



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
MISC. APPLICATION NO 7 OF 2013 (J.R)
IN THE MATTER OF: AN APPLICATION FOR LEAVE TO FILE FOR JUDICIAL REVIEW
ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA 2010 ARTICLES 47 AND 175

AND

IN THE MATTER OF: THE TRANSITION TO DEVOLVED GOVERNMENT ACT
SECTION 14

BETWEEN

ISAAK MOHAMMED MOHAMUD.....APPLICANT

VERSUS

THE TRANSITION AUTHORITY.....RESPONDENT

RULING

Background

Isaak Mohammed Mohamud (the ex parte applicant) sought leave of this court, through his legal counsel Mr. A. Ingutya, to institute judicial review proceedings against the Transition Authority (Respondent). Leave was granted on 6th June 2013. He filed the application and served it on the Respondent. The Respondent instructed Garane & Associates to represent him. On 12th August 2013, the Respondent filed a preliminary objection to the effect that the Judicial Review Application was incompetent for having been filed in a court that lacks jurisdiction. The Respondent sought to have the application struck out and dismissed with costs.

With directions of this court, parties filed written submissions and have highlighted them on 18th February 2014.

Respondent’s submissions

Counsel for the Respondent has submitted that the ex parte Applicant’s Judicial Review Proceedings contending that his transfer from the County Government to the Town Council of Wajir is unprocedural for the reason that this court does not have jurisdiction to hear and determine matters that fall within the

purview of the Industrial Court and that this matter relates to a dispute between employer and employee.

Counsel cited Article 162 (2) (a) of the Constitution (the Constitution) and Section 12 (1) of the Industrial Court Act 2011 (the Act). He submitted that this matter falls under the provisions of section 12 of the Act; that the ex parte Applicant is disputing his transfer from the County Government of Wajir where he was acting as the Clerk to the Town Council of Wajir; that the issue as to whether the said transfer was procedural can only be properly determined by the Industrial Court which is the only court seized with the jurisdiction to hear and determine matters that relate to employer and employee relationship. Counsel relied on **United States International University v. The Attorney General & 2 others (2012) eKLR** and **Samson Onyango Ngonga v. Public Service Commission and 5 others (2013) eKLR** in support of his submissions that the High Court does not have jurisdiction to hear and determine disputes relating to employer and employee.

Applicant's submissions

The Applicant has submitted through his legal representative that this matter is of a purely constitutional nature relating to the mandate of the Transitional Authority as sanctioned by the constitution and statute; that the Transition Authority was not the employer of the applicant; that the applicant was seconded by the Authority to work as the County Assembly Clerk and his salary was paid by the County Assembly.

It was further submitted that the preliminary objection is misconceived as the court cannot determine it without considering evidence; that a preliminary objection should be on points of law. Counsel relied on **Mukisa Biscuit Manufacturing Ltd v. West End Distributors Ltd (1969) E.A 696** to support the argument that preliminary objections raises points of law. It was submitted that the court cannot decide whether there was employer and employee relationship without evidence to that effect.

Determination

I have considered the preliminary objection raised by the Respondent, the rival submissions of both parties as well as the oral submissions in court and the cited authorities. The main issue before me is simply whether this court has jurisdiction to hear and determine this matter. The Respondent says this court does not have such jurisdiction because the matter before it relates to employer and employee. It was submitted that the matter falls squarely within the purview of the Industrial Court.

On the other hand, the Applicant contents that this court has jurisdiction to hear and determine this matter because it is not about employer/employee but a constitutional matter.

Jurisdiction is everything and without it a court cannot proceed with a matter (see **Owners of Motor Vessel Lilian S v. Caltex Oil (Kenya) Ltd (1989) KLR 1**)

The Applicant was, by a letter dated 25th February 2013 from the Respondent, deployed to the Respondent with effect from 12th February 2013 as an Interim Clerk of County Assembly in Wajir County on a temporary basis. The letter continues to give the Applicant particulars of terms and conditions of service. The Respondent asked the Applicant to indicate in writing his acceptance of the deployment. It seems he accepted the deployment as indicated by a letter dated 22nd May 2013.

Further, by a letter dated 26th April 2013 from the Respondent, the Applicant was relieved his duties as the Clerk to the Wajir County Assembly and redeployed back to Wajir Town Council. To my understanding the three letters I have mentioned above discloses an employer/employee relationship and by dint of section 12 of the Industrial Court Act, the Industrial Court is better placed to handle such a matter. Even if the issues raised by the Applicant were to be constitutional issues, the Industrial Court would be well equipped to handle them in the exercise of its jurisdiction. I therefore agree with the Respondent that this court is not seized with the jurisdiction to hear and determine this matter. In my view the issues raised by the Applicant relate to his deployment and redeployment. Whether his constitutional rights were infringed upon is a matter that the Industrial Court is capable of determining. As stated in

United States International University case above:

“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 or to interpret the Constitution would lead to a situation where there is a parallel jurisdiction between the High Court and the Industrial Court.....”

Consequently, I hereby allow the preliminary objection. In the spirit of substantive justice I hesitate to strike out the Judicial Review Proceedings. I take the view that this court will not subject the Applicant to a lengthy procedure and deny him justice where his only mistake is to file this matter in the wrong court. Instead, I hereby order that this file be transferred to the Industrial Court in Nairobi to be placed before the Principal Judge of that Court for directions. However, the costs of the proceedings so far before this court are payable by the Applicant to the Respondent. It is so ordered.

Dated, signed and delivered on 1st April 2014.

S.N.MUTUKU

JUDGE