



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 257 of 2013

JULIUS CHACHA MWITA PETITIONER

AND

KENYA AIRWAYS LIMITED 1ST RESPONDENT

DIRECTOR,

**OCCUPATIONAL SAFETY & HEALTH SERVICES, MINISTRY OF
LABOUR AND HUMAN**

RESOURCES DEVELOPMENT 2ND RESPONDENT

RULING

1. By a petition dated 16th May 2013, the petitioner moved this court for several reliefs contending that his rights had been violated. The particulars of infringement are set out in the petition and are as follows;

(i) Subjecting the petitioner to indignity, inhuman and degrading treatment by declaring the petitioner redundant nine months later after its own panel of Doctors recommended the petitioner's retirement on medical grounds, and despite being aware of his medical condition.

(ii) Subjecting the petitioner to indignity, inhuman and degrading treatment by deliberately refusing and or neglecting to acknowledge the fact that the petitioner had been injured in the course of duty.

(iii) Subjecting the petitioner to indignity, inhuman degrading treatment by declaring redundant while on sick leave.

(iv) Placing the petitioner's life in peril and or danger by stopping indefinitely all together his medical scheme cover and not affording the petitioner means to access treatment.

(v) Discriminating the petitioner on account of health status by declaring the petitioner redundant despite being aware of his medical condition and despite its own panel of Doctors recommending the petitioner's retirement on medical grounds.

(vi) Failing to provide the petitioner in accordance section 22(3) of the Work Injury Benefits Act, 2007 and Article 35 of the Constitution with a copy of the accident and copies of all documents in respect to the injuries sustained by the petitioner on 4th May 2010 despite such request being made.

(vii) The respondents have refused, neglected, ignored and or otherwise failed to grant your petitioner

with any access to information requested and required for the exercise or protection of the petitioner's right and fundamental freedom despite the petitioner's requesting them to do so on several occasions.

(viii) Failing to address the petitioner's compensation for injuries sustained during the course of employment with the 1st respondent in an efficient manner and or within a reasonable period.

(ix) Failing to accord the petitioner expeditious, efficient, and reasonable and procedurally fair administrative action.

(x) Unsavoury and inhuman treatment of the petitioner despite his debilitating medical condition.

2. Together with the petition, the petitioner filed a chamber summons dated 16th May 2013 in which he sought the following interim orders;

(1) That this application be certified as urgent.

(2) That leave be granted to the applicant in the first instance to proceed on a priority basis dispensing service of the petition and application under the preceding certificate of urgency.

(3) An order of mandatory injunction be and is hereby issued against the 1st respondent herein to furnish this Honourable Court and indeed your petitioner with a copy of the notice of the accident and all documents lodged by the 1st respondent with the 2nd respondent and copies of all medical reports and documents in respect of the injuries sustained by the petitioner on 4th May 2010.

(4) An order of mandatory injunction be and is hereby issued against the 1st respondent herein to furnish this Honourable Court and indeed your petitioner with written reasons, in accordance with Article 35 and 47(2) of the Constitution as to its failure in addressing the petitioners injury sustained during the course of employment with the 1st respondent and further to furnish this Honourable Court and indeed your petitioner written reasons for declaring your petitioner redundant instead of retiring him on medical grounds as advised to do so by Medical Doctors.

(5) An order compelling the 1st respondent herein to furnish this Honourable Court and indeed your petitioner with written reasons, in accordance with Articles 35 and 47(2) as to its assessment of the petitioner's injuries or its failure in addressing the petitioner's injury sustained during the course of employment with the 1st respondent.

(6) A conservatory order be and is hereby issued against the 1st respondent herein suspending decision and or the implementation and operation of the decision made on the 4th September 2012 declaring the petitioner redundant pending the hearing and determination of these or other proceedings or until further orders of this court.

(7) That an order of mandatory injunction be issued as against the 1st respondent to compensate and or make periodic payments equivalent to the petition's monthly earnings amounting to Kshs.160,000/= inclusive of allowances and other privileges pending the hearing of this application for his subsistence and payment of medical treatment and or physiotherapy.

(8) That an order of mandatory injunction be issued as against the 1st respondent to compensate and or make periodic payments equivalent to the petitioner's monthly earnings amounting to Kshs.160,000/= inclusive of allowances and other privileges pending the hearing of the petition herein for his substance and payment of medical treatment and or physiotherapy.

(9) The Honourable Court do make, issue and give such further, other and consequential orders, writs and directions as it may consider appropriate for purposes of enforcing or securing the enforcement of any of the provisions of Articles 2, 3, 10, 21, 22, 23, 26, 27, 28, 35, 41, 47, 165, 258, 259 and 260 of the

Constitution.

(10) *The costs of this application be provided for.*

3. It is evident that this cause is not the first time the petitioner has been involved with the court process. He was an employee of the Kenya Airways, having been employed in 2007 as an in-flight attendant. While in the course of employment he was injured. His employer's doctors recommended that he be retired on medical grounds. He contends that his employer declined to exercise this option but instead declared him redundant with the result that he lost any entitlement under the **Work Injury Benefits Act, Act No. 13 of 2007**.

