Chemmuttut & 2 others v Attorney General & 3 others (Civil Appeal 45 of 2017) [2024] KECA 1598 (KLR) (8 November 2024) (Judgment)

Neutral citation: [2024] KECA 1598 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 45 OF 2017

K M'INOTI, HA OMONDI & KI LAIBUTA, JJA

NOVEMBER 8, 2024

BETWEEN

JUSTICE CHARLES PIUS CHEMMUTTUT ..... 1ST APPELLANT

JUSTICE PAUL KIPSANG KOSGEI ..... 2ND APPELLANT

JUSTICE STEWART MWACHIN MADZAYO ..... 3RD APPELLANT

AND

ATTORNEY GENERAL ..... 1ST RESPONDENT

PERMANENT SECRETARY, MINISTRY OF LABOUR ..... 2ND RESPONDENT

JUDICIAL SERVICE COMMISSION ..... 3RD RESPONDENT

PUBLIC SERVICE COMMISSION ..... 4TH RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Mumbi Ngugi, J.), dated 16th January 2015 in HC Const. Pet. No. 307 of 2012)

JUDGMENT

1. At the heart of this appeal is the question whether the respondents violated the appellants' rights and fundamental freedoms during the transition from institutions antedating *the Constitution* of Kenya, 2010, to those created by the said Constitution. At all material times prior to the promulgation of *the Constitution* of Kenya 2010, the three appellants were judges of the defunct Industrial Court created by the *Labour Institutions Act*, No. 12 of 2007. The 1st appellant was appointed under section 63(3) of the *Labour Institutions Act*, 2007, while the 2nd and 3rd appellants were initially appointed under section 14 of the repealed Trade Disputes Act and, subsequently, under section 63(3) of the *Labour Institutions Act*.

2. Upon promulgation, *the Constitution* of Kenya, 2010 abolished the former Industrial Court and in its place created in Article 162(2) the present Employment and Labour Relations Court (ELRC) as a superior court of equal status with the High Court, with jurisdiction to hear and determine disputes relating to employment and labour matters.

3. To fully operationalise Article 162(2) of *the Constitution*, the Parliament enacted the Industrial Court *Act, No. 20 of 2011*, which provided for the establishment of the Industrial Court created by *the Constitution* as a superior court of record, its jurisdiction and connected purposes. Section 32(2) of the 2011 Act provided for transition of judges of the defunct Industrial Court to the new Industrial Court.

4. By the Statute Law (Miscellaneous Amendments) Act, 2014 the Industrial Court Act was amended and renamed the Employment and *Labour Relations Act*, and the court renamed from the Industrial Court to the Employment and Labour Relations Court. For convenience, unless the context otherwise demands, we shall refer to the successor of the defunct Industrial Court as the ELRC, even for the period when the new court created under *the Constitution* was referred to as the Industrial Court.

5. On 16th March 2012, the 3rd respondent, the Judicial Service Commission (JSC), which under *the Constitution* is responsible for, among others, recommending to the President persons for appointment as judges, invited applications from qualified persons for appointment as judges of the ELRC. By a letter dated 15th March 2012, the Attorney General advised the appellants to apply for appointment as judges of the ELRC. However, taking the view that their offices under the defunct Industrial Court were secured and that they were entitled to automatically transit to the ELRC, the appellants did not apply for appointment as judges of the ELRC.

6. After interviewing those who applied, JSC recommended to the President the appointment of 12 judges, constituting the first cohort of judges of the ELRC. The judges were duly appointed and took the oath of office on 13th July 2012. Subsequently, the 2nd respondent advised the appellants that their offices had been abolished by operation of the law.

7. The applicants were aggrieved, and on 19th July 2012 they lodged a constitutional petition against the respondents in the High Court alleging violation of their rights and fundamental freedoms. The petition was amended on 18th September 2012 and re-amended on 7th February 2014. The appellants prayed for, among others, a declaration that by operation of the law, they were judges of the ELRC; a declaration that section 32(2) of the Industrial Court Act, 2011 was valid law; a declaration that the respondents had no power or authority to terminate their tenure; an order of certiorari to quash the decision of the respondents to terminate their tenure; an order of mandamus to restore their tenure; an order of prohibition to stop the respondents from interfering with their offices and status; a declaration that the respondents had violated their rights and fundamental freedoms under Articles 27, 28, 47 and 50 of *the Constitution*; and award of general damages for violation of their rights and fundamental freedoms. The appellants also prayed, as an alternative to restoration of their tenure, compensation as follows:

    i. 1st appellant - Kshs 82,242,287.00

    ii. 2nd appellant - Kshs 190,372,922 and

    iii. 3rd appellant - kshs 166,509,994.00

    In addition, the appellants also prayed for an order for payment of their pension until the age of 74 years.

8. The 1st respondent (the Attorney General), the 2nd Respondent (the Permanent Secretary, Ministry of Labour) and the 3rd respondent (the Public Service Commission (PSC)) opposed the petition vide grounds of opposition dated 27th July 2012 and a replying affidavit sworn by Bernadette Mwihaki Nzioki, the secretary to the PSC. They denied the appellants' averments and contended, among other things, that the judges of the ELRC are appointed under Article 166(1)(b) of *the Constitution*; that the appellants were appointed to the defunct Industrial Court, which was a subordinate court whereas the ELRC was a superior court; that there was no basis for transitioning a judge of a subordinate court to a judge of a superior court; that the ELRC contemplated by *the Constitution* was a new court and not a court existing on the date of promulgation of *the Constitution*; and that the requirement by *the Constitution* that all laws in force at the date of its promulgation are to be construed with the alterations, adaptations, qualifications and exceptions necessary to being them into conformity with *the Constitution* did not permit an interpretation that constituted the defunct Industrial Court into the ELRC.

