REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

Constitutional Reference 142 of 2011

IN THE MATTER OF ENFORCEMENT OF BILL OF RIGHTS AND OTHER RELEVANT PROVISIONS OF THE CONSTITUTION AND MORE SPECIFICALLY ARTICLES 2, 12, 19, 20, 21, 22,23,28,33,39,41,45,47,50,73,75,232 AND 236

B E T W E E N

PROFESSOR DANIEL N. MUGENDI…….…. PETITIONER

V E R S U S

KENYATTA UNIVERSITY.....1ST RESPONDENT

BENSON I. WAIREGI ……..……..2nd RESPONDENT

ELIUD MATHIU ……..……..…..3RD RESPONDENT

PROFESSOR OLIVE M. MUGENDA…….....…. 4TH RESPONDENT

R U L I N G

Introduction

1. This Petition arose out of a dispute between the Petitioner, **Professor Daniel Mugendi**, and his employer, the 1st Respondent. The Petitioner was, according to the Petition filed in this court, appointed as the Deputy Vice Chancellor ***(Finance Planning and Development***) on 24th May 2006 and confirmed on 8th August 2007. Following an altercation between the Petitioner and the 4th Respondent, the Vice Chancellor of the 1st Respondent, the Petitioner was suspended from duty on the 10th of August 2011.

The Pleadings

2.On 23rd August 2011, the Petitioner filed this Petition for the enforcement of fundamental rights under Articles **2, 12, 19, 20, 21, 22, 23, 28, 33, 39, 41, 45, 47 50, 73, 75 232 and 236 of the Constitution of Kenya.** The Petition was supported by an affidavit sworn by the Petitioner on the 23rd of August 2011. The Petitioner alleged at Paragraph 11 of his Petition that in breach of his employment contract, the 2nd Respondent had sent him on compulsory leave by his letter dated 10th August 2011 and barred him from undertaking *'administrative and academic responsibilities'* and from accessing the University's premises and facilities. At paragraph 10 of his supporting affidavit, the Petitioner averred that his constitutional and statutory rights had been adversely and violently violated.

3.The Respondents' advocates filed a notice of appointment on the 12th of September 2011. A replying affidavit sworn by the 4th Respondent, Prof. Olive Mugenda on the 20th of September 2011 was filed in court on the same day. In the replying affidavit, the Respondents, while setting out the factual position relating to the dispute from their perspective, averred that the dispute before the court was employment/contractual in nature and that the court lacked jurisdiction to hear it.

4.On the 21st of September, 2011, the Petitioner filed an application under certificate of urgency under **Articles 20** and **23** of the Constitution and **Rule 21** of the ***Constitution of Kenya (Supervisory Jurisdiction & Protection of Fundamental Rights and Freedom of the Individual) High Court Practice and Procedure Rules 2006*** seeking, *inter alia,* orders:

2.*That pending the hearing and determination of the Petition, the Petitioner's allowances viz responsibility, entertainment, domestic worker, non-use of car, electricity, water, and telephone partial ante 10.8.2011 be reinstated forthwith.*

3.*That pending the hearing and determination of the Petition, the Petitioner's rights viz access to university premises, medical facilities and correspondence, and freedom to conduct academic activities existing ante 10.8.2011 be reinstated.*

4. *That the Respondents jointly and/or severally be restrained from in any way interfering with the Petitioner's allowances and rights existing ante 10.8.2011 pending the hearing and determination of this petition.*

5. When the matter came up for hearing before Gacheche J, on 21st September, 2011, orders were granted in terms of prayers 2, 3 and 4 set out above with the court noting that though served the Respondents had not responded. It appears that the attention of the court was not drawn to the replying affidavit of Prof. Olive Mugenda which was already on record, an omission which the Respondents' Counsel submitted amounted to material non-disclosure on the part of the Petitioner when he obtained the *ex parte* orders on 21st September 2011. On 26th September 2011, the Court (Musinga J) ordered that the status quo be maintained.

6. On October, 6th 2011, the Petitioner filed an application expressed to be brought under Articles ***20, 21, 23, 47, 50***, and ***165***of the Constitution, Rule 21 of the ***Constitution of Kenya* (*Supervisory Jurisdiction & Protection of Fundamental Rights and Freedom of the Individua*l*) (High Court Practice and Procedure Rules, 2006), Section 5 of the* Judicature Act, Cap 8, *Section 12 of the Kenyatta University Act, Cap 210C*** and the ***Kenyatta University Statutes*** and all enabling Provisions of the law seeking, *inter alia,*

"That Benson I. Wairegi, Eliud Mathiu and Prof. Olive N. Mugenda be committed to civil jail for six (6) months or such other term deemed appropriate for disobeying the Court Order issued on 21.09.11."

