



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 21 OF 2017

IN THE MATTER OF ARTICLES 41 AND 43 OF THE CONSTITUTION OF KENYA 2010

AND

THE MATTER OF THE DOCTORS STRIKE

BETWEEN

ROBERT ALAI ONYANGO.....PETITIONER

VERSUS

CABINET SECRETARY IN CHARGE OF HEALTH1ST RESPONDENT

THE CABINET SECRETARY

IN CHARGE OF FINANCE.....2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERA.....3RD RESPONDENT

CLEOPHAS MAILU.....4TH RESPONDENT

AND

DR. SAMWEL OROKO

DR. DAISY KORIR

DR. OUMA OLUGA

THE REGISTERED OFFICE BEARERS OF THE KENYA MEDICAL PRACTITIONERS

AND DENTIST UNION.....INTERESTED PARTY

RULING

This petition once again brings into sharp focus the jurisdiction of Constitutional and Human Rights Division of the High Court to hear matters pending before or decided by other superior courts or

Divisions of the High Court.

The petitioner, Robert Alai Onyango filed a petition dated 25th January, 2017 against Cabinet Secretary in charge of Health, Cabinet Secretary in charge of Finance, The Honourable Attorney General, and Cleophas Mailu. Included in the petition as interested parties, are the officials of the Kenya Medical Practitioners and Dentists Union. The petition is premised on **Articles 41** and **43** of the constitution. The petitioner has sought the following main orders;

A. Prerogative order of MANDAMUS do issue to compare the respondents and the interested party to comply with the provisions of Article 43(1) (a) by resolving the issue behind the Doctors' strike.

B. Conservatory order does issue staying further proceedings and/or proceedings in the Industrial Court case number 2486 of 2016. The Council of County Governors v The Kenya Medical Practitioners and Dentist union.

C. A conservatory order do issue suspending or staying the execution of the orders of the Court in Industrial Court case number 2486 of 2016, The Council of County Governors v The Kenya Medical Practitioners and Dentist union, especially committing the interested parties herein to civil jail pending hearing and determination of this petition.

Simultaneous with the petition, the petitioner took out a motion on notice under urgency brought under the same **Articles 41** and **43** of the Constitution and sought the same orders as those in the petition. The petition and motion were supported by affidavits sworn by the petitioner. The grounds upon which the petition and motion are founded are, principally, that provision of medical care in public hospitals has ground to a halt, and as a result, lives have been lost and continue to be lost, that there is a real danger of the public health sector collapsing all together to the detriment of the petitioner and other citizens. For those reasons, the petitioner has averred, it is imperative that this Court intervenes and grants the orders sought to protect and safeguard the rights of the petitioner and other citizens to the highest attainable standard of health as guaranteed by **Article 43(1)(a)** of the constitution.

On being served, the Attorney General entered appearance on behalf of the 1st, 2nd and 3rd respondents, while the firm of Ahmed Nasir Abdikadir and Company Advocates came on record representing the 4th respondent. The Attorney General filed grounds of opposition objecting to the jurisdiction of this Court to hear the petition as well as the motion before it. Parties agreed to dispose of the preliminary question of jurisdiction of the court to entertain the petition first.

During the hearing of the objection, Miss Mbulo, learned Counsel for the 1st to 3rd respondents, submitted that this court lacks jurisdiction to entertain this petition. Counsel's main point of objection was that this Court is a court of equal status to the Employment and Labour Relation Court whose proceedings and orders this court is being asked to stay. Counsel pointed out that the prayers both in the motion and the petition are meant to stay proceedings before Employment and Labour Relations, a superior court in terms of **Article 162 (1)** of the constitution, and therefore, a court of equal status to the High Court. Counsel further submitted that under **Article 165 (6)**, this court has supervisory jurisdiction over subordinate Courts, it cannot exercise that supervisory jurisdiction over other superior courts. For that reason, learned Counsel submitted, this court cannot hear the motion or petition and grant the orders sought.

It was further submitted that the Employment and Labour Relations Court has jurisdiction to deal with constitutional issues that fall within its jurisdiction. Counsel relied on the decisions in the case of **United States International University v the Attorney General [2012] eKLR** and **Judicial Service Commission v Gladys Boss Shollei and another [2014] eKLR**, to buttress those arguments. In learned counsel's view, the petition and motion are an abuse of the court process.

The second limb of the objection is that this matter is **sub judice** under **section 6** of the Civil Procedure Act cap 21, because the dispute is a live before the Employment and Labour Relations Court. Counsel

also relied on **order 42** of the Civil Procedure Rules, arguing that the only Court that has jurisdiction to stay those proceedings or execution of the orders is the court that issued them. Miss Hanan agreed with Miss Mbulo and associated herself fully with those submissions. They urged the court to dismiss the petition in its entirety.

