



**Red Lands Roses Ltd v Mugo (Civil Appeal 68 of 2016)
[2025] KECA 96 (KLR) (24 January 2025) (Judgment)**

Neutral citation: [2025] KECA 96 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 68 OF 2016
K M'INOTI, HA OMONDI & GWN MACHARIA, JJA
JANUARY 24, 2025**

BETWEEN

RED LANDS ROSES LTD APPELLANT

AND

ROSEMARY WAMBUI MUGO RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Employment and Labour Relations Court at Nairobi (Mbaru, J.) dated 4th December 2013 in ELRCC No. 309 of 2012)

JUDGMENT

1. The central issue raised in this appeal is whether the Employment & Labour Relations Court (ELRC, Mbaru, J.) erred by holding that the appellant, Red Lands Roses Ltd., had unlawfully terminated Rosemary Wambui Mugo's employment (the respondent) while she was under probation.
2. The appellant contends that it lawfully terminated the respondent's employment in accordance with her contract of employment and section 42(1) of the *Employment Act* (The Act). For her part, the respondent maintains that the appellant terminated her employment in breach of the contract of employment and through unfair labour practice. The ELRC found that section 42 of the Act was inapplicable in the case and that the appellant had dismissed the respondent through unfair labour practice. Accordingly, the Court awarded the respondent Kshs 131,000, being one month's pay. Each party was directed to bear their own costs.
3. The short background to the appeal is as follows. On 3rd October 2011, the appellant employed the respondent as a human resource manager earning a gross salary of Kshs 131,000. The contract of employment contained clause 3 on probation, which provided as follows:

“Probationary period



You will serve a probationary period of 3 months during which period either party desiring to terminate this contract may do so by giving the other one month's written notice or an equivalent payment in lieu of notice. This period may be extended for a further period of three months at the discretion of management in the event your performance is evaluated to be below the required standards.”

4. By a letter dated 17th December 2011, the appellant terminated the respondent's employment with immediate effect. The reason for the termination was that after review of the respondent's performance, the appellant noticed a mismatch between the position she held and her professional experience and capacity. As is evidently clear, the termination took place within three months of the respondent's employment and within the period of probation.
5. On 27th February 2012 and 30th October 2012, the respondent filed in the Industrial Court (the predecessor of the ELRC) a memorandum of claim and a supplementary memorandum of claim, respectively, for unlawful, unfair and wrongful termination. She pleaded that the termination of her employment was unlawful, unfair and wrongful because it was not based on proper or any reasons at all. She further averred that the termination was in violation of Articles 27, 40, 41 and 50 of the Constitution and sections 5, 41, 43, 45 and 49 of the Employment Act. The dismissal was also challenged as a violation of the Termination of Employment Convention, 1982; the Discrimination (Employment and Occupation) Convention 1958; the Employment Policy Convention, 1964; the ILO Declaration of Fundamental Purposes and Rights at Works; and the appellant's Employment and Resource Policy Manual.
6. It was the respondent's further averment that she was entitled to a hearing before dismissal, which she was denied; that the reason given for her dismissal did not disclose any fault on her part; that the appellant ought to have evaluated her performance before dismissal, which it failed to do; and that the dismissal was malicious. She therefore prayed for a declaration that her dismissal was unfair, unlawful and wrongful, and award of Kshs 30,682,000.00. The said amount was made up of claims for loss of income until retirement, 12 months compensation for unfair, unlawful and wrongful termination; and loss of earning capacity, solarium and incorporeal loss. The respondent lastly prayed for interest and costs.
7. The appellant responded to the claim through a notice of preliminary objection dated 13th March 2012, a memorandum of defence of even date and a supplementary memorandum of defence dated 19th October 2012. In all, the appellant pleaded that it terminated the respondent's employment while she was under probation in accordance with the contract of employment and section 42 of the Employment Act; that the appellant paid the respondent all her dues; that section 41 of the Employment Act which provides for hearing before termination did not apply for dismissals during probation; and that the claim had no basis, the respondent having worked for the appellant for a relatively short period of less than three months.
8. At the hearing, the respondent testified on her own behalf while the appellant called two witnesses. By the judgment impugned in this appeal, the ELRC held that under the contract of agreement, the parties had agreed in clause 3 to give each other 30 days' notice before termination of the employment during probation; that the appellant was obliged to undertake an evaluation of the respondent's performance before termination; that the appellant did not give the respondent 30 days' notice and terminated her employment without review of her performance and that the reasons given by the appellant for termination were not legitimate.
9. The ELRC further held that section 42 of the Employment Act was not applicable in this case because the same cannot be applied so as to defeat the very purpose of the law or to deny an employee a



