



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO 529 OF 2017

CHARLES OYOO KANYANGI.....1ST PETITIONER
SOLOMON WAMWAYI.....2ND PETITIONER
JULIUS MUSHELLE.....3RD PETITIONER
PAUL NDUNGU.....4TH PETITIONER
FATUMA WANJIKU.....5TH PETITIONER
KARU SIRO OMBAYE.....6TH PETITIONER
KENNEDY ACHIENG OWUOR.....7TH PETITIONER
ANN WAMBUI NGUGI.....8TH PETITIONER
GREGORY OMBITO.....9TH PETITIONER
JUSTINE S KABURU.....10TH PETITIONER
MARGARET RUNGARE.....11TH PETITIONER
ERIC NJUGUNA JUMANUI.....12TH PETITIONER
MARGARET O OPONDO.....13TH PETITIONER
GLADYS NDENDA.....14TH PETITIONER
ALICE GATHOGO.....15TH PETITIONER
CLAIRE NAMENGE SIFUNA.....16TH PETITIONER
CHARLES OYUKE MOITUI.....17TH PETITIONER
ROBERT NDUMBI.....18TH PETITIONER
NICHOLAS NYAMATEGANDAH.....19TH PETITIONER
BENJAMIN F ODHIAMBO.....20TH PETITIONER

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| CLEVELAND MWEBI..... | 21 ST PETITIONER |
| NJERU ITHIGA..... | 22 ND PETITIONER |
| PAUL SIMEKI ONDIEKI..... | 23 RD PETITIONER |
| BETTY A.O ASUNAH..... | 24 TH PETITIONER |
| MARY KIPTOO..... | 25 TH PETITIONER |
| JACQUILINE WANJALA..... | 26 TH PETITIONER |
| NICHOLAS OPELE ATEYA..... | 27 TH PETITIONER |
| KENNEDY ORUKA OGOLA..... | 28 TH PETITIONER |
| NAFTALI MASARA..... | 29 TH PETITIONER |
| PETER MUTEGI MUTANI..... | 30 TH PETITIONER |
| CELYN ODEMBO..... | 31 ST PETITIONER |
| HUMPREHY NYAGA NJIRU..... | 32 ND PETITIONER |
| SHEM KEBONGO..... | 33 RD PETITIONER |
| GRACE NGARI..... | 34 TH PETITIONER |
| ALOIS KARIUKI MWANIKI..... | 35 TH PETITIONER |
| DANIEL K GICHUKI..... | 36 TH PETITIONER |
| WILLIAM KAHINDI..... | 37 TH PETITIONER |
| FRANCIS MBUGUA..... | 38 TH PETITIONER |
| JOEL OKEROSI OCHARO..... | 39 TH PETITIONER |
| WYCLIFFE OUMA OKUTTA..... | 40 TH PETITIONER |
| BETTY MALOBA..... | 41 ST PETITIONER |
| GORGE ABURILI..... | 42 ND PETITIONER |

VERSUS

JUDICIAL SERVICE COMMISSION OF KENYA.....RESPONDENT

RULING

1. This is a ruling on a preliminary objection dated 20th December 2017 against the petition dated 18th October 2017. The petitioners, who were employed as judicial officers at various periods, filed this petition faulting the respondent's decision to retire them from the judiciary on public interest. The petitioners' contended that the action taken by the respondent violated their constitutional rights and fundamental freedoms on various aspects including breach of the rules of natural justice.
2. The petitioners sought among other reliefs, a declaration that their retirement on public interest was unconstitutional and violated their fundamental rights to equal protection of the law, human dignity and integrity of the person.
3. One being served, the respondent took a notice of preliminary objection dated 20th December 2017 and filed on 21st December 2017, contending first, that this Court has no jurisdiction to hear and determine this petition because the dispute arises from employment relationships in terms of Article 162 of the Constitution and the Employment and Labour Relations Court Act and, therefore, falls for determination in the Employment and Labour Relations Court, *ELRC*. Second, the respondent contended that the petitioner's claim is time

barred since it was instituted after six years.

4. Parties elected dispose of the preliminary objection first since it relates to the Court's jurisdiction. They were therefore directed to file and exchange submissions on the issue and a hearing date given for them to argue the issue.

