



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CONT. PETITION NO. 44 OF 2015

**IN THE MATTER OF ARTICLES 27, 47, 48, 73, 75 AND 165 OF THE CONSTITUTION OF
KENYA 2006**

AND

**IN THE MATTER OF: PUBLIC SERVICE EMPLOYMENT OF CIVIL SERVANTS
REGULATION 2006**

AND

IN THE MATTER OF: THE CIVIL PROCEDURE RULES 2010 PETITION FOR MANDAMUS

AND

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

AND

IN THE MATTER OF: ALL OTHER ENABLING PROVISIONS OF THE LAW

BETWEEN

JOSEPH INNOCENT BOSIRE.....PETITIONER/APPLICANT

VS

SUB-COUNTY COMMISSIONER MARANI SUB-COUNTY

ALFRED MAKORI OMOA

THE HON. ATTORNEY GENERAL

RESPONDENTS

RULING

1. In this petition dated 21st September 2015, the petitioner prays for the following orders:

a. Issue an order commanding the respondents to declare or announce appropriately that the petitioner was a winner of the interview of being a chief and he be given his appointment letter.

b. Issue any other order as is deemed fit in the circumstance of the case.

c. Allow the costs of the petition.

2. The Petition is supported by the petitioner's affidavit sworn on 21st September 2015 wherein he states that he sat for interviews for the position of a chief on 3 occasions and emerged as the best candidate but that his position was deliberately and corruptly given to another person.

3. He therefore urges the court to declare him the winner at the interview so that he can be given his appointment letter. The petitioner also swore a further affidavit on 5th February 2016 in which he challenged the 1st respondent to exhibit the names of all the candidates who applied for the job.

4. The 1st and 3rd respondents opposed the petition through the replying affidavit of Dennis Ogola, the 1st respondent herein. He deposes that the petitioner was not one of the candidates who was interviewed on 1st August 2013 and that no results were declared on 15th November 2014 as alleged by the petitioner.

5. He further avers that, this court lacks the jurisdiction to hear and determine this petition which falls within the purview of the Employment and Labour Relations Court.

6. When the petition came up for directions on 7th November 2016, the parties agreed to canvass it by way of written submissions. I have perused and considered the parties' duly filed written submissions and I note that the first issue that this case raises is the issue of whether or not this court has jurisdiction to entertain this petition.

7. 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."

8. 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."

9. 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.

10. 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.

11. 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.

12. 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.”

13. 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 is awarded to the respondents.

It is so ordered.

Dated, signed and delivered in open court this 4th day of April, 2016

HON. W. OKWANY

JUDGE

In the presence of:

- for the Petitioner
- the Respondents
- Omwoyo: court clerk