7. In response to the application dated 6th October, 2011, the Respondents filed a Notice of Preliminary Objection dated 11th October 2011. The objection was based on 5 grounds:

1. ***That the Honourable Court does not have jurisdiction to entertain the petition lodged by the Petitioner by dint of Article 165(5) (b) of the Constitution of Kenya.***

2. *The application dated 6th October 2011 does not comply with the mandatory requirements of section 5 of the Judicature Act, Chapter 8, of the Laws of Kenya.*

3.***The alleged contemnors namely Benson Wairegi, Eliud Mathiu and Professor Oiire Mugenda had not been served with the order they were alleged to have breached.***

4.*The alleged contemnors have not been served with the application for committal to prison for contempt.*

5.*The application dated 6th October, 2011 is fatally defective, incompetent and ought to be struck out.*

The Respondents prayed for the application and the entire Petition to be dismissed with costs.

Both the Preliminary Objection and the application to commit the 2nd, 3rd and 4th Respondent to civil jail were argued before me on the 18th of October, 2011. The parties had filed written submissions which they highlighted before the court.

The Respondents' Submissions

8.The Respondentsthrough their Counsel **Mr. Nyaoga** and **Mr. Wetangula,** submitted that the dispute before the court as set out in the Petition and supporting affidavit relates to employment and contractual rights, and was not a constitutional issue. They argued that **Article 165(5)(b)** of the Constitution expressly limits the jurisdiction of the High Court with regard to matters reserved for the jurisdiction of courts contemplated under Article **162 (2) (a).**

9. The court contemplated under **Article 162 (2) (a),** relating to industrial and employment matters, they submitted, is already in place. The High Court therefore cannot hear a dispute such as the one before it. They referred to the case of ***Lilian S -vs- Caltex Kenya Limited (1989) KLR* 1** to support their contention that the court should deal with the issue of jurisdiction and once it found it had no jurisdiction should take no further step in the matter. Reference was also made to the case of ***Econet Wireless Kenya Ltd -vs- The Minister for Information and Communication & Another (2005) e KLR*** to support the contention that determining the question of jurisdiction should take precedence over an application for committal to prison for contempt of court. The dispute that the court was being asked to adjudicate upon, they argued, was nothing more than an employment/ contractual issue disguised as a constitutional matter, and they urged the court to strike out the Petition on the authority of ***Alphonse Mwangemi Munga & 10 Others –vs- Africa Safari Club Ltd (2008) e KLR***in which the High Court struck out a Petition similar to the one before this court.

10. On the application to commit the 2nd, 3rd and 4th Respondents to jail for contempt of the orders of the court issued on 21st September 2011, the Respondents made four main arguments. The first was that given the serious nature and consequences of such an application, all the procedural requirements for its institutions must be complied with. Section 5 of the Judicature Act did not provide the procedure to be followed in making such an application and so recourse in Kenya was had to the procedure set out in ***Order 52 of the Supreme Court Practice Rules of England.*** The first requirement was that the leave of the court should be sought before contempt proceedings are brought. Notice of the application was required to be served on the Attorney-General, and the application for leave served on the Respondents. The order and a Penal Notice needed to be personally served on the Respondents. There was nothing on record, they submitted, to show either that an application for leave to lodge contempt proceedings was made and leave granted, or that the application for leave was served on the Respondents. It was not enough for the Petitioner to state that he had made an oral application for leave. The rules required that a formal application should be made. Further, there was nothing to show that the Respondents were personally served with the order for the disobedience of which the Petitioner was asking the court to punish them. The Respondents therefore prayed for the application for contempt to be dismissed and the Petition struck out for want of jurisdiction.

The Petitioner's Submissions

11. On his part, with regard to the Court's jurisdiction, the Petitioner through his Counsel **Mr. Kipkorir**, argued that this court has jurisdiction to hear this Petition. He referred the court to **Article 165(3)** of the Constitution which he submitted gives the High Court jurisdiction to deal with any issue relating to violation of rights. That while there were various courts dealing with various matters like the Industrial Court dealing with employment disputes and the admiralty court with admiralty matters, the jurisdiction of the High Court cuts across all matters. He cited Article 20 of the Constitution as mandating the High Court to interpret and develop the law in such a way as to favour enforcement of fundamental rights. He

also argued that when one acts in violation of constitutional rights, the issue of violation takes precedence over all other issues. He made reference to the case of ***Kibunja -vs- the Attorney General (2002) KLR 6*** where **Chunga, CJ** *(as he then was)* observed in the suit brought under **Section 84** of the repealed constitution that-

"Where a party alleges infringement of constitutional rights, …he has the right to bring an application under the constitution, irrespective of any other mode of action that may be available to him under any other law."

