REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW CASE NO. 702 OF 2017

IN THE MATTER OF THE UNIVERSITIES ACT

AND

IN THE MATTER OF THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT

AND

IN THE MATTER OF THE PUBLIC OFFICER ETHICS ACT

AND

IN THE MATTER OF LEADERSHIP AND INTEGRITY ACT

AND

IN THE MATTER OF THE LEADERSHIP AND INTEGRITY REGULATIONS, 2015

BETWEEN

KENYA UNIVERSITIES STAFF UNION.....APPLICANT

VERSUS

THE UNIVERSITY COUNCIL OF MASINDE MULIRO

UNIVERSITY OF SCIENCE ND TECHNOLOGY.....1ST RESPONDENT

MINISTER FOR EDUCATION, SCIENCE

AND TECHNOLOGY.....2ND RESPONDENT

AND

FREDRICK OCHIENG OTIENO.....1ST INTERESTED PARTY

ETHICS AND ANTI-CORRUPTION COMMISSION...2ND INTERESTED PARTY

RULING

1. The applicant herein, **Kenya Universities Staff Union**, seeks that leave be granted to it to commence proceedings n the nature of judicial review for an order of mandamus to compel the respondents to give effect to the recommendations of the 2nd interested party of 10th November, 2017 by suspending the 1st interested party herein from the office as the Vice Chancellor of Masinde Muliro University of Science and Technology.

2. According to the ex parte applicant, the **Ethics and Anti-corruption Commission** (hereinafter referred to as "the Commission") in the exercise of its mandate under Article 252(1)(a) and (d) of the Constitution, section 11 of the ***Ethics and Anti-corruption Act 2011***, and

section 4(2) and 42(10) of the ***Leadership and Integrity Act, 2012***, is carrying out investigations into allegations of abuse of office, embezzlement of funds and employment irregularities against the 1st interested party herein.

3. It was averred that in the course of the said investigations, the 1st interested party has intimidated staff involved in the process through transfer, demotions, interdictions and dismissals contrary to the ***Leadership and Integrity Regulation*** No 8 of 2015 which provides that a person who lodges a complaint to a public entity under the Act shall not be subjected to harassment, suspension, transfer, verbal or other abuse or any other form of unfair treatment.

4. According to the ex parte applicant, pursuant to Regulation 25 of the Leadership an Integrity Regulations, 2015, the 2nd interested party has recommended the suspension of the 1st interested party with immediate effect that is, 10th November, 2017 being the date of the recommendation. However despite the clear directives of Regulation 25(1)(c) as read with Regulation 25(2)(a), (b) and (c) of the said Regulations, the Respondents have jointly and or severally failed, refused and or neglected to give effect to the said recommendations of the 2nd interested party.

5. It was the ex parte applicant's belief that the said refusal, failure or neglect of the Respondents to act is a major assault on the twin principles of constitutionalism and the rule of law and constitutes an illegality hence these proceedings.

6. However before leave could be granted, an issue of jurisdiction arose and the ordinary rule is that where a preliminary objection is raised that goes to the jurisdiction of a Tribunal such objection ought to be determined at the earliest opportunity.

7. According to the 1st Respondent, the University Council of Masinde Muliro University of Science & Technology (hereinafter referred to as "the University"), this Court lacks jurisdiction to determine the subject matter of this judicial review. According to the University, it is an express dictate of Article 165(5) of the Constitution that matters touching on employment and labour relations is a preserve of the courts established under Article 162(2)(a) thereof. In this case it was contended that the subject of these proceedings raises issues of employment and labour relations since the matter revolves around the issue of transfer of staff, demotions, interdictions and staff dismissal being undertaken by the 1st interested party in order to intimidate the staff involved in the investigations.

8. It was therefore the University's case that the issues raised in this application are matters involving a dispute in employment and labour relations thus this application cannot be determined in this form by virtue of Articles 162(2)(a) and 165(5) of the Constitution. In support of this position the 1st Respondent relied on **Maendeleo Ya Wanawake Orgnisation vs. Hellen Makone & Another [2014] eKLR and United Sttes International University (USIU) vs. Attorney General [2012] KLR** and submitted that the rights alleged to have been and/or continue to be infringed in the judicial review application before the court is a right categorised as labour rights under Article 4 of the Constitution and that equally matters touching on employment and labour relations is a preserve of the Employment and Labour Relations Court pursuant to Article 162(2)(a) of the Constitution.

