



**Lukorito v Attorney General & 2 others (Petition E298 of 2021) [2023] KEHC 22353 (KLR)
(Constitutional and Human Rights) (22 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22353 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION E298 OF 2021
LN MUGAMBI, J
SEPTEMBER 22, 2023**

BETWEEN

PHILIP LUKORITO PETITIONER

AND

THE HON ATTORNEY GENERAL 1ST RESPONDENT

KENYA DEFENCE FORCES 2ND RESPONDENT

THE NATIONAL TREASURY 3RD RESPONDENT

RULING

1. This is a ruling on a preliminary objection dated 11th April, 2023. It was filed by E Makori Principal State Counsel for and on behalf of the 1st and the 3rd respondents herein.
2. The Notice of preliminary objection is based on the following grounds: -
 - i. That this honourable court has no jurisdiction to hear, entertain and/or determine the matters as the remedies sought herein are the preserve of the Employment and Labour Relations Court.
 - ii. That this suit offends Article 162(2) of the Constitution of Kenya 2010 and Section 12(1) (a).
 - iii. Further and other grounds to be canvassed at the hearing hereof.
3. The preliminary objection was canvassed by way of written submission.
4. In support of the preliminary objection, the 1st and 3rd respondents filed written submissions dated 17th May, 2023.
5. The 2nd respondents' submissions are dated 21st June, 2023. The submissions by the petitioner in opposition to the preliminary objection are dated 29th May, 2023.



6. Miss Edna Makori commenced her submissions by training her eyes on the prayers in the petition. She singled out the prayer that seeks to have the *Defence Forces Act* of 2012 repealed and reinstatement of the Armed Forces Act, Cap 199. M/s Makori contended that this would be going against the doctrine of separation of powers as this Court has no capacity to dominate and perform the role of Parliament which has the mandate to make laws. She also faulted the petitioner for seeking such orders yet he had not made the legislature a party yet it has the powers to make or repeal laws.
7. She submitted it is the role of Parliament as provided for under Article 94(5) of the *Constitution* which states thus: -

“No person or body, other than parliament has the power to make provision having the force of law in Kenya except under authority conferred by this constitution or by legislation.
8. On jurisdiction, M/s Makori argued that this court lacks jurisdiction to determine this matter by dint of Article 162 (2) (a) of the *Constitution* . She submitted that jurisdiction confers the court with authority to hear and determine a dispute and in absence of which the proceedings are a nullity. She quoted Nyarangi, JA in the celebrated case of *Owners of Motor Vessel ‘Lilian S’ v Caltex Oil (Kenya) Limited* (1989) KLR where the judge 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...”
9. She also relied on the Court of Appeal case of *Jamal Salim v Yusuf Abdulabi Abdi & another*, Civil Appeal No. 103 of 2016 (2018) eKLR, where it was held that jurisdiction can neither be acquiesced nor granted by consent of the parties since it either exists or does not.
10. Further, the case of *Adero & another v Ulinzi Sacco Society Ltd* (2002) IKLR 577, where it was held that jurisdiction can be raised at any stage, even on appeal.
11. Counsel for 1st and 3rd respondents argued that Article 162(2) of the *Constitution* creates the Employment and Labour Relations Court which was operationalized by the *Employment and Labour Relations Act* No. 20 of 2011 as a specialized court to hear and determine disputes relating to or arising out of employment between employer and employee. This includes disputes relating to illegal and wrongful dismissal of an employee.
12. The 2nd respondent filed its submissions through L.A. Goro, a special State Counsel. The 2nd Respondent supported the Preliminary objection. Counsel for the 2nd respondent contended that the amended petition dated 30th May, 2022 is founded on employment between the petitioner and the 2nd respondent (the Kenya Defence Forces).
13. Counsel contended that in as much as Section 3 of the *Employment Act* removes KDF employees and armed forces reserves from the application of *Employment Act*, that does not mean matters relating to employment in the military cannot be filed in the Employment and Labour Relations Court.
14. The 2nd respondent relied on the case of *Paul K Langat v. Kenya Defence Forces 9th Battalion & Another* (2021) eKLR, where the Judge reasoned thus: -

“...Whereas I have no doubt about the jurisdiction of the court over the dispute between the parties, I am however, clear in my mind that the provisions of *Employment Act* do not apply to KDF pursuant to section 3(2) (a) of the *Act*. It follows that an officer of KDF can



only invoke the court's jurisdiction under the KDF Act, Constitution, Fair Administrative Actions Act or any other law but not under the Employment Act...”

15. The 2nd respondent also relied on the case of Charles Onyinge Abuso v Kenya Ports Authority (2019) eKLR, where it was held inter alia that the High Court jurisdiction is ousted in matters falling within the jurisdiction of courts contemplated under Article 162 (2).
16. Citing the case of Registrar of Trade Unions v Nicky Njuguna & 4 Others (2017) eKLR; the 2nd respondent submitted that even though there were other alleged constitutional violations such as being wrongfully and illegally detained; it was held under Article 20 of the constitution, all courts have the power to deal with constitutional matters that arise in regard to disputes they are exclusively empowered to adjudicate.
17. The petitioner, through his advocates, Akolo Wanyanga and Co. Advocates opposed the preliminary objection. The petitioner also relied on the provisions of Section 3 (2) (a) of the Employment Act which exempts members of armed forces and the reserves as defined in the Armed Forces Act from its application.
18. The petitioner thus contended that by dint of Section 3 (2) (a) of Employment Act; the ELRC Court can only adjudicate over matters of Employment concerning civilian employees but not the military personnel.
19. Counsel further argued that Section 12 (1) (a) of the Employment and Labour Relations Court does not mention military members hence the court can only handle employment disputes in regard to the civilians.
20. The petitioner submitted that there were other reliefs that had nothing to do with the employment dispute between the petitioner and the 2nd respondents. Those matters such as being detained and held in solitary confinement for longer period than necessary, illegal summary trial and sentence are some of the other issues that did not directly involve employment which should thus be heard and determined by this court.
21. The petitioner thus urged this court to proceed and find if it has jurisdiction to hear and determine the dispute.

