jurisdiction is restricted to where there exists employer and employee relationship has been the subject of several decisions in our jurisdiction.”
(Emphasis added)

57. In support of the Preliminary Objection the Respondent submitted that all the issues raised in the Petition arose out of an employment relationship between employees and the Petitioners, and also that all matters commenced in Employment and Labour Relations Court are pending hearing. The Respondent contend further that **Employment Cause no. 1639 of 2016** has been concluded by the Employment Court.

58. The Petitioners on their part in support that this Court has jurisdiction to entertain this Petition submitted that **Article 23 of the Constitution** empowers this Court to hear and determine matters pertaining to the issues of constitutional violations on fundamental rights and freedoms therefore urged the court has jurisdiction to hear and determine the Petition.

59. It is my considered view that looking at the prayers in the Petition, the same bring out the aspect of an employer / employee dispute as per prayer (b) of the Petition and also an employer and trade union dispute as per prayer (a) of the Petition which falls within the ambit of **Section 12 of the Employment and Labour Relations Court Act**.

60. I note further that the petition has also been brought under **Article 41 of the Constitution** which states that;

“(1) Every person has the right to fair labour practices.

(2) Every worker has the right—

(a) to fair remuneration;

(b) to reasonable working conditions;

(c) to form, join or participate in the activities and programmes of a trade union; and

(d) to go on strike.

(3) Every employer has the right—

(e) to form and join an employers organisation; and

(f) to participate in the activities and programmes of an employers organisation.

(4) Every trade union and every employers' organisation has the right—

(a) to determine its own administration, programmes and activities;

(b) to organise; and

(c) to form and join a federation.

(5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining."

61. Upon consideration of the pleadings, case laws and submissions, I find that, the dispute filed herein rightly falls within the jurisdiction of the employment and Labour Relations Court. In addition thereto, I find that the jurisdiction of this Court is limited by **Article 162(2) of the Constitution**, that empowers the Employment and Labour Relations Court, to hear and determine all disputes, arising out of an employer and employee relationship, as well as, disputes between an employer and a trade union. It is worth noting that the ELRC in exercising its mandate, the Employment and Relations Court, being a Court of equal and concurrent status as this Court, has jurisdiction to hear and determine constitutional violations on fundamental rights and freedoms arising from an employer and employee relationship, as well as, all disputes falling under **Article 41 of the Constitution**, as is in this case, as well as, all disputes stipulated under **Section 12 of the Employment and Labour Relations Court Act 2011**. Therefore the proper Court clothed with jurisdiction to hear and determine all issues raised in this Petition is Employment and Labour Relations Court.

62. It is noteworthy that among other prayers sought, by the petitioners, such as the prayer of an order terminating all Court proceedings commenced or / instituted by the respondent against the 1st and 2nd Petitioners, pending before ELRC, cannot be issued by this court against a court of equal and concurrent jurisdiction by dint of **Article 162(2) of the Constitution**. This Court cannot as sought, exercise jurisdiction over a matter that is properly before a Court of equal and concurrent jurisdiction.

63. I wish to state, that as regards jurisdiction of the Constitution and Human Rights Division, of the High Court, is just an administrative Division of High Court with same powers and jurisdiction as all other Divisions of the High Court. Reliance in support of the proposition is placed in the case of **Robert Mwangi vs Shepherd Catering Limited & Another (2012)** where Lady Justice Mumbi Ngugi stated;

"I do not know how often and for how long this has to be repeated: that the Constitutional and Human Rights Division of the High Court is just an administrative division of the High Court, with the same powers and jurisdiction as all the other Divisions of the High Court"

The Learned Judge proceeded further to state;

"This message must be brought home to litigants, and the duty to do this lies with their legal counsel. If a party is dissatisfied with a decision or conduct of a judge sitting in any Division or station of the High Court, and alleges that there has been a violation of his or her constitutional rights, the alleged violation must be raised before the judge of the High Court Seized of the matter. If the party is still not happy with the decision of that court, then his or her remedy lies in the Court of appeal, and from there the Supreme Court as provided in the Constitution and the relevant legislation. These are the courts in our system of courts to which appellate jurisdiction is vested." (Emphasis added)

64. Having said so much, and guided by various provisions of the law, Constitution and authorities cited herein above, I wish to add that it is clear from all the cited authorities, that in matters touching on Employment and Labour Relations, they lie exclusively and squarely within the jurisdiction of the Employment and Labour Relations Court and the High Court's jurisdiction is expressly ousted by the Constitution.

65. In light of my findings herein above, it is my view, that even though this court is vested with powers to hear and determine disputes on contraventions and infringements of constitutional rights and fundamental freedoms, the dispute herein is more of an employment and labour relations dispute and as such High Court has no jurisdiction to entertain such a matter.

66. I have no doubt, from the clear pleadings, before me, consider the nature of the pleadings, and the reliefs sought in the Petition and applying the jurisprudence, flowing from the various decisions cited herein above, the reliefs sought, in the Petition herein are as such, that they can be granted by ELRC as the Court that is clothed with jurisdiction in terms of **Article 23(3) of the Constitution** as read with **Section 12 of the Employment and Labour Relations Court Act** to determine issues of fundamental freedoms, in the Bill of Rights.

67. **The upshot is that the preliminary objection dated 28th October 2020 succeeds and I proceed to make the following orders:-**

a) That though this Court is vested with power to hear and determine disputes on contraventions and infringements of Constitutional fundamental freedoms, it has no jurisdiction to deal with Employment and Labour Relations Disputes.

b) The dispute herein is more of an employment and labour relations dispute, which should be heard and determined by the ELRC, which court has jurisdiction in terms of Article 23(3) as read with Section 12 of the Employment and Labour Relations Court Act, to determine issues of fundamental freedoms in the Bill of Rights.

c) Accordingly the Petition is transferred to ELRC, Milimani, for hearing and determination.

d) Costs be in the cause.

Dated, Signed and Delivered at Nairobi on this 27th day of May, 2021.

.....

J. A. MAKAU

JUDGE