



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL MISC APPLICATION NO. 168 OF 2015(JR)**

**IN THE MATTER OF AN APPLICATION BY DOUGLAS M. BARASA, COLLINS WAFULA MAKUNJA AND RICHARD WAMALWA MAKHINO FOR ORDERS OF MANDAMUS, PROHIBITION AND CERTIORARI**

**AND**

**IN THE MATTER OF EXTENSION OF THE TERM OF THE MANAGING DIRECTOR OF NZOIA SUGAR COMPANY ME SAUL WASILWA**

**BETWEEN**

**REPUBLIC....**

.....**APPLICANT**

**VERSUS**

**PRINCIPAL SECRETARY AGRICULTURE, LIVESTOCK AND FISHERIES.....1<sup>ST</sup> RESPONDENT**

**JOASH WAMANGOLI, CHAIRMAN NZOIA SUGAR COMPANY.....2<sup>ND</sup> RESPONDENT**

**THE BOARD OF DIRECTORS NZOIA SUGAR COMPANY.....3<sup>RD</sup> RESPONDENT**

**SAUL WASILWA.....INTERESTED PARTY**

**EX PARTE: DOUGLAS M. BARASA, COLLINS WAFULA MAKUNJA AND**

**RICHARD WAMALWA MAKHINO**

**RULING**

1. In these proceeding the Applicants substantially seek orders of certiorari to quash the 1<sup>st</sup> Respondent’s decision made on 4<sup>th</sup> May, 2015 extending the Interested Party’s term as the Managing Director (MD) of Nzoia Sugar Company. They similarly seek an order of prohibition

- prohibiting the said Respondent from renewing the said Interested Party's term as well as an order of mandamus compelling the said Respondent to withdraw and cancel the said extension.
2. The Application was substantially based on the grounds that the 1<sup>st</sup> Respondent had no power both under the ***State Corporations Act***, Cap 446, Laws of Kenya and the Constitution to extend the term of the current MD, **Mr Saul Wasilwa**, the Interested Party herein, having served the maximum 2 term period. It was further contended that in the absence of Board, the performance of the Interested Party could not have been evaluated on 9<sup>th</sup> January, 2015 as was alleged. To the applicants the purported extension of Interested Party's term was consequently irregular and an abuse of the process and that the 1<sup>st</sup> Respondent's actions were *ultra vires*.
  3. However before the matter could be heard, the Respondents and Interested Party raised a preliminary objection on the ground that these proceedings ought to have been instituted before the Employment and Labour Relations Court. The objection was based on Article 165(5)(b) of the Constitution as read with Article 162(2)(a) of the Constitution and section 12 of the ***Industrial Courts Act, 2011*** (hereinafter referred to as "the Act").
  4. According to the Respondents, the dispute the subject of these proceedings being the legality or otherwise of the contract, under Article 162(2) of the Constitution the legality of an employment is an employment question hence the dispute ought to be adjudicated by the Employment and Labour Relations Court. It was submitted that under section 5(3) of the ***State Corporations Act***, the Board is given the power to employ the MD with the Minister's approval a process which is complete once a letter of employment is issued. It was submitted that section 6(1)(2) of the said Act only deals with the gazettelement of the Chairman and the independent directors. As for the Interested Party, it was contended that having been given the letter to continue in employment, the challenge to the legality of his appointment could only be dealt with before the said Court.
  5. It was emphasised that the appointment of the MD is by the Board as opposed to the Principal Secretary who is only mandated to approve the appointment and that there is no requirement for gazettelement.
  6. In support of these submissions, they relied on *inter alia* **Prof Daniel Mugendi vs. Kenyatta University and 3 Others Civil Appeal No. 6 of 2012** and **Judicial Service Commission vs. Gladys Boss Sholei & Another [2014] KLR.**
  7. The Applicants on their part opposed the said objection.
  8. In their view, the authorities cited relate to disputes between employers and employees. However in the instant case, the applicants are farmers who were aggrieved with the decision of a public authority. In their view, it was not the mandate of the Board to extend the mandate of the MD. To the contrary the appointing authority is the Minister. To them, their complaint was that it was the wrong person who extended the MD's term. They contended that the appointment of the MD is only complete on gazettelement of the appointment. As the dispute relates to an illegality rather than an employment dispute, it was contended that this Court has jurisdiction to entertain the matter.

