



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL, HUMAN RIGHTS AND JUDICIAL REVIEW DIVISION

CONSTITUTIONAL PETITION NO. 317 OF 2016

**IN THE MATTER OF ARTICLES 2, 3, 19, 20, 22, 23, 28, 33 (1), 34, 41(1), 43, 47,
48, 50, 159, 165(3)(B), 258 & 260 OF THE CONSTITUTION OF KENYA 2010:**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND
FUNDAMENTAL FREEDOMS UNDER ARTICLES 28, 33(1), 34, 41(1), 43,**

47, 48 & 50 OF THE CONSTITUTION OF KENYA 2010

AND

**IN THE MATTER OF RULES 4, 10, 11 & 22 OF THE CONSTITUTION
OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL**

FREEDOMS) PRACTICE AND PROCEDURE RULES 2013.

AND

IN THE MATTER OF SECTIONS 12, 41, 44, 45 & 49 OF THE EMPLOYMENT ACT, 2017

BETWEEN

DENNIS GALAVA.....PETITIONER

VERSUS

NATION MEDIA GROUP LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The Petitioner was the former Managing Editor, Special Projects and Investigations at Nation Media Group Limited whereas the Respondent is a Limited Liability Company incorporated under the Companies Act Cap 486 of Kenya. It is the former employer of the Petitioner.

The Petition

2. The Petitioner in his petition dated 22.7.2016 alleges his rights and fundamental freedoms under the Constitution have been violated

especially Articles 2(1), 2(4), 3, 20(1), 22(1), 23(1), 28, 33(1), 34(1), 41(1), 43(1), 47(1), 50(1) and 258(1).

3. He was employed on 26.7.2010 as the Rewrite Editor Deputy Managing Director and on 1.8.12 he was promoted to Managing Editor of the Saturday Nation and in August 2015 was promoted to head the double docket of Special Projects and Investigations.

4. The Petitioner authored an editorial piece titled **“Mr. President get your act together this year”** which led to his suspension for 30 days on allegation that he failed to draw attention of the Editor-In-Chief before publication. He was never given an opportunity to defend himself which amounted to denial of the right to administrative justice that is expeditious, efficient, lawful and procedurally fair. Both the staff and the readers were informed of his suspension, which was extremely prejudicial and injurious.

5. The Petitioner further received a letter inviting him for a disciplinary hearing on 18.1.16 whereby he was to respond to the issues before then. He alleged to have been denied an opportunity to be accompanied by his lawyer. He alleged to have been discriminated against because other editors involved were summoned and given warning letters yet he had been suspended with a risk of being sacked. On 20th January 2016 he was issued with a termination letter. He alleged that the whole process was in blatant breach of his right to freedom of expression, dignity, fair procedural practices and fair administrative procedure.

6. It was his contention that the disciplinary panel had a pre-determined mind of terminating the petitioner from employment. His freedom of expression especially on the independence of the media had been violated, which was contrary to the Constitutional duty to uphold the public interest.

7. Further, it was his contention that he had been sacked for expressing himself whereas Mr. Tom Mshindi who had edited a script **“President quit playing politics with our security and stop Shabaab”** had been promoted. This was a breach on his right to equality and freedom from discrimination.

8. He further asserted that there was an employment dispute against himself and the respondent before the **Employment and Labour Relations Court, E&LRC Cause No. 390 of 2016, Denis Galava v. Nation Media Group Limited.**

9. The Petitioner sought for the following specific relief:

(a) The court do issue declarative orders for the violation of the Petitioner’s fundamental rights by the Respondent in the following terms:

(i) Ksh 5,000,000.00 for the violation of the Petitioner’s freedom of speech and expression as a journalist and as a citizen.

(ii) Ksh 3,000,000/= for freedom of conscience, belief and opinion.

(iii) Ksh 5,000,000/= for the violation of the Petitioner’s right to dignity and abridgement of fair administration action by denying him the right to representation and placing falsehoods on him by continuing a non-existent rule and using it as a basis for wrongful termination.

