



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO 278 “B” OF 2015

ROSELYN SISIALI WEKESAPETITIONER

VERSUS

KONRAD ADENAUER FOUNDATIONRESPONDENT

AND

BARBARA ISCHEBECKINTERESTED PARTY

RULING

Introduction

1. The proceedings in this matter were initially commenced in the Employment and Labour Relations Court in **Industrial Cause No. 2120 of 2014 - Roselyn Sisiali Wekesa vs Konrad Adenauer Foundation and Others**. The petitioner had lodged a claim against the respondent, the interested party, and several statutory organs namely the Director of Immigration, Kenya Revenue Authority, Ethics and Anti-Corruption Commission and the Director of Public Prosecutions. The Employment and Labour Relations Court, however, held that no employment dispute was disclosed in the pleadings, before it, and it ordered that the matter be transferred to this Court for hearing and determination.

2. Following the transfer of the matter to this Court, the petitioner amended her pleadings and removed all the statutory bodies from the proceedings, leaving the respondent and the interested party.

3. The respondent then filed a Notice of Preliminary Objection dated 16th September, 2015 in which it challenged among others, the jurisdiction of this court to hear and determine the Amended petition. This ruling relates to that preliminary objection.

Background

4. The petitioner was an employee of the respondent, a German Foundation based in Berlin but operating in various countries. In 2014, she was rendered redundant and as a result, she filed her claim alleging that the process leading to the termination of her employment through redundancy was illegal and in

contravention of her constitutional rights. In her Amended Petition, she seeks the following orders:

(a) A declaration that the termination of the petitioner by the respondent was wrongful and unfair.

(b) A declaration that the petitioner was racially discriminated against.

(c) A declaration that the retention of the interested party by the respondent is illegal to the extent that it violates the Agreement between the Kenya Government and German Foundations.

(d) Orders of Certiorari to remove to this Court and quash the decision of the respondent to terminate the services of the petitioner.

(e) Judgment against the respondent in the following terms:

(i) Reinstatement, or in the alternative, basic/ordinary damages for wrongful and unfair termination equivalent to 12 month's gross pay of Kshs3, 720, 000/=.

(ii) Aggravated damages for racial discrimination of Kshs.40, 000,000/=.

(iii) Punitive damages of Kshs.20,000,000.

(iv) Costs of the suit.

(v) Interest on (i) to (iii) above at court rates until payment in full from the date of filing of this suit.

(vi) Any other reliefs this Honourable Court may deem just.

The Preliminary Objection

5. In their preliminary objection to the petition, the respondent and the interested party argue that the petition does not disclose any constitutional or indeed any matters over which this Court can exercise its jurisdiction, and that no cause of action whatsoever or any allegation of violation of the petitioner's constitutional rights is disclosed as against the parties. More specifically, it is their argument that no cause of actions is disclosed against the interested party and her joinder is an abuse of the court process. They further argue that the amendment of the petition and removal of the various respondents previously named in Industrial Cause No. 2120 of 2014 has completely removed the substratum upon which the matter was transferred to this Court; that the reliefs sought by the petitioner are predicated upon a contract of employment and this Court lacks the jurisdiction to entertain what by all appearances is an alleged claim of unfair termination of employment. They therefore ask that the petition should be struck out with costs to them, terming it as vexatious and frivolous and wholly incompetent.

6. The respondent and interested party submit that the assertions by the petitioner do not constitute any particulars of racial bias but are instead a submission on why the petitioner feels that her contract of employment was unfairly terminated. While she has claimed that several of her rights under the Constitution have been infringed, the petitioner has failed to show how that was done and to demonstrate why such matters as she alleges cannot be addressed within the realm of private law. They relied on the authority in **Anarita Karimi Njeru vs Attorney General [1979] 2 KLR 54** and **Mumo Matemu vs Trusted Society of Human Rights Alliance and Others, Civil Appeal No. 290 of 2013** for that proposition.

