



**REPUBLIC OF KENYA**

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

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO 13 OF 2019**

**IN THE MATTER OF: THE ENFORCEMENT OF THE BILL OF RIGHTS UNDER SECTION 84 OF THE CONSTITUTION OF KENYA, 1963 (NOW REPEALED)**

**AND**

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF SECTIONS 74, 77 (1) AND (2) (a) OF THE CONSTITUTION OF KENYA, 1963 (NOW REPEALED)**

**BETWEEN**

**CHARLES ONYINGE ABUSO.....PETITIONER**

**VERSUS**

**KENYA PORTS AUTHORITY.....RESPONDENT**

**RULING**

1. The Respondent herein in response to the Petition filed on 7 February 2019 filed a Response to the Petition, a Replying Affidavit and a Notice of Preliminary Objection and Grounds of Opposition all dated 26 February 2019 and filed on 27 February 2019.

2. The Notice of Preliminary Objection is premised on the following grounds:

*a. This Court is divested off jurisdiction pursuant to Article 23(3), 162(2) (a) and 165(5) (b) of the Constitution of Kenya and Section 12 of the Employment and Labour Relations Act Cap 234B laws of Kenya.*

*b. The Petition is Res-judicata pursuant to Section 7 of the civil procedure Act Cap 21 Laws of Kenya.*

3. A further affidavit dated 11<sup>th</sup> April 2019 sworn by the Petitioner was filed in response to the Notice of preliminary objection by the Respondent in which he deposed as follows:

*a. That the law recognizes the possibility of multiple cases of action arising from the same set of facts and nothing bars him from pursuing each of them.*

*b. That the cause of action in the Petition herein is different form the cause of action in ELRC 370 of 2013 notwithstanding they arise from the same set of facts.*

*c. That the nature and scope of the Petition it's different from ELRC 370 of 2013 as it goes beyond the issue of contractual relationship of the parties and also it delves into issues that were not in issue in ELRC 370 of 2013.*

**Respondents Submissions**

4. In its written submissions filed on **21<sup>st</sup> May, 2019**, the Respondent argues that this Court's jurisdiction is donated under Article 165 of the Constitution while the Employment and Labour Relation Court's is established under Article 162(2) of the Constitution. Its jurisdiction and functions are provided for under Section 12 of the Employment and Labour Relations Court Act, which has the original and appellate jurisdiction to hear and determine all disputes relating and arising out of employment between an employer and an employee.

5. Counsel for the Respondent invited this court to consider the following authorities in relation to the issue of jurisdiction:

***Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd [1969] EA 696, in the matter of Independent Electoral Commission, Constitutional Application No. 2 of 2011; The Owners of the Motor Vessel "Lillian's" – vs.- Caltex Oil Kenya Ltd [1989] KLR 1, Republic vs. Karisa Chengo & 2 others [2017] eKLR and United States International University (USIU) vs. Attorney General [2012] eKLR.***

**Petitioner's Submission on the P.O.**

6. **Mr. Adhoch**, Learned Counsel for the Petitioner submitted that Article 162(2) (a) is explicit that the special court formed thereunder is for purposes of determining Employment and Labour Relations disputes and the exclusion of this Court's jurisdiction is only in matters provided for under Article 165(5)(b) of the Constitution and that this Court has jurisdiction to determine the question of whether a right or a fundamental freedom in the bill of rights has been denied, violated, infringed or threatened. Consequently, the above Article places the Petition squarely under the jurisdiction of this Court.

7. **Mr. Adhoch** submitted that the dispute before Court is not solely an employment dispute, as the Petitioner alleged interference with the police by the Respondent as well as violation of Human rights under international legal instruments and that this Court has concurrent and coordinate jurisdiction to hear and determine the current Petition as is.