(iv) Declaratory orders barring Joe Muganda, Mr. Tom Mshindi, Mr. David Kiambi and Mr. Joseph Kinyua from holding any office in Kenya for their brazen acts of violation of the Petitioners fundamental rights and freedoms.

(b) Costs of this Petition and interest thereon.

(c) Any other order or relief that this court may deem appropriate to grant.

Facts Relied Upon

10. The Petitioner in his Supporting Affidavit deponed that his key responsibilities as the Rewrite Editor/Deputy Managing Editor included:

- a. Editing important stories of the day and writing editorials on key issues of the day.
- b. Strategy development and implementation.
- c. Developing new products.
- d. Identifying and training new talent.
- e. Supervising production of newspaper.
- f. Preparing, maintaining and controlling section budget.
- g. Assigning special write-ups and sourcing material for publication.

11. While leading the Special Projects and Investigations for the respondent he was assigned other duties which included:

- a. Product development
- b. Content development
- c. News Production and Management
- d. Digital and Social Media Management
- e. Special Projects and Investigations
- f. External Relations.

12. On 1.1.2016, he was the Senior Editor on duty when he was tasked with supporting a new editor who was to stand in for the Saturday Nation Managing Editor. A meeting was held and it was agreed that he should write an editorial piece which he did and he gave it a title “Mr. President, get your act together this year”, which was published on 2.1.16 in the Saturday Nation. This piece was well received by the Public, but the Group Managing Editor, Mr. Eric Obino called to complain and to inform him that the piece had created a war against the presidency.

13. The acting editors for Saturday Nation and Sunday Nation were issued with email notices to show cause why disciplinary action should not be taken against them, on 5.1.2016 they were issued with a first warning letter and on the same day he was suspended for breaching procedure and editorial guidelines. Prior to this he had authored at least 476 editorials and there had been no guidelines issued to him in his line of duties until the day he submitted his response to the show cause.

14. He averred that the disciplinary board was comprised of the people who had accused and suspended him unheard. They included the Editor – in Chief Tom Mshindi, Group Managing Director Weekend editions Eric Obino, Human Resource Director David Kiambi and Company Secretary James Kinyua.

15. He was further informed during the disciplinary meeting that he had flouted editorial procedures in his article. The Nation Media Group Editorial Policy Guidelines Part 11, No. 12 was read to him which stated as follows:

“The Group’s editorial will base their conclusions on demonstrable and comprehensive research. They will be balanced, constructive and informative and will represent the authoritative voice of the Group and not only that of the writers. Like all other editorial content, leaders will justify the space they occupy in cogent, unrepentive and reasoned arguments. Editorials will be regarded as the flagship of the various media plat form’s and planned with appropriate care. Except in rare circumstances, they will comment on the most significant events of the day. Like news stories, they should contain facts not generally known. They will not be spiteful, prejudiced, propagandist or extremist; they will avoid the bizarre and offensive and will always maintain standards of decency and good taste. Wording should be temperate and non-inflammatory. Where an editorial is based on an issue in any of the East African countries, efforts must be made to verify the facts with the appropriate officials in the respective countries and not unnecessary or gratuitously contribute to inter-country tensions.”

16. It was further his averment that the Constitution of Kenya guaranteed freedom of the press, and his freedom and independence had been violated in order to appease the political and corporate interests.

17. He was dismissed on 20.1.2016 for willful disobedience of the covenants, the laid down process and procedures.

Notice of Motion dated 26.08.16

18. The respondent upon receipt of the petition filed a Notice of Motion dated 26.08.16 seeking for the petition to be struck out or in the alternative the petition be consolidated with **Employment and Labour Relations Court Case No. 390 of 2016 Denis Galava v. Nation Media Group Limited**.

19. The said application was based on the following grounds:

(a) The Petitioner is filing multiple suits to achieve the same purpose of seeking redress for the alleged unlawful termination of his employment with the respondent.

(b) The petition is a thinly veiled attempt to have this court adjudicate over an employment dispute which is a preserve of the Employment and Labour Relations Court established under Article 162(2) (a) of the Constitution.

