



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NUMBER 285 OF 2013

HEZEKIEL OIRA. PLAINTIFF

VERSUS

THE ETHICS AND ANTI-CORRUPTION COMMISSION. ... 1ST DEFENDANT

DIRECTOR OF PUBLIC PROSECUTIONS. 2ND DEFENDANT

R U L I N G

This honourable court has been called upon to make a ruling on a Preliminary Objection dated the 3rd December, 2015. The Preliminary Objection (herein referred to as the P.O.) has been raised by the 2nd Defendant on the following grounds: -

1. That the suit herein is fatally defective, frivolous and vexatious as it offends the provisions of Article 162 of the Constitution 2010.
2. That the Civil Division of the High Court has no jurisdiction to hear and determine matters relating to violation of constitutional rights and freedoms.

The parties canvassed the Preliminary Objection by way of written, submissions. The 2nd Defendant (who has raised the Preliminary Objection) has argued that since the Plaintiff is claiming that his constitutional rights have been violated, then, under Article 162 of the Constitution of Kenya, the matter should be handled by the Constitutional Division of the High Court. It contends that by filing a suit in this court the Plaintiff has violated Rule 4(1) and 10(1) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms Practice and Procedure Rules 2013, and that the same should be dismissed or struck out. It asserted that the Plaint does not raise any cause of action against the 2nd Defendant since it does not attach liability to the Defendants. It further averred that there is a multiplicity of suits since the plaintiff filed another suit in the Industrial Court Cause No. 299 of 2012 – **Hezekiel Oira Vs Kenya Broadcasting Corporation and Another** where the Plaintiff was awarded a sum of Ksh.5,742,410/= plus the costs of the suit. It argued that the Plaintiff has not enjoined the person who filed a complaint with the Defendants and that the Defendants have no control of what is published by the Media Houses who are not sued in this particular case.

On its part, the 1st Defendant in its submission argued that a claim for inducing a breach of contract as laid out in the plaint is an employment matter and should be handled by Employment and Labour Relations Court. It asserted that paragraphs 31 and 33 of the plaint invokes the Constitution of Kenya since the Plaintiff claims that his rights under the Constitution were beached and as such he is obligated to approach the court by way of petition and not a plaint as required under Rule 10(1) of the (Constitution of Kenya Practice and Procedure Rules, 2013). It concluded by submitting that it is not clear whether the Defendants are facing an employment matter, a constitutional matter, a defamation matter or a malicious

prosecution matter.

The Plaintiff on the other hand submitted that the suit is properly before the court. He argued that the Defendants instigated or induced his former employers Kenya Broadcasting Corporation (KBC) and the African Union Broadcasters (AUB) to terminate his employment following allegations that he was involved in procurement and marketing of free to air broadcasting rights for FIFA 2010 World Cup by KBC to other local media houses and the subsequent institution of Anti-Corruption Case No. 18 of 2011 against him.

He insisted that the question of inducing a breach of contract is not an employment matter but purely a tort and that the question of violation of rights and fundamental freedoms is intertwined with the tort such that divorcing it will be an abuse of court process particularly the overriding objective and would defeat justice. It was his contention that the High Court has jurisdiction to enforce rights and fundamental freedoms and that Civil Division and Constitutional and Human Rights Division are all High Courts.

The 2nd Defendant has raised the Preliminary Objection herein the essence of which was given by Law JA Old Sir Charles Newbold P. In **Mukisa Biscuits Manufacturing Company Limited Vs West End Distributors (1969) E.A. 696 at page 700 JA** wherein the learned Judge stated: -

“A Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a Preliminary Point may dispose off the suit. Examples are objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

The question, therefore, is whether this court has jurisdiction to entertain the suit as filed. In the Supreme Court case of **Samuel Kamau Macharia & Another Vs Kenya Commercial Bank & 2 Others**, Application No. 2 of 2011 (2012) eKLR. The court pronounced itself on jurisdiction thus:

Paragraph (68)A:

“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011 where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

The Supreme Court in Another case of **Yusuf Gitau Abdallah Vs Building Centre (K) Ltd & 4 Others (2014) eKLR** while referring to the case of **Peter Oduor Ngoge Vs Hon. Francis Ole Kaparo**, Petition No. 2 of 2012, (paragraph 29-30) the court stated as follows: -

“The Supreme Court, as the ultimate judicial agency, ought in our opinion, to exercise its powers strictly within the jurisdictional limits prescribed; and it ought to safeguard the autonomous exercise of the respective jurisdictions of the other Courts and tribunals. In the instant case, it will be perverse for this Court to assume a jurisdiction which, by law, is reposed in the Court of Appeal, and which that Court has duly exercised and exhausted. In the

interpretation of any law touching on the Supreme Court's appellate jurisdiction, the guiding principle is to be that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or of jurisprudential moment."

