



Kale v Teachers Service Commission & 2 others; Attorney General & 2 others (Interested Parties) (Judicial Review 004 of 2023) [2024] KEHC 8325 (KLR) (8 July 2024) (Ruling)

Neutral citation: [2024] KEHC 8325 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
JUDICIAL REVIEW 004 OF 2023**

**RK LIMO, J
JULY 8, 2024**

BETWEEN

KYAMA TITUS KALE APPLICANT

AND

TEACHERS SERVICE COMMISSION 1ST RESPONDENT

THE SECRETARY, TEACHERS SERVICE COMMISSION 2ND RESPONDENT

SALARIES AND REMUNERATION COMMISSION 3RD RESPONDENT

AND

AND THE HON. ATTORNEY GENERAL INTERESTED PARTY

KENYA UNION OF POST-PRIMARY EDUCATION TEACHERS INTERESTED PARTY

KENYA NATIONAL HUMAN RIGHTS AND EQUALITY COMMISSION INTERESTED PARTY

RULING

1. This ruling is in respect to a Preliminary Objection dated 24th October 2024 the Applicant herein had moved this court to challenge the decision by his employer the Teachers Service Commission (1st Respondent) and its secretary (2nd Respondent) to dismiss him from service and seeks to quash the dismissal letter dated 25th July 2022 and to be paid salary arrears amounting to Kshs. 480,635/= general damages for the loss occasioned.
2. The Applicant cited the following grounds as a basis for coming to court namely:
 - i. That the 1st Respondent acted in bad faith and against the provisions of Section 4 of the Fair Administration Action Act in upholding the appeal in favour of the Respondent (Teachers



Service Commission) despite the fact that both forums lacked the requisite jurisdiction to hear the matter.

- ii. That the 1st Respondent in upholding the commission's decision failed to provide the applicant with information, materials and evidence to be relied upon in making its decision.
 - iii. That the 1st Respondent in upholding the Respondent decision failed to prove the case against the applicant to the required standard of criminal liability.
 - iv. That the 1st Respondent failed to inform the applicant of his right to legal representation occasioning him an unfair trial.
 - v. That the 2nd Intended Respondent without any justifiable reason refused and or failed to remit salaries to the applicant hence infringing on his economic right.
3. The facts set out in the statutory statement are that the applicant was working as a head teacher at Kilimani Primary School at Kwa Vonza when on 24th January 2022, he received a letter he received a letter from the 1st Respondent informing him of his interdiction on fraud allegations levelled against him. That the applicant was thereafter invited for a disciplinary hearing which he did on 15th July 2022 and he received the disciplinary panel's decision terminating his services on 25th July 2022. That the applicant then appealed the dismissal vide letter dated 19th August 2022, he attended the appeal proceedings on 8th November 2022 and vide letter 21st November 2022, the applicant was informed that the decision to dismiss him from employment had been upheld. The applicant's case is that he was not accorded a fair hearing as he was allegedly not issued with information, materials and evidence that was to be relied upon during the hearing, he also complains that he was allegedly not informed of his right to legal representation.
4. In his written submissions the Applicant contends that the action complained of is an administrative process and a decision reached by a body exercising a quasi-judicial role and that under Article 165 of *the Constitution*, this court has jurisdiction to supervise administrative actions by TSC. He submits that he ceased being an employee upon dismissal on 15th July 2022 and that upon dismissal the issues raised are beyond an employment dispute.
5. The 1st and 2nd Respondent's preliminary objection to these proceedings are premised on the following grounds namely:
- i. That this Honourable Court has no jurisdiction to hear, entertain and/or determine the application dated 10/8/2023 as it is a dispute emanating from an employer-employee relationship which dispute falls within the realm of Section 12 of the *Employment and Labour Relations Court Act*, Cap 234 B of the Laws of Kenya as read with Article 162 (2) of *the constitution* of Kenya 2010.
 - ii. That the crux of the application relates to the alleged unlawful dismissal of the applicant and therefore the court with original jurisdiction to hear the same is the Employment and Labour Relations Court and not this Honourable Court.
 - iii. That the Judicial Review application filed herein is incompetent, fatally defective, misplaced and has no reasonable cause(s) of action, ground(s) or proof to warrant the grant of the orders sought and the same should be struck out.
 - iv. That consequently this Judicial Review application is an abuse of this Honourable Court process and should be struck out with costs to the 1st and 2nd Respondents.