7. The respondent and interested party submitted that the duty to implement rights and fundamental freedoms is imposed upon the state and state organs and not upon private individuals as stipulated under Article 21 (1) of the Constitution. In meeting that obligation, the state has enacted various statutes to govern the relationship between private parties and for the enforcement of such rights in private law. In

their view, by asserting a claim for compensation under the Employment Act and for aggravated and punitive damages under common law, the petitioner acknowledges the existence of substantive law and legal remedies outside the Constitution.

8. It was their submission further that the issues raised by the petitioner are issues between two private persons. They therefore invited the Court to determine as a preliminary point whether a constitutional petition can be lodged between such private persons.

9. In their view, and on the authority of the decision in **Hon. Uhuru Kenyatta vs The Star Publication Ltd, Petition No. 187 of 2012**, fundamental rights are contained in the Constitution and are principally against the State, while the rights and interests of individuals are taken care of in the province of private law and are invariably addressed as such.

10. The respondent and the interested party further relied on the decisions in **Revital Healthcare (EPZ) Ltd and Another vs Ministry of Health and 5 Others, Petition No. 63 of 2013** and **Anne Wangui Ngugi and Others vs Edward Odundo and Another, Petition No. 57 of 2014**, to submit that where an infringement of rights which can be founded in a claim under substantive law is alleged, the proper course is to bring the claim under such law and not under the Constitution. As to whether the Court can transfer the claim to another Court, their submission was that it is for a party to identify its claim and move the right forum appropriately and this Court cannot transfer a matter to another Court of equal jurisdiction. It was their submission therefore that the petitioner, having opted to assert a constitutional claim where none exists, must bear the consequences attendant thereto.

11. Ms. Kirimi submitted on behalf of the respondent and interested party that the principal consideration in establishing whether a constitutional question arises must be evident from the facts and orders sought. By asserting a claim for damages for unfair dismissal, the petitioner implicitly acknowledges that there is another remedy that she can pursue, in the Employment and Labour Relations Court. In her view, the present petition is not a proper matter for constitutional adjudication especially considering that the petitioner has failed to show that she has an issue or question whose determination requires the interpretation of the Constitution rather than a statute. The respondent and interested party therefore urged the Court to strike out the petition with costs to them.

The Petitioner's Response

12. The petitioner argued that this Court has jurisdiction over the subject matter of discrimination as generally provided for under the Constitution. It was also her contention that the amendment of the petition was necessary for purposes of clarity, and further, that whereas some of the reliefs she is seeking touch on employment matters, the declaratory reliefs that she seeks are within the jurisdiction of this Court. It was submitted on her behalf, however, that if the Court finds that it has no jurisdiction to grant any or all the reliefs sought in the matter, it has the option of referring the dispute to an appropriate forum.

13. It was also her submission that allegations of human rights violations should not be underrated and dismissed off hand, and the preliminary objection by the respondent and the interested party should be dismissed with costs to her.

14. The petitioner relied on the decisions in **Rose Wangui Mambo and 2 Others vs Limuru Country Club and 17 Others, [2014] eKLR**, and **Isaac Ngugi vs Nairobi Hospital and 3 Others, Petition No. 407 of 2012**, to argue that the present petition raised issues of discrimination within the realm of employment whereas the Constitution has created special courts to deal with employment matters. She conceded that the Employment and Labour Relations Court has jurisdiction to entertain issues relating to human rights abuses within the employment environment as was stated by the Court of Appeal in the case of **Judicial Service Commission vs Gladys Boss Shollei and Another [2014] eKLR**. In her view however, the Employment and Labour Relations Court has been overcautious in matters of human rights, preferring instead to take a narrow approach of dealing with breaches of the employment contract, and that the said court has not for instance addressed the issue of punitive damages.

15. According to the petitioner, the narrow approach to employment matters in which human rights violations are not broadly embraced raises the question as to whether the Employment and Labour Relations Court is a sufficient forum for ventilating human rights abuses at the workplace.