9. On its part, JSC opposed the petition vide a replying affidavit sworn on 19th September 2012 by its then secretary and Chief Registrar of the Judiciary, Gladys Boss Shollei, and a supplementary affidavit sworn on 18th March 2014 by Winfrida Mokaya, its then Registrar. The substance of the response was that, prior to the promulgation of *the Constitution*, the Industrial Court was a subordinate court within the meaning of section 65(1) of the repealed Constitution and that judges of that court did not enjoy the status of judges of the High Court; that those judges were appointed under an Act of Parliament rather than under *the Constitution*; that the appellants were not appointed to the Industrial Court on the recommendation of the JSC as was expressly required by the *Labour Institutions Act*; that, under the ELRC Act, a judge is defined as a judge appointed in accordance with Article 166(1) of *the Constitution* through a transparent and competitive process, and on the recommendation of the JSC; that the appellants were not appointed in accordance with *the Constitution* and, therefore, could not be deemed to be judges of the ELRC; and that section 32(2) of the Industrial Court Act, which purported to transition the appellants to the ELRC was inconsistent with and in violation of *the Constitution*.

10. The petition was heard by Mumbi Ngugi, J. (as she then was), who deduced that the central issue in the petition was whether the appellants should have been sworn in and transited as judges of the ELRC established by Article 162(2)(a) of *the Constitution* of Kenya, 2010. After considering the matter, the learned judge, by the judgment impugned in this appeal, found that the appellants' offices as judges of the defunct Industrial Court were terminated by operation of the law and that, therefore, the respondents had not violated the appellants' rights and fundamental freedoms. The court awarded the appellants their remuneration and allowances that were due and owing as of the date of termination of their offices and directed each party to bear their own costs.

11. The appellants were aggrieved and, after lodging a notice of appeal on 23rd January 2015, preferred the present appeal based on some 23 grounds of appeal, which their learned counsel, Mr. Kibe Mungai and Ms. Weru, clustered into six issues in their submissions dated 20th September 2019. For the avoidance of verbosity and imprecision, those issues as reframed by this Court, are whether the High Court erred:

    i. by negating the appellants' rights and fundamental freedoms under Article 27 (equality and freedom from discrimination) and Article 50 (fair hearing) in its evaluation and analysis of evidence and law;

    ii. by holding that the defunct industrial court was a subordinate court;

    iii. by failing to hold that the ELRC was the successor of the defunct Industrial Court;

iv. by finding that section 32(2) of the Industrial Court Act was unconstitutional without invitation by the parties to so find;

v. by failing to find that the appellant's petition ought to have been heard and determined by a bench of three judges; and

vi. by failing to hold that the appellants could only be removed from office upon recommendation of a tribunal appointed under Article 168(5) of *the Constitution*;

12. Highlighting their written submissions, on the first issue the appellant's merely submitted that the fact that the trial court negated their rights under Articles 27 and 50 of *the Constitution* in its evaluation and analysis of the law and evidence was self-evident from the other issues that they had raised. In other words, this issue crystallises after consideration of the other five issues raised by the appellants.

13. On the second issue, the appellants submitted that they were initially appointed to the Industrial Court under the repealed Trade Disputes Act (Cap 243) for a renewable term of five years. Upon enactment of the *Labour Institutions Act*, 2007 their appointments were regulated by the latter Act, which deemed them to have been appointed under the 2007 Act. They were appointed on permanent and pensionable terms and accorded the rights and privileges of Judges of the High Court. It was the appellants' submission that under the 2007 Act, the Industrial Court was not a subordinate court because its final judgments were appealable to this Court, which only happens with superior courts.

14. Turning to the third issue, the appellants contended that, just as the High Court and the Court of Appeal established under *the Constitution* of Kenya 2010 were the successors of the High Court and the Court of Appeal established under the repealed Constitution, the ELRC established under *the Constitution* of Kenya 2010 was the successor of the defunct Industrial Court. Relying on sections 31 and 33 of the Sixth Schedule to *the Constitution* of Kenya, 2010, the appellants submitted that *the Constitution* transited their offices from the defunct Industrial Court to the ELRC for their unexpired terms, and further that, under the 2010 Constitution, the ELRC was the corresponding institution to the defunct Industrial Court.

15. It was the appellant's further submission that section 32(2) of the Industrial Court Act, 2011 put it beyond dispute that any person who, at the commencement of the Act was a judge of the defunct Industrial Court, was deemed to have been appointed under the 2011 Act for the remainder of his or her term of office. The appellants contended that, having been so transitioned, they were entitled to be vetted under section 23 of the Sixth Schedule to *the Constitution*, just like all the other judges, and that the refusal to vet them constituted discrimination contrary to Article 27 of *the Constitution*. It was also urged that the appellants had a legitimate expectation, duly backed by the law, that their offices were sacrosanct, and that the trial court erred in holding that the appellants could only serve as judges of the ELRC upon recruitment by the JSC.

