



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, MWERA & KIAGE, JJ.A)

CIVIL APPEAL NO. 6 OF 2012

BETWEEN

PROF. DANIEL N. MUGENDI APPELLANT

AND

KENYATTA UNIVERSITY

BENSON I. WAIREGI

ELIUD MATHIU

PROF. OLIVE M. MUGENDA RESPONDENTS

(An appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Mumbi Ngugi, J) dated 4th November, 2011

in

H. C. Petition No. 142 of 2011)

JUDGMENT OF THE COURT

On 4th November, 2011 a ruling was delivered by the High Court (*M. Ngugi, J*) dismissing the Nairobi Constitutional Reference No. 142/11, filed on 23rd August, 2011. The appellant/petitioner had sought that court's orders to enforce his fundamental rights under Articles 2, 12, 19, 20, 21, 22, 23, 28, 33, 39, 41, 45, 47, 50, 73, 232 and 236 of the Constitution as against the respondents set out in the heading of the petition.

The background of this matter is that the appellant was an employee of the 1st respondent, in accordance with the Kenyatta University Act (Cap 210C). The rest of the respondents are employees/officers of the 1st respondent in one capacity or another. The appellant stated in the petition that he was appointed in an acting capacity as the Deputy Vice-Chancellor (Finance, Planning and Development) by the 1st respondent on 24th May, 2006 and confirmed on 3rd August, 2007. His contract was to run for five years i.e. up to 7th August, 2012 with an option to renew. The rest of the petition

stated:

“11. In breach of the said employment contract, the 2nd respondent vide the letter dated 10th August, 2011 sent the petitioner on compulsory leave, and further vide the memo dated 11th August, 2011 barred the petitioner from undertaking his “administrative and academic responsibilities” and from accessing the University’s premises and facilities.

12. The petitioner avers that his rights have been brazenly and violently violated on inter alia the following grounds:-

- i. The adverse action against the petitioner was actuated at the instance of the 4th respondent who has had disagreements with the petitioner since 2008 based on the 4th respondent’s misinterpretation of the petitioner’s powers and responsibilities and the 4th respondent’s documented actions to undermine the petitioner;**
- ii. The only motivation for the adverse action against the petitioner was standing up to the 4th respondent’s capricious, highhanded and dictatorial style of leadership, and the 4th respondent’s imprudent financial policies and expenditure;**
- iii. The petitioner can only be sanctioned by the University Council on due notice, both of which are absent;**
- iv. The action of the 3rd and 4th respondents to sanction the petitioner is void;**
- v. The suspension is an egregious violation of the petitioner’s rights to due process, fair administrative action, access to justice, fair hearing, and additional rights to family and labour rights.”**

It was further pleaded that the High Court had jurisdiction to entertain the petition as mandated by the Constitution. The appellant prayed for orders:-

“(a) THAT, a declaration do issue that the compulsory leave notice dated 10th August, 2011 and subsequent notices from the respondents are void;

(b) THAT, a declaration do issue that the petitioner’s rights have been violated;

(c) THAT, permanent injunction do issue restraining the respondents from in any way interfering with, violating or terminating the petitioner’s tenure as the Deputy Vice Chancellor (Finance, Planning and Development);

(d) THAT, a declaration do issue that any sections of the Kenyatta University Act Cap 210C and the statutes thereunder that violate the Constitution are void to that extent;

(e) THAT, an order of compensation do issue and that formal proof on quantum be gone into;

(f) THAT, the orders by the respondents in suspending the petitioner and all other proceedings thereafter be recalled and quashed by issuance of Judicial Review Orders;

(g) THAT, such other or further orders as the court may deem necessary to enforce the Constitution do issue.”

The appellant swore a supporting affidavit virtually reiterating his prayers and hardly stating in what way all the nineteen (19) Articles reproduced in the title of the petition were allegedly violated. He

also appended to the supporting affidavit the correspondences/memos touching on his employment, suspension from the same, being sent on compulsory leave and memos the appellant had exchanged with the 4th respondent which, to him, actuated his suspension from duty, later followed by termination of services.

