



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**Coram: D. K. Kemei - J**

**CONSTITUTIONAL PETITION NO.7 OF 2020**

**IN THE MATTER OF ARTICLE 22(1) OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS**

**OR FUNDAMENTAL FREEDOMS UNDER ARTICLES 10,**

**27 & 232 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF PUBLIC SERVICE (VALUE AND PRINCIPLES) ACT, NO. 1A OF 2015**

**AND**

**IN THE MATTER OF SECTION 6 (1) (A) & (H) OF THE ANTI-COUNTERFEIT ACT, NO. 13 OF 2008**

**AND**

**ON THE MATTER OF MWONGOZO, THE CODE OF GOVERNANCE FOR STATE CORPORATIONS, 2015**

**AND**

**IN THE MATTER OF THE SPECIAL ISSUE OF THE KENYA GAZETTE NOTICES NOS. 7054 & 7055**

**BOTH DATED 12<sup>TH</sup> JULY, 2018 AND PUBLISHED ON 13<sup>TH</sup> JULY 2018 & NOTICE NO. 13254**

**DATED 19<sup>TH</sup> DECEMBER, 2018 AND PUBLISHED ON 21<sup>ST</sup> DECEMBER, 2018**

**ERICK OMENY.....PETITIONER**

**VERSUS**

**CABINET SECRETARY, MINISTRY OF INDUSTRIALIZATION,**

**TRADE & ENTERPRISE DEVELOPMENT.....RESPONDENT**

**AND**

FLORA MUTAHI.....1<sup>ST</sup> INTERESTED PARTY

STEPHEN MUTORO.....2<sup>ND</sup> INTERESTED PARTY

### RULING

1. The petitioner filed the instant petition on 10.7.2020.
2. On record, there is a notice of preliminary objection that was filed on 27.7.2020 and learned counsel Sikuta & Co. Advocates for the 2<sup>nd</sup> interested party posited that this court lacks jurisdiction to entertain the petition in view of section 12 of the Employment and Labour Relations Court Act CAP 234B. Counsel prayed that the petitioners petition and notice of motion application dated 9<sup>th</sup> July, 2020 be struck out and or dismissed with costs to the 2<sup>nd</sup> interested party.
3. On record is a notice of withdrawal of the petition against the respondent and the interested parties. It is dated 13.8.2020 and is filed by Kyalo Muia & Co Advocates. It states that the petitioner wholly withdraws the petition as the same has been overtaken by events.
4. It was directed that the preliminary objection be canvassed vide written submissions and it is only the counsel for the 1<sup>st</sup> interested party who has filed submissions dated 14.8.2020. Learned counsel for the 2<sup>nd</sup> interested party pointed out to court that the petitioner vide petition dated 7.7.2020 challenged the appointment of the interested parties to the board of directors of the Anti-Counterfeit Authority and that the issues for determination are whether this honorable court has jurisdiction to hear and determine the present petition and if so, which orders should this court grant/issue.
5. Counsel submitted that the Anti-Counterfeit Authority is a state corporation that is established under section 3(1) of the Anti-Counterfeit Act and that the board appointment was being challenged by the petitioner. Counsel cited the case of **Okiya Omtata Okiiti v Attorney General & 2 Others; Francis K. Muthaura (AMB) & 5 others (Interested Parties) (2019) eKLR** that was handled by the Employment and Labour Relations Court. Also relied upon was the case of **Daniel M. Mugendi v Kenyatta University & 3 Others (2013) eKLR** where it was observed by the Court of Appeal that;

*“In the same token 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 incident 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.”*

6. Having looked at the petition and the submissions, I deemed it necessary to examine the issue of jurisdiction therefore as a consequence the issue for determination is whether the court has jurisdiction to determine the petition and what orders may the court make.
7. Before resolving the issue for determination, I note that there is a notice of withdrawal that is on record that was filed by counsel for the petitioner. I associate myself with the findings in the case of **Kofinaf Company Limited & another v Nahashon Ngige Nyagah & 20 others (2017) eKLR** where it was stated that;

*“And it has to be said that unlike some other procedural rules, The Civil Procedure Rules, in respect to order 25 Rule 1, does not have any provisions requiring the Leave of Court to Discontinue a suit or withdraw a claim. The Constitution of Kenya (Protection of Rights and Fundamental Freedom) Practice and Procedure Rules, 2013, for example provides as follows in rule 27(1):-*