5. During the hearing of the preliminary objection, **Mr. Kubai**, learned counsel for the respondent submitted, highlighting their written submissions, that this Court lacks jurisdiction to hear this petition which, according to learned counsel, falls within the jurisdiction of **ELRC**. Counsel submitted that there is no dispute that the petitioners describe themselves as former employees of the respondent and, therefore, the issue of employment is not in dispute.

6. Learned counsel submitted that Article 165(5) of the Constitution limits the jurisdiction of this Court on matters falling under **ELRC** or Environment and Land Court **ELC**. He contended that jurisdiction of **ELRC** is set out in section 12(1) of the Employment and Labour Relations Court Act to wit; the relationship between an employer and employee which jurisdiction extends to hearing and determining claims on matters relating to fundamental freedoms.

7. **Mr. Kubai** relied on the decision of **United States International University of Africa v the Attorney General & 2 others** [2012] eKLR for the submission that jurisdiction to hear Labour rights are fundamental rights within the Bill of rights. He also relied on the case of **Daniel Mugambi v Kenyatta University & 3 Others** [2013]eKLR (para 96) for the contention that ELRC can hear and determine issues of fundamental rights. He asked the Court to uphold the preliminary objection and strike out the petition and relied on the case of **Beatrice Musiria v Judicial Service Commission** [2012]eKLR

8. **Mr. Mogikoyo**, learned counsel for the petitioners, opposed the preliminary objection and submitted, also highlighting their written submissions, that there is no master- servant relationship between the petitioners and the respondent and that there is no employment relationship between the petitioners and the respondent.

9. Learned counsel contended that the respondent is an appointing authority exercising constitutional mandate but the employer is the government of Kenya, and relied on the letters of employment to support his contention. According to learned counsel, the letters were issued by the Public Service Commission. He therefore contended that there was no contract of service between the petitioners and the respondent in terms of the Employment Act.

10. **Mr. Mogikoyo** went on to submit that the letters of employment do not constitute a contract of employment and that the Employment Act is clear on a contract of service – it contains terms and conditions of service. Learned counsel contended that the respondent had not attached the conditions of service between her and the petitioners to show that employer –employee relationship existed between the petitioners and the respondent.

11. Commenting on the case of **United States International University of Africa v the Attorney General & 2 Others** (supra), **Mr. Mogikoyo** contended that Article 41(1) is about labour practices and according to counsel, the issue before Court is whether the petitioners can belong to a trade union and further, that the petition is about breach of fundamental rights and principles of fair administrative action which is purely a matter of constitutional rights and breach of the former service commissioner Act (Cap 185) hence the matter is properly before this Court hence the preliminary objection should be dismissed. He relied on a number of authorities to support his position.

12. This preliminary objection is on the jurisdiction of this Court to hear and determine the petition herein. Whereas the 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 fundamental freedoms, issues that fall within this Court's jurisdiction.

13. Jurisdiction is that power or authority conferred on a Court to determine disputes presented before it for resolution. The power of the Court may be conferred by the Constitution, statute or both and may be limited or unlimited in like manner. In the often quoted case of **Owners of Motor Vessel "Lillian S" v Caltex Oil Kenya Limited** [1989]KLR 1, the Court stated;

"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 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."

14. In **Owners and Masters of Motor vessel "Joey" v Owners and Masters of Motor Tugs "Barbara" and Steve "B"** [2007] eKLR, the Court of Appeal observed that the question of jurisdiction is a thresh-hold issue and must be determined by a judge at the thresh-hold stage, using such evidence as may be placed before him by the parties.

15. Jurisdiction of a Court flows from the Constitution or statute or both and the Court must exercises that jurisdiction as conferred on it by the Constitution or statute and no more. In this regard, the Supreme Court stated in **Re The Matter of Interim Independent Electoral and Boundaries Commission**, [2011]eKLR thus;

"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... jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours..."

16. And in *Samuel Kamau Macharia v Kenya Commercial Bank Limited & 2 others* [2012]eKLR, the Supreme Court again stated thus:-

“A Court’s jurisdiction flows from either the constitution, or legislation or both. Thus a Court of law can only exercise jurisdiction as conferred on it by law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law... where the constitution exhaustively provides for the jurisdiction of a Court of law, it must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation....”

17. The petitioners’ contention in the petition is that their rights and fundamental freedoms were violated when they were retired from employment on public interest. They plead that certain of their rights and obligations on the part of the respondent were not observed thus the respondent’s actions violated their fundamental rights.

