



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 94 OF 2016

(BEFORE HON. LADY JUSTICE HELLEN S. WASILWA ON 17TH FEBRUARY, 2017)

IN THE MATTER OF ARTICLES: 1, 2, 3, 10, 19, 20, 21, 22, 23, 24, 25, 27, 40(1), 41, 47, 48, 50(1) & (2), 159, 258 AND 259 OF THE CONSTITUTION OF KENYA AND SECTION 7(1) OF THE 6TH SCHEDULE TO THE CONSTITUTION OF KENYA.

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 20, 27, 40(1), 41, 47, 50(1), AND (2), AND 259 OF THE CONSTITUTION OF KENYA, 2010.

AND

IN THE MATTER OF: THE ENFORCEMENT OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: THE CONSTITUTIONAL VALIDITY OF SECTION 42 (1) OF THE EMPLOYMENT ACT, 2007 LAWS OF KENYA

AND

IN THE MATTER OF: RULES 4, 10, 11, 22, 23, AND 24 OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS PRACTICE AND

PROCEDURE RULES, 2013

BETWEEN

MONICA MUNIRA KIBUCHI1ST PETITIONER

JANIS MAKENA MUGAMBI.....2ND PETITIONER

MILKA KIURA MURIGI.....3RD PETITIONER

FRANKLINE KIOGORA GITONGA4TH PETITIONER

PIUS MUNANDI MUTSOLI.....5TH PETITIONER

LORRAINE WAMBITA ONYANGO6TH PETITIONER

IRENE OKENG'AYA OYARO.....7TH PETITIONER

VERSUS

MOUNT KENYA UNIVERSITYRESPONDENT

THE ATTORNEY GENERAL INTERESTED PARTY

RULING

1. The Preliminary Objection before the Court is dated 13th July, 2016, wherein the Respondent raises the following objections that:

a. The Honourable Court lacks the requisite jurisdiction to entertain, hear and determine this Application and the Petition against the Respondent.

b. The Application and the Petition is an abuse of the Court process and is therefore bad in law in so far as it relates to the Respondent.

c. The Application and the Petition offends public policy in as far as it relates to the Respondent.

d. The Application and the Petition offends the doctrine of estoppel in so far as it relates to the Respondent.

e. The Application and the Petition violates the constitutionality guaranteed freedom of contract and choice in so far as it relates to the Respondent.

f. The Application and the Petition offends the doctrine of waiver and acquiescence that the Respondent is entitled to in this case.

g. The Application and the Petition have failed to meet the Constitutional standard for admission to a hearing.

h. The Application and the Petition are contrary to the doctrine of prospective application constitutional declarations and therefore speculative and abusive of the process of this Court.

2. In support of their Preliminary objection they state that the Petitioners were engaged by the Respondent on probationary terms and the Respondent properly terminated the said engagement during the probationary period by way of letters dated 28th April, 2016, addressed to each of the Petitioners and each one was paid their terminal dues.

3. The Respondent states that they paid the Petitioners their terminal dues by virtue of a Court Order dated 27.6.2016 to the effect that the Petitioners be paid their terminal dues in terms of their termination letters.

4. They state that the Application before the Court has nothing to do with the Respondent and is not only speculative and does not raise any constitutional question against the Respondent all facts taken into consideration.

5. That the constitutionality or otherwise of Section 42 of the Employment Act has nothing to do with the Respondent and is a matter in the exclusive response of the Attorney General, the Interested Party herein,

and the Respondent should ideally be excused from the current proceedings.

6. They further submit that the Petitioners claim against the Respondent is merely speculative and they are hoping that the Court will find Section 42 unconstitutional and thereafter invest the Petitioners with a cause of action against the Respondent.

7. That should the Court find the Section 42 unconstitutional it can only have prospective Application and not retrospective as intended by the Petitioners. Further that the Petitioners acquiesced in the process of their termination by coming to the Court voluntarily to seek payment of their terminal dues which were paid and not disputed and as such the Petitioners are estopped from raising another cause of action based on the same facts.

8. They pray for the Petition to be dismissed with costs.

9. The Petitioners submit that the issues raised in the Petition are substantial and require to be investigated by the Court further. They submit that the parties sought certification under Article 165(4) of the Constitution on 26th October, 2016.

