



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 143 OF 2016

(Before D. K. N. Marete)

KEFA NYAMWEYA MOKAYA.....CLAIMANT

VERSUS

NYAMIRA TEA FARMERS SAVINGS AND

CREDIT CO-OPERATIVE SOCIETY LIMITED.....RESPONDENT

RULING

This is an application by way of preliminary objection dated 11th October, 2016 as follows;

That the respondent herein shall at the first hearing of the claimant's application dated the 20th days of September 2016, raise a preliminary objection on a point of law that the said application and indeed the entire cause herein should be struck out and/or dismissed as an abuse of the honourable court as this honourable court lacks jurisdiction of this honourable court to hear and determine the same.

The Respondent in her written submissions submits that the issues raised by the claimant in his application and claim are on his loan with the respondent and recoveries of the loan thereof. This is not an issue of employment or labour relations and therefore inapplicable to the jurisdiction of this court. Indeed, it is the Respondent's submission that this court lacks jurisdiction to determine the issues in dispute.

The Respondent seeks to rely on the authority of Professor **Daniel N. Mugendi vs Kenyatta University and 3 others, Civil Appeal No.6 of 2012** at Page 13 and 14 where the court observed as follows;

*To state that parties should **NOT FILE MIXED GRILL CAUSES** as in the case herein, wherein the Claimant has mixed Commercial and Employment and Labour Relations causes, which cannot be dealt with by this Honourable Court. It is now trite law that jurisdiction is everything and without which the Honourable Court cannot proceed one step further.*

The Respondent further sought to rely on the authority of Samuel Kamau Macharia and Another Versus Kenya Commercial Bank and 2 Others, Application No.2 of 2011 at page 47 and 48 as follows;

"... a court may not arrogate to itself jurisdiction through the craft of interpretation or by way of endeavours to discern or interpret the intentions of Parliament, where the legislation is clear and

there is no ambiguity.”

He also sought to rely on the authority of **Rafiki Enterprises Limited vs Kingsway Tyres & Automart Limited, Civil Application No. Nai. 375 of 1996 at page Page 69** where the Court of Appeal observed as follows;

Even assuming that it could, the Court of Appeal could not be reasonably expected to refer the matter to the High Court to determine whether or not it has jurisdiction to hear a particular matter.

The Claimant/Respondent in rebuttal relied on the authority of **Trusted Society of Human Rights Alliance vs Nakuru Water and Sanitation Services Company & Another (2013) Eklr** this Honourable Court (Ongaya J.) held that:

The court has considered the provision and finds that under the section, parties to the proceedings before the court are not limited to those in an employee-employer relationship. In particular, under section 12(2) of the Act, any person can bring before the court a case against an employer, employee, a trade union, an employer’s organization, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law. The court finds that the court has jurisdiction under section 12 (2) because the petitioner not being in an employer-employee relationship with the respondent, the respondent has been moved against in its capacity as an employer. As relates to jurisdiction by subject matter, Article 162(2)(a) of the Constitution and section 12(1) of are elaborate that jurisdiction attaches to this court with respect to disputes relating to employment and labour relations. In the instant case, the dispute is about a recruitment process undertaken by the respondent. The court finds that recruitment is a proper element of employment and therefore the court has jurisdiction in view of that subject matter. As for jurisdiction based on remedy, the court finds that the petitioner has substantially prayed for declarations which are remedies the court is authorized to make under section 12(3)(iv) of the Act. Thus, the court has jurisdiction on that account. Further, on jurisdiction by subject matter, the court holds that it is vested with constitutional jurisdiction to protect the Constitution under Article 258 and to enforce the Bill of Rights in disputes relating to employment and labour relations pursuant to provisions of Article 22(3) as read with Article 23 and 165(3)(b) of the Constitution. Thus, Rule 2 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and procedure Rules, 2013 “ High Court” means the High Court of Kenya established by Article 165 of the Constitution and includes courts with the status of a High Court established under Article 162(2) of the Constitution.

