



**IN THE COURT OF APPEAL**

**AT NAKURU**

**[CORAM: KARANJA, KIAGE & SICHALE, JJA]**

**CIVIL APPEAL NO. 72 OF 2016**

**BETWEEN**

**GODFREY NGUNJIRI NJUGUNA.....APPELLANT**

**AND**

**COUNTY GOVERNMENT OF NAKURU.....RESPONDENT**

*(Being an appeal against the Ruling and order of the High Court of Kenya*

*at Nakuru (H.O. Omondi, J) delivered on 28<sup>th</sup> January, 2015*

**IN**

**NAKURU H.C. JUDICIAL REVIEW NO. 9 OF 2011)**

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**JUDGMENT OF THE COURT**

The appellant, **Godfrey Ngunjiri Njuguna** filed Judicial Review Proceedings before the High Court of Kenya at Nakuru against the then Municipal Council of Nakuru (the predecessor to the respondent herein) (MCN) seeking orders that:

***“(i) The applicant be granted leave to apply for an order of MANDAMUS compelling the respondent (MUNICIPAL COUNCIL OF NAKURU) to fully compute and to pay forthwith to the applicant all the applicant’s full salaries, allowances, benefits and all accrued interests payable to the applicant from 1st September, 2002 to date,***

***(ii) The costs of the application do abide the outcome of the main substantive Notice of Motion”.***

The Judicial Review application was supported by the affidavit of the appellant sworn on **1<sup>st</sup> February, 2011** in which he deposed that he was employed by the MCN as a Principal Revenue Officer from **21<sup>st</sup> August, 1991** to **15<sup>th</sup> June, 1998** when he was transferred to the Town Council of Othaya; that on **8<sup>th</sup> February, 2001**, he was posted back to the MCN in the same position; that in **August, 2002**, he was dismissed from employment on allegations of absconding duty whereas in essence, he was held for investigations by the Criminal Investigations Officer whereby he was required to temporarily vacate the office pending investigations; that he was later charged, prosecuted and acquitted of criminal charges in which the MCN was the complainant; that even after his acquittal of the criminal charges against him, the Town Clerk of the MCN insisted that he had been dismissed from duty; that he had never received any formal communication regarding his suspension or interdiction; that although his lawyer wrote to the MCN demanding for his salary arrears from the year 2002 when his salary was stopped, to date, he has not received the said salary; and finally, that on **3<sup>rd</sup> September, 2003**, he sued the Town Clerk, MCN seeking a declaration that the actions of the MCN were illegal. However, he later withdrew the suit when he realized that the suit was not bearing any fruit. Further, he contended that contrary to the resolutions of MCN’s staff appointment sub-committee meeting held on **8<sup>th</sup> December, 2004**, he was not reinstated with full pay as recommended; that as at the time of filing the suit, his salary arrears stood at Kshs 3,958,685.63; that the respondent has since refused, failed or neglected to pay his salary arrears. The appellant urged the court to order the respondent to reinstate him to his employment and to pay him outstanding salary arrears amounting to Kshs 3,958,685.63.

In opposing the Judicial Review Application, the respondent filed a replying affidavit sworn on **7<sup>th</sup> March, 2011** by **Kaio Kathuu Mbulusi**,

the then Town Clerk and Accounting Officer of MCN in which he deposed that the appellant was employed by the Public Service Commission on **16<sup>th</sup> September, 1991** as a Principal Revenue Officer; that in June, 1998, the appellant was transferred to Othaya; that on **8<sup>th</sup> February, 2001**, the appellant was transferred back to Nakuru; that in a meeting of the Finance Staff General Purpose Committee (FSGPC) held on **11<sup>th</sup> December, 2001**, allegations of forgery in the MCN Rates Department were reported; that on **11<sup>th</sup> April, 2002**, the treasurer of MCN submitted a report to the FSGPC regarding the alleged forgery at the Rates Department; that on **3<sup>rd</sup> September, 2002**, the appellant was arrested over the alleged missing funds in the rates department of MCN; that the MCN wrote to the appellant a letter dated **11<sup>th</sup> October, 2002** requiring the appellant to show cause why he should not be summarily dismissed for absconding duty from **2<sup>nd</sup> September, 2002**; that on **19<sup>th</sup> October, 2002**, the appellant wrote to the MCN a letter explaining how he had been instructed not to go back to his office until investigations were completed; that on **13<sup>th</sup> March, 2003**, the appellant was charged with the offence of stealing contrary to section 280 of the Penal Code; that in a meeting of the FSGPC held on **29<sup>th</sup> April, 2003**, it was resolved that the appellant be dismissed; that the resolution to dismiss the appellant was adopted in the full Council's meeting held on **8<sup>th</sup> May, 2003**; that on **17<sup>th</sup> June, 2003**, the appellant wrote to the Permanent Secretary, Ministry of Local Government & copied the Town Clerk of MCN requiring the P.S's intervention in restoration of his "rights"; that on **22<sup>nd</sup> November, 2004**, the appellant again wrote to the Secretary Public Service Commission and the Permanent Secretary, Ministry of Local Government, copied to the Town Clerk of MCN appealing for "justice" in his case by being allowed to resume his duties at the MCN and to be paid all his salary in arrears from **September, 2002**. The MCN maintained that it did not owe any dues to the appellant as he was lawfully suspended from duty following a resolution passed at the FSGPC on **29<sup>th</sup> April, 2003** and adopted on **8<sup>th</sup> May, 2003**.

