



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**JUDICIAL REVIEW DIVISION**  
**MISCELLANEOUS APPLICATION 109 OF 2016**

REPUBLIC.....APPLICANT

VS

TRANS NATIONAL BANK LIMITED.....1<sup>ST</sup> RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....2<sup>ND</sup> RESPONDENT

THE DIRECTOR OF CRIMINAL INVESTIGATIONS.....3<sup>RD</sup> RESPONDENT

THE HON. ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT

EX-PARTE: TABITHA NASIPWONI TARACHA

**RULING**

**Introduction**

1. By a Notice of Motion dated 14<sup>th</sup> March, 2016, the ex parte applicant herein, **Tabitha Nasipwoni Taracha**, seeks the following orders:

**1. That an order of certiorari to remove deliver up to the court and quash the decision of the quasi-judicial body of Trans National Bank Limited contained in their letter dated 1<sup>st</sup> March 2016 terminating her gainful employment based I invalid unlawful arbitrary illegal unconstitutional and unfair grounds.**

**2. That an order for certiorari to deliver upto this honourable court and quash the decision of the director of criminal investigation department through its ant-banking fraud unit to investigate the ex parte applicant an issues in dispute arising out of the contract of employment embodied in their letter fated 1/3/2016.**

**3. That an order of prohibition to prohibit the director of criminal investigation through the ant-banking fraud from proceeding under proceeds of crime and anti-money laundering act no. 9 of 2009 or any other law from investigation the ex parte applicant’s employment contract**

**4. That leave so granted to the ex parte applicant be allowed to operate as a stay of the action by the director of criminal investigation department to investigate the ex parte applicant**

account of fraud until hearing and determination of this application.

5. That an order that the costs of the application be granted to the ex parte applicant.

### Applicant's Case

2. According to the verifying affidavit, in violation of her rights, the 1<sup>st</sup> Respondent Bank failed to consider her duties in the Bank which include installation of hardware and software, user support on various systems, ATM card file generation and ordering through KENSWITCH and as the 1<sup>st</sup> Respondent's officer, proceeded to condemn her unheard and unfairly

3. It was the applicant's case that even the procedures of posting entries whether by way of cash or transfer were not considered as it is the cashiers, clerks and officers at Branch level who make such entries.

4. In response to the application, the Respondents averred that by dint of the provisions of Articles 162(2)(a) and 165(5)(b) of the Constitution, as well as section 12(1)(a) of the *Employment and Labour Relations Court Act*, this Court lacks the requisite jurisdiction to entertain this matter.

5. It is this issue that falls for determination in this ruling.

### Determination

6. I have considered the material placed before this Court relevant to this ruling.

7. In Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited [1989] KLR 1 Nyarangi, JA expressed himself as follows:

**"By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognisance 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 cognisance, or as to the area over which the jurisdiction shall extend, or it may partake both of 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 into 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 the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.....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".**

8. Similarly the Supreme Court in Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others [2012] eKLR expressed itself as follows:

**"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.”

9. In *Owners and Masters of The Motor Vessel “Joey” vs. Owners and Masters of The Motor Tugs “Barbara” and “Steve B”* [2008] 1 EA 367 the Court of Appeal expressed itself as follows:

“The question of jurisdiction is a threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. 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 and 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 tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined. There is no reason why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado.”

10. It is therefore clear that where an issue of jurisdiction is raised before a Court, the Court must deal with the issue and reach a decision one way or the other and the mere fact that the issue is irregularly raised or that there is insufficient evidence, does not relieve the Court of the obligation to determine whether or not it has jurisdiction. This is so because the mere fact that an issue of jurisdiction is not raised does not necessarily confer jurisdiction on the Court if it has none. It is for this reason that an issue of jurisdiction may be raised at any stage of the proceedings even on appeal though it is always prudent to raise it as soon as the occasion arises.

11. In this case it is contended that since these proceedings fall within the provisions cited hereinabove, this Court has no jurisdiction to entertain the same.

12. Article 165(3) of the Constitution provides as follows:

***(3) Subject to clause (5), the High Court shall have—***

***(a) unlimited original jurisdiction in criminal and civil matters;***

.....

***(e) any other jurisdiction, original or appellate, conferred on it by legislation.***

13. Article 165(5)(6) and (7) thereof on the other hand provides:

***(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).***

**(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.**

**(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.**

14. The Courts contemplated in Article 162(2) are those with the status of the High Court to hear and determine disputes relating to employment and labour relations and the environment and the use and occupation of, and title to, land. It therefore follows that pursuant to Article 165(5)(b) of the Constitution this Court has no power to determine issues which fall within the jurisdiction of the Courts established under Article 162(2) of the Constitution and in this case courts with the status of the High Court to hear and determine disputes relating to employment and labour relations. Pursuant to the powers conferred upon Parliament under Article 162(3) of the Constitution to “*determine the jurisdiction and functions of the courts contemplated in clause (2)*”, Parliament has enacted the **Employment and Labour Relations Courts Act** which Act provides under section 12 thereof 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—***

***(1) (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 employers’ organisation and a trade union’s organisation;***

