



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

PETITION NO. 25 OF 2016

IN THE MATTER OF ARTICLES 22 (1) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 19, 20, 23, 25 (c), 47 AND 236 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE COUNTY GOVERNMENT ACT, 2012 (ACT NO. 17 OF 2012)

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT, 2015 (ACT NO. 4 OF 2015)

AND

IN THE MATTER OF INTERPRETATION OF ARTICLES 179 (b) OF THE CONSTITUTION OF KENYA, 2010 AND SECTIONS 40, 45 AND 59 OF THE COUNTY GOVERNMENTS ACT, 2012 AND STANDING ORDER 63 AND 153 (30 AND (4) OF THE COUNTY ASSEMBLY OF KILIFI

BETWEEN

BEN KAI CHILUMOPETITIONER

VERSUS

THE COUNTY ASSEMBLY OF KILIFI 1ST RESPONDENT

THE SPEAKER OF THE COUNTY

ASSEMBLY OF KILIFI.....2ND RESPONDENT

THE GOVERNOR OF KILIFI COUNTY3RD RESPONDENT

THE KILIFI COUNTY PUBLIC SERVICE BOARD4TH RESPONDENT

RULING

1. The Petitioner, Ben Kai Chilumo was appointed a Chief Officer in charge of Finance and Economic Planning by the County Government of Kilifi on 1st October, 2013. Towards the end of 2016, the 1ST Respondent's Committee on General Oversight tabled a report before the 1st Respondent, the Government of Kilifi County recommending that the Petitioner and the County Secretary in charge of Finance step aside pending investigation of their conduct. On 6th December, 2016 the 1st Respondent adopted the report of the Committee on General Oversight.

2. On 13th December, 2016, the Petitioner filed this Petition together with a notice of motion seeking stay of action on the said report. Conservatory orders were issued on a temporary basis against the Governor of Kilifi County (the 3rd Respondent) and the Kilifi County Public Service Board (the 4th Respondent) on 15th December, 2016. The Speaker of the County Assembly of Kilifi is named as the 2nd Respondent.

3. On 23rd March, 2017 the 1st and 2nd respondents filed the Notice of Preliminary Objection dated 20th March, 2017 opposing the Petition on the grounds that:

“1. That the present matter which is on Employment and Labour Relations falls purely under the jurisdiction of the Employment and Labour Relations Court created under Section 4 of the Industrial Court Act pursuant to Article 162 (2) of the Constitution.

2. The present Petition on Employment and Labour Relations having been instituted in the High Court of Kenya is invalid, a nullity and void which ought to be dismissed with costs.

3. That the High Court lacks jurisdiction to entertain disputes falling under Article 162 [2] [a] of the Constitution of Kenya.

4. That the present Petition which is on Employment and Labour Relations is incompetent and a nullity incapable of being transferred to a Court with competent jurisdiction hence ought to be dismissed for want of jurisdiction.”

4. The advocates for the parties agreed to tackle this matter through written submissions. It is noted for purposes of record that the 3rd Respondent has never participated in these proceedings.

5. The 4th Respondent supported the 1st and 2nd respondents' Notice of Preliminary Objection. It nevertheless went ahead to submit in support of its Statement of Grounds of Opposition dated 15th March, 2017.

6. The Petitioner opposed the Preliminary Objection and went ahead to argue his petition through the submissions dated 11th May, 2017.

7. The Preliminary Objection filed by the 1st and 2nd respondents challenges the jurisdiction of this court to handle the Petition herein and it should be addressed on priority basis.

8. It is not disputed by the parties herein that one of the limitations imposed on the jurisdiction of the High Court by the Kenyan Constitution relates to matters reserved for the courts contemplated in Article 162 (2). One of the courts created in pursuance to the provisions of Article 162 (2) is the Employment and Labour Relations Court established under the Employment and Labour Relations Court Act, Cap. 234B whose mandate as per Article 162 (2) (a) is to hear and determine disputes relating to employment and labour relations.

9. The parties herein also do not raise any issue with the fact that the issue of jurisdiction as framed in this matter is indeed a point to be taken up through preliminary objection as was established in **Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd [1969] E. A. 696**. At page 701

paragraph A – B Sir Charles Newbold, P defined a proper preliminary objection thus: -

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

10. The Preliminary Objection herein zeroes in on the question as to whether this court has the authority of the Constitution and statute to hear and determine this matter.

11. The 1st and 2nd respondents’ position is that this is a matter reserved for the Employment and Labour Relations Court and this court has no jurisdiction to handle the matter. They urge this court to down its tools as was stated in **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1**.

