



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

PETITION NO. 6 OF 2018

(PETITION 55 OF 2018 NAIROBI)

IN THE MATTER OF ARTICLES 10, 20, 21, 22, 23, 73, 75, 232,

258 AND 259 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL

RIGHTS AND FREEDOMS UNDER ARTICLES 27,

28, 41, 47 AND 80 OF THE CONSTITUTION

AND

IN THE MATTER OF THE COUNTY GOVERNMENTS ACT, 2012

(ACT NO. 17 OF 2012) AND COUNTY PUBLIC SERVICE

BOARD OF LAIKIPIA COUNTY

AND

IN THE MATTER OF THE PURPORTED TERMINATION OF

APPOINTMENTS/REMOVAL OF THE PETITIONER FROM OFFICE

AS MEMBER OF THE COUNTY PUBLIC SERVICE BOARD

BETWEEN

ESTHER NYAGUTHII WANJAU.....PETITIONER

AND

THE GOVERNOR LAIKIPIA COUNTY.....1ST RESPONDENT

LAIKIPIA COUNTY GOVERNMENT.....2ND RESPONDENT

RULING

1. The Petitioner herein sought to have the petition herein be transferred to the Employment & Labour Relations Court, Nairobi on grounds that that the Petitioner herein was the 4th Petitioner in Petition No. 3 of 2018 **Mary Mutonyi & 5 Others v Laikipia County & 2 Others [2018] eKLR** and that despite the conservatory orders issued in that petition the 1st Respondent terminated the Petitioner's appointment vide

a letter dated 28th May 2018 and she thus filed this present Petition seeking *inter alia* orders of *certiorari* to quash the aforesaid letter. The court in **Mary Mutonyi & 5 Others v Laikipia County & 2 Others** determined the matter on the preliminary objection holding that the court does not have jurisdiction to entertain the petition. In view of the Ruling of 10th July 2018, the Petitioner herein asserts that it is untenable and prejudicial to the Petitioner herein for this matter to proceed at Nyeri law courts. The Petitioner asserts that under Article 27 and 50 of the Constitution she has a right to have her case heard and determined by a Judge who has not made up his or her mind on jurisdiction of the court given that the Petitioner and her advocates will look ridiculous if the dispute were to be filed in the High Court in face of Article 162 of the Constitution and myriad decisions of the Court of Appeal that have held jurisdiction in this type of matters vests in the Employment & Labour Relations Court. The Petitioner argues that gross miscarriage of justice will occasion upon the Applicant unless the orders are granted forthwith.

2. The Respondents herein are of the view that the court has no jurisdiction to entertain the Petition in general since the matter does not fall within Article 162(2)(a) of the Constitution. The Respondents assert that the court lacks jurisdiction to hear the Petition as the matter is *sub judice* as the dispute is presently before the Court of Appeal. The Respondents argue that the substratum of the suit herein has been overtaken by events as the Laikipia County Public Service Board was disbanded and that the petition should be struck out *in limine* with costs.

3. The Petition was urged on 17th September 2018 by Mr. Kibe Mungai for the Petitioner and opposed by Mr. Wambugu for the Respondents. Mr. Mungai submitted that the application is dated 27th July 2018 and is supported by the affidavit of Esther Nyaguthi Wanjau. It seeks to a transfer of the Petition on the reasons set out in detail in the affidavit of the Petitioner. The Respondents hold that this court has no jurisdiction which is the precise reason that has precipitated this application. He stated that the Petitioner is one of the four Petitioners in Petition 3 of 2018 where this court held it had no jurisdiction to entertain their petition and that he and the Petitioner have conducted research to see whether such a case can be heard at the High Court and the Petitioner holds the position that the petition cannot be heard at the High Court. The Petitioner is thus of the view that the case should be heard by another judge of this division. She is subject of an adverse ruling of the court and she seeks to procure her rights to protection of law so she seeks the transfer to Nairobi. The fourth and final reason he advanced was that the ruling of 10th July 2018 is subject of an application before the Court of Appeal and there is a contest as to the issue of jurisdiction and the Petitioner being a victim twice, seeks transfer to Nairobi.

