



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

PETITION NO. 29 OF 2020

(Before Hon. Justice Mathews N. Nduma)

KENYA UNION OF SUGAR PLANTATION & ALLIED WORKERS.....PETITIONER

VERSUS

THE CABINET SECRETARY MINISTRY OF AGRICULTURE, LIVESTOCK, FISHERIES

AND COOPERATIVE DEVELOPMENT.....1ST RESPONDENT

AGRICULTURE AND FOOD AUTHORITY.....2ND RESPONDENT

THE COUNTY GOVERNMENT OF KISUMU.....3RD RESPONDENT

THE OFFICE OF THE ATTORNEY GENERAL.....4TH RESPONDENT

RULING

1. The 2nd respondent has raised a preliminary objection to the suit as follows:

i. The court lacks jurisdiction to entertain the petition.

ii. There exists no employer-employee relationship between the petitioner and the respondents, hence no *locus standi* to institute the petition, for inter alia, having no recognition agreement with any of the respondents.

iii. The petition does not elicit any dispute mentioned in section 12 of the Employment and Labour Relations Court Act.

iv. The petition does not elicit any constitutional issue for determination by the court.

v. The petition does not satisfy the criteria of a constitutional petition by not pleading and identifying with sufficient precision the provisions of the constitution alleged to have been violated by the respondents and the manner in which the provisions were breached.

2. The parties except the Hon. Attorney General filed written submissions regarding the pending application and the preliminary objection.

3. During virtual highlighting of submissions scheduled on 30th September 2020, the parties agreed to proceed on the preliminary objection pending the filing of responses on the Application by the Hon. Attorney General represented by M/S Esedi.

4. The Court of Appeal in the case of **Mukisa Manufacturing Company Limited vs West End Distributors Limited (1969) EA 698**, explained what a preliminary objection constitutes as follows:

“a preliminary objection is in the nature of what used to be a demurrer. It raises 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”.

5. It follows, as was held in the case of *Oraro vs Mbaja (2005) KLR 141* that any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof or seeks to adduce evidence for its authentication, is not as a matter of legal principle a true preliminary objection which the court should allow to proceed on.

6. However, when a proper preliminary objection is raised, the court must proceed to deal with it in the first instance and if it finds that it has no jurisdiction to entertain the matter, the court must down its tools immediately and take no further step as was decided in the case of *The Owners of Motor Vessel "Lilian S" vs Caltex Oil Kenya Limited (1989) eKLR*:

“a court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction

.....

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means.....where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given”.

7. The locus classicus on the jurisdiction of E&LRC is the case of *United States International University (USIU) VS Attorney General (2012) eKLR* which was upheld by the Court of appeal in *Daniel N. Mugendi vs Kenyatta University and 3 others (2013) eKLR*.

8. Justice Majanja citing the case of *Giaba vs Minister of Safety and Security and others CCT 64/08(2009) 2ACC 26*, held in the USIU case (supra),

“44..... I would adopt the position of the Constitutional Court of South Africa in *Giaba 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 axillary and incidental to the employment and labour relations including interpretation of the constitution within the matter before it”

9. The cause of action in this matter is premised on facts set out under paragraphs 23 to 32 of the petition that may be summarized as follows:

10. The petitioner is duly registered union representing the workers in Chemelil Sugar Factory, Sony Sugar Factory, Miwani Sugar Factory, Muhoroni Sugar Factory and Nzoia Sugar Factory with a total number of over three thousand five hundred employees.

11. That the above stated sugar factories are owned by the National Government.

12. That the said factories to date have not paid the workers of the above stated factories their dues amounting to over Kenya Shillings Three and a half billion (Kshs. 3,5000,000,000).

14. That sometimes on the 10th July 2020 without public participation or involvement of the petitioner or its members, the 2nd respondent advertised for bids for international expression of interest for leasing and operating the five state owned sugar factories.

14. That in the said advertisement the interest and concerns of the petitioner herein were not addressed despite the said factories owing the members of the petitioner salaries and unremitted statutory deductions amounting to over Kshs. Three and half billion.

15. That the respondents failed to adhere to the principles and values of national governance contained in Article 10 of the constitution as they failed to ensure public participation by the stakeholders before the coming up with decision to lease the state owned factories.

16. The petitioner alleged violation of Articles 10, 27, 35 and 232 of the constitution as detailed under paragraphs 33 to 35 of the petition.

17. In particular, the petitioner adds that the respondents have refused to disclose to the petitioner and its members how they intend to settle the debt owed to the petitioner's members, who are employees of the factories the subject of intended take over as well as disclosing the legal frame work governing the said restructuring of the sugar factories.

18. The petitioners allege discrimination by the respondents being one of the main stakeholders in the sugar industry factories in the Nyanza Region in violation of Article 27.

19. The petitioners further allege Article 232 provides for the values and principles of public service to include involvement of the people in the process of policy making amongst others and that this principle has been violated by the respondents in their disregard of the employees of the sugar factories intended to be leased out for long periods.

