



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CIVIL MISC. APPLICATION NO. 23 OF 2018

IN THE MATTER OF ARTICLES 2, 3, 10, 20, 22, 47, 50, 165, 174, 179, 196, 258 & 259 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE COUNTY GOVERNMENT ACT, 2012, SECTION 14, 31, 32(2) & 40

AND

IN THE MATTER OF THE PROCEDURE FOR REMOVAL FROM OFFICE OF A MEMBER OF THE COUNTY EXECUTIVE COMMITTEE UNDER THE KITUI COUNTY ASSEMBLY STANDING ORDERS NO. 62

AND

IN THE MATTER OF THE EXPRESS CONTRAVENTION OF STANDING ORDERS NO. 35 & 36 OF THE KITUI COUNTY ASSEMBLY

AND

IN THE MATTER OF PRINCIPLES OF NATURAL JUSTICE

BETWEEN

HON. MARY NDUNGE NGULI.....PETITIONER/APPLICANT

VERSUS

THE COUNTY ASSEMBLY OF KITUI.....1ST RESPONDENT

THE SPEAKER, COUNTY ASSEMBLY OF KITUI.....2ND RESPONDENT

HON. BONIFACE K. KASINA.....3RD RESPONDENT

THE CLERK, COUNTY ASSEMBLY OF KITUI.....4TH RESPONDENT

AND

THE GOVERNOR, KITUI COUNTY GOVERNMENT....INTERESTED PARTY

RULING

1. This matter arises out of the action of the 3rd Respondent who presented a motion before the Clerk to the County Assembly of Kitui for onward transmission to the 2nd Respondent for removal of the Petitioner from office under **Section 40** of the **County Government Act, 2012** and the **Kitui Standing Orders No. 62**.

2. It is urged that the motion is in violation of the Constitution and the County Government Act, 2012, therefore unconstitutional, illegal, null and void hence the prayer *inter alia*, for an order quashing the motion and proceedings, restraining the Assembly from debating, acting and/or voting on the motion.

3. On the **20th December, 2018** the Respondents filed a Notice of Preliminary Objection to the Petition on grounds that:

i. This Court lacks the requisite jurisdiction to entertain and determine this matter in view of the legislative process that is ongoing and which has not been concluded so as to give rise to a decision the basis of which the residual supervisory jurisdiction of this Court can be invoked.

ii. The matter before this Honourable Court relates removal from office and dismissal from employment of the Petitioner as can be discerned even from the caption of the Petitioner's Petition dated **16th December, 2018** and at paragraphs **4, 5, 6, 7, 12, 15, 16, 24, 32(b), C(1), C(5)** of the Petition and the Application dated the same date at paragraphs **5, 6, 7, 8, 9, 12, 15, 16, 20** of the said Supporting Affidavit; the process is ongoing, and as such the Court cannot as per the law issue an injunction against the Respondents at this stage.

iii. **Article 165(5)** of the **Constitution of Kenya 2010** bars the High Court from hearing and determining any matter falling within the jurisdiction of the Courts contemplated in **Article 162(2)** of the **Constitution of Kenya 2010** which are the Employment and Labour Relations Courts and the Environment and Land Court.

iv. Further, the Application and the Petition is a non-starter as there is a procedure which is ongoing and laid down to resolve the dispute under the **County Government Act** under **Section 40(3)(4)(5)** and **(6)** as read together with the **County Government of Kitui Standing Orders 35, 36, 47, 47 and 62** thus the Court should be very slow in interfering with the said internal mechanism.

v. The Petition as drawn is devoid of merits, it's misconceived, bad in law and premature thus it ought to fall *in limine*.

vi. The entire Petition is an abuse of the Court process and ought to be struck out forthwith with costs to the Respondents.

4. The Application was canvassed by way of written submissions. It was argued by the Respondents (Applicants) that the High Court is barred from hearing and determining matters that fall within the jurisdiction of Courts contemplated under **Article 162(2)** of the **Constitution** and in particular **Article 162(2)(a)** as read with **Section 12** of the **Employment and Labour Relations Court Act**.