Looking at the plaint filed on 24th July, 2013, it has listed the following causes of action.

1. Inducing a breach of contract.
2. Malicious prosecution and abuse of the prosecutorial process.
3. Defamation.
4. Violations of the Plaintiff's fundamental rights and Freedoms.

The High Court is established under Article 165(1) of the Constitution and its jurisdiction is set out in Article 165(3) of the Constitution which reads: -

"3) Subject to Clause (5) the High Court shall have

- a. ***Unlimited original jurisdiction in Criminal and Civil matters.***
- b. ***Jurisdiction to determine the question whether a right or fundamental freedom in Bill of Rights has been denied, violated, infringed or threatened.***
- c. ***Jurisdiction to hear an appeal from a decision of a tribunal appointed under this constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144 (inter alia)"***

On the other hand, Article 165(5) provides: -

"The High Court shall not have jurisdiction in respect of matters: -

- a. ***Reserved for the exclusive jurisdiction of the Supreme Court under this Constitution.***
- b. ***Falling within the jurisdiction of the courts contemplated in Article 162 (2)."***

Article 162 (2) provides: -

"Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to: -

- a. ***Employment and Labour Relations and***
- b. ***The Environment and the use and occupation of, and title to, land."***

In view of Article 162 and 165 of the Constitution as quoted above, it is clear that the High Court has unlimited original jurisdiction in Civil and Criminal matters apart from matters falling within the jurisdiction of Employment and Labour Relations Court and the Environment and the use and occupation of, and title to land which jurisdiction lies squarely with the respective courts as spelt out in Article 162 of the Constitution.

The plaint raises several causes of action and the 1st Defendant is of the view that the same should be heard by different courts. Looking at the first one; inducing a breach of contract, the tort in itself entails a tortious interference with a contractual relationship (see Black's Law Dictionary 9th Edition at page 1627) it entails a 3rd party's intentional inducement of a contracting party to breach a contract, causing damage to the relationship between the contracting parties. The Plaintiff alleges that the inducement of

breach of his Contract of employment was by the Defendants herein.

In my view, this cause of action as framed in the plaint is not one that falls within the jurisdiction of the employment and Labour Relations Court. Section 12 of the Employment and Labour Relations Act, 2011 outlines the jurisdiction of the said court (where relevant) 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 law 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.”

The cause of action herein is not against the employer and it does not touch on the terms and conditions of the employment or put in other words, it does not affect the relationship between the employer and the employee. It is not a dispute that relates to or arises from employment between him and his employer but rather, it is one between him and third parties who are the Defendants herein.

Regarding the 4th Cause of Action, Violations of the Plaintiff’s Fundamental Rights and Freedoms, the Constitution is very clear on which court has jurisdiction to hear such matter. Under Article 165(2) (b) the High Court has been given jurisdiction to determine the questions whether a right or a fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.

It should be noted that the Constitution does not create a distinction in the jurisdictions of the High Court save for what is expressed under Article 162(2). In my view, the divisions created within the High Court are purely administrative and only meant to facilitate effective and efficient administration of justice. Accordingly, there can be no question of jurisdiction as between the different divisions of the High Court legally speaking. In that regard I get support from the case of **Rachael Muaka Vs Kahawa Sukari Ltd & Another [2010] eKLR** which states that: -

The High Court of Kenya is only one court with unlimited original jurisdiction in civil and criminal matters, and such jurisdiction and powers as may be conferred on it by the Constitution or any other law. The divisions in High Court are purely administrative and do not erode the Constitutional jurisdiction conferred on the court. This court is therefore empowered to handle, hear and determine this matter.