20. The petitioner prays for the following reliefs:

a. A declaration that there was no public participation before making the decision for leasing and operating each of the five state

owned sugar factories in Kenya issued by the director general agriculture and food authority.

b. A declaration that the intended leasing of the five state owned sugar factories if done without involving the petitioner or its members will deny them the right to recover their wages and statutory deductions.

c. A declaration that the international expression of interest for leasing and operating each of the five state-owned sugar factories in Kenya issued by the director general agriculture and food authority is unconstitutional therefore null and void.

21. The Court of Appeal adopted the approach by Majanja J. *in consolidated petitions no. 373, 426 of 2012, Stephen Waweru Wanjohi and others vs the Attorney General and others, and Kipnetich Maiyo and others vs the Kenya Land Commission Selection Panel and others* where the learned judge said:

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

22. The petitioner has in the court’s considered opinion set out his cause of action in a detailed and precise manner in the body of the petition and the supporting documents.

23. The cause of action has been summarized by the court above and it is beyond peradventure that the matters raised by the petitioner are in four categories:

i. Reasonable Apprehension by the petitioner and the workers of the factories owned by the respondents and intended to be leased for long periods to third parties that the petitioners and its members may not be paid arrear wages in excess of Kshs. three and a half billion (3,500,000,000 Kshs.) if the intended leasing process without public participation including participation by the petitioner on behalf of the workers is actualized.

ii. Failure by the respondents to provide information to the petitioner and its members, in violation of Article 35 of the constitution with regard to the intended leasing and the framework on how the workers’ arrear wages shall be paid upon actualization of the intended takeover of the government owned factories by the private, third parties.

iii. Discrimination of the petitioner and its members in violation of Article 27 of the constitution in the manner set out in (i) and (ii) above and

iv. Violation of Article 232 of the constitution by the respondents by failing to include involvement of the people and in particular key stakeholders in the process of policy making amongst others.

24. In the scheme of things and in the mind of the court, the four issues raised by the petitioner are weighty, genuine and precise in nature deserving attention of a conscientious court of law that harbours no fear nor favour but has the sole focused desire to serve justice to the people that come before it.

25. The only issue today is whether the petitioners have approached the correct court clothed with authority to hear and determine the issues they have succinctly pleaded in their petition.

26. Article 162(2) (a) provides:

“Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to:

a. Employment and Labour Relations; “(emphasis mine)

27. Parliament did the bidding of the constitution enacted the Employment and Labour Relations Court Act, 2011 (as amended) in 2014 and established the Employment and Labour Relations Court therein under section (4).

28. Parliament then established the jurisdiction of the court under section 12 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, this Act or any other written law which extends jurisdiction to the court RELATING TO EMPLOYMENT AND LABOUR RELATIONS including.....”

29. Under Section 12 is then enumerated examples of disputes (a) to (j) included in disputes relating to employment.

30. Courts have interpreted Section 12 of the E&LRC Act severally and the court need not invent the wheel but abide the doctrine of *stare decisis* and follow the decision by the Court of Appeal in Daniel Mugendi (supra) and other decisions by courts of equal status including in *Daniel Kipkoech Kenduguo vs County government of Uasin Gishu (2017) eKLR, Kericho ELRC NO. 100 of 2016* where Marete J. stated:

“The issue of the jurisdiction of this court has been ably set out in various post constitution authorities in this court and elsewhere. It is settled law that jurisdiction in this case is not confined to merely employer/employee relationships as many would like to imagine. It would never have been anybody’s intention to create a court as limited and bound as one dealing with only employer/employee

relationships. This is clear from a literal interpretation of the constitution and the Employment and Labour Relations Court Act, 2014”

31. I must hasten to add, that the said literal interpretation is derived from the use of the words

“RELATING TO EMPLOYMENT AND LABOUR RELATIONS in Article 162(2) (a) of the constitution and repeat of the same wording under section 12(1) of E&LRC Act, 2011 as amended in 2014.”

32. The court is also clothed with wide jurisdiction to interpret the constitution and enforce human rights and freedoms enshrined in the constitution of Kenya 2010 as was affirmed by the Court of Appeal in the Daniel Mugendi case (supra).

33. In ***International Centre for Insect physiology and Ecology (ICIPE) vs Nancy Menally (2018) eKLR***, the court of appeal held also:

“There cannot be any argument that the E&LRC is clothed with jurisdiction to hear and determine such constitutional issues as and when they are from employment and labour relations. Any doubts on that jurisdiction were settled in the case of United States International University (USIU) vs Attorney General (2012) eKLR which was upheld by this court in Daniel N. Mugendi vs Kenyatta University and 3 others (2013) eKLR”.

34. The court is in no doubt that the remedies sought by the petitioner are appropriately directed at the respondents and especially the honourable Attorney General who is the proper representative of the government of Kenya in all matters involving government before court.

35. The petitioner may have opted to join specific sugar companies as respondents also but it is the finding of the court that such non-joinder is not fatal to this case and does not impact the jurisdiction of the court to hear and determine this particular dispute.

36. Accordingly, the preliminary objection lacks merit and is dismissed with costs in the cause.

Ruling Dated, Signed and delivered at Kisumu this 12th day October, 2020

Mathews N. Nduma

Judge

ORDER

In view of the declaration of measures restricting court of operations due 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

Lubullella and Associates Advocates for the 2nd respondent, objector.

P'D Onyango and Company Advocates for the petitioner.

M/S Eredi for Attorney General

Chrispo- Court clerk