



**UNITED STATES INTERNATIONAL UNIVERSITY
(USIU).....PETITIONER**

AND

**THE ATTORNEY
GENERAL.....RESPONDENT**

AND

**ERIC RADING OUTA.....1ST INTERESTED
PARTY**

**CENTRAL ORGANISATION OF TRADE UNIONS (COTU).....2ND
INTERESTED PARTY**

RULING

Introduction

1. The central issue to be determined in this matter is whether the High Court should continue to determine labour and employment matters in light of the establishment of the Industrial Court. The employment and labour relations court contemplated by **Article 162 (2)** was established by the enactment of the **Industrial Court Act (Act No. 20 of 2011)**. Judges to that court were appointed on 12th July 2012 as evidenced by **Gazette Notice No. 9797** dated 19th July 2012.
2. As a result of the appointment of the Industrial Court Judges I informed parties with employment and labour relations matters that I will transfer the matters to the Industrial Court for hearing and determination since the High Court did not have jurisdiction to deal with these matters under **Articles 162(2) and 165(5)**.
3. Counsel for the petitioner in this matter, Mr Ochieng' Oduol, sought to address me on the matter as he was of the view that this matter could not be transferred to the Industrial Court. Mr Kibe Mungai, counsel for the petitioner in **HCCC No. 1774 of 2004 (OS)** also sought to address me on the matter and I duly acceded to the request.

The Suits

4. The petitioner in **Petition No. 170 of 2012** is the respondent in **Industrial Court Cause No. 82 of 2011 Eric Rading Outa v United States International University** in which an award was made on 30th November 2011. The award was in the process of being executed when the petitioners approached this court for a conservatory to stay execution of the award.
5. The petitioner's main contention is that the Judges of the Industrial Court had not taken oath of office

pursuant to the provisions of **Article 74** and that therefore all orders and awards made in the case are unconstitutional null and void. It is the petitioner's argument that since the Industrial Court is a superior court under **Article 165**, the judges of the court as state officers within the meaning of **Article 74** ought to have subscribed to the oath or affirmation of office. The petitioner further maintains that **section 32** of the **Industrial Court Act, 2011** is inconsistent with the Constitution.

6. The applicants in **HCCC No. 1774 of 2004 (OS)** filed an originating summons seeking to challenge the constitutionality of an award made by the Industrial Court on the 7th March 2001 on grounds inter alia that the award was discriminatory against some of the applicants and that **section 17** of the **Trade Disputes Act (repealed)** was unconstitutional.

The Arguments

7. The petitioner's position is that it is the High Court which should hear and dispose of the matter because **Article 165** is clear on the interpretation and enforcement jurisdiction of the High Court. The petitioner cited various authorities to support its argument including **Centre for Rights Education and Awareness (CREAW) and Others v The Attorney General Nairobi Petition No. 16 of 2011 (Unreported)** and **Dennis Mong'are Mugambi v Attorney General and Others Nairobi Petition No. 146 of 2011 (Unreported)** where the High Court affirmed its jurisdiction to hear and determine matters of enforcement of fundamental rights and freedoms.

8. Mr Ochieng' Oduol submitted that the totality of **Article 162 (2)** and **165** leave no doubt that the High Court has a constitutional mandate to determine questions concerning the enforcement of fundamental rights and freedoms despite the claw back provision of **Article 165(5)** which reserves certain matters for the Supreme Court, the Employment and Labour Relations Court and Environment and Land Court. Counsel contended that the question of interpretation of the Constitution is vested expressly in the High Court under **Article 165(3)(d)**.

9. Mr Ochieng' Oduol, asserted that the Industrial Court as established under the Constitution has jurisdiction to determine labour rights protected under **Article 41** as well as other human rights in proceedings before it. Counsel submitted that Industrial Court contemplated by **Article 162 (2)** did not have jurisdiction to deal with proceedings existing before its establishment and which did not comply with the Constitution and that is why the High Court cannot exercise supervisory jurisdiction.

