**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: G. B. M. KARIUKI, MWILU & GATEMBU, JJ.A)**

**CIVIL APPEAL NO. 177 OF 2013**

**BETWEEN**

**THE KENYA AIRPORTS AUTHORITY............................APPELLANT**

**AND**

**ANTHONY MUTHUMBI WACHIRA....................RESPONDENT**

*(Appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Githua, J.)*

*delivered on 11th October, 2012*

*in*

**MISC. APPL. NO. 333 OF 2010***)*

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**JUDGMENT OF THE COURT**

**Background**

1. Kenya Airports Authority, the appellant, employed Anthony Muthumbi Wachira, the respondent, as its General Manager- ICT in February 2006. By a letter dated 29th October 2010 the appellant summarily dismissed the respondent from employment on the grounds that the respondent breached the terms of his contract of service in that he was allegedly negligent in the performance of his work.

2. Aggrieved, the respondent obtained leave to commence, and did commence judicial review proceedings in the High Court in Miscellaneous Civil Application No. 333 of 2010 against the appellant. In his notice of motion dated and filed in the High Court on 25th November 2010, and supported by a statement and verifying affidavit, the respondent applied for an order of certiorari to quash the decision of the appellant to summarily dismiss him; and an order of prohibition to prohibit the appellant from terminating the respondent’s contract of employment without following due process.

3. The grounds in support of that application included the complaints that the appellant, a statutory body established under section 3 of the Kenya Airports Authority Act, was under an obligation to comply with rules of natural justice and its own rules and regulations in dealing with its employees; that a committee of the board of directors usurped the powers of the board of directors of the appellant by purporting to

take disciplinary action against the respondent to summarily dismiss him from employment in contravention of section 29 of the Kenya Airports Authority Act.

4. In his verifying affidavit the respondent set out in detail the circumstances in which an audit with respect to two ICT projects relating to installation of Local Area Network and Wide Area Network in locations within the country was undertaken; that the audit was undertaken without interviewing the ICT staff; that he responded to the questions raised in the audit report; that he was later accused of incompetently handling the ICT projects as a consequence of which the appellant claimed to have made losses; that his request to be furnished with minutes of the audit committee of the board to enable him address complaints against him was not heeded; that he was therefore handicapped in preparing his defence to the accusations of incompetence; that without being given the purpose for which he was being summoned, he was asked to appear before a staff committee of the board of directors of the appellant where he was questioned and thereafter received a letter dated 29th October 2010 from the appellant's managing director summarily dismissing him from employment.

5. In response to the motion, the appellant filed and served a notice of preliminary objection and a replying affidavit sworn by Samson Kimilu, the head of Internal Audit Unit of the appellant. In the notice of preliminary objection the appellant contended that the judicial review proceedings were incompetent for violation of provisions of Order LIII Rules 1(2) and 4 of the Civil Procedure Rules; that the notice of motion was not supported by affidavit; that the court did not have jurisdiction to entertain the matter because it did not involve an issue of public law; that the matters the respondent complained of are in the nature of master and servant dispute which should be determined by the Industrial Court; and that as the respondent had already been dismissed from employment, the order for prohibition which was sought was overtaken and could not be granted.

6. In his replying affidavit, Samson Kimilu, head of Internal Audit Unit of the appellant deposed that an audit of ICT projects undertaken by the appellant between October and December 2009 under the respondent's watch revealed lapses in the implementation as several items paid for could not be accounted for; not all items were supplied in accordance with the tender requirements and acceptance reports and certificates of completion were fraudulently executed to enable payment to be made to the contractors; that the audit included interviews with ICT staff members; that the respondent was furnished with a draft audit report and a conference with the respondent was arranged to discuss the draft report and the issues raised; that the respondent was given an opportunity to address the audit queries and that on 25th May 2010 the respondent did send his responses to the queries which were then sent to the full board of directors of the appellant; that on 2nd June 2010 the respondent appeared before the audit committee of the board and was not sincere in his responses and portrayed incompetence; that the respondent was subsequently summoned before the staff disciplinary committee of the board of directors of the appellant to show cause why disciplinary action should not be taken against him; that the respondent did appear before that committee after which the committee recommended to the board his dismissal leading up to his summary dismissal by a letter dated 29th October 2010 from the appellant's managing director.