8. In support of the arguments, the Petitioner placed reliance on the following authorities: The Court of Appeal case of **John Njue Nyaga v Attorney General & 6 others [2016]** where it was held *that infringement of rights under Article 40(10),(2) and (3) of the Constitution was not a land issue and therefore the high Court hand the jurisdiction to entertain the Petition; Ledidi Ole Tauta & Others v Attorney General & 2 others [2015]eKLR*; where it was held that under Article 163(5) (b) and Section 13(3) of the Environment & Land Court Act, the High Court and the Environment & and Court have concurrent jurisdiction to deal with matters of Infringement of Constitutional rights; **Leisure Lodges Ltd v Commissioner of Lands & 767 others (2016) eKLR**, where it was held that the High Court and the Environment and Land Court have concurrent and coordinate jurisdiction to deal with matters of Infringement of Constitutional rights and for expeditious disposal it would be appropriate for the Petition to be heard before the High Court.

9. On the issue of whether the Petition is *Res-judicata* pursuant to Section 7 of the civil procedure Act Cap 21 Laws of Kenya, it was submitted that the issues in **ELRC 370 of 2013** are different from those raised in the Petition and therefore the same cannot be *Res-judicata* and it is possible for a person to have recourse in multiple avenues without the same amounting to *Res-judicata*.

10. It was further submitted that the civil procedure Act does not apply to the current proceedings reason being that Constitutional Petitions are special proceeding deemed to be neither civil nor criminal hence "*sui-generis*" and where a party relies on civil procedure Act/rules then the Petition pleadings are rendered defective and incompetent.

11. Reliance was placed on the following authorities to support the two positions. On multiplicity reliance was placed on the case of **Attorney General & another vs. Andrew Maina Githinji & Another [2016] eKLR** where *it was held that a single Act may have more than one aspect and may give rise to more than one legal consequence*

12. On the issue of applicability of the civil procedure, reliance was placed on the case of **Joel Onsare vs. Governor Trans Nzoia County & 16 others [2014] eKLR; Miguna vs. Fred Matiangi & 8 others [2018] eKLR**; where in both case it was held that constitutional petitions are special proceedings deemed to be neither civil nor criminal hence "*sui-generis*"

**Analysis and Determination.**

13. The definition of a preliminary objection is well set out in the case of **Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696.**

**"...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."**

14. Ojwang, J (as he then was) expressed himself as follows in **Oraro vs. Mbaja [2005] 1 KLR 141: -**

***"A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point 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.... 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 facts pleaded by the opposite side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion....The principle is abundantly clear. A "preliminary objection" correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from information, which stands to be tested by normal rules of evidence. ...."***

15. The prayer that this Court is divested off jurisdiction pursuant to Article 23(3), 162(2) (a) and 165(5) (b) of the Constitution of Kenya and Section 12 of the Employment and Labour Relations Act Cap 234B Laws of Kenya is a pure point of law, which does not warrant evidence.

16. Since the issue of Jurisdiction has been raised by the Respondent. This Court is still obligated to establish whether it has jurisdiction in this matter

17. The Supreme Court in **Samuel Kamau Macharia vs. KCB and Others [2012] eKLR** has held as follows:

**“A Court’s jurisdiction flows from either the Constitution or Legislation or both. Thus a Court can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law...the Court must operate within the constitutional limits. It cannot expand jurisdiction through judicial craft or innovation.”**

18. The ‘*locus classicus*’ on jurisdiction is the celebrated case of **The Owners of the Motor Vessel “Lillian’s” -V- Caltex Oil Kenya Ltd [1989] KLR 1** where Nyarangi J.A. held:

**“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 continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds that it is without jurisdiction.”**

19. The pertinent issue for determination is whether this current Petition is properly before this Court. The Petitioner admits that when his cause of action arose there was a relationship between him and the Respondent which may be inferred as an **employer - employee** relationship. The Petitioner alleges under paragraph 19 of his Petition that his rights were violated as outlined therein and as such the rights and remedies sought in this Petition are purely on breach of fundamental freedoms and this Court is best placed to entertain the same by dint of Article 165(3) b of the Constitution.

