



**Kenya Ports Authority v Daib & 4 others (Civil Appeal E008 of 2020)
[2022] KECA 1204 (KLR) (4 November 2022) (Judgment)**

Neutral citation: [2022] KECA 1204 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL E008 OF 2020
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
NOVEMBER 4, 2022**

BETWEEN

KENYA PORTS AUTHORITY APPELLANT

AND

ABDI MOHAMED DAIB 1ST RESPONDENT

KENYA INSTITUTE OF STUDIES IN CRIMINAL JUSTICE 2ND RESPONDENT

KENYA NATIONAL EXAMINATION COUNCIL 3RD RESPONDENT

KENYA METHODIST UNIVERSITY 4TH RESPONDENT

ETHICS AND ANTI-CORRUPTION COMMISSION 5TH RESPONDENT

(An appeal from the ruling and order of the High Court of Kenya at Mombasa (P.J.O. Otieno, J.) delivered on 27th May 2020 in High Court Constitutional Petition No. 30 of 2019)

JUDGMENT

1. Abdi Mohamed Daib (Mr. Daib), the 1st respondent, was employed by Kenya Ports Authority (KPA), the appellant, as a detective in June 1995. He remained in employment until September 2015 when, by letter dated September 29, 2015, KPA terminated his employment on grounds of having presented forged academic and professional certificates for the purpose of securing employment and promotion.
2. Mr. Daib challenged the termination before the Employment and Labour Relations Court (ELRC) at Mombasa in Cause Number 760 of 2015 where he asserted that he was unfairly and unlawfully terminated from employment. He sought a declaration that the termination of his employment was unfair and unlawful; an order for reinstatement into employment; compensation for the unlawful termination; and general damages. In a judgment delivered on December 2, 2016, the ELRC (O.N. Makau, J.) dismissed his suit having found that KPA had valid reasons to warrant his dismissal and that it (KPA) had followed a fair procedure before dismissing him from employment.



3. Dissatisfied with the decision of the ELRC, Mr. Daib lodged Civil Appeal No. 13 of 2017 before this Court, which, in its judgment delivered on March 15, 2018, held that the issue of forged certificates went to the core of the relationship between the employer and employee and resulted in breach of trust and that the termination of Mr. Daib's employment was fair. Consequently, the Court upheld the decision of the ELRC. Dissatisfied, and intent on appealing to the Supreme Court of Kenya, Mr. Daib lodged a notice of appeal dated March 19, 2018 which notice, according to KPA, has never been withdrawn.
4. On April 15, 2019, Mr. Daib instituted before the High Court at Mombasa, constitutional petition No. 30 of 2019 in which KPA is named as the respondent. Kenya National Examinations Council, Kenya Institute of Studies in Criminal Justice, Kenya Methodist University, and Ethics and Anti-Corruption Commission (EACC) are named as the 1st to 4th interested parties respectively.
5. In his lengthy petition before the High Court, Mr. Daib pleaded that during the tenure of his employment with KPA, he became a subject of constant intimidations, harassment, undue transfers and other charges on numerous occasions with the motive of silencing him; that after 19 years of diligent service KPA alleged that he had been employed on the basis of forged academic certificates; that KPA's malicious actions and unfair administrative actions prompted him to file suit before the ELRC and subsequently an appeal before this Court; that he was subsequently absolved by the interested parties who confirmed his certificates to be genuine.
6. He further averred in his petition that even though he was aggrieved by the judgments of the ELRC and of this Court, "he is respectful of the said decisions" and would leave them "undisturbed"; that he "is no longer challenging his termination" but is instead seeking intervention of the High Court "in enforcing his rights that were violated by [KPA] and the two superior courts in the entire process."; that the judgment of the ELRC "was unjust and a travesty of justice" whilst this Court "made fundamental errors in their judgment thereby occasioning serious violation of the petitioners' rights under Article 50."
7. The reliefs Mr. Daib seeks in his petition include: declarations that his constitutional rights under Articles 27, 28, 29, 35, 47, 48, 50, and 159 of the Constitution have been violated; a declaration that he holds valid certificates from the interested parties; a declaration that he is entitled to Kshs. 100,180,840 in benefits accrued from his employment with KPA over the years. Alongside the petition, Mr. Daib filed an application seeking orders against KPA to pay him "his rightful perks accrued as a result of his loyal and diligent service for a span of service for 20 years" pending the hearing and determination of the petition.
8. In response to the petition, KPA and EACC raised preliminary objections both dated April 24, 2019. On its part, KPA asserted that the petition is res judicata as the substantive issues raised had been determined by the ELRC and by this Court in the judgments to which we have already referred; that the High Court has no jurisdiction to superintend, supervise, direct, shepherd or review the ELRC or this Court; and that in any event the High Court has no jurisdiction to entertain a matter within the exclusive jurisdiction of ELRC under Article 162 of the Constitution; and that the petition is frivolous, misconceived and an abuse of the process of the court. EACC also objected to the petition on grounds of absence of jurisdiction under Article 162 of the Constitution asserting that jurisdiction to hear and determine any matter arising from employer and employee relationship lay within the exclusive jurisdiction of ELRC; that the petition was statute barred under Section 90 of the Employment Act; and that the petition contravened Sections 66(b) of the Kenya Ports Authority Act.



