

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT NAIROBI

APPEAL NUMBER E257 OF 2023

KENYA DEFENCE FORCES1ST APPELLANT

KENYA DEFENCE FORCES COUNCIL.....2ND APPELLANT

THE ATTORNEY GENERAL.....3RD APPELLANT

-VERSUS-

DAVID MUNENE.....RESPONDENT

*(Being an Appeal from the Ruling and Orders of the Hon. R. L. Musiega (SRM)
delivered on 8th December, 2023 in MCELRC 559/2019)*

CORAM

Before Lady Justice J.W.Keli

C/A Otieno

JUDGMENT

1. The Appellant herein, being dissatisfied with the Ruling and Orders of the Hon. R. L. Musiega (SRM) delivered on 8th December, 2023 in MCELRC 559/2019 between the parties filed a memorandum of appeal dated the 13th of December 2023 seeking the following orders:-

a)The appeal be allowed.

- b)The subordinate court’s finding that the Notice of Motion dated 13th March 2023 lacks merit be set aside, overturned and/or varied and substituted with a finding of this court.**
- c)This Honourable Court be pleased to find that Nairobi MC ELRC 558 of 2019 is incurably defective and dismiss it in its entirety.**
- d)The Respondent does pay the costs of this Appeal and the costs in the lower court.**
- e) Such further relief as may appear just to the Honourable Court.**

GROUND OF THE APPEAL

2. The Honourable Trial Magistrate erred in both in fact and in law in allowing a claim brought against the Government outside the twelve months prescribed under Section 3 of the Public Authorities Limitations Act Cap 39 of the Laws of Kenya without first obtaining leave of the court to extend time.
3. The Honourable Trial Magistrate erred in both law and in fact in allowing a suit where the Respondent herein has not exhausted the administrative mechanism provided for under the national legislation prior to the institution of the claim.
4. The Honourable Trial Magistrate erred both in fact and in law in allowing illegally obtained evidence to continue being placed in the record of the court.
5. The Honourable Trial Magistrate erred in law and in fact in allowing a claim which suffers paucity of evidence.

6. The Honourable Trial Magistrate acted outside his jurisdiction in entertaining an incurably defective suit and thereby cannibalized on the laws that clothe it with jurisdiction.

7. The Honourable Trial Magistrate disregarded authorities placed before it from the courts of record which are both persuasive and binding.

BACKGROUND TO THE APPEAL

1. The Respondent filed a memorandum of claim against the Appellants dated the 12th of April 2019 seeking the following orders:-

- a. A declaration that the claimant suffered unfair and unlawful termination by the 1st Respondent.
- b. General damages for wrongful and unlawful termination.
- c. The sum total of all monies, allowances and benefits due to the claimant from the date the Kenya Defence Forces effected the unfair termination of the claimant's employment.
- d. Terminal benefits.
- e. Costs of this suit.
- f. Interests on clause (ii), (iii) and (iv) above.
- g. Any other relief that this Honourable Court may deem fit and expedient to grant.

(pages 9-14 of Appellant's ROA dated 25th April 2025).

2. Alongside the memorandum of claim, the Respondent filed his verifying affidavit, witness statement and list of documents with bundle of documents attached, all dated 12th April 2019 (see pages 15-35 of ROA).

3. The claim was opposed by the Appellants who entered appearance and filed a Notice of Motion dated 13th March 2023 seeking the striking out of the suit and challenging the jurisdiction of the court to entertain the matter (pages 36-42 of ROA). The Notice of Motion was supported by the Affidavit of one Sammy Njoka Muthii, sworn on 20th March 2023, with attachments thereto (pages 43-68 of ROA).

4. In response to the Notice of Motion dated 13th March 2023, the Respondent filed a Replying Affidavit dated 25th October 2023.

5. The court issued directions that the Notice of Motion application be disposed of by way of written submissions. The parties complied.

6. The Trial Magistrate Court delivered its ruling on the 8th of December 2023, dismissing the Appellants' Notice of Motion dated 13th March 2023 (ruling at pages 71-83 of ROA).

DETERMINATION

7. The appeal was canvassed by way of written submissions. Both parties filed.

8. This being a first appellate court, it was held in Selle v Associated Motor Boat Co. [1968] EA 123 that:- *“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due*

allowance in this respect. In particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

9. Further in on principles for appeal decisions in Mbogo V Shah [1968] EA Page 93 De Lestang V.P (As He Then Was) Observed At Page 94:

"I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

Issues for determination

10. In their submissions dated the 28th of April 2025, the Appellant identified the following issues for determination:

- i. Whether the Respondent is guilty of laches.
- ii. Whether the instant claim is a subject of direct route to this Honourable Court and whether the claimant exhausted all the administrative mechanisms availed to him in law prior to approaching this Honourable Court.
- iii. Whether the evidence adduced by the claimant is illegally obtained.
- iv. Whether the Honourable Trial Court has jurisdiction to entertain the claim.

11. On his part, the Respondent identified the following issues for determination in his submissions dated the 5th of June 2025.

- i. Whether the Respondent's suit is time barred.
- ii. Whether the Respondent's suit violates the doctrine of exhaustion.
- iii. Whether the evidence the Respondent wishes to rely on was illegally obtained.
- iv. Whether the trial court has jurisdiction to hear and determine the matter.

12. The court on perusal of the appeal finds that the main issue for determination is whether the trial court had jurisdiction to handle the claim. The other issues are for consideration on merit by the trial court if it has jurisdiction.

Appellant's submissions

13. Manifestly, the Kenya Defence Forces Act, 2012 provides a comprehensive trial procedure for an accused person as per the provisions of the Act. A look at the facts as presented by the Claimant in his pleadings informs that he was dismissed from service but does not give an account of how the dismissal was finally arrived at.

14. The Appellant contends that any grievance arising from such criminal quasi-judicial summary trial should first be dealt with exhaustively through the internal mechanisms provided, failure to which the same should be a subject for Judicial Review before the Judicial Review bench and not the Employment and Labour Relations Court. At paragraphs 36 of the claim for instance the Respondent herein though alleging that the Commanding Officer of the Head Quarter wing lacked the capacity necessary to try him, which if it is an issue the 1st 2nd and

3rd Appellants allege is a subject for Judicial review and not a subject for direct route to this honourable court, he mischievously fail to provide the definition of a Commanding Officer as contained in the Armed Forces (General Regulations), 1969 which is "...in relation to a member of the Armed Forces is the Officer who has powers of Command over that member...". He does not impugn the exercise of command of the Commanding Officer who presided over his trial over him. Section 303 of the Kenya Defence Forces Act, Act number 25 of 2012 which was drafted in line with the Article 47 of the Constitution of Kenya 2010 provides as follows:-

"...(1) The Defence Council shall establish an internal grievance mechanism which shall be under the Office of the Chief of the Kenya Defence Forces to address any complaint brought by or against a member of the Defence Forces. (2) The Defence Council shall, within ninety days of the commencement of this Act make rules of procedure with respect to internal grievance mechanism established under subsection (1).

(3) The rules of procedure made under subsection (2) shall be in accordance with Article 47 of the Constitution and shall make provisions with respect to investigation and determination of any complaint by or against a member of the Defence Forces and without prejudice to the generality of the foregoing, the rules of procedure shall make provisions with respect to-the procedure to be observed in lodging a complaint; (b) manner in which the complaint is to be investigated; and
(c) manner in which appeals are to be made where a member of the Defence Forces has not obtained a satisfactory redress..."

15. The Kenya Defence Forces (Internal Grievance Mechanism) Rules, 2017, are contained in Legal Notice number 229 of 2017 and the route the Claimant/Respondent ought to have taken prior to coming before this honourable court are well woven articulated therein. Section 9 (2) of the Fair Administrative Actions Act provides that the High court or a subordinate court under sub- section (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and on remedies available under any other written law are first exhausted. That the Kenya Defence Forces Act provides for internal mechanism under legal Notice No. 229 of 2017 made pursuant to Section 303 of the Kenya Defence Force Act. The appellant invited the court to make an observation that the Respondent has not availed any proof for examination that he has exhausted the said internal grievance mechanism provided by the statutes and neither has he demonstrated in his pleadings even in a subtle way any hardship in exploiting the internal grievance mechanism provided. Moving on to the issue of loss of benefits raised by the Respondent, it is the 1st 2nd and 3rd Appellants contention that it is an issue of the Armed Forces (Pensions and Gratuities) (Officers and Servicemen) Regulations and not a matter for a direct route to the court in case of grievance by personnel serving in the Kenya Defence Forces. The Kenya Defence Forces (Pensions and Gratuities) (Officers and Service Member) Regulations establishes a Pensions Appeal Board. The Board has powers to hear an appeal on first instance and vary award based on its assessment. The Respondent herein did not make any attempt to approach the Board. His claim should not be granted by the mere asking of it but rather he should demonstrate that he has exhausted the prescribed procedures. Whenever an Act of Parliament prescribes a procedure or protocol, parties are bound to exhaust the chain before resolving to the sacred court process. The claimants redress to the trial Court as a Court of first instance to resolve a

pension matter is a deliberate attempt to mutilate the intentions of the legislature. That the jurisdiction of the Court is on appeals arising from Pensions Appeal Board and therefore it should dismiss the Claim herein for want of jurisdiction. To buttress the foregoing submissions the appellant relied on the decision by the Court of Appeal Judgements in Civil Appeal Number 145 of 2015 Non-Governmental Organisations Co-ordination Board vs EG & 5 others 2019 e KLR where Waki, Nambuye, Koome, Makhandia & Musinga JJ.A. held as follows-"...that where there is a clear procedure for redress of any particular grievance prescribed either by the Constitution or an Act of Parliament, that procedure should be followed..."Also, in Speaker of the National Assembly vs Karume 2008 1 klr EP 425 The Court of Appeal expressed itself in the following words "...in our view, there is considerable merit in the submission that there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed..."(emphasis added).

16. In order to address unique and peculiar circumstances, the Courts have recognised exceptions to the doctrine of exhaustion of remedies, which are also provided for under the Fair Administrative Action Act, Act No. 4 of 2015. Section 9 (4) of the Fair Administrative Action Act, Act No. 4 of 2015 provides that in exceptional circumstances, and on application by a party, the Court may exempt such party from the obligation of exhausting alternative remedies if the Court considers such exemption to be in the interest of justice. The exceptional circumstances are not outlined in the Act, thus leaving the Courts to exercise their discretion when faced with an application for exemption. Below is an excerpt of Section 9 (4) of the Fair Administrative Action Act, Act No. 4 of 2015 for ease of reference- "...(4) Notwithstanding

subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice..."(emphasis added)The High Court in the case of Krystalline Salt Limited v Kenya Revenue Authority (2019) eKLR expressed its view on the definition of "exceptional circumstances" as follows:"...What constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action at issue. Thus, where an internal remedy would not be effective and/ or where its pursuit would be futile, a court may permit a litigant to approach the court directly. So too, where an internal appellate tribunal has developed a rigid policy which renders exhaustion futile. The Fair Administrative Action Act does not define 'exceptional circumstances. However, this court interprets exceptional circumstances to mean circumstances that are out of the ordinary and that render it inappropriate for the court to require an applicant first to pursue the available internal remedies. The circumstances must in other words be such as to require the immediate intervention of the court rather than to resort to the applicable internal remedy..."

Respondent's submissions

17. The Respondent contended that the Appellants' extensive submissions on jurisdiction, though heavily cited, are entirely misplaced. This is an employment dispute arising from a wrongful dismissal. It was rightly filed before the subordinate court exercising delegated jurisdiction under the Employment and Labour Relations Court framework. The Respondent's cause of action arises from unlawful termination, and is grounded in employment contract and not tort. Therefore, Section 3(1) of PALA has no application in the Respondent's suit before the trial

court and the correct provision is Section 3(2) of PALA under which the Respondent filed his claim within the set timelines. The trial court had jurisdiction under Section 29(3) of the Employment and Labour Relations Court Act, which empowers the Chief Justice to designate Magistrates' Courts to hear employment matters where the pecuniary jurisdiction allows. The question is therefore not whether the trial court had jurisdiction in abstract, but whether it had statutory jurisdiction to hear an employment dispute. It did as earlier on demonstrate. Moreover, the Appellant's own omissions fatally undermine their attempt to raise the issue of jurisdiction via the doctrine of exhaustion. Section 159 of the Kenya Defence Forces Act mandates an automatic review process, initiated not by the Respondent, but by the commanding officer and superior commander. That mandatory process was never triggered, as conceded by the Appellants who produced no review outcome, no communication to the accused, and no record of compliance. Equity follows the law. A party cannot benefit from its own breach. The Appellants failed to discharge their statutory duty under Section 159. They are therefore estopped from invoking exhaustion to defeat the Court's jurisdiction. The Respondent was denied due process under both the Kenya Defence Forces Act and Fair Administrative Action Act. The subordinate court had jurisdiction under delegated authority from the ELRC to hear the claim. No valid objection was raised at the trial. The claim is not statute-barred and does not violate the doctrine of exhaustion

Decision

18. The striking out of a claim is a drastic action. The Court of Appeal in Kivanga Estates Limited v National Bank of Kenya Limited [2017] KECA 591 (KLR) court summarised the jurisprudence on striking out pleadings and observed- 'In Co-Operative Merchant Bank Ltd. vs George Fredrick Wekesa Civil Appeal No. 54 of 1999 the Court summarized the principles as follows;:

“The power of the Court to strike out a pleading under Order 6 rule 13(1) (b) (c) and (d) is discretionary and an appellate Court will not interfere with the exercise of the power unless it is clear that there was either an error on principle or that the trial Judge was plainly wrong.....Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact...A Court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment.” See Yaya Towers Limited vs Trade Bank Limited (In Liquidation) Civil Appeal No. 35 of 2000 and DT Dobie & Company (Kenya) Ltd vs Muchina (1982) KLR 1.’’ The court is guided by the foregoing jurisprudence in the appeal decision. The case before the trial court was a memorandum of claim dated 12th April 2019, where the claimant was former SGT David Munene, a former employee of the Kenya Defence Forces, deployed at Lab QM General, and had worked in various stores for a cumulative period of 17 years.(see pages 10-17 of ROA). The claimant was dismissed from the defence forces effective 15th February 2018 vide authority dated 16th February 2018 (page 68 of ROA).

19. The appellant in response to the claim filed the impugned application by way of Notice of Motion dated 13th March 2023 where among others it challenged the jurisdiction of the trial court and sought for striking out of the suit. Among others the appellant annexed the disciplinary proceedings before the Military including the charge sheet, the record of proceedings under the Kenya Defence Forces Act, the witness statements and the verdict. The appellant contended that this being a quasi judicial proceeding it was not subject of a claim before the court but judicial review. Further, the appellant contended the respondent had not

exhausted the appeal process hence the court had no jurisdiction for want of exhaustion of remedies.

20. Conversely, the respondent argued that this was an employment dispute, and the trial court had jurisdiction under delegated jurisdiction as an employment court. Since this is an appellate court, it re-evaluated the application on its merits using the standard set in Mbogo v Shah [1968] EA, where De Lestang V.P (as he then was) observed at page 94: “*I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.*”

21. The jurisdiction of the trial court is drawn from the legislation and the Constitution of Kenya . The jurisdiction of the Magistrate court is given under the Gazette Notice By Chief Justice Maraga (as he then was)as follows:- ‘GAZETTE NOTICE NO. 6024

THE EMPLOYMENT AND LABOUR RELATIONS COURT ACT (No. 20 of 2011)

APPOINTMENT OF MAGISTRATES’ COURTS TO HEAR MATTERS

RELATING TO EMPLOYMENT AND LABOUR RELATIONS

IN EXERCISE of the powers conferred by section 29 (3) and (4)

(b) of the Employment and Labour Relations Court Act, 2011, and in consultation with the Principal Judge of the Court, the Chief Justice appoints all Magistrates of the rank of

Senior Resident Magistrates and above as Special Magistrates designated to hear and determine the respective areas of jurisdiction:

1. Disputes arising from contracts of employment (excluding trade disputes under the Labour Relations Act, 2007) where employees gross monthly pay does not exceed KSh.80,000.00 as commenced and continued in accordance with the Employment and Labour Relations Court (Procedure) Rules, 2016.

2. Matters relating to the following specific areas—

(i) offences under the Work Injury Benefits Act, 2007(ii) offences under the Employment Act, 2007

(iii) offences under the Labour Institutions Act, 2007

(iv) offences under Occupational Safety and Health Act, 2007; and

(v) offences under the Labour Relations Act, 2007.

The conferment under Gazette Notice No. 9243 is revoked.

Dated the 10th June, 2018.

DAVID K. MARAGA,

Chief Justice/President, Supreme Court of Kenya.” Further Section 8 of the Magistrates Court Act, the Magistrates Courts have jurisdiction to entertain cases alleging violation of rights in the Bill of Rights, specifically under Article 5 25 (a and (b) of the Constitution ie the rights against cruel and degrading treatment and against slavery and servitude. Section 8 provides:-

“8. Claims relating to violation of human rights

(1) Subject to Article 165(3)(b) of the Constitution and the pecuniary limitations set out in section 7(1), a magistrates court shall have jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

(2) The applications contemplated in subsection (1) shall only relate to the rights guaranteed in Article 25(a) and (b) of the Constitution.

(3) Nothing in this Act may be construed as conferring jurisdiction on a magistrates court to hear and determine claims for compensation for loss or damage suffered in consequence of a violation, infringement, denial of a right or fundamental freedom in the Bill of Rights.

(4) The Chief Justice shall make Rules for the better exercise of jurisdiction of the magistrates' courts under this section.”

22. Further, the jurisdiction on employment disputes is to be exercised by the Magistrates for consideration of remedies under section 49 of the Employment Act. Section 3 of the Employment Act provides –‘3(1) This Act shall apply to all employees employed by any employer under a contract of service.

(2) This Act shall not apply to—

(a) the Kenya Defence Forces or the reserve as respectively defined in the Kenya Defence Forces Act (Cap. 199);”The court applying the foregoing finds that the a claim by ex-military officer/employee cannot lie against the Kenya Defence Forces under the Employment Act or the Labour Relations Act. In the case of Mulekano v Attorney General (Cause 6 of 2020) [2024] KEELRC 634 (KLR) (14 March 2024) (Judgment), the Court took upon itself jurisdiction over employment matters involving KDF servicemen, save that it indicated that the law applicable is the Kenya Defence Forces Act, not the Employment Act. It expressly held that the Employment Act does not apply in cases for KDF servicemen.

23. The disciplinary process under the Kenya Defence Forces is a comprehensive quasi-judicial process and can only be challenged under the Fair Administrative Action Act and/or the Constitution. The appellant has a pension appeal Board, which the Respondent had not invoked on terminal dues. Any aggrieved officer can still file a judicial review case or constitutional petition before this Court where they allege their constitutional/administrative rights were violated in the process. The claim before the trial court relates to compensation for unfair termination of employment, which the court reads to be in the context of termination under the KDF Act process. The court notes that the claimant was a Sergeant who had a choice to be before the Court-martial or the commanding officer. A decision of a court-martial is appealable to the High Court. The court opines that in the same breath, the said decisions on employment can only be challenged in this Court. That would call for compensation for violation of fair administrative action under Article 47 of the Constitution. Under section 8 (3) of the Magistrate Act the trial court has no jurisdiction to award compensation for violation of bill of rights to wit- *‘(3) Nothing in this Act may be construed as conferring jurisdiction on a magistrate’s court to hear and determine claims for compensation for loss or damage suffered in consequence of a violation, infringement, denial of a right or fundamental freedom in the Bill of Rights.’*

24. Consequently, the court faults the trial court for not determining its jurisdiction under the Employment Act or Section 8 of the Magistrates Court Act when dismissing the application. The appeal is allowed. The Ruling and Orders of the Hon. R. L. Musiega (SRM) delivered on December 8th, 2023, in MCELRC 559/2019 are set aside. The application dated March 13th,

2023, is granted, and the claim dated 12th April 2019, is struck out for want of jurisdiction with costs awarded to the applicant.

25. The Court, taking into account the status of the appellant and the respondent and to temper justice with mercy , makes no order as to costs in this appeal.

26. It is so ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 26TH DAY
OF SEPTEMBER, 2025.**

**J.W. KELI,
JUDGE.**

IN THE PRESENCE OF:

Court Assistant: Otieno

Appellant – Kabi

Respondent: Ms. Kamau h/b Mr. Swaka