9. The 1st Respondent submitted that as this complaint is brought by a Union representing Academic staffs who are seeking to protect the rights of their members against an alleged abuse by the 1st interested party this is an employment matter.

10. The 1st Respondent therefore prayed that this matter be transferred to the Employment and Labour Relations Court.

11. The objection was however opposed by the ex parte applicant.

12. According to the applicant, in order to determine whether this Court has the jurisdiction to deal with the matter presented by the applicant, it is important to consider the Constitution as a whole bearing in mind all provisions bearing upon a specific issue should be considered together. On this principle known as the principle of harmonization, the ex parte applicant relied on **Olum vs. Attorney General of Uganda [2002] 2 EA 508**, where the court stated that:

> **"The entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other. Constitutional provisions must be construed as a whole in harmony with each other without insubordinating any one provision to the other."**

13. According to the applicant, in answering this question, a purposive approach must be adopted. On the one hand is the need to preserve and protect the objective of creating a specialist employment and labour relations court for which Article 162(2) was enacted. In this respect the applicant relied on **In Re Reference Public Service Employee Relations Act [1987] 1 SCR 313, 1987 CanLII 88 (SCC),** at paragraph 182 where **McIntyre J**, observed that:

> **"Labour law . . . is a fundamentally important as well as extremely sensitive subject. It is based upon a political and economic compromise between organised labour - a very powerful socioeconomic force - on the one hand, and the employers of labour – an equally powerful socio-economic force - on the other. The balance between the two forces is delicate…"**

14. According to the applicant, the Industrial Court is a specialist court to deal with employment and labour relations matters. By virtue of Article 162(3), section 12 of the ***Employment and Labour Relations Court Act, 2011*** has set out matters within the exclusive domain of that court. Since the Court is of the status of the High Court, it must have the jurisdiction to enforce labour rights in Article 41 and the jurisdiction to interpret the Constitution and fundamental rights and freedoms is incidental to the exercise of jurisdiction over matters within its exclusive domain. In any matter falling within the provisions of section 12 of the ***Employment and Labour Relations Court Act, 2011***, then the Court has jurisdiction to enforce not only Article 41 rights but also all fundamental rights ancillary and incidental to the employment and labour relations including interpretation of the Constitution within a matter before it.

15. In this case it was however submitted that the applicant is not trying to enforce any Article 41 rights and that the applicant's case does not fall anywhere within domain of jurisdiction the Employment and Labour Relations Court. This, according to the applicant, is for the reason that the applicant is only seeking this courts intervention to enforce a recommendation made by the Ethics and Anti-Corruption Commission as the same is not being effected. In addition to that, the applicant herein is not concerned with the merits or demerits of the ongoing investigations for it to warrant this case being transferred to the Anti-Corruption and Economic Crimes Division of the High Court.

16. It was submitted that the applicant is not seeking any declaration of rights in the above case which distinguishes this case to the numerous petitions which have been found to fall within the ambit of the Employment and Labour Relations Court. Here, it was contended, the applicant is seeking purely judicial review orders in the nature of *mandamus* which is the preserve of this Court.

17. It was therefore submitted that this Court has jurisdiction to hear and entertain the above suit to its logical conclusion.

18. However, in the alternative it was submitted that in the event that this Court finds that it lacks jurisdiction, the appropriate remedy available to this court at this moment is to transfer this suit to the relevant court which this court in its wisdom makes a finding to have jurisdiction. This submission was based on the decision of **Mumbi Ngugi, J** in **Gladys Boss Shollei vs. Judicial Service Commission & Another [2014] eKLR** wherein the learned Judge having found that she lacked jurisdiction to handle the matter, transferred the same to the Employment and Labour Relations Court pursuant to *Article 162(2)* of the Constitution as read with *section 12 of the* ***Industrial Court Act, 2011***.

