



REPUBLIC OF KENYA



KENYA LAW
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**Ibwaga & 84 others v Attorney General (Employment and Labour Relations
Petition E071 of 2023) [2023] KEELRC 2802 (KLR) (3 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2802 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E071 OF 2023
AN MWAURE, J
NOVEMBER 3, 2023**

BETWEEN

EUNICE IBWAGA & 84 OTHERS PETITIONER

AND

ATTORNEY GENERAL RESPONDENT

RULING

1. The Respondent raised a preliminary objection dated 23rd June 2023 in opposition of the Petitioner's petition herein dated 12th April 2023 on grounds that:
 1. this Honourable Court lacks jurisdiction to entertain these proceedings. It is only the High Court by dint of articles 165(3)(d)(i) of the Constitution that has jurisdiction to determine the question whether any law is consistent with or in contravention of this Constitution.
 2. this Honourable Court lacks jurisdiction to entertain these proceedings by dint of the provisions of section 12 of the Employment and Labour Relations Court Act.
 3. the Petitioners have not rebutted the presumption of constitutionality of section 90 of the Employment Act or at all to warrant the orders sought.
 4. the Petitioners have not demonstrated with precision how its fundamental rights and freedom under the Constitution have been violated or are threatened and has not produced any evidence to prove the alleged violations contrary to the principles espoused in the locus classicus decision in Mumo Matemu v Trusted Society of Human Rights Alliance (2013) eKLR and Annarita Karimi Njeru (1979) KLR 154.
 5. the suit is an abuse of the court process.
 6. the suit is incompetent and ought to be struck out with costs.



Petitioners' Submissions

2. The Petitioners submitted that the main issue for determination is whether section 90 violates constitutional rights of persons seeking redress with regards to contracts of employment upon expiry of the 3-year limitation period prescribed under section 90 of the [Employment Act](#). This is a constitutional issue that arises from employer-employee dispute.
3. The Petitioners submitted that they were in an employer employee relationship, their contracts were terminated unlawfully and they intend to seek redress in this court but cannot do so unless the court addresses the impediment created by section 90 of the [Employment Act](#).
4. The Petitioners submitted that the petition demonstrated the complaint, specific provision of the constitution infringed and the manner it was infringed and have espoused on particulars of unconstitutionality of section 90 of the [Employment Act](#) in accordance with the criteria set in [Anarita Karimi Njeru case](#).

Respondent's Submissions

5. The Respondent submitted that there is no employer-employee dispute in the present suit calling for this court's determination.
6. It further submitted that this court lacks jurisdiction to entertain the suit as only the high court by dint of article 165 (3)(d)(i) of the [Constitution](#) that has jurisdiction to determine whether any law is inconsistent with or in contravention of this contravention.
7. The Respondent submitted that during inception of ELRC files were transferable from the high court to ELRC since it was during the transition period. This court lacks jurisdiction to entertain the present proceedings and equally lacks jurisdiction to transfer the suit to the high court.
8. The Respondent submitted that this court should strive to interpret the provisions of section 90 of the [Employment Act](#) to promote the intent of the legislature. Section 90 of the [Act](#) places all nature of employees in the same room and it fails to envision that the inability to access to justice can be both as a result and cause of disadvantage and poverty and the Petitioner's delay in filing their suit within the requisite time was a result of their impecuniosity hence the inability to afford services of a legal representative
9. The Respondent submitted that the Petitioners are misinterpreting section 90 of the [Employment Act](#). The impugned section limits filing of suits to within 3 years next after the cause of action and not denying Kenyans the right of access to justice.
10. The Respondent further submitted that the petition does not meet the threshold espoused in [Mumo Matemu v Trusted Society of Human Rights](#) and the Anarita Karimi cases which set the threshold to be met in a petition alleging constitutional violations and opined that it should define the dispute to be decided by the court and plead with particularity and reasonable precision on the provisions breached and the nature or manner of the breach alleged or complained of. The present petition and the submissions are merely reproduction of the constitutional provisions allegedly violated according to them without any evidence to prove the alleged violations. The allegations of breach lack basis and is contrary to regulation 10 of the [Employment and Labour Relations Court \(Procedure\) Rules 2016](#) and regulation 10(2) of the [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution\) Practice and Procedure Rules 2013](#). The Constitutional provisions cited by the Petitioners without iota of evidence to not warrant the orders sought.