***(d) disputes between trade unions;***

***(e) disputes between employer organisations;***

***(f) disputes between an employers’ organisation and a trade union;***

***(g) disputes between a trade union and a member thereof;***

***(h) disputes between an employer’s organisation or a federation and a member thereof;***

***(i) disputes concerning the registration and election of trade union officials; and***

***(j) disputes relating to the registration and enforcement of collective agreements.***

15. Although the applicant seeks some prayers against the 1<sup>st</sup> and the 3<sup>rd</sup> Respondents, from the affidavits filed herein, it is clear that no allegations have been made against the 3<sup>rd</sup> Respondent. The determination of whether the Court has jurisdiction or not depends on the cause of action and in **Sebaggala vs. Attorney General and Others [1995-1998] EA 295** it was held that:

**“A “cause of action” means every fact, which, if traversed, it would be necessary for the plaintiff, to prove in order to support his right to a judgement of the Court. In other words, it is a bundle of facts which taken with the law applicable to them gives the plaintiff a right to relief against the defendant. It must include some act done by the defendant since in the absence of such an act no cause of action can probably accrue. It is not limited to the actual infringement of the right sued on but includes all the material facts on which it is founded. It does not comprise evidence necessary to prove the facts but every fact necessary for the**

plaintiff to prove to enable him to obtain decree. Everything, which is not proved, would give the defendant a right to an immediate judgement must be part of the cause of action. It is, in other words, a bundle of facts, which it is necessary for the plaintiff to prove in order to succeed in the suit. But it has no relation whatever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It is a media upon which the plaintiff asks the court to arrive at a conclusion in his favour. The cause of action must be antecedent to the institution of the suit.”

16. Therefore what constitutes the cause of action must be gleaned from the facts as averred by the parties and not on the prayers sought. With respect to judicial review, those facts are contained in the verifying affidavit. This position was restated by the Court of Appeal in Commissioner General, Kenya Revenue Authority Through Republic vs. Silvano Anema Owaki T/A Marenga Filing Station Civil Appeal No. 45 of 2000, where it was held that:

“We are certain that the issue of the procedure used does not arise inasmuch as the applicant has not ruled out the possibility of the bulk of the products containing the chemical used only in the products meant for export. That much is clear from some of the matters in the Statement accompanying the application for leave, which the Judge in his ruling, despite the statements purportedly of facts being worthless, appear to put a lot of faith in. The learned Judge decided the application for judicial review on the basis of inadmissible matters. We would observe that it is the verifying affidavit not the Statement to be verified, which is of evidential value in an application for judicial review. That appears to be the meaning of rule 1(2) of Order LIII. This position is confirmed by the following passage from the Supreme Court Practice 1976 Vol. 1 at paragraph 53/1/7:

‘The application for leave “By a statement” – The facts relied on should be stated in the affidavit (see R v. Wandsworth JJ. ex p. Read [1942] 1 KB 281). “The statement” should contain nothing more than the name and the description of the applicant, the relief sought, and the grounds on which it is sought. It is not correct to lodge a statement of all the facts, verified by an affidavit.’

At page 283 of the report of the case of R v. Wandsworth Justices, Viscount Caldecote CJ said:

‘The Court has listened to argument on the proper procedure or remedy in the case of the exercise by an inferior court of a jurisdiction which it does not possess. It is, however, not necessary here to consider whether or not there has been a usurpation of jurisdiction, because there has been a denial of justice, and the only way in which that denial of justice can be brought to the knowledge of this court is by way of affidavit. For that reason the court is entitled, indeed, it is bound, if justice is to be done, to look at the affidavit just as it would in an ordinary case of excess of jurisdiction.’ ”

17. It is clear from the affidavits filed herein that there are no allegations made against the respondents apart from the 1<sup>st</sup> Respondent. With respect to the 1<sup>st</sup> respondent the complaints clearly revolve around the employment relationship between the applicant and the 1<sup>st</sup> Respondent.

18. I agree with the position adopted by Majanja, J in United States International University (USIU) v Attorney General Nairobi Petition 170 of 2012 [2012] eKLR, in which he expressed himself *inter alia* as follows:

“[41] *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 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. Such a situation would lead precisely to diminishing the status of the Industrial Court and recurrence of the situation obtaining before the establishment of the current court .....[43] The intention to provide for a specialist court is further underpinned by the provisions of Article 165(6) which specifically prohibit the High Court from exercising supervisory jurisdiction over superior courts. To accept a position where the Industrial Court lacks jurisdiction to deal with constitutional matters arising within matters of their competence would undermine the status of the court. Reference of a constitutional matter to the High Court for determination or permitting the filing of constitutional matters incidental to labour relations matters would lead to the High Court supervising a superior court. Ordinarily where the High Court exercises jurisdiction to interpret the Constitution or enforce fundamental rights, its decisions even where declaratory in nature will require the court to follow or observe the direction. This would mean that the High Court would be supervising the Industrial Court which is prohibited by Article 165(6). [44]..... 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 is 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.”*

19. Whereas this Court, in my view, has the power to transfer a matter to a Court of equal status, where the cause of action falls within the jurisdiction of that Court, unless a party seeks such a prayer, the Court cannot grant a relief that is not sought by a party.

20. It follows that this application is incompetent and is hereby struck out with costs to the Respondents.

21. Orders accordingly.

**Dated at Nairobi this 15<sup>th</sup> day of August, 2016**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

***Miss Efendi for the 1<sup>st</sup> Respondent***

***Cc Mwangi***