The Judicial Review Application was heard by **H. Omondi, J** who in a ruling delivered on **28<sup>th</sup> January, 2015** held that:

***"I think since the issue of jurisdiction is raised, it would be prudent to address the same first, before going into the merits of the claim. This is because, as was recognized in the case of M.V. Lilian S. vs. Caltex Oil, jurisdiction is everything, without it a court cannot move even one step".***

*From the submissions, and even the depositions by parties, this is clearly a Labour Relations matter. Unlike the other cases referred to where parties were seeking to enforce decrees made against their employer, the present case has not gone through the processes which led to the various judges upholding the prayers for mandamus. The subject is not seeking to enforce any decree issued by a court, in pursuit of its implementation. If he retained the matter he had filed against the council, obtained decree and the council refused to implement, then he would be on all fours which the other cited cases. However, in this instance, his situation is entirely distinguishable from those arising in the decided cases, his counsel has cited".*

The learned judge relied on Section 12 of the Labour Institutions Act 2007 in support of her findings that the Industrial Court has exclusive jurisdiction to determine matters such as the appellants. Section 12 thereof provided:

***"The Industrial Court shall have exclusive jurisdiction to hear, determine and grant any appropriate relief in respect of an application, claim or complaint or infringement of any of the provisions of this Act or any other legislation which extends jurisdiction to the Industrial Court, or in respect of any matter which may, arise at common law between an employer and employee in the course of employment..."***

The learned judge further stated:

***...."This position was stated very well in the case of Jane Frances***

***Angalia vrs Masinde Muliro University of Science and Technology and others [2010] eKLR where the applicant filed Judicial Review Application after her appeal against the termination of his employment by her employer was rejected. The court on upholding a preliminary objection raised by the respondent, held that it had no jurisdiction to determine any complaint referred to under section 87 (2) of the Employment Act, and Section 12 of the Labour Industrial Act. I hold the same view; this is a matter which falls within the exclusive docket of the Industrial Court, being disguised as a Judicial Review on administrative actions.***

***The prayers sought ought to be crafted in an Industrial Cause action and I hold that this court lacks jurisdiction to deal with the same. The Notice of Motion application is subsequently struck out".***

The appellant was aggrieved with the findings of the honourable judge and in a Memorandum of Appeal dated **14<sup>th</sup> October, 2016**, listed eight (8) grounds of appeal faulting the learned judge for finding that the High Court had no jurisdiction to hear and determine the Judicial Review Application despite the express Constitutional Provisions of Article 165(3) (a); for finding that the High Court lacked jurisdiction to determine the matter despite the provisions of Article 165(6)(7) conferring jurisdiction to the High Court; for erroneously failing to distinguish Judicial Review reliefs from the claims and complaints under the provisions of section 87 of the Employment Act 2007; for failing to appreciate that Article 23 (3) (f) of the Constitution conferred jurisdiction to the High Court to hear and determine applications such as the one filed by the appellant; for failing to appreciate that the High Court has unlimited jurisdiction notwithstanding the creation of the divisions; for erroneously and literally avoiding the issues in controversy by strictly adhering to the issue of jurisdiction; for erroneously failing to set out the issues and points of determination before the court and rendering a decision in each case and the reasons thereof and finally; for failing to critically examine the real issues in controversy to the detriment of the appellant.

On **18<sup>th</sup> February, 2020**, the appeal came up for plenary hearing before us. **Mr. Karanja Mbugua**, learned counsel for the appellant in urging the appeal contended that the gravamen of this appeal is the issue of jurisdiction; that **Omondi, J.** issued or dealt with the single issue

of jurisdiction and did not consider the merits or demerits of the motion; that the appellant's suit was struck out on the basis that the High Court had no jurisdiction; that the suit was filed on **1<sup>st</sup> January, 2009** before the promulgation of the Constitution of Kenya, 2010; that Special Courts were created in 2011, long after the institution of the appellant's Judicial Review Motion and finally, that the applicant's motion being a Judicial Review matter, the High Court was properly seized of it.

In opposing the appeal, **Miss Mbeche**, learned counsel for the respondent pointed out that the Judicial Review Application was filed in 2011. Counsel supported the findings of the judge in coming to the conclusion that she had no jurisdiction, which issue had been raised in a Preliminary Objection.

We have considered the record, the evidence adduced at the trial court, the rival written and oral submissions made before us, the authorities cited and the law.