10. The Petitioners contend that the only constitutional provision that expressly permits the constitution of a bench of more than one High court Judge is Article 165(4). That under the said provision the Court must certify that the matter raises a substantial question of law.

11. They cite the case of **Harrison Kinyanjui vs. Attorney General & Another (2012) eKLR**; where the Court stated that the meaning of “substantial question” must take into account the provisions of the Constitution as a whole and the need to dispense justice without delay particularly given specific fact situation.

12. They further rely on the case of **Chunilal Mehta Vs. Century Spinning and Manufacturing Co. AIR 1962 SC 1314** where the Court stated:

“a substantial question of law is one which is of general public importance or which directly and substantially affects the rights of the parties and which have not been finally settled by the Supreme Court, the Privy Council or the Federal Court or which is not free from difficulty or which calls for discussion of alternative views. If the question is settled by the Highest Court or the general principles to be applied in determining the questions are well settled and there is a mere question of applying those principles or that the pleas raised is palpably absurd, the question would not be a substantial one.”

13. The Petitioners submit that a matter would be construed to raise a substantial question of law if *inter alia* any or all of the following factors are present:

“Whether the matter is moot in the sense that the matter raises a novel point, whether the matter is complex, whether the matter by its nature requires a substantial amount of time to be disposed of, the effect of the prayers sought in the Petition and the level of public interest generated by the Petition”.

14. It is the Petitioners’ submission that the Petition sets out that Section 42(1) of the Employment Act 2007, as enacted violates the myriad provisions of the Constitution and other statutes. Therefore it is in the interest of justice that the provisions of section 42(1) of the impugned Act be declared unconstitutional, null and void.

15. They state that Section 42(1) of the Act which provides:

“Termination of Probationary contracts,

1. The provisions of section 41(1) shall not apply where the termination of employment

terminates a probationary contract.”

16. This they state excludes the principle of *audi alteram* from its purview and is thus draconian in its Application in that the employer can dismiss any employee from employment at his/her whims during the probationary period. The Application of Section 42(1) is unconstitutional, impermissible, null and void.

17. They finally submit that in light of their submissions and pursuant to the Employment and Labour Relations Court's duty to promote and safeguard constitutionalism and the rule of law, and it is now incumbent for the Honourable Court to determine the issues raised in the Application to ensure that the Constitution is protected and the statute are not inconsistent with the constitution by transmitting the same to the Chief Justice to empanel uneven number of Judges to hear and determine the matter.

18. The Petitioners therefore call upon the Court to confirm the conservatory orders granted on 26th October, 2016, by the Honourable Court until the final determination of the Petition and to transmit the Petition to the Hon. the Chief Justice forthwith to consider empanelling the uneven number of Judges of the court of not less than three to hear and determine the Petition.

19. The Interested Party also filed a Preliminary Objection dated 17th October, 2016, wherein they raise:

1. In as far as the Claimant seeks declarations that Section 42 of the Employment Act, 2007, is inconsistent with the Constitution of Kenya 2010, this Honourable Court lacks jurisdiction to entertain this suit or grant the declaratory Orders by reason of the provisions of article 165(3) (d) (i) of the Constitution of Kenya 2010.

2. Any interpretation of sections of statute or assertions that sections of statute are inconsistent with the Constitution require to be heard by a three judge bench of the High Court. The Jurisdiction of this Honourable Court as prescribed under section 12 of the Employment and Labour Relations Act No. 20 of 2011 does not include determining the question as to whether any law is inconsistent with the Constitution.

20. In support of their Preliminary Objection they have filed submissions wherein they contend that the Jurisdiction of the Employment and Labour Relations Court does not extend to a determination of the constitutionality of section of statute and that the power was preserved by the Constitution itself to a three judge bench of the High Court.

21. They state that the jurisdiction of the Court is detailed in section 12 of the Employment and Labour Relations Act No. 20 of 2011 which has original and appellate jurisdiction to hear and determine all disputes referred to it relating to the employment and labour relations. That the jurisdiction under the said Section 12 does not extend to determining the question as to whether any law is inconsistent with the constitution.

22. They contend that the exclusive jurisdiction to determine the question of whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of the Constitution lies with the High Court as stipulated under Article 165 (3).

