



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW NO. 156 OF 2015**

**IN THE MATTER OF: AN APPLICATION FOR ORDERS OF CERTIORARI PROHIBITION AND MANDAMUS.**

**AND**

**IN THE MATTER OF: ALLEGED SUSPENSION AND PROPOSED FALSE TERMINATION FROM EMPLOYMENT OF PROFESSOR MATILU MWAU BY JOMO KENYATTA UNIVERSITY OF AGRICULTURE AND TECHNOLOGY.**

**AND**

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**JOMO KENYATTA UNIVERSITY OF AGRICULTURE & TECHNOLOGY (JKUAT)....RESPONDENT**

**PROFESSOR MATILU MWAU.....EX-PARTE APPLICANT**

**JUDGMENT**

1. On 20<sup>th</sup> May 2015 Hon Mr Korir J granted to the exparte applicant **PROFESSOR MATILU MWAU** leave to institute these Judicial Review proceedings against the Respondent **JOMO KENYATTA UNIVERSITY OF AGRICULTURE & TECHNOLOGY (JKUAT)** through a notice of motion dated 26<sup>th</sup> May 2015 seeking the following Judicial Review orders.

a) An order of certiorari do issue to bring into this Honourable court the respondent’s decision to allegedly and falsely suspend the applicant from duty which was communicated to him by way of a letter dated 8<sup>th</sup> April 2015 for purposes of being quashed.

b) The said decision be quashed.

c) An order of prohibition do issue to prohibit the respondent from purporting to dismiss the applicant from employment or taking or performing any action in furtherance of or in connection with the said decision or in any other way taking away adverse action against the applicant in furtherance of or in connection with the applicant's former employment with the respondent.

d) An order of mandamus do issue directing the respondent to pay applicant's salary for the month of February, 2015 plus his terminal dues and issue him with a clearance certificate.

e) The costs of this application are provided for.

2. The notice of motion as is stipulated in Order 53 Rule 3(1) of the Civil Procedure Rules is predicated on the statutory statement and verifying affidavit filed together with the chamber summons for leave. The two instruments were filed on 19<sup>th</sup> May 2015. The verifying affidavit is sworn on 15<sup>th</sup> May 2015 by professor Matilu Mwau which is quite lengthy and detailed.

3. The gist of the applicant's complaint is that he was an Associate Professor, Department of Microbiology from 3<sup>rd</sup> July 2013 and was unfairly suspended from his job yet he had by the time of the alleged suspension resigned from employment with the respondent University and that as at the time of filing of these proceedings, the respondent's University Council was planning to purportedly terminate his employment with the University which actions are said to be baseless, senseless and founded on malice.

4. The applicant claims that the respondent alleged that it had received and processed a complaint against him by an Master of Science student one L Z M for allegedly harassing her sexually which allegations he denied and that without according him a fair hearing, he was served with a notice to show cause letter dated 18<sup>th</sup> March 2015 and that despite his show cause letter written on 29<sup>th</sup> March 2015, on 8<sup>th</sup> April 2015 he received a letter of suspension from duty setting out totally different grounds for suspension from those contained in the notice to show cause letter. He therefore sought the court's intervention.

5. In the replying affidavit sworn by Professor Victoria W. Ngumi the Deputy Vice Chancellor (Administration) of the respondent University, she confirms that the applicant was on 3<sup>rd</sup> July 2013 appointed by the respondent as an Associate Professor grade 14 in the Department of Microbiology on permanent and pensionable basis which terms the applicant accepted.

6. The respondent's Deputy Vice Chancellor deposes that on 12<sup>th</sup> February 2015 it received a complaint of sexual harassment against the applicant from a Ms L Z M, a Master of Science student upon which the respondent did on 18<sup>th</sup> March 2015 write to the applicant specifying the allegations against him and asking him to show cause why disciplinary action should not be taken against him.

7. That on 29<sup>th</sup> March 2015 the applicant responded to the notice to show cause which letter is still being deliberated upon by the respondent.