Mr. Oonge, learned Counsel for the petitioner, opposed the preliminary objection and submitted that the petition is grounded on **Article 43 (1)(a)** which gives a fundamental right to the petitioner, and which right has been infringed. According to learned counsel, this is the only court that can address the issue of violation of rights given by **Article 43 (1)(a)** as a right in the Bill of Rights. Counsel further submitted that the issue before the Employment and Labour Relations Court is a tussle between **employer** and **employee** which is distinguishable from the issue before this court.

Counsel urged that proceedings before Employment and Labour Relations Court be suspended as this court addresses the issue raised before it under **Article 43 (1) (a)**. According to Counsel, the petitioner has not asked this court to supervise Employment and Labour Relations Court, but in their view, the issue here is different from the one before the Employment and Labour Relations Court. On the submission that the petition is *sub judice*, counsel argued that the petitioner is not a party in the case before Employment and Labour Relations Court hence the *sub judice* rule does not apply in this petition..

In a short rejoinder, Miss Mbulo submitted that **Article 43** cannot be addressed without regard to **Article 41** which is being addressed before the Employment and Labour Relations Court. Counsel maintained that this court lacks jurisdiction.

I have perused the record, considered submissions by Counsel for both parties and the authorities cited. The central issue in the objection is whether this court has jurisdiction to hear the petition before it.

Jurisdiction is the authority granted to a court of law to administer justice in a given area of responsibility. Like an engine, jurisdiction propels a court into action and enables the court to take cognizance of matters presented before it for determination. Without jurisdiction, the court's actions will be in vain. Jurisdiction can be limited or unlimited, original, or appellate or both and is conferred by the constitution or statute.

The fact that a court must be possessed of jurisdiction first before it hears a matter, was well stated by **Nyarangi JA** in the case of **Owners of Motor Vessel Lillian”S” v Caltex Oil (Kenya) Limited [1989] 1 KLR 1** thus–

“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....”

The Supreme Court expressed itself in support of that statement of law, in **RE: The matter of Interim Independent Electoral and Boundaries Commission [2011] eKLR** as follows–

“The Lilian “S” established that jurisdiction flows from the law and the recipient court is to apply the same with any limitation embodied therein; such a court may not arrogate itself jurisdiction through a craft of interpretation, or by way of endeavours to discern or interpret intentions of parliament, where the wording of the legislation is clear and their respective jurisdictions are donated by the constitution.”

In the case of **Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 others [2012] eKLR**, the Supreme Court once again stated–

“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 the other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law... where

the constitution exhaustively provides for jurisdiction of a court of law, the court must operate within the constitutional limit.”

The decisions above illustrate the fact that a court of law must first have jurisdiction before it can proceed to hear a matter presented before it and must exercise that jurisdiction in accordance with the law.

The jurisdiction of this court is conferred by the constitution. **Article 165** provides;

(1).....

(2).....

(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

(4).....

(5) ***The High Court shall not have jurisdiction in respect of matters–***

(a) reserved for the exclusive jurisdiction of the Supreme Court under this constitution; or

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

(6) The High Court has supervisory jurisdiction over the Subordinate Courts and over any person, body, or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7).....”

Article 165 (3) (a) gives the High court unlimited jurisdiction in criminal and civil matters. **Sub Article (3) (b)** gives the court jurisdiction to determine the question of whether a right or fundamental freedom in

the Bill of Rights has been denied, violated, infringed or is threatened.

Article 23 (1) reiterates the fact that the High court has jurisdiction in accordance with **Article 165**, to hear and determine applications to redress denial, violation or infringement of or threat to a right or fundamental freedom in the Bill of Rights. No doubt this court has wide jurisdiction to deal with allegations of violation or infringement of a fundamental right under the Bill of Rights.

However, **Article 23(1)** requires that the court exercises that jurisdiction in accordance with **Article 165**. According to the prayers in the petition, this court is being asked to grant a prerogative order of mandamus to compel the respondents and interested parties to comply with the provisions of **Article 43 (1) (a)** by resolving the issue behind the doctors strike. The petitioner further prays that this court issues a conservatory order staying further proceedings in the case before the Employment and Labour Relations Court between the Council of Governors and the Doctors Union. He further seeks assistance of this court in granting an order staying execution of orders issued by that court committing officials of the union to civil jail. Those prayers in the petition and the motion prompted the objection to this court's jurisdiction to hear the petition.