(c) The facts and matters raised in these proceedings are similar to the facts and matters raised in E & LRC Case No. 390 of 2016, Denis Galava v Nation Media Group Limited currently before the Employment and Labour Relations Court.

(d) The petition does not disclose any violation of the petitioner’s constitutional rights of his rights by the respondent.

(e) The petitioner has failed to particularise the details and manner of infringement of his rights by the respondent.

(f) In the circumstances there is no basis for the action against the respondent.

(g) The petition is scandalous, frivolous, vexatious and an abuse of the court process.

(h) The petition has been brought in bad faith.

(i) It is just and fair that the petition be struck out.

(j) It is an abuse of the process of the court to seek orders against persons who are not before the court.

20. The application was supported by an Affidavit sworn by Sekou Owino, the Head of Legal and Training for the Respondent who deposed that the claim in the Employment and Labour Relations was based on the following grounds: -

a. There was no justification in the termination of the Petitioner's employment as the petitioner was alleged to have violated the respondents due process and procedure when in fact non-existed.

b. The suspension of the claimant from his employment before termination was illegal.

c. The respondent's termination of the Petitioner's employment was prejudicial to the Petitioner and has expressed the Petitioner to loss of a career progression opportunity and future earnings.

d. The procedure followed in suspending and terminating the claimant's employment was flawed and biased. The procedure constitutes a violation of the principles of natural justice.

21. Further he averred that by the advise of the company advocate, the petitioner was filing multiple suits to achieve the same purpose of seeking redress from the alleged unlawful termination which is an abuse of the court process.

Replying Affidavit

22. In response to the application seeking to strike out the petition, the petitioner averred that his right to fair hearing was not applied; and that he was exposed to infinite prejudice and embarrassment which denied him the right to dignity. The Constitutional court and the Employment and Labour Relations court have different jurisdictions that is the E & LRC is mandated to hear and determine disputes arising out of employment while the Constitutional court inter-alia is tasked to hear and determine the question on whether a right or fundamental freedom in the Bill of rights has been denied, violated, infringed or threatened.

23. By advise from his advocate he averred that the petition was not frivolous, scandalous, vexations nor an abuse of the court process as it sought to enforce rights and freedoms guaranteed by the Constitution and also that the petition could not be consolidated with the E & LRC case No. 390 of 2016.

Submissions

Petitioner's Submission.

24. The Petitioner filed Submissions pursuant to the directions issued by the court on 16.9.2016. The petitioner urged the court to rely on Article 22(1) which granted every person the right to institute court proceedings. The E & LRC does not have jurisdiction to hear constitutional matters relating to one's right whereas Rule 4 (1) of the Constitution (protection of rights and fundamental freedoms) Practice and Procedure Rules, 2013, Article 23 and 165 gives the High Court a constitutional mandate to hear and determine questions concerning enforcement of fundamental rights and freedoms.

25. In addition to the above the Industrial Court Act established the Industrial Court which determines disputes relating to employment and labor relations as provided by Section 12 of the Employment and Labour Relations Act, Chapter 234B Laws of Kenya which states as follows:

“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 laws 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 employer's organization and a trade union's organization.

(d) Disputes between trade unions

(e) Disputes between employer organizations

- (f) Disputes between an employer's organization and a trade union
- (g) Disputes between a trade union and a member thereof
- (h) Disputes between the employer's organization or a federation and a member thereof
- (i) Disputes concerning the registration and election of trade union officials
- (j) Disputes relating to the registration and enforcement of collective agreements.

26. The Petitioner referred to **Karisa Chengo, Jefferson Kalama Kengha & Kitsao Charo Ngati v. Republic** [2015] eKLR where the court stated,

“ the High Court no longer had original and unlimited jurisdiction in all matters as it was in the repealed constitution. It could not deal with matters set out under section 12 of the ELRC Act and section 13 of the ELC Act.”

