



Republic v Board of Directors, Agriculture & Food Authority & 3 others; Gikonyo (Nuts and Oil Crops Directorate) & 6 others (Interested Parties); Kiume (Exparte Applicant) (Judicial Review Application E027 of 2024) [2024] KEELRC 2701 (KLR) (30 October 2024) (Ruling)

Neutral citation: [2024] KEELRC 2701 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

JUDICIAL REVIEW APPLICATION E027 OF 2024

B ONGAYA, J

OCTOBER 30, 2024

IN THE MATTER OF ARTICLES 1, 2, 3, 10, 19, 20, 22, 23, 27, 41, 73, 75, 232, 233, 234 AND 258 OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, THE LAW REFORM ACT AND ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010

IN THE MATTER OF THE AGRICULTURE AND FOOD AUTHORITY (NO. 13 OF 2013)

IN THE MATTER OF THE ILLEGAL, IRRATIONAL DISPROPORTIONATE, UNFAIR AND PROCEDURALLY IMPROPER DECISION BY THE BOARD OF DIRECTORS OF THE AGRICULTURE AND FOOD AUTHORITY TO ALTER THE ORGANISATIONAL STRUCTURE OF THE AUTHORITY.

IN THE MATTER OF THE AGRICULTURE AND FOOD AUTHORITY’S ORGANISATIONAL STRUCTURE, GRADING AND STAFF ESTABLISHMENT POLICY, OF APRIL 2024.

BETWEEN

REPUBLIC APPLICANT

AND

THE BOARD OF DIRECTORS, AGRICULTURE & FOOD AUTHORITY 1ST RESPONDENT

CABINET SECRETARY, MINISTRY OF AGRICULTURE & LIVESTOCK DEVELOPMENT 2ND RESPONDENT

STTAE CORPORATIONS ADVISORY COMMITTEE 3RD RESPONDENT

PUBLIC SERVICE COMMISSION 4TH RESPONDENT

AND



ANNE GIKONYO (NUTS AND OIL CROPS DIRECTORATE) INTERESTED PARTY

BENSON APUOYO (COFFEE DIRECTORATE) INTERESTED PARTY

CALISTUS EFUKHO (FOOD CROPS DIRECTORATE) INTERESTED PARTY

CHRISTINE CHESARO (HORTICULTURAL CROPS) INTERESTED PARTY

JUDE CHESIRE (SUGAR DIRECTORATE) INTERESTED PARTY

FELIX MUTWIRI (MIRAA, PYRETHRUM & OTHER INDUSTRIAL CROPS) INTERESTED PARTY

GRACE KYALO (FIBRE CROPS DIRECTORATE) INTERESTED PARTY

AND

CHRISTINE MUMBI KIUME EXPARTE APPLICANT

RULING

1. The 1st respondent herein filed the Notice of Preliminary Objection dated 24.06.2024 through Lubulellah & Associates Advocates on the following grounds:
 - i. The Honourable Court lacks jurisdiction to hear or entertain the Application for Judicial Review in the circumstances of the suit.
 - ii. Whereas the Honourable Court possesses jurisdiction to interpret and apply *the Constitution*, that jurisdiction is not original or unlimited like that of the High Court. It is limited to constitutional issues that arise in the context of employment and labour relations (*Daniel N. Mugendi -v- Kenyatta University & 3 Others* [2012] eKLR). Every litigant purporting to exercise the right under Article 258 of *the Constitution* to litigate on behalf of another person who cannot act in their own name, or in the interests of a class of persons, or acting in the public interest, can only validly invoke the jurisdiction of the ELRC 162 (2)(a) and (3) which empowers Parliament to determine the jurisdiction and functions of the Courts contemplated under Article 162(2) of *the Constitution* of Kenya, 2010, which includes the ELRC. Section 12 of the ELRC *Act No. 18 of 2014* has set out the Honourable Court's jurisdiction.
 - iii. There exists no employer-employee relationship between the ex parte applicant, Christine Mumbi Kiume, and any of the respondents, hence no employment or labour related dispute between the parties to be entertained or heard and determined by the Honourable Court in accordance with its exclusive original jurisdiction in accordance with Articles 41 and 162(2) (a) of *the Constitution* of Kenya 2010, as read with Section 12 of the *Employment and Labour Relations Court Act* No. 18 of 2014.
 - iv. The ex parte applicant lacks standing to file and prosecute the Application for Judicial Review before the ELRC Court not being an employee or otherwise directly affected by the Organizational Structure, Grading and Staff Establishment Policy of AFA, and is so to speak a busy body.
 - v. Every litigant seeking to invoke Article 258(2) of *the Constitution* at the ELRC, by law must bring the litigant within the provisions of Section 12 of the ELRC *Act No. 18 of 2014* in order for the Court to entertain the litigant or hear and determine the litigant's suit, for the ELRC



can only interpret and apply *the Constitution* on matters within its jurisdiction as set out in the ELRC Act.