The learned trial Judge dismissed the petition for lack of jurisdiction. The application for contempt dated the 4th day of October, 2011 was also dismissed on the basis that the order allegedly disobeyed had not been served personally on the alleged contemnors/respondents. The appellant was aggrieved with that decision and has filed this appeal raising some twelve (12) grounds of appeal.

Mr. Donald B. Kipkorir of Kipkorir, Titoo & Kiara Advocates learned counsel who filed the petition appeared for the appellant both in the High Court and also in the appeal before us while **Mr. Emmanuel Wetangula** and **Gabriel Mwangi** appeared for the respondents.

Mr. Kipkorir, argued the 12 grounds of appeal in a summary form or in other words, globally. On jurisdiction, learned counsel argued that the petition before the High Court encompassed both breach of fundamental rights and breach of contract of employment. Breach of fundamental rights was justiciable in the High Court as of right. Breach of contract of employment on the other hand was also justiciable in the High Court at the time because up to 19th July, 2012 when the Industrial Court was gazetted, the High Court had jurisdiction on such matters. For this reason, the learned trial Judge should not have declined jurisdiction. Alternatively, if the learned trial Judge was of the view that the High Court had no jurisdiction to deal with the issues on the contract of employment, the learned trial Judge should have directed that the appellant do move to the Industrial Court instead of striking out the entire petition. He also argued that the appellant's petition was meritorious considering that by virtue of the position then held by the appellant in the 1st respondent's establishment, only the senate and not the general purpose committee could initiate termination proceedings against the appellant.

Learned counsel continued to submit that the appellant was granted some injunctive orders on 21st September, 2011 to last until his petition was finally determined. These orders were served on 22nd September, 2011 on the lawyers of the respondents and the secretary to the Vice Chancellor. On 26th September, 2011 the respondents applied to set aside those injunctive orders and on the same day served the appellant with a dismissal letter, – an act that caused the contempt application to be filed. It is the appellant's argument that the respondents were aware of the injunctive orders issued on 21st September, 2011 and therefore did not have to be personally served with those orders. The injunctive orders had restrained the respondents from proceeding with disciplinary action against the appellant, yet they did just that, all ending in dismissal. The contempt proceedings were therefore meritorious. The learned trial judge was therefore in error when she dismissed contempt proceedings after she had declined jurisdiction.

On the basis of the foregoing assertions, learned counsel urged us to allow this appeal so that the Industrial Court can hear this matter.

Mr. Emmanuel Wetangula, learned counsel for the respondents started by stating that the grounds of appeal before us did not touch on the discipline issue; that breach of contract could not be equated to violation of fundamental rights; that for the former, there existed the Industrial Court under the now repealed Labour Relations Act, before the present Industrial Court was set up by an Act of Parliament; with lack of jurisdiction the court could not transfer an essentially employment claim to the appropriate court; the appellant should not have gone to the High Court with this claim and that the right forum was the Industrial Court.

It was further submitted that since the appellant was not a constitutional office holder, and considering that the appellant did not specify/enumerate any of his fundamental rights allegedly breached, the learned trial Judge was entitled to hold that the appellant's petition largely dwelt on suspension from employment and determine that the appellant's claim lay to be determined with the Industrial Court. The petition was therefore properly struck out for want of jurisdiction.

Turning to the contempt of court proceedings issue, learned counsel argued these were argued before the learned judge of the High Court because the parties agreed to that by consent. And having been so argued they invited a decision from the learned Judge which decision the learned Judge gave dismissing the contempt proceedings. To fortify their stand learned counsel cited in the case of **Nyamodi Nyamogo & Another vs K P & T Corporation Civil Appl. Nai 264 of 1993** to the effect that when a party wishes to cite another for contempt, invoking the powers donated by **section 5** of the Judicature Act, that party must first obtain leave of the court, to so cite ; second the orders to be obeyed must be personally served on the respondent, which was not done here notwithstanding that in any event the orders the appellant obtained on 21st September, 2011 did not restrain the respondents from proceeding with disciplinary action against the appellant. So the appeal ought to be dismissed.