He also relied on the case of ***Lempaa Vincent Suyianka & Others v Kenyatta University & Others Nairobi HCCC No. 1118 of 2003***. It was therefore the Petitioner's submission that the court had jurisdiction to entertain the petition.

12. On the issue of contempt, the Petitioner argued that the Order of 21st September 2011 was served on the Respondents and their Advocates which was the reason why the Respondents applied to court to set aside the orders. Such service was effected on the Respondents through service on their Advocates and authorized officers. The Respondents had knowledge of the order and the Penal Notice which required re-instatement of the Petitioner's rights prior to 10th August 2011. As to whether the court was bound by ***Order 52 of the Rules of the Supreme Court of England*** on the procedure for punishing for contempt, it was the Petitioner's submissions that the court was bound on one level, but not on another. The court was bound to the extent that the spirit behind punishing for contempt was to protect the dignity of the court and its process, but on the other hand, it was not bound as the Constitution required the court not to be bound by technicalities. The issue of personal service, he submitted, was such a technicality. What was important was that the Respondents had knowledge of the order. He cited ***Halsbury's Laws of England Fourth Edition, Volume 9*** on what constitutes civil contempt and ***Hadkinson v Hadkinson (1952) All ER 507, Shah & Another v Shah (1989) KLR 220*** and ***Ramesh Popatlal Shah v National Industrial Credit Bank Nairobi HCCC No 515 of*** **2003 (Unreported)** on the circumstances under which a court will refuse to grant a contemnor audience until contempt of court has been purged. The Petitioner further submitted that the relationship between the Petitioner and the Respondents was governed by the Kenyatta University Act. Issues of discipline of University staff such as the Petitioner were dealt with under **Statute XIV** of the Kenyatta University Statutes and the rights of the Petitioner under the Statutes had been violated. He urged the court to find that the rights of the Petitioner had been violated and to find the Respondents in contempt.

Findings

13. From the pleadings and the submissions made before me, I find that the court is called upon to determine two issues in this matter. The first relates to its jurisdiction to hear and determine the Petition herein, and the second relates to whether or not the 2nd, 3rd and 4th respondents should be punished for contempt of the court order issued by this court on the 21st of September 2011. I have gone carefully through the submissions filed by the parties, the authorities in support and their respective oral submissions before me. I am grateful to the parties for their submissions and the extensive authorities cited in support of their respective positions. My findings on the two issues are as set out hereunder.

Jurisdiction

14. From all the pleadings filed in this matter and in particular the Petition and the affidavit in support as well as the orders sought by the Petitioner in its application of 21st September 2011, it is not in doubt that the dispute between the Petitioner and the Respondents arises out of the Petitioner's employment with the 1st Respondent. The Petitioner states at Paragraph 11 of his Petition that in breach of his employment contract, the 2nd Respondent had sent him on compulsory leave by his letter dated 10th August 2011. At paragraph 10 of his supporting affidavit, the Petitioner avers that his constitutional and statutory rights had been adversely and violently violated.

15. **Article 165 (3)** of the Constitution does, as submitted by the Petitioner, grant the High Court

jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated or threatened. Such jurisdiction, however, is granted subject to Article 162 (2) which provides that-

"Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to (a) employment and labour relations..."

The Constitution has made provision to safeguard fundamental rights and freedoms, but it has also made provision for the adjudication and resolution of disputes arising under different areas of law relating to the rights of citizens. As submitted by the Petitioner's Counsel, there are various courts set up to deal with various matters, among them the industrial court to deal with employment matters.

16. The view that this court takes of the matter is that the resolution of such disputes must take place in the forums and through the processes set out under those laws the enactment of which is provided for in the constitution for dealing with the different classes of rights. Only where such forums and processes deal with disputes in a manner that violates the fundamental rights of a party, such as, for instance, by a failure to observe the rules of natural justice or by treating a party in a discriminatory manner, should recourse be had to a constitutional court for protection of the aggrieved party's fundamental rights.

As the High Court observed in the case of **Alphonse Mwangemi Munga & 10 Others v African Safari Club Limited (2008) e KLR**:

"The Constitution is the Supreme Law of the land but it has to be read together with other laws made by Parliament and should not be construed as to be disruptive of other laws in the administration of justice…"

The court in this case went on to emphasise that:-

"…..parties should make use of the normal procedures under the various laws to pursue their remedies instead of all of them moving to the constitutional court and making constitutional issues of what is not."