8. According to the respondent, on 8<sup>th</sup> April 2015 it suspended the applicant for absenting himself from duty pending his appearance before its disciplinary committee, for absenteeism.

9. In addition, it is contended by the respondent University that the applicant did not give the requisite notice for resignation and that he accepted another employment from the Consortium for National Health Research on 15<sup>th</sup> September 2014 while he was still in employment of the respondent University and drawing a salary there from, hence, he acted illegally and therefore not entitled to the orders sought.

10. According to the respondent, the applicant's application is incompetent, bad in law and an abuse of

court process.

11. Both parties' advocates filed and exchanged written submissions and authorities to canvass the notice of motion with the respondent's counsel highlighting the same whereas the applicant's counsel wholly adopted the pleadings, affidavits and written submissions and supported by a list and bundle of authorities filed on 13<sup>th</sup> April 2016. Their written submissions were filed on 9<sup>th</sup> June 2015 as skeletal submissions following the court's directions.

12. The applicant in his submissions filed on his behalf by his counsel reiterates the grounds upon which the application is predicated and maintains that the respondent could not purport to suspend him on 8<sup>th</sup> April 2015 when he had already resigned from its employment on 19<sup>th</sup> January 2015 and that the respondent breached the rules of natural justice by failing to accord him a fair hearing hence the decision was based on malice.

13. The applicant denied allegations of any consensual or inappropriate sexual relations with his student Ms. L Z M and complains that he was not allowed to be represented by his advocate at the questioning wherein allegations of sexual harassment were leveled against him hence the decision to suspend him was biased and that the respondent should pay him his terminal dues and issue him with a certificate of service. He relied on several authorities namely:-

**1) Republic vs Thames Magistrate's Court exparte Polemn [1974] 2 ALL ER 1219** where it was held that a party to proceedings should be given a reasonable opportunity to present his case, and that includes a reasonable opportunity to prepare his case before being called to present it;

**2) Pett v Greyhound Racing Association Ltd [1969] CA 125** where it was held that where a matter concerns a person's reputation and livelihood, such a person has a right to be presented by a lawyer;

**3) Geoffrey Mwangi Kariuki vs University of Nairobi HC Miscellaneous Application 4788/1992** where the court held that the right to legal representation could not be denied;

**4) Onyango v Attorney General CA [1986-1987] EALR 456** where it was held that a party must be given a notice which contains details of the case against him to enable him to fully appreciate the charge or complaint he is to face;

**5) Republic vs Commissioner of Co-operatives exparte Kirinyaga Tea Growers Co-operative Savings and Credit Society Ltd[1991] EA 248** where it was held that a decision made in bad faith is against the rules of natural justice.

14. The applicant made it clear at paragraph 11 of his submissions that he seeks to quash the respondent's decision to allegedly suspend him from employment and prohibit it from proceedings to allegedly terminate his services. Further, that the decision to allegedly suspend and thereafter terminate the applicant was preceded by illegal actions which are not set out in detail in the submissions.

15. The applicant also relied on the often quoted case of **Kenya National Examination Council vs Republic Exparte Geoffrey Gathenji Njoroge & 8 Others** on the principles applicable in application for Judicial Review orders of certiorari, prohibition and mandamus.

16. The respondent's counsel filed written submissions on 14<sup>th</sup> October 2015 and submitted orally through Mr Mukele contending that the High Court in exercising Judicial Review jurisdiction should not be concerned with private rights or the merits of the decision being challenged but with the decision making process as was espoused in **Municipal Council of Mombasa v Republic exparte Umoja Consultants Ltd CA No. 185/2001**.

17. The respondent also framed 4 issues for determination as hereunder;

**a) Whether this court has the requisite jurisdiction to hear and determine this matter:-**

18. On this question of requisite jurisdiction, it was submitted that Article 162(2) of the Constitution of Kenya, 2010 establishes the Employment and Labour Relations Court [ELRC] (the Court) and that Section 12(1) of the Employment and Labour Relations Court Act confers on the Court 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 the Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations and the sections lists categories of disputes relating employment and labour relations.

