



**Fondo & another v Commission for Human Rights and Justice & another
(Civil Appeal E40 of 2021) [2023] KECA 927 (KLR) (28 July 2023) (Judgment)**

Neutral citation: [2023] KECA 927 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPEAL E40 OF 2021
SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA
JULY 28, 2023**

BETWEEN

MICHELLE BIBI FONDO 1ST APPELLANT

H.E GOVERNOR, KILIFI COUNTY 2ND APPELLANT

AND

COMMISSION FOR HUMAN RIGHTS AND JUSTICE 1ST RESPONDENT

**PUBLIC SERVICE BOARD, KILIFI COUNTY GOVERNMENT 2ND
RESPONDENT**

*(Being an appeal against the ruling and order of the Honorable Justice Byram
Ongaya delivered on 12th March 2021 in Malindi ELRC Petition E001 of 2020)*

JUDGMENT

1. This appeal arises from a constitutional petition filed before the Employment and Labour Relations Court in Malindi being ELRC Petition No E001 of 2020. The subject of the petition is the transition of public officers on the coming of a new Act of Parliament, in this case the *County Attorney Act, 2000* (hereafter referred to as the Act). The petition was instituted by the 1st Respondent and it challenged the constitutionality, propriety and legality of the appointment, swearing in and assumption of office by the 1st appellant as the County Attorney. The grounds of the challenge were the absence of declaration of vacancy of the office of the county attorney; the non-conduct of interviews; the non-compliance with the provisions of Section 68 of the *County Governments Act*; and the failure to vet the 1st appellant; the failure to follow the constitutional provisions on appointment of public officers; and the withholding of information from the public surrounding the 1st appellant's appointment.
2. The petition therefore sought the following substantive reliefs:



1. A declaration that the appointment, swearing in and assumption of office by the 1st respondent was unprocedural, illegal and null and void ab initio.
2. A declaration that the 3rd respondents violated the provision (sic) of Article 10, 35, 73 and 232 of the Constitution and presided over illegality and the 1st respondent is unprocedurally, irregularly and illegally in the office and do cease forthwith from discharging and occupying the position of county attorney of Kilifi County.
3. The appellants in opposing the petition contended that by dint of Section 31(1) of the Act, the county attorney retains any rights accrued and continue to hold their positions after the coming into effect of the Act if they meet the qualifications specified therein. According to the appellants, the 1st appellant, based on the letter dated October 14, 2020, that was a “Corrigendum – Appointment to the Office of the County Attorney”, was to serve as County Attorney for a 6 year contract with effect from July 27, 2020. It was disclosed that there was an advisory opinion dated November 10, 2020 from the Office of the Attorney General, on the implementation of the Act, to the effect that a serving county attorney was to serve the functions for the unexpired terms of their contract.
4. The 2nd respondent’s position was that the county was entitled to retain the 1st appellant by dint of operation of Section 31(2) of the Act and took issue with what it termed as its malicious joinder in the petition.
5. Having heard the matter, the Learned Judge in the judgement dated March 12, 2021 found that the 1st respondent failed to establish the alleged violations of the constitutional provisions. It was also found that the 1st appellant’s continued service as county attorney was within the law as she was properly appointed.
6. On the issue of the effective tenure of the county attorney the court considered Section 5(1) and 6(1) of the County Attorney Act as well as the provisions of the transitional section 31 of the Office of the County Attorney Act and found that after 6 years, there would be need for another appointment as a person could not be given a contract beyond the contractual tenure under the Act. It was noted that the 1st appellant was appointed as from April 2, 2018 and the tenure of the governor ends on July 27, 2020, yet the Act provides for 6 years; that upon vacation of the governor then the 1st appellant’s contractual tenure comes to an end.
7. In order therefore to align the appointment of the 1st appellant with the law, the court declared that the 1st appellant’s letter of appointment was amenable to correction on the duration and terms of service. The court, inter alia, issued:

“The declaration that in view of the prayers in the petition and the findings by the court, a declaration is hereby issued that the letter Ref No CG/KLF/OG/VOL 1 dated 14th October 2020 is amenable to correction in clause 1 to effectively reflect thus, “You will continue in service as County Attorney, County of Kilifi, for a term commensurate to the term of the current Governor, or, until lapsing of six years from July 27, 2020, whichever comes first”

8. It was this declaration that provoked the instant appeal. The gist of the appeal is that the said declaration was not sought in the petition and hence the parties were not heard thereon and that its effect was to alter the contract between the appellants and the 2nd respondent.
9. This appeal was heard on March 23, 2023 vide the Court’s virtual platform. Learned counsel Ms Nancy Gitari held brief for Mr Muthama for the appellant, Ms Meeme held brief for Mr Mkan for the 1st respondent while Mr Njoroge Mwangi appeared for the 2nd respondent. Both Ms Gitari and Ms



Meeme informed us that they had filed their submissions while Mr Njoroge informed us that he was not opposing the appeal.

10. According to the appellants, by proceeding, after finding no merit on the appeal, to make a declaration whose effect was to amend the said letter of appointment, the Learned trial judge went on a frolic of his own and determined an issue that was not before him for determination. It was submitted by Ms Gitari that the parties were not given an opportunity to address the question of the terms of the contract hence the appellants' right to be heard was violated. According to the appellants that decision amounted to the re-writing of a contract for the parties by the court without hearing hence the same cannot stand.
11. On his part Mr Njoroge informed us that he was in support of the appeal.
12. In opposing the petition, the 1st respondent, through Ms Meeme relied on his submissions and added that the letter in question was issued pursuant to an earlier letter of 2018 and that by the time of the issuance of the letter under consideration, the 1st appellant was already acting in the same position though prior to the enactment of the County Attorney Act. It was submitted that the trial court's finding was based on Sections 5 and 6 of the Act yet the 1st appellant relied heavily on the opinion of the Attorney General. According to learned counsel, claims of office are subject to the provisions of the section establishing that office hence the trial court in making the declaration, was acting under section 12 of the Employment Act in protection of the Constitution. It was submitted that by relying on the attorney general's advisory opinion, the appellants gave the trial court the avenue to deal with the issue raised in the said opinion. We were urged to note that the petition was brought by the 1st respondent on behalf of the public in order to safeguard sovereignty of the Constitution.

Analysis and Determination

13. We have considered the issues raised in this appeal.
14. This being a first appeal, we are mindful that the duty of this Court as set out in the decision of *Selle & Another v Associated Motor Boat Co. Ltd & Others* (1968) EA 123 is to reconsider the evidence, evaluate it and draw our own conclusion of facts and law, and we will only depart from the findings by the trial court if they were not based on evidence on record; where the said court is shown to have acted on wrong principles of law as was held in *Jabane v Olenja* (1968) KLR 661, or where its discretion was exercised injudiciously as held in *Mbogo & Another v Shah* (1968) EA 93.
15. In this appeal the issues that fall for our determination are whether the order to amend the 1st appellant's appointment letter was proper; whether the order issued was not prayed for in the pleadings; and whether the order was granted without giving the 1st appellant an opportunity to be heard; and whether in those circumstances it was a valid order.
16. We have briefly set out the cause of action and the remedies sought. Amongst the reliefs granted we have also set out the one that forms the subject of this appeal. It is clear from the foregoing that the issue of amendment of the 1st appellant's letter of appointment was not one of the issues in the petition. This therefore calls for a discourse on the importance of pleadings. We must underscore the need for



pleadings to be as precise as possible. This Court in *Dakianga Distributors (K) Ltd v. Kenya Seed Company Limited* [2015] eKLR rendered itself on the issue as follows:-

“A useful discussion on the importance of pleadings is to be found in *Bullen and Leake and Jacob's Precedents of Pleadings, 12th Edition, London, Sweet & Maxwell (The Common Law Library No 5)* where the learned authors declare:-

“The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the two-fold purposes of informing each party what is the case of the opposite party which he will have to meet before and at the trial, and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial.”

