



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 262 OF 2018

IN THE MATTER OF: ARTICLE 10, 20, 21, 22, 23, 27, 36, 40, 41, 47, 48, 159 & 258

AND

IN THE MATTER OF: LABOUR RELATIONS ACT 2007

AND

**IN THE MATTER OF: THE CONTRAVENTION OF SPEDAG INTERFREIGHT KENYA LIMITED AND IT'S EMPLOYEES
FUNDAMENTAL RIGHTS AND FREEDOM BY THE CABINET SECRETARY FOR LABOUR AND SOCIAL PROTECTION**

BETWEEN

SPEDAG INTERFREIGHT KENYA LIMITED.....PETITIONER

AND

THE CABINET SECRETARY FOR

LABOUR & SOCIAL RELATIONS.....1ST RESPONDENT

TRANSPORT WORKERS UNION.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

RULING

1. By notice of Preliminary Objection dated and filed on the 14th January 2018, the 2nd Respondent Objects to this Court's jurisdiction to hear and determine the Petitioner's Application and the petition both dated 21st December 2018 on the following grounds:-

a) The dispute herein relates to deductions of agency fees pursuant to section 49 of the Labour Relations Act. It is a dispute which revolves around and relates to employment and Labour Relations which can only be heard and determined by the employment and Labour relations court under Article 162(2) (a) of the constitution and section 4 of the employment and Labour relations act, 2011.

b) Under section 73 of the Labour relations act, 2007, if a trade dispute is not resolved by the conciliator, the dispute can only be referred to the Employment and Labour Relations Court for determination and not to the High Court. Section 73 of the Labour Relations Act, 2007 ousts the High Court Jurisdiction to deal with this dispute the same having been dealt with by the conciliator.

c) This Petition is sub-judice and utter abuse of the Court process because the issue in dispute herein is also directly in dispute in Mombasa ELRC No. 479 of 2018: TRANSPORT WORKERS UNION-KENYA VS. SPEDAG INTERFREIGHT (K) LIMITED which was filed earlier than this petition.

d) The Petition does not raise any issue to warrant determination by way of a constitutional petition. It is a simple trade dispute magnified to become a constitutional Petition. The law is clear that not all disputes warrant determination by way of Constitutional Petition.

e) Where there is a clear procedure laid down in the law for resolving disputes, that procedure must be followed. The petitioner herein has deliberately failed to follow the procedure laid down in the Labour Relations Act, 2007 which provides that the dispute herein should be referred to the Employment and Labour Relations Court (ELRC) for determination.

2. On the 15th January 2019, this Court directed that the Preliminary Objections be dispensed with via written submissions. The submissions to the preliminary objection were highlighted on the 30th January 2019.

SUBMISSIONS

3. **Mr. Oluga**, Counsel for the 2nd Respondent submitted that this Court has no jurisdiction to hear and determine the matter since the issue in dispute is an ELRC matter. He referred to paragraph 5 of the Petition, where it is stated that the Petition arises out of **Legal notice No. 130 of 2018** published in the Kenya gazette on the 26th June 2018 by the 1st Respondent and stated that the Petitioner is basically challenging Labour Relations Act.

4. Counsel submitted that the dispute is between an employer and a trade union and it revolves around the collection of union dues, so it is a dispute that falls under the jurisdiction of the Employment and Labour Relation Court pursuant to Article 162(2)a of the Constitution.

5. Counsel submitted that Article 165(3) (d) (i) of the Constitution clothes the High Court with the jurisdiction to declare provisions of a law unconstitutional but the jurisdiction is subject to clause 5 of Article 165 of the Constitution which provides that the High Court shall not have jurisdiction in respect of matters reserved for the Courts created under Article 162(2) which includes the ELRC. Therefore, the High Court has no jurisdiction to declare a provision of law as inconsistent with the Constitution if the subject matter is Employment and Labour Relations as that jurisdiction is a preserve of the ELRC under Article 162(2).

6. Counsel further submitted that Section 73 of the Labour Relations Act, 2007 ousts the High Court's jurisdiction to deal with this dispute, the same having been dealt with by the conciliator on the 2nd July 2018.

7. In rejoinder to **Mr. Khagram** submissions, Counsel for the 2nd Respondent submitted that Section 12 of the Employment and Labour Relations Act creates the jurisdiction of the Court in accordance to Article 162(2) and the words used under Section 12 is "including" which means that the list is not exhaustive.

8. **Mr. Oluga** submitted that the minister did not exercise his powers under Section 49 of the Labour Relations Act in a vacuum. He was instigated. He referred this court to paragraph 18 of the petition.