10. Mr. Bitta, counsel representing the Attorney General, submitted that all courts have the power to interpret the Constitution and that this jurisdiction is not a preserve of the High Court. He cited **Article 10** and **section 3** of the **Judicature Act (Chapter 8 of the Laws of Kenya)**. He further stated that by virtue of **Articles 162 (2)** and **165 (5)**, once the Industrial Court was set up, the High Court ceased to have jurisdiction to deal with employment and labour relations matters.

11. Mr. Bitta opined that **Article 165(3)(d)** does not confer exclusive jurisdiction to interpret the Constitution on the High Court and that all courts are competent to determine their jurisdiction. Any issues of jurisdiction should therefore be raised before the Industrial Court and the court would competently address the objection. Counsel submitted that under **Article 162 (3)** Parliament has power to determine the jurisdiction and functions of the Industrial Court and this has now been done by **section 12** of the **Industrial Court Act, 2011** establishing the Court. He invited the court to give a purposeful interpretation to this matter, particularly given the specialized nature of the court.

12. Ms Mghanga appearing for the 1st interested party, agreed with the submissions of the Attorney General. The 1st Interested Party's position is that if this court were to determine the issues in this case, it would amount to exercising supervisory jurisdiction over the Industrial Court, a course that is prohibited by **Article 165 (5)**. Ms Kitonga, representing the 2nd interested party, concurred with the Attorney General's position and that of the 1st interested party.

13. Mr Kibe Mungai, appearing for the applicants in **HCCC No. 1774 of 2004 (OS)** pointed out that the

suit sought a mixture of reliefs, some of which fell within the jurisdiction of the Industrial Court and others that fell the jurisdiction of the court. He invited the court to make the following express findings:

a. A declaration that the Industrial Court has jurisdiction to determine applications for enforcement of rights and fundamental freedoms under **Article 22 and 23** in relation to all matters falling within their jurisdiction under the Act.

b. For purposes of all matters falling within the Industrial Court, reference to the “High Court” in the Constitution shall be deemed to refer to the “Industrial Court”.

14. Mr Mungai submitted that in order to avoid apparent conflict, the court having the status of the High Court should have all the powers of the High Court in determination of disputes.

15. I permitted Mr Orao Obura, a labour law expert and advocate, to address the court as amicus curiae. He submitted that the jurisdiction to hear cases arising out of violation of the Bill of Rights is specifically donated to the High Court under **Article 23(1)** and reiterated in **Article 165(3)(b)**. The obvious conclusion, Mr Obura submitted is that “*employment and labour relations*” jurisdiction given to the Industrial Court under **Article 162(2)** does not include jurisdiction over violation of Bill of Rights in an employment relations situation. In his view, the Constitution could not have specifically bestowed jurisdiction to the High Court to entertain Bill of Rights cases under **Article 23** and then take it away under **Article 165**.

16. Mr Obura further submitted that no power has been given to Parliament to enact legislation bestowing original jurisdiction for enforcement of the Bill of Rights other than that donated by **Article 23 (2)** to subordinate courts. In counsel’s view these provisions left no doubt that the drafters of the Constitution did not intend to entrust the Industrial Court with jurisdiction to entertain cases relating to the Bill of Rights and no greater jurisdiction should be inferred on the employment and labour relations court beyond that conferred by **section 12** of the **Industrial Court Act, 2011**.

17. The amicus curiae pointed out that some of the fundamental rights and freedoms under the Bill of Rights concerning labour relations in **Article 41** are replicated in the employment statutes as general principles of employment and labour relations. For example, the **Employment Act, 2007** prohibits forced labour, discrimination and sexual harassment while the **Labour Relations Act, 2007** guarantees freedom of association of employers, employees, trade unions and employers organisations. The result of this, Mr Obura contended, is that Industrial Court will have jurisdiction to entertain a suit alleging violation of rights secured in the employment statutes notwithstanding a similar suit could be lodged in the High Court enforcing the rights protected in the Bill of Rights. According to him, a litigant cannot purport to institute a petition in the Industrial Court challenging a violation of any fundamental freedom under the Bill of Rights enshrined under the Constitution.