16. On the fourth issue, the appellants submitted that the High Court erred by making a finding that section 23(2) of the Industrial Court Act was unconstitutional whereas none of the parties had prayed for such a finding in a petition or cross- petition. It was the appellants' view that this Court must uphold the constitutionality of the said provision until it was properly challenged in accordance with the law. Relying on the judgment of this Court in Independent Electoral and Boundaries Commission & another v. Stephen Mutiuda Mule & 3 Others [20141 eKLR and that of the Court of Appeal of Uganda in Libyan Arab Uganda Bank for Foreign Trade and Development & another v. Adam Vassiliadis [1986] UG CA 6, they submitted that, in an adversarial system, it is the parties who set the agenda of their cases through pleadings and that, in the case at hand, the court descended into the arena of the conflict and got its eyes clouded by the dust of the conflict.

17. As regards the fifth issue, the appellants submitted that, for a litigant to obtain justice against the JSC in the High Court, it is necessary to have the dispute determined by a bench of at least three judges. Without such a bench, it was contended, the constitutional guarantee of a fair hearing by an imperial and independent court would be a mirage. Accordingly, the appellants urged this Court to invoke Articles 20 and 22 of *the Constitution* and declare that proceedings involving the JSC should be heard by a bench of at least three judges.

18. Lastly, the appellants submitted that, having transitioned from the defunct Industrial Court to the ELRC, they could only be removed from office pursuant to recommendations of a tribunal appointed under Article 168(5) of *the Constitution*. Removal through any other process was unconstitutional, illegal, null and void and in violation of their constitutional rights and fundamental freedoms.

19. For the foregoing reasons, the appellants urged the Court to allow the appeal, set aside the judgment of the High Court and grant the remedies that they had prayed for.

20. The 1st, 2nd and 4th respondents opposed the appeal vide submissions dated 9th June 2022, which were highlighted by their learned counsel, Mr. Bita. These respondents submitted that the PSC had no role in the appointment and removal of the appellants and was therefore wrongly joined in the petition and the appeal.

21. It was further submitted that the 2010 Constitution ushered in a new dispensation that entailed, among other things, the creation of a new hierarchy of specialised courts on environment and land and on employment and labour matters, enjoying the status of the High Court; appointment to those courts in accordance with the recommendations of the JSC; and a requirement that all serving judges and magistrates who wished to continue serving under the 2010 Constitution must undergo vetting by an independent Board. In the view of these three respondents, the appellants could not transition into the courts created by the 2010 Constitution without being subjected to the processes applicable to judges wishing to continue serving as such under the 2010 Constitution.

22. It was also submitted that the appellants' offices were abolished by operation of the law, and that the defunct Industrial Court, to which they had been appointed, was a subordinate court. As regards section 32(2) of the Industrial Court Act, it was submitted that the trial court did not err in finding that it was unconstitutional because it purported to transition the appellants to the ELRC without complying with the process provided by *the Constitution* for transitioning judges.

23. On that basis, the three respondents submitted that the appellants had not proven violation of any of their rights and urged the Court to dismiss the appeal for lack of merit.

24. The appeal was also opposed by the JSC vide written submissions dated 23rd October 2017, which were highlighted by its learned counsel, Mr. Issa. As regards the status of the defunct Industrial Court, it was submitted that it was a subordinate court established by an Act of Parliament and did not enjoy the status of the High Court. It was contended that the defunct Industrial Court was created pursuant to section 65(1) of the repealed Constitution, which empowered Parliament to create courts subordinate to the High Court. In support of that submission, JSC relied on the decisions of the Court in Karisa Chengo & 3 others v. Republic [2015] eKLR and Universities Academic Staff Union v. Kenyatta University & Another [2017] eKLR.

25. JSC also contested the appellant's assertion that the defunct Industrial Court was not a subordinate court because its appeals lay to this Court. Instead, it was contended that appeals from the Industrial Court lay to the ELRC and, in support of that submission, JSC relied on the decision of this Court in Joseph Mchere Aoko v. Civicon Ltd. [2015] eKLR.

26. On the transition of the appellants to the ELRC, JSC submitted that the appellants could not transition from the defunct Industrial Court to the ELRC because they were not appointed in accordance with section 13(1) of the *Labour Institutions Act*, 2007 which required appointment by the President on the recommendation of JSC. It was contended that, instead, the appellants were appointed by the then Permanent Secretary, Ministry of Labour and Human Resource Development without any involvement of JSC.

27. JSC also submitted that the appellants could not have transitioned from the defunct Industrial Court to the ELRC because judges of the latter court are appointed by the President on the recommendation of JSC, and, further, that the Employment and *Labour Relations Act* defines a judge of the ELRC to mean a person appointed under Article 166(1) (b) of *the Constitution* (by the President on the recommendation of JSC), which the appellants were not.

28. Turning to the constitutionality of section 32(2) of the Industrial Court Act, 2011, JSC relied on the decision of the ELRC in United States International University (USIU) & 3 others v. Attorney General & 13 Others [2016] eKLR where it was held that the said section was unconstitutional for ignoring the provisions of *the Constitution* on appointment of judges of the ELRC, and for purporting to amend *the Constitution*. It was further contended that section 31(2) of the Sixth Schedule to *the Constitution* allowed a person holding a public office prior to the promulgation of *the Constitution* to continue holding such office only in so far as it was consistent with *the Constitution*, and that the alleged transitioning of the appellants without vetting or appointment by the President on the recommendation of the JSC was not consistent with *the Constitution*.

29. Lastly, JSC submitted that the appellants' offices were terminated by operation of the law as contemplated by section 13(2) (iii) of the *Labour Institutions Act*, 2007 upon Promulgation of the 2010 Constitution, the enactment of the ELRC Act and establishment of the ELRC as a superior court with jurisdiction on employment and labour matters.