19. On behalf of the 2nd interested party, it was submitted that the question is not whether or not the 1st interested party should be suspended from office pending investigations, but the question is one of enforcement of the 2nd interested party's recommendation against the 1st interested party, which falls within the jurisdiction of this Court. It was further submitted that the applicant has not raised allegations of violation or infringement of the Bill of Rights touching on rights that fall within the jurisdiction of the Employment and Labour Relations Court.

20. It was however submitted that investigations and the recommendation made b he 2nd interested party giving rise to this case were carried out under the ***Anti-corruption and Economic Crimes Act*** and under the ***Leadership and integrity Act***, which Act falls amongst the statues listed in the Practice Directions for the Anti-Corruption and Economic Crimes Division of the High Court gazetted vide Gazette Notice No. 10263 of 9th December, 2016.

21. Whereas the 2nd interested party submitted that this Court has jurisdiction to hear this application, it was its view that in the event that this Court finds that it lacks jurisdiction to grant the orders sought, the matter ought to be transferred to the aforesaid Division of the High Court.

Determinations

22. I have considered the issues raised herein.

23. As I have noted hereinabove, it is trite where a preliminary objection is raised that goes to the jurisdiction such objection ought to be determined at the earliest opportunity. This was the position in **Owners and Masters of The Motor Vessel "Joey" vs. Owners and Masters of The Motor Tugs "Barbara" and "Steve B" [2008] 1 EA 367** where the Court of Appeal expressed itself as follows:

> **"The question of jurisdiction is a threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. 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 and 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. It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined. There is no reason why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado."**

24. Article 162 of the Constitution envisaged Parliament establishing a Court to hear and determine disputes relating to employment and labour relations. Pursuant to this Article, Parliament enacted the ***Employment and Labour Relations Court Act*** and the jurisdiction of the Court was 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' 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.

25. The High Court has variously dealt with the powers of the Employment and Labour Relations Court (the ELRC). In **Cabinet Secretary, Ministry of Mining & Another vs. National Environment Management Authority & 3 Others Ex-Parte Cortex Mining Kenya Limited**, JR Misc. Appl. No. 298 of 2013 this Court expressed itself as follows:

> **"The High Court's power and authority is derived from the Constitution and where the Constitution limits the jurisdiction of the High Court, that limit is legal and proper. Therefore it is my view that such High Court Divisions cannot be equated to the Courts established pursuant to the provisions of Article 162(2) of the Constitution. In my view by specifically creating the Courts with the status of the High Court to deal with employment and labour relations disputes on one hand and environment and land disputes on the other, the people of Kenya appreciated the importance of these specialised Courts."**

26. In **United States International University (USIU) vs. Attorney General [2012] eKLR** it was held that:

> **"Labour and employment rights are part of the Bill of Rights and are protected under Article 41 which is within the province of the Industrial Court. To exclude the jurisdiction of the Industrial Court from dealing with any other rights and fundamental freedoms howsoever arising from the relationships defined in section 12 of the *Industrial Court Act, 2011* or to interpret the Constitution would lead to a situation where there is parallel jurisdiction between the High Court and the Industrial Court. This would give rise to forum shopping thereby undermining a stable and consistent application of employment and labour law. Litigants and ingenious lawyers would contrive causes of action designed to remove them from the scope of the Industrial Court. Such a situation would lead to diminishing the status of the Industrial Court and recurrence of the situation obtaining before the establishment of the current Industrial Court."**

27. This was the position adopted by the Court of Appeal's *dicta* in **Daniel N. Mugendi -v- Kenyatta University & 3 Others CACA No. 6 of 2012 [2013] eKLR,** where the said Court expressed itself as hereunder:

> "**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 fundamentals rights associated with two subjects**".

28. Therefore both **United States International University –v- Attorney General** (supra) and **Daniel Mugendi –v- Kenyatta University** (supra) the courts returned the verdict that the High Court could not deal with and determine matters where a purely labour and industrial dispute also had constitutional issues arising.