19. According to respondent, the nature of the orders sought herein relate to or arises from employer employee relationship which relation is not disputed as fitting perfectly well within Section 12 of the Employment and Labour Relations Court Act.

20. Accordingly, it was submitted that this court lacks jurisdiction to hear and determine this matter which should therefore be struck out with costs. Reliance was placed on **Joseph Karobia Gicheru vs Michael Gachuki Gicheru [2013] e KLR** where the Court of Appeal made it clear that where a court embarks on hearing and proceeds to determine a dispute over which it has no jurisdiction, the entire proceedings are empty of legal life and are null and void ab initio.

**b) Whether public law remedies are available in respect of private contracts.**

21. According to the respondent, the applicant had not demonstrated that the respondent had a statutory duty or existence of statutory underpinnings to invoke this court's jurisdiction, moreso, when the proceedings herein were instituted before the Fair Administrative Action Act 2015 came into effect. Reliance was placed on **Republic vs Professor Mwangi S. Kimenyi & another exparte Kenya Institute for Public Policy and Research Analysis (KIPPRA) CA 16/2008 Nairobi** where the court reiterated the emphasis in **Republic vs BBC exparte Lavelle [1983] 1 WLR 1302** that Judicial Review remedies are not available in a situation of employer-employee relationship. Further, that since the disciplinary procedure under which the applicant was dismissed arose out of her contract of employment and was purely private and domestic in character, the applicant was not entitled to relief by way of certiorari.

22. The respondent submitted that Judicial Review remedies can however be available in employer/employee relationships where the contract of employment has statutory underpinnings. Further reliance was placed on **Republic vs Sports Stadia Management Board Exparte Michael Kinyua Njeru and Wilson Otieno Muganda** where Honourable Korir J held that there must be public law issues placed before court for Judicial Review orders to issue.

**c) Whether the application sustains the requisite threshold for the grant of the orders sought.**

23. It was submitted that the applicant alleges that on 19<sup>th</sup> January 2015 he tendered his resignation from his job with effect from 1<sup>st</sup> March 2015 after he had secured a better job and that it was after his resignation that the respondent started harassing him. In that case, it was submitted by the respondent's counsel in contention that the applicant having resigned from employment, he cannot seek orders which are predicated on the fact that he is still in employment with the respondent.

24. Accordingly, it was contended that the application is overtaken by events and therefore there is no basis upon which the Judicial Review orders sought can be granted to him. In addition, that this court cannot issue orders in vain. Reliance was placed on **Kenya Civil Aviation Authority exparte the Kenya Aircraft Maintenance Engineers Association & 3 Others Miscellaneous Application 274/2010 Nairobi** where Musinga J (as he then was) stated that where the orders sought have been overtaken by events because the impugned circular was no longer in force, the court would not issue orders in vain.

25. It was further submitted on behalf of the respondent that the applicant had failed to demonstrate that the decision was tainted with illegality, irrationality, and procedural impropriety since he had merely been suspended pending investigations into the allegations. It was submitted that the applicant had failed to demonstrate that the respondent acted wrongly in suspending him.

***d) Whether the conduct of the applicant entitles him to the orders sought in the application.***

26. The respondent's counsel submitted that Judicial Review remedies are discretionary hence the court is obliged to consider the conduct of the parties before it. It was submitted that albeit the applicant alleges that he resigned from employment with the respondent on 19<sup>th</sup> January 2015 after he secured a better job elsewhere, it is clear that he was still an employee of the respondent even after taking up his better job, therefore earning two salaries contrary to the law. As such, it was contended that his conduct is not worthy of the exercise of the court's discretion in his favour and therefore the applicant is not entitled to the orders sought. The court was urged to dismiss the application dated 26th May 2015 with costs.

**DETERMINATION.**

27. I have carefully considered all the foregoing and in my humble view, the main issues for determination are two namely- ***whether this court has the requisite jurisdiction to hear and determine this matter and if so, whether the exparte applicant is entitled to the judicial review remedies sought.*** The first question is significant because if the court finds that it has no jurisdiction to determine this matter on merits then it will have to down its tools and say no more.