16. With regard to the question whether this Court has the jurisdiction to transfer a matter to another Court for determination, the petitioner relied on the decision in **Prof. Daniel M. Mugendi vs Kenyatta University and Others, Nairobi Civil Appeal No. 6 of 2012 (unreported)** and expressed the view that this Court has the jurisdiction to refer the current petition to another court of parallel jurisdiction should it deem it necessary in the interests of justice to do so.

Determination

17. Two issues arise in relation to the preliminary objection raised by the respondent and the interested party. The first is whether this Court has the jurisdiction to determine this matter, which the respondent and interested party assert that it does not have. The second is whether, should it find that it has no jurisdiction, it can properly transfer the matter back to the Employment and Labour Relations Court.

18. The issue of jurisdiction raised in this matter is in two limbs. The first is with regard to the question whether the Bill of Rights can be enforced against private individuals, such as the respondent, as opposed to the state.

19. I believe that this question has been answered in the affirmative in several decisions of this Court, the reasoning being that the Constitution provides for both vertical application-between the citizen and the state, and horizontal application of the Bill of Rights between individual private citizens *inter se* in appropriate cases.

20. This emerges from the provisions of Article 2 (1) of the Constitution which states that the **Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.** Further, Article 20 of the Constitution is to the effect that:

(1) The Bill of Rights applies to all law and binds all State organs and all persons.

(2) Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.

(3) ... (Emphasis added)

21. In the **Rose Wangui Mambo and 2 Others vs Limuru Country Club case (supra)** a three judge bench of this Court took the position that:

“[69] To accede to the respondents’ proposition that private entities are insulated from the constitutional duty to respect and uphold fundamental rights, to hold that private entities are completely shrouded by their private cloak from this Court’s scrutiny is we believe, to reverse the intention of the framers of the Constitution. It is to strip individual Kenyans of the very constitutional protection that the Constitution of Kenya 2010 meant to jealously guard and leave them exposed and vulnerable in private dealings. This would effectively render the constitutional protections of little or no practical value to the very persons designed to enjoy its protections and would, in our view, amount to abdication of this Court’s primary responsibility conferred upon it by the people of Kenya.”

22. In **Satrose Ayuma and 11 Others vs Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme and 3 Others, Petition No. 65 of 2010**, the Court observed as follows:

“[58] I am also aware that under the provisions of Article 20(3) as read with Article 259 of the Constitution, this Court is obligated to develop the law to the extent that it gives effect to a right or fundamental freedom; and it must adopt an interpretation that favours the enforcement of a

right or fundamental freedom, in order to promote the spirit and objects of the Bill of Rights. Clearly, to interpret the Constitution in a manner to even suggest that the 1st and 2nd Respondents do not have an obligation to promote and protect the Petitioners' rights and freedoms does not only fly right out of the window, but would also defeat the very essence and spirit of Article 20(3). It is thus clear to my mind that it would not have been the intention of the drafters of the Constitution and the Kenyan people who overwhelmingly passed the Constitution that the Bill of Rights would only bind State Organs. A purposive interpretation as can be seen above would imply that the Bill of Rights binds all State Organs and all persons, whether they are public bodies or juristic persons. (Emphasis added)

23. Finally, in **Mwangi Stephen Mureithi vs Daniel Toroitich Arap Moi, Petition No. 625 of 2009**, Gacheche J stated that:

“The rigid position that the human rights apply vertically is being overtaken by the emerging trends in the development of human rights law and litigation. We can no longer afford to bury our heads in the sand, for we must appreciate the reality, which is that private individuals and bodies such as clubs and companies wield great power over the individual citizenry, who should as of necessity be protected from such non-State bodies who may for instance discriminate unfairly, or cause other Constitutional breaches.

...

I need not point out that this is the beginning of a new dawn for Kenya; one that should be embraced enthusiastically by all and it will not matter who the duty holder is, rather, what matters is who should enjoy the rights as enshrined in the Constitution.