### **Determinations**

9. I have considered the submissions made by the parties herein.
10. 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”.

11. 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.”

12. I am however aware of the legal position enunciated by **Mulenga, JSC** in the Supreme Court of Uganda case in Habre International Co. Ltd vs. Kassam and Others [1999] 1 EA 125 which position I believe does not conflict with ours that:

“The tendency to interpret the law in a manner that would divest courts of law of jurisdiction too readily unless the legal provision in question is straightforward and clear is to be discouraged since it would be better to err in favour of upholding jurisdiction than to turn a litigant away from the seat of justice without being heard; the jurisdiction of courts of law must be guarded jealously and should not be dispensed with too lightly and the interests of justice and the rule of law demand this.”

13. I must emphasise that the matter before me is a determination on a preliminary point of law. In this respect the decision in Mukisa Biscuits Manufacturing Ltd. vs. West End Distributors Ltd. Civil Appeal No. 9 Of 1969 [1969] EA 696 immediately comes to mind. In that case **Newbold, P**, held:

“A preliminary objection is in the nature of what used to be called a *demurrer*. It raises a pure point of law, which is argued on the assumption that all the facts pleaded are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop”.

14. In this decision therefore I cannot reconcile the conflicting factual issues raised in the submissions before me.

15. Article 165(5)(b) of the Constitution provides *inter alia* that the High Court has no jurisdiction to deal with matters falling within the jurisdiction of the courts contemplated in Article 162(2). Article 162(2)(a) on the other hand empowers Parliament to establish Courts with the status of the High Court to hear and determine disputes relating to employment and labour relations and to determine their jurisdiction and functions. As has been held severally by this Court, whereas the High Court is a creature of the Constitution itself, the Employment and Labour Relations Court is creature of Parliament though the Court is of the equal status as the High Court.

16. In my view the legislation contemplated under Article 162(2)(a) is the ***Industrial Courts Act, 2011*** since in its preamble, it is described as:

***AN ACT of Parliament to establish the Industrial Court as a superior court of record; to confer jurisdiction on the Court with respect to employment and labour relations and for connected purposes.***