23. The Interested Party submits that public interest may be considered in determining whether the Petition raises a substantial question of law but it is not necessarily a decisive factor. They agree with the Petitioners that the matter raises a high level of public interest and as such the Court should constitute a three Judge bench to hear and determine the Petition.

24. Having considered the submissions of both the Petitioner and Respondent, the issues for this Court's determination are as follows:

1. Whether this Court has jurisdiction to entertain this matter.

2. Whether the issue raised in this application raises substantive question/s of law to warrant

empaneling of an uneven number of Judges to hear the substantive claim.

3. What orders to grant on the same.

25. On the 1st issue, the Respondents have submitted that the jurisdiction of this Court does not extend to a determination of the constitutionality of section of a statute and this they say is by virtue of Article 165(3) (d) (i) of the Constitution.

26. Article 165(3)(d)(i) of the Constitution grants the High Court jurisdiction as follows:

“(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”.

27. The jurisdiction of the Employment & Labour Relations Court has been discussed over and over again in relation to interpretation of the Constitution and statute - JSC vs. Gladys Shollei. In Civil Appeal 50/2014 (eKLR) JA Okwengu CA considered the jurisdiction of the Industrial Court (as it then was) in granting reliefs of a constitutional nature had this to say:-

“41 under Article 162(2) (a); the Constitution has provided for special Courts with the ‘status’ of the High Court to determine employment and labour relations disputes. The fact that the Industrial Court has been given the ‘status’ of the High Court enhances the power and discretion of the Court in granting reliefs”.

28. In my considered view, the general power provided by the Industrial Court under Section 12(3)(viii) of Industrial Court Act to grant relief as may be appropriate, read together with Article 213(3), empowers the Industrial Court to grant the relief that the Respondent sought in her Petition.

29. Indeed I concur with the position taken by Majanja J in United States International University (USIU) vs. Attorney General & 2 Others (2012) eKLR that:

“Labour and employment rights are part of the Bill of Rights and are protected under Article 41 which is within the province of the Industrial Court. To exclude the jurisdiction of the Industrial Court from dealing with any other rights and fundamental freedoms howsoever arising from the relationships defined in Section 12 of the Industrial Court Act 2011 or to interpret the Constitution, would lead to a situation where there is a parallel jurisdiction between the High Court and the Industrial Court. This would give rise to forum shopping thereby undermining a stable and consistent application of employment and labour law”.

“(42) in my view to hold that the Industrial Court has no jurisdiction to hear and determine a Petition seeking redress of violations of fundamental rights arising from an employment relationship would defeat the intention and spirit of the Constitution in establishing special Courts to deal with employment and labour disputes-----“.

30. In the Petition No. 64/2015 (ELRC NRB) Hon. J. Mbaru dealt with a similar issue of whether to entertain an application seeking to have the Hon. The Chief Justice empanel an uneven Number of Judges to entertain the Petition where issues to be determined also fell under Section 41, 42(1) and 45(3) of Employment Act as being inconsistent with the Constitution.

31. The issue of the Court’s jurisdiction to hear the matter was also raised and the Hon. J. Mbaru determined that the issue was an employment matter as provided under Article 162(2) of the Constitution and the Court had jurisdiction to hear and determine the application.

32. I do agree with my learned sister and also by relying on the arguments raised in the Judicial Service Commission vs. Shollei case, and USIU case, I find this Court has jurisdiction to entertain this

application.

33. On the 2nd issue this Court has to determine whether the application raised substantive question of law. As cited above in the case of **Chunilal Mehta vs. Century Spinning and Manufacturing Company AIR 1962 SC 1314**, a matter raised substantial question of law is one which is of general public importance or which have not been finally settled by a superior Court from the Court entertaining the matter.

34. The application seeks to determine whether Section 42(1) of the Employment Act is unconstitutional issue if determined, will affect a wide spectrum of the public and would in view be better handled by a panel of more than one Judge.

35. I do find as submitted that the questions being raised would best be determined by an uneven number of Judges. I therefore refer this matter to the Hon. Chief Justice to consider empanelling an uneven number of Judges to hear and dispense of this Petition.

Read in open Court this 17th day of February, 2017.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Achiando for the Petitioners – Present

No appearance for Respondent