National Social Security Fund Board of Trustees v Kenya Tea Growers Association & 14 others (Civil Appeal 656 of 2022) [2023] KECA 80 (KLR) (3 February 2023) (Judgment)

Neutral citation: [2023] KECA 80 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 656 OF 2022

HM OKWENGU, MA WARSAME & JM MATIVO, JJA

FEBRUARY 3, 2023

BETWEEN

NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEES .. APPELLANT

AND

KENYA TEA GROWERS ASSOCIATION & 14 OTHERS & 14 OTHERS ..... RESPONDENT

(An Appeal against the judgment and decree of the Employment and Labour Relations Court at (Nderi, Wasilwa, and Mbaru JJ) delivered on 19thSeptember, 2022) in NAIROBI ELRC PETITION NO. 38 OF 2014 CONSOLIDATED WITH PETITION NOS. 35 OF 2014; 34 OF 2014; 49 OF 2014 AND 50 OF 2014)

The Employment and Labour Relations Court can determine constitutional issues only if they arise from employer-employee disputes

The instant appeal challenged the jurisdiction of the Employment and Labour Relations Court (ELRC) to entertain a matter challenging the constitutionality of the National Social Security Fund Act, 2013 (NSSF Act, 2013). The ELRC had declared the NSSF Act, 2013 unconstitutional. The instant court found that constitutional validity of the statute or the targeted provisions did not arise from an employer-employee dispute. The court thus held that constitutional issues could be determined by the ELRC only if they arose from an employer-employee dispute.

Reported by Kakai Toili

Jurisdiction *– ingredients required to invest a court with jurisdiction – jurisdiction of the Employment and Labour Relations Court - jurisdiction to determine the constitutionality of statutes - under what circumstance could the Employment and Labour Relations Court determine the constitutionality of statutes - where the matter did not arise from an employer-employee dispute - whether the Employment and Labour Relations Court had jurisdiction to determine the constitutionality of the National Social Security Fund Act, 2013 - Constitution of Kenya, 2010, articles 162(1),(2)(a) and (b) and 165(3)(d)(i); Employment and Labour Relations Court Act, 2011, sections 12(1) (a)-(f).*

Jurisdiction *– jurisdiction of the High Court vis a vis the Employment and Labour Relations Court - jurisdiction to determine the constitutionality of statutes - whether a mixed bench of 3 judges from the High Court and the Employment and Labour Relations Court could have the jurisdiction to determine the constitutionality of the National Social Security Fund Act, 2013.*

Jurisdiction *– jurisdiction of the Court of Appeal – jurisdiction where there was an appeal on a substantive matter and the court's jurisdiction had been challenged - what was the role of the Court of Appeal where there was an appeal on a substantive matter and its jurisdiction had been challenged.*

Devolution *– powers and functions of the National Government vis a vis county governments - distinction between overlap and concurrence of powers and functions of the National and County Governments - principles to be considered in determining whether a matter fell within a particular National or County Government jurisdiction - pith and substance test - what was the nature of the pith and substance test in national and county legislations - Constitution of Kenya, 2010, articles 109 to 114, Fourth Schedule parts 1 and 2.*

Constitutional Law *– constitutionality of statutes – constitutionality of the National Social Security Fund Act, 2013, - claim that the National Social Security Fund Act, 2013 ought to have been considered by the Senate before it was enacted - whether the National Social Security Fund Act, 2013 was unconstitutional for failure to involve the Senate in its enactment.*

Words and Phrases *- include - definition of include - to contain as part of something. The participle typically indicates a partial list....including but not limited to means the same thing - Black's Law Dictionary 10th Edition.*

Words and Phrases *- including - definition of including - containing as part of the whole being considered - Concise Oxford English Dictionary 12th Edition.*

Brief facts

The instant appeal was against the decision of the Employment and Labour Relations Court (ELRC) which declared the National Social Security Fund Act, 2013 (NSSF Act, 2013 unconstitutional. The appellant challenged the jurisdiction of the ELRC to entertain consolidated petitions at the ELRC challenging the constitutionality of the NSSF Act, 2013. The appellant argued that determining the constitutionality of an Act of Parliament was a preserve of the High Court. The appellant submitted that; the ELRC wrongfully assumed jurisdiction over a dispute falling within the High Court's domain; the consolidated petitions concerned the constitutionality of the NSSF Act, 2013 and/or specific sections of the Act; the petitions did not disclose any employer-employee relationship to invoke the jurisdiction of the ELRC; and that none of the petitions raised a constitutional issue ancillary to or incidental to the matters contemplated under section 12(1) of the Employment and Labour Relations Court Act, 2011, (ELRC Act).

The respondents argued that the petitions were initially filed in the High Court but they were transferred to the ELRC by the court on grounds that social security and employment issues fell within the jurisdiction of the ELRC. The respondents further argued that the appellants never opposed the transfer. The respondents claimed that the bulk of the contributors to the funds established by the NSSF Act, 2013 were employees and employers who were subject to the Employment Act, 2007 and contributions to the fund was subject to the existence of a contract of service.

The respondents submitted that in their petitions at the ELRC, they questioned the constitutionality of the NSSF Act, 2013 which imposed on them additional liability by requiring employers to pay enhanced contributions towards their employees' account in the fund. Further, the petitioners being representatives of employees questioned the constitutionality of being made to pay enhanced contributions because they had a contract of service with various employers.

Issues

i. Whether the Employment and Labour Relations Court had jurisdiction to determine the constitutionality of the National Social Security Fund Act, 2013.
ii. Under what circumstance could the Employment and Labour Relations Court determine the constitutionality of statutes?

iii. What were the ingredients required to invest a court with jurisdiction to hear a matter?
iv. Whether a mixed bench of 3 judges from the High Court and the Employment and Labour Relations Court could have the jurisdiction to determine the constitutionality of the National Social Security Fund Act, 2013.
v. Whether the National Social Security Fund Act, 2013 was unconstitutional for failure to involve the Senate in its enactment.
vi. What were the principles to be considered when determining whether a matter fell within a particular National or County Government jurisdiction?
vii. What was the nature of the pith and substance test in national and county legislations?
viii. What was the distinction between overlap and concurrency of powers and functions of the National and County Governments?
ix. What was the role of the Court of Appeal where there was an appeal on a substantive matter and its jurisdiction had been challenged?

Relevant provisions of the Law

Employment and Labour Relations Court Act, 2011

Section 12 - Jurisdiction of the Court

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

i. *interim preservation orders including injunctions in cases of urgency;*
ii. *a prohibitory order;*
iii. *an order for specific performance;*
iv. *a declaratory order;*
v. *an award of compensation in any circumstances contemplated under this Act or any written law;*
vi. *an award of damages in any circumstances contemplated under this Act or any written law;*
vii. *an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law; or*
viii. *any other appropriate relief as the Court may deem fit to grant.*

Held

1. The Constitution left it to Parliament to determine the jurisdiction and functions of the courts contemplated in article 162(1) and (2). Pursuant to article 162(3), Parliament enacted the ELRC Act. The preamble to the Act provided that it was an Act of Parliament to establish the Employment and Labour Relations Court (ELRC) to hear and determine disputes relating to employment and labour relations and for connected purposes.

2. Section 12(1)(a)-(j) of the ELRC Act provided for the jurisdiction of the court. Despite the clear-cut jurisdictional demarcation prescribed by the Constitution and section 12(1)(a)–(j) of the ELRC Act and numerous judicial pronouncements by the superior courts defining the jurisdiction of courts of equal status, there appeared to be hitches either in the understanding of the scope of the jurisdiction of the specialized courts or the application of the law and precedents to specific facts or both.

3. When there was an appeal on the substantive matter to the Court of Appeal and the issue of jurisdiction was raised, (as in the instant case), the Court of Appeal should first make a finding on jurisdiction. But, if it found that it had no jurisdiction, it was prudent to go ahead and say so and give a considered judgment on the substantive matter. That was so because as the penultimate court it had to make its decision on the substantive appeal known should an appeal to the apex court ensue.

4. A mixed bench of 3 judges from the High Court and the ELRC could not have been properly constituted or possess the requisite jurisdiction. Jurisdiction was a threshold matter which went to the competence of the court to hear and determine a suit. Jurisdiction could be raised at any stage of the proceedings in the High Court, on appeal and even in the Supreme Court for the first time. It could be raised by any of the parties or by the court, and once raised the court would do well to examine it and render a considered ruling on it.

5. Jurisdiction, a mantra in adjudication connoted the authority or power of a court to determine a dispute submitted to it by contending parties in any proceeding. A court of law was invested with jurisdiction to hear a matter when:

1. it was properly constituted as regards numbers and qualifications of members of the bench, and no member was disqualified for one reason or another;
2. the subject matter of the case was within its jurisdiction, and there was no feature in the case which prevented the court from exercising its jurisdiction; and
3. the case came before the court initiated by due process of law, and upon fulfilment of any condition precedent to the exercise of jurisdiction.

The above three ingredients had to co-exist in order to infuse jurisdiction in a court. Where a court was drained of the jurisdiction to entertain a matter, the proceedings flowing from it, no matter the quantum of diligence, dexterity, artistry, sophistry, transparency and objectivity injected into it, would be marooned in the intractable web of nullity.

6. The promulgation of the Constitution and the enactment of the ELRC Act marked a watershed moment in the resolution of labour and employment disputes in Kenya because it brought about immeasurable advancement in the jurisdiction and powers of the ELRC. The ELRC Act not only resolved the question of the jurisdiction and status of the ELRC as a superior court of record, but it also established the court as the prime and exclusive judicial body for the resolution of all labour, employment and industrial relations disputes in Kenya. In terms of subject matter, the ELRC was a court of limited jurisdiction. It could not entertain any matter outside the prescribed subject matter area.

7. The jurisdiction of the courts of equal status was jealously guarded by the Constitution. Article 165(5)(b) of the Constitution in peremptory terms provided that the High Court did not have jurisdiction in respect of matters falling within the jurisdiction of the courts contemplated in article 162(2) of the Constitution.