18. Mr Obura emphatically stated that it would be unconstitutional for the court to refer these matters and similar constitutional petitions pending back to the Industrial Court for determination as judges of that court though having the status of the High Court do not have jurisdiction on matters of constitutional interpretations as this is a preserve of the High Court.

Jurisdiction under the Constitution

19. Jurisdiction is a fundamental matter in the dispensation of justice. The Supreme Court in the recent decision; **Re The Matter of the Interim Independent Electoral Commission Constitutional Application 2 of 2011 (Unreported)** at *para. 29 and 30* discussed the issue of jurisdiction in the following terms; “[29] Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in **Owners of Motor Vessel ‘Lillian S’ v. Caltex Oil (Kenya) Limited [1989] KLR 1**, which bears the following passage (Nyarangi, JA at p.14): “**I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is**

everything. Without it, a Court has no power to make one more step. [30] **The Lillian ‘S’ case** establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the Constitution.”

20. A determination of this issue requires an analysis of the provisions of **Article 162** and **165** of the Constitution which establishes the Superior Courts and sets out the jurisdiction of each court. **Articles 162** and **165** provide as follows;

162. (1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts mentioned in clause (2).

(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) the environment and the use and occupation of, and title to, land.

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

(4) The subordinate courts are the courts established under Article 169, or by Parliament in accordance with that Article.

165. (1) There is established the High Court, which—

(a) shall consist of the number of judges prescribed by an Act of Parliament; and

(b) shall be organised and administered in the manner prescribed by an Act of Parliament.

(2) There shall be a Principal Judge of the High Court, who shall be elected by the judges of the High Court from among themselves.

(3) Subject to clause (5), the High Court shall have—

(a) unlimited original jurisdiction in criminal and civil matters;

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of —

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

(iv) a question relating to conflict of laws under Article 191; and

(e) any other jurisdiction, original or appellate, conferred on it by legislation.

(4) Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.

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

(a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or

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

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

21. A summary of these provisions is that apart from the Superior Courts which are the Supreme Court, Court of Appeal and the High Court, Parliament is empowered under **Article 162(2)** of the Constitution 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 and the use and occupation of, and title to, land. Under **Article 162(3)**, Parliament is empowered to determine the jurisdiction of the court of the status of the High Court. **Section 12** of the **Industrial Court Act, 2011** sets out the jurisdiction of the court as follows;

Jurisdiction of the Court.

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 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.

The Industrial Court under the former Constitution

22. The creation of court of the status of the High Court is a new phenomenon in our judicial system and is not free from controversy. These provisions were not in the Bomas Draft, Ghai Draft or the Wako Draft. When the Commission of Experts (COE) included the provisions in the draft forwarded to the Parliamentary Select Committee (PSC) on the Constitution, the references were deleted. The COE then reinstated these provisions as part of the Constitution.

23. The ***Judiciary Response to the Harmonized Draft*** prepared by the COE noted the difficulties inherent having a High Court and other courts of the Status of the High Court. It stated, “*The problems inherent in this provision are as follows: Already, specialized divisions of the High Court have been administratively created. They deal with disputes concerning Commercial Law, Criminal Law, Family Law, Land & Environment Law and Constitutional Law. It is not clear how the proposed new courts will relate with these divisions. It is not clear what jurisdiction the proposed new courts will have vis a vis the High Court. Already, existing legislation that gave the Industrial Court the same status as the High Court has brought about a jurisdictional conflict.*”

24. The Industrial Court contemplated under **Article 162(2)** was intended to be independent of the High Court. It is for this reason that it was bestowed the status of the High Court. Indeed the Final Report of the COE affirms that giving Parliament power to establish the Industrial Court with the status of the High Court was aimed at addressing the competing jurisdictional issues that have historically existed between the High Court and the Industrial Court. It was the intention of the drafters of the Constitution to give the Industrial Court, though a specialized court in nature, full independence from the High Court.

