

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI, MILINMANI LAW COURTS

JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 430 OF 2018

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW FOR ORDERS OF CERTIORARI AND PROHIBITION.

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA, ARTICLES 32, 47(1), 50(1) AND (2) OF THE CONSTITUTION

AND

IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT

BRAHIM TADICHA SORA.....EX PARTE APPLICANT

VERSUS

ISAAC B. NADERA (SSP).....1ST RESPONDENT

COMMISSIONER OF PRISONS.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

RULING

Introduction.

1. This ruling disposes a Preliminary Objection raised by **Mr. Bitta**, counsel for the Respondents. The contestation is that the substance of *ex parte* applicant's claim is primarily a dispute between an employer and an employee, hence, by dint of Article **162(2) (a)** of the Constitution, it falls outside the jurisdiction of this court.

The *ex parte* applicant's application.

2. By an application dated **16th** October 2018, the *ex parte* applicant seeks leave to institute judicial review proceedings to quash the first Respondent's decision made on **26th** September 2018 and an order prohibiting the Respondents from implementing the impugned decision. He also prays that the leave sought if granted do operate as stay of the decision.

3. It is undisputed that the *ex parte* applicant is a Prison Officer who was subjected to orderly room proceedings, He was tried for Neglecting Duty contrary to Rule **124(i)(g)** of the Prison Rules. The facts were that on Friday **20th** July 2018, at around **15:30** hours, while deployed at section "**A**" at Mathari Teaching and referral Hospital, he left his post unmanned thereby endangering the security of inmates he was entrusted to safeguard.

4. Upon trial, the Adjudicating Officer returned a guilty verdict and fined him **Ksh. 1,500/=** and a severe reprimand. He now seeks leave of this court to quash and prohibit its implementation. He claims that the proceedings were tainted with illegality, irrationality and procedural impropriety and that his right to a fair hearing was violated.

The Preliminary Objection.

5. **Mr. Bitta's** objection is that this court's jurisdiction has been expressly ousted by specific provisions of both the Constitution and the relevant statute. He contended that his objection is premised on a point of law which if upheld, it can dispose this suit. **[1]** To buttress his argument, he cited *Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd.* **[2]** He argued that this matter ought to have been filed at the Employment and Labor Relations Court which has the same status as the High Court. **[3]** To fortify his argument, he cited *Samson O. Ngonga v The Public Service Commission & Others* **[4]** where it was held that the issues of employment and labor relations are entirely under the purview of the Industrial Court which by dint of section **4(1)** of the enabling statute hears employment and labor relations disputes relating to or arising out of employment between an employer and an employee, a position he submitted was also upheld in *James Davies Njuguna v James Chacha (Sued as Chairman Parklands Sport Club & 3 Others)* **[5]** and *United States International University (USIU) v A.G.* **[6]**

6. **Mr. Mburu's**, counsel for the respondent submitted that "Judicial Review questions the decision making process of any administrative officer discharging judicial or quasi-judicial function or disciplinary (sic) with an administrative duty." He argued that the *ex parte* applicant "raises fundamental questions on the decision making process and that the Fair Administrative Action Act^[7] applies to the impugned decision. He submitted that "*the Employment Court though clothed with jurisdiction to issue judicial review orders, it has no express ouster clause that statutory bars this court from hearing and determining a claim based on the violation of an administrative action and instituted under the Law Reform Act^[8] and Civil Procedure Rules.*"(sic). He contended that this court is clothed with jurisdiction to hear this case adding that the authorities referred to by the Respondents' counsel do not deal with Judicial Review jurisdiction. He relied on *Council for Civil Service Unions v Minister for Civil Service*,^[9] a decision that is famed for delineating Judicial Review grounds.

Determination.

7. A casual view of the line of argument advanced by **Mr. Mburu** as summarized above raises serious worrying doubts as to whether he correctly understood the crux of the Preliminary Objection mounted in this case. This is more discernible from the authorities he cited among them *Council of Civil Service Unions v. Minister for the Civil Service*^[10] in which Lord Diplock enumerated a threefold classification of grounds of Judicial Review, any one of which would render an administrative decision and/or action *ultra vires*. These grounds are; *illegality, irrationality and procedural impropriety*. It is evident that **Mr. Mburu** confused the judicial review jurisdiction of the High Court and the jurisdiction to hear and determine a case which is the hurdle mounted by **Mr. Bitta**. To this extent, his arguments were irrelevant.

