REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO. 608 OF 2002

JOHN MIUMU & 18 OTHERS …….....……..……..……..…….. PLAINTIFFS

VERSUS

JOMO KENYATTA UNIVERSITY OF AGRICULTURAL & TECHNOLOGY …..... DEFENDANT

R U L I N G

This suit arose out of the Plaintiffs' employment with the Defendant, which employment was terminated on 31st March 2001 by way of 'retrenchment'. The Plaintiffs claim various entitlements, including "golden handshake", unpaid leave days, and various allowances. They also seek a declaration that their retrenchment was discriminatory and a breach of their contracts of employment. They seek general damages on that account. The suit was filed on 9th April 2002, but has not been heard.

The Defendant filed defence and denied liability. It also applied by chamber summons dated 25th February 2010 for an order to strike out the Plaintiffs' suit with costs. The application was opposed. By order dated 12th October 2010 the court (Dulu, J) directed that parties do file written submissions and take a hearing date for the application at the registry. The Plaintiff's submissions were filed on 25th February 2011 while those of the Defendants were filed on 18th November 2011.

When the matter was placed before me on 21st November 2011 (erroneously for hearing of the substantive suit) the learned counsels for the parties asked the court to render a ruling on the application for striking out, the same having been canvassed by way of written submissions. But the court pointed out that there was an issue of jurisdiction to be addressed first in view of **Articles 162(2)** and **165(5)** of the **Constitution**, this being a dispute relating to employment. The court then fixed the matter for canvassing of that issue of jurisdiction on 9th December 2011.

On that date the learned counsels declined to address the issues of jurisdiction and instead insisted that a ruling ought to be rendered first on the application for striking out. That was a curious approach. It has often been said that jurisdiction is everything, and if a court has no jurisdiction in a matter it should not take any further step.

Needless to say, if the court has no jurisdiction in a matter it would not have jurisdiction to adjudicate over an application to strike out the suit.

The issue of jurisdiction must therefore be first determined, and I will do so without the benefit of submissions by learned counsels.

Article 162 of the **Constitution of Kenya** provides as follows in **sub-articles (2) (a)** and **(3):** -

"(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-

(a) employment and labour relations; and

(b) ….."

(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2)."

And **Article 165(5) (b)** of the Constitution provides as follows: -

"(5) The High Court shall not have jurisdiction in respect of matters-

(a) ……..

(b) falling within the jurisdiction of the courts contemplated in Article 162(2)."

The **Industrial Court** has, since promulgation of the new Constitution, been re-established under **section 4** of the **Industrial Court Act, No. 20 of 2011** in order to bring it within the new Constitution. That section provides: -

"4. (1) In pursuance of Article 162(2)(a) of the Constitution, there is established the Industrial Court for the purpose of settling employment and industrial relations disputes and the furtherance, securing and maintenance of good employment and labour relations in Kenya.

(2) The court shall be a superior court of record with the status of the High Court.

(3) The court shall have and exercise jurisdiction throughout Kenya".

Jurisdiction of the Industrial Court is further provided for in **section 12** of the said Act. **Subsection (1)** of that section provides as follows in part:-

"12. (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…"

It is clear that the Constitution intends that the Industrial Court do have exclusive original and appellate jurisdiction to hear and determine all disputes and appeals involving employment and labour relations.

The Industrial Court is a superior court of record with the status of the High Court. The court will no doubt in due course develop its own jurisprudence in employment and labour relations disputes. The Constitution specifically denies the High Court jurisdiction in disputes involving employment and labour relations.

There are transitional provisions contained in **section 22** of the **6th Schedule** to the Constitution regarding matters involving employment and labour relations disputes filed in this and other courts before

promulgation of the Constitution. That section provides as follows:-

"22. All judicial proceedings pending before any court shall continue to be heard and shall be determined by the same court or a corresponding court established under this Constitution or as directed by the Chief Justice or the Registrar of the High Court."

The term **"…shall continue to be heard…"** is in my view instructive. It can only mean that the **"judicial proceedings pending"** are those cases that are **part-heard**, not those whose hearing is yet to commence.

The present suit is **not** part heard before this court.

In my considered view, the transitional provisions under section 22 of the 6th Schedule to the Constitution are not intended to facilitate two parallel but different jurisdictions with regard to employment and labour relations disputes. The intention is that **where hearing of a matter already filed in the High Court or in a subordinate court <u>has commenced</u>**, such hearing ought to be concluded in the High Court or in the subordinate court.

On the other hand, **<u>where hearing has not commenced</u>, then such suit ought to be transferred to the right court**, that court being the Industrial Court.

For good conduct of cases involving employment and labour relations disputes, it is best that such cases pending in the High Court or in subordinate courts **where actual hearing has not commenced** be forwarded to the Industrial Court for disposal. I so hold.

I therefore direct that this present suit be and is hereby transferred to the Industrial Court for disposal. No doubt that court shall deal with the application for striking out. Costs will be in the cause. It is so ordered.

DATED AT NAIROBI THIS 23RD DAY OF FEBRUARY 2012

H.P.G. WAWERU

<u>JUDGE</u>

DELIVERED AT NAIROBI THIS 24TH DAY OF FEBRUARY 2012