Again, he sought to rely on the authority of **Okiya Omtatah Okioti v Attorney Genral & 5 others [2015] eKLR** this Honourable Court (Nduma J) opined at paragraphs 35 – 39 as follows;

The subject matter of this dispute as set out in the Petition being the lawfulness or otherwise of strikes in the essential service; the adequacy of statutory dispute resolution mechanism in the essential service and terms and conditions of service of nurses serving in the County Governments are matters of Employment and Labour Relations described under Article 162 (2) of the Constitution of Kenya 2010 as read with Section 12 of the Employment and Labour Relations Act 2014 (as amended).

The Court has exclusive jurisdiction over such matters by dint of Article 165 (5) of the Constitution which provides;

“The High Court shall not have jurisdiction in respect of matters – (b) Falling within the jurisdiction of the Courts contemplated in Article 162 (2)”

This is one such matter and the Court has jurisdiction to deal with it. The Court of Appeal at Nairobi in the Civil Appeal No. 6 of 2012, Prof. Daniel N. Mugendi – vs – Kenyatta University and 3 others is instructive on this matter.

The Judges reviewed with approval, the decision by Majanja J. in Petition No. 70 of 20123, United States International University (USIU) –vs- The Attorney General & 8 others in determining whether the High Court should continue to determine Employment and Labour Relations matters in the light of the establishment of the Employment and Labour Relations Court.

The Court held;

“in sum on this ground of jurisdiction we find as we had stated earlier that the High Court had no jurisdiction to entertain the claim which essentially was based on breaches of contract of employment along with some unstated claims of breaches of rights, as the learned Judge did find ... It is only meet and proper that the Industrial Court do exclusively entertain those matters in that context and with regard to Article 165 (5)(b)”. [Empasis ours]

Lastly, in **Republic v Clerk County Assembly of Baringo ex parte William Kassait Kamket (2015) eKLR**, this Honourable Court (Radido J.)

Article 162 of the Constitution did not envisage a Court Limited or restricted to dealing with disputes arising out of a contract of service as defined in the Employment Act, 2007 which in any case predates the Constitution. The primary statute granting this Court universal jurisdiction is the Employment and Labour Relations Court Act (previously the Industrial Court Act). The most relevant provision is located in section 12 of the Act. And in granting the Court its jurisdiction, Parliament faithfully observed the command of the Constitution by using the phrase disputes relating to employment and labour relations. The jurisdiction granted included disputes relating to or arising out of employment between an employer and an employee ant not only in respect of contract of service as a reading of the Employment Act, 2007 may suggest. And in my view, the use of the term including in section 12 is significant as it helps to construe the jurisdiction of the Court over the present proceedings flow from application of Article 162 of the Constitution in establishing a specialist Court to deal with employment and labour relations disputes. The jurisdiction of the Court over the present proceedings flow from application of Article 162 of the Constitution and section 12(1)(a) of the Employment and Labour Relations Court Act rather than from an interpretation of the provisions of the employment Act, 2007. The definition of employer, employee and contract of service in the Employment Act, 2007, in my view, is not meant to limit or restrict the jurisdiction granted to the Court by section 12 of the Employment and Labour Relations Court Act, office holders are employees who have access to this Court and where a speaker alleges improprieties in the removal process that is a dispute relating to and arising out employment. It matters not that they are employees or servants of the people or the respective Commissions or County Assemblies.

The claimant has the more compelling authorities of the subject. It is settled law that where litigation digresses and incorporates areas apparently grey to the jurisdiction of this court, and these are interrelated and mixed up with situations of employment and labour relations, this court should boldly come up and manage the same. This is more so in situations where the circumstances are compelling in favour of such approach. All this is, however, left to the discretion of the attendant judicial officer who has the capacity to interrogate and make a determination in the circumstances.

In the instant case, this compellingly tilts in favour of handling this cause under this jurisdiction. I am therefore incline to dismiss the preliminary objection with orders that each party bears their own cost of the application.

Delivered, dated and signed this 26th day of April 2017.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Mokuia instructed by Zablon Mokuia & Company Advocates for the Respondent.
2. Miss. Chelimo holding brief for Mr. Konosi instructed by Konosi & Company Advocates for the Claimant