6. This court has considered the Preliminary Objection raised and the response made by the Applicant. The Objection raised is that the matter placed before this court is purely on employment dispute which ought to be canvassed at Employment and Labour Relations Court (ELRC).
7. Jurisdiction is a mandate or power donated either by the Constitution or any written law to any organ or authority to exercise it within specified limits.
8. Jurisdiction is everything to a court and is it either donated by the Constitution or any written law. This Court draws its jurisdiction from the provisions of Article 165(3) of the Constitution which provides as follows:

- “(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.”

9. The Court of Appeal in Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1 rendered itself on the question of jurisdiction as follows:

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to



the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given”

10. The Jurisdiction to deal with labour related matters is missing from the above provisions. Limitations of the jurisdiction of this court on fact is stipulated under Article 165(5) which states:

“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).”

11. The *Employment and Labour Relations Court* draws its jurisdiction from Article 162(2) which states

“162.

- (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).”

12. ELRC is a specialized Court mandated to handle labour disputes and other issues related to labour and employer/employee relationship.

13. The question jurisdiction of the specialized Courts has been determined by the Court of Appeal and the Supreme Court in case of *Karisa Chengo & 2 others v Republic* [2015] eKLR where the limits of jurisdiction of this court was outlined. The court observed as follows:

“It was therefore clear what jurisdiction the two courts contemplated under Article 162(2) would exercise. The jurisdiction of the High Court as established under Article 165 of *the Constitution* is limited in two fronts. First, it shall not exercise jurisdiction on matters reserved for the Supreme Court and matters falling within the jurisdiction of the two courts contemplated in Article 162(2). It is therefore clear that the High Court no longer had original and unlimited jurisdiction in all matters as it used to have under the repealed Constitution. It cannot deal with matters set out under section 12 of the *ELRC Act* and section 13 of the *ELRC Act*. Conversely, the courts contemplated in Article 162(2) of *the Constitution* cannot deal with matters reserved for the High Court. Of fundamental importance in this appeal is Article 165(6) of *the Constitution* which empowers the High Court to supervise subordinate courts and any other person exercising judicial or quasi-judicial function but not over a superior court including the ELRC and ----



The Labour Court has exclusive jurisdiction in respect of all matters stated to be determined by the court under the Act. The question as to whether the High Court had jurisdiction in matters reserved for the Labour Court has arisen severally in South Africa. For instance in 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 Court held:

“The 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.”

We have deliberately discussed the law in South Africa to demonstrate that like in Kenya the ELRC under Article 162(2) was intended to be autonomous, distinct and independent of the High Court and it is for that reason that it was bestowed with the status of the High Court. Indeed, it can be gathered from the Final Report of the Committee of Experts on Constitutional Review process that there was a need to address the competing jurisdictional issues that historically existed between the High Court and the ELRC under the repealed *Constitution*. It was the intention of the drafters in our view to give the ELRC and ELC independence from the High Court. This independence is essential to the role of the Courts as specialized courts charged with the responsibility of developing coherent and evolving labour relations, environment and land jurisprudence.”

14. The facts brought out by the applicant in his case clearly touches on his employment with the Respondent and going by the above the provisions the issue is within the armpit of ELRC.
15. The applicant’s contention is that his complaint is based on administrative action taken by the Respondents which action led to this termination from employment. The dispute is purely an employment dispute because the dispute at hand arose from an employer-employee relationship which was admitted by the applicant and the jurisdiction of the labour court extends to complaint’s complaint which is the process leading to termination of his employment. The jurisdiction to entertain the dispute is clearly set out under Section 12 (1) (a) of the *Employment and Labour Relations Court Act* which provides as follows;
 - “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;”
16. It is apparent from my reading of Article 165 (5) that this court’s jurisdiction to entertain the issues at hand in this case is ousted. The High Court is clearly precluded from exercising or assuming jurisdiction in matters reserved for court of equal status as contemplated under Article 162(2).



In the premises, this court finds that the Preliminary Objection raised by the Respondents is merited and is sustained. The end result is that this Judicial Review proceedings are hereby struck out as they are filed before the wrong court. I shall however, make no order as to costs.

DATED, SIGNED AND DELIVERED AT KITUI THIS 8TH DAY OF JULY, 2024

HON. JUSTICE R. K. LIMO

JUDGE