5. It was urged that the matter arises from an employer-employee relationship with the Petitioner being an employee of the County Government of Kitui as constituted pursuant to **Article 176(1)** of the **Constitution**. It was submitted that regarding what was stated in the case of **The County Government of Nyeri & Another vs. Cecilia Wangechi Ndungu, Civil Appeal No. 2 of 2015** that:

“A state officer's terms and conditions of service are regulated by the Constitution or the relevant statute, principles of fair administrative action and rules of natural justice. It therefore follows that a member of the County Executive Committee being a state officer is not subject to the provisions of the Employment Act.”

It was within their knowledge that the Petitioner is a State Officer in line with **Article 260** of the **Constitution of Kenya** hence not subject to the **Employment Act**; but in the **Employment and Labour Relations Act, Kisumu Cause No. 4 of 2016 Doctor Eunice Jepkoech Siria vs. The County Secretary, Uasin Gishu County, Onyango J.** stated that Employment and Labour Relations Court's jurisdiction was not confined to employment relationships created by the **Employment Act** but the Court had the mandate to determine issues relating to all employment.

6. Further, it was urged that there exists a contract of service, and the dispute touches on Employment and Labour Relations, a dispute that should be resolved by the **Employment and Labour Relations Court**. In that regard they cited the case of **Nick Githinji Ndichu vs. Clerk, Kiambu County Assembly & Another (2014) eKLR** in which **Nduma J.** citing the decision of **Majanja J.** in **United States International University (USIU) vs. Attorney General (2013) eKLR** and **Civil Appeal No. 6 of 2012 Professor Daniel N. Mugendi vs. Kenyatta University and 3 Others**, stated as follows:

“13. It is clear from the foregoing that the law is not concerned with the method of acquiring an employee. The law does not concern itself with whether the person was appointed or elected. Rather, the person must;

(i) be having an oral or written contract of service;

(ii) be provided a service to a real or legal person;

(iii) be receiving a wage/salary for the services rendered.

If such a person has a dispute with the person with whom he/she has a contract of service and to whom he/she provides services for a wage or salary, the court has jurisdiction over such dispute and has available remedies for that purpose.

14. It is the Court's finding that the Petitioner has a relationship with all the above attributes with the 2nd Respondent. This Court has therefore got jurisdiction over this matter.”

7. In response the Petitioner (Respondent) asserted that this Court has jurisdiction to handle the suit as it relates to violation of fundamental rights and freedoms of the Petitioner under **Article 23** of the **Constitution** and **Article 165(3)** of the **Constitution** that vest the High Court with unlimited original jurisdiction in civil matters.

8. That the Petitioner has raised instances of her constitutional rights having been discriminated against on the basis of gender and social origin which is in violation of her constitutional rights. That what is before Court is a Constitutional Petition seeking to vindicate the Petitioner's constitutional rights which have been violated by the Respondent.

9. That the instant Petition is not a labour dispute to fall under the jurisdiction of the **Employment and Labour Relations Court** but a Constitutional Petition seeking to examine fundamental breaches of the fundamental freedoms of the Petitioner as guaranteed by the Constitution.

10. That the Petitioner is employed by the Government of Kitui County but not the County Assembly. That if the Petitioner had been sacked by the Governor then she would have gone to the **Employment and Labour Relations Court**. In this regard she cited the case of **Martin Nyagah Wambora and 3 Others vs. Speaker of the Senate & 6 Others (2014) eKLR** where the Court stated that:

“... In this case, a cursory look at the verifying affidavit sworn by the Applicant on 16th January, 2014 and the statutory statement of facts dated the same day shows clearly that the gist of the Applicant's complaint in this matter is that the Joint Committees of Infrastructure, Youth and Sports; the Committees of Agriculture, Fisheries and Livestock and the Committee on Public Investments and Accounts (herein after referred to as the Joint Committees) made recommendations on 6th January, 2014 that she should step aside from the performance of her duties as County Secretary for the County Government of Embu pending investigations to be undertaken by the Ethics and Anti-Corruption Commission (EACC) without having given her an opportunity to be heard which in her view amounted to a violation of the rules of natural justice and her right to fair administrative action guaranteed under Article 47 of the Constitution. It is therefore clear from the pleadings that the Applicant's complaint relates to the process adopted by the Joint Committees of the County Assembly of Embu in undertaking the inquiries before them leading to the impugned recommendations. The said complaint has nothing to do with a labour dispute. The Applicant was not for example seeking redress on grounds that she was unlawfully suspended from office in breach of her terms of employment or that any of her terms of employment had been breached by her employer. If the application had raised such complaints, we would have readily agreed with Counsel for the Respondents that it is the Industrial Court not this Court that would have Jurisdiction to determine the issues raised therein but in so far as what is challenged is the process followed in arriving at the recommendations in question, we find that it is this Court in the exercise of its Judicial Review Jurisdiction that has the mandate to investigate whether that process complied with the law. It is common ground, as this has not been disputed by any of the Respondents that the Joint Committees being committees established by the County Assembly of Embu under Section 14 of the County Government Act while discharging their functions in the exercise of the Assembly's mandate to oversee the proper and efficient management of the County Governments' affairs including the use of financial resources at its disposal were acting as quasi Judicial bodies and their decisions are therefore amenable to Judicial Review. For the reasons stated above, we have no doubt that this Court has Jurisdiction to hear and determine the instant application and we so hold. ...”

11. It was urged that the complaint of the Petitioner relates to the process adopted by the County Assembly in initiating the impeachment motion and has nothing to do with a labour dispute or the Petitioner's employment by her employer.

12. That the High Court has a supervisory role of examining whether any procedural law or Constitution was violated by the County Assembly of Kitui in the impeachment process of the Petitioner herein.

13. In a rejoinder, the Applicants (Respondents) argued that there exists an employer-employee relationship between the Applicant/Petitioner (Respondent) and the County Assembly of Kitui as the Application is under employment contract which makes the instant dispute purely a labour relations dispute. And being an employee of the County Government, the procedure of her removal from office can either be initiated by the Governor or a Member of the County Assembly. A procedure through which her employment could be determined. That the case of **Martin Nyagah Wambora and 3 Others vs. Speaker of the Senate** was distinguishable and inapplicable as he was a Governor, his position was elective and not appointive hence there was no employer-employee relationship.

14. I have duly considered rival submissions of both the Applicant and Respondents learned Counsels.

15. It is contended that this Court lacks jurisdiction to hear and determine this matter following an argument that it is a dispute arising from an employer-employee relationship therefore should have been initiated before the **Employment and Labour Relations Court (ELRC)**.

16. **Article 162** of the **Constitution of Kenya, 2010** provides thus:

“(1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts mentioned in clause (2).

(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).

(4) The subordinate courts are the courts established under Article 169, or by Parliament in accordance with that Article.”

17. **Article 165(5)(b)** of the **Constitution of Kenya, 2010** provides thus:

“(5) The High Court shall not have jurisdiction in respect of matters—

(b) falling within the jurisdiction of the courts contemplated in Article 162 (2).”

18. Section 12 of the Employment and Labour Relations Act provides thus:

“(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;

(b) disputes between an employer and a trade union;

(c) disputes between an employers’ organisation and a trade union’s organisation;

(d) disputes between trade unions;

(e) disputes between employer organisations;

(f) disputes between an employers’ organisation and a trade union;

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

(h) disputes between an employer’s organisation 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.

(2) An application, claim or complaint may be lodged with the Court by or against an employee, an employer, a trade union, an employer’s organisation, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose.

(3) In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders—

(i) interim preservation orders including injunctions in cases of urgency;

(ii) a prohibitory order;

(iii) an order for specific performance;

(iv) a declaratory order;

(v) an award of compensation in any circumstances contemplated under this Act or any written law;

(vi) an award of damages in any circumstances contemplated under this Act or any written law;

(vii) an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law; or

(viii) any other appropriate relief as the Court may deem fit to grant.

(4) In proceedings under this Act, the Court may, subject to the rules, make such orders as to costs as the Court considers just.

(5) The Court shall have jurisdiction to hear and determine appeals arising from—

(a) decisions of the Registrar of Trade Unions; and

(b) decisions of any other local tribunal or commission as may be prescribed under any written law.”