9. Counsel relied on the following authorities, **United States International University versus The Attorney General; In Charles Oyoo Anyangi vs Judicial Service Commission; Eric Cheruiyot vs IEBC; Registrar of Trade Unions vs. Nicky Njuguna & 4 others ;David Onyango Opolo vs Inspector General of Police.**

10. **Mr. Khagram**, Counsel for the Petitioner submitted that the Petition arises out of the Legal Notice no. 130 of 2018 published in Kenya Gazette of the 26th June 2018 by the 1st Respondent by which he purports to compel the petitioner to collect union dues from all the petitioners unioniable employees including non-members who form a substantial majority and all of whom have objected to such deduction.

11. **Mr. Khagram** submitted that the impugned legal notice was published pursuant to powers conferred upon the 2nd Respondent under section 49 of the Labour Relations Act 2007 and the Petitioner seeks a declaration that its constitutional rights have been violated and the 2nd Respondent has acted inconsistent and in breach of the Constitution as well as an order declaring the said section 49(1) aforesated unconstitutional and consequently an order of *certiorari* to quash the said Legal Notice.

12. **Mr. Khagram** submitted that under Article 23 of the Constitution of Kenya, the Employment and Labour Relations Court has no jurisdiction to grant the reliefs specified therein but rather such jurisdiction is reserved for the High Court. He stated that Article 165 of the Constitution recognizes that the High Court is vested with jurisdiction to hear and determine matters of this nature as was appreciated in **Malindi Law Society v Attorney General & 4 others [2016] Eklr.**

13. Counsel submitted that the issue arising herein relates to constitutionality of Section 49(1) of the Labour Relations Act and consequent thereupon, grant of prerogative relief in judicial review by an order of *certiorari*. **Mr. Khagram** submitted that the issues raised herein are not related to Employment or Labour, and the Petitioner has been very careful to stay proceedings before the Employment and Labour Relations Court **MSA ELRC 479 of 2018** where the 2nd Respondent seeks to enforce payment relying on the said legal notice which can only be done after the constitutionality of that provision has been determined.

14. Counsel further submitted that none of the statutes relating to proceedings in the ELRC grant the Court jurisdiction to determine constitutionality of a statutory clause nor grant any judicial review orders.

15. **Mr. Mwandeje**, counsel for the 1st and 3rd Respondents supported the Preliminary objection by **Mr. Oluga** and submitted that the matter was a Labour Relations matter.

ANALYSIS AND DETERMINATION

16. This preliminary objection is on the jurisdiction of this Court to hear and determine the petition herein. Whereas the 2nd Respondent contends that the Court lacks jurisdiction on the grounds that the matter relates to employment, the petitioners maintain that the Court has jurisdiction because the issue before the Court is on the violation of constitutional rights and the unconstitutionality of Section 49 of the Labour Relations Act, issues that fall within this Court's jurisdiction.

17. The '*locus classicus*' on jurisdiction is the celebrated case of **The Owners of the Motor Vessel "Lillians" -V- Caltex Oil Kenya Ltd (1989) KLR 1** where Nyarangi J.A. held:

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. 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 continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds that it is without jurisdiction."

18. In **Samuel Kamau Macharia & Another Vs Kenya Commercial Bank Limited and 2 Others (2010) Eklr**, the Court held that: -

"A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of Law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submissions that the issue as to whether a Court of Law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, in the matter of the Interim Independent Electoral Commission (Appellant), Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the Constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of Law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a Court or tribunal by statute law".

19. In order to determine the issue at hand, there is need for an analysis of the provisions of **Articles 165(3) (5), 162 (2) (a)** of the Constitution, **Section 12** of the of the Employment and Labour Relations Court Act which establishes the Jurisdiction of the Employment and Labour Relations Court and the High Court's respective jurisdictions.

20. **Article 162 provides as follows:-**

162. (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

21. **Article 165 is tailored as follows**

165. (3) 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; and

(iv) a question relating to conflict of laws under Article 191; and

(e) any other jurisdiction, original or appellate, conferred on it by legislation.

(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).

22. Section 12 of the Employment and Labour Relation Court Act Provides:

12. 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.

23. Looking at the petition dated **21st December 2018** I observe the following by producing part of the petition verbatim.

a) At paragraph 8 of the petition the petitioner avers that:

Although there is in existence collective bargaining Agreement between the petitioner and the 2nd Respondent effective for 2 years from 1st April 2017, there is no Recognition Agreement between the Petitioner and the 2nd Respondent in existence. Your petitioner avers that the 2nd Respondent acted with a complete lack of candor and bona fides right from the outset by misleading and deliberately deceiving the Petitioner that it (2nd Respondent) was a recognized entity and had the requisite locus to negotiate and enter into a collective bargaining agreement as aforesaid when in fact it did not.

b. At Paragraph 10 of the petition, the petitioner avers that: **...majority of them have objected to any deductions being made on the basis that they have no desire to join the 2nd Respondent's membership.**

c. At Paragraph 12 of the Petition, the petitioner avers that: **...the 2nd Respondent does not have in its membership the required statutory threshold (section 54 of the Trade Relations Act 2007 for it to be a recognized entity for the purpose of collect bargaining. Consequently your Petitioner avers and asserts that the 2nd Respondent has and had no locus standi whether for the purposes of the Collective Bargaining Agreement referred to above or in reporting any trade dispute or filing claim thereof.**

24. Applying the foregoing, I notice that the central issue relates to deduction fees pursuant to section 49 of the Labour Relation Act. The dispute involves an employer and a trade union. The Court with the exclusive and Appellate Jurisdiction to deal with Employer and trade union dispute in my view is none other than the Employment & Labour Relations Court and its jurisdiction on the said dispute is exclusive.