12. As to whether this court should transfer this case to the court with jurisdiction, the 1st and 2nd respondents assert that it cannot do so. They rely on the decisions in **Mombasa Court of Appeal Civil Appeal No. 13 of 2016, Equity Bank Ltd v Bruce Mutie Mutuku t/a Diani Tour & Travel; Macfoy v United Africa Co. Ltd [1961] 3 ALL ER 1169** and **Official Receiver & Provisional Liquidator Nyayo Bus Service Corporation v Firestone E. A. Ltd [1998] eKLR** for the proposition that a nullity is a nullity and nothing can stand on it nor can any argument correct it.

13. The 1st and 2nd respondents cited the decisions in **Misc. Appl. No. 639 of 2005 Boniface Waweru Mbiyu v Mary Njeri & another [2005] eKLR** and **Misc. Civil suit No. 136 of 2012, Abraham Mwangi Wamigui v Simon Mbiriri Wanjiku & another [2012] eKLR** in support of their assertion that once a matter is found to have been filed in a court without jurisdiction and thus a nullity then the same cannot be revived by transferring it to the court with the proper jurisdiction.

14. In **Abraham Mwangi Wamigui** (supra), my brother Odunga, J expressed himself on this issue thus: -

“It is therefore trite that where a suit is instituted before a tribunal having no jurisdiction, such a suit cannot be transferred under section 18 aforesaid to a tribunal where it ought to have been properly instituted. The reason for this is that a suit filed in a court without jurisdiction is a nullity in law and whatever is a nullity in law is in the eyes of the law nothing and therefore the court cannot purport to transfer nothing and mold it into something through a procedure known as “transfer”. In other words, courts can only transfer a cause whose existence is recognized by law. It is now settled law that where a Court finds that it has no jurisdiction, it must immediately down its tools and proceed no further.”

15. I will revert back to the 1st and 2nd respondents’ arguments when determining the Preliminary Objection.

16. The Petitioner took a different approach to the question of jurisdiction. He pointed to Article 179 (1) and (2) of the Constitution which defines a county executive committee as comprising of the county governor, the deputy county governor and members appointed by the governor with the approval of the county assembly and provides that the executive authority of a county vests in and is exercised by a county executive committee.

17. The Petitioner then proceeded to highlight Article 235 of the Constitution which provides for establishment of offices, appointment to those offices and disciplinary control and removal of the holders of those offices within a county government. He then points to Article 236 which prohibits victimisation or discrimination of a public officer.

18. The Petitioner then refers to the decision of the Court of Appeal at Nyeri in **County Government of Nyeri & another v Cecilia Wangechi Ndungu [2015] eKLR** in which state offices were identified with

the rider that the Employment Act does not apply to state officers.

19. In the Petitioner's view all these facts point to the fact that this court has jurisdiction to interpret the Constitution in regard to the questions of breach of fundamental rights and freedoms that he has raised in his Petition. In his opinion, such matters do not fall within the jurisdiction of the Employment and Labour Relations Court.

20. The question here is whether this matter is before the right forum. The jurisdiction of the Employment and Labour Relations Court is found in Section 12 of the Employment and Labour Relations Court Act. As per Section 12 (a) the jurisdiction extends to resolution of disputes arising out of employment between an employer and an employee. The Petitioner contends that the dispute herein is purely on constitutional matters and places emphasis on paragraph 46 of the judgement of the Court of Appeal in **County government of Nyeri & another v Cecilia Wangechi Ndungu [2015] eKLR** where it was stated that: -

“We are of the considered view that the Employment Act does not apply to State Officers. A State Officer's terms and conditions of service are regulated by the Constitution or the relevant Statute, principles of fair administrative action and rules of natural justice. It therefore follows that a member of the County Executive Committee being a State Officer is not subject to the provisions of the Employment Act.”

21. If the said statement by the Court of Appeal is taken to its logical conclusion, the outcome would be that matters touching on the terms of service of State Officers are not subject to the jurisdiction of the Employment and Labour Relations Court. I say so, as Section 87 of the Employment Act, Cap 226 gives jurisdiction to the said Court to hear disputes between employers and employees.

22. Be that as it may, I note that the appeal that was before the Court of Appeal arose from the decision of Justice Byram Ongaya of the Industrial Court of Kenya now the Employment and Labour Relations Court. Secondly, the Court of Appeal at paragraph 45 gave a list of State Officers. The position of Chief Officer of a county is not in that list and the Petitioner, being a Chief Officer does not therefore fall into the category of State Officers. He cannot elevate himself to the position of a member of the executive committee of the County Government of Kilifi.