*“27(1) The Petitioner may;*

*(a) On notice to Court and the Respondent, apply to withdraw the Petition; or*

*(b) With Leave of the Court, Discontinue the proceedings.*

*2) The Court shall, after hearing the parties to the proceedings, decide on the matter and determine the juridical effect of that decision.*

*3) Despite sub Rule (2), the Court may, for reasons to be recorded, proceed with the hearing of a case in spite of the wish of the Petitioner to withdraw or discontinue the proceedings”.*

*Similarly, The Elections (Parliamentary and County Elections) Petition Rules, 2017 requires that Leave of an Election Court be sought before there can be a withdrawal of an Election Petition. The requirement for Leave in both Constitutional and Election Petitions extends to where the Petition has not been set down for hearing.”*

8. In the case of **Harry John Paul Arigi & 2 Others v Board Kenya Ports Authority & 2 others (2016)eKLR** the Court held that;

*“Rule 27(1)(a) allows a petitioner who wishes to withdraw a Petition to apply to withdraw the same after giving notice of his intention to both the Court and the Respondent. Clearly, under that provision the withdrawal of the Petition is not automatic and is not achieved merely by notice.”*

9. I note that the Petitioner did not give a satisfactory reason or any reason at all as to why he was withdrawing the Petition. It is commonplace that every time a Petitioner files a Petition, the Respondents are required to defend it and this is a costly affair as they require to hire an Advocate; I have taken note of the notices of appointment on record in respect of the Interested parties. The irresistible finding is that the Petitioner did not follow the set out procedure in withdrawing the petition and I therefore decline to accept that the petition is withdrawn. The petitioner will be at liberty to raise the said issue before the relevant court in the event that I find it prudent to transfer the suit.

10. That being said, according to the petition, it is clear that the claim is in respect of a dispute related to appointment to the Anti-Counterfeit Authority Board where there have been considerable developments with regard to the law that governs such disputes. The 2<sup>nd</sup> interested party has raised a preliminary objection to the jurisdiction of this court hence this ruling. The 2<sup>nd</sup> interested party has pointed out that the court clothed with the requisite jurisdiction to handle the petition is the Employment and Labour Relations Court; this position has been supported by counsel for the 1<sup>st</sup> interested party in submissions on behalf of the 1<sup>st</sup> interested party.

11. It is trite law that a preliminary objection on a point of law must first, raise a point of law based on ascertained facts and not on evidence. Secondly, if the objection is sustained, that should dispose of the matter. A preliminary objection is in the nature of a legal objection not based on the merits or facts of the case, but must be on pure points of law.

12. Discussing what constitutes a preliminary objection, Law JA in **Mukisa Biscuit Manufacturers Ltd vs. West End Distributors Ltd**(1969) E.A 696 at Page 700 said:-

*"...so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection 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 the contract giving rise to the suit, to refer the dispute to arbitration."*

13. In the words of **Sir Charles Newbold P** at page 701, B:-

*"...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 issues, and this improper practice should stop."*

14. 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** where he held 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."*

15. 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.***

16. 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.**

17. In **Daniel M. Mugendi v Kenyatta University & 3 Others (2013) eKLR**, the Court of Appeal directed its mind to the fact that constitutional petitions with a bearing towards employment and labor relations can ably be handled by the Employment and Labour Relations Court.

18. It is undisputable from the pleadings in this petition that all the alleged violations have their foundation in what is termed as employment of the interested parties. In other words, the foundation of this petition in every bit is about the appointment of the interested parties. 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.

19. 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 handing issues which properly belong to a court of equal status. I am satisfied 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 the provisions cited above. It is the position of this court that the petition herein must be heard and determined by the ELRC which 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.

20. Majanja, J in **United States International University (USIU) v Attorney General Nairobi Petition 170 of 2012 (2012) eKLR**, 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 .....”**

21. 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 who would have to take steps to file fresh pleadings and instruct advocates afresh. For the foregoing reasons, I make the following orders:

**a) This petition be and is hereby transferred to the ELRC.**

**b) The Costs shall be in the cause.**

It is so ordered.

Dated and delivered at Machakos this 7<sup>th</sup> day of October, 2020.

D. K. Kemei

Judge