2. The Preliminary Objection was canvassed by way of written submissions. The 1st respondent and the ex parte applicant filed their respective submissions while the 2nd, 3rd and 4th respondents chose not to participate in the said preliminary objection proceedings.
3. The ex parte applicant's case was that the Notice of Preliminary Objection does not meet the threshold set for preliminary objections, as it does not disclose pure points of law, and its determination involves disputed facts. The Court has considered the rival submissions and returns as follows.
4. The Court has considered and been guided by the judgment of the Supreme Court in *Kenya Tea Growers Association and 2 others -Versus- The National Social Security Fund Board of Trustees and 7 others Petition E004 of 2023* as consolidated with Petition No. E002 of 2023 (Kooame CJ & P; Mwilu DCJ & V-P; Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ) delivered on 21.02.2023. At paragraph 75 of the Judgment, the Supreme Court with reference to section 12(2) of the *Employment and Labour Relations Court Act* concluded thus, "From the above provisions of *the Constitution* and the Act, it is clear that the jurisdiction of the ELRC is limited in terms of the types of disputes and the parties." Further, "[83] Can it be said that the parties herein are not among the disputants contemplated under Section 12(2) of the ELRC Act? Even where the Act stipulates that a complaint, application or suit may be lodged against the Cabinet Secretary for Labour or any office established by law for that purpose? Or that the nature of the dispute is not one that falls within the jurisdiction of the ELRC, even where, as in this case, both employers and employees, trade unions, and workers associations are decrying what they consider to be the adverse effect of a new law on their working conditions? We are in agreement with the Court of Appeal to the effect that this dispute did not arise strictly from an employer-employee relationship. But what about the other aspects of the dispute? What meaning is to be ascribed to the phrase "labour relations"?" Further, "[79] In our view, there is nothing in *the Constitution*, the ELRC Act, or indeed in our decision in the Karisa Chengo Case to suggest that in exercising its jurisdiction over disputes emanating from employment and labour relations, the ELRC Court is precluded from determining the constitutional validity of a statute. This is especially so if the statute in question lies at the centre of the dispute. What it cannot do, is to sit as if it were the High Court under Article 165 of *the Constitution*, and declare a statute unconstitutional in circumstances where the dispute in question has nothing or little to do with employment and labour relations within the context of the ELRC Act. But, if at the commencement or during the determination of a dispute falling within its jurisdiction, as reserved to it by Article 162 (2) (a) of *the Constitution*, a question arises regarding the constitutional validity of a statute or a provision thereof, there can be no reason to prevent the ELRC from disposing of that particular issue. Otherwise, how else would it comprehensively and with finality determine such a dispute? Stripping the Court of such authority would leave it jurisdictionally hum-strung; a consequence that could hardly have been envisaged by the framers of *the Constitution*, even as they precluded the High Court from exercising jurisdiction over matters employment and labour pursuant to Article 165 (5) (b). We are therefore in agreement with the appellants' submissions regarding this issue as encapsulated in paragraph 69 of this Judgment."
5. The issue is whether, looking at the pleadings, is the dispute in question got nothing or little to do with employment and labour relations within the context of the ELRC Act. The answer is that the applicant has filed the application against the respondent whereby the subject matter of the dispute is formulation and implementation of the impugned policy which is said to be a human resource instrument with direct impact on employment and labour relations in the public service. As submitted for the applicant, any interested citizen may institute proceedings in this Court with respect to formulation, implementation and interpretation of human resource policies, terms and



conditions of service whether the situ is *the constitution*, statute, subsidiary legislation, policy, practice, contract, collective agreement or such other formal source. Thus, section 2 of the *Employment and Labour Relations Court Act* contemplates and institutes strategic or public interest litigation when it provided thus, “12(2) An application, claim or complaint may be lodged with the Court by or against an employee, an employer, a trade union, an employer’s organisation, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose.” The Court returns that the instant application is made squarely under the provisions of the sub-section and within the holding of the Supreme Court in the cited case. The subject matter falls within the Court’s jurisdiction and the applicant has established standing, accordingly.

6. The Court has considered the 1st respondent’s cited authorities to the effect that to access the ELRC jurisdiction, a litigant moving the Court should show the existence of employer-employee relationship. However, that position is obviously inconsistent with the quoted subsection 12 (2) of the Act and the Supreme Court holding prevails.

In conclusion, the preliminary objection is hereby dismissed with costs in the cause and parties to take directions for further steps towards the expeditious hearing and determination of the petition.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS WEDNESDAY 30TH OCTOBER 2024.

BYRAM ONGAYA

PRINCIPAL JUDGE