29. That the Employment and Labour Relations Court can grant orders of judicial review is clear. However the jurisdiction to do so is confined to matters falling within Article 41 of the Constitution. The Court cannot therefore purport to grant judicial review orders outside employment matters as its judicial review jurisdiction is limited only in so far as employment matters 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 specialised Courts. However 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. As was held in Nairobi High Court Petition No. 613 of 2014 – **Patrick Musimba vs. The National Land Commission and Others**: where it was held that:

> **"…it would be ridiculous and fundamentally wrong, in our view, for any court to adopt a separationalistic view or approach and insist on splitting issues between the Courts where a court is properly seized with a matter but a constitutional issue not within its obvious exclusive jurisdiction is raised."**

30. The ***Musimba*** decision therefore concluded on this issue that:

> **"…both the High Court and the ELC Court have a concurrent and or coordinate jurisdiction and can determine constitutional matters when raised and do touch on the environment and land. Neither the Constitution nor the ELC Act limit the High Court's jurisdiction in this respects while a closer reading of the ELC Act reveals that the ELC Court's jurisdiction was in 2012 limited by Parliament in so far as constitutional issues touching on land and environment are concerned but the Court of Appeal in *Mugendi* expressed the view that the ELC when dealing with disputes concerning the**

environment and land may also deal with claims of breaches of fundamental rights touching on the subject at hand. We hold that in matters constitution the ELC has jurisdiction not just when it involves clean and healthy environment but also land."

31.In my view, the same position must apply with respect to judicial review proceedings.

32. This window, it has been held, is to empower the Employment and Labour Relations Court to fully handle employment matters that are exclusively reserved for it under Article 162(2) of the Constitution of Kenya 2010. This position, in my view is the true interpretation of section 12 of the ***Employment and Labour Relations Act*** Cap 234B, Laws of Kenya as read with Rule 28 of the ***Employment and Labour Relations Rules, 2016*** which empower the Employment and Labour Relations Court to grant a prohibitory order and any other order to meet the ends of justice. That any other order extends to judicial review orders comes clearly in **JR Case 330 of 2011 - Republic vs. Kenya Ordinance Factories Corporation Ex-Parte Anne Gichimo [2014] eKLR,** in which the court stated that:

"**Among the orders that the court can grant is any other appropriate relief that it may deem fit. As can be seen, the other remedies provided by Section 12 are similar to the orders of certiorari, prohibition and mandamus available in judicial review. In fact the interim preservation order including injunctions that can be granted by the Industrial Court can be equated to an order of stay of proceedings available in judicial review. A prohibitory order serves the same purpose with an order of prohibition. An order of reinstatement of an employee can serve the purpose of orders of certiorari and mandamus. In my view therefore orders of judicial review as they are traditionally known or their equivalents can be obtained in the Industrial Court**."

33. I therefore agree that the ***Employment and Labour Relations Act***, and Article 162(2) and 165(5) of the Constitution must all be interpreted in a manner as to allow the Employment and Labour Relations Court to have the powers to grant appropriate remedies *when an employment or labour relations matter is before it*. To buttress the holding that the said Court can grant judicial review orders in employment matters the Court of Appeal in **Civil Appeal 160 of 2008 - Republic vs. Mwangi S. Kimenyi Ex-Parte Kenya Institute for Public Policy and Research Analysis (KIPPRA) [2013] eKLR** stated that:

"This is not to say that judicial review remedies cannot be available in contracts of employment. There are instances when such remedies are available. One such instance is when the contract of employment has statutory underpinning and where there is gross and clear violation of fundamental rights. In the case of *CHIEF CONSTABLE OF NORTH WALES POLICE – V- EVANS (1982) I WLR 1155,* Lord Hailsham pronounced himself thus:

"the purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority after according fair treatment reached on a matter which it is authorized by law to decide for itself a conclusion which is correct in the eyes of the court" (See also Commissioner of Lands – vs- Kunste Hotel Limited 1995-1998 1E.A. 1 (CAK)).* In the case of *Eric Makokha & Others – vs- Lawrence Sagini & Others CA No. 20 of 1994 at NRB,* this court defined statutory underpinning. It was stated: *"the word statutory underpinning is not a term of art. It has no recognized meaning. If it has, our attention was not drawn to any. Accordingly, under the normal rules of interpretation, we should give it its primary meaning. To underpin is to strengthen. In a case in which the issue is whether an employer can legitimately remove his employee, a term which suggests that his employment is guaranteed by statute is hardly of any help. As a concept, it may also mean the employees removal was forbidden by statute unless the record met certain formal laid down requirements. It means some employees in public positions may have their employment contract guaranteed by statute and could not be lawfully removed unless the formal requirements laid down by the statute were observed. It is possible that this is the true meaning of what has become the charmed words "statutory underpinning". The statute makes it mandatory that a certain procedure must be observed in some contracts of employment before termination. Examples are constitutional office holders such as judges and the Attorney General."

