



**Omullo v National Land Commission (Petition E089 of 2020)
[2021] KEELRC 2414 (KLR) (27 January 2021) (Ruling)**

Leonard Omullo v National Land Commission [2021] eKLR

Neutral citation: [2021] KEELRC 2414 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E089 OF 2020
NZIOKI WA MAKAU, J
JANUARY 27, 2021**

BETWEEN

LEONARD OMULLO PETITIONER

AND

NATIONAL LAND COMMISSION RESPONDENT

RULING

1. The National Land Commission, the Respondent herein, filed a Notice of Preliminary Objection to the Petition dated 14th December 2020 on grounds that:-
 1. This Honourable Court has no jurisdiction to hear and determine this matter by reason of sub judice as there is an appeal (Nairobi Civil Appeal No. 248 of 2020) pending before the Court of Appeal, being an appeal from the Judgment in Nairobi ELRC Petition No. 8 of 2019 as consolidated with Nairobi ELRC Cause No. 1643 of 2018.
 2. It is within the Respondent's functions, powers and further a constitutional duty under Article 252(1)(c) of *the Constitution* of Kenya to recruit its own staff. The Orders sought are therefore expressly or impliedly barred by the operation of Article 2(4) of *the Constitution*.
 3. Section 40 of the *Employment Act* (No. 11 of 2007) is void in the specific circumstances of this case to the extent that it is inconsistent with Article 252(1)(c) as read with Article 249(2)(a) and Article 2(4) of *the Constitution*, and also with Section 22 of the *National Land Commission Act*.
 4. The International Labour Organization - Termination of Employment Convention, 1982 (No. 158) which the Petitioner seeks to rely upon has not been ratified by Kenya and which ratification is sine qua non for it to form part of the law of Kenya under *the Constitution*.



5. The Petitioner has no prima facie case as he has already attained the age of 60 years thus becoming mandatorily due for retirement and would therefore not be eligible for renewal of his employment on 'permanent and pensionable' terms. In any event the Petitioner has materially disclosed this fact.
 6. The Petitioner has not sought Orders for maintenance of the status quo before the Court of Appeal but is instead abusing the process of the court by seeking to use the ELRC to relitigate the issues before the Court of Appeal and to injunct the said Court. The Court of Appeal has jurisdiction to grant the Petitioner the Orders he is seeking if merited.
 7. The Petition should be struck out for being an abuse of the court process or should otherwise be stayed pending the hearing and determination of Nairobi Civil Appeal No. 248 of 2020.
2. The Petitioner is opposed to the grant of the orders sought.
 3. In arguing the preliminary objection, the Respondent's advocate submitted that the Petitioner herein was the 4th Petitioner in Nairobi ELRC Petition No. 8 of 2019 and the only Claimant in Nairobi ELRC Cause No. 1643 of 2018 after other two Claimants withdrew from that case. He submitted that on 24th May 2019, the Hon. Lady Justice Maureen Onyango made a decision in the two consolidated suits and that an appeal from the decision ensued. He submitted that the gist of the appeal pending before the Court of Appeal is as follows: In the course of the Petitioner's employment with the Respondent and prior to expiry of his contract, the terms were converted from fixed term to permanent and pensionable and the terms for Directors, including the Petitioner, were thereafter reconverted to contracts. He submitted that the Respondent has challenged the order made in favour of the Petitioner for their retention on permanent and pensionable terms. He further submitted that the Petitioner is now seeking renewal of the contracts in this suit and seeking to fetter the discretion of the Court of Appeal to the orders it can grant. He submitted that *the Constitution* provides under Article 249(2)(a) that the Commissioners and holders of office are bound by *the Constitution* and the law. He submitted that if there is conflict between Section 40 of the *Employment Act* on redundancy and Section 22 of the *National Land Commission Act*, then Section 22 of the *National Land Commission Act* would prevail as it is the statute dealing with the National Land Commission Institute. He further submitted that the danger that will be occasioned to the matter if this Court exercises concurrent jurisdiction with the Court of Appeal would lead to inconsistencies, as this Court could say one thing and the Court of Appeal another. Further, he argued, nothing in law allows the Petitioner to stop the Commission from carrying out its mandate and the Petitioner should respond and answer why he is seeking to prolong his employ even when he is not entitled to retain the permanent and pensionable terms having attained the age of 60 years. Counsel thus prayed that the Petition be struck out with costs to the Respondent so as to enable the Court of Appeal deal with the contractual obligation with the Petitioner.
 4. In opposing the preliminary objection, the Petitioner's advocate submitted that the nature of the P.O does not meet the threshold of a preliminary objection on pure points of law as per the classic case of *Mukisa Biscuit Manufacturing Co. Ltd v West-End Distributors Limited* [1969] EA 696. He submitted that the preliminary objection further seems to trivialise the issues presented and couches them as if they relate only to the Petitioner. He submitted that all the facts pleaded are correct and the factual background of the Petition is shown in the Petition and on the grounds. He submitted that the Petition relates to a restructuring of office and that the issues raised in the Petition have never been canvassed anywhere. Further, he submits that Section 40 of the *Employment Act* is applicable where an employer is contemplating a restructure that will lead to loss of a position and this Court should hold that Section 40 applies. He cited the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* [2014] eKLR in support of his submissions. He submitted that the ILO Convention on