The court was also referred to Re: **The matter of the Interim Independent Electoral Commission** [2011] eKLR and in **Samuel Kamau Macharia & Anor v. K.C.B 2 Ors** [2012] eKLR to emphasize on jurisdiction.

27. The Petitioner raised an issue on whether the Constitutional Petition should be struck out. He urged that striking out a suit is an only remedy which should be resorted to if a suit is a complete sham, scandalous, frivolous and an abuse of the court process. In **Oluoch Dan Owino & 3 Ors v. Kenyatta University** [2014] eKLR Mumbi J referred to Article 47 and 50, which gave the rules of natural justice with regard to administrative action. Regardless of the merits of a decision, if it is not arrived at through a fair process then it could be allowed to stand.

28. Further he urged that he had set out in the petition his rights that had been violated and he also demonstrated that procedural fairness was not accorded to him. In **Kinyanjui v. Kinyanjui** EALR (1995 – 1998) I EA 146 (HCK), Ringera J stated:

“I am of the firm view that for a court of Law to shirk from its Constitutional duty of granting relief to a deserving suitor because of fear that the effect would be to engender serious ill will and probable violence between the parties or indeed any other consequences would be to sacrifice the principle of legality and the dictates of the rule of law at the altar of convenience. It would be to elevate perceived might to a legal advantage law. This court will not do any of these things.”

29. Also the Petitioner urged that the employment dispute in E & LRC Cause No. 390 of 2016 and the instant petition emanate from separate, different and specific causes of action. The reliefs sought are different, distinct and separate, and therefore the E & LRC Court cannot make a declaration on an infringement of the petitioner's rights as sought for in this petition. He finally urged the application be dismissed with costs.

Respondent's Submissions

30. It was their submission that the petitioner filed the Nairobi E & LRC Case No. 390 of 2016 on 14.03.2016 citing wrongful dismissal and unfair termination of employment whereas the petition was filed on 22.07.2016 alleging violation of his constitutional rights arising from the termination of his employment by the respondent.

31. The counsel referred to a Court of Appeal decision in **Muchanga Investments Limited v. Safaris Unlimited (Africa) Ltd & 2 Ors** [2009] KLR 229 where it was held that a matter became an abuse of court process where the proceedings to be used in pursuit of truth is used for purposes extraneous to that objective. On the other hand in **Dr. Kiama Wangari v. John N. Mugambi & Anor** [2012] eKLR the court observed that it amounted to an abuse of the court process to file multiplicity of matters especially where a petition is filed to litigate the same matter between the same parties seeking similar relief.

32. Further that the petitioner was using the petition to litigate what is purely an employment dispute and the court was referred to section 41 and 5 of the Employment Act, which provides the safeguards to an employee in case of termination from employment and also these safeguards promote equality at the work place to ensure all employees are treated fairly and are not discriminated against.

33. It was further urged that the E & LRC Court has jurisdiction to determine a petition relating to violation of constitutional rights arising from an employment dispute and the petitioner was trying to achieve the same purpose of seeking redress for the alleged unlawful termination of his employment; and the Petitioner could have raised issues relating to the alleged violation in the Industrial Employment and Labour Relations court. The court was referred to **United States International University (USIU) v. A.G & 2 Ors** [2012] eKLR, Majanja J. 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.”

34. Further they urged that the Petitioner had not set out precisely what rights had been infringed on and in what manner they had been infringed as established in **Anarita Karimi Njeru v. A.G** [1979] KLR 54. The Petitioner alleged he was not given adequate time to respond to

the allegations against him, and the allegation that the disciplinary panel was biased was not elaborated.

35. Also it was their submission that the court has power to strike out the petition to prevent an abuse of the court process. Rule 3(8) of the constitution of Kenya (protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 provides that

“Nothing in these rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of court.”

It was their submission that the petition be struck out for being an abuse of the court and in the alternative, consolidate it with the Employment and Labour Relations Court case.

Issues for determination

36. The court has considered the issues raised, the record petition, the application to strike out the petition, the responses, submissions and the authorities relied on, and the following specific issues arise for determination.