It must be clear by now that I find that the fundamental rights are applicable both vertically and horizontally, save that horizontal application would not apply as a rule but it would be an exception, which would obviously demand that the court do treat on a cases by case basis by examining the circumstances of each case before it is legitimised.”

24. I fully agree with the views expressed by the courts in the above matters.

25. The second limb relates to the question whether the alleged violation of the petitioner’s rights in this case falls for determination by this Court. This calls for a consideration of the jurisdiction vested in this Court by the Constitution at Article 165(3), which is in the following terms:

(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) ...

26. Article 165(5)(b) then 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).

27. Article 162 (2) provides that:

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.

28. In the present matter, there is no dispute that the petitioner is aggrieved by the respondent's decision to retrench her. In the petitioner's view, her retrenchment was illegal because she was racially discriminated against. Further, she alleges that her layoff was deceitful and a mockery and therefore in contravention of **sections 40, 45 and 49** of the **Employment Act**.

29. Without embarking on an analysis of the petitioner's case, which this Court cannot properly do at this stage, it is clear that her grievance arises from her employer-employee relationship with the respondent. That being the case, her claim falls squarely within the jurisdiction of the Court contemplated under Article 162(2) (a) of the Constitution.

30. In compliance with this provision, Parliament enacted the Employment and Labour Relations Court Act as "***an Act of Parliament to establish the Employment and Labour Relations Court to hear and determine disputes relating to employment and labour relations and for connected purposes.***" Section 12 of the Act provides that:

(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;

(2)

(3) In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders—

(i) interim preservation orders including injunctions in cases of urgency;

(ii) a prohibitory order;

(iii) an order for specific performance;

(iv) a declaratory order;

(v) an award of compensation in any circumstances contemplated under this Act or any written law;

(vi) an award of damages in any circumstances contemplated under this Act or any written law;

(vii) an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law; or

(viii) any other appropriate relief as the Court may deem fit to grant.

.....[Emphasis added]

31. It was submitted for the petitioner that she was seeking declaratory relief in this petition before this Court. However, as the above provisions of the Employment and Labour Relations Court Act illustrate, the Court is vested with the jurisdiction to make declaratory orders and an award for compensation with regard to any claim before it. This was the holding in the case of **United States International University**

(USIU) vs Attorney General, [2012] eKLR in which the Court stated that:

“[24] The Industrial Court contemplated under Article 162(2) was intended to be independent of the High Court. It is for this reason that it was bestowed the status of the High Court. Indeed the Final Report of the COE affirms that giving Parliament power to establish the Industrial Court with the status of the High Court was aimed at addressing the competing jurisdictional issues that have historically existed between the High Court and the Industrial Court. It was the intention of the drafters of the Constitution to give the Industrial Court, though a specialized court in nature, full independence from the High Court.

[28] The Constitution does not define what “status” means but in my view it implies that the court so created must have the same juridical incidents as the High Court. The jurisdiction bestowed upon the High Court under Article 165(3) is not absolute but ‘subject to clause (5)’ whose provisions forbid the High Court from exercising jurisdiction over matters falling within the province of the Supreme Court and the specialized court established under Article 162(2). This status is to be determined from a textual consideration of the provisions governing the judicature. First, under Article 162, the courts of (the) status of the High Court are considered superior courts save that their functions are to be defined by Parliament rather than the Constitution itself. Second, Part 2 of Chapter Ten titled “Superior Courts” sets out the jurisdiction of the Superior courts, that is, the Supreme Court, the Court of Appeal and the High Court. Though the Courts of (the) status of the High Court are not defined their jurisdiction is dealt with in negative terms under Article 165. The High Court shall not exercise jurisdiction in matters reserved for status courts contemplated under Article 162(2). This implies that the High Court cannot deal with matters set out in section 12 of the Industrial Court Act, 2011. Third, the High Court does not have supervisory jurisdiction of superior courts, which includes courts with the status of the High Court.”