17. Section 12 of the Act provides:

***(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;***

***(b) disputes between an employer and a trade union;***

***(c) disputes between an employers' organisation and a trade unions organisation;***

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

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

***(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.***

18. On the reliefs which the Employment and Labour Relations Court may grant, section 12(3) of the Act provides:

***(3) In exercise of its jurisdiction under this Act, the***

***Court shall have power to make any of the following orders—***

***(i) interim preservation orders including injunctions in cases of urgency;***

***(ii) a prohibitory order;***

***(iii) an order for specific performance;***

***(iv) a declaratory order;***

***(v) an award of compensation in any circumstances contemplated under this Act or any written law;***

***(vi) an award of damages in any circumstances contemplated under this Act or any written law;***

***(vii) an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any***

*written law; or*

*(viii) any other appropriate relief as the Court may deem fit to grant.*

19. Since the Court is a Court with equal status as the High Court, I have no doubt in my mind that the Employment and Labour Relations Court (commonly referred to as the Industrial Court) has powers to issue orders in the nature of judicial review. However such relief as section 12(3) provides, can only be granted **“in exercise of its jurisdiction under this Act”**. In other words that jurisdiction can only be exercised in the context of its jurisdiction as conferred upon it by the Constitution and the Legislation hence the Court can only exercise its judicial review jurisdiction where the substance of the matter before it falls within its jurisdiction.
20. From section 12 of the Act, it is clear that the instant dispute does not fall within any of the subsection of the said section since the dispute does not relate to or arise out of employment between an employer and an employee. Whereas one may argue, and this is the Respondents’ and Interested Party’s case that the dispute relates to or arises from an employment, there is a further requirement under section 12(1)(a) that the dispute must be between the an employer and an employer. As for clauses (b) to (i), they deal with the parties who are expressed to be employers, employees, trade unions, employer’s organisations or federations. Clause (e) on the other hand deals with registration and enforcement of collective agreements.
21. I am however alive to the fact that the section does not purport to exclusively provide for disputes over which the Court is empowered to preside since the catchword is **“including”**. It is however my view that what comes out from a reading of Article 162(2)(a) of the Constitution as read with the said section 12 is that any other jurisdiction not expressly provided under the aforesaid section can only derive its validity from **“any other written law”**. In other words the jurisdiction must be expressly conferred by Parliament and not by implication.
22. Section 87 of the **Employment Act, Cap 226** Laws of Kenya provides:

**(1) Subject to the provisions of this Act whenever—**

**(a) an employer or employee neglects or refuses to fulfill a contract of service; or**

**(b) any question, difference or dispute arises as to the rights or liabilities of either party; or**

**(c) touching any misconduct, neglect or ill treatment of either party or any injury to the person or property of either party, under any contract of service, the aggrieved party may complain to the labour officer or lodge a complaint or suit in the Industrial Court.**

**(2) No court other than the Industrial Court shall determine any complaint or suit referred to in subsection (1).**

**(3) This section shall not apply in a suit where the dispute over a contract of service or any other matter referred to in subsection (1) is similar or secondary to the main issue in dispute.**

23. In my view for a matter to fall exclusively within the relevant provisions of the two statutes, the parties to the dispute must necessarily be employee, employer, trade union, employers’ organisation or federation unless the same relates to registration and enforcement of collective agreements. In the instant case, the Applicants do not in relation to the Respondents fall within the description of either of the aforesaid status. Whereas the relationship between the Respondents and that of the interested party may well be that of employer and employee, that does not apply to the Applicants.
24. Apart from that the Applicant’s main grievance as I understand them is the exercise of the statutory power by the Respondents and whether the Respondents have exceeded their powers conferred upon them by the law. The issue of employment relationship between the Respondents and the Interested Party is in my view a secondary issue. As section 78(3) of the **Employment Act** clearly stipulate the section does not apply to a suit where the dispute over a contract of service or any other matter referred to therein is similar or secondary to the main issue in dispute. In other

words where the relationship or the issue which would otherwise have brought the dispute under the **Employment Act** is secondary to the main issue the exclusive jurisdiction of the Employment and Labour Relations Court is expressly restricted. This was the position adopted by this Court in JR Misc. Application No. 152 of 2011 – **R vs. Kenya Civil Aviation Authority & Others ex parte Patrick Waweru Mwangi** in which it was held:

**“In the instant case, whereas the relationship between the applicant and the 2<sup>nd</sup> Respondent may be that of employer employee, the issue between the applicant and that of the 1<sup>st</sup> Respondent is an alleged wrongful exercise of statutory power since such relationship does not exist between the said parties. Accordingly, I do not agree that this Court has no jurisdiction to entertain the instant matter.”**

25. In matters of jurisdiction of superior courts, it is however my view that one ought to take in consideration the well-known principle as enunciated in **East African Railways Corp. vs. Anthony Sefu [1973] EA 327**, where it was held that

**“It is, a well established principle that no statute shall be so construed as to oust or restrict the jurisdiction of the Superior Courts, in the absence of clear and unambiguous language to that effect.”**

