



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL PETITION NO. 30 OF 2019

IN THE MATTER OF: THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF: THE EMPLOYMENT ACT, 2007

AND

IN THE MATTER OF: FAIR ADMINISTRATIVE ACTION ACT

AND

IN THE MATTER OF: THE PETITIONERS' ACADEMIC PAPERS ISSUED BY THE KENYA NATIONAL EXAMINATION COUNCIL; KENYA METHODIST UNIVERSITY AND KENYA INSTITUTE OF STUDIES IN CRIMINAL JUSTICE

AND

IN THE MATTER OF: ALLEGED VIOLATION AND INFRINGEMENT OF THE RIGHTS AND FREEDOMS IN ARTICLES 2(4), 3, 10, 19(1) & (2), 20(1) & (2), 21, 22, 23, 27, 28, 29(f), 25, 47, 48, & 50(1) & (2), 159, 258(1) & 259(1) OF THE CONSTITUTION OF KENYA

-BETWEEN-

ABDI MOHAMED DAIB.....PETITIONER

-VERSUS-

KENYA PORTS AUTHORITY.....RESPONDENT

KENYA NATIONAL EXAMINATION COUNCIL.....1ST INTERESTED PARTY

KENYA INSTITUTE OF STUDIES IN CRIMINAL JUSTICE.....2ND INTERESTED PARTY

KENYA METHODIST UNIVERSITY.....3RD INTERESTED PARTY

ETHICS AND ANTI-CORRUPTION COMMISSION.....4TH INTERESTED PARTY

RULING

1. Before the Court for determination is the Respondent's and the 4th interested party's Notices of Preliminary Objection both dated 24th April 2019, objecting to the petition and the Notice of Motion both dated 5th April, 2019 on the following grounds; -

- i. That this Honourable Court lacks jurisdiction to hear and determine any and all issues in dispute arising from employment relationship.
- ii. That the Petition is Res Judicata as the substantive issues raised in it have been determined by a Court of competent and equal jurisdiction.

iii. That the claim is in any event statute barred.

2. The preliminary objection (PO) was disposed of by way of written submissions. The submissions by the Respondent was dated 31.07.2019, that by the 4th interested party dated 21.05.2019 while those by the plaintiff were dated 17.06.2019

The Respondent's & 4th Interested Party's Submission

3. Both the Respondent and the 4th Interested Party submitted that the Petition and the Notice of Motion contravene provisions of Article 162(2) as read with the mandatory provisions of **section 12 of the Employment and Labour Relations Court Act, 2011.**

4. In their view, the Petition presents an employment dispute between the Petitioner and the Respondent and therefore the Employment and Labour Relations Court has the exclusive original jurisdiction to deal with the issues.

5. They also submit that According to section 90 of the Employment Act this petition is statute –barred and incurably bad in law. Further they submitted that the petition is **Res Judicata** as the substantive issues raised in it have been determined by a Court of Competent and equal jurisdiction.

The Petitioner's Submission

6. The Petitioner on the other hand opposed the objection and submitted that they are frivolous, misconceived, bad in law and an abuse of the Court process and should therefore fail in *limine* to pave way for the hearing and disposal of the Petition. It is their view that the effect of the P.O, if it were to be successful, is that the Petitioner's rights in the Petition would have been determined without giving him the opportunity to ventilate his case.

7. The Petitioner further submits that the jurisdiction of this Court as the interpreter of rights is created by the Constitution under **Article 23** as read with **Article 165** and that **section 12(2)** of the **Employment and Labour Relations Court Act, 2011** does not purport to confer exclusive jurisdiction to the Employment and Labour Relations Court in Constitutional matters. They rely on the case of **Theresa Runji & others Vs. National Lands Commission (2018) eKLR** and the case of **Habo Agencies Limited Vs. National Land Commission & others Petition No. 44 of 2018.**

Analysis and determination.