In the Court of Appeal case of **Peter Nganga Muiruri Vs Credit Bank Limited & Another, Civil Appeal No. 203 of 2006** the court expressed itself thus: -

“The part of the Constitution which deal with the establishment and jurisdiction of courts in Kenya is headed “The Judiciary” and Article 165 of the Constitution establishes the High Court with “unlimited original jurisdiction in Civil and Criminal matters and such other jurisdiction and powers as may be conferred on it by the Constitution or any other law”. Although the Constitution stipulates that the jurisdiction of the High Court in Criminal and Civil matters is unlimited, it is circumscribed by rules of practice and procedure to enable the court to function side by side with courts and tribunals subordinate to it and to guide it in the matter of exercising its jurisdiction and powers... Article 164 of the Constitution establishes the Court of Appeal with such “... jurisdiction and powers in relation to appeals from the High Court as may be conferred on it by law”. On the basis of this provision the Court of Appeal cannot directly entertain an appeal from any other court other than the High Court.... Articles 169 and 170 of the Constitution establishes courts subordinate to the High Court which are Magistrate’s Courts and Kadhis’ Courts, respectively. Each of these courts exercises such jurisdiction and powers as “may be conferred on it by law”... There is no provision in the Constitution, which establishes what, is referred to as Constitutional Court. In Kenya we have a division of the High Court at Nairobi referred to as “Constitutional and Judicial Review” Division which is not an independent court but merely a division of the High Court. The

wording of Article 165 of the Constitution which donates the power to the High Court to deal with questions of interpretation of Articles of the Constitution or parts thereof does not talk about a Constitutional Court but talks about the High Court... with regard to the protective provisions of the Constitution, it does not in any of its Articles talk about the Constitutional Court but instead talks about an application being made to the High Court... The Hon. The Chief Justice must have been aware that no such Court is established under the Constitution and that would explain why he created a Constitutional Division and not a Constitutional Court. The creation of the Constitutional and Judicial Review Division was an administrative act with the sole object of managing the cause list. The Chief Justice would have no jurisdiction to create a constitutional court as opposed to creating a division of the High Court... Any single Judge of the High Court in this Country has the jurisdiction and power to handle a constitutional question. The fact that a Constitutional Division was established did not by such establishment create a court superior to a single Judge of the High Court sitting alone. It would be a usurpation of power to push forward such an approach and whatever decision, emanates from a court regarding itself as a Constitutional Court with powers of review over decisions of Judges of concurrent or superior jurisdiction such decision, is at best a nullity. Jurisdiction is everything and without it, a court has no power to make one more step... courts must follow the law as it is currently... The appellant by filing the Originating Summons which was referred to the Chief Justice and also the motion before Nyamu J. was challenging the doctrine of finality. There is neither Constitutional or Statutory authority to support that approach. Therefore, neither the Chief Justice, nor Nyamu J. had the jurisdiction to entertain the Appellant's application to the extent that he was seeking to challenge a decision of a court of competent jurisdiction against which no Constitutional or Statutory right of appeal or review was available. This matter had been concluded a long time back and attempts to revive it can only have one outcome – failure.”

In view of the foregoing, a submission that a High Court Division dealing with Civil Matters does not have the jurisdiction to determine questions of violations of Human Rights is absurd and mistaken. The Constitution of Kenya (Protection of Rights and Fundamental Freedoms Practice and Procedure Rules 2013) provides the procedure for commencing a cause of action on an alleged breach of fundamental freedoms but in a case where a party files a plaint claiming several causes of action in one plaint, it would not be reasonably expected that the laid down procedure would be followed in terms of moving the court by way of a petition. I have in mind the case at hand which has been commenced by way of a plaint. It is enough for the Plaintiff to plead the particulars of the alleged breach and claim any relief that he feels he is entitled under that head. It therefore makes a lot of sense and it saves a lot of judicial time for the causes of action to be heard together in one suit rather than in different courts yet all the courts have requisite jurisdiction to hear the matter. It would of course make a difference if it was only one cause of action on violation of Constitutional Rights and Freedoms in which case, the right division to hear the matter would be the Constitutional Division and in such a case, the rules would apply to the letter.

It is therefore, the finding of this court that the Preliminary Objection dated 3rd December, 2015 is devoid of merits and it is hereby dismissed with costs to the Plaintiff.

Dated, signed and delivered at Nairobi this 9th day of June, 2016.

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L NJUGUNA

JUDGE

In the Presence of

..... **for the Plaintiff.**

..... **for the Defendant.**