This court is established under **Article 165 (1)**. It is a superior court under **Article 162 (1)**. The reliefs sought before this court are essentially to halt further proceedings before the Employment and Labour Relation Court, and execution of the order committing the Doctors' union officials to civil jail. In a nutshell, the prayers call upon this court to take over proceedings before another superior court and stay them, ostensibly in exercise of jurisdiction as a Constitutional and Human Rights Division of the High Court.

There seems to be a general misconception among some legal practitioners, litigants, and a section of members of the public that this court, sitting as Constitutional and Human Rights Division of the High Court, has special jurisdiction to supervise superintend or direct other superior courts. Granted, the High Court has jurisdiction under **Article 165 (6)** to supervise subordinate courts and any person, body or authority exercising a judicial or quasi-judicial functions. The court also has jurisdiction to redress violation and infringement of fundamental rights under the Bill of Rights. However, **sub Article (6)** is clear that the High Court has no supervisory jurisdiction over **superior courts**. Superior courts in terms of **Article 162 (1)** are the Supreme Court, Court of Appeal, High Court and Courts of Equal status. Courts of equal status are those courts mentioned under **Article 162(2)**; that is; Employment and Labour Relations Court and Environment and Land Court.

The High Court draws its jurisdiction from the constitution. It has wide jurisdiction to deal with allegations of violation and/or infringement of fundamental rights. It also has jurisdiction of supervisory nature but that supervisory jurisdiction is limited. It cannot be exercised over superior courts. **Article 23(1)** is also clear that the court must exercise the jurisdiction given under **Article 165**. Looking at the prayers in the petition, the court is being asked to assume a supervisory role and stay proceedings pending before a superior court as well as stop execution of orders issued by that superior court. Taking such a step would amount to this court exercising jurisdiction it does not have, and which is excluded.

As stated by the Supreme Court in the case of **Samuel Kamau Macharia** (supra), the High Court as a creature of the constitution, draws its jurisdiction from the constitution and must exercise that jurisdiction as conferred on it. It must resist the suggestion that it can act otherwise. That must also be the case with the Constitutional and Human Rights Division of the High. It is only a Division of the High court. It is not a creation of the constitution but exists because of an administrative act. This division of the High court cannot, therefore, assume jurisdiction it does not have and supervise or superintend other superior courts. The jurisdiction of the High Court in this respect is limited by the constitution and the court must respect that limitation. It cannot and must not expand its jurisdiction beyond that limitation.

The temptation to make this Division superior to other superior courts has been the subject of litigation in a number of cases and decisions a bound on this. In the case of **Peter Nganga Muiruri v Credit Bank limited and other (Civil Appeal No 203 of 2006)**, the Court of Appeal had the following to say after **Nyamu J**, (as he then was) sitting in the Constitutional and Judicial Review Division, under the retired

constitution tended to hold the view that the Division had supervisory powers over other superior courts—

“There is no provision in the Constitution which establishes what Nyamu J. referred to as the Constitutional Court. In Kenya we have a Division of the High Court at Nairobi referred to as “Constitutional and Judicial Review” Division. It is not an independent Court but merely a Division of the High Court. The wording of Section 67 of the constitution which donates the power to the High Court to deal with questions of interpretation of Sections of the Constitution or parts thereof does not talk about a Constitutional Court. Instead it talks about the High Court.

With regard to the protective provisions, Section 84 of the Constitution does not in any of its sub-sections talk about the Constitutional Court. Instead it talks about an Application being made to the High Court.

In view of what we have stated above, it is quite clear that Nyamu, J.’s remarks which we earlier reproduced were based on the mistaken belief that the Constitution had created a Court called the Constitutional Court with supervisory powers over all other Courts. The Hon. The Chief Justice must have been aware that no such Court is established under the Constitution and that, we think, would explain why he created a Constitutional Division and not a Constitutional Court. The creation of the Constitutional and Judicial Review Division was an administrative act with the sole object of managing the cause list. The Chief Justice would have no jurisdiction to create a Constitutional Court as opposed to creating a Division of the High Court.

Any single judge of the High Court in this country has the jurisdiction and power to handle a constitutional question. The fact that a Constitutional Division was established did not by such establishment create a Court superior to a single judge of the High Court sitting alone. It would be a usurpation of power to push forward such an approach and whatever decision which emanates from a Court regarding itself as a Constitutional Court with powers of review over decisions of judges of concurrent or superior jurisdiction such decision is at best a nullity. Courts must exercise the jurisdiction and powers vested in them. ...