This being a first appeal, we are reminded of our primary role as the first appellate court namely to re-evaluate, reassess and re-analyze the facts that were placed before the learned trial Judge and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of **Sumaria and Another versus Allied Industries Limited (2007) KLR** wherein the court of appeal held inter alia that:-

“Being a first appeal, the court was obliged to consider the evidence, re-evaluate it and make its own conclusion bearing in mind that the Court of Appeal would not normally interfere with a finding of fact by the trial court unless it was based on misapprehension of the evidence or that the judge has shown demonstrably to have acted on wrong principle in reaching the finding he did”

The two issues argued before us i.e. jurisdiction and contempt of court, were argued by both sides before the High Court and the learned judge made due findings on the two. She stated:

“From the pleadings and the submissions made before me, I find that the court is called upon to determine two issues in this matter. The first relates to its jurisdiction to hear and determine the petition herein, and the second relates to whether 2nd, 3rd and 4th respondents should be punished for contempt of the court order issued by this Court on 21st of September, 2010.”

From the above, the parties placed before the superior court the issues they desired determined. The learned judge perused the related pleadings together with submissions thereto and made a determination. It was not submitted that if the learned judge found that she had no jurisdiction in the whole case then she should not move to determine the issue the contempt of court. However, it is a basic principle in the administration of justice that once an adjudicating body finds that it has no jurisdiction to entertain a given matter, then it must there and then down its tools and proceed no more to the other parts of that matter. See the case of **Rafiki Enterprises Limited versus Kings Way Tyres and Gatumart Limited Nai Civil Application No.375 of 1996 (UR)** wherein this Court held inter alia that:- ***“Every court has a duty to determine whether or not it has jurisdiction in a particular matter...”***

On jurisdiction the learned judge found that she had none to entertain the petition before her because:

“From all the pleadings filed in this matter and in particular the petition and the affidavit in support as well as the orders sought by the petitioner in its application of 21st September, 2011, it is not in doubt that the dispute between the petitioner and the respondents arises out of the petitioner’s employment with the 1st respondent.”

And then the judge went on to enumerate aspects touching on the employment breach of contract, being sent on compulsory leave and others. And for her, such “rights” fell to be determined by a court established under **Article 162 (2) (a)** of the Constitution.

“162. (1)

(2) Parliament shall establish courts with status of the High Court to hear and determine disputes relating to

- a. **employment and labour relations;**
- b. **The environment and the use and occupation of, and title, to land.”**

The learned judge continued:

“The Constitution has made provision to safeguard fundamental rights and freedoms, but it has also made provision for the adjudication and resolution of disputes arising under different areas of law relating to the rights of citizens,”

Citing the case of **Alphonse Mwangemi Munga & Others vs African Safari Club Ltd [2008] eKLR**, the learned judge was persuaded that the Constitution had to be read together with other laws made by Parliament. It should not be so construed as to be disruptive of other laws in the administration of justice and that accordingly parties should make use of the normal procedures under the various laws to pursue their remedies instead of all of them moving to the constitutional court and making constitutional issues of what is not. With all the foregoing, the learned judge concluded that the claim placed before her by the appellant was based on employment – a matter that should have instead been taken to the Industrial Court which had constitutional and statutory jurisdiction over such matters and not the High Court in the form of a constitutional reference.

Having heard counsel submit on this issue of jurisdiction and also having gone over the nature of the pleadings as placed before the High Court as well as the manner in which that court found and determined the reference, we do not discern any fault on the part of the learned judge. We say so because the drafting, tenor and substance of the reference before her was essentially on breach of terms of employment. All this shines through the quotations (above) from the petition as regards the orders, and prayers stated. The appellant was hired by the 1st respondent as Deputy Vice Chancellor according to the Kenyatta University Act. In alleged breach of that employment contract, the 1st respondent allegedly sent him on compulsory leave, suspended him from duty and stopped his emoluments before finally firing him. So the appellant had gone before the High Court for declarations/orders that the compulsory leave was void, terminating his employment should be halted and he should be paid compensation. To any mind, this petition was essentially an employment claim that should have gone to the Industrial Court in accordance with **Article 162 (2) (a)** above, and the learned judge rightly declined jurisdiction over it.