Analysis and Determination

11. The jurisdiction of the High Court and this court have been clearly set out in the constitution.
12. Article 165 (3) of the Constitution of Kenya provides for the jurisdiction of the High Court as follows:

“Subject to clause (5), the High Court shall have—

- (a) unlimited original jurisdiction in criminal and civil matters;
 - (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
 - (c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under article 144;
 - (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
 - (i) the question whether any law is inconsistent with or in contravention of this Constitution;
 - (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
 - (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
 - (iv) a question relating to conflict of laws under Article 191; and
 - (e) any other jurisdiction, original or appellate, conferred on it by legislation.”
13. The Employment and Labour Relations Court was established under article 162 (2)(a) as a court with the status of the High Court to hear and determine disputes relating to employment and labour relations and its jurisdiction is spelled out under section 12(1) and (2) of the Employment and Labour Relations Act, No. 20 of 2011 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 unions 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 hereof;
- i. disputes concerning the registration and election of trade union officials; and;
- j. disputes relating to the registration and enforcement of collective agreements.

(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 organization, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose."

14. Section 12(3) of the [Employment and Labour Relations Act](#), No. 20 of 2011 provides for the powers of the court as follows: -

"In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders: -

- i. Interim preservation orders including injunctions in cases of urgency;
- ii. a prohibitory order;
- iii. an order for specific performance;
- iv. a declaratory order;
- v. an award of compensation in any circumstances contemplated under this Act or any written law;
- vi. an award of damages in any circumstances contemplated under this Act or any written law;
- vii. an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the court thinks fit to impose under circumstances contemplated under any written law; or
- viii. any other appropriate relief as the court may deem fit to grant."

15. In the Court of Appeal case, [National Social Security Fund Board of Trustees v Kenya Tea Growers Association & 14 others](#) (Civil Appeal 656 of 2022) [2023] KECA 80 (KLR):

"The jurisdiction of the courts of equal status was jealously guarded by the Constitution. Article 165(5)(b) of the Constitution in peremptory terms provided that the High Court did not have jurisdiction in respect of matters falling within the jurisdiction of the courts contemplated in article 162(2) of the [Constitution](#).



In terms of the Constitution, the ELRC was constrained in its decision-making power by the supremacy of the Constitution(article 162(a)) and the rule of law. It was further constrained by legislation (section 12 (1) (a)-(f)) of the ELRC Act, the common law, precedents and procedural rules. When examining the jurisdiction conferred on the ELRC by section 12(1) (a)-(f), the word “includes” had to be borne in mind. However, there could not be any inflexible rule that the word “includes” should be read always as a word of extension without reference to the context.

The key to the opening of every law was the reason and spirit of the law — it was the *animus imponentis*, the intention of the law-maker, expressed in the law itself, taken as a whole. Hence, to arrive at the true meaning of any particular phrase in a statute, that particular phrase was not to be viewed detached from its context in the statute. It was to be viewed in connection with its whole context as well as the title and preamble of the statute.

It was to the preamble that the court was to look for the reason or spirit of every statute; rehearsing that, as it ordinarily did, the evils sought to be remedied, or the doubts purported to be removed by the statute, and so evidencing, in the best and most satisfactory manner, the object or intention of the Legislature in making and passing the statute itself. However, two propositions were quite clear a preamble could afford useful light as to what a statute intended to reach and if an enactment was itself clear and unambiguous, no preamble could qualify or cut down the enactment.

The issue under consideration in the petitions was the constitutional validity of a statute and or some specific provisions of the NSSF Act, 2013. The constitutional validity of the statute or the targeted provisions did not arise from an employer-employee dispute. The intention of Parliament was clear both from the preamble and section 12(1)(a)-(f). The ELRC Act was enacted to resolve employer-employee disputes as provided by article 162(a) of the Constitution. That was the purpose and context which could not be ignored in interpreting provisions of the ELRC Act. Decided cases were in agreement that constitutional issues could be determined by the ELRC only if they arose from an employer-employee dispute. The germane issue framed by the ELRC did not arise in an employer-employee dispute nor did it fall under section 12(1)(a)-(f).