Accordingly, JSC urged the Court to dismiss the appellants' appeal with costs.

30. We have carefully considered the record, the judgment of the High Court, the submissions by learned counsel for all the parties, the authorities they cited and the law. We are grateful to counsel for their industry and illuminating submissions. All the issues raised by the appellant revolve around the question as to whether, in the circumstances of this appeal the appellants were entitled to, and did, automatically transition from the Industrial Court created by the *Labour Institutions Act*, 2007 to the ELRC created by *the Constitution* and the ELRC Act. That is the issue we shall strive to answer in this judgment.

31. To begin with, it is common ground that immediately prior to the promulgation of *the Constitution* of Kenya, 2010 on 27th August 2010, the appellants were serving as judges of the Industrial Court of Kenya then established under the *Labour Institutions Act*, 2007. Initially, Judges of the Industrial Court were appointed under the Trade Disputes Act, Cap 234 (repealed) which commenced on 8th June 1965. Part IV of the Act provided for dispute settlement and section 14 of the same Act provided for the Industrial Court as follows:

> " 14.
>
> (1) For the purpose of the settlement of trade disputes and of matters relating thereto the President may, by order, establish an Industrial Court consisting of –

a. such number of Judges, not being less than two, as may be determined by the President:

b. eight other members, who shall be appointed for terms of not less than three years by the Minister after consultation with the Central Organization of Trade Unions and the Federation of Kenya Employers:

Provided that whenever it appears to be expedient a judge may appoint two assessors, one to represent employees, from a panel of assessors appointed by the Minister, to assist in the determination of any trade dispute before the Court.

32. To qualify for appointment as a judge of the Industrial Court, a person had to be an advocate of at least seven years standing. The appointment was for a term of not less than five years, renewable. A judge of the court could be removed from office by the Public Service Commission for inability to discharge the functions of the office or for misbehaviour. By dint of section 17, an award of the Industrial Court was final and not amenable to challenge by way of appeal, review, injunction, certiorari or prohibition.

33. As is crystal clear from the above provision, the Industrial Court was to be established by an order of the President. Towards that end, the court was subsequently established by the Trade Disputes (Establishment of Industrial Court) Order, 1965 (Legal Notice No. 154). As the ELRC aptly stated in United States International University & 3 others v. Attorney General & 13 Others (2016) eKLR, the original Industrial Court was an ad hoc court that sat as and when the need arose and was not established by *the Constitution*. Its creation, appointment of judges, and determination of their numbers was the prerogative of the President, and the JSC had no role in the Industrial Court because:

> " The court was an institution created through tripartite engagement of the Government, the Employers and Organized Labour. It was not a Court within the Judiciary, but a Dispute Resolution Mechanism perched atop a Dispute Resolution Mechanism existing outside the Judiciary, in the Ministry of Labour. The Court acted as a Court of reference and appeals in matters originating from the Ministry. Its decisions were final and binding, reflecting the intention of its creators not to be part of the Judiciary."

34. In 2007, section 84 of the *Labour Relations Act* repealed the Trade Disputes Act, which hitherto had provided for the establishment of the Industrial Court. Instead, the Industrial Court was established under the *Labour Institutions Act*, 2007. By section 11 thereof, the court consisted of a principal judge, such number of judges as the President, on the advise of the JSC, considered necessary, and other members of the court appointed by the Minister on the advise of the National Labour Board. To be eligible for appointment as the principle judge, one had to be an advocate of at least ten years standing and with considerable knowledge and experience in law and practice of industrial relations and employment issues. Regarding appointment as a judge, one had to be an advocate of at least even years standing and the similar knowledge and experience.

35. As for jurisdiction, the industrial court had exclusive jurisdiction to hear and determine disputes over alleged violation of the Act or any other relevant legislation or any dispute between an employee or employers' organisation and a trade union or between a trade union, an employers' organisation, a federation or a member thereof.

36. As regards the tenure of the judges, section 13(2) provided as follows:

> " 13
>
> (2) A judge of the Industrial Court shall hold office until the judge:
>
> i. retires;
>
> ii. resigns from office;
>
> iii. is removed from office by operation of the law, or
>
> iv. dies."

37. Lastly, the Industrial Court was conferred with power to review its decisions, and any party aggrieved by its final judgment, award or order, had a right of appeal to the Court of Appeal only on matters of law.

38. Section 63(3) of the Act made provision for transition of the judges appointed under the Trade Disputes Act as follows:

> "(3) The persons who, at the commencement of this Act are Judges of the Industrial Court and members of the Industrial Court shall be deemed to have been appointed under this Act.
>
> (4) For the greater certainty and subject to subsection (3), the persons referred to in subsection (3) shall have and may exercise and perform all the powers and functions of a judge or member of the Industrial Court as the case may be."

39. The 1st appellant was appointed on 7th November 2008 under the *Labour Institutions Act*. The 2nd and 3rd appellants were initially appointed under the repealed Trade Disputes Act on 14th April 2004 and 22nd September 2003, respectively. Both were transitioned on 2nd June 2008 to the Industrial Court created by the *Labour Institutions Act*.

40. It is common ground that the appellants' letters of appointment to the Industrial Court created by the *Labour Institutions Act*, 2007 were under the hand of Beatrice Mukunya, the then Permanent Secretary, Ministry of Labour and Human Resource Development. It is also common ground that, notwithstanding the provisions of section 11 of the *Labour Institutions Act*, 2007, the JSC had no role in the appointment of the appellants.