25. The history of the Industrial Court in Kenya can be traced back to the enactment of the now repealed ***Trade Disputes Act (Chapter 234 of the Laws of Kenya)***. Under the Act, the Industrial Court had jurisdiction to deal with trade disputes. The Court was presided over by Judge appointed by the President under the Act. The Act also made provision for appointment of additional judges. Under **section 17** of the Act the award of the court was final and the award, decision or proceedings of the Industrial Court could not be questioned or reviewed, restrained or removed by orders of prohibition injunction and certiorari or otherwise at the instance of the government or any other person. Subsequent legislation that is the ***Employment Act, 2007, Labour Relations Act, 2007*** and the ***Labour Institutions Act, 2007*** extended the jurisdiction of the Industrial Court to deal with a wider range of employment and labour disputes.

26. The status of the Industrial Court in relation to the High Court has been somewhat controversial in view of conflicting decisions of the High Court. In the case of ***Mecol Limited v the Attorney General and Others Nairobi HC Misc. App. 1784 of 2004 (Unreported)*** the High Court declared that the Industrial Court was a subordinate court for the purposes of the exercise of the supervisory jurisdiction of the High Court under **section 65** of the former Constitution. In ***Kenya Guards and Allied Workers Union v Security Guards Services and 38 Others Nairobi HC Misc. 1159 of 2003 (Unreported)*** the court expressed a contrary view on the basis of legislative policy favouring finality of labour disputes.

27. In the case of ***Brookside Dairy Limited v Attorney General and the Industrial Court Nairobi Petition No. 33 of 2011 (Unreported)***, I took the position that the Industrial Court, as a creature of statute, is a court subordinate to the High Court. Under the former Constitution, the Industrial court as established under the ***Labour Institutions Act*** was subordinate to the High Court. **Section 65** of the former Constitution provided that, “*Parliament may establish courts subordinate to the High Court and courts martial, and a court so established shall, subject to this Constitution, have such jurisdiction and powers as may be conferred on it by any law.*” Thus, Parliament did not have the constitutional authority under the former Constitution to create a court of equivalent status with the High Court. (See also ***Samuel G. Momanyi v Attorney General and Another Nairobi Petition No. 341 of 2011 (Unreported)*** per Lenaola J.)

28. The Constitution does not define what “**status**” means but in my view it implies that the court so created must have the same juridical incidents as the High Court. The jurisdiction bestowed upon the High Court under **Article 165(3)** is not absolute but ‘*subject to clause (5)*’ whose provisions forbid the High Court from exercising jurisdiction over matters falling within the province of the Supreme Court and the specialized court established under **Article 162(2)**. This status is to be determined from a textual

consideration of the provisions governing the judiciary. First, under **Article 162**, the courts of status of the High Court are considered superior courts save that their functions are to be defined by Parliament rather than the Constitution itself. Second, **Part 2 of Chapter Ten** titled “**Superior Courts**” sets out the jurisdiction of the Superior courts, that is, the Supreme Court, the Court of Appeal and the High Court. Though the Courts of status of the High Court are not defined their jurisdiction is dealt with in negative terms under **Article 165**. The High Court shall not exercise jurisdiction in matters reserved for status courts contemplated under **Article 162(2)**. This implies that the High Court cannot deal with matters set out in **section 12** of the **Industrial Court Act, 2011**. Third, the High Court does not have supervisory jurisdiction of superior courts, which includes courts with the status of the High Court.

The Labour Court in South Africa

29. The terminology “*courts of the status of the High Court*” is borrowed from South Africa. Though the parties did not refer to any comparative jurisprudence I think it is important to look beyond our borders to see how the issue that we are dealing with has been resolved.