23. It is also important to note that constitutional issues arising out of employment and labour matters are supposed to be dealt with by the Employment and Labour Relations Court.

24. In **Daniel N. Mugendi v Kenyatta University & 3 others [2013] eKLR** the Court of Appeal held that:

“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 fundamental rights associated with the two subjects.”

It therefore goes without saying that the proper forum to deal with this dispute is the Employment and Labour Relations Court.

25. The only issue is whether to dismiss the Petition or to transfer the same to the proper court. The decisions of Ojwang, J (as he then was) in **Boniface Waweru Mbiyu** (supra) and Odunga, J in **Abraham Mwangi Wamigwi** (supra) indicate that a matter filed before a court without jurisdiction can only be dismissed. That position was adopted by J.B. Havelock, J in **James Davies Njuguna v James Chacha (sued as Chairman Parklands sports Club) & 3 others [2013] eKLR** when he held that: -

“I would only add that in my view Section 18 of the Civil Procedure Act only covers the power of the High Court to withdraw and transfer cases instituted in a subordinate court. In

my view, this section does not allow the transfer of a case from the High Court to any other Court of equal status.”

26. This position converges with that of the Court of Appeal in **Equity Bank Limited** (supra) in which the Court stated: -

“In numerous decided cases, courts, including this Court have held that it would be illegal for the High Court in exercise of its powers under Section 18 of the Civil Procedure Act to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow court to transfer an incompetent suit for want of jurisdiction to a competent court would be to muddle up the waters and allow confusion to reign. It is settled that parties cannot, even by their consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where it lacks, parties cannot even seek refuge under the “O2” principle or the overriding objective under the Civil Procedure Act, the Appellate Jurisdiction Act or even Article 159 of the Constitution to remedy the situation. In the same way, a court of law should not through what can be termed as judicial craftsmanship sanctify an otherwise incompetent suit through a transfer.”

27. However, earlier on in **Daniel N. Mugendi** (supra) the Court of Appeal, differently constituted, found that the High Court should not have struck out the petition but should have instead transferred the same to the Court with jurisdiction. The Court stated thus: -

“In sum on this ground of jurisdiction, we find as we had stated earlier that the High Court had no jurisdiction to entertain the claim which essentially was based on breaches of contract of employment along with some unstated claims of breaches of rights, as the learned judge did find.

Believing as we do that the approach taken by Majanja, J is the correct one, and in endeavouring to meet the ends of justice untrammelled by procedural technicalities, we set aside the order striking out the appellant’s petition and direct that the High Court do transfer it to the Industrial Court which also has jurisdiction and authority to consider the claims of breach of fundamental rights as pertain to industrial and labour relations matters. It is only meet and proper that the Industrial Court do exclusively entertain those matters in that context and with regard to Article 165 (5) (b). And in order to do justice in the event where the High Court, the Industrial Court or the Environment & Land Court comes across a matter that ought to be litigated in any of the other courts, it should be prudent to have the matter transferred to that court for hearing and determination. These three courts with similar/equal status should in the spirit of harmonization, effect the necessary transfers among themselves until such time as the citizenry is well-acquainted with the appropriate forum for each kind of claim. However, parties should not file “*mixed grill*” causes in any court they fancy. This will only delay the dispensation of justice.”

28. In my view, the **Daniel N. Mugendi** decision is more in line with the constitutional requirement in Article 159 (2) (d) that justice be done “**without undue regard to procedural technicalities.**” Striking out the Petition will result in unnecessary expenses to the parties and the Petitioner’s case could die at the altar of procedural technicalities. On the other hand, no prejudice will be suffered by the respondents if this matter is transferred to the right Court.

29. One may wonder whether an order of transfer is “**one more step**” in contravention of the doctrine in **Owners of the Motor Vessel “Lillian S”** (supra). Engaging in such a discussion would mean a matter filed before a court without jurisdiction can also not be struck out as it would amount to taking “**one more step**”.

30. In the circumstances of this case, I find that this Court has no jurisdiction to handle this matter. The

same is transferred to Malindi Employment and Labour Relations Court for hearing and determination. As for costs, the same will be determined upon conclusion of the matter.

Dated, signed and delivered at Malindi this 24th day of July, 2017.

W. KORIR,

JUDGE OF THE HIGH COUR