Termination of Employment Convention, 1982 (No. 158) has acquired the position of *jus cogens* and referred to the case of *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others* [2014] eKLR where Maraga JA (as he then was) applied this Convention and that being the Court of Appeal, this Court is bound by the said decision. He submitted that the Respondent is a public organisation funded publicly and its decisions will affect the directors and that to protect the adjudicatory interest of the Court, it can provide a conservatory order and suspend the abolition of restructuring of the Respondent. He submitted that the Respondent only filed the preliminary objection as a delaying tactic to allow it to proceed with the restructuring. He submitted that the Memorandum of Appeal demonstrates that the abolishing of offices is not a part of the appeal and that the preliminary objection ought to be dismissed with costs as it lacks merit.

5. In a brief reply, Counsel for the Respondent submitted that as per the decision in *Owners of Motor Vessel Lillian 'S' v Caltex Oil* [1989] KLR 1, jurisdiction is everything and without it a court should not take any more steps. He submitted the Respondent is not oblivious to the *Mukisa Biscuit* case and that the issues raised are pure points of law except the issue of the Petitioner having attained 60 years. He submitted that the Petitioner's cases before the Court of Appeal have clear procedure of bringing in fresh evidence on age and restructure. He thus urged the court not to issue any conservatory orders as the Petitioner has not disclosed his age.
6. The main issue for determination is whether the Petition herein is sub judice and the second issue is whether the Respondent's Application dated 14th December 2020 has met the threshold of a Preliminary Objection. I will deal with the second issue first. In the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696 it was held that a preliminary objection should raise a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. In the instant case, the preliminary objection raised by the Respondent speaks to this court's jurisdiction and therefore fits within the prism of a preliminary objection as canvassed in the case of *Mukisa Biscuits* (*supra*) as the issue of sub judice is one that fits in the classic definition of preliminary objection.
7. On the second issue it is asserted that this Court has no jurisdiction to hear and determine this matter by reason of the same being sub judice as there is a pending appeal being *Nairobi Civil Appeal No. 248 of 2020* before the Court of Appeal. A jurisdictional contest would arise if there is application of the analysis in the *locus classicus* case on jurisdiction. In the celebrated case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1 per Nyarangi JA of the Court of Appeal held that:-

“...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 down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...”
8. More recently, in the case of *Joyce Cherop Kaspondoy & 609 Others v Kenya Power and Lighting Company* [2019] eKLR, Mativo J. held that:-

“24. A court has no inherent jurisdiction to decline to entertain a matter within its jurisdiction. Jurisdiction is determined on the basis of pleadings and not the substantive merits of the case. The South African Constitutional Court (In



the matter between Vuyile Jackson Gcaba vs Minister for Safety and Security First & Others Case CCT 64/08 [2009] ZACC 26) had this to say:-

"... In the event of the court's jurisdiction being challenged at the outset (in limine), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. While the pleadings – including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognizable only in another court. If however the pleadings, properly interpreted, establish that the applicant is asserting a claim..., one that is to be determined exclusively by.....{another court}, the High Court would lack jurisdiction..."

It is not disputed that where this Court has no jurisdiction it cannot take one more step. I would have to down my tools once I am of the opinion that I lack jurisdiction.

