



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

PETITION NO. 11 OF 2017

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS IN ARTICLES 19, 20, 21, 22, 23, 27, 32, 33 (1) (a) (b), 34 (1) (b) 38, & 40 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF THE CONSTITUTION IN ARTICLES 2, 3, 10, 33, 73, 75, 79, 249, 258 & 259

BETWEEN

ELIJAH OKEMWA.....PETITIONER

VERSUS

CLERK, COUNTY ASSEMBLY OF NYAMIRA.....1ST RESPONDENT

SPEAKER, COUNTY ASSEMBLY OF NYAMIRA.....2ND RESPONDENT

COUNTY ASSEMBLY OF NYAMIRA.....3RD RESPONDENT

COUNTY ASSEMBLY OF NYAMIRA SERVICE BOARD.....4TH RESPONDENT

DIRECTOR HUMAN RESOURCE, COUNTY ASSEMBLY OF NYAMIRA...5TH RESPONDENT

RULING

1. The suit herein was initiated through a petition filed by the petitioner on 14th December 2017 wherein he sought orders as follows:

- 1. An injunction restraining respondents or any other person in the same capacity from interfering with the constitutional provisions and public procurement and asset disposal Act 2015.**
- 2. The respondents be permanently restrained by injunction from interfering with petitioner's employment AND SPREADING malicious information regarding the competency and integrity of the petitioner.**
- 3. A declaration that respondents have abused their office, breached the Constitution and should therefore not be allowed to hold a public office.**

2. Concurrently with the petition the applicant also filed an application dated 14th December 2017 that is the subject of this ruling in which he sought orders, inter alia, to restrain the respondents from interfering in any manner whatsoever with his employment as a director of supply chain management pending the hearing and determination of the application and the petition.

3. The application is supported by the applicant's affidavit dated 14th December 2017 wherein he avers that as the director of supply chain management having been employed in 2015, he on 18th October 2017, initiated a tender process for medical cover for the speaker, Members of County Assembly (MCAS) and other staff of the County Assembly of Nyamira in which five (5) insurance companies placed their bid but that the tendering process was interfered with by the 1st respondent who insisted that the tender be awarded to a particular insurance company contrary to his professional opinion and the provisions of the Public Procurement and Asset Disposal Act 2015.

4. He further avers that he was, on 11th December 2017, interdicted from his employment without being accorded an opportunity to respond to the allegations made against him in respect to the tendering process.

5. The respondents opposed the application through the replying of one Daniel Orina dated 21st December 2017. He avers that the 4th respondent has the mandate to oversee the management of public funds and the authority to discipline the applicant for any wrongs committed as an employee. He further states that the application offends the provisions of Article 232 of the constitution and that the petitioner has not demonstrated that any of his constitutional rights have been violated.

6. The respondent filed a notice of preliminary objection dated 27th December 2017 wherein they challenge this court's jurisdiction to hear and determine the petition in view of the provisions Article 162 (2) of the Constitution as read with Section 12 of the Employment and Labour relations Court Act 2011 which donates exclusive powers to the Employment and Labour Relations Court (ELRC) to handle matters relating to employment.

7. At the hearing of the application, parties agreed to argue the preliminary objection first when Miss Michoma, learned counsel for the respondents, urged the court to transfer the case to the Employment and Labour relations Court in line with the provisions of Article 162 (2) of the Constitution. According to the respondents, the case was founded on the employer and employee relationship even though it was given the title of a constitutional petition.

8. On his part, Mr. Ochoki, learned counsel for the applicant submitted that the petition refers to several articles in the Constitution which are alleged to have been contravened by the respondent and that under Article 165 (3) (b) of the Constitution the High Court had jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been infringed, denied, violated or threatened. The respondent maintained that the case does not only relate to employer/employee relationship but also refers to corruption, abuse of office and defamation of character.

9. I have considered the preliminary objection raised by the respondent together with the pleadings and the submissions made by the parties' respective counsel on record. I note that the preliminary objection is hinged on the question of whether or not this court is seized with the jurisdiction to hear and determine the application and the main petition.

10. The subject matter of jurisdiction is as old as the judicial system. In the matter of **Owners of Motor Vessels 'Lillians' vs Caltex Oil Ltd (1989) eKLR, Nyarangi JA** observed 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"

11. Going by the dictum in the above decision I find that the preliminary objection raised by the respondents in this case is well grounded as it has been raised at the very earliest opportunity and challenges this court's power to handle the petition. An answer to the question on whether or not this court has the jurisdiction to hear and determine this case would call for an evaluation and interpretation of, *inter alia*, Articles 162 (2), 165, 22 and 23 of the Constitution of Kenya, 2010. Articles 162 (2), and (3), 165 (3) and 165 (5) (b) together with section 12 of the Employment and Labour Relations Court Act (hereinafter "the Act") provide for the respective and separated jurisdictions of this and the High Court.

12. Article 162 (2) of the Constitution establishes courts with the status of the High Court to hear and determine disputes in permitted areas. To my mind, equal status means courts similar or bearing sameness with the High Court. The issue of what constitutes 'equal status' has been a subject of debate and discussion in many forums and cases. My own understanding of equality of status is that both the High Court and the ELRC are on the same footing or at par with one another as none can be said to be of a higher rank than the other. See **United States International University (USIU) Vs The Attorney-General [2012] eKLR, Karisa Chengo, Jefferson Kalama Kengha & Kitsao Charo Ngati vs Republic [2015] eKLR.**

13. Nduma J. had the following to say on the subject of equality of status between the two courts in the case of **Kenya County Government Workers' Union versus National Social Security Board of Trustees and 5 Others 2015 eKLR:**

"...the Constitution did not define the extent to which the Employment and Labour Relations Court, as a Court having the same status of the High Court should deal with matters that come before it which do not wholly relate to Employment and Labour Relations. However, under Article 159(2) (e) both the High Court and the Employment and Labour Relations Court are enjoined to protect and promote the Principles of the Constitution."