41. After the promulgation of *the Constitution* of Kenya, 2010, the Industrial Court created by the *Labour Institutions Act*, 2007 was superseded by the current ELRC (initially known as the Industrial Court) created by Article 162 (2) (a) of *the Constitution* and the Industrial Court Act, 2011 Act. Section 31 of the Industrial Court Act, 2011 repealed Part III of the *Labour Institutions Act*, 2007, which up to that time had created the Industrial Court. Section 32(2) of the 2011 Act provided for transition of the judges of the defunct Industrial Court as follows:

> "A person who at the commencement of this Act is a Judge of the Industrial Court shall be deemed to have been appointed under this Act for the remainder of that person's term."

42. There are three other provisions of *the Constitution* of Kenya, 2010 pertaining to transition of judges from the old order to the new institutional order, which are relevant in this appeal. The first is section 23 of the Sixth Schedule to *the Constitution*, which required judges and magistrates who were in office

at the date of promulgation of *the Constitution* to undergo vetting to determine their suitability to continue serving under the new constitutional order. The section provides as follows:

> "23
>
> (1) Within one year after the effective date (27th August 2010), Parliament shall enact legislation, which shall operate despite Article 160, 167 and 168, establishing mechanisms and procedures for vetting, within a time frame to be determined in the legislation, the suitability of judges and magistrates who were in office on the effective date to continue to serve in accordance with the values and principles set out in Article 10 and 159.
>
> (2) A removal or a process leading to the removal, of a judge, from office by virtue of the operation of legislation contemplated under subsection (1) shall not be subject to question in, or review by, any court."

43. The second relevant provision is section 31(2) of the same Schedule which provided for transition as regards the existing public offices created by law prior to the promulgation of the 2010 Constitution. The section provides thus:

> "31
>
> (2) Subject to subsection (7) and section 24, a person who immediately before the effective date held or was acting in a public office established by law, so far as is consistent with this Constitution, shall continue to hold office or act in that office as if appointed to that position under this Constitution."

44. Lastly, section 33 of the same Schedule provided for among others, the succession of institutions and offices, in the following terms:

> "An office or institution established under this Constitution is the legal successor of the corresponding office or institution, established under the former Constitution or by an Act of Parliament in force immediately before the effective date, whether known by the same name or a new name."

45. The appellants' contention that they automatically transitioned from the defunct Industrial Court to the ELRC is based on their assertion that section 32(2) of the Industrial Court Act, 2011 and sections 31(2) and 33 of the Sixth Schedule to *the Constitution* transitioned them to the ELRC, and that the defunct Industrial Court was a superior court and that therefore, the ELRC is its successor. On their part, the respondents contend that the appellants' offices were determined by operation of the law; that the defunct Industrial Court was a subordinate court and that therefore, the ELRC is not its successor; that the appellants could not transition to the ELRC without complying with the provisions of *the Constitution* 2010; and that section 32(2) of the Industrial Court Act, 2011 which purported to transition the appellants to the ELRC was inconsistent with *the constitution* and therefore null and void to that extent.

46. Beginning with the validity of section 32(2) of the Industrial Court Act, 2011, which the High Court found to be unconstitutional, the appellants contend that the High Court erred by finding

the provision unconstitutional whilst none of the parties had filed a petition or cross-petition on the constitutionality of the provision. Having carefully perused the record, we are satisfied that there is no basis for faulting the High Court on the ground that it determined an issue that the parties had not placed before it.

47. In their re-amended petition, the appellants hinged their claim inter alia on section 32(2) of the Industrial Court Act, 2011 which they contended was valid law. In paragraph 31 of the petition, they pleaded thus:

> "In view of the foregoing, the petitioners contend that unless and until the High Court or any court of competent jurisdiction declares section 32(2) of the Industrial Court Act unconstitutional, they remain judges of the court and the respondents alongside other Kenyans are enjoined to treat them as such."

48. Among the reliefs that the appellants prayed for from the High Court were the following, based on their view that section 32(2) of the Industrial Court Act, 2011 was sound and valid law:

> "(h) A declaration be issued to declare that by dint of section 32(2) of the Industrial Court Act, 2011 the petitioners can only be removed from office in accordance with *the Constitution* of Kenya, 2010;
>
> (i) A declaration be issued to declare that unless and until section 32(2) of the Industrial Court Act, 2011 is declared unconstitutional by the High Court or any court of competent jurisdiction, the petitioners shall remain judges of the industrial court with effect from the commencement date of the said Act...
>
> l. A declaration be issued to declare that the respondents are are bound to abide with and enforce the determination by Parliament of the composition of the Industrial Court to include the petitioners by dint of 32(2) of the Industrial Court Act, 2011.
>
> m. A declaration be issued to declare that under Article 172 of *the Constitution* (that) the 3rd respondent has no re-establish or reconstitute the Industrial Court contrary to or irrespective of the provisions of the Industrial Court Act, 2011."