9. On the issue of sub judice, which is the core of the objection, Section 6 of the *Civil Procedure Act* expressly provides that no court shall 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, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed. Mativo J. analysed the issue of sub judice in the case of Republic v Paul Kihara Kariuki, Attorney General & 2 Others Ex parte Law Society of Kenya [2020] eKLR that in determining whether or not the rule on sub judice applies, it is the substance of the claim that ought to be looked at rather than the prayers sought. The Learned Judge held that:-

“ 40. Thus, the multiplicity of actions on the same matter between the same parties even where there exists a right to bring the action is regarded as an abuse. The abuse lies in the multiplicity and manner of the exercise of the right rather than exercise of right per se. The abuse consists in the intention, purpose and aim of person exercising the right, to harass, irritate, and annoy the adversary and interface with the administration of justice.”

10. There is the corollary issue of the applicability of ILO Convention on Termination of Employment Convention, 1982 (No. 158) which it is argued is not part of the rubric of applicable law. It was argued by the Petitioner that the Convention is jus cogens. The Latin phrase Jus cogens sometimes known as ius cogens literally means “compelling law.” It designates norms from which no derogation is permitted by way of particular agreements. It stems from the idea already known in Roman law that certain legal rules cannot be contracted out, given the fundamental values they uphold. Does the ILO Convention No. 158 fit in this prism? I think not all Conventions carry the weight of jus cogens save for some that bear principles that are compelling law. The ILO Convention on Termination of Employment Convention, 1982 (No. 158) was not ratified by Kenya as far as the ILO Normlex matrix shows. Kenya is in the long list of ILO Member countries that are yet to ratify this Convention. However, the Convention has been consistently applied in our labour laws with references to it being found in decisions of the Courts from the Industrial Court to the present Employment and Labour Relations



Court and now, in the Court of Appeal as was held in the case of Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others (supra). In that case, Maraga JA (as he then was) held that:-

By dint of Article 2(6) of *the Constitution*, the treaties and conventions ratified by Kenya are now part of the law of Kenya. The Kenya Constitution, 2010 was promulgated on 27th August, 2010. Before then Kenya was a dualist state, which, like other dualist states, domesticated the treaties or conventions it ratified by legislation. By virtue of the provisions of this Article, however, the treaties or conventions which Kenya had ratified before that date, whether domesticated or not, automatically became part of the law of Kenya. The process of ratification of the treaties Kenya has entered and those it enters into after the enactment and entry into force of the Ratification of Treaties Act, 2012 is now through legislation.

The learned Judge was correct in his surmise of the Constitutional provision and the import in as far as treaties and conventions that Kenya had ratified to the date of Promulgation of the New Constitution. The essence of the provision of Article 2 of *the Constitution* was to bring the treaties ratified by Kenya into force without the need for municipal legislation as a large corpus of law was out there having been ratified by the Republic of Kenya but not domesticated through legislation. Article 2(5) and 2(6) therefore were resolving a long standing issue when it was expressed that the general rules of international law shall form part of the law of Kenya and any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution. In the case of ILO Convention on Termination of Employment Convention, 1982 (No. 158), the application of Article 2(5) and (6) does not quite apply.

11. Now turning to the issue that may well determine the survivability of the Petition before me. The Petitioner ostensibly seeks to overturn the process of reorganisation of the Respondent as this present reorganisation is in his view contrary to the law and aimed at depriving the employees such as the Petitioner of their livelihoods. In my considered opinion, the substance of the Petition herein is eerily similar to the issues raised in Nairobi ELRC Petition No. 8 of 2019 and whose proceedings are currently pending before the Court of Appeal in Nairobi Civil Appeal No. 248 of 2020. It would be foolhardy for a superior court such as this one to proceed with a matter whose substance is before an appellate court. The preliminary objection succeeds to the extent that this Petition is sub judice. Having so found, it is clear this Court lacks jurisdiction to entertain the Petition.
12. Costs ordinarily follow the event. Whereas the Petitioner is seeking to articulate his perceived rights, he took a gamble when he filed the Petition herein when the matter is before the Court of Appeal. Having taken the step to play Russian roulette with his claims, he must bear the consequences of the misstep. The Petition herein is sub judice and no judicial craft or innovation can save it from this inevitable fate – Petition is struck out with costs to the Respondent.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JANUARY 2021

NZIOKI WA MAKAU

JUDGE