20. The Constitution of Kenya establishes the Employment and Labour Relations Court and clothes it with jurisdiction in Articles 162(2) a

*Article 162 provides as follows: -*

*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.*

21. The Constitution under Article 165(3) and Article 165(3) (a) provides.

*(3) Subject to clause (5), the High Court shall have—*

*(a) Unlimited original jurisdiction in criminal and civil matters;*

On the other hand, Article 165(5) provides that: -

***The High Court shall not have jurisdiction in respect of matters falling within the jurisdiction of the courts contemplated in Article 162(2).***

22. Section 12 of the Employment and Labour Relations Court Act defines the jurisdiction of the ELRC. The Court has 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.’’

23. Section 87. (1) and (2) of the Employment Act provides: -

(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).**

24. The Court of Appeal in **Registrar of Trade unions vs. Nicky Njuguna & 4 others** held as follows:

***“This same issue was central in the following matters; Prof. Daniel N. Mugendi v Kenyatta University & Others Nairobi Civil Appeal No. 6 of 2012 (Unreported); U.S.I.U v A.G &Others (2012) eKLR Seven Seas Technologies v Eric Chege Nairobi HC Misc. Appl. No. 29 of 2013 (Unreported) and Judicial Service Commission v Gladys Boss Shollei & Another Civil Appeal No 50 of 2014. In all the aforesaid decisions by this Court differently constituted, it was emphasized that although Article 165(3) (c) of the Constitution gives the High Court jurisdiction to determine questions involving violation of the Bill of Rights, the Article did not oust the jurisdiction of ELRC to deal with such issues especially when the interpretation of the Constitution is intricately interwoven with a labour issue or is central to the determination thereof. In any case the Court found that under Article 20, the Constitution gives all courts and bodies powers to deal with constitutional matters; thus the court had jurisdiction to deal with all constitutional matters that arise before it in employment and labour disputes.***

***We will say no more on the jurisdiction of the ERLC to interpret the Constitution on fundamental rights that are germane and intricately connected with labour issues, as it has adequately been dwelt with and we fully agree with the above findings.”***

25. Majanja J in the case of **United States International University vs. Attorney General** (supra), the Court stated:

***“[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 or to interpret the Constitution, 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.”***

The Court went on to conclude;

***“[44]...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 status of the High Court, it must have the jurisdiction to interpret the constitution and fundamental rights in Article 41 and freedoms is incidental to the exercise of jurisdiction over matters within its conclusive 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 a matter before it.”***

26. This Court finds that the dispute between the parties herein is purely an Employment and Labour Relations matter, which squarely falls under the ambits of Article 162(2) (a) of the Constitution and Section 12 of the Employment and Labour Relations Court Act which Court is a specialist Court to deal with Employment and Labour Relations matters including Constitutional Rights. Pursuant to Article 165(5) of the Constitution, this Court has no jurisdiction over the matter now.

27. This Court accordingly finds that it must down its tools in this matter. The issue of whether this current Petition is *Res judicata* being a matter of fact and law, the same ought to be determined with the Court of competent jurisdiction, which in this case is the ELRC. This Court however in the exercise of its inherent jurisdiction hereby transfers this Petition to the Employment and Labour Relations Court for hearing and final determination. See **Daniel N Mugendi vs. Kenyatta University & 3 others [2013] eKLR**

***“...in order to do justice in the event where the High Court, the industrial court or the Environment and Land court come across a matter that ought to be litigated in any of the other courts, it should be prudent to have the matter transferred to that court for hearing and determination. These three courts, with equal/similar status should in the spirit of harmonization, effect the necessary transfers among themselves.”***

28. Costs shall abide in the cause.

**Dated, Signed and Delivered at Mombasa this 19<sup>th</sup> day of September, 2019**

**E. K. OGOLA**

**JUDGE**

In the presence of:

Mr. Ochieng holding brief Adhoc for Petitioner

Mr. Wafula holding brief for Ikegu for Respondent

Mr. Kaunda Court Assistant