8. In terms of the Constitution, the ELRC was constrained in its decision-making power by the supremacy of the Constitution (article 162(a)) and the rule of law. It was further constrained by legislation (section 12 (1) (a)-(f)) of the ELRC Act, the common law, precedents and procedural rules. When examining the jurisdiction conferred on the ELRC by section 12(1) (a)-(f), the word “includes” had to be borne in mind. However, there could not be any inflexible rule that the word "includes" should be read always as a word of extension without reference to the context.

9. The key to the opening of every law was the reason and spirit of the law — it was the *animus imponentis*, the intention of the law-maker, expressed in the law itself, taken as a whole. Hence, to arrive at the true meaning of any particular phrase in a statute, that particular phrase was not to be viewed detached from its context in the statute. It was to be viewed in connection with its whole context as well as the title and preamble of the statute.

10. It was to the preamble that the court was to look for the reason or spirit of every statute; rehearsing that, as it ordinarily did, the evils sought to be remedied, or the doubts purported to be removed by the statute, and so evidencing, in the best and most satisfactory manner, the object or intention of the Legislature in making and passing the statute itself. However, two propositions were quite clear a preamble could afford useful light as to what a statute intended to reach and if an enactment was itself clear and unambiguous, no preamble could qualify or cut down the enactment.

11. The issue under consideration in the petitions was the constitutional validity of a statute and or some specific provisions of the NSSF Act, 2013. The constitutional validity of the statute or the targeted provisions did not arise from an employer-employee dispute. The intention of Parliament was clear both from the preamble and section 12(1)(a)-(f). The ELRC Act was enacted to resolve employer-employee disputes as provided by article 162(a) of the Constitution. That was the purpose and context which could not be ignored in interpreting provisions of the ELRC Act. Decided cases were in agreement that constitutional issues could be determined by the ELRC only if they arose from an employer-employee dispute. The germane issue framed by the ELRC did not arise in an employer-employee dispute nor did it fall under section 12(1)(a)-(f).

12. The Constitution should always be the point of reference by any court while adjudicating disputes. The ELRC failed to appreciate that a claim questioning constitutional validity of a statutory provision was not merely an ancillary claim to the issue before it nor did the issue arise during the adjudication of the dispute (which in any event was not an employer-employee dispute). The germane issue which was identified by the court as early as at paragraph one of its judgment was a substantive claim brought under article 165(3)(d)(i) of the Constitution. That was a stand-alone issue not emanating from a dispute under section 12(1) (a)-(f) of the ELRC Act.

13. The words "including" or "connected thereto" could not be deployed to swallow such a substantive issue so as to justify invocation of other claims. While enacting the provisions of article 165(3)(d)(i) of the Constitution which conferred on the High Court the jurisdiction to hear any question respecting the interpretation of the Constitution including the determination of the question whether any law was inconsistent with or in contravention of the Constitution, the drafters of the Constitution were not acting on a clean slate. They had before them cognate provisions of articles 162(1)(2)(a) and (b) and (3) of the Constitution.

14. Having identified the germane issue before it as early as at paragraph 1 of the judgment, the ELRC fell into a grave error when it failed to appreciate that the issue before it fell within the jurisdiction of the High Court as prescribed by article 165(3)(d)(i) of the Constitution. Further, the bench fell into error when it failed to appreciate that authorities were replete on the following positions;-

1. the constitutional issues had to arise from an employer-employee dispute for the ELRC to assume jurisdiction; and
2. employment cases were not the appropriate mechanism for the ventilation of grievances of litigant's constitutional issues except where the issues arose in an employer-employment dispute.
    1. The Constitution had to be interpreted flexibly to meet social, political and historic realities.

15. The ELRC failed to appreciate that jurisdiction was determined on the basis of pleadings before consideration of the substantive merits of the case. The petitions challenged the constitutional validity of the legislative process leading to enactment of a legislation and or some of its provisions. The instant matter was not an employer-employee dispute. The ELRC failed to appreciate that laws affected many things in a variety of ways, large and small, but those side winds did not determine what matter a law was in relation to. That was determined by analyzing the central focus of the law, what it was really all about. In order to analyze what matter a challenged law was "in relation to" the court had to separate it from matters incidentally affected by the law. The bench failed to appreciate that crucial separation.

16. From a reading of articles of 162(1), (2)(a) and (b) and (3) and 165 (3) (d)(i) of the Constitution and section 12 (1) (a)-(f) of the ELRC Act and the germane issue before the ELRC, the ELRC wrongfully assumed jurisdiction. Parties could not by consent confer jurisdiction on a court, which it did not have by virtue of its enabling statute. When it came to determining the issue of jurisdiction, a court could not be influenced by sympathy. Where the statute creating a court conferred it with jurisdiction over a limited subject matter, it could only entertain any such claim that fell within the purview of the subject matter.

17. If proceedings were conducted by a court without jurisdiction, they were a nullity. Any award or judgment and or orders arising from such proceedings of a court acting without jurisdiction were also a nullity. The plea by counsel of the respondents that in the event the court finds the ELRC had no jurisdiction, the matter to be referred back to the High Court was undesirable. In any event, the parties were given an opportunity to address the court on the question of jurisdiction after the directions by the Chief Justice. That was the opportune moment to make such a plea. Instead, the parties fiercely defended their respective positions on jurisdiction, then came the court ruling affirming its jurisdiction.

18. The legislative competence conferred to both Houses of Parliament and the procedure for enacting legislation was provided for under article 109 of the Constitution. Basically, any Bill could originate from the National Assembly (article 109(2) of the Constitution). A Bill not concerning county government was considered only in the National Assembly, and passed in accordance with article 122 of the Constitution and

the Standing Orders of the Assembly (article 109(3) of the Constitution. A Bill concerning county government could originate in the National Assembly or the Senate, and was passed in accordance with articles 110 to 113, 122 and 123 of the Constitution and the Standing Orders of the Houses (article 109(4) of the Constitution).

19. Article 110(1)(a) of the Constitution defined Bills concerning counties as Bills which had provisions affecting the functions and powers of the county governments as set out in the Fourth Schedule to the Constitution; Bills which related to the election of members of the county assembly or county executive; and Bills referred to in Chapter Twelve of the Constitution affecting the finances of the county governments. That was a very broad definition which created room for the Senate to participate in the passing of Bills in the exclusive functional areas of the national level of Government for as long as it could be shown that such Bills had provisions affecting the functional areas of the county governments.

20. The Fourth Schedule to the Constitution distributed functions between the National Government and the county governments. Parts 1 and 2 of the Fourth Schedule provided the functional areas of the National Government and county governments respectively. However, the list in parts 1 and 2 of the Fourth Schedule did not provide a detailed definition of the functional areas.

21. Considerable overlap between the functional areas assigned to the two levels of Government could lead, in practice, to an overlap of powers and functions. Overlap was distinct from concurrency. Within the meaning of the Constitution, concurrency of powers referred to the existence of the same powers over the same functional areas. Overlap of functions, on the other hand, occurred where more than one level of Government had authority (be it legislative, Executive, or both) over the same functional area. A function was the responsibility to perform a role and deliver a given service. Any function that was not explicitly assigned to any of the two levels was a National Government responsibility. Under part 1 of the Fourth Schedule to the Constitution, standards for social security and professional pension plans were a function expressly conferred to the National Government.

22. In order to determine whether authority to enact a particular piece of legislation vested only in the National Assembly or concurrently in the National Assembly and the Senate, it was necessary to determine whether the legislation in question was a legislation with regard to a matter concerning county governments that fell within a functional area listed in the Fourth Schedule part 2 of the Constitution. Where the legislation fell within the functions in the Fourth Schedule, there was no difficulty determining whether it was a matter concerning the county governments. Difficulties could only arise where the legislation fell outside any of the matters covered in the Fourth Schedule and the court was invited to determine whether it was a matter for the National Assembly or county governments. Even then, in such situations, courts had come up with a test.

23. Pith and substance was a legal doctrine in constitutional interpretation used to determine under which head of power a given piece of legislation fell. In the case of national legislation, the application of the pith and substance test to legislative competence could lead to a conclusion that the Bill's pith and substance placed it wholly within functional areas of the National Government, even though certain provisions of the Bill (which for that purpose would be viewed as ancillary or incidental) fell within the functional areas of county governments (an exclusive county government competence).

24. In the case of county legislation, the pith and substance test could lead to a conclusion that the Bill's pith and substance placed it wholly within the Fourth Schedule part 2 of the Constitution functions, even though certain provisions of the Bill (again viewed for that purpose as ancillary or incidental) could fall outside the Fourth Schedule part 2.

25. If a statute was found in substance to relate to a topic within the competence of the Legislature, it should be held to be *intra vires* even though it could incidentally trench on topics not within its legislative competence. The extent of the encroachment on matters beyond its competence could be an element in determining whether in the guise of making a law on a matter within its competence, the Legislature was, in truth, making a law on a subject beyond its competence. However, where that was not the position, the fact of encroachment did not affect the *vires* of the law even as regards the area of encroachment.

26. Purpose was relevant to determine whether, in the instant case, Parliament was legislating within its jurisdiction, or venturing into an area under county government jurisdiction. The legal effect referred to how the law would affect rights and liabilities, and was also helpful in illuminating the core meaning of the law. The effects could also reveal whether in form, the law appeared to address something within the Legislature's jurisdiction, but in substance, it dealt with a matter outside that jurisdiction.

27. Two major principles were used in determining whether a matter fell within a particular national or county government jurisdiction:

1. The principle of devolution had to be respected, keeping in mind power was shared by two levels of Government, each autonomous in developing policies and laws within their own jurisdiction.

28. One would have expected the ELRC to undertake a pith and substance analysis to satisfy themselves on the true character of the legislation under challenge. That crucial analysis was not done. The ELRC did not engage in any interpretation of articles 109 to 114 of the Constitution. Instead it based its conclusions on the Supreme Court Advisory Opinion Reference No 2 of 2013 without interrogating the peculiar facts before it so as to satisfy itself that the advisory opinion was relevant to the issues before it. A case was only an authority for what it decided. It was not meant to be a general proposition for the entire law.

29. The ELRC not only failed to analyze the provisions of articles 109 to 114 of the Constitution, the clear provisions of parts 1 and 2 of the Fourth Schedule to the Constitution which defined the functional areas of both levels of the Government, but it also ignored several decisions of the court which had interpreted those articles. The bench fell into a grave error by failing to establish the true character of the legislation before it so as to satisfy itself that the legislation affected functions of the county government.