19. In the celebrated case of **Owners of Motor-vessel “Lilian S” vs. Caltex Oil (k) LTD (1989) KLR 1, Nyarangi J.** (as he then was) stated as follows:

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. 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 down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

20. The Court of Appeal in the case of **Daniel N. Mugendi vs. Kenyatta University & 3 Others (2013) eKLR** while dealing with the issue of jurisdiction upheld the approach that was taken by **Majanja J.** when he adopted what was enunciated in the case of **Gcaba vs. Minister of Safety and Security & Others CCT 64/08 (2009) ZACC 26** by stating thus:

“I would adopt the position of the Constitutional Court of South Africa in Gcaba Vs Minister of Safety and Security (Supra). The Industrial Court is a specialist court to deal with employment and labour relations matters. By virtue of Article 162(3), section 12 of the Industrial Court Act 2011 has set out matters within the exclusive domain of that court. Since the court is of the same status of the High Court, it must have the jurisdiction to enforce labour rights in Article 41 and the jurisdiction to interpret the Constitution and fundamental rights and freedoms, is incidental to the exercise of jurisdiction over matters within its exclusive domain. In any matter falling within the provisions of Section 12 of the Industrial Court Act, then the Industrial Court has jurisdiction to enforce, not only Article 41 rights but also all fundamental rights ancillary and incidental to the employment and labour relations including interpretation of the Constitution within the matter before it.”

21. Therefore, to down tools, this Court must satisfy itself of the existence of a relationship of employer-employee between the parties herein. Ordinarily an employee would be a person employed for wages or salary and especially at a non-executive level.

22. Black’s Law Dictionary defines an employee as:

“A person who works in the service of another person (the employer) under an express or implied contract of hire, under which the employer has the right to control the details of work performance.”

23. It has been stated that the Petitioner (Respondent) herein is a member of the Executive Committee of the County. **Article 179(1)(2)** of the **Constitution** provides thus:

“(1) The executive authority of the county is vested in, and exercised by, a county executive committee.

(2) The county executive committee consists of—

(a) the county governor and the deputy county governor; and

(b) members appointed by the county governor, with the approval of the assembly, from among persons who are not members of the assembly.” (Emphasis mine).

24. A member of the Executive Committee is appointed/nominated by a Governor (see **Section 35 of the County Government Act**). The only role the County Assembly plays is approval of the nominations. The member of the Executive Committee is accountable to the Governor in the exercise of their powers and performance of their duties and responsibilities (see **Section 39 of the County Government Act**).

25. Therefore the person who has the right to control details of the County Assembly member in terms of employment would be the Governor and the County Government but not any of the Respondents (Applicants) herein as no contract of service exist between them.

26. The jurisdiction of the High Court emanates from the Constitution. **Article 165(3)** of the **Constitution** 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.”

27. The question of jurisdiction was also addressed in the case of **David Ramogi & 4 Others vs. The Cabinet Secretary, Ministry of Energy and Petroleum & 7 Others (2017) eKLR** as follows:

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance 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 cognizance, 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 fact 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.”

28. The complaint raised by the Respondent is in regard to violation or a threat to violation of her rights. She seeks intervention of the Court to prevent an infringement of her rights. She avers that she has been discriminated against on the basis of gender and social origins. She terms the purported impeachment by the Respondents unprocedural, illegal and unconstitutional.

29. Further it is argued that the Application filed simultaneously with the Petition and the substantive Petition are non-starters as there is a procedure that is ongoing which is an internal mechanism that the Court should not interfere with. In the case of **Judicial Service Commission vs. Speaker of the National Assembly & 8 Others [2014] eKLR** the Supreme Court stated that:

“The Constitution disperses powers among various constitutional organs. Where it is alleged that any of these organs has failed to act in accordance with the Constitution, then the Courts are empowered by Article 165(3)(d)(ii) to determine whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of the Constitution.”

30. Therefore the issue of Judicial Limit in interfering with a process commenced by the County Assembly can only be addressed at the hearing of the Application.

31. The Complaint of the Petitioner (Respondent) concerns the legal process adopted by the County Assembly in initiating the impeachment motion therefore falls under the jurisdiction of this Court.

32. In the premises the Preliminary Objection raised lacks merit. Accordingly, it is dismissed with costs to the Respondent.

33. It is so ordered.

Dated, Signed and Delivered at Kitui this 12th day of February, 2019.

L. N. MUTENDE

JUDGE