8. **Mr. Mburu** appears to have missed the point that by jurisdiction to hear and determine a case as opposed to the judicial review jurisdiction means 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 of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the fact exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.^[11]

9. Court's jurisdiction flows from either the Constitution or legislation or both. The Supreme Court in *the matter of the Interim Independent Electoral Commission*^[12] discussed the issue of jurisdiction in the following manner; " *Assumption of jurisdiction by courts in Kenya is a subject regulated by the constitution; by statute law, and by principles laid out in judicial precedent.*" Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written laws.^[13]

10. Article 162 of the constitution of Kenya 2010 provides that: -

(1) *The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2).*

(2) *Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—*

(a) *employment and labour relations; and*

(b) *the environment and the use and occupation of, and title to, land.*

(3) *Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).*

11. Article 165 (5) of the Constitution provides that the High Court **shall not** have jurisdiction in respect of matters— (a) reserved for the exclusive jurisdiction of the Supreme Court...; or (b) falling within the jurisdiction of the courts contemplated in Article 162 (2). Pursuant to Article 162(2) of the Constitution, Parliament enacted the Employment and Labour Relations Court Act.^[14] The Preamble to the Act reads:- "An Act of Parliament to establish the Employment and Labour Relations Court to hear and determine disputes relating to employment and labour relations and for connected purposes."

12. Section 12 of the act provides for the Jurisdiction of the court. It provides *inter alia* that 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 the 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. Section 12(3) of the act provides that in exercise of its jurisdiction under the Act, the court shall have power to make any of the following orders—

i. *interim preservation orders including injunctions in cases of urgency;*

ii. *a prohibitory order;*

iii. *an order for specific performance;*

iv. *a declaratory order;*

v. *an award of compensation in any circumstances contemplated under this Act or any written law;*

vi. an award of damages in any circumstances contemplated under this Act or any written law;

vii. an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law; or

viii. any other appropriate relief as the Court may deem fit to grant.

13. Section 2 of the act defines court as follows:-“**Court**” means the Employment and Labour Relations Court established under [section 4](#).

14. It is common ground that the *ex parte* applicant is a Prison officer. It is uncontested that he was subjected to disciplinary proceedings for allegedly neglecting duty in the course of his duties as a Prison Officer. Put differently, the facts of this case present a dispute with his employer relating to or arising out of employment between the *ex parte* applicant and his employer as contemplated under section 12 of the act.

15. Article 165(5) of the Constitution provides that the High Court shall not have jurisdiction in respect of matters-(b) falling within the jurisdiction of the courts contemplated in Article 162(2). It is instructive to note the use of the word *shall* in the above provisions. The classification of statutes as mandatory and directory is useful in analyzing and solving the problem of what effect should be given to their directions.^[15] There is a well-known distinction between a case where the directions of the legislature are imperative and a case where they are directory.^[16] The real question in all such cases is whether a thing has been ordered by the legislature to be done and what is the consequence if it is not done. The general rule is that an absolute enactment must be obeyed or fulfilled substantially. Some rules are vital and go to the root of the matter, they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance.

16. It is the duty of courts of justice to try to get at the real intention of the Constitution or legislation by carefully attending to the whole scope of the Constitution or a statute to be considered. The Supreme Court of India pointed out on many occasions that the question as to whether a statute is mandatory or directory depends upon the intent of the Legislature and not upon the language in which the intent is clothed. The meaning and intention of the Legislature must govern, and these are to be ascertained not only from the phraseology of the provision, but also by considering its nature, its design and the consequences which would follow from construing it in one way or the other.

17. The word “*shall*” when used in a statutory provision imports a form of command or mandate. It is **not permissive**, it is **mandatory**. The word *shall* in its ordinary meaning is a word of command which is normally given a compulsory meaning as it is intended to denote obligation.^[17] The Longman Dictionary of the English Language states that “*shall*” is used to express a command or exhortation or what is legally mandatory.^[18] Ordinarily the words ‘*shall*’ and ‘*must*’ are mandatory and the word ‘*may*’ is directory.

18. A proper construction of Article 165(5) of the Constitution leads to the conclusion that it is couched in mandatory terms. Article 165 (5) explicitly provides that the High Court **shall not** have jurisdiction in matters falling within the jurisdiction of the courts contemplated in Article 162(2). Clearly, the above Article is binding on this court. The binding nature of this provision is absolute. Article 165 (5) is an edict firmly addressed to the High Court stating that it has no jurisdiction to entertain matters falling within the jurisdiction of courts contemplated in Article 162(2). **Mr. Mburu’s** argument that the applicant invokes the judicial review jurisdiction of this court cannot stand. The test is whether a dispute falls within the forbidden sphere.

19. In *Judicial Service Commission vs Gladys Boss Shollei & another*^[19] which decision related to an objection on the jurisdiction of the Industrial and Labour Relations Court to handle issues pertaining to violation of constitutional rights, the court of Appeal held that the Industrial and Labour Relations Court had jurisdiction to handle complaints relating to violation of constitutional rights arising out of a labour dispute.

“[45] In this case, the respondent filed her petition in the Constitutional and Human Rights Division of the High Court and the same was properly transferred to the Industrial Court by the High Court as the violations alleged arose from the employment relationship. Accordingly, I would thus reject the contention that the Industrial Court had no jurisdiction to entertain the respondent’s claim.”