7. In a ruling delivered on 9th December 2011 the court dismissed the preliminary objection. On the question whether the matter before the court involved an issue of public law and whether the matter fell for adjudication in the Industrial Court, the court took the view and ruled that the main complaint by the respondent "*relates not only to the decision itself but more importantly the process by which the decision to terminate his services was arrived at*" and that to the extent that "*the remedy of judicial review is concerned with reviewing not the merits of the decision…but with the decision making process itself…*" and the court therefore had the jurisdiction to investigate those complaints under its supervisory jurisdiction.

8. In reaching that conclusion the court held that the employment and disciplining of employees by the appellant has statutory underpinning making it a statutory obligation, which ought to be exercised fairly and in accordance with rules of natural justice. In that regard the court stated that:

> ***"It is common ground that the respondent is a public body being a statutory body created by***

***section 3 of the Act. Section 29 (1) of the Act gives the respondent authority to hire members of staff and to exercise disciplinary control over them. The authority to discipline employees by the respondent is therefore a power derived from statute not from private employment contracts entered into with its employees like the applicant."***

9. Being of that view the court concluded:

> ***"I find that in so far as the said complaints related to the process by which the impugned decision was arrived at and in so far as there is a claim that the respondent which is a public body or any of its organs breached the rules of natural justice in arriving at the said decision, this court has jurisdiction to investigate those complaints and reach a determination on their validity or otherwise."***

10.The court in its ruling also rejected the contention by the appellant that the notice of motion was defective or incompetent and the respondent's notice of motion was thereafter heard on its merits.

11.On 31st January 2012, the court, with the concurrence of the parties gave directions relating to filing and service of written submissions with respect to the respondent's judicial review application. After oral highlighting of the written submissions by counsel for the parties the learned judge delivered judgment on 11th October 2012 dismissing the respondent's application. The appellant has, notwithstanding that the respondent's application for judicial review was dismissed, instituted the present appeal on the grounds that it is aggrieved by findings and pronouncements made by the court in the judgment.

**<u>The appeal and submissions by counsel</u>**

12. In this appeal, there are two main complaints by the appellant against the judgment of the High Court. The first is that the learned judge should have declined to entertain respondent's claim because the respondent did not serve the managing director of the appellant with notice under section 34 of the Kenya Airports Authority Act prior to commencing action. The second complaint is that the learned judge erred in failing to hold that the Industrial Court has the exclusive jurisdiction to determine disputes arising from termination of employment.

13. Before us, Mr. T. T. Tiego learned counsel for the appellant submitted that the appellant is a statutory body established under The Kenya Airports Authority Act Chapter 395 of Laws of Kenya (the Act) with power to employ and dismiss employees; that the respondent was employed by the appellant until 29th October 2010 when his employment was terminated; that on 10th November 2010 the respondent initiated judicial review proceedings against the appellant without first serving notice on the managing director of the appellant in accordance with the requirement of section 34 of Act; that the respondent wrongly instituted his claim in the High Court when, under sections 11 and 12 [1] of Labour Institutions Act 2007 Chapter 234 of the Laws of Kenya, the Industrial Court has exclusive jurisdiction over the matter; that the pronouncements by the learned judge on matters over which jurisdiction is vested in the Industrial Court is null and void and it was incumbent upon the Judge to down her tools.

14. Counsel faulted the finding by the Judge that section 34 of the Act has no application to judicial review proceedings on the basis that judicial review proceedings are special proceedings that are neither civil nor criminal and are exclusively governed by section 8 and 9 of the Law Reform Act and Order 53 of the Civil Procedure Rules. According to counsel, the judge erred in failing to appreciate that the Act is the substantive regulating statute; he referred us to the decision of this Court in **<u>The Speaker of the National Assembly vs. The Hon. James Njenga Karume,</u> Civil Application No. NAI 92 of 1992** and submitted that the provisions of Order 53 of the Civil Procedure Rules cannot oust statutory provisions.

15. Counsel went on to say that the learned Judge was alive to the fact that the respondent had also commenced legal proceedings in the correct forum, the Industrial Court, and should therefore not have been considering and pronouncing herself on matters before that court; that despite being alive to that fact, the learned judge went to great lengths to discredit the processes used in terminating the

respondent's employment; that under section 44 of the Evidence Act, the pronouncements by the learned judge regarding the termination of the respondent will, to the prejudice of the appellant, be admissible before the Industrial Court where one of the findings sought is that the process used to terminate the respondent's employment was not procedural; and that the object of judicial review proceedings is not to provide civil remedies to a party.