4. Mr. Wambugu in his reply submitted that in response to the application, the Respondent had filed grounds in opposition and he finds no legal grounds advanced to warrant the transfer of this file to any other court. He said that going through the grounds laid it seems they have come to a conclusion as to the findings this court will make. It is incumbent that they allow justice to take its course. He submitted that the motion is in violation of section 15 of the Civil Procedure Act which deals with territorial jurisdiction. He urges that this course of action having accrued in Laikipia, this is the court with the original territorial jurisdiction to determine the same and that the Petitioner should, if they were dissatisfied should have sought committal. He holds that we cannot have the matter pending in three courts including the Court of Appeal and states that the Respondent will suffer prejudice should this matter be transferred.

5. In his reply, Mr. Mungai submitted that this motion is not speculative at all and that Section 15 of the Civil Procedure Act was complied with as the suit was filed here in Nyeri. He asserts that this court has territorial jurisdiction that is countrywide and there is no contravention on the *sub judice* rule as this suit is based on a separate course of action affecting her status as member as member of the County Public Service Board. He states that this course of action is separate and she had power to seek redress and the case should be heard here in Nyeri or in Nairobi and as she cannot expect the court to find one way in July and find otherwise in October he thus urges the court to allow the application.

6. The issue of jurisdiction is moot. In the case of the **Owners and Masters of the Motor Vessel “Joey” v Owners and Masters of the Motor Tugs “Barbara” and “Steve B” [2007] eKLR** per Omolo, Tunoi and Githinji JJA on 27th April 2007 the learned judges of the Court of Appeal held that *the question of jurisdiction, raised in the circumstances such as those existing in the present appeal, is a thresh-hold issue and must be determined by a judge at the thresh-hold stage, using such evidence as may be placed before him by the parties.* Nyarangi, J.A graphically put it thus:-

“..... I think 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 (sic) tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

The learned Judge of Appeal then referred to certain passages in the text “Words & Phrases Legally Defined.” – Vol. 3: I – N at pg. 113 and then continued:-

“It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined. I can see no grounds why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado.”

And in concluding his judgment, Masime, J.A, said at pg. 26 of the Report:- **“The evidence placed before the court in support of the claim as well as the motion has been analyzed above and I have also, as I said before, had the advantage of reading in draft the comments of my brothers, Nyarangi and Kwach, JJA on it with which I respectfully agree that evidence so far as it was adduced by the respondent fell foul of the requirements of rule 5 of Order 75; it failed to establish that the appellant was “the relevant person.” The upshot of that is that the High Court did not have the admiralty jurisdiction and that the respondent was not entitled to invoke that jurisdiction.”**

7. The court is ably guided. In matters Constitutional, the issue of jurisdiction was settled with finality in the Court of Appeal decision in

County Assembly of Kisumu & 2 Others v Kisumu County Assembly Service Board & 6 Others [2015] eKLR where the learned Judges of Appeal held that *since the court is of the same status as the High Court, it must have 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, the then Industrial Court has jurisdiction to enforce not only Article 41 rights but also all fundamental rights ancillary and incidental to the employment and labour relations including the interpretation of the Constitution within the matter before it.* I am in full agreement with this decision of the Court of Appeal and cannot resile from it. In the decision I made in July in Petition No. 3 of 2018, I held as follows:-

The Petition in its substance is not about employee and employer relationship but clearly a matter of the enforcement of fundamental rights purely within the purview of the High Court. This is the wrong forum and as such I lack the requisite jurisdiction to entertain the Petition as it is not an employment matter.

8. The Petitioner is right in as far as she surmises that this court cannot hold one way in July and hold otherwise in October. The process she seeks to injunct through her Petition is the letter terminating her as member of the County Public Service Board. As she is desirous of exploring her remedy in line with Article 50, I will order the transfer of the Petition to Nairobi for mention and directions before the Principal Judge of this Court. I will say no more so as not to jeopardize the positions of any of the parties before me. The costs of the motion will abide the outcome in the Petition 55 of 2018 at Nairobi.

It is so ordered.

Dated and delivered at Nyeri this 30th day of October 2018

Nzioki wa Makau

JUDGE