18. The petitioners were judicial officers who had been employed to serve as magistrates. They attached copies of letters of employment, pay-sheets and other documents to show that they were indeed serving as magistrates when they were retired on public interest in violation of their human rights and fundamental freedoms and now seek declarations to that effect.

19. I have perused the record herein and it is true that the petitioners were appointed as magistrates and served at various levels within the judiciary. They were retired by the respondent on public interest around 2003 during the radical surgery within the judiciary. This was, without a doubt, retirement from employment which the petitioners now contend violated their fundamental rights and have challenged it through this constitutional petition.

20. There is no doubt that the issue in this petition is an employer and employees over termination of employment. The only other aspect that comes in is that the termination of employment did not take into account certain constitutional or legal principles, thus violated the petitioners’ rights and fundamental freedoms.

21. In 2010, the people of Kenya adopted a Constitution that significantly changed the judiciary’s way of conducting its affairs. The Constitution has established three sets of courts of equal status exercising different jurisdiction, that is; the High Court and Courts of equal status namely the **ELRC** and the **ELC**.

22. Article 162 of the Constitution empowered Parliament to establish Courts with the status of the High Court to hear and determine disputes relating to employment and labour relations and environment and land and determine jurisdiction of those Courts. As a consequence, Parliament enacted the Employment and Labour Court Act (No of 2012) whose section 12 provides for the jurisdiction of that Court. According to section 12(1), **ELRC** has 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 that Court relating to employment and labour relation including – disputes relating to or arising out of employment between an employer and an employee.

23. The section does not state what kind of dispute it must be as long as it is a dispute between an employer and an employee relating to employment. The Act defines an **“employee”** as **a person employed for wages or salary**, and an **“employer”** as **a person, public body, firm corporation or company which has entered into a contract of service to employ an individual**.

24. There are letters of employment displayed by the petitioners signifying the relationship between them and the respondent. Secondly, the petitioners were employed to salary which was paid by the respondent as signified by the payslips attached to their pleadings leaving no doubt that the petitioners were indeed employees of the respondent.

25. From the above definition and considering the issue herein and more so, the fact that the dispute relates to termination of employment, the matter is about employment and whether the respondent followed the procedure in bringing that employment to an end. Although **Mr. Mogikoyo** submitted that there is no issue of contract of employment. I am satisfied that the petitioners were employees and the respondent was an employer and the issue relates to employment hence is an issue that falls under section 12(1) of the Employment and Labour Relations Court.

26. The next aspect that I must decide is whether this Court has jurisdiction to hear and determine this dispute. Having determined that the dispute falls within the Employment and Labour Relations Court Act, Article 165(5) of the Constitution comes into play. Article 165(5) bars this Court from hearing disputes that fall within the jurisdiction of the **ELRC** and **ELC**. The Article provides that **the High Court shall not have jurisdiction in respect of matters falling within the jurisdiction of the courts contemplated in Article 162(2)**; that is the **ELRC** and **ELC**. This is a constitutional decree that this Court has no discretion over.

27. In *Republic v Karisa Chango & Others* [2017] eKLR, the Supreme Court stated the ELRC and ELC are Courts of equal status to the High Court stating;

[50]... Article 162(1) categorises the ELC and ELRC among the superior Courts and it may be inferred, then, that the drafters of the Constitution intended to delineate the roles of ELC and ELRC, for the purpose of achieving specialization, and conferring equality of the status of the High Court and the new category of Courts. Concurring with this view, the learned Judges of the Court of Appeal in the present matter observed that both the specialised Courts are of “equal rank and none has the jurisdiction to superintend, supervise, direct, shepherd and/or review the mistake, real or perceived, of the other”. Thus, a decision of the ELC or the ELRC cannot be the subject of appeal to the High Court; and none of these Courts is subject to supervision or direction from another.”

28. The Supreme Court went on to observe that **Article 165(5)** precludes the High Court from entertaining matters reserved to the ELC and ELRC, and it should, by the same token, be inferred that the **ELC** and **ELRC** too cannot hear matters reserved to the jurisdiction of the High Court

29. **Mr. Mogikoyo** did submit that because the issues raised in the petition touch on violation of the petitioners' constitutional rights and fundamental freedoms, only this Court can hear the petition but not the **ELRC**. I do not agree. Although on the face of it, the petition raises issues to do with violation of rights and fundamental freedoms, these rights and fundamental freedoms are in the nature of rights that accrued by virtue of the petitioners' position as employees and that of the respondent as the employer.