20. The intention in the Constitution is that if an issue arises touching on the matters reserved for the courts contemplated under Article 162(2) of the Constitution, then the High Court will have no jurisdiction. The dispute disclosed in this case falls within the ambit of the matters listed in section 12 of the act. It follows that the dispute is outside the jurisdiction of this court.

21. The other closely related issue is the jurisdiction of the Employment and Labour Relations Court to deal with issues relating to constitutional interpretation and enforcement of constitutional remedies. A similar issue arose in the case of *United States International University (USIU) vs. Attorney General*^[20] where the court dealt with the question at a very great length. The case related to labour issues, and, one of the issues in contention was whether or not the Employment and Labour Relations Court as created under Article 162(2) of the Constitution has the jurisdiction to interpret the Constitution and to grant the remedies provided under Article 23 of the Constitution which remedies are clearly stated to be a sole preserve of the High Court. The court expressed himself on the said issues as follows: -

“45. In light of what I have stated, I find and hold that the Industrial Court as constituted under the Industrial Court Act, 2011 as court with the status of the High Court is competent to interpret the Constitution and enforce matters relating to breach of fundamental rights and freedoms in matters arising from disputes falling within the provisions of Section 12 of the Industrial Court Act, 2011.” (emphasis added).

22. It is instructive to note that the Court of Appeal also had an occasion to address itself on the issue in the case of *Daniel N. Mugendi vs. Kenyatta University & 3 others*^[21] were in allowing an appeal and setting aside an order dismissing a suit on the finding that the Industrial Court was not possessed of jurisdiction to interpret the Constitution and to grant the remedies provided under Article 23 of the Constitution settled the issue in *toto* in respect to such matters within the jurisdiction of both the Employment and Labour Relations Court as well as those

before the Environment and Land Court. The Court of Appeal expressed itself in the following words: -

"In the same token we venture to put forth the position that as we have concluded that the Industrial Court can determine industrial and labour relations matters alongside claims of fundamental rights ancillary and incident to those matters, the same should go for the Environment & Land Court, when dealing with disputes involving environment and land with any claims of breaches of fundamental rights associated with the two subjects." (emphasis added).

23. Clearly, the High court has no jurisdiction to determine matters falling squarely under the jurisdiction of the 'status courts' namely the Employment and Labour Relations Court and the Land and Environment Court. These are the courts established under Article 162(2) and whose jurisdiction is spelt out in the respective constitutive statutes. Regrettably, even with that clear-cut jurisdictional demarcation on paper, quite often matters camouflaged in what may on the surface appear to be a serious constitutional issue or a judicial review applications, may, on a closer scrutiny reveal otherwise- that the germane of the application is actually a labour dispute or land issue falling squarely in the forbidden sphere of the specialized courts!^[22] This is such a case. It falls within the forbidden sphere.

24. I find that this case discloses a dispute within the meaning of section 12 of the act which clearly falls within the jurisdiction of the Employment and Labor Relations Court, hence, outside the jurisdiction of this court. Consequently, I allow the preliminary objection and dismiss the *ex parte* applicant's application dated 16th October 2018 with no orders as to costs.

Orders accordingly.

Dated, signed and delivered at Nairobi this 25th day of March 2019

John M. Mativo

Judge

[1] Citing *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* {1969} EA 696.

[2] {1989} KLR 1.

[3] To buttress his argument, counsel cited *Seven Seas Technologies Limited v Eric Chege* {2014} eKLR.

[4] Pet No. 459 of 2011.

[5] {2013} eKLR.

[6] {2012} eKLR

[7] Act No. 4 of 2015, citing sections 2 and 3(a)(b)(c) of the act.

[8] Cap 26, Laws of Kenya.

[9] {1985}AC 374. Counsel also cited *Municipal Council of Mombasa v Republic & Pastoli v Kabale District Local Government*.

[10] {1985} AC 374.

[11] John Beecroft, *Words and Phrases Legally Defined*, Volume 3:1-N, at Page 113.

[12] Constitutional Application No. 2 of 2011 (unreported).

[13] *Samuel Kamau Macharia v. Kenya Commercial Bank and Two others*, Civ. Appl. No. 2 of 2011.

[14] Act No. 20 of 2011.

[15] *Dr Sanjeev Kumar Tiwari, Interpretation of Mandatory and Directory Provisions in Statutes: A Critical Appraisal in the Light of Judicial Decisions*. International Journal of Law and Legal Jurisprudence Studies: ISSN:2348-8212 (Volume 2 Issue 2).

[16] *Ibid*.

[17] See *Dr Arthur Nwankwo and Anor vs Alhaji Umaru Yaradua and Ors* (2010) LPELR 2109 (SC) at page 78, paras C - E, Adekeye, JSC .

[18] This definition was adopted by the Supreme Court of Nigeria in *Onochie vs Odogwu* [2006] 6 NWLR (Pt 975) 65.

[\[19\]](#){2014}eKLR

[\[20\]](#) {2012} eKLR

[\[21\]](#) Supra.

[\[22\]](#) Supra note 20.