9. Having considered the preliminary objections after hearing counsel, the High Court (P.J.O. Otieno, J.) in a ruling, the subject of this appeal delivered on May 27, 2020, dismissed the preliminary objections and held that:

“...even though the ELRC has jurisdiction to hear and determine employment and labour relations matters with coordinate jurisdiction to hear claims of violation or rights and fundamental freedoms founded upon, ancillary to or incident to employment and labour relations matters, neither the Constitution nor the Employment and Labour Relations Court Act has limited the High Court’s jurisdiction in this respect”

10. According to the learned Judge, the crux of the dispute for determination in the petition involved the redress of violations or infringement or threatened violations of fundamental rights and freedoms and the High Court was therefore properly seized of jurisdiction; and that to the extent that the Petition raised “new issues of infringement of rights that were never raised” before the ELRC, the petition was not *res judicata*.

11. Aggrieved, the appellant lodged this appeal complaining that the learned Judge erred in: holding that the High Court has jurisdiction over the matter; finding that the petition is not *res judicata*; and failing to determine that the High Court has no jurisdiction to superintend or supervise the ELRC and this Court.

12. During the hearing of the appeal, learned counsel Mr. Munyao for KPA submitted that the High Court has no jurisdiction to supervise or sit on appeal over decisions of either the ELRC or of this Court; that in his petition before the High Court, Mr. Daib is effectively seeking to have the High Court overturn decisions of the ELRC and of this Court by urging the High Court to declare those decisions illegal; that under Article 162 of the Constitution, the ELRC is clothed with exclusive jurisdiction over employment matters; and that the matters raised by Daib in the petition mirror those that were the subject of the suit before the ELRC and are therefore *res judicata*. Learned counsel Mr. Moranda Nicholes for EACC in his submissions fully associated with the appellant’s submissions.

13. Mr. Ogada, learned counsel for Mr. Daib in opposing the appeal submitted that the preliminary objections were properly dismissed; that in them, KPA and EACC were not raising pure points of law as the question whether the matter is *sub judice* can only be determined by reference to pleadings and to contested facts; that the issues raised in the petition relating to violation of constitutional right to fair trial had not been litigated in the previous proceedings; that the decisions of the ELRC and of this Court are not being challenged before the High Court but are *per incuriam*; that on the authority of the Supreme Court decision in Jasbir Singh Rai & 3 others vs. Tarloch Singh Rai Estate & 4 others [2013] eKLR, the High Court is the proper forum and has jurisdiction under Article 165 of the Constitution.

14. We have considered the appeal and the submissions. Two issues arise in connection with the overarching question whether the Judge erred in declining to uphold the preliminary objections. First is whether the High Court has jurisdiction over the matter. Second is whether the matters raised in the petition before the High Court are *res judicata*.

15. We begin with the question of jurisdiction. As pronounced by the Supreme Court of Kenya in Samuel Kamau Macharia & another vs. Kenya Commercial Bank Limited & 2 others [2012] eKLR:

“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”



16. Earlier in, *In the Matter of Interim Independent Electoral Commissions*, Constitutional Application No. 2 of 2011 [2011] eKLR, the Supreme Court had similarly expressed that where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits and that a court cannot expand its jurisdiction through judicial craft or innovation and nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution.

17. Under Article 165(3) of the Constitution, the jurisdiction of the High Court is set out and includes unlimited original jurisdiction in civil and criminal matters as well as jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened, among other things. However, Article 165(5) of the Constitution provides that:

“The High Court shall not have jurisdiction in respect of matters-

- (a) ...
- (b) falling within the jurisdiction of the courts contemplated in Article 162(2).”

While Article 165(6) provides that:

“(6) The High Court has supervisory jurisdiction over the subordinate Courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior Court.”

18. Article 162(2) empowers Parliament to “establish Courts with the status of the High Court to hear and determine disputes relating to employment and labour relations and under Article 162 (3), Parliament is mandated to determine the jurisdiction and functions of the ELRC. Pursuant to the constitutional mandate granted under Article 162 (2) of *the Constitution*, Parliament enacted the *Employment and Labour Relations Court Act*, which in Section 12 provides that the ELRC “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”.