livelihood. In the view of the court, to apply the provision would amount to disregarding fair labour practices which are underpinned by *the Constitution*. Accordingly, the ELRC allowed the claim and granted the remedies we have already referred to.

10. The appellant was aggrieved and preferred this appeal, in which it faults the ELRC on six grounds some of which are repetitive or overlapping. Shorn of repetition, appellant contends that the ELRC erred by:
 - i. holding that section 42 of the Act did not apply in this case and awarding compensation contrary to the express provisions of section 42 of the Act;
 - ii. awarding the respondent compensation whilst her employment was terminated during probation and she was paid all her dues; and
 - iii. ignoring or failing to consider the appellant's evidence and submissions.
11. As regards the application of section 42, the appellant submitted that contracts of employment under probation are regulated by section 42 of the Act which provided that section 41 of the Act which in turn provides for hearing before termination of employment, does not apply to such contracts. The appellant relied on section 42(4) which provides that a contract of employment under probation may be terminated by either party giving seven days' notice or the employer paying the employee seven days' notice in lieu of wages. It was contended that under those provisions, the appellant was not obliged to give reasons for termination and to insist on such reason in a probationary contract is to apply section 41 of the Act through the backdoor, contrary to the express terms of section 42 of the Act. The appellant relied on the decision of ELRC in *Danish Jalang'o & another v. Amicabre Travel Services Ltd* [2014] eKLR and submitted that employers have no obligation to hear employees serving on probation.
12. Turning to the award of compensation, the appellant submitted that the award was made contrary to section 42 of the Act which permits termination of probationary contracts by giving notice or paying wages in lieu of notice. It was contended that the appellant had paid the respondent all her terminal dues amounting to Kshs 127, 828, and that there was no basis for award of compensation. In support of the submission, the appellant relied on the decision of ELRC in *John Muthomi Mathiu v. Mastermind Tobacco (K) Ltd* [2018] eKLR.
13. On the last ground, the appellant submitted that the ELRC failed to consider clause 3 on probation which was clear enough on the method of termination of the contract of employment during probation. It was contended that the failure to consider the clause amounted to failure to take into account relevant considerations and thus constituted a misdirection that led to the wrong conclusion.
14. For the above reasons, the appellant urged the Court to allow the appeal with costs.
15. The respondent opposed the appeal, contending that the contract of employment between the appellant and the respondent was not restricted to clause 3 only, but was intended to create permanent employment and that to properly interpret the contract, it must be read as a whole. The respondent justified the award of compensation on the grounds that the appellant had breached fair labour practices by failing to give her the real or true reasons for her termination. She urged that the reasons given in the letter of termination were different from the evidence adduced at the hearing.
16. It was contended that to dismiss the respondent for incompetence, the appellant had to show, among others, that it had given her a warning and that she was incapable of meeting standards, and that it was not enough to show that the appellant was dissatisfied with her work or that she was careless or negligent. It was further submitted that the appellant had failed to prove valid and fair reason for



termination of employment as required by section 45 (2) of the Act. The respondent also contended that her dismissal was unlawful because she was denied the right to be heard contrary to the dictates of the rules of natural justice.