30. **Article 166** of the South African Constitution provides that the courts include, “*any other court established or recognised in terms of an Act of Parliament, including any court of a status to either the High Courts or Magistrates Court.*” Under **Article 169** a High Court may decide

a. *any constitutional matter except a matter that*

i. *only the Constitutional Court may decide; or*

ii. *is assigned by an Act of Parliament to another court of a status similar to a High Court; and*

b. *any other matter not assigned to another court by an Act of Parliament.*

31. The **Labour Relations Act, 1995** (“the LRA”) established the Labour Court as a Court with the status of the High Court to adjudicate over a class of labour disputes. **Section 151** of the LRA provides that the Labour Court, “*is a superior court that has authority, inherent powers and standing, in relation to matters under its jurisdiction, equal to that which a court of a provincial division of the Supreme Court has in relation to the matters under its jurisdiction.*” The Labour Court has exclusive jurisdiction in respect of all matters stated to be determined by the court under the Act. More importantly, **section 157(2)** states that the Labour Court has concurrent jurisdiction with the Supreme Court (a) in respect of any alleged violation or threatened violation, by the State in its capacity as employer of any fundamental right entrenched in Chapter 3 of the Constitution; and (b) in respect of any dispute over the constitutionality of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct, by the State in its capacity as employer.

32. These provisions have not been free from controversy. In **Langeveldt v Vryburg Transitional Council and Others [2001] ZALAC 3**, Zondo JP referred to the “*unsatisfactory state of affairs which various statutory provisions have produced.*” He further observed that, “*An examination of the law reports over the past four years when the Labour Court became fully operational reveals a number of employment and labour matters which have come before various High Courts. In most of those cases the High Courts have been confronted time and again with the question of whether they had jurisdiction in such matters despite the existence of the Labour Court or whether only the Labour Court had jurisdiction in such matters. A reading of those cases clearly reveals the jurisdictional complexities which the present state of the law has produced.*”

33. The case of **Gcaba v Minister of Safety and Security and Others CCT 64/08 [2009] ZACC 26**, the Constitutional Court of South Africa dealt with and brought much clarity to the vexed question of overlapping constitutional and general jurisdiction of the Labour Court and the High Court. The facts giving rise to this case were that Mr Gcaba held the position of station commissioner in Grahamstown. When the position he held was upgraded he applied and was shortlisted and interviewed. He was not appointed and as result he lodged a complaint against the Police Service but later

abandoned it and referred it to the Bargaining Council. He thereafter withdrew the dispute and elected to approach the High Court with an application to review to the decision of the Police Service not to appoint him. The High Court held that it had no jurisdiction to hear the matter as it was a labour matter.

34. In determining the issues the court considered the intention of the legislation to provide a forum for settlement of labour disputes which is necessary for a modern and complex society. The court also cautioned against adopting an interpretation that would lead to forum shopping which was not desirable and the problems caused by creating parallel systems of law. The court held that, “[T]he Labour Court and other LRA structures have been created as a special mechanism to adjudicate labour disputes such as alleged unfair dismissals grounded in the LRA The High Court adjudicates the alleged violations of constitutional rights, administrative review applications, and of course all other matters. Section 157(1) confirms that the Labour Court has exclusive jurisdiction over any matter that the LRA prescribed should be determined by it Section 157(1) should, therefore, be given expansive content to protect the special status of the Labour Court, and section 157(2) should not be read to permit the High Court to have jurisdiction over these matters as well.”

35. In relation to the jurisdiction of the labour Court to adjudicate over violations of fundamental rights and freedoms, the court further stated, “Section 157(2) confirms that the Labour Court has concurrent jurisdiction with the High Court in relation to alleged or threatened violations of fundamental rights entrenched in chapter 2 of the Constitution and arising from employment and labour relations, any dispute over the constitutionality of any executive or administrative act or conduct by the state in its capacity as employer and the application of any law for the administration of which the minister is responsible. The purpose of this provision is to extend the jurisdiction of the Labour Court to disputes concerning the alleged violation of any right entrenched in the Bill of Rights which arise from employment and labour relations, rather than to restrict or extend the jurisdiction of the High Court. In doing so, section 157(2) has brought employment and labour relations disputes that arise from the violation of any right in the Bill of Rights within the reach of the Labour Court. This power of the Labour Court is essential to its role as a specialist court that is charged with the responsibility to develop a coherent and evolving employment and labour relations jurisprudence. Section 157(2) enhances the ability of the Labour Court to perform such a role. Therefore, section 157(2) should not be understood to extend the jurisdiction of the High Court to determine issues which (as contemplated by section 157(1)) have been expressly conferred upon the Labour Court by the LRA. Rather, it should be interpreted to mean that the Labour Court will be able to determine constitutional issues which arise before it, in the specific jurisdictional areas which have been created for it by the LRA, and which are covered by section 157(2)(a), (b) and (c).”

