



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

PETITION NO. 21 OF 2016

**IN THE MATTER OF ARTICLES 1,2 (2) 10(1) C 10(2) 22 & 165 OF THE CONSTITUTION OF
KENYA 2010 AND IN THE MATTER OF VIOLATION OR INFRINGEMENT OF THE
FUNDAMENTAL RIGHTS OF THE PETITIONER**

AND

IN THE MATTER OF TEACHERS SERVICE COMMISSION ACT

AND

IN THE MATTER OF ARBITRARY TRANSFER OF PERSONS

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS &
FUNDAMENTAL FREEDOM) PRACTICE & PROCEDURE RULES 2013**

BETWEEN

JOSEPH MOMANYI.....PETITIONER

VS

TEACHERS SERVICE COMMISSION

ABDIRIZAK K. FARAH.....RESPONDENTS

RULING

1. The 1st Respondent herein is established under Article 237 of the Constitution with its primary function being to manage persons engaged in teaching service. This management function among other functions entails the registration of trained teachers; recruitment; employment and assignment of teachers for service to public schools; promotion to higher grades and administrative positions; transfers and exercise of discipline.

2. The Petitioner is employed by the 1st Respondent as a teacher. He alleges that the 1st Respondent has violated his fundamental rights by demoting him from the position of the Principal of Nyataro Secondary School, transferring him to Ekerubo Gietai T.T.I School and assigning him teaching duties. He further claims that he has appealed to the 1st Respondent against the said transfer but that the appeal is yet to be heard and determined thereby precipitating the filing of this petition.

3. Through a Notice of Motion dated 13th June 2016 brought under rules 19, 23, 24 & 26 of the Constitution of Kenya (Protection of Rights & Fundamental Freedom) Practice & Procedure Rules 2013 and Articles 1, 2 (2) 10 (1) (C), 20(1) & 22(1), 23 & 165 of the constitution of Kenya 2010 the petitioner seeks the following orders:

a) Spent

b) Pending the hearing and determination of this application *inter parties*, an interim temporary injunction do issue restraining the defendants from declaring the petitioner absent from duty before his appeal dated 7.6.2016 is heard and determined.

c) Pending the hearing and determination of this petition, a permanent injunction do issue restraining the respondents from declaring the petitioner absent from duty before his appeal dated 7.6.2016 is heard and determined.

d) Any other conservatory relief that this court may deem fit to grant.

e) Costs.

4. The Motion is supported by the petitioner's affidavit sworn on 15th June 2018 in which he gives a detailed account of the sequence of events that culminated in his demotion and transfer to another school. In a nutshell, it is the Petitioner's case that the manner in which the 1st Respondent demoted him violates his fundamental constitutional rights and he now seeks a permanent injunction to issue restraining the respondents from declaring him absent from duty until this petition is heard as his appeal to the respondents has not been heard and determined.

5. The application is opposed by the Respondents vide a notice of preliminary objection dated 29th June 2016 in which the respondents have listed the following grounds:

a) That pursuant to the provisions of Articles 162(2)(a), 165(5) of the Constitution of Kenya , 2010 and Section 12 of the Employment and Labour Relations Court Act, this Honourable court has no jurisdiction to hear and determine the substantive matter herein.

b) The court lacks jurisdiction to grant such conservatory orders in the manner and on the facts of law disclosed in this matter.

6. When the matter came up for hearing before me on 29th August 2016, parties agreed to canvass the preliminary objection by way of written submissions.

7. After considering the Notice of Motion by the Petitioner, the Notice of Preliminary objection raised by the Respondents and the written submissions filed by each party's advocates, I note that the only issue for determination is whether the respondents' preliminary objection is merited.

8. In **Re The Matter of the Interim Independent Electoral Commission Constitutional Application No. 2 of 2011 (unreported) at para 29 and 30** the Supreme Court discussed the issue of jurisdiction in the following terms:

“Assumption of jurisdiction by court in Kenya is a subject regulated by the constitution, by statute law and by principles laid out in judicial precedent.”

9. In the celebrated case of **Mukisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Ltd 1969 E.A 696** preliminary objection was discussed as follows:

"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."

10. From the above decision it is clear that the test to be applied in determining whether the respondent's preliminary objection meets the threshold of the standards set out in the **Mukisa** case (supra) is first, that the Preliminary Objection raises a pure point of law, second that there is demonstration that all the facts pleaded by the other party are correct and lastly that there is no fact that needs to be ascertained.

11. The respondents also contended that this court lacks jurisdiction to hear the petitioner's notice of motion. The *locus classicus* on jurisdiction is the celebrated case of **Owners of the Motor Vessel "Lillian S" V Caltex Oil (Kenya) Ltd [1989] KLR 1** in which Justice Nyarangi of the Court of Appeal held 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 way 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 downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

12. As correctly submitted by the respondents herein, the dispute before me is one between an employer and an employee regarding the terms and conditions of employment.

13. **Article 162 (2) of the Constitution** establishes 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 the title to land. Under **Article 162 (3)** Parliament is empowered to determine the jurisdiction of the court of the status of the High Court. **Section 12 of the Industrial Court Act, 2011** sets out the jurisdiction of the court as follows:-

12(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) Dispute between an employer's organization and a trade union organizations.**
- (d) Disputes between trade unions.**
- (e)**

14. The above provisions are clear that the Industrial Court is constituted under the Industrial Court Act, 2011 as a court with equal status of the High Court and is competent to interpret matters arising from disputes falling within the provisions of section 12 of the Industrial Court Act. In the instant case, as I have already stated in this ruling, the petitioners' cause of action is primarily rooted on his terms of employment with his employer. It is therefore my finding that this court lacks the jurisdiction to entertain this case as it falls squarely under the jurisdiction of the Employment and Labour Relations Court. Having found that this court lacks jurisdiction, I also find that the preliminary objection raised by the respondents is sound and merited. I therefore allow the preliminary objection, albeit in part, because the mere fact that the petition was filed before a court that lacks jurisdiction does not automatically result in the dismissal or striking out of the said petition. My position is bolstered by the decision of the Court of Appeal in the case of **Prof. Daniel N. Mugendi vs Kenyatta University, Benson I. Wairegi, Eliud Mathiu & Prof Olive Mugenda, CA No. 6. Of 2012 at page 11**, in which it was held as follows:-

“Believing as we do that the approach taken by Majanja J is the correct one, and in endeavouring to meet the ends of justice untrammelled by procedural technicalities, we set aside the order striking out the appellant’s petition and direct that the High Court do transfer it to the Industrial Court which also has jurisdiction and authority to consider the claims of breach of fundamental rights as pertains to Industrial and Labour Relations matters. It is only just and proper that the Industrial Court do exclusively entertain those matters in the context and with regard to Article 165 (5) (b). And in order to do justice, in the event where the High Court or the Environment and Land Court comes 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 similar/equal status should in the spirit of harmonization, effect necessary transfers among themselves until such time as the citizenry is well acquainted with the appropriate form for each kind of claim. However, parties should not file “mixed grill” causes in any court they fancy. This will only delay dispensation of justice.”

15. Having regard to the subject matter of this case and the above quoted authorities, I am convinced that it will be in the interest justice to have this matter transferred to the Industrial Court for hearing and determination. Consequently I direct that this petition be placed before the Employment and Labour Relations Court at Kisumu for hearing and determination. The costs of the objection will be in the cause.

It is so ordered.

Dated, signed and delivered in open court this 21st day of February 2017

HON. W. OKWANY

JUDGE

In the presence of:

- Mr. Okioma for Abobo for the Petitioner
- N/A the Respondents
- Omwoyo: court clerk