When coming to that conclusion we are alive to the fact that in the heading/title of the petition the appellant cited several articles of the Constitution and he prayed for an order:

“(b) That a declaration do issue that the petitioner’s rights have been violated.”

As we observed earlier, nowhere in the petition were those rights set out specifically and pleaded. It was not even suggested that submissions/arguments were placed before the learned judge for/against those unspecified rights allegedly violated. We say so because it is not the appellant’s ground of appeal that material of the alleged violations were set before the judge and she ignored the same. Instead we noted a ground of appeal wherein it was claimed that she was **“selective on the court record”** and that she **“showed demonstrative bias.”** There was no demonstration of such an approach by the learned judge. The decision to decline jurisdiction was solely based on the way pleadings were laid out beginning with what was perceived as the grounds for the cause of action, to the orders sought. While still on this point of pleadings, **Majanja, J** when delivering a judgment after hearing two consolidated **Constitutional Petitions no. 373, 426 of 2012, Stephen Waweru Wanjohi & Others vs the Attorney General & Others**, and **Kipnetich Maiyo & Others vs the Kenya Land Commission Selection Panel & Others** said the following with which agree:

“The key purpose of pleadings is to set out facts which constitute a cause of action.”

In those two causes, the petitioners were challenging the way the members of the National Land Commission had been selected. Facts therein are not relevant here but the principle stated is that the purpose and drafting of pleadings is to set out facts constituting a cause of action. Pleadings should clearly and specifically set out facts in order to enable the court to grasp what the cause of action is and what orders to consider. We can say here that the appellant’s pleadings were about an employment claim and nothing of the alleged violation of rights. None was pleaded nor set out in the supporting affidavit.

It needs no repeating that *The Constitution of Kenya (Supervisory, Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules 2006*, still govern the procedure to be followed when one petitions under the Constitution 2010. Those Rules, popularly called the “*Gicheru Rules*” did stipulate, inter alia that:

“11. Where a contravention of any fundamental rights and freedoms of an individual under sections 70 to 83 (inclusive) of the Constitution is alleged or is apprehended an application shall be made directly to the High Court.

12. An application under rule 11 shall be made by way of a petition as set out in Form D in the Schedule to these Rules.”

13. The petition under rule 12 shall be supported by an affidavit.”

Those rules related to the now repealed Constitution where fundamental rights falling under *sections 70 to 83* are those that appear under the Bill of Rights (Chapter Four) of the current Constitution 2010.

If we may reproduce Form D (*rule 12*) to emphasize what we are about to focus on, its format is as follows:

“FORM D

IN THE HIGH COURT OF KENYA AT

PETITION NO. OF 20

IN THE MATTER OF SECTION 84 (1)

IN THE MATTER OF ALLEGED CONTRAVENTION

OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER

SECTION (insert section)

BETWEEN

A.B. (insert names of parties) PETITIONER

AND

C.D. (insert names of parties) RESPONDENT

To:

The High Court of Kenya

The humble petition of A.B (insert names of petitioner of in the Republic of Kenya is as follows: (the allegations upon which the petitioner(s) rely must be concisely set

out, in consecutively numbered paragraphs

.....

Your petitioner(s) therefore humbly pray(s) that (set out exact Order(s) sought)

Or that such other order(s) as this Honourable Court shall deem just.