- a) Whether the Petition raises the same issues raised in the Employment and Labour Relations Court case No. 390 of 2016.*
- b) If so, whether the Petition can be struck out or in the alternative be consolidated with the E & LRC case No. 390 of 2016.*

Determination

37. The Petitioner filed his petition on 22.07.2016 seeking for declaratory orders against the respondent. It is also not in dispute that the Petitioner had earlier on 14.03.16 filed a case in the Employment and Labour Relations Court being case No. 390 of 2016 Dennis Galava v. Nation Media Group Limited. It is this instant petition that prompted the respondent to file an application by way of Notice of Motion to seek the court to strike out the petition for abuse of the court process. The respondent also annexed the claimant’s Memorandum of claim together with the Memorandum of response.

38. The Petitioner’s Memorandum of Claim was filed pursuant to the Provisions of the Constitution. Section 3, 17, 25, 41, 43, 44, 45, 49 and 87 of the Employment Act No. 11 of 2007, the Employment and Labour Relations Act.

39. The Petitioner contends that this court has jurisdiction to hear and determine the petition, an issue not disputed by the respondent. Jurisdiction is derived either through legislation or through the Constitution. Article 165(1) establishes the High Court of Kenya. Article 165(3) gives the following powers that are limited by Article 165(5).

- (a) Unlimited original jurisdiction in Criminal and Civil matters.*
- (b) Jurisdiction is determine the question whether a right or fundamental freedom is the Bill of Rights has been denied, violated, infringed or threatened*
- (c) Jurisdiction to hear an appeal from a decision of 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 court 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 laws of government.*
 - (iv)*

40. On the other hand, the High Court has been limited in its jurisdiction under Article 165(5) as follows:

(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)*

41. The Memorandum of Claim before the Employment and Labour Relations Court and the Petition herein are founded on the same facts and grounds save for the reliefs, which are different. The Petitioner is citing his rights and fundamental freedom were infringed on in the Petition, and it is for this reason that the respondent urged the petition is a duplication of the claim that is pending hearing. The petitioner

denies this fact and states the issues raised are different. Part of the submissions read as follows:-

“21. The respondent’s grievance on the supposed non-compliance and “willful disobedience of the covenants and laid down process and procedures” in respect of the publication of the editorial of Saturday Nation of 2nd January 2016 by the claimant is undermined by basic facts, based on grounds that until the 20th Jan 2016, there existed no editorial policy of Nation Media Group Limited that had made reference to procedure and that the only one in existence was in regard to content.

22. The termination letter to the claimant dated 20th Jan 2016 purporting to terminate his employment disingenuously misrepresents that he was on contract when in actual fact he is a permanent and pensionable employee of Nation Media Group Limited. The aforesaid letter is therefore void and of no legal effect for want of compliance with the mandatory provisions of the Employment Act, 2007.

23. Further the Respondent’s letter dated 5th Jan 2016 in which the respondent purported to suspend the claimant for 30 days on half pay is not only unprecedented but is also contrary to the Employment Act, 2007. The said suspension is therefore null and void.

24. The suspension of the claimant by the respondent without according him a hearing and later assembling a partisan and biased panel into a disciplinary meeting that later led to his termination is a clear violation of the procedural safeguards prescribed by Section 41 of the Employment Act.

25. The termination of the claimant’s employment in such an acrimonious manner has exposed him to infinite prejudice and is unlikely to be gainfully employed in the only profession that he has trained for and made a career out of. The respondent is thus in career progression and future pension earnings.

26. Taken as a whole, the respondent’s conduct is a brazen violation of the law having been undertaken in the knowledge that the prospect of material advantage to it by reason of such violation of the law outweighed the prospects of material loss.

27. ..

28. This honorable court has the jurisdiction to entertain this matter by virtue of the provisions of the Employment and labor Relations Act.

