



Republic v Commissioner for Labour & another; Masoud (Exparte Applicant) (Judicial Review Application E008 of 2024) [2025] KEHC 7325 (KLR) (16 May 2025) (Judgment)

Neutral citation: [2025] KEHC 7325 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
JUDICIAL REVIEW APPLICATION E008 OF 2024**

OA SEWE, J

MAY 16, 2025

BETWEEN

REPUBLIC APPLICANT

AND

COMMISSIONER FOR LABOUR 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

AND

MUNIR ABUBAKAR MASOUD EXPARTE APPLICANT

JUDGMENT

1. The ex parte applicant, Munir Abubakar Masoud, filed this suit by way of the Notice of Motion dated 11th April 2024 seeking that:
 1. The Court be pleased to issue an order of Mandamus, directed at the labour officers in Mombasa to investigate the Kenya Revenue Authority (KRA) and if found to be in breach of Sections 10(3)(e) and 15 of the Employment Act, then to prosecute them as by law provided.
 2. Costs of the and incidental to the application be provided for.
2. The application was filed under Sections 8 and 9 of the Law Reform Act, Chapter 26 of the Laws of Kenya, Order 53 Rules 1, 2, 3 and 4 of the Civil Procedure Rules, 2010, and all other enabling provisions of the law. It was premised on the grounds that the Kenya Revenue Authority (KRA) has ever since its creation been in breach of Sections 10(3)(e), 11 and 15 of the Employment Act, 2007, as read together with Paragraph 21 of the Second Schedule of the Employment (General) Rules, 2014; and therefore that the employees of KRA have suffered and continue to suffer irreparable loss and damage for decades now because of breaches by KRA.



3. The applicant further contended that, despite writing a letter dated 26th December 2023 to the Mombasa Labour Office seeking that it proceeds with investigation into the matter as directed by the Employment and Labour Relations Court, the Commissioner for Labour, the 1st respondent herein, has refused, ignored or failed to take satisfactory action or any action at all. Therefore, it was the contention of the applicant that, unless this Court intervenes by way of an order of Mandamus, the situation will not change and KRA employees will continue to be oppressed.
4. The applicant further stated that the continued refusal and/or failure by the labour officers to take action on the complaint, which is their legitimate statutory duty, amounts to a dereliction of duty. He accordingly prayed that an order of Mandamus be granted to compel the labour officers to investigate the complaints against KRA; and if found that KRA has breached the law then the labour officers to proceed and prosecute KRA in accordance with the law. He also prayed for costs of the application.
5. Alongside his application for Mandamus, the applicant filed a Chamber Summons application of even date, seeking for leave to apply for an order of Mandamus. The said application was accompanied by a Statutory Statement and a Verifying Affidavit sworn by the applicant, to which he attached the documents in support of his averments.
6. When the matter first came up before the Court on 13th May 2024 for directions, the Court brought the issue of jurisdiction, which was apparent from the averments made by the applicant, to the attention of the parties. The applicant then confessed that he was a layman but believed that this Court has the requisite jurisdiction to hear his application and that the Employment and Labour Relations Court had done its part and delivered a judgment which the Commissioner for Labour had refused or neglected to implement. He was accordingly granted time to reconsider the matter and seek legal advice, if need be, with a view of withdrawing the suit.
7. Thereafter, the applicant physically filed a Notice of Withdrawal dated 14th May 2024 but was advised to file the same through the Court's e-filing system. Instead, he opted to withdraw that Notice for Withdrawal and insisted on proceeding with his application. Counsel for the respondent had no objection to the applicant's request to withdraw his Notice of Withdrawal. Therefore, the applicant's Notice of Withdrawal was accordingly marked as withdrawn on 23rd May 2024. By that time, the respondent had already filed a Notice of Preliminary Objection on the ground of jurisdiction.
8. Having withdrawn his Notice of Withdrawal, the stage was set for the disposal of the respondent's Notice of Preliminary Objection. The parties made their oral submissions on 12th June 2024. Counsel for the respondent submitted that, this being a matter falling under Article 162 of *the Constitution*, this Court has no jurisdiction to entertain it. She relied on the case of *Mukisa Biscuit Manufacturing Company Ltd v West End Distributors Ltd* [1969] 1 EA 696 as well as the case of *Macharia & another v Kenya Commercial Bank Limited & 2 others* (Application 2 of 2011) [2012] KESC 8 (KLR) (23 October 2012) (Ruling), to support her submissions. According to the respondent, the applicant ought to have gone back to the Employment and Labour Relations Court for enforcement of its Judgment dated 12th October 2023. Accordingly, counsel prayed that the respondents' Preliminary Objection be upheld and orders granted accordingly.
9. The applicant reiterated his stance that this Court has the jurisdiction to handle this suit. He emphasized the fact that he approached the Court under Order 53 of the Civil Procedure Rules; and that the High Court is the court with jurisdiction for purposes of Order 53. In his submission the High Court has powers under different procedures such as constitutional petitions, judicial review, admiralty and civil procedure. He relied on *Abyssina Steel Ltd v Douglas Momanyi Ondara, Kisumu ELRCC No. 1 of 2024* and *Karisa Chengo & 2 others v Republic* [2015] eKLR, to demonstrate that