26. It is therefore my view that for the High Court to be stripped of jurisdiction, the dispute must fall exclusively within the jurisdiction of the Courts established under Article 162(2) of the Constitution. Where for example the issues in dispute fall within the jurisdiction of the High Court and Courts of the same status, it would be unjust to compel a party to sever its case and file the same in different Courts. As was held by this Court in Nairobi High Court Petition No. 613 of 2014 – **Patrick Musimba vs. The National Land Commission and Others**:

**“...it would be ridiculous and fundamentally wrong, in our view, for any court to adopt a separationistic view or approach and insist on splitting issues between the Courts where a court is properly seized with a matter but a constitutional issue not within its obvious exclusive jurisdiction is raised.”**

27. In this matter the Respondents have introduced the issue of the existence of a contract of employment between them and the interested party. With due respect that issue is not substantially the applicant’s cause of action and as was held in JR Misc. Application No. 298 of 2014 – **Cortex Mining Kenya Limited vs. Cabinet Secretary Ministry of Mining & Others**:

**“It is therefore clear that at the commencement of these proceedings, there was no issue with respect to the mining rights and land and environment as contemplated under section 13 of the ELC Act. These issues were introduced by the Respondents and the interested parties and based on their introduction the said parties now seek to have the applicant’s cause terminated. In my view, a respondent or interested party in a judicial review application ought not in his or their response to transmute the application by raising issues with a view to scuttling the applicant’s cause or action and prematurely terminating the same. Where the Court is of the view that at the time the applicant set out to protect his rights, his cause of action brought it within the jurisdiction of the Court, it is my view that the Court ought to be reluctant in terminating the cause for lack of jurisdiction and instead to take steps to save the proceedings in question since it is trite that striking out of proceedings being a drastic measure ought to be taken only in situations where the proceedings are incurable by any other legally accepted alternative. It is only where the applicant invokes the jurisdiction of the Court while well aware or where he ought to have been aware that the Court had no jurisdiction that the Court will terminate the proceedings since such proceedings would amount to an abuse of the process of the Court.”**

28. I associate myself with the position adopted by Nyamu, J (as he then was) in **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati**

**Nairobi HCMA No. 1260 of 2007 [2008] KLR 728** to the effect that:

**“The Courts guard their jurisdiction jealously, but recognize that it may be precluded or restricted by either legislative mandate or certain special contexts. Legislative provisions which suggest a curtailment of the Courts’ power of review give rise to a tension between the principle of legislative mandate and the judicial fundamental of access to courts. Judges must search for critical balance and deploy various techniques in trying to find it. The Court has to look into the ouster clause as well as the challenged decision to ensure that justice is not defeated. In our jurisdiction, the principle of proportionality is now part of our jurisprudence. Anyone bred in the tradition of the law is likely to regard with little sympathy legislative provisions for ousting the jurisdiction of the Court, whether in order that the subject may be deprived altogether of remedy or in order that his grievance may be remitted to some other tribunal...It is a well settled principle of law that statutory provisions tending to oust the jurisdiction of the Court should be construed strictly and narrowly. It is a well established principle that a provision ousting the ordinary jurisdiction of the Court must be construed strictly meaning, I think, that, if such a provision is reasonably capable of having two meanings, that meaning shall be taken which preserves the ordinary jurisdiction of the Court.”**

29. In this case even if I was to find that the issues the subject of these proceedings could be resolved by the Employment and Labour Relations Court, I am not satisfied that the same fall within the exclusive jurisdiction of that Court in order to deprive this Court of its jurisdiction under the Constitution.

30. In the premises I dismiss the objection with costs to the Applicants to be paid by the Respondents.

**Dated at Nairobi this 26<sup>th</sup> day of June, 2015**

**G V ODUNGA**

**JUDGE**

***Delivered in the presence of:***

***Mr Saende for the exp Applicant***

***Mr Munene for the 1<sup>st</sup> Respondent***

***Mr Kiarie for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents***

***Mr Wekesa for the Interested Party***