



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCC JR MISC. APPL NO. 3 OF 2018

IN THE MATTER OF AND APPLICATION FOR JUDICIAL REVIEW BROUGHT UNDER ORDER 53 OF THE CIVIL PROCEDURE RULES 2010.

AND

IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA ARTICLE 47, 50 AS TO A FAIR ADMINISTRATIVE ACTION.

AND

IN THE MATTER OF THE PUBLIC FINANCE MANAGEMENT ACT.

AND

IN THE MATTER OF THE COUNTY GOVERNMENTS ACT 2012

AND

IN THE MATTER OF SUSPENSION OF THE APPLICANT BY THE GOVERNOR MAKUENI COUNTY VIS-AVIS THE MAKUENI COUNTY ASSEMBLY.

BETWEEN

DAVID MUIMI KAKONZI.....APPLICANT

-VERSUS-

1. THE GOVERNOR MAKUENI COUNTY.....1ST RESPONDENT

2. THE INTERIM COUNTY SECRETARY

MAKUENI COUNTY GOVERNMENT.....2ND RESPONDENT

3. THE MAKUENI COUNTY EXECUTIVE.....3RD RESPONDENT

RULING

INTRODUCTION

1. By a preliminary objection dated 04/06/2018, the Respondents raise the following grounds of objection.

- 1) The application herein is fatally defective, it is frivolous, bad in law, lacks merit and the same is an abuse of the court process.
- 2) This Honourable Court lacks the requisite jurisdiction to determine this application and/ or to issue the orders sought herein in view of the mandatory provisions of Article 162 (2) (a) and Article 165 (b) of the Constitution of Kenya, 2010.

3) The ex-parte Applicant has not filed a notice of motion pursuant to grant of leave been given by Hon. B.T Jaden which leave was issued on the 28th June, 2013 in view of the mandatory provisions under Order 53, Rule (3.) and (4) of the Civil Procedure Rules 2010.

4) The suit herein is fatally defective and ought to be struck out.

2. They thus seek the matter to be struck out with costs.

3. On 05/06/2008, the court gave directions that the Preliminary Objection be canvassed by way of submissions. The Respondents were to file their submissions and serve within 21 days.

4. The Applicant was also to reply to the Respondents' submissions within 21 days from the date of service.

5. On 12/07/2018, when matter was coming for highlighting of the submissions, the Applicant in Preliminary Objection filed their submissions.

6. The Ex-parte Applicant similarly filed an application to transfer suit to Employment Labor Relations Court on the same 12/07/2018 instead of filing his submissions.

RESPONDENTS' SUBMISSIONS.

7. The Respondents submitted relying on the case of **The Owners Of Motor Vessel "Lilians S" –Vs- Caltex Oil Kenya Limited (1989) KLR 1653 (C.A)** that, it is now trite law that jurisdiction is everything and without it, a court has no power to make one more step.

8. This pronouncement was made in the celebrated case above where the court of Appeal stated as follows:-

“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 a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

9. Emukule J. in **John Kipng'eno Keoach and 2 Others –Vs- Nakuru County Assembly And 5 Others (2013) eKLR** had this to say on jurisdiction:-

“Jurisdiction is the practical authority granted to a formally constituted legal body to deal with and make pronouncements on legal matters and by implication to administer justice within a defined area of responsibility. It is the scope, validity, legitimacy or authority to preside or adjudicate upon a matter.”

10. The High Court is created under Article 165 of the Constitution of Kenya 2010. Article 162 (2) (a) further establishes courts with the status of the High Court. It provides that:-

“Article 162.

(1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts mentioned 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 Labor Relations and;

b) The environment and the use and occupation of, and title to, land.”

11. It is in light of the above that Parliament enacted the Employment and Labor Relations Court Act No. 20 of 2011 which Act is to the effect that the Employment and Labor Relations Court has the jurisdiction to hear and determine disputes relating to employment and labor relations.

12. Section 12 of the Employment and Labor Relations Court Act provides *inter alia* that:-

(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 labor 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 union's organization;”

13. Thus it is submitted that, the right forum under which the Applicant herein could have had his issues addressed is the Employment and Labor Relations Court and not the High court.

14. It is clear that this is a dispute relating to or arising out of employment between an employer and an employee which jurisdiction lies with the employment and Labor Relations Court and not this Honourable Court in accordance with Section 12(1) of the Employment and labor Relations Court Act.

15. The Respondents cite the case of **Karisa Chengo, Jefferson Kalama, Kengha & Kitiso Charo Ngati –Vs-Republic (2015) eKLR** where the court of appeal held:-

“The jurisdiction of the High Court is limited, it cannot exercise jurisdiction on matters falling within the jurisdiction of the two courts contemplated in Article 162 (2). Therefore the High Court no longer has original and unlimited jurisdiction in all matters as it used to have under the repealed constitution. It cannot deal with matters set out under Section 12 of the ELRC and Section 14 of the ELC Act. Conversely, the ELRC and ELC cannot deal with matters reserved for the High Court.”

16. The Applicant in application dated 12/07/2018 ground iv on the notice of motion states that Employment Labor Relations Court is the only court vested with jurisdiction to hear the issues raised by the Ex-parte Applicant.

17. The Applicant substantive notice of motion dated 05/07/2013 seeks the orders for certiorari against Respondent to quash the decision by the Governor Makueni County seeking to suspend him from the office in a letter dated 29/05/2013.

18. The Applicant depones in his affidavit sworn on 17/06/2013 that he became Respondent’s employee on 29/05/2013. However by a letter dated 29/05/2013, the Respondent suspended him from his employment and that in executing the aforesaid suspension, the 1st Respondent did not accord him a hearing.

19. It is not disputed thus the instant matter is in the nature of a dispute between employee and the employer as set out in Section 12 (1)(a) Employment and Labor Relations Court Act No. 2 of 2011. That being so the provisions of Article 162(2) (a) of the Constitution of Kenya come into play.

20. Under Article 165 (b) the High Court is denied jurisdiction to entertain matters which lies in the province of the Employment Labor Relations Court jurisdiction. Thus this court lacks jurisdiction to entertain the instant matter.

21. The Applicant seeks refugee on the eleventh hour under what he calls the High Court mandate under Section 3A CPA and order 51 CPR to have matter transferred to the ELRC court. This has been done as an afterthought on the day of the hearing of the matter.

22. Since 2013, the parties herein have been having contests in the instant court without any of them raising the issues on jurisdiction.

23. Of course since inception of the instant matter the High Court had no jurisdiction to make any move in the matter. The Applicant ought to have lodged the matter in the ELRC but opted to lodge in a court lacking jurisdiction.

24. The Respondents also sat pretty until 04/06/2018 (when Preliminary Objection was filed) when it seems to have dawned on them that the High Court lacked jurisdiction on the matter.

25. The court time would have been saved long time if both sides were diligent. Thus the court holds that it has no jurisdiction in the matter but because of negligence on the part of both sides denies both parties costs. The sought transfer of the matter to ELRC has come late in the day and as an afterthought.

26. Thus the court makes the following orders:-

1) The notice of motion dated 05/07/2013 is struck out.

2) No orders as to cost.

SIGNED, DATED AND DELIVERED THIS 26TH DAY OF JULY 2018, IN OPEN COURT.

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C. KARIUKI

JUDGE