19. In *Republic v Karisa Chengo & 2 others* SC Petition No. 5 of 2015 [2017] eKLR the Supreme Court in distinguishing the jurisdiction of the High Court and the specialized courts established under Article 162(2)(3) had this to say:

“... Article 162(1) categorises the ELC and ELRC among the superior Courts and it may be inferred, then, that the drafters of *the Constitution* intended to delineate the roles of ELC and ELRC, for the purpose of achieving specialization, and conferring equality of the status of the High Court and the new category of Courts.

(51) Flowing from the above, it is obvious to us that status and jurisdiction are different concepts. Status denotes hierarchy while jurisdiction covers the sphere of the Court’s operation. Courts can therefore be of the same status, but exercise different jurisdictions.”

20. And later in the same case, the Supreme Court stated:

“...pursuant to Article 162(3) of *the Constitution*, Parliament enacted the *Environment and Land Court Act* and the *Employment and Labour Relations Act* and respectively outlined



the separate jurisdictions of the ELC and the ELRC as stated above. From a reading of *the Constitution* and these Acts of Parliament, it is clear that a special cadre of Courts, with suis generis jurisdiction, is provided for. We therefore entirely concur with the Court of Appeal's decision that such parity of hierarchical stature does not imply that either ELC or ELRC is the High Court or vice versa. The three are different and autonomous Courts and exercise different and distinct jurisdictions. As Article 165(5) precludes the High Court from entertaining matters reserved to

the ELC and ELRC, it should, by the same token, be inferred that the ELC and ELRC too cannot hear matters reserved to the jurisdiction of the High Court.”

21. In *Kisauni Bridge Limited vs. Kenya Urban Roads Authority & another* [2019] eKLR this Court stated that Article 165(5) of *the Constitution* precludes the High Court from entertaining matters that are exclusively reserved for the Environment and Land Court as well as the Employment and Labour Relations Court.
22. Although, on the face of it, Mr. Daib's petition raised matters of violation of his constitutional rights, at the core, is a dispute over his relationship of employee/employer with KPA which is a matter falling squarely within the constitutional and statutory jurisdiction of the ELRC which has the mandate to address constitutional questions arising in its sphere of jurisdiction. As Okwengu, JA put it in the case of *Judicial Service Commission vs. Gladys Boss Shollei & another* [2014] eKLR:

“In my view to hold that the Industrial Court has no jurisdiction to hear and determine a petition seeking redress of violations of fundamental rights arising from an employment relationship would defeat the intention and spirit of *the Constitution* in establishing special courts to deal with employment and labour disputes.”
23. Similarly in the more recent case in *Public Service Commission & 4 others vs. Cheruiyot & 20 others* (Civil Appeal 119 & 139 of 2017 (consolidated) [2022] KECA15 (KLR) (February 8, 2022) (Judgment), this Court held that the jurisdiction of the ELRC extends to determination of any constitutional violations of the rights of any party arising from an employee-employer relationship thus:

“The jurisdiction of the Employment and Labour Relations Court is not limited to the determination of disputes arising out of a contract of employment between an employee and an employer, the Court can also determine any constitutional violations of the rights of any party arising from an employee- employer relationship. However, for the court to entertain a petition premised on the breach of a party's fundamental rights under *the Constitution*, the alleged constitutional breach must be ancillary and incidental to the matters contemplated under section 12 of the Act.”
24. There is, therefore, abundant authority for the proposition that the courts of equal status have the jurisdiction and competence to adjudicate and settle constitutional questions in their respective areas of jurisdiction. In addition to decisions already mentioned, in *Kenya Tea Growers & another vs. Kenya Plantation and Agricultural Workers Union* [2018] eKLR, this Court stated that ELRC has the mandate to determine disputes involving interpretation of *the Constitution* in their area of jurisdiction. Also, the case of *Prof. Daniel N. Mugendi vs. Kenyatta University & others* [2013] eKLR, was concerned with the question of whether or not the Industrial Court had jurisdiction to determine



issues concerned with the of violation of constitutional rights. In answering in the affirmative, the Court stated:

“We venture to put forth the position that as we have concluded that the Industrial Court can determine industrial and labour relations matters alongside claims of fundamental rights ancillary and incident to those matters, the same should go for the Environment & Land Court, when dealing with disputes involving environment and land with any claims of breaches of fundamental rights associated with the two subjects.”

See also *Registrar of Trade Unions v Nicky Njuguna & 4 others* [2017] eKLR].

25. There is no reason therefore why the matters of constitutional violations claimed by Mr. Daib in the subsequent petition before the High Court could not have been raised before the ELRC. We are therefore persuaded that there is merit in KPA’s complaint that the learned Judge erred in declining to uphold the preliminary objection on jurisdiction.
26. We turn to the question whether the doctrine of *res judicata* applied. In *Florence Maritime Services Ltd v Cabinet Secretary Transport, Infrastructure & 3 others* [2021] eKLR, the Supreme Court of Kenya extensively examined the doctrine of *res judicata* stating that:

“That the doctrine of *res judicata* is based on the principle of finality which is a matter of public policy. The principle of finality is one of the pillars upon which our judicial system is founded and the doctrine of *res judicata* prevents a multiplicity of suits, which would ordinarily clog the Courts, apart

from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.”