4. The redundancy was contested by his Union, the Aviation and Allied Workers Union, in the Industrial Court and by an award given on 3rd December 2012 in **Industrial Cause No. 1616 of 2012**, he and other employees of Kenya Airways were reinstated. The enforcement of the award was however stayed pending appeal.

5. The petitioner states that he continues to suffer from the injuries he sustained from employment and as a result he filed **Industrial Court Cause No. 114 of 2012** in which he sought, *inter alia*, "General damages under the Work Injury Benefits Act for injuries sustained in the Course of ... employment with (Kenya Airways) Ltd."

6. In the said suit, the petitioner also filed an application in which he sought the following substantive interim orders;

[2] *THAT the respondent be and is hereby ordered to compensate and or make periodic payment equivalent to the claimants monthly earnings amounting to Kshs.160,000/= inclusive of allowances and other privileges pending the hearing of this application.*

[3] *THAT the respondent be and is hereby ordered to compensate and or make periodic payment equalled to the claimants monthly earnings of allowances and other privileges pending the hearing of the substantive cause.*

7. The application came up before Hon. Lady Justice Linet Ndolo sitting at the Industrial Court on 1st February 2013 where she made the following order;

1) THAT the matter falls under the Work Injury Benefits Act.

2) THAT counsel for the Claimant/Applicant is hereby advised to file suit under the Work Injury Benefits Act.

3) THAT the Notice of Motion application dated 1st February 2003 is stood over.

8. This petition was filed thereafter as the petitioner's case felt that the result of the order issued by Hon. Justice Ndolo was to deny him access to justice. When this matter came up before me on 24th May 2013, I directed the petitioner's counsel, Mr Ochola, to address me on the jurisdiction issue as this matter was one arising from a contract of employment.

7. Mr Ochola, contended that the petitioner was unable to lodge his claim under the **Work Injuries Benefits Act, the Industrial Court Act, 2011** and the **Labour Institutions Act, 2007**. He contended that the **Work Injuries Benefits Act** does not have any guiding principles on how and where a claim made under the Act should be filed. Counsel further submitted that this problem was more acute after the High Court rendered certain portions of **Work Injuries Benefits Act** unconstitutional in the case of **Law Society of Kenya v Attorney General and Another Nairobi Petition No. 185 of 2008 (Unreported)**.

8. Counsel noted that pursuant to **section 16** of the **Labour Institutions Act** vide **Gazette Notice No.**

9243 of 2011, the Chief Justice had designated all courts in 47 counties presided over by Magistrates of the rank of Senior Resident Magistrate and above as special courts to hear and determine employment and labour related matters within their areas of jurisdiction. These cases included “work injury” related matters. Counsel submitted that in the circumstances of this case, the petitioner’s claim is beyond the pecuniary limit of the magistrate’s court and in the absence of a provision of law granting the Industrial Court jurisdiction, then the petitioner is entitled to move the High Court as it is an appropriate forum. He submitted that this was an issue of access to justice, a right protected under **Article 48**.

9. Learned counsel for the 1st respondent, Ms Oduol denied that the High Court had any jurisdiction to determine the matter in light of the clear provisions of **Article 162(2)** and **165(5)** of the Constitution. She submitted that all the issues raised by the petitioner fell within the jurisdiction of the Industrial Court and that this matter should be transferred to that Court. She relied on **United States International University (USIU) v Attorney General & Another Nairobi Petition No. 170 of 2012** and **Samson Onyango Ngonga v Public Service Commission and Others Nairobi Petition No. 459 of 2011 (Unreported)** which were also cited by the petitioner.

10. As I understood the petitioner’s case is that he is seeking to enforce fundamental rights and freedoms arising from the fact that he claims the Industrial Court abdicated its responsibility to adjudicate the claim that was before it and that he has nowhere to turn to except the High Court. The crux of this determination is whether this court has jurisdiction to deal with a matter which is founded on an employment contract. This issue I think is no longer in doubt in light of **Article 162(2)** and **165(5)** of the Constitution. In the **United States International University (USIU) v Attorney General & Another Nairobi Petition No. 170 of 2012 (Unreported)**, I stated as follows, “[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. [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.*”

11. As the matter at hand is founded on a contract of employment, it is one within the jurisdiction of the Industrial Court which also has the jurisdiction to enforce fundamental rights and freedoms under the Constitution which are ancillary to the employment contract. As the High Court lacks jurisdiction the law is clear that the court can proceed no further than state that it lacks jurisdiction. As Justice Nyarangi stated in **The case of Owners of Motor Vessel “Lillian S’ v Caltex Oil (Kenya) Limited [1989] KLR 1**, “*Jurisdiction is everything. Without it, a court has no power to make one more step.*”

12. All the issues raised in the petition are issues which the Industrial Court is competent to deal with. In the circumstances, this matter is transferred to the Industrial Court for further orders and directions.

DATED and DELIVERED at NAIROBI this 31st May 2013

D.S. MAJANJA

JUDGE

Mr Ochola instructed by Soita and Saende Advocates for the petitioner

Ms Oduol instructed by Ochieng’, Onyango, Kibet and Ohaga Advocates for the 1st respondent.