30. The jurisdiction of the Senate did not extend to each and every legislation passed by the National Assembly. To so hold would render article 110 of the Constitution redundant since it was difficult to think of any law that did not touch on counties. Although the Fourth Schedule to the Constitution gave a wide array of functions to the counties, it was incumbent upon the person who alleged noncompliance with article 110 to demonstrate that the law in question concerned county governments.

31. It was a cardinal principle of law that legislative enactments enjoyed a presumption of constitutional validity. That presumption operated until the person alleging unconstitutionality dislodged it by demonstrating the alleged unconstitutionality. The ELRC erred by failing to appreciate that the parties citing the alleged unconstitutionality did not rebut that presumption.

32. Article 110(3) of the Constitution only applied to Bills concerning counties and it was to those Bills alone that the concurrence process would be subjected. The extent of the legislative role of the Senate could only be fully appreciated if the meaning of the phrase concerning counties was examined. The ELRC failed to appreciate that the impugned legislation had no provisions affecting the functional areas of the county governments as listed in part 2 of the Fourth Schedule to the Constitution.

33. The exclusive powers of the counties related to matters which could be regulated within the counties. The impugned Act related to a function which exclusively fell under the National Government functions. None of the objects of the Bill touched on the functional areas assigned to the county government. The ELRC erred in law by holding the concurrence of the Senate and the National Assembly was required in enacting the impugned legislation. The decision declaring the NSSF Act, 2013, unconstitutional for failure to involve the Senate in its enactment was not supported by the law.

34. Even after declaring the entire statute unconstitutional, the ELRC went further and declared specific sections of the NSSF Act, 2013 as unconstitutional. Having declared the entire Act as unconstitutional, the inquiry ended there. Any further proceedings or declarations served no utilitarian value because the statute was no longer law. It was absolutely unnecessary for the ELRC to deploy the much-needed energy to determine the constitutional validity of provisions of a statute it had already nullified. In any event, the prayers touching on those sections were alternative prayers, and it was not proper to grant alternative prayers after allowing the main prayer.

Appeal allowed; the entire judgment and all the consequential orders of the ELRC was set aside.

Orders

Each party to bear its own costs for the appeal.

Citations

Cases

1. Attorney General & 2 others v Okiya Omtatah Okoiti & 14 others [2020] eKLR (Civil Appeal 621 of 2019 (Consolidated with Civil Appeal 74 of 2020)) — Mentioned
2. Council of Governors & 47 others v Attorney General & 3 others (Interested Parties); Katiba Institute & 2 others (Amicus Curiae) [2020] eKLR (Reference 3 of 2019; [2020] eKLR) — Mentioned
3. EG v Non- Governmental Organisations Co-ordination Board, Attorney General, AMI, DK & Kenya Christian Professionals Forum (Petition 440 of 2013; [2015] KEHC 5425 (KLR)) — Mentioned
4. George Lesaloi Selelo & Blue Jay Limited (t/a Betway) v Commissioner – General, KRA, Cabinet Secretary, National Treasury, Attorney General, National Assembly & Speaker of the Senate; Pevans EA Limited (t/a Sportpesa), Bluejay Limited (t/a Betway), Acumen Communication Limited (t/a Cheza) & Chairman, Betting Control & Licensing Board (Constitutional Petition 9 & 10 of 2018; [2019] KEHC 4787 (KLR)) — Mentioned
5. In the Matter of the Speaker of the Senate & Senate of the Republic of Kenya (Advisory Opinions Application 2 of 2013; [2013] KESC 7 (KLR)) — Explained
6. In the Matter of the Speaker of the Senate & Senate of the Republic of Kenya (Advisory Opinions Application 2 of 2013; [2013] KESC 7 (KLR))
7. Judicial Service Commission v Gladys Boss Shollei & Commission on Administrative Justice (Civil Appeal 50 of 2014; [2014] KECA 334 (KLR)) — Mentioned
8. Law Society of Kenya v Mwenda & 5 others; IEBC (Interested Party) (Petition E019, E005, E009, E011, E012, E13, E015 & E021 of 2021 & E433 of 2020 (Consolidated); [2021] KEHC 449 (KLR)) — Explained
9. Mugendi, Daniel N v Kenyatta University, Benson I Wairegi, Eliud Mathiu & Olive M Mugenda (Civil Appeal 6 of 2012; [2013] KECA 41 (KLR)) — Mentioned
10. Nation Media Group & 6 others v Hon Attorney General & 9 others (Judicial Review Miscellaneous Application 30 & 31 of 2014;[2016] eKLR) — Explained
11. Okiya Omtatah Okoiti & 4 others v The Attorney General & 4 others
12. Okoiti, Okiya Omtata & 4 others v Attorney General & others (Petition 7 of 2019; [2019] KEHC 9110 (KLR)) — Explained
13. Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya Ltd) (Civil Appeal 50 of 1989;[1989] KLR 1) — Mentioned
14. Pevans EA Limited (t/a Sportpesa) & 3 others ([2019] eKLR) — Mentioned
15. Pevans East Africa Limited & another v Chairman Betting Control and Licensing Board & 7 others (Petition 353 & 505 of 2017 (Consolidated)) — Mentioned
16. Pevans East Africa Limited & Bradley Limited T/A Pambazuka National Lottery v Chairman, Betting Control & Licensing Board, Cabinet Secretary, Ministry Of Interior & Coordination Of National Government, Commissioner General, Kenya Revenue Authority, Cabinet Secretary, Ministry Of Finance, The Speaker, National Assemmbly, The Speaker, Senate, & The Attorney General (Civil Appeal 11of 20 of 2018; [2018] KECA 332 (KLR)) — Mentioned
17. Public Service Commission & 4 others v Cheruiyot & 20 others (Civil Appeal 119 & 139 of 2017 (Consolidated); [2022] KECA 15 (KLR)) — Mentioned
18. Republic v Karisa Chengo, Jefferson Kalama Kengha & Kitsao Charo Ngati (Petition 5 of 2015; [2017] KESC 15 (KLR)) — Explained
19. Republic v Magistrates Court, Mombasa; Absin Synegy Limited (Interested Party) (Judicial Review E033 of 2021; [2022] KEHC 10 (KLR)) — Mentioned

20. Samuel Kamau Macharia v Kenya Commercial Bank Limited & 2 others (Application 2 of 2011;[2012] eKLR) — Explained
21. Speaker of the National Assembly & another v Senate & 12 others (Civil Appeal E084 of 2021; [2021] KECA 282 (KLR)) — Explained
22. United States International University v Maestro Connections Health Systems Ltd, Daniel Toroitich Arap Moi, Chief Land Registrar, Attorney General & ICEA Lion Life Assurance Company Limited (Petition 170 of 2012; [2012] eKLR) — Mentioned
23. Ibadan SE v Adeleke ((2007) 1 SCNJ 57) — Explained
24. Petrojessica Enterprises Ltd and Jessica Trading Company Ltd v Leventis Technical Company Ltd ([1992] 5NWLR) — Mentioned
25. Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill ((CCT12/99) [1999] ZACC 15; 2000 (1) SA 732; 2000 (1) BCLR 1 (11 November 1999)) — Mentioned
26. Gcaba v Minister for Safety and Security and Others (CCT 64/08 [2009] ZACC 26) — Mentioned
27. Helen Suzman Foundation v President of the Republic of South Africa and Others (CCT 07/14 and CCT 09/14) — Mentioned
28. Solidarity and Others v South African Broadcasting Corporation (Case no:J1343/16) — Mentioned
29. The City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others ((CCT89/09) [2010] ZACC 11; 2010 (6) SA 182 (CC) ; 2010 (9) BCLR 859 (CC) (18 June 2010)) — Explained
30. Western Cape Provincial Government and Others In Re: DVB Behuising (Pty) Limited v North West Provincial Government and Another ([2000] ZACC 2; 2001 (1) SA 500 (CC)) — Explained
31. R v Morgentaler (1993 Can LII 74 (SCC), [1993] 3 SCR 463) — Explained
32. Jijubhai Nanbhai Kachar v State of Gujarat (1995 Supp. (1) SCC 596)) — Mentioned
33. State of Orissa v Sudhansu Sekhar Misra (1968 AIR 647, 1968 SCR (2) 154) — Explained
34. Desai v Warsaw ((1967) EA 351) — Mentioned
35. Cushing v Dupey ({1880} UKPC 22) — Mentioned
36. Dilworth v Commissioner of Stamps ([1899] AC 99) — Explained
37. Reynolds v The Commissioner of Income Tax for Trinidad and Tobago (TT 1964 CA 28) — Explained

Statutes

1. Civil Procedure Act (cap 21) — Section 16 — Interpreted
2. Competition Act, 2010 (Act No 12 of 2010) — In general — Cited
3. Constitution of Kenya, 2010 — Article 109(2)(3),110,113,122,123,162(1)(2),162(3),165(3),165(5)165(4),205,217,259(4)(b); Chapter 12; Schedule 4; Part 2 — Interpreted
4. Employment Act, 2007 (Act No 11 of 2007) — Section 18(4),19(1)(f),87 — Interpreted
5. Employment And Labour Relations Court Act, 2011 (Act No 20 of 2011) — Section 12, — Interpreted
6. National Social Security Fund Act, 2013 (Act No 45 of 2013) — Section 18(1),18(3),18(4) — Interpreted
7. National Social Security Fund Act (repealed) (cap 258) — In general — Cited

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2. Garner.B.A., (Ed) (2014), Black's Law Dictionary (Thomson West;10th edt)
3. Oxford Languages.,(Ed) (2011), Concise Oxford English Dictionary: (Oxford University Press; 12th Edt)

Advocates

None mentioned

JUDGMENT

1. Undeniably, specialized courts of limited and exclusive jurisdiction fulfil a growing need for expertise in increasingly complex areas of the law. In fact, world over, the resolution of labour and employment disputes is guided by informality, simplicity, flexibility and speed. No doubt, specialized courts play an important role in the economic development of the country. Conscious of the foregoing, the drafters of our 2010 *Constitution* deliberately inserted article 162(1)(2) of the *Constitution* providing for the establishment of courts with the status of the High Court to hear and determine disputes relating to- (a) employment and labour relations; and (b) the environment and the use and occupation of, and title to, land.