28. I shall therefore first and foremost determine the issue of jurisdiction of the court to hear and determine this matter, albeit the applicant did not say anything regarding this issue which was raised and argued by the respondent's counsel Mr Mukele in extenso.

29. As s was correctly stated in **Joseph Karobia Gicheru v Michael Gachuki Gicheru**(supra):

***“ where a court embarks on hearing and proceeds to determine a dispute over which it has no jurisdiction, the entire proceedings are empty of legal life and are null and void ab initio. No amount of acquiescence by any party to the conduct of such proceedings and no measure of consent by parties, no matter how express or deliberate could confer upon such court or tribunal such jurisdiction. The proceedings and orders are nullities and of no legal effect from inception and remain so to the end.”***

30. By jurisdiction, as was held in **Joseph Njuguna Mwaura & Others V Republic CR. Appeal No. 5 of 2008:**

***“ it is incumbent upon any court intending to render an opinion or determine a matter to first ascertain the entry point to the doors of justice, and that is jurisdiction.”***

31. The authority of the court is determined by the existence or the lack of jurisdiction to hear and determine disputes. In essence, jurisdiction is the first hurdle that a court or tribunal will cross before it embarks on its decision making function. In my understanding, courts have no jurisdiction in matters over which other arms of government have been vested with jurisdiction to act.

32. It has been held, not once and in the recent **R vs Karisa Chengo & others SC Petition No. 5 of 2015** that Courts guard their jurisdiction jealously but recognize that it may be precluded or restricted by either legislative mandate or certain special contexts. It is a well-established principle that legal or constitutional provisions ousting the ordinary jurisdiction of the court must be construed strictly. (See also **Republic vs Public Procurement and Administrative Review Board & another Exparte Selex Sistemi Integrati Nairobi HC Miscellaneous Application 1260/2007 [2008] KLR 728.**

33. In the premier and precedent setting decision on jurisdiction in **Motor vessel “Lilian S” vs Caltex**

Oil (K) Ltd [1989] KLR 1 Nyarangi JJA (as he then was) stated:

*“I think that 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 its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”*

34. The authority for the above holding by the Court of Appeal is to be found in the writing of **John Beecroft Saunders Treatise Words and Phrases legally defined** VOL 3: 1-N page 113 where it is stated:

*“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire in the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”*

35. From the above authorities it is clear that jurisdiction of a court or tribunal emanates from the Constitution and statutes. In addition, the Constitution or statute can limit the court's jurisdiction and where it does limit, then the court is expressly barred from exercising such jurisdiction which it is divested of.

36. In the instant case, the respondent contends that the High Court has no jurisdiction to hear and determine the issues which are to be found in the notice of motion filed by the exparte applicant. Such issues, as can be deduced from the prayers/orders of Judicial Review sought include:

*a. Whether this court can bring into this court and quash the respondent's decision contained in its letter dated 8<sup>th</sup> April 2015 which allegedly suspended the exparte applicant from duty;*

*b. whether this court can issue a Judicial Review order of prohibition prohibiting the respondent from purporting to dismiss the exparte applicant from employment or taking or performing any action in furtherance of or in connection with the said decision or in any other way taking any adverse action against the applicant in furtherance of or in connection with the applicant's former employment with respondent;*

*c. and whether the court should issue an order of mandamus directing the respondent to pay the applicant's salary for the month of February plus his terminal dues and issue him with a clearance certificate.*

37. From the prayers sought by the exparte applicant, I have no doubt from the onset that they relate to a dispute between employer and employee and whether or not those prayers are merited can only be determined by a court of competent jurisdiction. That court is the Employment and Labour Relations Court (ELRC). The reasons for my above finding are found in Article 162(2) (a) of the Constitution, Article 165(5) (b) of the Constitution and Section 12 of the Employment and Labour Relations Act, 2012.

38. Article 162(2) of the Constitution contemplates the establishment of a specialized court with jurisdiction to hear and determine disputes relating to Employment and Labour Relations. The same Article at Sub Article 3 empowers Parliament to enact legislation to confer jurisdiction, powers and functions to the said court.

