



THE REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. E003 OF 2021

SHERIA MTAANI NA SHADRACK WAMBUI.....1ST APPLICANT

NADI BORU MOHAMMED.....2ND APPLICANT

AND

JUDICIAL SERVICES COMMISSION.....RESPONDENT

RULING

1. The applicants filed a chamber summons application dated the 4th February 2021 praying for an order in the following terms *inter alia*: -
 - (a) That exparte, this application be certified as urgent and apt for hearing on priority basis and leave be granted to the applicants to apply for the following Judicial Review Orders:
 - a.
 - b.
 - c.
 - d. That leave so granted do act as stay of the respondent's decision to advertising ,recruiting, shortlisting, interviewing, vetting, employing persons as Resident Magistrates on the basis of the qualifications listed on the Respondent's Newspaper advertisement of on or about the 27th January 2021 and through its website <<https://www.jsc.go.ke/index.php/job-vacancies-feb.2021/>> to the extent that it has prescribed a three year post admission experience to bar as a pre-requisite qualification for the consideration or appointment as a Resident Magistrate.
2. When the matter came before Hon. Nzioki Wa Makau j. exparte on 8th February 2021 the learned judge gave directions on the hearing of the application inter-parties on 15th February 2021 before any judge and did not grant the applicants any of the prayers sought exparte.
3. Meanwhile the respondent filed Notice of preliminary objection dated 12th February 2021 challenging the jurisdiction of the court to hear and determine this dispute on the grounds that the dispute in question is not an employment and labour dispute as contemplated by Article 162 (2) (a) of the Constitution and section 12 of the Employment and Labour Relations Court Act No. 20 of 2011 and that no Employer-employee relationship exists as between the applicants and the Respondent within the meaning of section 12 of the Employment and Labour Relations Act No.20 of 2011
4. In line with the decision of the Appeal Court in the case of **The Owners of the Motor Vessel "lilian S" v Caltex Oil (K) Ltd [1989] eKLR** the court directed the preliminary objection to be argued at the earliest opportunity since as was decided in the aforesaid case jurisdiction is everything and once a court finds that it has no jurisdiction it must down its tools outrightly and strike out the suit for want of jurisdiction and or transfer the suit to a court with jurisdiction to hear and determine the matter. In the present case the court was urged that the proper court to hear and determine this dispute is the High Court and not E&LRC.
5. The respondent submitted citing the case of **Samuel Macharia v. Kenya Commercial Bank & 2 Others [2012] eKLR, and In the Matter of Interim Independent Electoral Commission[2011] eKLR**, that jurisdiction flows from the Constitution or statute and a literal reading of Article 162(2) (a) together with section 12(1) of the E&LRCA shows that an employer -employee relationship must exist between the applicants and the respondent for the court to have jurisdiction to be seized of the matter which was clearly not the case in this dispute.

6. The respondent submitted that the appointment of magistrates is governed by statute, being Judicial Services Act no 1 of 2011 and if the JSC acted *ultravires* the statute as alleged by the applicant that was a matter that laid squarely within the mandate and jurisdiction of the High Court to determine.

7. The respondent submitted further that prospective employees are not employees as contemplated under section 12(1) of E&LRCA and therefore the court lacked jurisdiction to entertain the dispute before it.

8. The respondent submitted that this matter was made crystal clear in a bidding decision of the Court of Appeal in the matter of **Attorney General & 2 Others v. Okiya Omtata Okoiti & 15 Others [2020] eKLR**. The court rendered itself thus:

“Pursuant to Article 162(2) of the constitution, Parliament enacted the Employment and Labour Relations Court Act, whose purpose, as the long title states, is to “establish THE Employment and Labour Relations Court to hear and determine disputes relating to “employment and labour relations”. By section 12(1) of the Act, the jurisdiction of the Court is to hear disputes “relating to employment and labour relations”, including:

- (a) Disputes relating to or arising out of employment between an employer and employee;
- (b) Disputes between an employer and a trade union
- (c) Disputes between an employers’ organisation and a trade unions’ organisation;
- (d) Disputes between trade unions;
- (e) Disputes between employer organisations;
- (f) Disputes between an employers’ organisation and a trade union;
- (g) Disputes between a trade union and a member thereof;
- (h) Disputes between an employers’ organisation or a federation and a member thereof;
- (i) Disputes concerning the registration and election of trade union officials; and
- (j) Disputes relating to the registration and enforcement of collective agreements.