Analysis and Determination

22. The main issue for determination in this ruling is whether or not this court has jurisdiction to handle this matter in view of Article 162 (2) of the Constitution .
23. The preliminary objection raised by the 1st and 3rd respondent and supported by the 2nd respondent is to the effect that the substratum of this matter is an employment dispute and whatever else the petitioner seeks sprouts from the said matter. The respondents thus argued that it is the ELRC Court which has jurisdiction to hear this matter.
24. On the contrary, the petitioner disagreed and argued that the Employment Act, Section 3(a) excludes matters relating to employment and military personnel from the employment Act and hence ELRC has no jurisdiction over the matter before the court. Furthermore, it is the petitioner's contention that besides the employment question, this petition also raises other constitutional violations such as illegal and solitary confinement and illegal summary trial which are matters within the competence of this court to determine.



25. Jurisdiction describes the authority of a court to adjudicate over a matter. The Court of Appeal in the Civil Case Number 244 of 2010 – *Phoenix of East Assurance Company & Twiga T/A Newspaper Service* (2019) eKLR; explained what jurisdiction entails as follows:

“...Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a compliant one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction to itself...”

26. In the Supreme Court Case of *Albert Chaurembo Mumba & 7 others v Maurice Munyao & 148 Others* (2018) eKLR, the court elucidated on Articles 162 and 165 of the *Constitution* held as follows: -

“...the purposeful reading of 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 Courts, prima facie that meant that any dispute subject to any other statutory and constitutional limitations emanating from dispute contemplated under Article 162(2) must be determined by Labour and Employment Relations Court...”

27. Under Article 165(5) of the *Constitution* , the jurisdiction of the High Court in Labour and Employment matters is explicitly ousted. It states:

“SUBPARA 165 (5) (b)-

the High court shall not have jurisdiction in respect of matters: -

a.

b) Falling within the jurisdiction contemplated in Article 162 (2)”

28. Section 12 (1) of the *Labour Relations and Employment Court* is more specific in defining the jurisdiction conferred on the ELRC court. It provides inter alia:

“(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;”

29. In the instant case, although the petitioner alleges that his other constitutional rights were violated by being placed in solitary confinement and being subjected to an illegal trial that led to his summary dismissal; it is apparent that the main reason behind this petition is to seek redress for the loss of his employment through an unfair process aggravated by other surrounding circumstances that he underwent prior to his termination. This is evidenced by the fact that most of the reliefs sought are employment related as is discernible in prayers iv, v & vi which are as follows:

iv. An order directed at the 3rd respondent to assess the petitioner’s pensions, salary, benefits of his salaries, allowances and promotions.



- v. An order that the petitioner was wrongly dismissed and that the petitioner’s salary, allowances, pension and promotions be calculated as from the time he was wrongly dismissed.
- vi. An order that the petitioner be transferred to civilian service and be discharged honorably with the rank of Sergeant.
30. The petitioner’s argument that the *Employment Act* ousts the jurisdiction of the ELRC Court is not tenable. The *employment Act* neither creates the ELRC Court nor does it confer it with jurisdiction. The Jurisdiction of ELRC is conferred by Section 12 (1) of ELRC Court which jurisdiction among others related to:-
- “disputes relating to or arising out of employer and employee”.
31. Although the Petitioner argues that the matter is not just an employment dispute but one that touches on other constitutional violations, the main issue is obviously employment and Employment and Labour Relations Court mandate applies, the other constitutional issues raised are incidentals that attach to the main grievance for which I believe the ELRC Court mandate would extend to. The unfair termination process is the central theme and the rest of the alleged violations are offshoots traceable to this process.
32. Applying the predominant issue principle in deciding the jurisdictional question between the High Court and Special Courts of equal status as applied by Munyao J in *Lydia Nyambura Mbugua v. Diamond Trust Bank Kenya & Anor* (2018) eKLR it is my finding that the jurisdiction over this matter appropriately resides in the ELRC Court.
33. Before I conclude, it is also important that I address my mind to one of the issues submitted upon by Ms. Makori, that is a prayer in the petition calling upon this court to repeal the *Kenya Defence Forces Act* and order the reinstatement of the Armed Forces Act Cap 199.
34. I concur with the submission by Miss E. Makori that to do so would be to usurp the powers of the legislature through judicial tyranny. It would be an affront to the constitutional principle of separation of powers. Under Article 94 (1) of the *Constitution*, the legislative authority of the Republic is derived from the people and at national level, is vested and exercised by Parliament. At Article 94 (5), No person or body, other than Parliament, has the power to make any provision having the force of law in Kenya except under authority conferred by this Constitution or by legislation. This Court cannot repeal an Act of Parliament and substitute it with another one. That is a constitutional mandate of Parliament.
35. The upshot of the foregoing is that this court is satisfied that it has no jurisdiction to hear and determine this petition. It is thus struck out with costs to the Respondents.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF SEPTEMBER, 2023.

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L N MUGAMBI

JUDGE