Determination

36. Unlike the provisions of the South African statute, the **Industrial Court Act, 2011** is silent on the jurisdiction of Industrial Court to interpret the Constitution or to enforce fundamental rights and freedoms. In South Africa, the LRA indeed contemplates that there may be areas of concurrent jurisdiction. Likewise, **Article 165** is silent whether the courts of the Status of the High Court have jurisdiction to interpret the Constitution and enforce fundamental rights and freedoms under the Bill of Rights. Does this mean that the courts with status of the High Court lack jurisdiction to interpret the Constitution in the same manner as the High Court or enforce fundamental rights and freedoms?

37. In order to determine whether the Industrial Court has the jurisdiction to deal with matters concerning the enforcement of fundamental rights and freedoms it is important to consider the Constitution as a whole bearing in mind all provisions bearing upon a specific issue should be considered together; this is the principle of *harmonization*. As was held in **Olum v Attorney General of Uganda [2002]2 EA 508**, “the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other. Constitutional provisions must be construed as a whole in harmony with each other without insubordinating any one provision to the other.”

38. In answering this question, a purposive approach must be adopted. On the one hand is the need to preserve and protect the objective of creating a specialist employment and labour relations court for

which **Article 162(2)** was enacted. In *Re Reference Public Service Employee Relations Act [1987] 1 SCR 313, 1987 CanLII 88 (SCC)*, at paragraph 182 McIntyre J, observed that, “Labour law . . . is a fundamentally important as well as extremely sensitive subject. It is based upon a political and economic compromise between organised labour - a very powerful socioeconomic force - on the one hand, and the employers of labour – an equally powerful socio-economic force - on the other. The balance between the two forces is delicate. . . .”

39. The other consideration is to maintain the jurisdiction of the High Court as the guardian of fundamental rights and freedoms. In this respect, reference was made to the provisions of **Article 23(1) and (2)** which provide as follows;

23. (1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

(2) Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

40. It was argued since **Article 23(3)** only empowers the legislature to enact legislation to give original jurisdiction to subordinate court, it follows that Parliament cannot grant courts of the status of the High Court original jurisdiction in the absence of a specific provision to that effect. In my view, the jurisdiction of the High Court is not governed by **Article 23** but by **Article 165** and the conferring of the Industrial Court the Status of the High Court as superior courts are covered by **Article 165** to the extent of their defined subject-matter jurisdiction.

41. 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 parallel jurisdiction between the High Court and the Industrial Court. This would give rise to forum shopping thereby undermining a stable and consistent application of employment and labour law. Litigants and ingenious lawyers would contrive causes of action designed to remove them from the scope of the Industrial Court. Such a situation would lead to diminishing the status of the Industrial Court and recurrence of the situation obtaining before the establishment of the current Industrial Court.

42. **Article 19** provides that the Bill of Rights is an integral part of the framework of Kenya’s democratic state and is the framework for social, economic and cultural policies. The necessity of having the Industrial Court deal with matters of fundamental rights and freedoms as part of the jurisdiction to resolve labour disputes is to infuse into employment and labour relations the values and essence of the Bill of Rights. The fact that the content of labour rights protected under **Article 41** is reiterated in the **Employment Act, 2007** and **Labour Relations Act, 2007** does not create a separate wall of jurisdiction for the High Court and the Industrial Court as contended by Mr Obura. The reiteration of these rights is merely a consequence of **Article 19** and recognition of their universality and indivisibility in application is all spheres of labour and employment law.