The Constitution}} should always be the point of reference by any court while adjudicating disputes. The ELRC failed to appreciate that a claim questioning constitutional validity of a statutory provision was not merely an ancillary claim to the issue before it nor did the issue arise during the adjudication of the dispute (which in any event was not an employer-employee dispute). The germane issue which was identified by the court as early as at paragraph one of its judgment was a substantive claim brought under article 165(3)(d)(i) of the Constitution. That was a stand-alone issue not emanating from a dispute under section 12(1) (a)-(f) of the ELRC Act.

The words “including” or “connected thereto” could not be deployed to swallow such a substantive issue so as to justify invocation of other claims. While enacting the provisions of article 165(3)(d)(i) of the Constitution which conferred on the High Court the jurisdiction to hear any question respecting the interpretation of the Constitution including the determination of the question whether any law was inconsistent with or in contravention of the Constitution, the drafters of the Constitution were not acting on a clean slate. They had before them cognate provisions of articles 162(1)(2)(a) and (b) and (3) of the Constitution.



16. Having identified the germane issue before it as early as at paragraph 1 of the judgment, the ELRC fell into a grave error when it failed to appreciate that the issue before it fell within the jurisdiction of the High Court as prescribed by article 165(3)(d)(i) of the *Constitution*. Further, the bench fell into error when it failed to appreciate that authorities were replete on the following positions;-
- a. the constitutional issues had to arise from an employer-employee dispute for the ELRC to assume jurisdiction; and
 - b. employment cases were not the appropriate mechanism for the ventilation of grievances of litigant’s constitutional issues except where the issues arose in an employer-employment dispute.
 - c. The Constitution had to be interpreted flexibly to meet social, political and historic realities.
17. The ELRC failed to appreciate that jurisdiction was determined on the basis of pleadings before consideration of the substantive merits of the case. The petitions challenged the constitutional validity of the legislative process leading to enactment of a legislation and or some of its provisions. The instant matter was not an employer-employee dispute. The ELRC failed to appreciate that laws affected many things in a variety of ways, large and small, but those side winds did not determine what matter a law was in relation to. That was determined by analyzing the central focus of the law, what it was really all about. In order to analyze what matter a challenged law was “in relation to” the court had to separate it from matters incidentally affected by the law. The bench failed to appreciate that crucial separation.
18. From a reading of articles of 162(1), (2)(a) and (b) and (3) and 165 (3) (d)(i) of the *Constitution* and section 12 (1) (a)-(f) of the ELRC Act and the germane issue before the ELRC, the ELRC wrongfully assumed jurisdiction.”
19. In *London Distillers Kenya Limited & another v Kenya Union of Commercial Food Allied Workers Union* [2021] eKLR the court stated:
- “In addition thereto, I find that the jurisdiction of this Court is limited by article 162(2) of the *Constitution*, that empowers the *Employment and Labour Relations Court*, to hear and determine all disputes, arising out of an employer and employee relationship, as well as, disputes between an employer and a trade union. It is worth noting that the ELRC in exercising its mandate, the Employment and Relations Court, being a Court of equal and concurrent status as this Court, has jurisdiction to hear and determine constitutional violations on fundamental rights and freedoms arising from an employer and employee relationship, as well as, all disputes falling under article 41 of the *Constitution*, as is in this case, as well as, all disputes stipulated under section 12 of the *Employment and Labour Relations Court Act* 2011.”
20. In *Daniel Mangi Gichuru v Jubilee Insurance Co. Ltd* CA No 138 of 2016 the Court expressed itself as follows:
- The Environment and Land court and the Employment and Labour relations court do have jurisdiction to redress violation of constitutional rights in matters falling under their jurisdiction.
- The prayers sought in this applicant is to do with the constitutionality of section 90 of the *Employment Act* which is not an employee/employer matter but is the ambit of the legislation.
21. Furthermore, the petitioner does to demonstrate how their rights and/or access to justice are being infringed upon.



22. The claimants have right of access to justice under article 90 within 3 years of the occurrence of the infringement of their rights.
23. Flowing from the above the court is persuaded it lacks jurisdiction to entertain these proceedings by dint of articles 165(3)(d)(1) of the Constitution and section 12 of Employment and Labour Relations Court Act.
24. The said petition dated 12th April 2023 is therefore not merited and is dismissed accordingly.
25. Each party will bear their respective costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 3RD DAY OF NOVEMBER, 2023.

ANNA NGIBUINI MWAURE

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

****JUDGE***