Dated at this day of 20

Signed Petitioner/Advocate for the Petitioner

DRAWN & FILED BY:

TO BE SERVED UPON:”

So as per the Gicheru Rules, it can be noted that the petitioner is required to set out the sections (now Articles) of the Constitution allegedly violated. Then one should set out **concisely** the allegations upon which he/she wishes to rely, in consecutively numbered paragraphs. The petitioner also must set out **exact** orders sought. That is the kind of pleading required of a petitioner. The petition must be supported by an affidavit. The **contents** of an affidavit should be within the knowledge of the deponent. As Majanja J observed, after stating the purpose of pleadings (see above):

“Similarly, the purpose of an affidavit is to depone to facts which the deponent knows of his knowledge, information and belief. Affidavits should not express the deponent’s opinions or those of the advocate. These matters are better left for submissions. I do not think that this obligation is lessened merely because the matter is one filed to enforce fundamental rights and freedoms under Article 22 or enforce the Constitution under Article 258. Argumentative pleadings, devoid of facts obscure the real issues in controversy and more often than not undermine the objective of expeditious disposal of matters.”

We respectfully agree with **Majanja J’s** position on the purpose and effect of pleadings and supporting affidavits as asserting the correct position in law as we know it.

The appellant did not concisely and exactly set out the specific allegations of violation of rights under the Constitution or the orders sought. Our view is that the subject petition set out breaches of a contract of employment as the cause of action and then narrated what orders were being sought. Such was only suitable for lodging a claim at the Industrial Court. And for that the appellant who proceeded to the High Court did not contribute to the principle of expeditious disposal of matters. He went to the wrong venue and he was so told.

After hearing arguments in this appeal and finding that the appellant went to the wrong court, we wondered whether the High Court could have severed his **“mixed grill”** petition so that alleged breaches of rights could be handled by it while the employment claim went to the Industrial Court. We even considered whether the inelegant drafting of the claims of violations of rights could be amended and heard by the High Court. While **Mr. Wetangula** for the respondent thought that the whole appeal should fail with no directions regarding “severance” of the claim, **Mr. Kipkorir** pleaded with us to allow the appeal so that, if we quote him correctly:

“We should be heard on merit now that the Industrial Court is in place.”

The question now is whether the appellant should go back and “sever” the composite petition alleging violation of his fundamental rights and breach of contract of employment. Much as such a severance would entail time and resources to effect the necessary amendments and make due motions, we are of the view that with necessary amendments, which appear imperative to make out a clear use of

breach of rights being effected, the appellant can and should be heard by the Industrial Court on the two claims i.e. violation of rights and breach of contract of employment. The position that the Industrial Court can and should entertain the claim as laid by the appellant, is in line with the decision of Majanja, J. in ***Petition No.170 of 2012 – United States International University (USIU) Vs The Attorney General & Others.***

In the ***USIU*** case the petitioner was a respondent in the ***Industrial Court Cause No.82/2011, Eric Rading Ota Vs United States International University.*** An award had been made there on 30th November, 2011. However, in the process of executing it, ISIU filed the petition No.1170/12 for conservatory orders to stop the execution in the High Court. The petitioner (USIU) contended that the judges of the Industrial Court, who made the award had not first taken the oath of office pursuant to ***Article 74 of the Constitution*** and thus the award/orders they made were unconstitutional, null and void and therefore incapable of execution, through the High Court.

The learned judge framed the issue before him thus:

“1. The central issue to be determined is whether the High Court should continue to determine labour and employment matters in the light of the establishment of the Industrial Court.”

That question was framed on the basis that the employment and labour relations court was contemplated by ***Article 162(2) of the Constitution.*** It was then established by the ***Industrial Court Act*** (Act No.20 of 2011) and its judges were appointed on 12th July, 2012 vide ***Gazette Notice No.9797*** of 19th July, 2012.

For our purposes, it does not appear necessary to go into the details of the Industrial Court Cause (above) or the details of the award. Suffice it to say that the learned judge was concerned with and he determined the issue whether the High Court could still continue to entertain employment and labour disputes when an Industrial Court had been established for just that – to deal exclusively with such disputes as set out in ***S.12 of the Industrial Court Act***, alluded to above. Again the detail of the whole range of the nature of disputes that should be laid before the Industrial Court are not pertinent here. However, in his long and well-researched determination, covering legislation more or less similar to the content of our ***Article 162(2)***, and cases so far determined in South Africa, ***Majanja, J.*** delivered himself in part of his determination thus:-

“49. A correspondent court to the High Court, that is the Industrial Court, has now been established to deal with employment and labour matters. It follows that all employment and labour relations matters pending in the High Court shall now be heard by the Industrial Court which is now a court of the status of the High Court. The High Court therefore lacks jurisdiction to deal with matters of employment and labour matters whether filed in the High Court before or after the establishment of the Industrial Court.” (undertaking supplied.)