9. The court of Appeal continued to say: “from the above provisions of the constitution and the Act, it is obvious that the jurisdiction of the E&LRC is precise and limited rather than unlimited. The straight forward jurisdictional question in the appeal therefore is whether recruitment of members of the National Land Commission falls within the meaning of a dispute relating to employment and labour relations. the appointment and removal from office of the commissioners of these independent commissions is not a labour and employment issue as the E&LRC erroneously held, but a *sui generis* devise to address challenging governance needs and gaps.”

10. The court of Appeal equated the position of independent commissioners to those of judges who upon appointment are only subject to the constitution and the law and not subject to the direction or control of any person or authority and enjoy security of tenure and cannot be removed from office except for cause and following a specific procedure entailing recommendations of an independent tribunal.

11. The Court of Appeal concluded, “***we have no doubt in our minds that E&LRC did not have any jurisdiction to entertain the three petitions that led to this appeal.***”

12. The applicants made submissions to distinguish this bidding decision of the Court of Appeal from the matter in *casu* stating among other reasons that magistrates are employees of the Judiciary and the JSC which recruits, appoints, disciplines and removes them is their tacit employer.

13. The applicants submitted further citing various decisions of E&LRC including: **Trusted Society of Human Rights Alliance v. Nakuru Water & Sanitation Services [2013] eKLR per Ongaya J.; Kenya National Parents Association [2015] eKLR per Mbaru J; and Daniel Kipkoeh [2017] eKLR per Marete J**; that recruitment of prospective employees is an employment and labour related matter that falls squarely within the jurisdiction of this court.

14. The applicants further submitted that unlike Judges and independent commissioners, magistrates were employees in public service and E&LRC was clothed with jurisdiction to hear and determine disputes relating to their recruitment, appointment, discipline and removal.

15. The applicants submitted further that E&LRC had heard and determined a plethora of disputes filed by or on behalf of magistrates and the issue of lack of jurisdiction did not arise in those specific cases even before the Court of Appeal

16. The court has carefully considered the pleadings, depositions, submissions and list of authorities furnished by the parties.

17. The court has further considered the Court of Appeal decision in **Daniel N. Mugendi v. Kenyatta University & 3 others [2013] eKLR**; and the High Court **decision in United States International University(USIU) v. The Attorney General & Others[2012 eKLR** which two

decisions are the *locuss classicus* on the issue of the jurisdiction of E&LRC vis a vis the High Court and the incidental matter of concurrent jurisdiction of the two courts in border line and mixed grill cases and is left with no doubt that magistrates unlike judges and independent commissioners are employees in public service and the E&LRC has jurisdiction to hear and determine disputes arising from recruitment, appointment, discipline and removal of magistrates.

18. Accordingly, the preliminary objection by the respondent lack merit and is dismissed with costs.

19. The court further grants leave to the applicants to file the substantive motion in terms of prayer 1 of the chamber summons. However, the issue as to whether the grant of leave to file the substantive motion should operate as stay of the named decision of the respondent should be argued inter-parties upon filing of the substantive motion.

Dated at Nairobi this 16th Day of February 2021

MATHEWS N. NDUMA

JUDGE

ORDER

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this ruling has been delivered to the parties online with their consent. 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 18 of the Civil 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.

MATHEWS N. NDUMA

JUDGE

Appearances:

M/s Saina , G & A Advocates for the Respondent/objector: info@gallp.co.ke; 0719-851555

Mr. Shadrack Wambui, Appearing with Cherongo; Alexander Mwendwa; Abel; Asuma; Holly and Omaiyo for the Applicants: info@sheriamtaani.org; Tel. 0798-653763

Ekale, Court Clerk