16. In support of the submission that the proceedings the subject of this appeal are a nullity on account of non compliance by the respondent with section 34 of the Act and on account of the provisions conferring exclusive jurisdiction on the Industrial Court, counsel referred us to the Privy Council decision in **Macfoy vs. United Africa Company Ltd** **[1962] AC 152** and the decision of this Court in **Omega Enterprises (Kenya) Limited vs. Kenya Tourist Development Corporation and 2 others,** **[1998] eKLR**.

17. Counsel concluded by submitting that judicial review proceedings are inappropriate in a matter between master and servant where a remedy in damages should be pursued in civil proceedings. With that, counsel urged us to allow the appeal and set aside the judgment of the High Court in its entirety.

18. In his address when opposing the appeal Mr. Charles Kanjama learned counsel for the respondent began by saying that this appeal is peculiar in that the judgment appealed from is favourable to the appellant save as relates to the order condemning the appellant to pay costs; that the appellant's real concern is on the findings of law that were made that would be prejudicial to the appellant in Industrial Court and the appeal is therefore being used for purposes of expunging those findings.

19. According to Mr. Kanjama the High Court had the jurisdiction to determine the matters that it did; the objection to jurisdiction was taken as a preliminary objection and determined in ruling delivered on 9th December 2011; the appellant did not appeal that ruling and is improperly revisiting matters that were subject of that ruling in which the High Court determined it had jurisdiction and was properly seized of the matter.

20. Regarding the contention that the action before the High Court was incompetent for want of a notice under section 34 of the Act, counsel submitted that the learned judge properly addressed that issue and was right in concluding that given the special nature of judicial review proceedings, the only notice that was required to be served was notice under Order 53 of the Civil Procedure Rules and no other notice was required.

21. As to the argument that the Industrial Court has exclusive jurisdiction over this matter, counsel contended that based on the doctrine of statutory underpinning, there is jurisdiction if there is statutory underpinning and the only reason the judge did not grant relief was on account of the fact that during the pendency of the matter in court the appellant filled the respondent's position, otherwise the remedies sought in the judicial review application would have been available. Counsel maintained that the lower court has jurisdiction concurrently with the Industrial Court and having interrogated the procedure used by the appellant to terminate the employment of the respondent the court was right to pronounce itself on the matter and to determine that the employment termination procedure was wrong and there is therefore no error on the part of the learned Judge. Counsel urged that it would not be expeditious for this Court to require the parties to again raise the same matters before the Industrial Court.

22. Regarding the award of costs to the respondent by the High Court despite having dismissed the respondent's motion, counsel submitted that the reasons for departing from the general rule that costs follow the event were given by the court, namely, that the respondent would have succeeded in its action had it not been overtaken by events and the judgment in that regard should also be upheld.

23. Counsel concluded by saying that the decisions in **Macfoy** **vs. United Africa Company Ltd** and **Omega Enterprises (Kenya) Limited vs. Kenya Tourist Development Corporation and 2 others** relied upon by the appellant are not applicable as they dealt with a different issue where proceedings are deemed to be null and void. With that counsel urged us to dismiss the appeal with costs.

24. In his brief reply to the submission that the issue of jurisdiction was subject to a ruling by the lower

court that was not appealed, Mr. Tiego submitted that the matter of jurisdiction was canvassed in the closing submissions by the parties and was determined in the impugned judgment.

**Determination**

25. Although the appellant framed six grounds of appeal in its memorandum of appeal, the critical question is whether the High Court should have declined jurisdiction in this matter: Firstly, on the grounds that the Industrial Court was, by reason of sections 11 and 12 of the Labour Institutions Act, the proper forum; secondly, on the grounds that the respondent had not prior to the commencement of the proceedings served notice on the managing director of the appellant in accordance with section 34 of the Act.

26. At the very outset, we agree with counsel for the appellant that if indeed the lower court was, by reason of section 12 of the Labour Institutions Act, Act No. 2 of 2007, divested of jurisdiction, then it should have declined jurisdiction and not gone ahead to undertake an inquiry regarding the termination of the respondent's employment with the appellant. In the words of Nyarangi, J.A. in the often cited case of **The Owners Of Motor Vessel Lilian "S" vs. Caltex Oil (Kenya) Ltd [1989] KLR 1** at page 14:

> ***"Jurisdiction is everything. Without it, a court has no power to take one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending the evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."***

27. Recently, the Supreme Court of Kenya expressed itself on the question of jurisdiction in **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Ltd & 2 Others, Application No. 2 of 2011** where it said:

> ***"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court 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…***
>
> ***… The issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter; for without jurisdiction, the Court cannot entertain any proceedings...***
>
> ***…Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."***