17. The function of pleadings is to give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issue disclosed by them. To condemn a party on a ground of which no fair notice has been given may be as great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded. (See *Esso Petroleum Co. Ltd vs. Southport Corporation* [1956] AC 218 at 238.)

18. This Court in on the case of *Independent Electoral and Boundaries Commission & Another vs. Stephen Mutinda Mule & 3 Others*; (2014) eKLR held as follows:-

“As the authorities do accord with our own way of thinking, we hold them to be representative of the proper legal position that parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce. The learned Judge, no matter how well-intentioned, went well beyond the grounds raised by the petitioners and answered by the respondents before her and thereby determined the petition on the basis of matters not properly before her. To that extent, she committed a reversible error, and the appeal succeeds on that score.”

19. The Supreme Court added its voice to the chorus in *Raila Amolo Odinga & Another vs. IEBC & 2 others* (2017) eKLR when it emphasised that: -

“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings...”

20. We appreciate that there may be occasions when the Court, depending on the manner in which the proceedings are conducted, may determine a case based on unpleaded issue. However, the proceedings



must meet certain requirements. It was therefore held by this Court in *MNM v DNMK & 13 Others* [2017] eKLR.

“Decisions abound from this court that unequivocally declaim the power of a court to determine issues which the parties have not raised in their pleadings or otherwise by consent allowed the court to determine. For example in *Chalicha FCS Ltd v. Odhiambo & 9 Others* [1987] KLR 182, the Court held that:

“Cases must be decided on the issues on the record. The court has no power to make an order, unless by consent, which is outside the pleadings. In this instance, the issues raised by the Judge and the order thereon, was a nullity.”

Later in *Kenya Commercial Bank Ltd v. Sheikh Osman Mohammed*, CA No 179 of 2010 the court expressed itself thus:

“It is not the function of a court in civil litigation to speculate or surmise as to the nature of the plaintiff’s claim. Pleadings must be deployed to serve their function, namely to inform the other party, and the court, with sufficient clarity what their case is so that the other party may have a fair opportunity to meet that case and more importantly, so that the issues for determination by the court are clear.”

A court may validly determine an unpleaded issue where evidence is led by the parties and from the course followed at trial it appears that the unpleaded issue has been left to the court to decide (See *Odd Jobs v. Mubea* [1970] EA 476). However, that was clearly not the case in this appeal.”

21. In the case before us, we have considered the pleadings as well as the evidence and we are unable to find that the parties were given an opportunity to address the issue of the amendment of the 1st appellant’s letter of appointment and that the said issue was left to the court to decide. While we understand the 1st respondent to be saying that the court in so doing was only safeguarding the *Constitution*, the *Constitution* itself in Article 22(3)(d) states that:

The court while observing rules of natural justice, shall not be unreasonably restricted by procedural technicalities.

22. Therefore, the Court cannot purport to be enforcing the *Constitution* while violating the right to a hearing. We therefore find that the issue of amendment of the 1st appellant’s letter of appointment having not been properly placed before the trial court and having not formed part of the issues for determination, the declaration amending the said letter cannot be allowed to stand.
23. In the premises we allow this appeal and set aside the Judgement of the Employment and Labour Relations Court in Malindi ELRC Petition No E001 of 2020 dated March 12, 2021 to the extent that it declared that “the letter Ref No CG/KLF/OG/VOL.1 dated October 14, 2020 is amenable to correction in clause 1 to effectively reflect thus, “You will continue in service as County Attorney, County of Kilifi, for a term commensurate to the term of the current Governor, or, until lapsing of six years from July 27, 2020, whichever comes first”.
24. As the petition was brought in the public interest, we make no order as to costs.
25. Judgement accordingly.

DATED AND DELIVERED AT MOMBASA THIS 28TH DAY OF JULY, 2023.

S. GATEMBU KAIRU, FCIArb



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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

G. V. ODUNGA

.....
JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