the jurisdiction of the High Court is distinct from that of the ELRC. In his view, an application for judicial review falls within the exclusive jurisdiction of the High Court and therefore urged the Court to find that he filed the instant suit before the correct forum.

10. [10] The applicant also made reference to Part III of the *Fair Administrative Action Act* and submitted that, whereas the ELRC has the powers to handle matters including judicial review, they are confined to cases of a contractual or tortious nature. He stated that he could not go back to the ELRC for enforcement of the judgment dated 12th October 2023. In the premises, the applicant prayed for the dismissal of the Preliminary Objection and for the orders sought by him to be granted as prayed.

11. What constitutes a preliminary objection was discussed in the case of *Mukisa Biscuits Manufacturing Ltd v West End Distributors* [1969] EA 696. The court held:

“...a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration”.

12. Sir Charles Newbold, P. added:

“a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.

13. The Supreme Court also pronounced itself in this regard in *Independent Electoral & Boundaries Commission v Cheperenger & 2 others* (Civil Application 36 of 2014) [2015] KESC 2 (KLR) (15 December 2015) (Ruling), and stated:

“...The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits...”

14. Accordingly, since the respondents’ Preliminary Objection was taken on the point of jurisdiction, it was well taken in the circumstances. It is now trite law that jurisdiction is everything and without it, a court has no power to entertain or determine a matter. In *The Owners of Motor vessel Lillian ‘S’ vs Caltex Kenya Limited* [1989] KLR 1 the Court held:

“Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of Law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”



15. Moreover, in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR, the Supreme Court pointed out that:

“(68) A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, *In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011*. Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law...”

16. The jurisdiction of the High Court is provided for in Article 165(3) of *the Constitution* thus:

- (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.



17. Article 165(5) of *the Constitution* is however explicit that:
- (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).
18. Article 162(2) and (3) of *the Constitution* provides for courts of equal status to the High Court. It states:
- (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).
19. Pursuant to Articles 162(2) and 165(5) of *the Constitution*, Section 12 of the Employment and *Labour Relations Act* stipulates that:
- “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...”
20. [20] As has been pointed out herein above, the applicant approached the ELRC at Mombasa in Cause No. E088 of 2022. He impleaded the Kenya Revenue Authority as the 1st respondent along with two others. His basic cause for action was that the 1st respondent had abused its power and authority by denying its workers the constitutional right to form a trade union to champion their labour rights. The ELRC heard the matter and made its determination on 12th October 2023. Whereas the applicant’s claim was dismissed, the court noted that:
- “...The practice has been for a complaint to be lodged with the Labour Officer responsible for the area nearest to the employer alleged to have committed an employment and labour relations offence. Based on the report, the labour officer is allowed to enter the shop floor and to conduct investigations leading to presentation in court to allow for prosecution and to give the employer and responsible officer(s) the opportunity to make their representations. The mandate to prosecute under the Act or LRA is hence specifically removed from this court. Legal Notice No. 6024 of 10 June 2018 is still in force as held in *Willington Wanzala Okwalo v Laxmanbhai Construction Ltd* [2015] eKLR. Penal sanction under Section 16(4) of the Act are matters to be enforced by the labour officer...”
21. It was on the basis of the foregoing that the applicant hinged his application for mandamus, contending that the 1st respondent herein has failed to act in accordance with the orders of the ELRC. It is notable that the claim was otherwise dismissed.
22. Judicial Review is now a constitutional remedy and therefore, for enforcement of the decision of the ELRC, by way of Mandamus or otherwise, the applicant ought to have gone back to the ELRC. In *Prof. Daniel N. Mugendi v Kenyatta University & 3 Others* [2013] eKLR, it was held that the