17. For those reasons, the respondent urged us to uphold the judgment if the ELRC and to dismiss the appeal with costs.
18. As we turn to consider the merits of this appeal, it is necessary to advert to several contradictory decisions on the applicability of section 41 of the Act in contracts of employment under probation and the constitutionality of section 42 of the Act. This appeal was argued on the footing that section 42 of the Act was valid and within confines of *the Constitution*. However, the ELRC has since determined otherwise and it is necessary to briefly sketch the evolution of the law before the ELRC.
19. The seed which in the fullness of time would germinate into the proposition that section 42 of the Act was unconstitutional was first planted in the judgment of the High Court (Lenaola, J., as he then was) in *Samuel G. Momanyi v. Attorney General & Another* [2012] eKLR. Strictly speaking, the case did not involve termination of a contract of employment during probation. Instead, it involved interpretation of section 45(3) of the Act which provides:

“An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.”

20. The effect of the provision is simply that an employee who is dismissed after serving less than 13 months could not be entitled to complain that the dismissal was unfair. The provision was challenged as inconsistent with Articles 28, 41(1), 43, 48 and 50(1) of *the Constitution* and therefore unconstitutional. The High Court found that the provision ran contrary to the object of the Act, and that by denying the claimant the rights and freedoms enshrined in *the Constitution*, it was inconsistent with the cited provisions of *the Constitution*. In short, if section 45(3) of the Act was unconstitutional for violating human dignity, fair labour practices, economic and social rights, access to justice and fair hearing, how then could section 42 of the Act, which ousted some rights of employees while under probation, be any different? No appeal was ever preferred against the decision of the High Court.
21. In *Carole Nyambura Thiga v. Oxfam* [2013] eKLR, the claimant filed suit for alleged unlawful and unfair termination of employment. While the respondent maintained that the termination took place during probation, the ELRC (Rika, J.) found that the probation was not justified because the claimant had worked for the respondent under previous contracts.
22. Nevertheless, the court stated the law on dismissal during probation, as follows:

“Under section 42 [1] of the *Employment Act* 2007, an employee who is on probation, is not entitled to the minimum statutory procedural guarantees created under Section 41, upon termination of the contract of employment. Employment during probation is at-will. The protections afforded to regular employees under the unfair dismissal laws are not available to employees whose contracts are terminated while on probation.

The court did not consider the decision in *Samuel G. Momanyi v. Attorney General & Another* (supra), probably because it did not strictly relate to section 42 of the Act.

23. *Onesmus Kilonzo v. Nation Media Group Ltd.* [2014] eKLR involved a claim in the ELRC for alleged unlawful termination of employment by a claimant who had served for only two months. The respondent raised a preliminary objection founded on section 45(3) of the Act. By a ruling dated 24th



March 2014, the Court (Nzioki wa Makau, J.) dismissed the objection relying on the decision of the High Court in Samuel G. Momanyi v. Attorney General & Another (supra). The judge held that the provision was no longer law, having been declared unconstitutional. Although the case was allegedly founded on section 45(3) of the Act, the learned judge nevertheless stated:

“The *Employment Act* requires that before termination of employment is done, an employee must be given a reason for which the termination is being considered and called upon to respond and where necessary call witnesses. This provision applied to all employees whether on probation or not.” (Emphasis added)

24. Next came Mercy Njoki Karingithi v. Emerald Hotels Resorts & Lodges Ltd [2014] eKLR. The claimant’s contract of employment was terminated during probation after two days. The contract of employment provided that either party could terminate the employment by giving seven days’ notice or payment in lieu of notice. The claimant was paid for the two days worked and seven days in line of notice. She lodged a claim for unfair termination, which was undefended. The ELRC (Radido, J.), stated thus:

“Clause 3 of the Claimant’s letter of appointment was explicit that the first two months would be on probation and that during probation, the appointment was terminable by the giving of 7 days written notice or pay in lieu of notice. The revocation letter informed the Claimant that she would be paid 7 days pay in lieu of notice. Section 42 of the *Employment Act* ousts the application of the procedural fairness requirements of section 41 of the Act in dismissals during probationary period. The consequence of section 42 of the Act is that an employee who is still serving under probation is not entitled to notification and hearing before a decision to terminate is taken. Natural justice does not apply in such situations. On this basis, the Respondent did not breach the statutory protection of following fair procedure before terminating an employee.”