2. However, the *Constitution* left it to parliament to determine the jurisdiction and functions of the courts contemplated in the above article. Pursuant to article 162(3), Parliament enacted the *Employment and Labour Relations Court Act*, No 20 of 2011 (the*ELRC Act*). The preamble to the act provides that it is "An act of parliament to establish the employment and labour relations court (ELRC) to hear and determine disputes relating to employment and labour relations and for connected purposes." Section 12 (1)(a)-(j) of the act provides for the jurisdiction of the court. We shall shortly address the scope of the court's jurisdiction in detail. For now, it will suffice to say that despite the clear-cut jurisdictional demarcation prescribed by the *Constitution* and section 12(1)(a) – (j) of the *ELRC Act* and numerous judicial pronouncements by our superior courts defining the jurisdiction of courts of equal status, there still appears to be hitches either in the understanding of the scope of the jurisdiction of the specialized courts or the application of the law and precedents to specific facts or both.

3. When there is an appeal on the substantive matter to the Court of Appeal and the issue of jurisdiction is raised, (as in this case), the Court of Appeal should first make a finding on jurisdiction. But, if it finds that it has no jurisdiction, it's prudent to go ahead and say so and give a considered judgment on the substantive matter. This is so because as the penultimate court it must make its decision on the substantive appeal known should an appeal to the apex court ensue. For this reason, we shall as a preliminary issue determine the question of jurisdiction, then proceed to address the substantive issue in this appeal which is whether the enactment of the *National Social Security Fund Act*, 2013 (the NSSF Act, 2013) required the concurrence of both the National Assembly and the Senate.

4. At this point, we find it necessary to mention that the record of appeal only names the respondents as Kenya Tea Growers Association & 14 others. The names of the 14 others are not disclosed anywhere in the memorandum of appeal. The notice of appeal only listed parties in the consolidated petitions as they appeared in each petition before the ELRC. Whereas there is nothing wrong in naming some parties as others, this presupposes the existence of a pleading by the appellant identifying the others. To add on the confusion, the respondents' advocates kept on referring to their clients as they appeared in the consolidated petitions before the ELRC. To avert further confusion, and for the sake of brevity, we shall in this judgment, where the context so requires refer to the parties by name for ease of identification.

5. A synopsis of the history of this litigation shows that the question of the courts' jurisdiction occupied a pivotal area right from the initiation of these proceedings. For instance, three out of the five consolidated petitions (ie Petition Nos 34 of 2014, 35 of 2014 and 38 of 2014) were initially filed at the Constitutional and Human Rights Division of the High Court at Nairobi but they were transferred

by the High Court to the ELRC. The record shows that on June 6, 2014, Mumbi Ngugi J (as she then was) while transferring one of the petitions to the ELRC remarked: "this matter pertains to issues related to Social Security & Employment and properly falls within the jurisdiction of the Labour & Employment Court."

6. At the ELRC, on 9th June, the parties by consent dispensed with hearing of interlocutory applications in favour of hearing the substantive petitions. On June 20, 2010, Nderi J declined a request to certify the petitions under article 165(4) of the *Constitution*. Instead, he directed that the matter shall be heard by a single judge. However, notwithstanding the earlier consent dispensing with the hearing of interlocutory applications and the court's refusal to certify the matter under article 165(4) of the *Constitution*, without any formal application to vary the above orders, Mr Obura, counsel for Kenya Tea Growers Association (KTGA) and the Agricultural Employers Association (AEA) filed an application dated June 23, 2014 seeking certification under article 165(4) of the *Constitution* and a conservatory order staying the *NSSF Act, 2013*. The application was partly heard but before it could be concluded, on August 5, 2014, the parties recorded a consent as follows:

    a. Petition numbers 49 of 2014 and 50 of 2014 which had been filed in Nakuru be consolidated with petitions 35, 34 and 38 of 2014;

    b. That the matter is hereby certified as raising substantial questions of law under article 165(4) of the *Constitution* and the file be forwarded to the honourable the Chief Justice to empanel a bench of uneven number of judges;

    c. Mention before uneven number of judges for directions; (d) costs in the cause.

7. The honourable the Chief Justice instead of constituting a bench as requested, on August 20, 2014 issued directions as follows:

> "The issue of jurisdiction of the Employment and Labour Relations Court in this matter is apparent. It could be argued that the Constitutional and Human Rights Division of the High Court has the requisite jurisdiction. It could be argued that the former court has jurisdiction. It could also be argued that the bench of three to hear the matter from the two respective courts. To forestall protracted delays in finalizing this matter, I direct that the issue of jurisdiction be argued before the Principal Judge of the Employment and Labour Relations Court as a matter of priority."(Emphasis added).

8. Pursuant to the above directions, Nduma Nderi J heard the parties on the question of jurisdiction and in a ruling dated February 27, 2015 ordered as follows: -

    a. That the consolidated petition raises substantial questions of law concerning employers and employees and matters incidental thereto.

    b. That the consolidated petition raises substantial questions of law on the constitutionality of the *National Social Security Fund Act, 2013* and matters incidental thereto.

    c. Arising from the aforesaid the High Court and the Employment and Labour Relations Court have the jurisdiction to determine the issues raised in the consolidated petition.

    d. The hon the Chief Justice consider empaneling a bench of uneven number of judges, being not less than three (3) from both the High Court and the Employment and Labour Relations Court but sitting as Employment and Labour Relations Court to hear and determine the consolidated petition.

9. Order (d) above raises two fundamental issues which lies at the heart of the question of jurisdiction. Firstly, according to Nduma Nderi J, the Chief Justice was to constitute a bench of 3 judges from the High Court and the ELRC. Secondly, we doubt whether a mixed bench as per order (d) above could have been properly constituted or could possess the requisite jurisdiction. With profound respect, the judge thought the two courts could exercise similar or concurrent jurisdiction which is not contemplated under the *Constitution* of the statutes. But what is clear is that the Chief Justice ultimately constituted a bench of three judges from the ELRC, comprising of Nduma Nderi, Wasilwa and Mbaru JJ (the ELRC bench) who heard the matter and delivered the impugned judgment. As early as at paragraph 1 of the impugned judgment, the ELRC bench identified the germane issue in the petitions as follows:

> " ....The gravamen of the petition is for the court to find the enactment of the *National Social Security Act* No 45 of 2013 (NSSF act) in its entirety to be in violation of the *Constitution of Kenya 2010* and the court to declare it null and void; and in the alternative to find and declare that some of the provisions of the new act contravene the *Constitution* and the *Competition Act* and provide the reliefs sought in the consolidated petition."

10. The National Social Security Fund Board of Trustees (the appellant) in its first two grounds of appeal questions the jurisdiction of the ELRC to entertain the matter. It also faults the ELRC bench for failing to find that the disputes pleaded in the petitions did not relate to existing employee-employer relationship. A similar challenge was raised by the Cabinet Secretary for Labour, Social Security and Services, the Competition Authority and the Attorney General in their cross-appeal dated October 31, 2022. To them, determining the constitutionality of an act of parliament is a preserve of the High Court under article 165(3)(d)(i) of the *Constitution*.

11. In a nutshell, Mr Ngatia, SC, appearing for the appellant submitted that: (a) the bench wrongfully assumed jurisdiction over a dispute falling within the High Court's domain under article 165(3)(d)(i) of the *Constitution*; (b) the consolidated petitions concerned the constitutionality of the *NSSF Act, 2013* and/or specific sections of the act; (c) the petitions did not disclose any employer-employee relationship to invoke the jurisdiction of the ELRC; (d) article 162(2)(a) of the *Constitution* and section 12(1) of the ELRC act restricts the court's jurisdiction to disputes relating to employment and labour relations;

    (e) None of the petitions raised a constitutional issue ancillary to or incidental to the matters contemplated under section 12(1) of the act; and, (f) the allegations of unconstitutionality of the *NSSF Act* or sections of the act did not arise from an employment and labour relations dispute. Mr Ngatia, SC cited *Public Service Commission & 4 others v Cheruiyot & 20 others* (Civil Appeal No 119 & 139 of 2017 (consolidated) [2022] KECA 15 [KLR] and *Attorney General & 2 others v Okiya Omtatah Okoiti & 14 others* [2020] eKLR and argued that in absence of an employee-employer relationship, the trial court lacked jurisdiction to determine the petitions rendering the decision a nullity. He also cited the Nigeria Supreme Court in *Petrojessica Enterprises Ltd v Leventis Technical Co Ltd* [1992] 5 NWLR.

12. Mr Mbilo, counsel for the Cabinet Secretary for Labour, Social Security and Services, the Competition Authority and the Attorney General associated himself with Mr Ngatia's submissions. The highlights of his submissions were: (a) the ELRC bench lacked jurisdiction to entertain the matter. He cited the High Court in *Republic v Magistrates Court, Mombasa; Absin Synergy Limited (Interested Party)* [2022] KEHC 10 (KLR) which defined jurisdiction as the power of the courts to decide and try a case or issue; (b) that the jurisdiction of the ELRC is provided in section 12(1) of the *ELRC act*. Also, he cited the Supreme Court in *Samuel Kamau Macharia v Kenya Commercial Bank Limited & 2 others*

[2012] eKLR which held that a court's jurisdiction flows from either the *Constitution*, or legislation or both, and that a court of law can only exercise jurisdiction as conferred on it by the law; (c) without jurisdiction a court has no power and it must down its tools. He cited *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya Ltd)* [1989] KLR; (d) the reliefs sought in the petition do not fall within the ambit of section 12(1) of the *ELRC Act*; and,

(e) the NSSF act 2013 relates to the entire populace and it is not limited to employers and employees as is evident from section 4(b) which describes it objectives.