Employment and Labour Relations Court has the jurisdiction to entertain constitutional matters as well as matter ancillary thereto. In my considered view such matters include applications for judicial review, especially in a case such as this where the applicant seeks to enforce the decision of the Employment and Labour Relations Court. The Court of Appeal expressed the following viewpoint in the above-mentioned case:

“...we venture to put forth the position that as we have concluded that the Industrial Court can determine industrial and labour relations matters alongside claims of fundamental rights ancillary and incidental to those matters, the same should go for the Environment & Land Court, when dealing with disputes involving environment and land with any claims of breaches of fundamental rights associated with the two subjects.”

23. Similarly, in *Okiya Omtatah v Joseph Kinyua & Another* [2018] eKLR, in which the issue arose as to whether that court had the jurisdiction to entertain a dispute involving the interpretation of *the Constitution*, and it was held that:

“...The preamble to the ELRC Act ...is wide enough and cannot by any manner of interpretation be understood to confine the jurisdiction of the court to only situations where there is in existence an employer-employee relationship. That would be too narrow interpretation.”

24. In the result, I hereby uphold the Respondents' Preliminary Objection on jurisdiction and find that this is a matter that ought to have been filed before the Employment and Labour Relations Court; and therefore that this Court has no jurisdiction to entertain it.

25. It is now trite that a suit filed in a court without jurisdiction cannot be transferred to another court. The Supreme Court of Kenya restated the position in *Albert Chaurembo Mumba & 7 others* (sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v *Maurice Munyao & 148 others* (suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme) [2019] eKLR, thus:

“(153) ...the purposive reading and interpretation of Article 162 together with Article 165(5) of *the Constitution* leaves no doubt that the original and appellate jurisdiction over disputes related to Employment and Labour relations was transferred from the High Court to the Employment and Labour Relations Court. Prima facie, that meant that, any dispute subject to any other statutory or constitutional limitations emanating from the disputes contemplated under Article 162(2) supra, must be determined by the Employment and Labour Relations Court. This is what may have informed the consent by parties through respective counsel to transfer the matter from the High Court to the Employment and Labour Relations Court.

(154) However, as it was well elucidated in the case of *Kagenyi v Musiramo & Another* (1968) EALR 43, an order for transfer of a suit from one court to another cannot be made unless the suit has been brought, in the first instance, to a court which has jurisdiction to try it. It is therefore irrelevant as parties cannot consent to confer jurisdiction to a Court/tribunal where it is not provided by law.”



26. Likewise, in Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service [2019] eKLR, the Court of Appeal held:

“Decided cases on this issue are legion and we cannot cite all of them...The Court succinctly settled this point in the following words:-

“When a suit has been filed in a court without jurisdiction, it is a nullity. Many cases have established that; the most famous being Kagenyi v. Musirambo (1968) EA 43. The same would apply to pecuniary jurisdiction in a claim for special damages where the liquidated sum claimed exceeds the court’s pecuniary jurisdiction.

We hold that jurisdiction cannot be conferred at the time of delivery of judgment. Jurisdiction does not operate retroactively. Jurisdiction must exist at the time of filing suit or latest at the commencement of hearing.

20. It is clear from the foregoing that the claim by the respondent was filed before a court devoid of jurisdiction. The suit was a nullity ab initio and was not transferable to another court; jurisdiction cannot be conferred by consent and ultimately, all orders emanating from that suit are null and void. CIVIL APPEAL NO. 6 OF 2018 PHOENIX EAST AFRICA ASSURANCE CO.LTD v. S.M. THIGA T/A NEWSPAPER SERVICES is therefore a nullity as it was based on a nullity.”

27. In view of the above, the respondents’ Preliminary Objection dated 15th May 2024 is hereby upheld with the result that the applicant’s Notice of Motion dated 11th April 2024 is hereby struck out for want of jurisdiction.

28. Each party to bear their own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 16TH DAY OF MAY 2025

OLGA SEWE

JUDGE