28. The appellant's letter dated 29th October 2010 summarily terminating the respondent's employment precipitated the dispute between the parties in this appeal. The judicial review proceedings in the High Court challenging the employment termination process were commenced by the respondent in November 2010 during the currency of The Constitution of Kenya, 2010 that was promulgated on 27th August 2010. Article 162(2) the Constitution of Kenya, 2010 provides that Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to employment and labour relations, amongst other courts [2] . Under section 7 of the Sixth Schedule to the Constitution all law in force immediately in force before the effective date (the promulgation of the Constitution) continued in force. Pending enactment of legislation for establishment of employment and labour court[3], the Labour Institutions Act, Act No. 12 of 2007, which, under section 11 thereof, established the Industrial Court, continued in force.

29. The jurisdiction of the Industrial Court under the Labour Institutions Act was set out under Section 12 of Act. Section 12(1) 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, between employee or employer's organization and a trade union or between a trade union, an employer's organization, a federation and a member thereof."***

30.Under Section 12(4):

***"(4) In the discharge of its functions under this Act, the Industrial Court shall have the power to grant injunctive relief, prohibition, declaratory order, award damages, specific performance or reinstatement of an employee."***

31.Subsections 5 and 6 of section 12 are also relevant and provided that;

***"(5) In deciding on a matter, the Industrial Court may make any other order it deems necessary which will promote the purpose and objectives of this Act.***

***"(6) Any decision or order by the Industrial Court shall have the same force and effect as a judgment of the High Court and a certificate signed by the Registrar of the Industrial Court shall be conclusive evidence of the existence of such decision or order."***

32.The remedial powers of the Industrial Court in cases of wrongful dismissal were extended under section 15 of the Labour Institutions Act to include powers to order reinstatement of an employee, power to order re-engagement of an employee and power to order payment of compensation.

33. The purpose for which the respondent commenced judicial review proceedings in the High Court is manifest from his notice of motion presented to the High Court on 25th November 2010 and the Statement filed pursuant to Order 53 of the Civil Procedure Rules. It was to quash the summary dismissal; to prohibit the appellant from terminating his contract of employment without following due process; to direct the appellant to re-admit the applicant in employment. In effect, the substantive reliefs that the respondent sought were reliefs that the Industrial Court had authority, under the provisions of the Labour Institutions Act that we have reproduced above, to grant.[4]

34. However, and as submitted by Mr. Kanjama for the respondent, we agree that under section 60 of the retired Constitution of Kenya, the High Court had "*unlimited original jurisdiction in civil and criminal matters and such other jurisdiction and powers as may be conferred on it by this Constitution or any other law*."[5]

35. Section 8 of the Law Reform Act Chapter 26 of the Laws of Kenya is such "*other law*" that has conferred on the High Court power to make "*a like order*"[6] as the High Court in England is by virtue of the provisions of section 7 of the Administration of Justice (Miscellaneous Provisions) Act, 1938, of the United Kingdom empowered to make that is an order of mandamus, prohibition or certiorari. There is no provision extending those powers to the Industrial Court although under the provisions of section 12(6) of the Labour Institutions Act any decision or order by the Industrial Court has the same force and effect as a judgment of the High Court.

36. The learned Judge of the High Court was alive to the fact that the respondent had commenced proceedings in the Industrial Court over the same subject matter. In her judgment, the learned Judge observed:

***"It is evident from the court record that prior to the filing of the substantive motion, the applicant had filed a claim in the Industrial Court in Cause No. 1590 of 2010 in which he had sought orders of reinstatement in the respondent's employment and in the alternative, damages and compensation for unlawful and unfair termination of employment. On application by the***

***respondent, the case at the Industrial Court was stayed pending the hearing and determination of this case".***

37. It is clear from that passage that the learned Judge was aware that the proceedings before the Industrial Court had been commenced "*prior to the filing of the substantive motion*" in the judicial review proceedings. Should the learned Judge have, in those circumstances, proceeded to determine the matters before her on merits? We do not think so. In our view, the proper course that the Judge should have taken was to let the Industrial Court as the first port of call to determine what was clearly a dispute between an employer and employee, perhaps disguised as a matter for judicial review.

38. We think, as a matter of policy of the law that finds expression in section 6 of the Civil Procedure Act for instance that no court should proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties where such suit or proceeding is pending in the same or any other court having jurisdiction to grant the relief claimed. The sound object behind that policy is to prevent courts of concurrent jurisdiction from simultaneously trying two parallel suits or proceedings in respect of the same subject matter in issue.