30. In that regard, **ELRC** has jurisdiction to hear disputes that, though touching on human rights and fundamental freedoms, arise from the nature of the relationship between the parties. In the case of **United States International University v Attorney General** (supra), the Court stated;

“[41] 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.”

31. The Court went on to conclude;

“[44]...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 Industrial 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 interpret the constitution and fundamental rights in Article 41 and freedoms is incidental to the exercise of jurisdiction over matters within its conclusive domain. In any matter falling within the provisions of section 12 of the Industrial Court Act, then the Industrial 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.”

32. That decision has been approved by the Court of Appeal in a series of decisions. In **Daniel N Mugendi v Kenyatta University & 3 Others** [2013] eKLR, the Court of Appeal approved the view expressed in the **United States International University** case, stating that the fact that the Industrial Court can and should entertain the claim as laid by the appellant, is in line with the decision in **United States International University (USIU) Vs The Attorney General & Others**.

33. In the case of **Judicial Service Commission v Gladys Boss Shollei** [2014]eKLR, the Court of Appeal observed that;

“[40] Article 23(1) & Article 165(3) (b) of the Constitution grants the High Court powers to hear and determine questions involving redress of violations or infringement or threatened violations of fundamental rights and freedoms in the Bill of Rights. However, Article 23(2) provides for legislation giving original jurisdiction to subordinate courts to hear and determine disputes for enforcement of fundamental rights and freedom. In addition, Article 23(3) does not limit jurisdiction in the granting of relief in proceedings for enforcement of fundamental rights to the High Court only, but empowers “a court” to grant appropriate relief including orders of Judicial Review in the enforcement of rights and fundamental freedoms under the Bill of Rights. Also of note is Article 20(3) that places an obligation on “any court” in applying a provision of the Bill of Rights to develop the law and to adopt the interpretation that most favours the enforcement of a right or fundamental freedom. These provisions confirm that the Constitution does not give exclusive jurisdiction in the enforcement of the Bill of Rights to the High Court, but anticipates the enforcement of the Bill of Rights by other Courts.

[41] Under Article 162(2) (a), the Constitution has provided for special Courts with the “status” of the High Court to determine employment and labour relations disputes. The fact that the Industrial Court has been given the “status” of the High Court enhances the power and discretion of the Court in granting relief.... the general power provided to the Industrial Court under Section 12(3) (viii) of the Industrial Court Act to grant relief as may be appropriate, read together with Article 23(3), empowers the Industrial Court to grant the kind of reliefs that the respondent sought in her petition.”

34. And in the case of **International Centre for Insects Physiology and Ecology (ICIPE) v Nancy McNally** [2018] eKLR, the Court of Appeal again stated;

“[27] 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. We are not in doubt too, that the relationship between the appellant and the respondent was not a private matter between the two parties but a public activity intrinsically connected to the operations of the appellant. With respect, the contention to the contrary by Ms. Kilonzo has no substance.”

35. Applying the jurisprudence flowing from the above decisions, it is clear to me that the nature of the pleadings, the tenor and the reliefs sought in the petition herein are such that they can be granted by the **ELRC** because that Court as a creature of the Constitution, has jurisdiction in terms of Article 23(3) as read with section 12 of the Employment and Labour Relations Court Act to determined issues of fundamental freedoms in the Bill of Rights.

36. Having carefully considered the arguments by counsel by the parties and weighed them against the Constitution, the law and precedent, I agree with the respondent's counsel that this petition would be properly handled by the **ELRC** as it relates to matters arising from employment. Consequently, the preliminary objection dated 20th December 2017 is upheld.

37. The respondent's counsel urged the Court to strike out the petition should the objection succeed. Striking out pleadings even after declining jurisdiction, is at the discretion of the Court. Considering the nature of this petition the order I deem appropriate to make is to refer the matter to the **ELRC** for hearing and determination.

38. For the above reasons, this Court having declined jurisdictions, this petition is hereby transferred to the Employment and Labour Relations Court at Milimani, Nairobi for hearing and final determination.

Dated Signed and Delivered this 15th Day of August 2018

E C MWITA

JUDGE