And with that the learned judge directed that the two causes that gave rise to the petition before him be transferred to the Industrial Court for hearing and determination.

The learned judge had in the proceedings before him been addressed on the aspect where it was alleged that fundamental rights relating to employment and labour (Article 41 Constitution) had been violated, and whether the Industrial Court could entertain such claims. While adopting the position enunciated in the South African case of ***Gcaba Vs Minister of Safety and Security & Others CCT 64/08 (2009) ZACC 26, Majanja, J*** proceeded:

“44. ...I would adopt the position of the Constitutional Court of South Africa in Gcaba Vs Minister of Safety and Security (Supra). The Industrial Court is a specialist court to deal with employment and labour relations matters. By virtue of Article 162(3), section 12 of the Industrial Court Act 2011 has set out matters within the exclusive domain of that court. Since the court is of the same status of the High Court, it must have the jurisdiction to enforce labour rights in Article 41 and the jurisdiction to interpret the Constitution and fundamental rights and freedoms, is incidental to the exercise of jurisdiction over matters within its exclusive domain. In any matter falling within the provisions of

Section 12 of the Industrial Court Act, then the Industrial Court has jurisdiction to enforce, not only Article 41 rights but also all fundamental rights ancillary and incidental to the employment and labour relations including interpretation of the Constitution within the matter before it.

We have quoted *in extenso* the pertinent parts of the judgment above for the relevance attached to this appeal. In sum on this ground of jurisdiction, we find as we had stated earlier that the High Court had no jurisdiction to entertain the claim which essentially was based on breaches of contract of employment along with some unstated claims of breaches of rights, as the learned judge did find.

Believing as we do that the approach taken by *Majanja J* is the correct one, and in endeavouring to meet the ends of justice untrammelled by procedural technicalities, we set aside the order striking out the appellant's petition and direct that the High Court do transfer it to the Industrial Court which also has jurisdiction and authority to consider the claims of breach of fundamental rights as pertain to industrial and labour relations matters. It is only meet and proper that the Industrial Court do exclusively entertain those matters in that context and with regard to **Article 165(5)(b)**. And in order to do justice, in the event where the High Court, the Industrial Court or the Environment & Land Court comes across a matter that ought to be litigated in any of the other courts, it should be prudent to have the matter transferred to that court for hearing and determination. These three courts with similar/equal status should in the spirit of harmonization, effect the necessary transfers among themselves until such time as the citizenry is well-acquainted with the appropriate forum for each kind of claim. However, parties should not file "*mixed grill*" causes in any court they fancy. This will only delay dispensation of justice.

In the same token 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.

The other ground argued was the dismissal of the application to commit the respondents for contempt to civil jail. Yes, after the learned judge found that she had no jurisdiction to entertain the petition as placed before her, she should have stopped there and done nothing further or more with the matter. This is what Nyarangi J.A. said in **Owners of the Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd [1989] KLR 1, 14** while addressing the issue of jurisdiction in an admiralty appeal:

I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law (should) down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

Although we appreciate that the learned judge made a decision on the contempt proceedings even after finding that she had no jurisdiction in the industrial proceedings before her, because the parties consented and argued the matter before her, she ought not have gone on to decide that matter, having found that she had no jurisdiction. That is the law. We accordingly allow this ground of appeal and set aside the High Court order regarding it.

In conclusion this appeal partly succeeds and partly fails. Each party will bear its own costs.

Dated and delivered at Nairobi this 17th day of May, 2013.

R. N. NAMBUYE

.....

JUDGE OF APPEAL

J. W. MWERA

.....

JUDGE OF APPEAL

**P. O.
KIAGE**

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

/jkc