39. That policy underlies the pronouncement by the Supreme Court in **Hermanus Phillipus Steyn vs. Giovanni Gnecchi-Ruscone, [2013] eKLR** when dealing with the question whether the Constitution of Kenya, 2010 had conferred concurrent jurisdiction both to the Court of Appeal and the Supreme Court in certification of matters that are of great public importance. Taking the view that the Court of Appeal and the Supreme Court have concurrent jurisdiction, the Supreme Court went on to say:

> ***"We would agree with counsel that, indeed, we have concurrent jurisdiction; and when one opts to exercise one's right under either of the entities with jurisdiction, one cannot again go before the other entity with the same subject matter. This is the reasoning behind the principle of res judicata in civil matters, in choosing*** **the** ***Court (forum) in which to institute a matter."***

40. There is no doubt in our minds that the subject matter of the proceedings commenced by the respondent before the Industrial Court is the same as the subject matter in the judicial review proceedings with which the learned judge of the High Court was dealing. We are also aware that where a matter is for all intents and purposes a matter falling within the jurisdiction of the Industrial Court, and such matter is framed as either a constitutional reference or as judicial review proceedings, the practice in the High Court is to re- direct such matters to the Industrial Court[7]. It is a practice that recognizes the role and importance of specialized courts and promotes the just, expeditious and proportionate resolution of disputes. In **United States International University (USIU) vs. Attorney General (2012) eKLR**, a matter decided under the Constitution of Kenya, 2010 and in the context of the Industrial Court Act, 2011, the High Court is categorical that it should not continue to hear and determine labour and employment matters.

41. The upshot of the foregoing is that we consider there is merit in the appellant's complaint that the learned Judge erred in proceeding with the judicial review proceedings when the same subject matter was pending before the Industrial Court, being the only court vested with requisite jurisdiction. For that reason alone we allow the appeal and set aside the whole of the judgment of the High Court delivered on 11th October 2012.

42. In view of the conclusion we have reached, it is not necessary to pronounce ourselves on the issue whether the respondent had prior to the commencement of the proceedings served notice on the managing director of the appellant in accordance with section 34 of the Act, and if not, whether the proceedings were competent as that issue may be a live issue before the Industrial Court[8].

43. As regards costs, each party shall bear its own costs of the proceedings before the High Court. The appellant shall however have costs of the appeal.

**Dated and delivered at Nairobi this 20th day of March, 2015.**

**G. B. M. KARIUKI, SC**

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**JUDGE OF APPEAL**

**P. M. MWILU**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU,FCIArb**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

**Endnotes:**

[1] Both provisions were subsequently repealed under section 31of the Industrial Court Act, Act No 20 of 2011 which repealed Part III of the Labour Institutions Act, 2007. The Industrial Court Act, Act No 20 of 2011 commenced on 30th August 2011. See also Section 12 of that Act dealing with exclusive jurisdiction.

2. Under the Fifth Schedule to the Constitution, the legislature had a period of one year to enact legislation on the system of courts.

3. The Industrial Court Act, Act No. 20 of 2011 was enacted by parliament pursuant to Article 162(2) of the Constitution commenced on 30th August 2011.

[4] It is noteworthy that under section 12 of the Industrial Court Act, Act No.20 of 2011 enacted under the current Constitution, the Industrial Court established under section 4 that Act in pursuance of Article 162(2) of the Constitution is, like its predecessor, clothed with “exclusive original” in disputes relating to or arising out of employment between an employer and an employee and has extensive powers in terms of the reliefs it can grant.

5. Unlike the current Industrial Court established in pursuance of Article 162(2) of the Constitution that has “*the status of the High Court*”[5] the Industrial Court under the Labour Institutions Act could not bost of similar status and was arguably subordinate to the High Court

6. See section 8(2) of the Law Reform Act, Chapter 26 of the Laws of Kenya.

[7] For example in Gladys Boss Shollei vs. Judicial Service Commission [2013] eKLR, the matter had been initiated in the High Court and was by consent transferred to the Industrial Court in recognition of Article 162(2) of the Constitution of Kenya, 2010 and section 12 of the Industrial Court Act, 2011 conferring exclusive jurisdiction on that court in matters relating to or arising out of employment between an employer and an employee.

[8] The High Court has recently taken the view in **Kenya Bus Services Ltd and another vs. Minister for Transport and others [2012] eKLR** that a similar provision, namely section 13A of the Government Proceedings Act, requiring service of notice prior to institution of a suit violates the provisions of Article 48 of the Constitution. We were not addressed on this and do not express any view on the matter.