49. In their 14th ground of objection to the petition, the 1st, 2nd and 4th respondents took a view contrary to that of the appellants, and contended that the purported transition from the Industrial Court to the ELRC that the appellants were relying on was in breach of *the Constitution*. They averred thus:

> "14. The purported transitioning of the petitioners from being judges of a subordinate court to a superior court without observance of the national values and principles of governance referred to under Article 10, e.g. competitive, open and accountable recruitment, without the participation of the Judicial Service Commission would be inconsistent with the principles and purposes of the Current Constitution." (Emphasis added)

50. For its part, JSC launched a frontal attack on section 32(2) of the Industrial Court Act, 2011 in paragraph 31 of the replying affidavit sworn by Gladys Boss Shollei. The JSC averred as follows:

> "31. That the provisions of Section 32(2) of the Industrial Court Act, which purport to preserve the position of the petitioners, and which the petitioners

herein rely in support of their claim for conservatory orders, is inconsistent with and violates the provisions of *the Constitution* for the following- reasons:

i. section 31(2) of the Sixth Schedule to *the Constitution* provides 'that subject to subsection 7 and subsection 24: a person who immediately before the effective date, held or was acting in a public office established by law, so far as it is consistent with *the Constitution*, shall continue to hold or act in that office as if appointed to that position under this Constitution;

ii. *The Constitution* provides for appointment of Judges only (on) the recommendation of the Judicial Service Commission. The Petitioners' appointment was not on the recommendation of the Judicial Service Commission and therefore not consistent with *the Constitution*." (Emphasis added).

51. We bear in mind that under rule 15 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, a respondent may respond to a petition by a replying affidavit or grounds of opposition.

52. We have also perused the respective parties' submissions before the High Court and are satisfied that the parties squarely placed before the trial court the issue as to the validity of section 32(2) of the Industrial Court Act, 2011. For example, the very first issue framed by the appellants themselves for determination was:

> " Whether the appointment of the petitioners as judges of the Industrial Court pursuant to the *Labour Institutions Act*, 2008 was valid in view of the Provisions of section 32(2) of the Industrial Court Act, 2011 and whether the petitioners constitute part of the composition of the Industrial Court in view of the enactment of Parliament vide section 32(2) of the Industrial Court Act, 2011?"

53. For its part, JSC framed two issues pertaining to the varsity of section 32(2) of the Industrial Court Act, 2011 as follows:

> " 16.
>
> (a) Whether the Appointment of the Petitioners as Judges of the Industrial Court pursuant to the *Labour Institutions Act*, 2007 is valid in view of the provisions of Section 32(2) of the Industrial Court Act, 2011; and
>
> (b) Whether the Petitioners constitute part of the (composition) of the Industrial Court in view of the enactment by Parliament vide Section 32(2) of the Industrial Court Act, in exercise of its powers under Article 162(2) of *the Constitution*."

54. In the perception of the trial court, one of the main issues raised by the respondents to the petition was whether section 32(2) of the Industrial Court Act, 2011 was in violation of *the Constitution*. In resolving the issue, the trial court expressed itself as follows:

> " 73. Could the petitioners be exempt, as they claim, from the requirement that they be appointed in accordance with *the Constitution* by virtue of section 32(2) of the Industrial Court Act?
>
> 74. It is the petitioner's contention that the respondents are violating the principle of separation of powers by second-guessing Parliament which had provided for the transition to the Industrial Court stablished pursuant to *the Constitution* by providing at section 32(2) of the Industrial Court Act as follows:
>
> '(2) A person who at the commencement of this Act is a judge of the Industrial Court shall be deemed to have been appointed under this Act for the remainder of that person's term.'
>
> 75. In my view, by enacting this provision which appears to have been intended to transit the former judges of the Industrial Court to the new Industrial Court, Parliament exceeded the mandate granted to it under the provisions of Article 162(3) of *the Constitution*, which provides that 'Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2)'. In my view, Parliament could determine or set the parameters of the jurisdiction and functions of the Industrial Court with the status of the High Court. It could not, however, determine who presides over the said Court, for that was already placed in the hands of the Judicial Service Commission by *the Constitution* by dint of Article 166 of *the Constitution* which I have set out above. Section 32(2) of the Industrial Court Act is therefore unconstitutional, cannot be of avail to the petitioners."

55. We agree with the appellants on the principle that they have eloquently urged to the effect that a court must determine only the issues presented to it by the parties and that it has no businesses framing and determining issues that have not been raised by the parties in their pleadings. Indeed, in Chumo Arap Songok v. David Keigo Rotich [2006] eKLR, this Court held that:

> "The law is now settled, that parties to a suit are bound by the pleadings in the suit and the court has to pronounce judgment only on the issues arising from the pleadings."
>
> And in Baber Alibhai Mwaji v. Sultan Hashim Lalji & Another [2010] eKLR, the Court reiterated:
>
> > "A court of law cannot pluck issues literally from the air and purport to make determinations on them. It is the pleadings which determine the issues for determination."

56. However, we also bear in mind that the above principle is qualified to the extent that the court is allowed to determine an unpleaded issue if, from the conduct of the proceedings, the parties have raised the

issue and left it for the determination of the court. In Odd Jobs v. Mubia [1970] EA 476, the former Court of Appeal for Eastern Africa stated the principle as follows:

> " ...a court may allow evidence to be called, and may base its decision, on an unpleaded issue if it appears from the course followed at the trial that the unpleaded issue has in fact been left to the court for decision."

(See also Justice Kalpana H. Rawal v. Judicial Service Commission & 4 Others [2016] eKLR; Captain Harry Gandy v. Caspar Air Charters Ltd. [1956] 23 EACA 139 and Mapis Investment (K) Ltd. v. Kenya Railways Corporation [2005] 2 KLR 410).

57. Accordingly, we are satisfied that the question of the constitutional validity of section 32(2) of the Industrial Court Act, 2011 was properly before the trial court, was addressed by the parties, and that the trial court did not err in determining the same as it did.