25. The learned judge, however, found that section 42 of the Act ousted only procedural fairness, not substantive fairness. In his view, fairness of termination of employment was not to be evaluated merely on the basis of procedural fairness but also on the basis of substantive fairness. In that respect, he reasoned:

“It cannot be disputed that although still serving under probation, an employment relationship between parties has commenced. Immediately on the commencement of the relationship, legal obligations on the side of each of the parties arise. These obligations are in terms of duties and rights. Duties of the employer (respondent) and rights of employee (claimant) and vice versa. The fundamental rights of employees not to be unfairly terminated and the claimant in this case, as provided for in Section 45(1) and (2) of the *Employment Act* cannot be abrogated during the probation period unless clearly expressed so. The only right as far as termination is concerned which has been abrogated during the probationary period is the right to procedural fairness in section 41 of the Act. That is the import of section 42 of the *Employment Act*. However, the security of tenure given to ordinary employees by section 45 of the *Employment Act* is still applicable. The employees’ right not to be unfairly terminated still binds the employer and is applicable during the probationary period. An employer is obliged to prove the reasons and that the reasons are valid and fair reasons.



Further, Article 41 of *the Constitution* which protects the right of all workers to fair labour practices is now a constitutional norm against which all conduct and practices in employment must be measured.”

26. The court concluded that the termination of the claimant was unfair because the employer had failed to prove valid or fair reasons for the termination.
27. Regarding the decision of the High Court in Samuel G. Momanyi v. Attorney General & Another (supra), the learned judge indicated, that he could have reached a different decision, were it not for that decision, the correctness of which he questioned. He doubted whether termination of an employment contract was indeed subject to Article 47 of *the Constitution* on fair administrative action. He also noted that the practice of requiring service for at least 13 months before an employee could lay a claim for unfair termination was a common statutory provision in many jurisdictions.
28. Next in line was Danish Jalang’o & another v. Amicabre Travel Services Ltd [2014] eKLR, a decision of the ELRC. The claimants were on probation when their employment was terminated. They filed a claim for unfair and unlawful termination in the ELRC. Relying on section 42 of the Act, Rika, J. again, held that the statutory fair termination procedures did not apply during probation. The learned judge expressed himself thus:

“The effect of this is that Employers have no obligation, to hear Employees who are serving probation for any of the reasons stated under Section 41, i.e. poor performance, misconduct or physical incapacity, before arriving at the termination decision. There is no obligation under Section 43 and 45 for Employers to give valid and fair reasons for termination of probationary contracts, or to hear such Employees at all, little less in accordance with the rules of fairness, natural justice or equity. The termination of the probationary contract is strictly regulated by the terms of the contract. The only question the Court should ask, is whether the appropriate notice was given, or if not given, whether the Employee received pay in lieu of notice; and, whether the Employee was, during the probation period, treated in accordance with the terms and conditions of the probationary contract. The Employee has no expectation of substantive justification, or fairness of procedure, outside what the probation clause and Section 42 of the *Employment Act*, 2007 grants. If the Employee has received notice of 7 days before termination, or is paid 7 days’ wages before termination, there can be no further demands made on the Employer. If the Employee is advised termination is because the Employer feels there should be no confirmation, there can be no additional demands for substantive justification made on the Employer. The Employer retains the discretion whether to confirm, or not confirm an Employee serving under probation. The law relating to unfair termination does not apply in probationary contracts.”