13. Mr Agwara, counsel for the Retirement Benefits Authority (RBA) associated himself with Mr Ngatia's submissions.

14. Mr Obura, representing the KTGA and the AEA recalled that the petitions were initially filed in the High Court but they were transferred to the ELRC by the court on grounds that social security and employment issues fall within the jurisdiction of the ELRC. He argued that the appellants never opposed the transfer. He referred to the preamble to the *NSSF Act, 2013* and the definition of the words "Fund," "employee" and "employer" in sections 2 and 3 of the impugned act and in the *Employment Act*, 2007 and argued that section 18(1) of the *NSSF Act 2013* establishes (a) the pension fund, and (b) the provident fund while section 18(4) provides that all persons who are subject to the *Employment Act*, 2007 and are over 18 years must be members of the pension fund. He argued that section 18(3) requires all those who were members of the provident fund under the repealed *National Social Security Fund Act* (cap 258) to open a new provident fund.

15. Mr Obura argued that the bulk of the contributors to the funds established by the impugned act are employees and employers who are subject to the *Employment Act, 2007* and contributions to the fund is subject to the existence of a contract of service. Further, section 19(1)(f) of the *Employment Act, 2007* recognizes the deduction imposed by the impugned act by requiring an employer to effect the deductions. He submitted that deductions from employee's salaries are envisaged under the said act and it is a condition of the contract of service between the employer and the employee, so "any question, difference or dispute" touching on the right or liabilities of either party must be referred to the ELRC under section 87 of the *Employment Act, 2007*.

16. Mr Obura submitted that in their petition, the KTGA and AEA questioned the constitutionality of the impugned act which imposes on them additional liability by requiring employers to pay enhanced contributions towards their employees' account in the fund. Further, the petitioners being representatives of employees questioned the constitutionality of being made to pay enhanced contributions because they had a contract of service with various employers. He argued that pursuant to article 162(2) (a) of the *Constitution*, parliament enacted the *ELRC Act* and section 12(1) of the Act grants the court original jurisdiction to determine employment and labour disputes.

17. He submitted that the term "employment and labour" entails any dispute emanating from a contract of service such as requiring an employer to make NSSF deductions. He cited article 259 of the *Constitution* and argued that section 12(1) of the act is not exhaustive as demonstrated by the use of the word "including." He referred to *Black's Law Dictionary* which defines "including" to mean "to continue as a part of something...a partial list." He also cited article 259(4)(b) of the *Constitution* which defines "includes" to mean "includes, but is not limited to" to support his argument that the list in section 12(1) of the *Act* is not exhaustive. He cited *EG v Non-Governmental Organization Co- ordination Board & 4 others* {2015} eKLR in support of his argument that the list is subject to interpretation to include such grounds as the context and circumstances demonstrate.

18. Also, Mr Obura submitted that section 12(1) vests the *ELRC* with jurisdiction in accordance with any other written law which extends jurisdiction to the court in relation to employment and labour

relations, and that section 87(2) of the *Employment Act*, 2007 extends the court's jurisdiction to the issues disclosed in the petitions. He cited *Republic v Karissa Chengo*, Supreme Court Petition No 5 of 2015 which held that the *Constitution* sets out in broad terms the jurisdiction of the ELRC. Further, Mr Obura submitted that the constitutionality of the impugned act and the violations of the fundamental rights and freedoms cited in the petitions are ancillary to the core mandate of the ELRC. He relied on the High Court decision in *United States International University (USIU) v Attorney General and others* {2012] eKLR, the Court of Appeal decisions in *Prof Daniel N Mugenda v Kenyatta University & others* [2012] eKLR and *Judicial Service Commission v Gladys Boss Shollei & another* [2014] eKLR.

19. Further, Mr Obura relied on two South African decisions, namely, *GCABA v Minister of Safety and Security and Others* CCT 64/08 [2009] ZACC 26 and *Solidarity and others v South Africa Broadcasting Corporation*, Case No J 1343/16 in support of the holding that the labour court has concurrent jurisdiction with the High Court in matters touching on alleged or threatened violation of fundamental rights arising from (a) employment and Labour Relations; (b) any dispute over the constitutionality of any executive or administrative act, threat or conduct by the state in its capacity as an employer. Lastly, Mr Obura urged this court in the event it finds the ELRC had no jurisdiction to allow the cross-appeal and refer the matter to the High Court for trial because his clients should not suffer because of the court's decision to transfer the petitions to the ELRC.

20. Mr Masese, representing the Federation of Kenya Employers (FKE) adopted Mr Obura's submissions while Mr Kithi representing the Kenya County Government Workers Union (KCGWU) associated himself with Mr Obura's submissions and added that the dispute involves employers and employees both of whom have responsibilities under the impugned act, and that the issues raised in the petitions fall within the jurisdiction of the ELRC. He cited *Owners of Motor Vessel Lilian S* (*supra*) and section 16 of the *Civil Procedure Act* in support of his argument that objections on jurisdiction must be raised at the earliest opportunity possible and not during appeal.

21. We start our determination by stressing that jurisdiction is a threshold matter which goes to the competence of the court to hear and determine a suit. Jurisdiction can be raised at any stage of the proceedings in the High Court, on appeal and even in the Supreme Court for the first time. It can be raised by any of the parties or by the court, and once raised the court would do well to examine it and render a considered ruling on it.

22. Jurisdiction, a mantra in adjudication connotes the authority or power of a court to determine a dispute submitted to it by contending parties in any proceeding. A court of law is invested with jurisdiction to hear a matter when: (a) it is properly constituted as regards numbers and qualifications of members of the bench, and no member is disqualified for one reason or another; (b) the subject matter of the case is within its jurisdiction, and there is no feature in the case which prevents the court from exercising its jurisdiction; and, (c) the case comes before the court initiated by due process of law, and upon fulfilment of any condition precedent to the exercise of jurisdiction. The above three ingredients must co-exist in order to infuse jurisdiction in a court. Where a court is drained of the jurisdiction to entertain a matter, the proceedings flowing from it, no matter the quantum of diligence, dexterity, artistry, sophistry, transparency and objectivity injected into it, will be marooned in the intractable web of nullity.

23. The promulgation of the 2010 *Constitution* and the enactment of the *ELRC Act* marked a watershed moment in the resolution of labour and employment disputes in Kenya because it brought about immeasurable advancement in the jurisdiction and powers of the ELRC. The act not only resolved the question of the jurisdiction and status of the ELRC as a superior court of record, but it also established the court as the prime and exclusive judicial body for the resolution of all labour, employment and

industrial relations disputes in the country. In terms of subject matter, the ELRC is a court of limited jurisdiction. It cannot entertain any matter outside the prescribed subject matter area. The preamble to the *ELRC Act* gives an outlook of the purpose of the statute. It reads: "An act of parliament to establish the Employment and Labour Relations Court to hear and determine disputes relating to employment and labour relations and for connected purposes." Section 12(1)(a) – (f) of the act reads:

1. The court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with article 162(2) of the *Constitution* and the provisions of this act or any other written law which extends jurisdiction to the court relating to employment and labour relations including —

    a. Disputes relating to or arising out of employment between an employer and an employee;

    b. Disputes between an employer and a trade union;

    c. Disputes between an employers' organisation and a trade unions organisation;

    d. Disputes between trade unions;

    e. Disputes between employer organizations;

    f. Disputes between an employers' organisation and a trade union;

    g. Disputes between a trade union and a member thereof;

    h. Disputes between an employer's organisation or a federation and a member thereof;

    i. Disputes concerning the registration and election of trade union officials; and

    j. Disputes relating to the registration and enforcement of collective agreements.

24. Section 12(3) of the *Act* settles who may lodge a complaint or a claim and against whom it can be brought. It reads:

2. An application, claim or complaint may be lodged with the court by or against an employee, an employer, a trade union, an employer's organisation, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose.

25. Parliament defined the court's powers at section 12(3) as follows:

3. in exercise of its jurisdiction under this act, the court shall have power to make any of the following orders—

    i. Interim preservation orders including injunctions in cases of urgency;

    ii. A prohibitory order;

    iii. An order for specific performance;

    iv. A declaratory order;

    v. An award of compensation in any circumstances contemplated under this act or any written law;

    vi. An award of damages in any circumstances contemplated under this act or any written law;

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

viii. any other appropriate relief as the court may deem fit to grant.

26. The jurisdiction of the courts of equal status is jealously guarded by the *Constitution*. Article 165(5) (b) of the *Constitution* in peremptory terms provides that the High Court shall not have jurisdiction in respect of matters-(b) falling within the jurisdiction of the courts contemplated in article 162(2).

27. The question before us now is whether the ELRC had jurisdiction to determine the germane issue presented in the consolidated petitions as identified by the trial court at paragraph 1 of its judgment. This in turn depends on whether the *ELRC Act* excludes such jurisdiction. Mr Obura, aware that the issue presented in the petitions did not fall within the list provided in section 12 (1) (a) – (f) singled out the use of the word "includes" in section 12(1) to advance his argument that the said list is not exhaustive. He urged this court to find that the word "including" is wide enough to cover the dispute before the ELRC.

28. From Mr Obura's lengthy submissions, and without demeaning any of his grounds, we have mined 10 points which recap his arguments. These are: (i) the impugned act establishes a provident fund and a pension fund; (ii) section 18(4) provides that all persons who are subject to the *Employment Act* and are over 18 years must be members of the fund; (iii) the act requires those who were members of the provident fund under the old act to open a new provident fund under the impugned act; (iv) the bulk of the contributors to the funds established by the impugned act are employees who are subject to the *Employment Act*; (v) contributions to the fund is subject to contract of service; (vi) employers are required to deduct the contributions from the employees' salaries; (vii) any question in dispute touching on employer and employee or service contracts is referred to the ELRC; (viii) the petitioners are simply questioning the constitutionality of a statute which imposes on them liability of making enhanced contributions; (ix) the dispute relates to deductions under the impugned act; and (x) the term employer and employee includes any dispute from a service contract.

29. Mr Obura passionately urged the court to find and hold that the word "includes" is broad enough to cover the above matters because all of them, in his view, relate to service contracts which are matters between an employer and an employee. Further, the deductions imposed by the *NSSF Act*, 2013 will be paid by the employers which again will affect the employees, and therefore, before the court was an employer-employee dispute falling within the jurisdiction of the court. He cited section 87 of the *Employment Act*, 2007 to fortify his arguments and the Court of Appeal decisions in *Daniel N Mugenda v Kenyatta University & 3 others*, (*supra*), *Judicial Service Commission v Gladys Boss Shollei & another* (*supra*) and the High Court decision in *United States International University (USIU) v Attorney General* (*Supra*). However, a reading of the said decisions show that the courts in the three cases were emphatic that for the ELRC to entertain a dispute involving violations of fundamental rights, the matters in issue must arise from an employment dispute.

