REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

PETITION NO. 16 OF 2013

BARNABAS KIPRONO …….. 1ST PETITIONER

DAVID TANUI …… 2ND PETITIONER

SAMMY MWITIKI …… 3RD PETITIONER

WILLIAM METTO …….. 4TH PETITIONER

DANIEL KOSGEI …….. 5TH PETITIONER

PETER BIRIR …….. 6TH PETITIONER

VERSUS

KERIO VALLEY DEVELOPMENT AUTHORITY ……..…… RESPODNENT

RULING

1. By a Notice of Motion dated 16thSeptember 2013, respondent/applicant, *Kerio Valley Development Authority* implored this court to dismiss the petition filed on 20th August, 2013 by the six petitioners namely, *Barnabas Kiprono, David Tanui, Sammy Mwitiki, William Metto, Daniel Kosgei,* and *Peter Birir* for want of jurisdiction.

The application is premised on the grounds stated on its face the main one being that the petition was filed in the wrong court as this court does not have jurisdiction to entertain the same given that it's subject matter relates to a dispute between an employer and its employees; that it ought to have been filed in the Industrial Court (now named the Employment and Labour Relations Court) which is the court that is clothed with jurisdiction to hear and determine employment disputes. The application is supported by an affidavit sworn by *Esther J. Kiror*, the respondent's legal assistant.

2. The application is opposed. There is a replying affidavit sworn by the 6th petitioner on 12th May, 2014 on his own behalf and on behalf of the other petitioners. In the replying affidavit, the 6th petitioner deposes that the petition was properly before this court as though the petitioners were alleging breach of terms and conditions of their employment, they were seeking the enforcement of their constitutional rights enshrined under *Article 41* and *Article 236* of the Constitution; that it is only the High Court that has jurisdiction to enforce such rights; that in the event the court found that it lacked jurisdiction to determine the petition, it should transfer it to the Industrial Court.

3. By consent of the parties, the application was canvassed by way of written submissions. Those of the applicant were filed on 3rd November, 2015 while those of the petitioners were filed on 26th October 2015.

4. I have considered the application and the rival submissions made on behalf of both parties and the authorities cited by the applicant. The gist of the applicant's submissions is that the petition ought to have been filed in the Industrial Court which is the court that was constitutionally mandated to handle all employment disputes; that the petition was therefore filed in the wrong court; that as such, the petition was a nullity in law and ought to be struck out with costs as there was nothing to transfer to any other court.

5. The petitioners on the other hand re-iterated their position that this court had jurisdiction to entertain the petition and in the event it found that it lacked jurisdiction, it should exercise its discretion and transfer it to the Industrial Court; that striking out the petition was a draconian measure which should be used as a matter of last resort and that it would offend the provisions of *Article 159* of the Constitution.

6. Having considered the submissions made by both parties, I find that it is not disputed that the applicant and the petitioners enjoy an employer- employee relationship and that the petitioners seek to enforce their right to fair labour practices and reasonable working conditions guaranteed under *Article 41* of the Constitution which the applicant allegedly violated by arbitrarily and unprocedurally transferring them to various field stations, departments and or divisions on 26th April, 2013.

7. The petitioners in their submissions maintained that even though the petition raised issues related to their employment by the applicant, it also raised matters related to enforcement of Constitutional rights and that the High Court is the only court that is mandated to enforce constitutional rights. The issue that then arises for my determination is whether the petition was filed in the correct court and if not whether this court can transfer it to the court with jurisdiction to hear and determine the same.

8. The People of Kenya in promulgating the Constitution of Kenya 2010 decided that the Republic of Kenya should have four superior courts namely the Supreme Court, the Court of Appeal, the High Court and the Specialized Courts established under *Article 162 (2)* of the Constitution. Under *Article 162 (2)*, Parliament was mandated to 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, use and occupation of, and title to land.

Under *Article 162 (3)*, Parliament was directed to enact legislation to determine the jurisdiction and functions of the two courts.