58. As a postscript to the issue of constitutionality of section 32(2) of the Industrial Court Act 2011, it is important to point out that, by a judgment dated 4th February 2016, a bench of three judges of the ELRC in United States International University & 3 others v. Attorney General & 13 Others (supra) also found the provision to be unconstitutional: The ELRC held thus:

> " 35 ...The Section (32(2) creates an avenue outside *the Constitution*, through which a person could become a judge, without meeting the constitutional criteria. *The Constitution* does not allow that judges are deemed appointed through legislation...
>
> 37. Section 32 [2] of the Industrial Court Act has the effect of amending *the Constitution*, by creating an additional route outside *the Constitution*, through which persons could be appointed judges of a superior court. We are convinced, hold and declare Section 32 [2] of the Industrial Court Act to be unconstitutional, null and void."

59. Turning to the issue as to whether the defunct Industrial Court was a superior court and whether the ELRC is its successor, it is common ground that the defunct Industrial Court was not established by the repealed constitution. Rather, at the material time, it was established by an Act of Parliament, the *Labour Institutions Act*, 2007. During the currency of the repealed Constitution, a superior court was created by *the Constitution*. Any other court created by an Act of Parliament, by whatever name called or by whatever jurisdiction conferred on it remained a subordinate court by dint of section 65(1) of the repealed Constitution, which provided as follows:

> " 65.
>
> (1) Parliament may establish courts subordinate to the High Court and courts-martial, and a court so established shall, subject to this Constitution, have such jurisdiction and powers as may be conferred on it by any law." (Emphasis added).

60. In addition, section 123 of the repealed Constitution defined

"a subordinate court" as follows:

> "123 "subordinate court" means a court of law in Kenya other than -
>
> a. the High Court;

b. a court having jurisdiction to hear appeals from the High Court; or

c. a court-martial;

61. It cannot therefore be gainsaid that from the method of its establishment, appointment of its judges and their removal which we have considered above, the defunct Industrial Court was not of the status of the High Court established by the repealed Constitution, which was a superior court of record and whose judges were appointed by the President in accordance with the advice of the JSC, and who enjoyed security of tenure and could only be removed for cause upon recommendations of an independent tribunal. If anything, through its establishment, the Industrial Court was a subordinate court by dint of sections 65(1) and 123 of the repealed Constitution. The drafters of the Industrial Court Act, 2007 may have intended to make that Court a superior court but, in juridical terms, it remained a subordinate court.

62. We would add that, even if ELRC was to be considered as the successor to the defunct Industrial Court, (which we have found it was not), section 33 of the Sixth Schedule to *the Constitution*, of and by itself could not have validly transitioned the appellants to the ELRC in light of the other express provisions of *the Constitution* on transition of personnel.

63. In Joseph Mchere Aoko v. Civicon Ltd. [2015] eKLR, this Court reiterate that the defunct Industrial Court was a subordinate court notwithstanding the purported conferment by section 27 of the *Labour Institutions Act*, 2007, of a right of appeal from its decisions to this Court. The Court was emphatic in that respect:

> "Analysis of the above provisions of the old Constitution leaves no doubt that the former Industrial Court established under the *Labour Institutions Act*, 2007 was a subordinate court to the High Court and therefore amenable to the judicial review jurisdiction of the High Court."

(See also Director of Kenya Medical Research Institute v. Agnes Muthoni & 35 Others [2014] eKLR)

64. We agree with the trial court that sections 31(1) and (2) of the Sixth Schedule to *the Constitution* could not transition the appellants from the defunct Industrial Court to the ELRC. Section 31(1) relates to transition from offices established by the repealed Constitution. That provision could not apply to the appellants, whose offices were at the material time created by an Act of Parliament, the *Labour Institutions Act*, 2007, rather than by the former Constitution. Section 31(2), which relates to transition from public offices established by law, is not a blanket transitioning provision. It only allows transition where such transition is consistent with the provisions of *the Constitution*.

65. Taking into account what we have stated above, automatic transition of the appellants from the defunct Industrial Court to the ELRC would not have been consistent with *the Constitution*. The inconsistency is plainly manifest as regards, among others, the fundamental difference in the juridical nature of the defunct Industrial Court and that of the ELRC under the 2010 Constitution; the appointment of the appellants to the defunct Industrial Court in a manner that was not consistent with the express provisions of the prevailing law; the lack of competitive and transparent recruitment procedure demanded by the 2010 Constitution; the failure to involve mandatory institutions like the JSC and the President in the appointment of the appellants; and the mandatory requirement in Article 74 of *the Constitution* that all state officers must take and subscribe to the oath or affirmation of office.