To conclude on this aspect, it is our view and we hold that Nyamu J. raised and considered this issue to give him the opportunity of answering his critics and to popularize his view as to the scope and extent of the jurisdiction and powers of his Division. The Law is not on his side. If his views were to be allowed to gain currency we opine that confusion in the administration of justice will be engendered and disharmony will ensue among judges of the High Court.”

In the case of Philip Moi v Pluda Moi (Petition No.65 of 2012), Lenaola J, (as he then was) had the following to say on the same issue-

“I must begin by dispelling the fallacy that the Constitutional and Human Rights Division of the High Court in Nairobi has jurisdiction to superintend, supervise, direct, guide, shepherd and/or purport to mend the mistakes, real or perceived, of other Divisions of the High Court in Nairobi or elsewhere in Kenya. In spite of the continued and consistent stand of Judges of that Division that it cannot have been the intention of the framers of the Constitution that such a position should exist, parties in every conceivable case, continue to invoke that fallacious and misguided jurisdiction.”

The issue arose again and was addressed by Mumbi Ngugi J in the case of Robert Mwangi v Catering Ltd and Another [2012] eKLR thus—

“If I understand Mr. Odera correctly, his contention is that this court as a constitutional and Human Rights Division, in using its original jurisdiction conferred on the High Court under Article 165, can supervise even the Supreme Court and the Court of Appeal on matters of procedure. Even without reference to the existing judicial authorities on the point, this is not only an argument that flies in the face of clear constitutional provisions but is a totally fallacious

argument that, taken to its logical conclusion, would lead to complete absurdities and reduce our judiciary into a comical farce.”

There is a long list of decisions on this point but what the above decisions demonstrate is that there has been concerted effort to make the Constitutional and Human Rights Division of the High Court appear special and superior to other superior courts. Courts have rejected that temptation and have remained faithful to the constitution. That must remain the position that the Division does not have such special jurisdiction and cannot act as such. Acting in that manner would cause not only embarrassment but also disharmony within the judiciary. It must be resisted at all costs.

Looking at the petition before court, one cannot help wonder what counsel and the petitioner wanted to achieve in the face of clear constitutional provisions. This court cannot sit over decisions made by a superior court. It cannot take over proceedings pending before a superior court and stay them. Neither can it stay execution of orders made by that court. This court cannot direct the respondents and interested parties to end a labour dispute. That is a mandate for the Employment and Labour Relations Court and the dispute is presently before that court. It is up to that court to resolve that dispute.

I must also add that Employment and Labour Relations Court has jurisdiction to issue declarations on violation or infringement of the Bill of Rights if the infringement touches on rights that fall within its jurisdiction. In this regard, the case of **Judicial Service Commission v Gladys Shollei and Another [2014] eKLR** is spot on. The Court of Appeal stated as follows with regard to that court's jurisdiction-

“ [40] Article 23(1) & Article 165(3)(b) of the Constitution grants the High Court powers to hear and determine questions involving redress of violations or infringement or threatened violations of fundamental rights and freedoms in the Bill of Rights. However, Article 23(2) provides for legislation giving original jurisdiction to subordinate courts to hear and determine disputes for enforcement of fundamental rights and freedom. In addition, Article 23(3) does not limit jurisdiction in the granting of relief in proceedings for enforcement of fundamental rights to the High Court only, but empowers “a court” to grant appropriate relief including orders of Judicial Review in the enforcement of rights and fundamental freedoms under the Bill of Rights. Also of note is Article 20(3) that places an obligation on “any court” in applying a provision of the Bill of Rights to develop the law and to adopt the interpretation that most favours the enforcement of a right or fundamental freedom. These provisions confirm that the Constitution does not give exclusive jurisdiction in the enforcement of the Bill of Rights to the High Court, but anticipates the enforcement of the Bill of Rights by other Courts.”

The court concluded that the Employment and Labour Relations Court has jurisdiction to grant reliefs in cases of violation and infringement of fundamental rights. The issues that this court is being asked to deal with are issues that should be dealt with by that court because they fall within its jurisdiction. Although the petitioner, like everyone else, has the right to the highest attainable standard of health, the reasons why Doctors are not offering their services are clear and are known to all. It is due to the on-going industrial action a matter that is before the Employment and Labour Relations Court. That court can issue the orders sought in this petition.

Even without dealing with the submission that the petition is **sub judice**, it is obvious that the petition herein is not sustainable. Following what I have said above and having given due consideration to the petition, the objection thereto, the law and the authorities, I am satisfied that the objection has merit and is hereby allowed. The petition dated 25th January, 2017 is struck out. Each party do bear their own costs.

Dated Signed and Delivered at Nairobi this 16th day of February 2017.

E C MWITA

JUDGE