39. In 2012, Parliament enacted the Industrial Court Act (now amended to read Employment and Labour Relations Court Act). I was privileged to participate in its coming into being through the legislative drafting processes.

40. The Act at Section 4 establishes the Employment and Labour Relations Court as contemplated in Article 162(2) (a) of the Constitution. Section 12(1) of the said Act provides:

*“The court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) (a) 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.*

41. The disputes which the Court is empowered to resolve are listed to include:

- 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 trade unions;*
- d) Disputes between employer organizations.*
- e) Dispute between an employer’s organization or a federation and a member thereof.*
- f) Disputes concerning the registration and election of trade union officials; and*
- g) Disputes relating to the registration and enforcement of collective agreements.*

42. In the instant case, the exparte applicant claims that he was a former employee of the respondent but resigned on 1<sup>st</sup> March 2015 after serving diligently from 3<sup>rd</sup> July 2013 but that he was requested to hold fort owing to the fact that the Department did not have an alternative lecturer. It was while he was still serving the respondent University that he was allegedly suspended. He claims that he was not accorded a fair hearing and even then, that having resigned from employment, there could not be any disciplinary action that the University could take against him.

43. The applicant also claims that the University was in the process of terminating his services yet it had not paid him his terminal dues following his resignation hence, the actions by the respondent University were intended to frustrate and deny him his terminal dues hence this court should order (compel) the respondent to pay him and prohibit the respondent from terminating his services.

44. On the part of the respondent, it has admitted that the applicant was its employee who was not genuine. That he was issued with Notice to show cause for absenteeism and that he had absconded duty.

45. In my humble view, the above issues arising from the dispute between the applicant employee or former employee depending on the merits of each party’s claim which this court is not determining at this stage and the respondent employer or former employer can only be resolved by a court of competent jurisdiction which is the Employment and Labour Relations Court. This is the case because the dispute relates to employment and labour relations and more specifically, is a dispute relating to or arising out of employment between an employer and an employee.

46. That being the case, Article 165(5) (b) of the Constitution is clear that the High Court shall not have

jurisdiction to hear and determine matters falling within the jurisdiction of the courts contemplated in Article 162(2) of the Constitution. One of those courts is the employment and Labour Relations Court and the Environment and Land Court.

47. The express divesting of jurisdiction from the High Court to the courts contemplated in Article 162(2) of the Constitution by the Constitution which is the supreme law of the land by dint of Article 2 of the Constitution is a limitation or bar to jurisdiction of the Court.

48. Accordingly, this court would be acting contrary to the Constitution if it heard and determined this matter on its merits as it has no jurisdiction to do so and without jurisdiction, a court of law acts in vain.

49. It is for the above reasons that this court finds and holds that it has no jurisdiction to hear and determine this matter on its merits. Section 12(7) of the Employment and Labour Relations Court Act empowers the ELRC to issue orders including Judicial Review orders which are sought herein. This is not a specialized court. It is the High Court exercising Judicial Review Jurisdiction as stipulated in section 9 of the Law Reform Act and Order 53 of the Civil Procedure Rules among other provisions of the law.

50. This matter was filed in court in 2015 long after the transitional period contemplated in the Sixth Schedule Part IV of the Transitional and Consequential Provisions of the Constitution of Kenya, 2010. By 2015, the Employment and Labour Relations Court had long been established and operationalised with the appointment of competent judges to hear and determine such disputes as this.

51. Accordingly, I find and hold that the Judicial Review proceedings hereto as instituted are incompetently before this court which lacks the requisite jurisdiction to hear and determine. The notice of motion dated 26th May 2015 is hereby struck out.

52. Each party to bear their own costs of these proceedings.

Dated, signed and delivered in open court at Nairobi this 19<sup>th</sup> day of September, 2017.

**R.E. ABURILI**

**JUDGE**

**In the presence of:**

Mr Mburu John for the exparte applicant

N/A for the Respondent

CA: George