



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**MISC CIVIL APPLICATION NO. 360 OF 2015**

**IN THE MATTER OF AN APPLICATION BY SAMUEL BARONGO FOR ORDERS OF CERTIRARI AND PROHIBITION**

**AND**

**IN THE MATTER OF THE POLICE SERVICE ACT AND THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE CIVIL PROCEDURE ACT**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**INSPECTOR GENERAL OF POLICE ..... 1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF CRIMINAL INVESTIGATION..... 2<sup>ND</sup> RESPONDENT**

**RULING**

By way of the Notice of Motion dated 11<sup>th</sup> August 2015 the Ex Parte Applicant **SAMUEL BARONGO ONGOTO** sought the following –

(a). ***THAT*** an order of Certiorari be issued to remove to this Honourable Court for the purposes of being quashed the directives (sic) decision and order of the Respondents purporting to transfer the Ex Parte Applicant from his current post at Nakuru County as this officer in charge of Flying Squad Nakuru to Loyangalani in Marsabit as the Deputy Divisional Criminal Investigating Officer without authority from the National Police Service Commission.

(b). ***THAT*** an order of prohibition be issued to restrain the Respondents from further making orders, directives and decisions with regard to the Applicants employment, transfer and stationing.

***(c). THAT costs of this application be borne by the Respondents***

On their parts the Respondents being **THE INSPECTOR GENERAL OF THE NATIONAL POLICE SERVICE** (hereinafter referred to as the 1<sup>st</sup> Respondent) and **DIRECTOR OF CRIMINAL INVESTIGATIONS** (hereinafter referred to as the 2<sup>nd</sup> Respondent) filed the Notice of Preliminary objection dated 18<sup>th</sup> November, 2015 seeking the striking out of the Notice of Motion on the ground that:

***(a). The Notice of Motion was filed in disregard of Article 162 (2) (a) of the Constitution;***

***(b). The court lacks jurisdiction to determine the underlying issue which is a labour dispute; and***

***(c). The application was filed in disregard to Legal Notice 88, 89 and 90 of 2011 which were published by the National Police Service Act;***

Following directions made by the court on 14/12/2014 both parties filed written submissions in respect of the Preliminary Objection.

The brief undisputed facts of this matter are that the Ex Parte Applicant is an employee of the National Police Service Commission who is currently designated as the officer commanding the Flying Squad in Nakuru. By way of a signal dated 16<sup>th</sup> July 2015 sent by the Director of Criminal Investigations (the 2<sup>nd</sup> Respondent) the Petitioner was transferred to Loyangalani, in Marsabit County where he was to be designated to serve as the Deputy Divisional Criminal Investigations Officer.

The Applicant objected to this transfer and thus filed the Notice of Motion of 18/11/2015 seeking order to quash the same. The Applicant further prayed for orders of prohibition to restrain the Respondents from making further orders, directives and decisions relating to his transfer and stationing. As stated earlier before the main Notice of Motion application was heard the Respondents filed this Notice of Preliminary Objection.

The Respondents submitted that this court lacked jurisdiction to hear the present dispute as it was a labour dispute which ought properly be heard by the Employments and Labour Relations Court, pursuant to Article 162(2) (a) of the Constitution.

The Applicant in his submissions filed on 14/12/2015 argued that the underlying issues in this petition was whether the Respondents had powers to transfer the Ex Parte Applicant. He submitted that powers of transfer are vested solely in the Police Service Commission and therefore the decision of the 2<sup>nd</sup> Respondent to transfer him was made ultra vires. The Applicant submitted that the dispute was not an issue which concerned employment and labour relations and was one which this court in exercise of its judicial review jurisdiction was competent to hear and determine. Lastly the Applicants submitted that Legal Notices Nos. 88, 89 and 90 which purported to vest the power to transfer officers in the Respondents were unconstitutional as they contradict Article 246(3) of the Constitution which Article vests this mandate upon the National Police Service Commission.

The Applicant cited the case of **REPUBLIC Vs DEPUTY INSPECTOR GENERAL OF NATIONAL POLICE & 32 OTHERS [2013] eKLR** in which the courts quashed a directive made by the Inspector General of the National Police Service transferring the Ex Parte Applicants. In that case the court held that the powers of transfer are vested in the National Police Service Commission.

### **ANALYSIS**

The issue for determination here is whether this court has the requisite jurisdiction to determine this dispute. Once a question regarding jurisdiction is raised that question must be determined immediately. Jurisdiction it is said is everything and it goes to the root of any matter. Without requisite jurisdiction a court must immediately down its tools. In the case of **OWNERS OF MOTOR VESSEL 'LILLIAN S' Vs CALTEX OIL (KENYA) LIMITED (1989) KLR 1** it was held as follows

*“I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction:.*

Similarly in SAMUEL KAMAU MACHARIA & ANOTHER Vs KENYA COMMERCIAL BANK LTD & 2 OTHERS, Application No. 2 of 2011 in reliance upon the decision in “Owners of Motor Vessel Lillian S’ stated that

*“A court’s jurisdiction flows from either the Constitution or Legislation or both. Thus, a court 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.....*

*... 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....*

*....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”.*

Article 162(2) (a) of the Constitution of Kenya, 2010 together with Section 4(1) of the Employment and Labour Relations Courts Act have established the Employment and Labour Relations Courts. Article 162(2) (a) of the Constitution vests in these courts the jurisdiction to **“hear and determine disputes relating to Employment and labour relations”**

This jurisdiction is further expounded and specified in Section 12(1) of the Employment and Labour Relations Courts Act, 2014 to include jurisdiction to determine

**“(a) disputes relating to or arising out of employment between an employer and an employee”**

Section 12(3) of the same Act empowers the Employment and Labour Relations Court to make interim preservative injunctive orders, prohibitory orders, orders of specific performance, declaratory orders, award of compensation or damages, an order for reinstatement, and any other relief as the court may deem appropriate.