16. In my view, the case before this court is on all fours with the **Alphonse Mwangemi Munga** case. The Petitioner's claim against the Respondents is based on his contract of employment with the 1st Respondent. The Constitution has by Article 162 (2) (a) expressly removed jurisdiction to hear disputes arising from industrial/employment relations from the High Court and placed such jurisdiction with the Industrial Court. There is already a functioning industrial court. In addition, there are internal procedures under the Kenyatta University Act for the resolution of disputes between parties in the position of the Petitioner and the 1st Respondent. From the pleadings before the court, there is nothing to suggest that the Petitioner's constitutional rights were violated in the process of adjudication of his employment/contractual rights in the forum and through the process provided for in the relevant laws. If anything, from the evidence before the court, the Petitioner chose not to avail himself of these processes by declining to appear before the Special Committee of the General Purposes Committee of the 1st Respondent when given an opportunity to do so on two occasions and electing instead to file this Petition. Had there been evidence of violation of the Petitioner's constitutional rights, the court would have been properly able to address itself to those violations and make appropriate orders. What has been placed before this court, however, shows only alleged breaches of employment/contractual rights.

17. Counsel for the Petitioner submitted that Article 20 of the Constitution mandates this court to interpret the law in a way that favours the enforcement of fundamental rights. I would agree with that in principle. However, enforcement of fundamental rights would be greatly compromised if the constitutional court were to take up all matters, even those for which appropriate forums and procedures have been provided by the constitution or legislation. Indeed, an interpretation of the law and the Bill of Rights that allows every violation of the law to be presented as a constitutional issue would lead to a violation of those very rights that the constitution seeks to protect. It would become virtually impossible to access justice due to the number of petitions that would be presented before the constitutional court as raising constitutional

issues while in reality they relate to violation or perceived violations of rights for the adjudication of which other forums and procedures exist.

For the above reasons, I find that this court has no jurisdiction to hear and determine the present Petition.

Contempt of Court

18. I now turn to consider whether, had the Court jurisdiction to hear this matter, the Respondents were in contempt of the order of the court made on the 21st of September 2011.

From the documents filed in this court and the affidavits of service filed, it is clear that the requirements of Order 52 of the Rules of the Supreme Court were not complied with by the Petitioner. No leave was sought by the Petitioner to file the application to commit the Respondents to civil jail for contempt; and no notice was served on the Attorney General. The application for committal was not served on the Respondents. With regard to service of the order, the affidavits of service show that the order was served on the 4th Respondent's secretary. There is nothing to show that an attempt was made to effect personal service on any of the Respondents. It was open to the Petitioner, should attempts at personal service fail, to apply to court for substituted service by advertisement. This was not done.

19. Given the very serious nature of contempt proceedings and the consequences to alleged contemnors - in the words of Lord Denning, M.R in **Re Bramblevale Ltd (1969 3 All ER 1062**

"A contempt of court is an offence of a criminal character. A man may be sent to prison for it."

the requirement for personal service must be complied with. As the Court of Appeal observed in **Nyamodi Ochieng-Nyamongo & *Another v Kenya Posts and Telecommunications Corporation Civil Application No. NAI 264 of 1993 (NAI114/93 UR*),** the law on thequestion of service of orders stresses the necessity of personal service. The Court of Appeal cited **Halsbury's Laws of England 94th Ed) Vol. 9 on page 37 para 61** where it is stated as follows:-

"Necessity of personal service: as a general rule, no order of court requiring a person to do or abstain from doing any act may be enforced unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question."

In the absence of personal service on the Respondents, even had the other procedural requirements for instituting an application for contempt been complied with, it would not be possible to punish the Respondents for contempt. I therefore dismiss the application for committal of the Respondents to civil jail for contempt dated 4th October 2011 and filed in this Court on 6th October 2011.

In light of my earlier finding on the question of jurisdiction, the entire Petition is hereby struck out.

I have also addressed my mind to the issue of costs in this matter. It was clear from the outset that this is a matter arising out of the Petitioner's employment/contractual relations with his employer, the 1st Respondent. It is a matter that ought to have been dealt with through the 1st Respondent's dispute resolution mechanism and failing that, through the court charged with resolution of employment disputes. It was a purely private law dispute in which no violations of fundamental rights were discernible and no public interest issues involved. In the circumstances, the Respondents shall have the costs of the application and the Petition.

Dated and Delivered at Nairobi this 4th day of November, 2011

MUMBI NGUGI
JUDGE.