Prayer and conclusion

29. It is the claimant’s prayer that this honorable court does order against the respondent for: -

- a) A declaration that the claimant’s employment services with the respondent were terminated wrongfully, maliciously and unfairly
- b) Three month’s pay in lieu of notice as per his letter of appointment (Ksh 800,000*3=Ksh 2,400,000/=)
- c) Equivalent of one’s year pay in accordance with section 49(1) C under the remedies for wrongful dismissal and unfair termination in the Employment Act, 2007(ksh 800,000 *12=Ksh 9,600,000)
- d) I month salary for each completed year of service (6 years)(Ksh 800,000*6=Ksh 4,800,000)
- e) Pay for 24.5 days leave earned up to February 2016 and counting (Ksh 9,600,000/360*24.5=Ksh 653,333.35)
- f) Salary up to February 2016 and counting (Ksh 800,000*2=Ksh 1,600,000 and counting)
- g) Accrued Employer pension contributions in accordance with the law and within the period prescribed by the regulation on retirement benefits.
- h) Compensation for damage to career based on the fact that at the time of the wrongful termination of his services, the claimant’s monthly pay was Ksh.800,000 and had legitimate expectation to work until retirement at 60 years. Before adjusting for promotion and annual increment our client is entitled to ksh.182,400. In addition, the amount claimable as annual increment calculated at 6% every year for the next 19 years is ksh. 19,445,755.
- i) Compensation for lost pension earnings quantified at monthly employer contribution and adjusted for annual salary increment of 6% (Ksh.19,849,194).
- j) That the respondent’s do issue the claimant a certificate of service, so far.
- k) Interest at commercial rates on prayers b, c, d, e, f, g, h and I above from the date of filing suit till payment in full.
- l) Costs of the suit.

42. From the above pleadings, the court finds that the facts of the case in the petition and the affidavit in support are similar to the issues

raised in the claimant's Memorandum of Claim save for the reliefs sought. Although a party may be entitled to recover various remedies for causes of action arising from the same facts, the court(s) must be careful that there should not be double compensation for the petitioner. With respect the principle of **Muchanga Investment Limited** (supra) does not apply as different causes of action and reliefs are pursued in the two suits, one has Constitutional reliefs and the other as employer/employee breach of contract.

43. Having found as above, the next issue for determination is whether the petition can be heard by the Employment, Labour and Relations Case.

44. This court has jurisdiction to hear and determine issues concerning the Bill of Rights as enshrined in Article 165 (3) of the Constitution and for matters of Labour and Employment Article 162(2) establishes the Employment and Labour Relations Court which is a court with the status with the High Court. Section 12 of the Employment and Labour Relations Act provides for the specific jurisdiction of the E&LC as above.

45. The Petitioner is in agreement that it is out of being allegedly terminated from work that he filed this Memorandum of Claim and the Petition. Also in his petition he states the nature of injury from paragraph 25 – 35, which is related to his employment, and nature of work with the respondent. Section 12 of the Employment and Labour Relations Act has clearly provided the circumstances under which the court can hear and determine issues.

46. In **Daniel N. Mugendi v. Kenyatta University & 3 Ors** [2013] eKLR, this was a dispute between employee and employer. The Petitioner had sought for the court to enforce his fundamental rights as enshrined in the constitution. The Court of Appeal held as follows:

“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...”

47. The Petitioner cited **Gladys Boss Shollei v. JSC** [2013] eKLR, which petition was filed in the industrial court and the respondent appealed against that decision. The applicant filed an application seeking for a conservatory order to reinstate her to office and that the office of the Chief Registrar of the judiciary should not be occupied by any other person other than the petitioner (applicant). This case is different from the instant petition in terms of the prayers being sought, the petitioner in this case has already been dismissed and he is along that it was unlawful and his bill rights was infringed on. The petitioner had filed an application, which application was declined and the final judgment was appealed against.