29. As regards the decision in Samuel G. Momanyi v. Attorney General & Another (supra), the learned judge expressed strong doubts on its correctness as well as in the decision of the ELRC in Mercy Njoki Karingithi v. Emerald Hotels Resorts & Lodges Ltd (supra). He expressed himself as follows:

“The correct interpretation is that Section 43 and 45 of the *Employment Act*, both in terms of procedural and substantive justification, have no application to termination of probationary employment contracts.

Section 42 would have no meaning, and probation, which is a period granted to the Employer and the Employee to get to know each other before making any firm



commitments, would itself be meaningless. Section 43 and 45 require Employers to prove fair and valid reason or reasons for termination. Assuming these laws are relevant in termination of probationary employment contracts: where an Employee is advised the reason for termination is because he/ she is on probation; and the contract and the law allows for termination while on probation, through the specific mode given under Section 42; is this not a substantive ground in itself? What more substantive justification would be needed, beyond the explanation that the contract has a probationary provision, based on a substantive law under Section 42? Substantive justification requires the Employer to show the correctness, validity or existence of the reason for termination. Should Employers be asked to show the validity, correctness or existence of Section 42 comprising the probation law, in justifying termination? An Employee, whose contract is terminated while on probation, has no reason to demand to be shown by the Employer, other reasons for termination, outside the probationary contract. It is completely illogical to expect the Employer to prove any substantive grounds relating to misconduct, poor performance, physical incapacity, or any of the offences listed under Section 44 [4] of the *Employment Act*, 2007, in terminating contracts of Employees on probation. This is the one contract of employment, where the burden of persuasion, within the confines of the probationary contract, rests with the Employee. And should such an Employee succeed in establishing breach, the remedy is in contractual damages, weighed against the contractual notice period, or in the assessment of the Court, the gravity of the contractual breach. The effect of the High Court decision of Samuel G. Momanyi and that of the Industrial Court in Mercy Njoki Karingithi is to nullify certain fundamental employment laws, such as the law of employment probation, and blur the intention of Parliament in creating qualifying periods for Employees to access certain rights and obligations. Employers could find themselves compelled to retain Employees who are not fit for the job from day one. They risk the high cost of administering procedural justice, and in meeting compensation for unfair termination, when they act against relatively new, and unsuitable Employees at the workplace. Employees are not normally recruited at face value; there is a period of uncovering if they are fit for the job. Labour is flexible, and to have a strong, long term, and productive employer-employee relationship, the Parties must be allowed a period of learning each other. The probation law should be retained. Employers should retain a freehand in evaluating Employees' suitability, and in terminating the relationship during probation, where the Employee is found wanting...It is not proper that rules of natural, procedural, and substantive justice under Sections 41, 43 and 45 of the *Employment Act* 2007 are imported into probationary contracts. Section 42 of the *Employment Act* 2007 is a standalone law, regulating a special, formative, employer-employee relationship, and should be read as a reasonable limitation, on the constitutional rights flowing from Article 41 of *the Constitution* of Kenya, as well as those rights and protections given under the other provisions of the *Employment Act* 2007."

30. Then followed the decision in *Vitalis Opondo Adhere v. Longhorn Kenya Ltd* [2015] eKLR. The claimant's employment was terminated while he was under probation. He filed in the ELRC a claim for unfair and unlawful termination and non-payment of outstanding terminal dues. Although the decisions in *Danish Jalang'o & another v. Amicabre Travel Services Ltd.* (supra) and *Mercy Njoki Karingithi v. Emerald Hotels Resorts & Lodges Ltd* (supra) were cited to the court, Nzioki wa Makau, J. opted to rely on the latter, and held that the protection against unfair and unlawful dismissal under sections 43 and 45 were available to employees on probation. The court concluded that the claimant was denied the expected procedural fairness.



