



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MAKUENI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 12 OF 2017**

**IN THE MATTER OF ARTICLES 1, 2, 3, 10, 22, 23, 27, 28, 40, 41, 47, 48, 50, 165, 258, 259 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE COUNTY GOVERNMENTS ACT**

**AND**

**IN THE MATTER OF THE SALARIES AND REMUNERATION COMMISSION ACT**

**AND**

**IN THE MATTER OF THE SALARIES AND REMUNERATION COMMISSION REGULATIONS**

**AND**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT**

**BETWEEN**

1. JACKSON NGOVI
2. FRANCIS MUTUKU
3. BERNARD MUSAU
4. BENSLEY MATHUKU .....PETITIONERS
5. TIMOTHY MANENO
6. SHARACK MWAU
7. GIDEON MWANGO

**VERSUS**

**COUNTY ASSEMBLY OF MAKUENI.....RESPONDENT**

**RULING**

1. The petitioners filed the instant petition on 27<sup>th</sup> December, 2016.
2. The petition was canvassed vide submissions. However in light of my reasoning below, I deemed it unnecessary to consider them.
3. Having looked at the petition and the submissions, I find it necessary to examine the issue of whether the court has jurisdiction to

determine the petition and what orders can be made.

4. According to the petition, it is clear that the claim is in respect of a dispute relating to lien over gratuity that is being challenged. There have been considerable developments with regard to the law that governs such disputes that shall guide me in this ruling.

5. The guiding principles to all courts is that where a suit is filed in a court that lacks jurisdiction to hear and determine the suit, then the suit would be deemed a nullity as per the decision of Nyarangi J A in the case of **OWNERS OF MOTOR VESSEL "LILIAN S" v CALTEX OIL (K) LTD [1989] KLR 1** that:-

*“Jurisdiction is everything without which a court of law has no power to make one more step where a court of law has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter the moment it holds the opinion that it is without jurisdiction.”*

6. The Employment & Labour Relations Court Act No. 20 of 2011 provides as here below under Section 12 (1):

**12. Jurisdiction of the court**

**(1) the court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to 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' organization and a trade union's organization;**

**(d) disputes between trade unions;**

**(e) disputes between employer organizations;**

**(f) disputes between an employers' organization and a trade union;**

**(g) disputes between a trade union and a member thereof;**

**(h) disputes between an employer's organization 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.**

7. The Employment Act No. 11 of 2007 at Section 87 provides as follows: -

**87. Complaint and jurisdiction in cases of dispute between employers and employees**

**(1) Subject to the provisions of this Act whenever –**

**(a) an employer or employee neglects or refuses to fulfill a contract of service; or**

**(b) any question, difference or dispute arises as to the rights or liabilities of either party; or**

**(c) touching any misconduct, neglect or ill-treatment of either party or any injury to the person or property of either party, under any contract of service, the aggrieved party may complain to the labour officer or lodge a complaint or suit in the Industrial Court.**

**(2) No court other than the Industrial court shall determine any complaint or suit referred to in subsection (1).**

**(3) This section shall not apply in a suit where the dispute over a contract of service or any other matter referred to in subsection (1) is similar or secondary to the main issue in dispute.**

8. In **Daniel Piranto Ole Nchani v Ministry of Interior and National Co-ordination & another [2019] eKLR**, Lady Justice Maureen Onyango handled in detail a petition that dealt with the right or the right not to earn pension.

9. It is undisputable from the pleadings in this petition that all the alleged violations have their foundation in the contract of employment between the Petitioner and the Respondent. In other words, the foundation of this petition in every bit is about the said contract of

employment. This court, as a constitutional court may have jurisdiction to deal with those violations. However, the ELRC is the court constitutionally mandated with the jurisdiction on the said petition.

10. The ELRC is a court with equal status to the high court and courts with equal status to the High Court have the jurisdiction to hear and determine constitutional issues, and alleged violations of constitutional rights which emerge during the proceedings in matters before those courts. This court must be wary of handling issues which properly belong to a court of equal status. This court is sure that the jurisdiction to handle the petition herein lies with the ELRC, and that the attempt to involve this court by invoking its constitutional division is not proper in light of provisions cited above. It is the position of this court that the petition herein must be heard and determined by the ELRC as it is in a better position to deal with the aspects of the alleged violations of the contract of employment and the rights of an employee.

11. I share the view by Majanja, J in **United States International University (USIU) v Attorney General Nairobi Petition 170 of 2012 (2012) eKLR**, in which he expressed himself inter alia as follows:

**“[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 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. Such a situation would lead precisely to diminishing the status of the Industrial Court and recurrence of the situation obtaining before the establishment of the current court .....”**

12. Having found that this court has no jurisdiction to handle the instant petition, the orders available are either dismissal or transfer of the suit. I find that it would serve the interests of justice if the matter is transferred as an order of dismissal would prejudice the parties and more specifically the petitioners who are pursuing their pension. Further the parties herein have a legitimate expectation to have their case determined on merit.

13. In the result this matter is hereby transferred to the **Employment and Labour Relations Court** for determination. The costs shall be in the cause.

**Orders accordingly.**

**Dated and delivered at Machakos this 6<sup>th</sup> day of February, 2020.**

**D.K.Kemei**

**Judge**