25. In **Speaker of the National Assembly v Karume (2008) 1 KLR** it was held as follows...

"where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament that procedure should be strictly followed."

26. Similarly, in **Benard Murage v Fine Serve Africa Limited & 3 others [2015] eKLR** the Court stated as follows...

"Not each and every violation of the law must be raised before the High Court as a constitutional issue. Where there exists an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first;"

27. On the issue of constitutionality of section 49 of the Labour Relation Act, this Court finds that the Employment and Labour Relations Court and the High Court stand at parity, whatever the High Court can do the Employment Court would do in equal measure subject to the respective jurisdiction of the individual Court. This sentiments have been echoed in the Court of Appeal decision in **Registrar of Trade unions vs. Nicky Njuguna & 4 others where the court held as follows...**

“This same issue was central in the following matters; Prof. Daniel N. Mugendi v Kenyatta University & Others Nairobi Civil Appeal No. 6 of 2012 (Unreported); U.S.I.U v A.G & Others (2012) eKLR Seven Seas Technologies v Eric Chege Nairobi HC Misc. Appl. No. 29 of 2013 (Unreported) and Judicial Service Commission v Gladys Boss Shollei & Another Civil Appeal No 50 of 2014. In all the aforesaid decisions by this Court differently constituted, it was emphasized that although Article 165(3) (c) of the Constitution gives the High Court jurisdiction to determine questions involving violation of the Bill of Rights, the Article did not oust the jurisdiction of ELRC to deal with such issues especially when the interpretation of the Constitution is intricately interwoven with a labour issue or is central to the determination thereof. In any case the Court found that under Article 20, the Constitution gives all courts and bodies powers to deal with constitutional matters; thus the court had jurisdiction to deal with all constitutional matters that arise before it in employment and labour disputes.

We will say no more on the jurisdiction of the ERLC to interpret the Constitution on fundamental rights that are germane and intricately connected with labour issues, as it has adequately been dwelt with and we fully agree with the above findings.”

28. In **International Centre for Insect Physiology and Ecology (ICIPE) v Nancy McNally [2018] Eklr** the Court of Appeal held as follows...

“There cannot be any argument that the ELRC is clothed with jurisdiction to hear and determine such constitutional issues as and when they arise from employment and labour relations. Any doubts on that jurisdiction were settled in the case of United States International University (USIU) vs Attorney General [2012] eKLR which was upheld by this Court in Daniel N. Mugendi vs Kenyatta University & 3 Others [2013] eKLR.”

29. Similarly, In **Chunky Limited & another v Patrick Ndune & 11 others [2018] eKLR** it was held as follows ...

“Whereas the jurisdiction to determine whether there had been a violation of any of the rights under the Bill of Rights was vested in the High Court under Article 165(3) (b), the said jurisdiction was subject to clause (5) which prohibited the High Court from exercising jurisdiction over matters that fell within the province of the courts established under Article 162(2).”

30. It is therefore this Court’s finding that the dispute between the parties herein is an Employment and Labour relations matter which squarely falls under **Article 162(2) (a)** of the Constitution and **Section 12** of the Employment and Labour Relations Court Act. Pursuant to Article 165(5) of the Constitution, this Court has no jurisdiction over the matter now.

31. In **Daniel N. Mugendi v Kenyatta University(supra)**, the Court of Appeal observed as follows:

“And in order to do justice, in the event where the High Court, the Industrial Court or the Environment & Land Court comes across a matter that ought to be litigated in any of the other Courts, it should be prudent to have the matter transferred to that Court for hearing and determination. These three courts within similar/equal status should in the spirit of harmonization, effect the necessary transfers among themselves until such time as the citizenry is well-acquainted with the appropriate forum for each kind of claim.”

32. For the above stated reasons, this Court having established it lacks jurisdiction to entertain the petition, it is left with no option but “to down its tools.” In the interest of justice, this petition is hereby transferred to the Employment and Labour Relation Court at Mombasa for hearing and final determination.

33. The interim orders granted here on 21st December 2018 shall remain for a period of 14 days during the period of transfer of the matter to ELRC.

34. Costs should be in the cause.

Date, Signed and Delivered in Mombasa this 24th day of April, 2019.

E. K. OGOLA

JUDGE

In the presence of:

Mr. Ngure h/b for the Petitioner

Mr. Mwanjeje for the 1st, 3rd Respondents

M/s. Mwanatumba h/b for Oluga for the 2nd Respondent