30. The question narrows to whether the use of the word "includes" encompasses an implication to the effect suggested by Mr Obura. The converse is whether there is a strong presumption against such an implication. The court's jurisdiction is included only if the conclusion flows by necessary implication from the provisions of section 12 (1) (a)-(j), and then only to the extent supported by such necessary implication.

31. In terms of the *Constitution*, the ELRC is constrained in its decision-making power by the supremacy of the *Constitution* (read article 162(a)) and the rule of law. It is further constrained by legislation

(read section 12(1)(a)-(f)), the common law, precedents and procedural rules. When examining the jurisdiction conferred on the ELRC by section 12(1) (a)-(f) of the act, the word “includes” must be borne in mind. However, we do not think there could be any inflexible rule that the word "includes" should be read always as a word of extension (as Mr Obura suggested) without reference to the context. As Lord Watson observed in *Dilworth v Commissioner of Stamps*, [1899] AC 99:

> “ The word "include" is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. But the word "include" is susceptible of another construction, which may become imperative, if the context of the act is sufficient to show that it was not merely employed for the purpose of adding to the natural significance of the words or expressions defined. It may be equivalent to "mean and include" and in that case it may afford an exhaustive explanation of the meaning which, for the purposes of the act, must invariably be attached to these words or expressions."

32. In *Reynolds v The Commissioner of Income Tax for Trinidad and Tobago,* [1965] 3 All ER 901 (PC), the privy council relying on the dictum of Lord Watson in *Dilworth v Commissioner of Stamps* (*supra*) supported the proposition that the word 'including' is to be interpreted keeping in view the text and context of the particular statute in which the word occurs. Talking about the text and context, it is important to bear in mind the following:

(a) the ELRC is a court of limited jurisdiction in terms of subject matter, as clearly spelt out in section 12 (1); (b) in order to discover the intention of Parliament, the court should read the whole ct, inform itself of the legal context of the act and of the factual context, such as the mischief sought to be remedied by the act; (c) no part of a statute can be regarded as independent of the rest; (d) a construction that promotes the purpose or object underlying the act (whether that purpose or object is expressly stated in the act or not) shall be preferred to a construction that would not promote that purpose or object; (e) the preferred approach to statutory interpretation is that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise; (f) ‘context’ is used in its widest sense to include such things as the existing state of the law and the mischief which one may discern the statute was intended to remedy; (g) it is always necessary in determining ‘the ordinary meaning’ of a provision to have regard to the purpose of the legislation and the context of the provision as well as the literal meaning of the provision; (h) the interpretation must not ‘unduly strain’ the language of a statute so as to ascribe a meaning that distorts the intention of Parliament; (i) the interpretation must be readily ascertainable from the text of the provision; (j) the use of the word 'includes' only furnishes the court with the key to open the mind of the legislature; and (k) the definitions assigned to the words used in a statute must elaborately achieve the objective of the statute.

33. The *Black’s Law Dictionary*, 10th Edition defines the word “include” to mean- “to contain as part of something. The participle typically indicates a partial list.

...including but not limited to means the same thing. The *Concise Oxford English Dictionary*, 12th Edition defines the word “including” to mean “containing as part of the whole being considered.”

34. The key to the opening of every law is the reason and spirit of the law — it is the ‘animus imponentis', the intention of the law-maker, expressed in the law itself, taken as a whole. Hence, to arrive at the true meaning of any particular phrase in a statute, that particular phrase is not to be viewed detached

from its context in the statute. It is to be viewed in connection with its whole context as well as the title and preamble of the statute. It is to the preamble more especially that we are to look for the reason or spirit of every statute; rehearsing this, as it ordinarily does, the evils sought to be remedied, or the doubts purported to be removed by the statute, and so evidencing, in the best and most satisfactory manner, the object or intention of the legislature in making and passing the statute itself. However, two propositions are quite clear — one, a preamble may afford useful light as to what a statute intends to reach, and, two, if an enactment is itself clear and unambiguous, no preamble can qualify or cut down the enactment.

35. For the matters cited by Mr Obura to qualify by implication that they fall within the ambit contemplated by the use of the word "includes," they must be part of the issue under consideration in the dispute. The issue under consideration in the petitions was the constitutional validity of a statute and or some specific provisions of the act. The constitutional validity of the statute or the targeted provisions did not arise from an employer-employee dispute. The intention of Parliament is clear both from the preamble and section 12(1)(a)-(f). The *ELRC Act* was enacted to resolve employer-employee disputes as provided by article 162 (a) of the *Constitution*. That is the purpose and context which cannot be ignored in interpreting provisions of the act. Decided cases are in agreement that constitutional issues can be determined by the ELRC only if they arise from an employer-employee dispute. The germane issue framed by the court did not arise in an employer-employee dispute nor does it fall under section 12(1)(a)-(f).

36. Equally important is the backdrop upon which the act was enacted. The *Constitution* should always be the point of reference by any court while adjudicating disputes. Article 162(a) of the *Constitution* provided for Parliament to establish courts to determine disputes relating to employment and labour relations. There is a clear definition of these disputes in section 12(1)(a) – (f). The ELRC bench failed to appreciate that a claim questioning constitutional validity of a statutory provision is not merely an ancillary claim to the issue before it nor did the issue arise during the adjudication of the dispute (which in any event was not an employer-employee dispute). The germane issue which was identified by the court as early as at paragraph one of its judgment is a substantive claim brought under article 165(3)(d)(i) of the *Constitution*. This was a stand-alone issue not emanating from a dispute under section 12(1)(a)-(f). The words "including" or "connected thereto" cannot be deployed to swallow such a substantive issue so as to justify invocation of other claims. While enacting the provisions of article 165(3)(d)(i) of the *Constitution* which confers on the High Court the jurisdiction to hear any question respecting the interpretation of the *Constitution* including the determination of the question whether any law is inconsistent with or in contravention of the *Constitution*, the drafters of the *constitution* were not acting on a clean slate. They had before them cognate provisions of articles 162(1)(2)(a) & (b) & (3) of the *Constitution*.

37. Having identified the germane issue before it as early as at paragraph 1 of the judgment, the ELRC bench fell into a grave error when it failed to appreciate that the issue before it fell within the jurisdiction of the High Court as prescribed by article 165(3)(d)(i) of the *Constitution*. Further, the bench fell into error when it failed to appreciate that authorities (including the decisions cited by Mr Obura before us) are replete on the following positions- (a) the constitutional issues must arise from an employer-employee dispute for the ELRC to assume jurisdiction, and (b) employment cases are not the appropriate mechanism for the ventilation of grievances of litigant's constitutional issues except where the issues arise in an employer-employment dispute. As the learned author, Bamidele Aturu

aptly noted in his book, *Law and Practice of the National Industrial Court*, Lagos: Hebron Publishing Co Ltd, 2013, 25 :

> " the fact that the right of a person is infringed in the work place is not sufficient to confer jurisdiction on the court except if an employment issue is involved."

38. Also, the ELRC bench failed to appreciate that jurisdiction is determined on the basis of pleadings before consideration of the substantive merits of the case. As the South African Constitutional Court held in *Vuyile Jackson Gcaba v Minister for Safety and Security First & others* case CCT 64/08 [2009] ZACC 26 :-

> "Jurisdiction is determined on the basis of the pleadings,...and not the substantive merits of the case... In the event of the court's jurisdiction being challenged at the outset (*in limine*), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. While the pleadings – including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognizable only in another court. If however the pleadings, properly interpreted, establish that the applicant is asserting a claim ..., one that is to be determined exclusively by... {another court}, the High Court would lack jurisdiction..." (Emphasis added)

39. We have read all the pleadings in the consolidated petitions. As the ELRC bench correctly noted, the petitions challenged the constitutional validity of the legislative process leading to enactment of a legislation and or some of its provisions. This was not an employer-employee dispute. The ELRC bench failed to appreciate that laws affect many things in a variety of ways, large and small, but these side winds do not determine what matter a law is in relation to. That is determined by analyzing the central focus of the law, what it is really all about. In order to analyze what matter a challenged law is "in relation to" the court must separate it from matters incidentally affected by the law. The bench failed to appreciate this crucial separation.

40. A reading of articles of 162(1)(2)(a) & (b) & (3) and 165(3)(d)(i) of the *Constitution* and section 12(1)(a)-(f) of the ELRC act and the germane issue before the trial court leaves us with no doubt that the ELRC bench wrongfully assumed jurisdiction. Needless to restate that jurisdiction is fundamental and it cannot be treated lightly. Parties cannot by consent confer jurisdiction on a court, which it does not have by virtue of its enabling statute. When it comes to determining the issue of jurisdiction, a court cannot be influenced by sympathy. As Niki Tobi, JSC of Nigeria once said in *Ibadan SE v Adeleke* (2007) 1 SCNJ 57, "in the determination of the issue of jurisdiction, the court should not be influenced by sympathy for the case of one of the parties but must base its decision on the law, particularly in the light of the enabling law. After all, jurisdiction is a matter of hard law." Where the statute creating a court confers it with jurisdiction over a limited subject matter, it can only entertain any such claim that falls within the purview of the subject matter.

41. If proceedings are conducted by a court without jurisdiction, they are a nullity. See: *Desai v Warsaw* (1967) EA 351. Any award or judgment and or orders arising from such proceedings of a court acting without jurisdiction are also a nullity. We so find. This being the position, the plea by Mr Obura that in the event we find the ELRC bench had no jurisdiction, we refer the matter back to the High Court is undesirable. In any event, the parties were given an opportunity to address the court on the question of jurisdiction after the directions by the Chief Justice. That was the opportune moment to make

such a plea. Instead, the parties fiercely defended their respective positions on jurisdiction, then came the court ruling affirming its jurisdiction, effectively setting in motion the protracted battle the Chief Justice had cautioned against. Having concluded that the bench lacked jurisdiction, the only order which comments itself in the circumstances of this case is to allow the appellant's appeal which we hereby do and set aside the judgment of the ELRC delivered on September 19, 2022 in its entirety.