The jurisdiction of the High Court is only limited by Article 165(5) of the Constitution, which provides that the High Court **shall not** have jurisdiction in respect of matters

**“(a) .....**

**(b) Falling within the jurisdiction of the courts contemplated in Article 162(2)”**

In interpreting Article 165(5) the courts have adopted a purpose approach and have held consistently that the High Court does **not** have jurisdiction to determine matters that fall within the ambit of Section 12(1) of the Employment and Labour Relations Courts Act, 2014 and under Article 2(1) of the Constitution.

My learned brother **Hon. Justice David Majanja** exhaustively determined the scope of jurisdiction of the Employment and Labour Relations Court in his decision in UNITED STATES INTERNATIONAL UNIVERSITY (USIU) Vs ATTORNEY GENERAL 2013 eKLR, where he stated that

***“44. In the final analysis., I would adopt the position of the Constitutional Court of South Africa in Gicaba Vs Minister of Safety and Security (supra). The Industrial Court is a specialist court to deal with employment and labour relations matters. By virtue of Article 162(3), Section 12 of the Industrial Court Act, 2011 has set out matters within the exclusive domain of that court. Since the court is of the status of the High Court, it must have the jurisdiction to enforce labour rights in Article 41 and the jurisdiction to interpret the Constitution and fundamental rights and freedoms incidental to the exercise of jurisdiction over matters within its exclusive domain. In any matter falling within the provisions of Section 12 of the Industrial Court Act, then the Industrial Court has jurisdiction to enforce not only Article 41 rights but also all fundamental rights ancillary and incidental to the employment and labour relations including interpretation of the Constitution within a matter before it.***

***45. In light of what I have stated, I find and hold that the Industrial Court as constituted under the Industrial Court Act, 2011 as court with the status of the High Court is competent to interpret the Constitution and enforce matters relating to breach of fundamental rights and freedoms in matters arising from disputes falling within the provisions of Section 12 of the Industrial Court Act, 2011”***

Other courts have subsequently adopted the same approach. In **Seven Seas Technologies Limited Vs Eric Chege [2014] eKLR** the court held that the Employment and Labour Relations Court:

***“.. is imbued with all the powers of the High Court. The High Court has extensive jurisdiction in matters except those that fall under Article 162. As the High Court is expressly excluded by the Constitution to deal with matters under Article 162, there is a constitutional imperative thrust upon this court to deal with all aspects of disputes that relate to labour and employment matters whenever they arise within Kenya”.***

Also in Samson **Onyango Ngonga Vs Public Service Commission & 5 Others [2013] eKLR** Lenaola, J further held that:

***“... The Industrial Court has jurisdiction to hear and determine both disputes relating to employment and labour relations including those involving members of the Kenya Police Force where such violations arise in an employment context. Once the Industrial Court was established and was functional, then this court had no jurisdiction to entertain disputes relating to labour and employment. It matters not that the employee may be in the Police Service or the Defence of Forces.”***

Finally the Court in **Republic Vs Kenya Ordnance Factories Corporation Ex-Parte Anne Gichimo [2014] eKLR** adopted the holding of Majanja, J in the **United States International University** above and further added that this power extends to the issuance of orders similar to those found in the judicial review field. The court stated:

***“The Industrial Court has powers similar to those of the High Court. It is a specialized court designed to meet a specific need ie hear and determine matters touching on employments and labour relations. It can, in its area of operation, do all that which the High Court can do including exercising supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function as per Article 162(6) of the Constitution”***

It is instructive to note that in **GLADYS BOSS SHOLLEI Vs JUDICIAL SERVICE COMMISSION [2013] eKLR** despite the matter having been initiated in the High Court, the suit was later transferred by consent of all the parties to the Industrial Court. This was done due to the recognition by both parties of Article 162(2) of the Constitution and Section 12 of the Industrial Court Act, 2011 which provisions conferred exclusive jurisdiction on that court in matters relating to or arising out of employment between an employer and employee.

In this case the Ex-Parte Applicant has challenged and/or objected to his transfer and redeployment from Nakuru to Marsabit. He bases his objection on two main grounds: Firstly that the authority to transfer him was the preserve of the National Police Service Commission therefore the 2<sup>nd</sup> Respondent acted '**ultra vires**' in purporting to exercise such authority. Secondly the Ex-Parte Applicant is aggrieved by the fact that he was not given reasons for his transfer.

He contends that certain factors such as the impact of the transfer on himself and his family were not taken into account when the decision was made.

The underlying issue as I see it are, which body is empowered to transfer employees within the National Police Service Commission, what is the procedure for effecting a transfer within the National Police Service, and which factors ought to be taken into account (or ought not taken into account) when the decision to transfer an officer is being made. The dispute has arisen in the context of the employment of Ex Parte Applicant in the National Police Service and raises questions regarding fair labour practices. It is therefore clearly a dispute relating to employment and labour relations as contemplated by Article 162(2) (a) of the Constitution as well as Section 12 (a) of the Employment and Labour Relations Court Act. I therefore find that this is a matter which falls squarely within the jurisdiction of the Employment and Labour Relations Courts. The jurisdiction of the High Court is expressly precluded by virtue of Article 165(5) (b) of the Constitution from hearing and determining this suit.

Since this court has no jurisdiction, it must down its tools and not take any further step in this matter. The Preliminary Objection is hereby allowed. The suit is struck out for want of jurisdiction. Costs are awarded to the Respondents.

Dated in Nakuru this 29th day of July, 2016.

**Maureen Odera**

**Judge**