34. In this case the objection to this Court's jurisdiction, according to the 1st Respondent is premised on the fact that the matter revolves around the issue of transfer of staff, demotions, interdictions and staff dismissal being undertaken by the 1st interested party in order to intimidate the staff involved in the investigations. With due respect that is not the substratum of these proceedings. The applicant's case as I understand it is that contrary to the provisions of section 42(7) of the ***Leadership and Integrity Act, 2012*** as read with Regulation 25 of the ***Leadership and Integrity Regulations, 2015,*** the respondents have ignore, failed and/or declined to give effect to the recommendations of the 2nd interested party of 10th November, 2017 by suspending the 1st interested party herein from the office as the Vice Chancellor of Masinde Muliro University of Science and Technology.

35. According to the applicant the 2nd interested party having commenced investigations into the allegations of abuse of office, embezzlement of funds and employment irregularities against the 1st interested party herein the Respondent ought to have suspended the 1st interested party from the said office.

36. In my view the allegation that the 1st interested party is intimidating staff involved in the process of his investigations through transfer, demotions, interdictions and dismissals contrary to the ***Leadership and Integrity Regulation*** No 8 of 2015 are merely the consequences of the 2nd interested party's failure to suspend the 1st interested party and not the substance of the application herein. As stated hereinabove, the jurisdiction of the Employment and Labour Relations Court's in matters in respect of the violation of human rights and fundamental freedoms are confined to matters falling within Article 41 of the Constitution and hence that Court cannot purport to grant judicial review orders outside employment matters as its judicial review jurisdiction is limited only in so far as employment matters are concerned. In other words, the matters which fall within the ambit of Article 162(2) of the Constitution must be matters within the exclusive jurisdiction of the said specialised Courts. That is my understanding of the holding in **United States International University (USIU) vs. Attorney General** (supra).

37. In my view this case revolves around the interpretation and application of section 42(7) of the ***Leadership and Integrity Act, 2012*** as read with Regulation 25 of the ***Leadership and Integrity Regulations, 2015*** to the circumstances of this case. It is my view that it is not in every case that some of the parties before the Court are in a relationship of employee and employer that such matters must as a matter of course be

heard and determined by the Employment and Labour Relations Court. Rather, it is the cause of action that determines which Court is to hear the dispute. An employer may, for example lodge a complaint against an employee for say, theft by servant. The employee may institute judicial review proceedings challenging his intended prosecution by the Director of Public Prosecution. The mere fact that there exist an employer/employee relationship in such a matter does not necessarily deprive this Court of the jurisdiction to hear and determine whether the DPP is exercising his powers lawfully and fairly. In those circumstances, just as in this case the employment relationship becomes a secondary issue, if at all, to the main issue for determination.

38. It follows that this matter falls within the jurisdiction of the High Court. However it is clear that in order to determine the issues herein, this Court will have to determine the effect of section 42(7) of the ***Leadership and Integrity Act, 2012*** as read with Regulation 25 of the ***Leadership and Integrity Regulations, 2015*** to the circumstances of this case since, *prima facie*, the exercise of powers thereunder are not couched in mandatory terms as the said provisions use of the word "may" as opposed to "shall". That however is a matter that can only be conclusively determined by the Anti-Corruption and Economic Crimes Division of this Court which has the administrative power to deal with cases revolving, *inter alia*, around ***Anti-Corruption and Economic Crimes Act***, Cap 65 and ***Leadership and Integrity Act, 2012.***

39. In the premises, the order which commends itself to me and which I hereby make is that this application be heard and determined by the Anti-Corruption and Economic Crimes Division of this Court.

40. The costs will be in the cause and those shall be the orders of this Court.

Dated at Nairobi this 14th day of February, 2018

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Magina for the Applicant

Mr Okuta for 1st Respondent

Miss Daido for 2nd Respondent

CA Ooko