42. Notwithstanding our above finding, we now proceed to address yet another threshold issue, which is whether the enactment of the *National Social Security Fund 2013* required the participation of the senate as provided under article 110 of the *Constitution*.

43. On behalf of the appellant, Mr Ngatia, SC submitted that the enactment of the *NSSF Act, 2013* did not require the concurrence of the Senate because the bill did not fall within the ambit of the description of a bill concerning county Government as defined in article in 110(1) (a) of the *Constitution*. He submitted that under part 1 of the fourth schedule to the *Constitution*, social protection and professional pension plans are an exclusive function of the National Government while bills set out in Chapter 12 of the *Constitution* relate to division of revenue between the two levels of government. He relied on *Nation Media Group & 6 others v Hon Attorney General & 9 others* [2016] e KLR which underscored that article 110(3) comes into play when there is a question or doubt as to whether or not a bill concerns counties. Mr Ngatia SC cited *George Lesaloi Selelo & Another v Commissioner General, KRA & 4 others*: Pevans EA Limited (t/a Sportpesa) & 3 others [2019] e KLR which held that a question must first arise as to whether a Bill is one concerning counties before the concurrence process arises under article 110 (3) of the *Constitution*. Also, he cited the Court of Appeal in *Speaker of the National Assembly & another v Senate & 12 others* (Civil Appeal No E083 of 2021) [2021] KECA 282 (KLR) (November 19, 2021) which held that the role and participation of the senate in financial legislation is limited to the Bills referred to in chapter twelve of the *Constitution* affecting the finances of county governments.

44. Mr Ngatia, SC submitted that the trial court misapprehended the Supreme Court Advisory Opinion No 2 of 2013; *Speaker of the Senate & another v Attorney General & 4 others* in finding that the act dealt with matters in respect of which the senate and the National Assembly had concurrent jurisdiction even though the act did not mention county government revenue. He faulted the court for holding that the act concerned county government finances and also for unfairly accusing the senate, and relied on *Helen Suzman Foundation v President of the Republic of South Africa* CCT 07/14 & CCT 09/14.

45. Mr Mbilo on behalf of the Cabinet Secretary for Labour, Social Security and Services, The Competition Authority and the Attorney General submitted that the ELRC bench erred in law in finding that the act has implications on County Government finances requiring the input of the senate. He submitted that the act does not in any way touch on functions of the county governments under the fourth schedule to the *Constitution*. Lastly, he submitted that part 1 of the fourth schedule expressly provides that standards for social security and professional pension plans are functions of the National Government, so, the act was rightly enacted under article 109(2) & (3) of the *Constitution*.

46. Mr Agwara, counsel for the RBA relied on its submissions before the ELRC Bench and associated himself with Mr Ngatia's submissions.

47. On behalf of the KTGA and the AEA, Mr Obura urged the court to note the difference between a "Bill affecting the functions and powers" and a "Bill on the functions and powers." He argued that social protection and professional pension could be part of the national government function according to the Fourth Schedule but a bill passed in the exercise of that function could affect functions and powers of the county government, hence the need to receive the input of the Senate. He relied on the Supreme Court Advisory Opinion number 2 of 2013 and submitted that to the extent that the

NSSF Act, 2013 affects employees whom the county government engaged in the performance of their functions and whom the county government have to pay their contributions out of the county revenue fund established under article 207(1) which falls under chapter 12 of the *Constitution*, the act concerns county governments within the meaning of article 110 of the *Constitution*. He cited *Speaker of the National Assembly of the Republic of Kenya, National Assembly and the Senate of the Republic of Kenya & 12 others* [2021] eKLR KECA 282 (KLR) and *Okiya Omtatah Okoiti & 4 others v Attorney General & 4 others* [2020] eKLR in support of his argument that once a matter is brought before the court, it has a duty to analyze and determine what the bill intends to achieve and the court will not hesitate to declare an act of parliament a nullity if it establishes that it is an act which concerns the functions of county governments and was not subjected to Senate proceedings.

48. Mr Obura reasoned that for the county governments to contribute towards the fund they would be expected to debit their revenue fund which contains allocation on revenue by the Senate pursuant to article 217 of the *Constitution*, which allocation is part of the shared revenue bringing into play article 205 of the *Constitution*, so, it was imperative before passing the bill to obtain recommendations by the Commission on Revenue Allocation. Lastly, Mr Obura submitted that the act having been enacted without the input of either the senate or the Commission on Revenue Allocation, it is null and void and relied on *Council of Governors & 47 others v Attorney Genera* [2020] eKLR.

49. Mr Masese representing FKE adopted Mr Obura's submissions.

50. Mr Kithi, appearing for the KCGWU though supporting the decision declaring the act unconstitutional, argued that the declaration left a gap in the law and faulted the court for failing to give directions to cure what he described as a lacuna. He cited *Law Society of Kenya v Mwenda & 5 others; IEBC (Interested Party)* [2021] KEHC 449 (KLR) which underscored the courts inherent power to deal with a lacuna in law.

51. We start by asserting that the legislative competence conferred to both houses of Parliament and the procedure for enacting legislation is provided for under article 109 of the *Constitution*. Basically, any bill may originate from the National Assembly. (See article 109 (2)). A bill not concerning county government is considered only in the National Assembly, and passed in accordance with article 122 and the standing orders of the assembly. (See article 109(3). A bill concerning county government may originate in the National Assembly or the Senate, and is passed in accordance with articles 110 to 113, articles 122 and 123 and the standing orders of the houses. (See article 109(4)).

52. Article 110(1)(a) of the *Constitution* defines Bills concerning counties as bills which have provisions "affecting the functions and powers of the county governments" as set out in the fourth schedule; Bills which relate to the election of members of the county assembly or county executive; and bills referred to in chapter twelve affecting the finances of the county governments. This is a very broad definition which creates room for the senate to participate in the passing of bills in the exclusive functional areas of the national level of government for as long as it can be shown that such bills have provisions affecting the functional areas of the county governments.

53. The fourth schedule to the *Constitution* distributes functions between the national government and the county governments. Parts 1 and 2 of the said schedule provides the functional areas of the national government and county governments respectively. However, the list in parts 1 and 2 of the fourth schedules does not provide a detailed definition of the functional areas. Considerable overlap between the functional areas assigned to the two levels of government may lead, in practice, to an overlap of powers and functions. Overlap is distinct from 'concurrency.' Within the meaning of the *Constitution*, concurrency of powers refers to the existence of the same powers over the same functional areas. Overlap of functions, on the other hand, occurs where more than one level of government

has authority (be it legislative, executive, or both) over the same functional area. A "function" is the responsibility to perform a role and deliver a given service. Any function that is not explicitly assigned to any of the two levels is a National Government responsibility.

54. To our mind, all the parties were in agreement that under part 1 of the fourth schedule, standards for social security and professional pension plans is a function expressly conferred to the national government. In fact, Mr Obura acknowledged this position in his submissions. However, the nub of his argument as we understand it is that: (i) the pension and provident funds established under the impugned act require the county governments as employers to make contributions to the funds in respect of their employees; (ii) to effect the contributions, county governments would be expected to debit their revenue fund allocated by the Senate pursuant to article 217 of the *Constitution*; (iii) the said allocation is part of the shared revenue bringing into play article 205 of the *Constitution*, so, it was imperative before passing the bill to obtain recommendations from the Commission on Revenue Allocation.

55. In order to determine whether authority to enact a particular piece of legislation vests only in Parliament or concurrently in Parliament and the Senate, it is necessary to determine whether the legislation in question is a legislation with regard to a matter concerning county governments that falls within a functional area listed in schedule four part two. Where the legislation clearly falls within the functions in the said schedule, there is no difficulty determining whether it is a matter concerning the county governments. Difficulties can only arise where the legislation falls outside any of the matters covered in the fourth schedule and the court is invited to determine whether it is a matter for the National Assembly or county governments. Even then, in such situations, courts have come up with a test.

56. In our jurisdiction, the applicable test was first embraced by the High Court in *Pevans East Africa Limited & another v Chairman Betting Control and Licensing Board & 7 others* [2017] eKLR, a decision which was confirmed on appeal by this court in *Pevans East Africa Limited & another v Chairman, Betting Control & Licensing Board & 7 others* [2018] eKLR. (Waki, M'inoti & Murgor, JJA). The reasoning by the High Court in the said decision was approved by this court in *Speaker of the National Assembly & another v Senate & 12 others* (Civil Appeal E084 of 2021) [2021] KECA 282 (KLR) Neutral citation: [2021] KECA 282 (KLR) (AK Murgor, P Nyamweya & JW Lessit, JJA, November 19, 2021).

57. In the said decision, the High Court followed the reasoning by the Constitutional Court of South Africa in *Western Cape Provincial Government & others: In re DVB Behuising (Pty) Ltd v North West Provincial Government & another* [2000] ZACC 2; 2001(1) SA 500 (CC) which determined that the manner of resolving this type of problem in relation to legislative authority is to characterise the legislation by applying what is sometimes called the 'pith and substance' test. This test requires 'the determination of the subject-matter or the substance of the legislation, its essence, or true purpose and effect, that is, what the [legislation] is about.' The court referred to Indian authors who wrote that the doctrine of 'pith and substance' was one of the interpretive tools which is invoked whenever 'a law dealing with a subject in one list is also touching on a subject in another list.' The purpose of the legislation is at the forefront of this enquiry. Legislation may purport to deal with matters within schedule 4, but its true purpose and effect may be found to have been directed at achieving a different goal falling outside the functional areas listed in schedule 4.

58. Pith and substance is a legal doctrine in constitutional interpretation used to determine under which head of power a given piece of legislation falls. (See *Cushing v Dupey* [1880] UKPC 22). The Court of

Appeal in *Speaker of the National Assembly & another v Senate & 12 others* (*supra*) cited the Supreme Court of Canada in *R v Morgentaler*, 1993 Can LII 74 (SCC), [1993] 3 SCR 463 which observed:

> "A law's "matter" is its true character, or pith and substance. The analysis of pith and substance necessarily starts with looking at the legislation itself, in order to determine its legal effect. The court will also look beyond the four corners of the legislation to inquire into its background, context and purpose and, in appropriate cases, will consider evidence of the actual or predicted practical effect of the legislation in operation. The ultimate long-practical effect of the legislation is not always relevant, nor will proof of it always be necessary in establishing the true character of the legislation. The court is entitled to refer to extrinsic evidence of various kinds provided it is relevant and not inherently unreliable."