For a start, the Judicial Review Application which was supported by "**statement of facts**" and a verifying affidavit were all dated **1<sup>st</sup> February, 2011**, the same date of the filing. The respondent filed a replying affidavit (sworn by **Kaio Kathuu Mbulusi**, the then Town Clerk of the MCN) sworn on **7<sup>th</sup> March, 2011**.

Thereafter, the respondent filed a Notice of Preliminary Objection on **8<sup>th</sup> March, 2011**. In the Notice of Preliminary Objection, the respondent intimated that it would raise the following points of law:

“

**(1) This Court has no jurisdiction to entertain, hear and determine the issues raised; the suit is filed in breach of Section 87 (2) of the**

**Employment Act No. 11 of 2007 and Section 12 (1) of the Labour Institutions Act No. 12 of 2007 (commencement dated is 2<sup>nd</sup> June, 2008).**

**(2) The suit offends the provisions of Articles 162 (2) of the Constitution of Kenya (2010).**

**(3) This suit is time barred as it is instituted after the limitation period of three (3) years after the act complained of. Section 90 of the Employment Act No. 11 of 2007”.**

It was this Preliminary Objection that the judge determined in her ruling of **30<sup>th</sup> December, 2014** and having come to the conclusion that she had no jurisdiction, she did not deem it fit to consider the merits or demerits of the Judicial Review Application.

On our part, we too are of the view that the dispute between the appellant and the respondent was that of an employer-employee. The Constitution of Kenya, 2010 set up Specialized Courts to determine employment and Labour Relations matters as well as Land and Environmental matters. In the Supreme Court decision of **Republic v Karisa Chengo & 2 others [2017] eKLR**, the Supreme Court cited **John Beecroft Saunders** in his treatise **Words and Phrases legally Defined Vol. 3 at page 113** on the definition of jurisdiction as follows:

**“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given”.**

For our purposes, the jurisdiction of the High Court is set out in Article 165(3) of the Constitution as follows:

**“165 (3) (a) Subject to clause (5), the High Court shall have— (a) unlimited original jurisdiction in criminal and civil matters”**

The said clause (5) expressly excludes and denies jurisdiction to the High Court to deal with matters reserved to the specialized courts.

On the other hand, Article 162(2) empowers Parliament to set up Specialized Courts with the status of the High Court. These Specialized Courts are to hear and determine disputes. It provides:

**“162(2) Parliament shall establish 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”.**

In pursuance to Article 162 (3) of the Constitution, Parliament enacted the Employment and Labour Relations Court Act. Sec. 12 (1) of the Employment and Labour Relations Court Act provides for the jurisdiction of the ERLC as follows:

**“(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’ organization and a trade union organization;**
- (d) Disputes between trade unions;**
- (e) Disputes between employer organizations;**
- (f) Disputes between an employers’ organization and a trade union;**
- (g) Disputes between a trade union and a member thereof;**
- (h) Disputes between an employer’s organization 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”.**

Whilst addressing the issue of specialized courts, in **Republic vs. Karisa Chengo & 2 others** (Supra), the Supreme Court rendered itself as follows:

**“It is against the above background, that Article 162(1) categorizes 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. Concurring with this view, the learned Judges of the Court of Appeal in the present matter observed that both the specialized Courts are of equal rank and none has the jurisdiction to superintend, supervise, direct, shepherd and/or review the mistake, real or perceived, of the other. Thus, a decision of the ELC or the ELRC cannot be the subject of appeal to the High Court; and none of these Courts is subject to supervision or direction from another.**

It concluded:

**“It follows from the above analysis that, although the High Court and the specialized Courts are of the same status, as stated, they are different Courts. It also follows that the Judges appointed to those Courts exercise varying jurisdictions, depending upon the particular Courts to which they were appointed. From a reading of the statutes regulating the specialized Courts, it is a logical inference, in our views, that their jurisdictions are limited to the matters provided for in those statutes. Such an inference is reinforced by and flows from Article 165(5) of the Constitution, which prohibits the High Court from exercising jurisdiction in respect of matters “reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or (b) falling within the jurisdiction of the Courts contemplated in Article 162(2)”.**

By parity of reasoning, if a judge of the Environmental and Land Court is not seized of a matter whose jurisdiction lies with the High Court, then it follows that a judge of the High Court cannot be seized of jurisdiction to hear a matter reserved for the Employment and Labour Relations Court. Moreover, such exclusion of jurisdiction is set out in unmistakable and unambiguous items in Article 165 (5) (b) of the Constitution.

It is in view of the above that we have come to the conclusion that the High Court rightly came to the conclusion that it had no jurisdiction to determine the matter before it.

Accordingly, the appeal herein is dismissed with costs.

**Dated and Delivered at Nairobi this 10<sup>th</sup> Day of July, 2020.**

**W. KARANJA**

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**JUDGE OF APPEAL**

**P.O. KIAGE**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**