32. With respect to the jurisdiction of the Employment and Labour Relations Court to hear and determine claims relating to violations of the rights in the Bill of Rights, the Court went on to state that:

“[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. 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 and recurrence of the situation obtaining before the establishment of the current Industrial Court.

[43] The intention to provide for a specialist court is further underpinned by the provisions of Article 165(6) which specifically prohibits the High Court from exercising supervisory jurisdiction over superior courts. To accept a position where the Industrial Court lacks jurisdiction to deal with constitutional matters arising within matters its competence would undermine the status of the court. Reference of a constitutional matter to the High Court for determination or permitting the filing of constitutional matters incidental to labour relations matters would lead to the High Court supervising a superior court. Ordinarily where the High Court exercises jurisdiction to interpret the Constitution or enforce fundamental rights, its decisions even where declaratory in nature will require the court to follow or observe the direction. This would mean that the High Court would be supervising the Industrial Court which is prohibited by Article 165(6).”(Emphasis added)

33. It is therefore my finding that this Court has no jurisdiction to hear and determine the issues raised in the Amended Petition, and the respondent’s preliminary objection succeeds. To hold otherwise would

result in this Court encroaching on the mandate of the Employment and Labour Relations Court, which it is expressly prohibited by the Constitution from doing. The petitioner's claim is based on alleged breach of sections 40, 45 and 49 of the Employment Act, which relate to termination of employment on account of redundancy, unfair termination and wrongful dismissal respectively. These fall within the mandate of the Employment and Labour Relations Court, and if there is any question of discrimination in the application of these sections, the Labour Relations Court is fully competent to hear and determine such issue.

34. It was submitted on behalf of the petitioner that the Employment and Labour Relations Court is not a sufficient forum for ventilating human rights abuses in the work place as it has been overcautious in matters of human rights, and has taken a narrow approach of dealing largely with breaches of the employment contract. It must be borne in mind, however, first, that the said court was expressly established by the Constitution and vested with the jurisdiction to deal with such matters. Secondly, its decisions are subject to appeal as stipulated under section 17 of the Employment and Labour Relations Act which is to the effect that:

“Appeals from the Court shall lie to the Court of Appeal against any judgment, award, order or decree issued by the Court in accordance with Article 164(3) of the Constitution.”

35. I will therefore say no more on this point. The upshot of my findings above is that this petition is improperly before me. Having so found, the question is how best to deal with the petitioner's claim.

36. Ordinarily, the Court would be reluctant to, so to speak, play ping pong with a matter, moving it from one Court to another and back again. However, noting that the jurisdiction of this Court on employment and labour relations matters is expressly prohibited by the Constitution, yet recognizing the need to allow the petitioner to have her day in court, I have no option but to transfer the matter back to the court where it originated, and where it ought to have been heard and determined: the Employment and Labour Relations Court.

37. I do this bearing in mind the sentiments of the Court of Appeal in **Prof. Daniel M. Mugendi vs Kenyatta University and Others (supra)** in which it recommended that the High Court ought to have transferred the matter which had been filed before it to the Employment and Labour Relations Court, which was vested with the jurisdiction to hear the matter, instead of striking it out. In that case, the Court of Appeal stated as follows:

“...It is only meet and proper that the Industrial Court do exclusively entertain those matters in that context and with regard to Article 165(5) (b). And in order to do justice, in the event where the High Court, the Industrial Court or the Environment & 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 the necessary transfers among themselves until such time as the citizenry is well-acquainted with the appropriate forum 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.” [Emphasis added]

38. I therefore direct that this matter be and is hereby transferred back to the Employment and Labour Relations Court for hearing and determination.

39. With respect to costs, I direct that they shall await the determination of the matter before the Employment and Labour Relations Court.

Dated, Delivered and Signed at Nairobi this 5th day of April 2016.

MUMBI NGUGI

JUDGE

Mr. Wekesa instructed by the Moni Wekesa & CO. Advocates for the petitioner.

Ms. Kiremi instructed by the firm of Hamilton Harrison & Mathews & Co. Advocates for the respondent and interested party.