8. Putting into consideration the pleadings filed as well as the submissions by the two parties, I agree that jurisdiction is the power of a court and that without jurisdiction the court has no mandate to move one more step. It must down its tools. However, the law on preliminary objections is also well settled that it is argued on the basis that all facts asserted by one side are correct. An objection cannot be properly argued if the facts must be ascertained by minute scrutiny or elaborate arguments. See **Mukisa Biscuits Co Ltd Vs West End Distributors Ltd (1969) EA 696.**

9. Article 162 of the Constitution envisaged Parliament establishing a Court of equal status to the High Court to hear and determine disputes relating to employment and Labour relations. It must be emphasised that the Employment and Labour Relations Court is not an inferior court to the High Court since the two enjoy the same status but with different source of jurisdiction.

10. Pursuant to the said Article, Parliament enacted the **Employment and Labour Relations Court Act** and the jurisdiction of the Court is set out in section 12 as follows:

(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 unions organisation;

(d) disputes between trade unions;

(e) disputes between employer organizations;

(f) disputes between an employers' organization 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.

11. It is important to note that the law on jurisdiction was set and reiterated by the Supreme court in **S K Macharia vs Kenya Commercial Bank Limited & 2 others [2012] eKLR** to be that it must be vested by the constitution or a statute and that a court has no power to abrogate to itself a jurisdiction it has not been vested with nor can parties vest jurisdiction on a court when the law has not done so. It follows therefore that even though **the Employment and Labour Relations court has the jurisdiction to hear and determine employment and labour relations matters with coordinate jurisdiction to hear claims of violation of rights and fundamental freedoms founded upon, ancillary to or incident to employment and labour relations matters, neither the Constitution nor the Employment and Labour Relations Court Act has limited the High Court's jurisdiction in this respects. Of note is Article 20(3) that places an obligation on "any court" in applying a provision of the Bill of Rights to develop the law and to adopt the interpretation that most favours the enforcement of a right or fundamental freedom.**

12. In the Petition, the Petitioner alleges denial, violation, infringement or threat such infringement to rights or fundamental freedoms some of which arose after the Petitioner had been dismissed from employment while others are said to be continuing. The jurisdiction of this Court as the interpreter of rights is conferred by the Constitution under **Article 23** as read with **Article 165**. These two Articles gives this Court the **powers to hear and determine questions involving redress of violations or infringement or threatened violations of fundamental rights and freedoms in the Bill of Rights**. I find that to be crux of the dispute for determination in the Petition. For that reason and the fact that such matters were never in issue in the previous proceedings, I do find that the court is properly seized of jurisdiction in this petition.

13. Therefore, I do find that the matter for determination in this petition cannot be treated as a purely employment issue or one that deals purely with labour relations; rather it is a constitutional issue which this court has jurisdiction to determine by virtue of Article 165(3) of the Constitution. The question is whether the respondents have infringed upon the rights of the Petitioner and therefore, not exclusive question for the Employment and Labour Relations Court but rather for determination by the High Court.

14. On the objection and issue that the petition is **Res Judicata** because the substantive issues raised in it have been determined by a Court of Competent and equal jurisdiction, it is, to me, clear that the Petition raises new issues of infringement of rights that were never raised in before the Employment and Labour Relations Court. Furthermore, the Petition raises issues of continuous violation of his rights and freedoms, something that was never and could not be raised or dealt with in the Employment and Labour Relations Court and therefore cannot be shut out by this Court striking out the petition.

15. On the attack that the matter is statute barred by dint of section 90, Employment and Act and section 66 of Kenya Ports Authority Act, the obvious answer is the fact that I have found that this is not a pure employment matter. More important is the law that to adjudication of fundamental rights and freedoms claims are not sanctioned by limitation of time. One need not say much beyond quoting the court of appeal in **Peter M. Kariuki v Attorney General [2014] eKLR** where it was said that;

"...the Constitution did not set a time limit within which applications for enforcement of fundamental rights should be brought."

16. The foregoing determinations lead me to the conclusion that the Respondent's and the 4th interested party's Notices of Preliminary Objection both dated 24th April 2019 fails and are dismissed. I direct that costs shall wait the determination of the petition.

Dated and delivered at Mombasa this 27th day of May 2020

P.J.O. OTIENO

JUDGE