59. In the case of national legislation, the application of the pith and substance test to legislative competence may lead to a conclusion that the bill's pith and substance places it wholly within functional areas of the national government, even though certain provisions of the bill (which for this purpose would be viewed as ancillary or incidental) fall within the functional areas of county governments (an exclusive county government competence). Conversely, and in the case of county legislation, the pith and substance test may lead to a conclusion that the bill's pith and substance places it wholly within schedule 4 part two functions, even though certain provisions of the bill (again viewed for this purpose as ancillary or incidental) may fall outside schedule 4 part 2.

60. Therefore, if a statute is found in substance to relate to a topic within the competence of the legislature, it should be held to be intra vires even though it might incidentally trench on topics not within its legislative competence. The extent of the encroachment on matters beyond its competence may be an element in determining whether in the guise of making a law on a matter within its competence, the legislature is, in truth, making a law on a subject beyond its competence. However, where that is not the position, the fact of encroachment does not affect the vires of the law even as regards the area of encroachment.

61. The analysis must answer two questions: (a) what is the pith and substance or essential character of the law? (b) does it relate to an enumerated head of power in *Constitution*? The first task in the analysis is to determine the pith and substance or essential character of the law, that is, the true meaning or dominant feature of the impugned legislation. This is resolved by looking at the purpose and the legal effect of the regulation or law. The purpose refers to what the legislature wanted to accomplish. Purpose is relevant to determine whether, in this case, parliament was legislating within its jurisdiction, or venturing into an area under county government jurisdiction. The legal effect refers to how the law will affect rights and liabilities, and is also helpful in illuminating the core meaning of the law. The effects can also reveal whether in form, the law appears to address something within the legislature's jurisdiction, but in substance, it deals with a matter outside that jurisdiction. (See *Pevans East Africa Limited & another v Chairman Betting Control and Licensing Board & 7 others* (*supra*).

62. Two major principles are used in determining whether a matter falls within a particular national or county government jurisdiction. One, the *Constitution* must be interpreted flexibly to meet social, political and historic realities. Two, the principle of devolution must be respected, keeping in mind power is shared by two levels of government, each autonomous in developing policies and laws within their own jurisdiction. Notably, a law found to be valid under the pith and substance analysis of the law may also have some incidental effects upon matters outside of one level of government's jurisdiction. This is tolerated, as a law is classified by its dominant characteristic. Incontrovertibly, the modern approach to constitutional interpretation is to allow a fair amount of interplay and overlap into the other level of government's jurisdiction. This doctrine has been applied in India to provide a degree

of flexibility in the otherwise rigid scheme of distribution of powers. (See *Ijubhai Nanbhai Kachar v State of Gujarat*, 1995 Supp (1) SCC 596) The justification for adoption of this doctrine is that if every legislation were to be declared invalid on the grounds that it encroached powers, the powers of the legislature would be drastically circumscribed.

63. The key question here is whether the bill leading to the enactment of the *NSSF Act 2013* fits the description in article 110(1)(a) which defines a bill concerning county government as "a bill containing provisions affecting the functions and powers of the county governments set forth in the fourth schedule." One would have expected the ELRC bench to undertake a "pith and substance" analysis to satisfy themselves on the true character of the legislation under challenge. This crucial analysis was not done. The ELRC bench did not engage in any interpretation of articles 109 to 114. Instead it based its conclusions on the Supreme Court Advisory Opinion Reference No 2 of 2013 without interrogating the peculiar facts before it so as to satisfy itself that the advisory opinion was relevant to the issues before it. It is settled law that a case is only an authority for what it decides. It is not meant to be a general proposition for the entire law. As the Supreme Court of India observed in State of *Orissa v Sudhansu Sekhar Misra* MANU/SC/0047/1967:

> " A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it every
>
> judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found a case is only an authority for what it actually decides " (Emphasis added)

64. The ratio of any decision must be understood in the background of the facts of the particular case. A little difference in facts or additional facts may make a lot of difference in the precedential value of a decision. It is notable that the findings by the Supreme Court in the above advisory opinion were in relation to the division of revenue bill and not in relation to all bills that are originated by the two houses of Parliament. This crucial distinction was underscored by this court in *Speaker of the National Assembly & another v Senate & 12 others* (*supra*) which held that "it is for the same reason that the Supreme Court in *Council of Governors & 47 others v Attorney General* (*Supra*) framed some of the issues that needed to be decided by the High Court in this regard as follows:

a. Whether a speaker of a house of parliament must first seek the concurrence of the speaker of the other house of parliament as to whether a bill is one that concerns counties, and if it is, whether it is a special or an ordinary bill, before the bill can be introduced for consideration in the originating house;

b. Whether it is mandatory and a condition precedent for any bill that is published by either house to be subjected to a joint concurrence process to determine, in terms of article 110(3) of the *Constitution*, whether the bill is a special or ordinary bill and that such determination is not dependent on a question arising as to whether the bill concerns counties;

c. Whether the provisions of article 110(3) are couched in mandatory terms and is a condition precedent before any house of parliament can consider a bill."

65. As the learned justices of this court observed in the above decision, "had the Supreme Court decided these issues in Advisory Opinion Reference No 2 of 2013, there would have been no need to refer

them back to the High Court, and the Supreme Court would simply have reiterated and reinforced its position."

66. The ELRC bench not only failed to analyze the provisions of articles 109 to 114 of the *Constitution*, the clear provisions of parts 1 and 2 of the fourth schedule which define the functional areas of both levels of the government, but it also ignored several decision of this court which have interpreted the said articles such as *Speaker of the National Assembly & another v Senate & 12 others* (*supra*), *Pevans East Africa Limited & another v Chairman, Betting Control & Licensing Board & 7 others* [2018] eKLR and persuasive High Court decisions such as *Pevans East Africa Limited & another v Chairman Betting Control and Licensing Board & 7 others* (*supra*) all of which interpreted the same articles. The bench fell into a grave error by failing to establish the true character of the legislation before it so as to satisfy itself that the legislation affects functions of the county government.

67. As was observed by this court in *Speaker of the National Assembly & another v Senate & 12 Others* (*supra*), the jurisdiction of the Senate does not extend to each and every legislation passed by the National Assembly. To so hold would render article 110 of the *Constitution* redundant since it is difficult to think of any law that does not touch on counties. Although the fourth schedule to the *Constitution* gives a wide array of functions to the counties, it is incumbent upon the person who alleges noncompliance with article 110 of the *Constitution* to demonstrate that the law in question concerns county governments.

68. In any event, it is a cardinal principle of law that legislative enactments enjoy a presumption of constitutional validity. This presumption operates until the person alleging unconstitutionality dislodges it by demonstrating the alleged unconstitutionality. The ELRC bench erred by failing to appreciate that the parties citing the alleged unconstitutionality did not rebut this presumption.

69. Article 110(3) only applies to bills concerning counties and it is to those bills alone that the concurrence process would be subjected. As the Supreme Court in Advisory Opinion No 2 of 2013 observed, the extent of the legislative role of the senate can only be fully appreciated if the meaning of the phrase concerning counties is examined. The Supreme Court held that the definition in article 110(1)(a) of the *Constitution* of a bill concerning counties is broad creating room for the Senate to participate in passing of bills in the exclusive functional areas of the national government, for as long as it can be shown that such bills have a provision affecting the functional areas of the county government. The ELRC bench failed to appreciate that the impugned legislation had no provisions affecting the "functional areas" of the county governments as listed in part 2 of the fourth schedule.

70. As stated earlier, the first step is always to determine whether the legislation deals with a schedule 4 part 2 matter. In other words, which house actually has the competence to legislate over the matter? Then look at whether the relevant house did in fact pass the legislation. (See the Constitutional court of South Africa in *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* (CCT12/99) [1999] ZACC 15; 2000 (1) SA 732; 2000 (1) BCLR 1 (11 November 1999). To clarify, the exclusive powers of the counties relate to matters which can be regulated within the counties. The impugned act relates to a function which exclusively falls under the national government functions. None of the objects of the bill touch on the functional areas assigned to the county government.

71. The Constitutional Court of South Africa had an opportunity to define the distinctive nature of the spheres of government in *The City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and others* It state at para 55:

> " It is, however, true that the functional areas allocated to the various spheres of government are not contained in hermetically sealed compartments. But that notwithstanding, they remain distinct from one another. This is the position even in respect of functional areas that share the same wording like roads, planning, sport and others. Distinctiveness lies in the level at which a particular power is exercised... The prefix attached to each functional area identifies the sphere to which it belongs and distinguishes it from the functional areas allocated to the other sphere...."

72. It is our finding that the ELRC bench erred in law by holding the concurrence of the Senate and the National Assembly was required in enacting the impugned legislation. The decision declaring the *NSSF Act, 2013* unconstitutional for failure to involve the Senate in its enactment was not supported by the law. On this ground, we hold that the judgment cannot be allowed to stand.

73. We note that even after declaring the entire statute unconstitutional, the ELRC bench went further and declared specific sections of the act as unconstitutional, effectively doing what Mr Ngatia SC counsel described as an "over kill." In our view, having declared the entire act as unconstitutional, the inquiry ended there. Any further proceedings or declarations served no utilitarian value because the statute was no longer law. It was absolutely unnecessary for the ELRC bench to deploy the much needed energy to determine the constitutional validity of provisions of a statute it had already nullified. In any event, the prayers touching on those sections were alternative prayers, and it was not proper to grant alternative prayers after allowing the main prayer.

74. Having found, as we did earlier that the trial court had no jurisdiction to entertain the matter, we find and hold that on this ground, this appeal succeeds. We therefore set aside the entire judgment dated September 19, 2022 and all the consequential orders. Each party shall bear its own costs for this appeal.

SIGNED AND DATED AT NAIROBI THIS 3RD DAY OF FEBRUARY, 2023.

HANNAH OKWENGU

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JUDGE OF APPEAL

M. WARSAME

.....

JUDGE OF APPEAL

JOHN MATIVO

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR