



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT MIGORI

CONSTITUTIONAL PETITION NO. 3 OF 2019

(Formerly Homa Bay High Court Constitutional Petition No. 2 of 2019)

FREDRICK ODERO.....PETITIONER

-VERSUS-

1. THE GOVERNOR HOMA BAY COUNTY

2. THE SPEAKER COUNTY

GOVERNMENT OF HOMA BAY

3. THE COUNTY ASSEMBLY OF HOMA BAY

4. HON. ATTORNEY GENERAL.....RESPONDENTS

RULING

1. On 20/05/2019 the Petitioner herein, **Fredrick Odero**, the County Executive Committee Member in charge of Tourism, Culture, Sports, Youth, Gender and Social Services Department in the County Government of Homa Bay filed a Petition in the High Court at Homa Bay challenging the process initiated at the County Assembly of Homa Bay towards his removal from office. Contemporaneously with the Petition the Petitioner filed a Notice of Motion evenly dated under certificate of urgency seeking conservatory orders pending the determination of the Petition.

2. As the Presiding Judge of the High Court at Homa Bay was on leave the matter was forwarded to the Presiding Judge at Kisii High Court for consideration. The Judge however disqualified himself and referred the matter to this Court.

3. The matter was placed before me on 21/05/2019 for consideration of the certificate where **Mr. Ongudi** Learned Counsel appeared for the Petitioner and **Miss Opar** Learned Counsel appeared for the Third Respondent. Counsel for the Third Respondent raised an issue touching on the jurisdiction of this Court and contended that the High Court has no jurisdiction over the matter as the dispute was on an employer-employee relationship and instead ought to be dealt with by the Employment and Labour Relations Court. Relying on the Court of Appeal decision in **County Government of Nyeri & Another vs. Cecilia Wangechi Ndungu (2015) eKLR** Counsel for the Petitioner contended that the issue of this Court's jurisdiction in respect to state officers was settled with finality when the application of the **Employment Act** against State Officers was ousted. It is that objection that elicited this ruling.

4. As the issue under consideration was raised by way of a Preliminary Objection, it will be in order for me to have a look at the law on preliminary objections. **Law, J.A.** in the much-celebrated case of **Mukisa Biscuits Manufacturing Company Limited -vs- West End Distributors (1969) EA 696** had the following to say: -

So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded or which raises by clear implication out of pleadings, and which if argued as a preliminary point, will dispose of the suit. Examples are an objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration.....

5. My brother **Mwita, J.** in the case of **John Musakali vs. Speaker County of Bungoma & 4 others (2015) eKLR** put the foregone legal position in clearer terms when he stated that: -

The position in law is that a Preliminary Objection should arise from the pleadings and on the basis that facts are agreed by both sides. Once raised the Preliminary Objection should have the potential to disposing of the suit at that point without the need to go

for trial. If, however, facts are disputed and remain to be ascertained, that would not be a suitable Preliminary Objection on a point of law.

6. Before I leave this discourse, my attention has been drawn to the words of **Hon. Ojwang, J** (as he then was) in the case of **Oraro vs- Mbaja (2005) KLR 141** where after quoting the statement of **Law, JA.** in the **Mukisa Biscuits case (supra)** went on to state that: -

A 'Preliminary Objection' correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a Preliminary Objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true Preliminary Objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point....

Anything that purports to be a Preliminary Objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.....

7. The jurisdictional point raised by the Third Respondent herein clearly meets the foregone criteria being a pure point of law capable of disposing the matter before this Court. That, jurisdiction is everything is a well settled principle in law. My Lordship **Ibrahim, JSC** in **Supreme Court of Kenya Civil Application No. 11 of 2016 Hon. (Lady) Justice Kalpana H. Rawal vs. Judicial Service Commission & Others** when in demystifying jurisdiction quoted from the decision in **Supreme Court of Nigeria Supreme Case No. 11 of 2012 Ocheja Emmanuel Dangana vs. Hon. Atai Aidoko Aliusman & 4 Others** where **Walter Samuel Nkanu Onnoghen, JSC** and expressed himself as follows: -

...It is settled that jurisdiction is the life blood of any adjudication because a court or tribunal without jurisdiction is like an animal without blood, which means it is dead. A decision by a court or tribunal without requisite jurisdiction is a nullity - dead - and of no legal effect whatsoever, That is why an issue of jurisdiction is crucial and fundamental in adjudication and has to be dealt with first and foremost...

8. The Court of Appeal more recently in the case of **Kakuta Maimai Hamisi -vs- Peris Pesi Tobiko & 2 Others (2013) eKLR** had the following to say on the centrality of the issue of jurisdiction: -

So central and determinative is the jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings in concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue in a consideration imposed on courts out of decent respect for economy and efficiency and necessary eschewing of a polite but ultimate futile undertaking of proceedings that will end in barren cui-de-sac. Courts, like nature, must not sit in vain.

9. On the source of a Court's jurisdiction, the **Supreme Court of Kenya** in the case of **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & others (2012) eKLR** stated as follows: -

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 counsels for the first and second respondents in his submission 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 ... 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.

10. There is no dispute that the Petitioner is the County Executive Committee Member in charge of Tourism, Culture, Sports, Youth, Gender and Social Services Department in the County Government of Homa Bay. Therefore, his terms of engagement including remunerations emanated from the **Constitution** and the **County Government Act, No. 17 of 2012** (hereinafter referred to as '**the Act**'). The process of appointment of a Member of the County Executive is governed by **Article 179** of the **Constitution** and **Section 35** of the **Act**. Such a member is first nominated by the County Governor and approved by the County Assembly before he/she takes an Oath of Office and assumes office. On the other hand, the process of removal of a Member of the County Executive is provided for under **Section 40** of the **Act**. This time round the removal is initiated by the County Assembly and effected by the County Governor. Once appointed a Member of the County Executive becomes a State Officer courtesy of **Article 260** of the **Constitution**.

11. A look at the processes of appointment and removal of a Member of the County Executive reveal a relationship between the County Governor as the head of the County Executive and the County Assembly on one part and the Member of the County Executive on the other hand. **Article 176(1)** of the **Constitution** creates **County Governments** which consist of the **County Executives** and the **County Assemblies**. Suffice therefore to say that a Member of the County Executive is engaged by the County Government which is a public body with corporate entity exercising constitutional authority and with perpetual succession.

12. Upon the promulgation of the **Constitution of Kenya** in 2010 the jurisdiction of the High Court was redefined under **Article 162** and **Article 165** thereof. **Article 165(5)(b)** provides that: -

The High Court shall not have jurisdiction in respect of matters: -

(a)

(b) falling within the jurisdiction of the courts contemplated in Article 162(2).

Article 162(2) of the Constitution states that: -

(1).....

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

(a) employment and labour relations.

(b)

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

13. One of the pieces of legislation contemplated under Article 162(3) of the Constitution is the **Employment and Labour Relations Act**, No. 20 of 2011 (hereinafter referred to as '**the ELRC Act**') which came into force on 30/08/2011 and is an Act of Parliament establishing the **Employment and Labour Relations Court** (hereinafter referred to as '**the Court**') with jurisdiction to hear and determine disputes relating to employment and labour relations and for connected purposes.

14. The jurisdiction of the Court is provided for under Section 12(1) and (2) thereof 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' organization and a trade unions organization;

(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 organization or a federation and a member hereof;

(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 organization, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose.

15. The powers of the Court are provided for under Section 12(3) as follows:

In exercise of its jurisdiction under this 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.

16. It is further settled that Courts of equal status as the High Court have jurisdiction to deal with any constitutional issue in a matter in which they have jurisdiction over. (See **United States International University -vs-Attorney General & 2 Others (2012) eKLR**, **Christopher Gatuiri v Commissioner of Police (2008) eKLR**, **Jane Frances Angalia v Masinde Muliro University of Science And Technology and Others (2010) eKLR** among others).

17. Section 2 of the ELRC Act defines ‘employee’ and ‘employer’ as under: -

‘employee’ means a person employed for wages or a salary and includes an apprentice and indentured learner;

‘employer’ means 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;

18. A Member of the County Executive hence enters into a contract with the County Government to serve in the County Executive. Such a member therefore provides services to the County Government at agreed terms including remunerations. Pursuant to the definitions in the **ELRC Act**, the Member of the County Executive is an employee whereas the County Government is the employer and there exists an employer-employee relationship between the two. I therefore fully associate myself with the words of **Nduma, J.** in **Nick Githinji Ndichu vs. Clerk, Kiambu County Assembly & Another (2014) eKLR** while in considering whether an employer–employee relationship existed between the Speaker of [who is an ex-officio Member of a County Assembly and a State Officer] and the County Assembly of Kiambu expressed himself thus: -

13. It is clear from the foregone that the law is not concerned with the method of acquiring an employee. The law does not concern itself with whether the person was appointed or elected. Rather, the person must; -

i) Be having an oral or written contract of service;

ii) Be providing a service to a real or a legal person;

iii) Be receiving wage/salary for the services rendered.

If such a person has a dispute with the person with who he/she has a contract of service and to whom he/she provides services for a wage or salary, the Court [Employment and Labour Relations Court] has jurisdiction over such disputes and has available remedies for the purpose.

14. It is the Court’s finding that the Petitioner has a relationship with all the above attributes with the 2nd Respondent, the County Assembly of Kiambu. The Court has therefore has jurisdiction over the matter.

19. The Petitioner raised the issue of a State Officer not being subject to the **Employment Act** and relied on **County Government of Nyeri & Another** (supra). I have carefully read the decision and I fully concur with that position. However, as I stated above the terms of engagement between the Petitioner and the Respondents in this case were governed by the **Constitution** and **the Act** and not the Employment Act. It is true that the Employment Act has no room to play in employee-employer relationships relating to State Officers. Respectfully, the Petitioner must have misunderstood the decision and regarded the Employment Act either as the only Act of Parliament dealing with all employee-employer relationships or that the Employment Act included all other Acts of Parliament dealing with employee-employer relationships. Certainly that is not what my Lordships and Ladyship meant since there are many other Acts of Parliament dealing with employee-employer relationships as well as the Constitution and that the Employment Act does not oust any other Act of Parliament or the Constitution from dealing with relationships between employees and employers. In this case the Employment Act does not feature anywhere within the contractual engagement between the Petitioner and the County Government. Further, the Employment Act does not even create or define the jurisdiction and functions of the Employment and Labour Relations Court.

20. I echo the words of **Maureen Onyango, J** in **Eunice Jepkoech Siria vs. County Secretary, Uasin Gishu County (2017) eKLR** when she added her voice to the decision in **County Government of Nyeri & Another** (supra) thus: -

This Court’s [ELRC] jurisdiction is thus not confined to employment relationships created under the Employment Act only as suggested by the Respondent. The court has mandate to determine issues relating to all employment irrespective of whether or not such employment relationship arises out of the Employment Act. Article 162(2)(a) does not make any reference to the Employment Act but rather, to ‘employment and labour relations’ as Parliament may by legislation confer.

21. From the foregone analysis I find and hold that the dispute between the Petitioner and the Respondents herein is a dispute relating to or arising out of the employment between an employer and an employee hence falling within the sole jurisdiction of the Employment and Labour Relations Court.

22. The upshot is that the Petition dated 19/05/2019 does not lie before the High Court on account of want of jurisdiction. It is a matter for the Employment and Labour Relations Court. In order to meet the ends of justice, I make the following final orders: -

(a) The High Court has no jurisdiction to in any manner whatsoever deal with the Petition dated 19/05/2019;

(b) The Deputy Registrar of this Court shall cause this file to be transferred to the Employment and Labour Relations Court at Kisumu;

(c) In view of the nature and urgency of this matter the Deputy Registrar of the Employment and Labour Relations Court at Kisumu shall, without any delay, place this file before the Honourable Judge;

(d) Costs in cause.

It is so ordered.

DELIVERED, DATED and SIGNED at MIGORI this 27th day of May 2019.

A. C. MRIMA

JUDGE

Ruling delivered in open court and in the presence of: -

Mr. Ongudi Counsel instructed by the firm of Messrs. Allamano & Associates Advocates for the Petitioner.

Miss. Wendy Winnie Opar Counsel for the Third Respondent.

Evelyne Nyauke – Court Assistant