48. The respondent cited the Court of Appeal decision in **Judicial Service Commission v. Gladys Boss Sholei & Anor** [2014] eKLR. In the decision Okwengu J held as follows:

*“[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. In my considered view, 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. Indeed I concur with the position taken by Majanja, J. in **United States International University (USIU) v Attorney General & 2 Others** [2012] eKLR 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. In my view to hold that the Industrial Court has no jurisdiction to hear and determine a petition seeking redress of violations of fundamental rights arising from an employment relationship would defeat the intention and spirit of the Constitution in establishing special courts to deal with employment and labour disputes. Indeed such a stance would not only be inimical to justice, but would expressly contravene Article 20 of the Constitution that provides that the Bill of Rights “applies to all law and binds all state organs and persons”, and enjoins a court to promote the spirit, purport and objects of the Bill of rights and adopt an interpretation that most favors the enforcement of a right or fundamental freedom.

CONCLUSION

No exclusive Bill of Rights jurisdiction

49. In **Chimweli Jangaa Mangale & 3 others v Hamisi Mohamed Mwawasaa & 15**

others [2016] eKLR, the Court of Appeal at Malindi in an environment and land matter considered whether the Environment and Land Court (ELC) had jurisdiction to entertain an action for enforcement or protection of fundamental rights where the alleged violations arise from or relate to matters within its jurisdiction, such as violation of the right to property and held as follows:

*“This Court considered the issue in **Prof. Daniel N. Mugendi v. Kenyatta University & Others, CA No 6 of 2012** and in **Judicial Service Commission v. Gladys Boss Shollei & Another, CA No 50 of 2014**, involving the Labour and Employment Court, which, like the ELC, is a court of equal status as the High Court under Article 162(2) of the Constitution. **The Court concluded that the High Court did not have exclusive jurisdiction to enforce the Bill of Rights and that the Constitution contemplates enforcement and protection of fundamental rights and freedoms by other courts, other than the High Court. Accordingly, where issues***

involving the environment or land raise constitutional issues or issues of protection and enforcement of the right to land as property, the ELC will have jurisdiction to hear and determine the dispute. We are satisfied that the appellant's claim that the ELC lacks jurisdiction to enforce constitutional rights is totally bereft of merit.

The appropriate court

50. One accept that the High Court and the Labour and Employment Court have a Bill of Rights jurisdiction over matters concerning employment, it becomes then a question depending on the facts of the particular case as to the appropriate court to deal with the particular dispute between the parties. As this court held in Nairobi Petition No. 151 of 2016, **Robert Kipkemboi v. The Kenya Railways Corporation & Ors.-**

16. “[I]t is a question of the appropriateness of the Court where two courts have concurrent or coordinate jurisdiction over a matter. In my view, the matrix of relationship of the High Court as a constitutional court and courts of equal status in their respective mandates is that, subject to suitability or appropriateness of the court to deal with the particular issue at hand, each Court has jurisdiction to deal with Bill of Rights issues relevant to labour, land or environment.

17. So that the place of suing is to be decided with reference to the dispute before the court on a case to case basis on the general principle that the High Court and the court of equal status have concurrent jurisdiction on Bill of Rights issues that come before them in their discharge of their respective jurisdiction.”

51. In view of the above finding, the court finds that the Petitioner has raised fundamental issues, which can be heard and determined by the Employment & Labour Relations court, which is a court of equal status as this court. The relationship between the petitioner and respondent is employee – employer which could be solved by the Employment & Labour Relations court. It is for the reason that this court was established to promote the spirit, purport and objects of the bill of rights out in regard to section 12 of the Industrial Court; this court downs its tools. Further labour and employment rights are part of the Bill of Rights as they are protected under Article 41 of the Constitution and the understanding by the Petitioner that the Employment & Labour Relations court does not have jurisdiction to determine and grant the orders sought is a misinterpretation of the law.

Orders

52. There shall, therefore, be an order for the transfer of the Petition herein to the Employment and Labour Relations Court for disposal.

53. There shall be no order as to costs.

Order accordingly.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 26TH DAY OF OCTOBER 2018.

E C MWITA

JUDGE

Appearances:-

M/S Kemboy & Co. Advocates for the Petitioner.

M/S Hamilton, Harrison & Mathews Advocates for the Respondent.