9. Pursuant to *Article 162 (3)* of the Constitution, Parliament passed the *Industrial Court Act No. 20 of 2011* to define the scope of the Industrial Court's jurisdiction and connected purposes.

Section 12 thereof in so far as is relevant to the instant application states as follows;

> ***(1) 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…"***

10. In view of the foregoing, I am unable to accept the petitioner's submission that the High Court is the only court that has jurisdiction to entertain their petition simply because it seeks to enforce some

constitutional rights which in their view had been violated by their

employer. The subject matter of the petition is basically a dispute concerning the petitioners terms of employment and is one of the disputes which the Constitution of Kenya 2010 determined that they ought to be adjudicated upon by the Employment and Labour Relations court established under *Article 162 (2)* of the Constitution.

11. It is pertinent to note that the courts established under *Article 162(2)* of the Constitution enjoy similar status as the High Court. The High Court under *Article 165* is mandated to *inter alia* interpret the constitution and to implement all its provisions including the enforcement of the Bill of Rights. What this means is that the specialized courts, being courts of similar status with the High Court also have jurisdiction to interpret the constitution and to enforce the constitutional rights that fall within their area of specialization.

12. I wholly agree with *Majanja J's* holding in ***United States International University (USIU) V Attorney General (2012) eKLR*** when in determining whether the Industrial Court had jurisdiction to determine disputes in which employees were seeking to enforce their constitutional rights against their employers, the Hon. judge held as follows;

> ***"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 over matters within its exclusive domain. In any matter falling within the provisions of Section 12 of the Industrial Court Act, 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…"***

13. It is thus my finding that the court that is clothed with both Constitutional and Statutory jurisdiction to determine the instant petition is the Employment and Labour Relations Court and not the High Court. I therefore agree with the applicant that the petition was filed in the wrong court.

14. Having so found, the only task left for this court to do is to determine whether it should strike it out as invited by the applicant or whether it should transfer it to the court with requisite jurisdiction as implored by the petitioners. In its submissions, the applicant relied on the following persuasive authorities for the proposition that a case filed in the wrong court was a nullity abinitio and was not capable of being transferred to any other court. These are;

> ***Boniface Waweru Mbiyu V Mary Njeri & Another (2005) eKLR; Abraham Mwangi Wamigwi V Simon Mbiriri Wanjiku & Another (2012)eKLR; Maendeleo ya Wanawake Organization V Hellen Makure & Another (2014) eKLR.***

15. But the Court of Appeal whose decisions are binding on this court took a different view of the matter in ***Daniel N. Mugendi V Kenyatta University & 3 others (2013) eKLR***. In this case, the Court of Appeal faulted the High Court (Mumbi J) for having struck out a petition after finding that it was wrongly filed in the High Court and that it ought to have been filed in the Industrial Court as it related to matters of employment. In allowing the appeal, the Court cited with approval Majanja J's decision in the ***United States university case (Supra)*** and ordered that the petition should be transferred to the Industrial court. The court expressed itself as follows;

> ***"Believing as we do that the approach taken by Majanja J is the correct one, and in endevouring to meet the ends of justice untrammeled 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 relation 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 and 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…."

16. I agree with the decision of the Court of Appeal because in my view, it gives meaning to two fundamental principles that lie at the heart of our new constitutional dispensation. I have in mind the principle of access to justice to all and the principle of substantive justice which courts are enjoined by the constitution to take into account when arbitrating on disputes between parties before it.

In the circumstances, I decline the applicant's invitation to strike out the instant petition. I instead direct that the Petition be transferred to the Employment and Labour Relations Court at Nakuru for hearing and final disposal.

17. Considering that the Petitioners are the ones who necessitated the filing of the instant application by filing their petition in the wrong court, the order that best commends itself to me on costs is that the petitioners should bear the costs of the application.

18. It is so ordered.

C.W. GITHUA

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 12th day of October 2016

In the presence of:

Ms Matoke holding brief for Mr. Chebii for the Respondent/ Applicant

Mr. Mugambi holding brief for Mr. Mwinamo for the Petitioners/ Respondents

Ms. Naomi Chonde Court Clerk.