66. We would also add that the argument based on direct transition of the appellants from the defunct Industrial Court to the ELRC is based on lack of appreciation of the fundamental break from the past, both in terms of institutions, principles and values, that *the Constitution* of Kenya 2010 intended to

engineer. In Justice Kalpana H. Rawal v. Judicial Service Commission & 4 Others (supra), this Court adverted to those changes as follows:

> "...it is pertinent to first point out in outline the nature and extent of the changes that the people of Kenya, in the exercise of their sovereign power, introduced to their governance system through the promulgation of *the Constitution* in 2010. Those changes, far from being confined to a single clause on the Judiciary, fundamentally altered and redefined all other state institutions.
>
> Upon the promulgation of *the Constitution*, among others, a devolved system of government was introduced dismantling power that hitherto was concentrated in the national government and diffused a substantial part of it to 47 county governments; the powers of the Executive were considerably reduced; a Westminster type cabinet government was replaced by an executive one; the legislature was transformed from a unicameral to a bicameral institution; the electoral system changed from a pure first-past-the-post to include a form of proportional representation, a revamped bill of rights, incorporating economic social and cultural rights was introduced; and a host of watchdog institutions were created and granted constitutional mandate. The Attorney General and the Auditor General in office immediately before the effective date were to vacate office within one year and their replacements were to be appointed under *the Constitution*. In the Judiciary, beyond reduction of the retirement age of judges from 74 to 70 years, a supreme court was introduced at the apex; the office of the deputy chief justice was created; a new transparent and competitive system of appointing judges was adopted; the Chief Justice in office immediately before the effective date was required to vacate office within six months to the intent that the successor would be appointed under *the Constitution*; and serving judges were subjected to vetting to determine their suitability to continue serving. We refer to these developments to emphasize the point that what happened in 2010 was not a mere constitutional amendment to change a provision of *the Constitution* on retirement of judges; it was a fundamental rethink and reorganisation of the State and its institutions."

67. If judges and magistrates in offices created by the repealed Constitution could not transition to the courts created by the 2010 Constitution without undergoing vetting to determine their suitability to serve under the 2010 Constitution, it is difficult to comprehend how the appellants could have automatically transitioned from a subordinate court created by an Act of Parliament under the old regime to a superior court created by the 2010 Constitution without any form of evaluation.

68. The argument that the failure to transition the appellants from the defunct industrial Court to the ELRC was in violation of their legitimate expectation does not hold much water. In Communication Commission of Kenya & 5 others v. Royal Media Services & 5 Others [2014] eKLR the Supreme Court explained, among others, that legitimate expectation arises when a body, by representation or past practice, has raised an expectation in a citizen that it is within its power to fulfil. However, the legitimate exception must be founded upon a promise or practice which the public authority can competently and lawfully make and that no legitimate expectation can arise contrary to the clear provisions of *the Constitution* of a statute. In this case, we have found that, by express terms of *the Constitution*, the appellants could not have validly transitioned from the defunct Industrial Court to the ELRC and that, therefore, no legitimate expectation arose which the appellants could enforce.

69. We also do not find any merit in the appellant's contention that the trial court erred by failing to hold that they could only be removed from office pursuant to recommendations of an independent tribunal appointed under Article 168 of *the Constitution*. Having not been appointed in the manner specified

in Article 166 of *the Constitution*, there would have been no basis for invoking Article 168 of *the Constitution* in their removal. We agree with the trial court that the appellant's offices were determined by operation of the law as provided by section 13(2) (iii) of the *Labour Institutions Act*, 2007.

70. The appellants have also invited this Court to direct, pursuant to Articles 20 and 22 of *the Constitution*, that henceforth all petitions involving JSC where allegation of violation of rights and fundamental freedoms are raised should be heard by a bench of three judges. We are not sure what to make of such a prayer for a blanket order in view of the express provisions of *the Constitution*. Article 165(4) of *the Constitution* provides as follows:

> " Any matter certified by the court (High Court) as raising a substantial question of law under clause (3) (b) (violation of the Bill of Rights) or (d) (supremacy of *the Constitution*, levels of government and conflict of laws) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice."

71. It is apparent from that provision that neither the High Court, nor this Court can issue a blanket order that a certain type of dispute or a dispute involving a particular party must in all and sundry cases be heard and determined by an uneven bench. Whether or not to empanel an uneven bench is to be decided by the High Court on a case by case basis, depending on whether there is a substantial question raised in the case. For us to issue the order requested by the appellant, we would not only be violating Article 165(4) of *the Constitution*, but would also be usurping jurisdiction which *the Constitution* has expressly and unequivocally vested in the High Court.

72. The High Court has developed consistent and rich jurisprudence on whether or not to certify a matter as one raising a substantial question so as to enable the Chief Justice to empanel an uneven bench. From that jurisprudence, some of the guiding considerations include the complexity of the matter, the novelty of the issues raised, the effect of the reliefs sought, and the public interest. (See Eric Gitari v. Attorney General & Another [2016] eKLR.

73. From the record before us, the appellants did not even apply to the High Court to certify that their petition qualified to be heard by an uneven bench. Without resulting to the solution offered by Article 165(4), the appellants cannot ask this Court to issue a blanket order on matters that by best practice are determined on a case by case basis. We see absolutely no merit in this issue.

74. Lastly, the appellants contended that, after considering all the issues they had raised, it would become self evident that the trial court erred in holding that the respondents had not violated the appellants' rights and fundamental freedoms under Articles 27 (equality and freedom from discrimination) and 50 (fair hearing). Having considered all the issues raised by the appellants, and having found none to be meritorious, we cannot reach a different conclusion from that of the High Court.

75. Before we conclude this judgement, we wish to apologise to the parties for the delay in rendering the judgment, which delay arose from unavoidable circumstances.

76. Taking into account all what we have stated above, we do not find any merit in the appellants' appeal. Accordingly, we hereby uphold the judgment of the High Court dated 16th January 2015 and dismiss the appeal in its entirety. Further, taking into account the nature of the litigation and the interest of the parties, we direct each party to bear its own costs. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF NOVEMBER 2024.

K. M'INOTI

.....

JUDGE OF APPEAL

H. A. OMONDI

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA, C.Arb, FCIArb.

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.