14. Article 165 of the Constitution establishes the High Court and bestows it with jurisdiction under Article 165 (3). Article 165 (5) (b) however delimits the jurisdiction of the High Court on matters falling within the jurisdiction contemplated under Article 162 (2). This essentially debars the High Court from dealing in matters of which ELRC has jurisdiction.

15. In the instant case, the applicant raised the issue of enforcement of his rights under the Bill of Rights as one of his reasons for arguing that this case falls within the jurisdiction of this court. The respondent's counter argument was that the ELRC was the right forum in which the case ought to have been filed in the first place. The question which then arises is which court is seized with the jurisdiction to hear and determine this case.

16. I find that the correct position is that since the ELRC has the same status as the High Court. It follows that it also has the jurisdiction to interpret the constitution and the fundamental rights and freedoms incidental to the exercise of jurisdiction over matters in its exclusive domain. I am guided by the decision in **In the matter of the Interim Independent Electoral Commission Constitutional Application No.**

2 of 2011 the Supreme Court held:

“Assumption of Jurisdiction by courts in Kenya is a subject regulated by the Constitution, by Statute law, and by principles laid out in judicial precedent... 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 flows from the law, and the recipient-court is to apply the same, with any limitations embodied therein. Such a court may not arrogate to itself jurisdiction through the craft to interpretation, or by way of endeavors to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity.”

17. The above position was emphasized by the Supreme Court in the case of **Samwel Kamau Macharia & Another vs Kenya Commercial Bank and 2 others (2012) eKLR** where again the court observed as follows;

“A court’s Jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law 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. We agree with counsel for the first and second Respondent in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the heart of the matter, for without jurisdiction, the court cannot entertain any proceedings.....where the Constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.”

18. In the instant case, the applicant, while advancing his case on the jurisdiction of this court to hear and determine the case, downplayed the aspect of employer/employee relationship in the matter by arguing that the huge chunk of the petition refers to numerous articles of the Constitution and that the labour relations bit was only a small fraction of the dispute. I disagree with the applicant’s argument on the place or centrality of labour relations in the dispute and instead find that it is the employer/employee relationship between the applicant and the respondents that forms the backbone of the entire petition and application as it is the alleged interdiction/suspension of the applicant from employment that triggered the filing of the petition.

19. Furthermore, a reading of the prayers sought in the application dated 14th December 2017 shows that the applicant seeks orders to restrain the respondents from interfering in any manner with the applicant’s office/employment as the director for supply chain management. A similar prayer is also sought in the petition among other incidental prayers.

20. My take, therefore, is that the main gist of this case is the claim that the applicant was unfairly interdicted while carrying out his duties as the respondent’s employee. I therefore find that under Article 162 (2) of the Constitution as read with Section 12 of the Employment and Labour Relations court Act 2011, this case falls within the jurisdiction of the Employment and Labour Relations Court irrespective of how many articles of the Constitution the applicant cites as having been infringed by the respondents in the process of executing the said interdiction. I am guided by the decision in the case of **United States International University (USIU) vs The Attorney General and Others [2012] eKLR** it was held:

“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 (so) 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. Litigants and ingenious lawyers would contrive causes of action designed to remove them from the scope of the Industrial Court. Such a situation would lead to diminishing the status of the Industrial Court ... to accept a position where the Industrial Court lacks jurisdiction to deal with constitutional matters arising within its competence would undermine the status of the court”.

21. The above decision was further emphasized in the case of **Karisa Chengo, Jefferson Kalama Kengha & Kitsao Charo Ngati vs Republic [2015] eKLR**, where the learned judges of the Court of Appeal observed as follows;

“It was the intention of the drafters in our view to give the ELRC and ELC independence from the High Court. This independence is essential to the role of the Courts as specialized courts charged with the responsibility of developing coherent and evolving labour relations, environment and land jurisprudence.”

22. In the said **Karisa Chengo** case (supra) the judges observed:

“It is therefore clear that the High Court no longer had (sic) original and unlimited jurisdiction in all matter as I used to have under the repealed constitution. It cannot deal with matters set out under Section 12 of ELRC Act and Section 13 of the ELC Act. Conversely, the courts contemplated in Article 162 (2) of the Constitution cannot deal with matters reserved for the High Court.”

23. I am further guided by the decision of Majanja J. in **Petition No.170 of 2012 – United States International University (USIU) Vs The Attorney General & Others**, as upheld in **Daniel N Mugendi v Kenyatta University & 3 others (2013) eKLR**, where the Court while adopting the position enunciated in the South African case of **Gcaba Vs Minister of Safety and Security & others CCT 64/08 (2009) ZACC 26**, held:

*“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 with 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.”

24. Having regard to all the above cited cases, my findings and observations in this ruling, I further find that the respondents’ preliminary objection is merited and I allow it. Consequently I direct that this case be referred to the Employment and Labour Relations Court at Kisumu for hearing and final determination.

Dated, signed and delivered in open court this 7th day of February, 2018

HON. W. A. OKWANY

JUDGE

In the presence of:

- N/A for the Petitioner
- N/A for the Respondents
- Omwoyo court clerk