43. The intention to provide for a specialist court is further underpinned by the provisions of **Article 165(6)** which specifically prohibits the High Court from exercising supervisory jurisdiction over superior courts. To accept a position where the Industrial Court lacks jurisdiction to deal with constitutional matters arising within matters its competence would undermine the status of the court. Reference of a constitutional matter to the High Court for determination or permitting the filing of constitutional matters incidental to labour relations matters would lead to the High Court supervising a superior court. Ordinarily where the High Court exercises jurisdiction to interpret the Constitution or enforce fundamental rights, its decisions even where declaratory in nature will require the court to follow or observe the direction. This would mean that the High Court would be supervising the Industrial Court

which is prohibited by **Article 165(6)**.

44. In the final analysis, I would adopt the position of the Constitutional Court of South Africa in ***Gcaba v Minister of Safety and Security (Supra)***. 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***.

Status of matters pending in the High Court

46. Having disposed of the issue of Industrial Court's jurisdiction, I now turn to the issue raised by Mr Ochieng' Oduol that the Industrial Court's jurisdiction is limited to hearing cases filed after the establishment of the Industrial Court. The issue is whether employment and labour relations matters which raise constitutional issues filed in the High Court prior to the establishment of the Industrial Court should be handled by the Court considering that at the time the matters were filed it lacked the '*status of the High Court.*'

47. The answer to this question is to be found at **Article 165 (5)(b)** which categorically states that this court, the High Court, is not to exercise jurisdiction of the courts established in **Article 162(2)**. Establishment of the Industrial Court is complete once judges to that court are appointed. (See ***Brookside Dairy Limited v Attorney General and the Industrial Court (Supra)*** and ***James Kuria Ndirangu v Dr Willy Mutunga and Others Nairobi Petition No. 50 of 2012 (Unreported)***) This would only leave the Industrial Court as the only other forum for the exercise of the jurisdiction over cases dealing with matters described in **section 12** of the ***Industrial Court Act, 2011***.

48. My reasoning is further fortified by the provisions of **section 22** of the **Sixth Schedule** to the Constitution which provides that, "***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.***" [Emphasis mine]

49. A corresponding court to the High Court, that is the Industrial Court, has now been established to deal with employment and labour matters. It follows that all employment and labour relations matters pending in the High Court shall now be heard by the Industrial Court which is now a court of the status of the High Court. The High Court therefore lacks jurisdiction to deal with matters of employment and labour matters whether filed in the High Court before or after the establishment of the Industrial Court.

Disposition

50. The cause of action in **Petition No. 170 of 2012** arises from an award made by the Industrial Court sitting in the capacity of a "subordinate court." Since the Industrial Court as presently constituted has the status of the High Court, it is the proper forum for dealing with this matter as it arises from an employer-employee relationship notwithstanding that the matter concerns the interpretation of the Constitution. The interpretation of the Constitution is incidental to its core jurisdiction of determining labour and employment matters.

51. Mr Mungai conceded that **HCCC No. 1774 of 2004 (OS)** dealt with labour and employment matters

although there were some issues of interpretation of the Constitution. It is a labour and employment matter properly within the jurisdiction of the Industrial Court.

52. In the circumstances both matters are hereby transferred to the Industrial Court for hearing and disposal.

53. There shall be no order as to costs.

DATED and DELIVERED at NAIROBI this 3rd day of August 2012

D.S. MAJANJA

JUDGE

Mr Ochieng' Oduol with him Ms M. Oduol instructed by Ochieng' Onyango, Kibet and Ohaga Advocates for the petitioner.

Mr E. Bitta, Senior Litigation Counsel, instructed by the State Law Office for the respondent.

Ms Mghanga instructed by Oluoch Olunya and Company Advocates by for the 1st interested party.

Ms Kitonga instructed by Ms Judith Guserwa and Company Advocates for the 2nd Interested party.

Mr K. Mungai instructed by Kinoti and Kibe Advocates for the applicants in HCCC No. 1774 of 2004 (OS).

Mr Orao Obura, Advocate appeared as amicus curiae.