27. That Court cited with approval the words of The Honourable Mr. Justice Russell in the Federal Court of Canada in the case *Sami v Canada (Citizenship and Immigration)*, 2012 FC 539 (CanLII) for the holding that the “preconditions for *res judicata*” are that, firstly, “the same question was decided in earlier proceedings. Secondly, that “the judicial decision which is said to create the estoppel was final” and third, that “the parties to the judicial decision were the same persons as the parties to the proceedings in which the estoppel was raised.” The Supreme Court then pronounced that:

“For *res judicata* to be invoked in a civil matter the following elements must be demonstrated:

- a) There is a former Judgment or order which was final;
- b) The Judgment or order was on merit;
- c) The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and
- d) There must be between the first and the second action identical parties, subject matter and cause of action”

28. With those principles in mind, there is no controversy that following his dismissal from employment by KPA in September 2015, Mr. Daib unsuccessfully challenged the termination before the ELRC in Mombasa in Cause Number 760 of 2015. His claim, as already noted, was dismissed in a judgment delivered on December 2, 2016. His appeal against that judgment was, as already stated, similarly



unsuccessful and was dismissed by this Court in its judgment delivered on March 15, 2018 in Civil Appeal No. 13 of 2017.

29. There is no question that Mr. Daib's grievances before the ELRC and this Court stemmed from an employer/employee relationship which he asserted was unfairly and unlawfully terminated while KPA maintained that his dismissal from employment was on account of gross misconduct following findings that his academic certificates were not authentic. Indeed, the issues as framed by the ELRC were: whether the reasons cited by KPA for dismissing Mr. Daib were valid and just; whether the procedure followed in terminating his employment was fair; and what orders should be made based on findings on those issues. Those issues were resolved in favour of KPA by the ELRC and affirmed by this Court on appeal. In his subsequent petition before the High Court Mr. Daib's complaints were again raised in connection with his employment with KPA albeit introducing the dimension of infringement of constitutional rights and adding new parties and the contention that the judgments of the ELRC and of this Court are per incuriam.
30. In John Florence Maritime Services Limited vs. Cabinet Secretary, Transport and Infrastructure & 3 others (above) the Supreme Court of Kenya endorsed the words by Wigram, V-C in *Henderson v Henderson* [1843] 67 E.R. 313, that:

“...where a given matter becomes the subject of litigation in, and adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a Judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.”

31. In the same case, the Supreme Court expounded as follows:

“(54) The doctrine of *res judicata*, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to Court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the Courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.”

32. In our view, in filing a fresh action before the High Court, albeit a constitutional petition, Mr. Daib was not only seeking to relitigate a matter that had already been litigated and concluded by the ELRC and by this Court but was also engaging in forum shopping, a practice to be frowned upon, as the Supreme Court cautioned in Albert Chaurembo and 7 others v Maurice Munyao and 148 others, S.C.Petition No.3 of 2016 [2019] eKLR where it stated:

“What is emerging from the above observations is a situation where disputing parties have options to choose the forum to approach in the quest for justice which in our view is an injustice in itself and a mortification of our judiciary and the jurisdictional competence set



by *the Constitution* in our judicial hierarchy. Such bridled state of events leaves the powers of the courts to the whims of judicial forum seeking litigants who practise before our courts to decide and choose at their own will the fora for dispute resolution in total disregard to the jurisdictional limits set out in *the Constitution*. It portends an imitable case of judicial forum shopping and an abuse of the court process.”

33. In the result, we conclude that the matters raised in the petition before the High Court are res judicata and the learned Judge of the High Court erred in declining to uphold the preliminary objection in that regard.
34. We have no doubt in our minds that the preliminary objections raised by KPA and EACC consisted of points of law within the purview of the decision of this Court *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696 and were properly taken as such.
35. We have said enough to demonstrate that there is merit in this appeal. Consequently, we allow the appeal and set aside the ruling of the High Court delivered on May 27, 2020 in its entirety. We substitute therefor an order upholding the preliminary objections and order that the petition by Abdi Mohamed Daib before the High Court be and is hereby struck out with costs to the appellant and to the 5th respondent.
36. The appellant will have the costs of this appeal.
Orders accordingly.

Dated and delivered at Mombasa this 4th day of November 2022.

S. GATEMBU KAIRU, FCIArb

.....
JUDGE OF APPEAL

P. NYAMWEYA

.....
JUDGE OF APPEAL

J. LESIIT

.....
JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