31. In *Dixon Amdama v. Amani Tiwi Beach Resort* [2015] eKLR, Rika, J. reiterated his earlier position, holding thus:

“An Employee whose contract is terminated during probation is not regulated by Section 41, 43, 45 and 47 of the *Employment Act*. Probationary contracts are governed by their terms, and by Section 42 of the *Employment Act*. The Claimant had worked for only a month and 17 days. He was on probation when his contract was terminated. Termination was in accordance with Section 42 of the Act. He was not entitled to being heard or given reasons for termination. It is enough that the Employer found the Claimant's performance not in line with the Employer's expectation. As the Claimant submits, probation constitutes a trial period, during which the Employee is tested, before full admission to the enterprise. The rights under Section 41, 43, 45 and 47 are reserved for Employees who have gone through the trial period, and confirmed in employment. All the Respondent was required to do was issue the Claimant 7 days' notice of termination, or pay to the Claimant 7 days salary in lieu of such notice, in accordance with Section 42 of the Act.

32. In *Evans Kiage Onchwari v. Hotel Ambassadeur Nairobi* [2016] eKLR (Ndolo, J.) took a diametrically opposed position. The case similarly involved alleged termination of employment during probation. Although the court found that the claimant was not in fact under probation, the court nevertheless addressed itself, *orbiter*, to the question of the constitutionality of section 42 of the Act, which had neither been raised nor addressed by the parties. Disagreeing with the views expressed in *Dixon Amdama v. Amani Tiwi Beach Resort* (*supra*), the judge expressed herself as follows:

“I hold a different view. Article 41 of *the Constitution*, 2010 guarantees employment and labour rights for all. To my mind these rights may only be limited to the extent that is permitted under Article 24 of *the Constitution*. To limit enjoyment of a right by the mere reason of the length of service does not in my view meet the threshold set in Article 24.”

With that, the court expressed the view that section 42 of the Act was unconstitutional.

33. The decision of the ELRC in *Onesmus Kilonzo v. Nation Media Group Ltd.* (*supra*), ultimately came before this Court on appeal as *Nation Media Group Ltd. v. Onesmus Kilonzo* [2017] eKLR. In a judgment rendered on 17th November 2017, the Court observed that the ELRC as a superior and autonomous court, was not bound by the decision of the High Court if it found that the decision incorrectly interpreted employment law. The Court further found that, as pleaded, the respondent's claim was for wrongful or unlawful summary dismissal rather than unfair termination. Since the respondent had not laid a claim for unfair termination under section 45, the appellant's preliminary objection was moot and therefore the question of the constitutionality of section 45(3) of the Act did not arise. The Court ultimately dismissed the appeal for different reasons and remitted the matter back to ELRC for hearing of the respondent's claim for wrongful or summary dismissal by a different judge.

34. In *John Muthomi v. Mastermind Tobacco Ltd* [2018] eKLR, the claimant was dismissed within the probation period of 6 months. He brought a claim for unlawful, wrongful and unfair termination in the ELRC. The respondent relied on section 42(1) of the Act and contended that an employee dismissed while on probation was not entitled to the rights tabulated in Article 41 of the Act. The ELRC (Nzioki wa Makau, J.) noted the conflicting jurisprudence on termination of probationary contracts but this time (unlike in *Vitalis Opondo Adhere v Longhorn Kenya Ltd* (*supra*), was persuaded to agree with the position taken by Rika, J. in *Danish Jalang'o & another v. Amicabre Travel*



Services Ltd. (supra) that sections 43 and 45 of the Act did not apply to termination of probationary contracts. The learned judge concluded:

“In my considered view, the probationary part of a contract of employment is the period where an employee is tested and he cannot therefore anticipate the same safeguards to be available for him/or her like for an employee already confirmed to position.

Section 42 of the Employment Act makes provision that permits the dismissal of an employee without ascribing reasons.”

35. Next in this jurisprudential ping pong came the second judgment of the ELRC in Onesmus Kilonzo v. Nation Media Group Ltd [2019] eKLR. When the matter was remitted by this Court back to the ELRC for hearing afresh by a judge, other than Nzioki wa Makau, the same landed before Abuodha, J., who in a judgment dated 31st May 2019, awarded the claimant two months compensation “for unfair termination”. This was surprising, granted the express finding by this Court that the claimant’s case as pleaded was not a claim for unfair termination, but one for wrongful or unlawful summary dismissal. Further, as the claimant was dismissed while he was under probation, the learned judge did not address the question whether section 42 of the Act was applicable or not, and the reason for the conclusion either way. He merely stated, which is quite unsatisfactory granted the differing positions taken by different judges of the ELRC, that:

“The Employment Act requires that before termination of employment is done, an employee must be given a reason for which the termination is being considered and called upon to respond and where necessary call witnesses. This provision applied to all employees whether on probation or not. The court has seen nothing on record giving reasons why the claimant’s service was terminated and whether before the termination he was called upon to show cause why his service should not be terminated. Failure to adhere to these requirements would lead to a finding that the termination was unfair and the court so finds and holds in this case.” (Emphasis added).

36. Then came the decision of the ELRC in Monica Munira Kibuchi & 6 others v. Mount Kenya University & Another [2021] eKLR, a decision of a bench of three judges of the ELRC (Mbaru, Abuodha and Ndolo, JJ.). The petitioners challenged upfront section 42(1) of the Act as inconsistent with Articles 10, 25, 41, 47 and 50 of the Constitution. The petitioners’ contracts of employment were terminated during probation but they contended, among others that section 42 (1) of the Act was draconian, curtailed their constitutional rights and allowed employers to dismiss employees on probation whimsically.
37. After hearing the matter, the ELRC, by a judgment dated 30th July 2021 held that, to the extent that section 42(1) of the Act excludes an employee on probation from the provisions of section 41 of the Act, it was inconsistent with Articles 41 and 47 of the Constitution and therefore null and void.
38. To the best of our knowledge, that decision of the ELRC has not been challenged in this Court or reversed. It is also not the subject of appeal in the appeal before us. In short, the decision of the ELRC in Monica Munira Kibuchi & 6 others v. Mount Kenya University & Another (supra) represents the law, taking into account the jurisdiction and mandate conferred upon ELRC by Article 162(2) (a) of the Constitution and section 12 (1) of the Employment & Labour Relations Court Act. Indeed, recently, in Kenya Tea Growers Association & 3 others v the National Social Security Fund Board of Trustees & 13 Others [2024] KESC 3 (KLR) the Supreme Court held that there was nothing in the Constitution or the akn/ke/act/2011/19 Environment and Land Court Act}} to suggest that in exercising its jurisdiction over disputes emanating from employment and labour relations, the ELRC



was precluded from declaring the constitutional validity of a statute. We would add, or a provision of a statute.

39. Turning to the merits of this appeal, the same is primarily hinged on the argument that the ELRC ignored section 42 of the Act. After filing the appeal, the ELRC declared section 42 of the Act unconstitutional. None of the parties address the fact that section 42 of the Act had been declared unconstitutional. As of now, the provision the appellant wishes enforced is of no legal effect, having been declared null and void. As we have already stated, to the best of our knowledge, that decision of an expanded bench of three judges of the ELRC has neither been appealed nor reversed.
40. In light of these developments, we have no choice but to dismiss the present appeal because, even if we were in agreement with the appellant, we cannot enforce a provision that has been declared null and void by a court of competent jurisdiction.
41. As regards costs, the order that best commends itself to us, in light of the circumstances of this appeal, is to direct each party to bear its own costs.
42. In the result, this appeal is hereby dismissed with no order on costs. It is so ordered.
43. We wish to apologise sincerely to the parties for the delay in rendering this judgment. The delay was occasioned by official regional duties involving one of the members of the bench.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JANUARY 2025.

J. M'INOTI

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original,

Signed

DEPUTY REGISTRAR.

