



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT & LABOUR RELATIONS COURT**  
**AT KISUMU**  
**CAUSE NO. 163 OF 2017**

*(Before Hon. Justice Mathews N. Nduma)*

**BENEDICT WECHULI.....CLAIMANT**

**= VERSUS =**

**NAVAKHOLO CONSTITUENCY DEVELOPMENT FUND...1<sup>ST</sup> RESPONDENT**

**THE NATIONAL GOVERNMENT CONTITUENCIES**

**DEVELOPMENT FUND BOARD.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The suit was in the first instance filed vide a Memorandum of Claim on 24<sup>th</sup> April 2017, later amended and filed on 12<sup>th</sup> May, 2017.
2. The cause of action disclosed in the Amended Memorandum of Claim is termination of employment of the Claimant by the 1<sup>st</sup> Respondent, Navakhlolo Constituency Development Fund, through the Member of Parliament of Navakhlo.
3. The remedies sought are –
  - (a) Payment of the unpaid salary for the remaining period of the three year contract in the sum of Kshs.190,000.
  - (b) Gratuity calculated at 31% of the annual basic salary as provided in the terminated contract.
4. The Respondent filed a Statement of Defence on 22<sup>nd</sup> June, 2017 in which it denied the claim in total. An Amended Statement of Defence was filed on 14<sup>th</sup> September, 2017 following the amendment of the Statement of Claim, in which the Respondent alleges that the Claimant's employment was terminated for misconduct following complaints of dishonesty by stakeholders.
5. Meanwhile, on 22<sup>nd</sup> June 2017, the Respondent filed Notice of Preliminary Objection as follows –
  1. That the Claim be struck out for lack of jurisdiction.

2. That the petition offend the mandatory provisions of section 56 of the National Government Constituencies Development Fund Act 2015.

3. That the petition is an abuse of court procedure and should be struck out in the interest of justice.

### **Submissions**

6. The Respondent filed written submissions on 16<sup>th</sup> November, 2017 in which the preliminary objection is elaborated.

### **Jurisdiction**

7. The Respondent cite Section 56 of the National Government Constituencies Development Fund Act 2015, which provides -

*(1) All complaints and disputes by persons arising due to the Administration of this Act shall be forwarded to the Board in the first instance and*

*(2) .....*

*(3) Disputes of a civil nature shall be referred to the Board in the first instance and where necessary an arbitration panel whose costs shall be borne by the parties to the dispute, shall be appointed by consensus of the parties to consider and determine the matter before the same is referred to court.*

8. It is submitted by the Respondent that the provisions of section 56 cited above are pre-employ or the word “shall” is used and therefore the claimant was bound to exhaust the statutory dispute resolution procedure before coming to court. To that extent the court lacks jurisdiction to entertain the suit.

9. Respondent cite the decision by the venerable Nyarangi JA in owners of the motor vessel “Lilian ‘s’ Vs Caltex Oil (Kenya) Limited (1989) KLR where he stated –

*“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 downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.*

10. The Respondent urges the court to drop this matter for lack of jurisdiction.

11. The Claimant on the other hand submits that the Employment and Labour Relations Court established under Article 162(2) of the Constitution of Kenya 2010 and under section 4 of the Employment and Labour Relations Court Act, Cap 234 of the Laws of Kenya, has exclusive jurisdiction over all employment and labour matters, and the said jurisdiction cannot be ousted by another statute as alleged or at all.

12. Article 162(2) provides,

*“parliament shall establish courts with the status of the High Court to hear and determine disputes relating to –*

*(a) Employment and Labour”*

Section 12 of the Employment & Labour Relations Court Act confers jurisdiction on Employment & Labour Relations court 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 and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and Labour Relations including -*

*(a) disputes relating to or arising out of employment between an employer and an employee inter alia.”*

### **Determination**

13. The exclusive jurisdiction of Employment & Labour Relations Court may only be ousted by an express provision of the constitution or by a statute, enacted by parliament pursuant to Article 62(2) (a) of the constitution and in that case, the wording of the statute must be express and unequivocal.

14. In this respect, section 56(1) of the National Government Constituency Act 2015, falls short of ousting the jurisdiction of ELRC in hearing and determination of Employment and Labour Relations matters or disputes related or arising from an employment and Labour Relationship for the following reasons:-

(i) The provision is not enacted pursuant to Article 162(2) of the Constitution.

(ii) The provision does not expressly make reference to employment and labour disputes or to disputes related or arising from an employment and Labour relationship.

(iii) The provision refers to disputes arising from the Administration of the National Government Constituencies Act, 2015 and a direct and purposive interpretation of section 56(1) leads the Court to the conclusion that the complaints and disputes intended to be covered under this provision are disputes that arise from the administration of constituency development funds.

15. With regard to Section 56(3) thereof, the same provides for reference of Civil disputes to the Board in the first instance and where necessary to an arbitration panel appointed by agreement of the parties and whose costs shall be borne by the parties to the dispute.

16. It is the court's considered view and finding that the Courts of equal status and the Magistracy have original and appellate jurisdiction over all civil cases conferred on them by the Constitution of Kenya 2010, in the first instance and by respective statutes relating to the jurisdiction of each of the Courts referred to herein.

17. The Jurisdiction of the Courts over civil matters is unlimited in the case of the High Court, specialised in the Case of ELRC and ELC and limited by monetary and geographical jurisdiction in the case of the Magistracy.

18. This jurisdiction cannot be ousted by any other statute and in particular, section 56(3) of the National Government Constituencies Act, 2015 couched in general terms and without reference to the enabling constitutional provisions, that give judicial authority to courts of law over civil matters which include Employment and Labour matters whose jurisdiction reside in specialised courts and the Magistracy.

19. Furthermore, Article 27(1) of the constitution provides –

*“Every person is equal before the law and has the right to equal protection and equal benefit of the law”*

20. It is the court's considered opinion that a provision that hinders persons from direct access to courts of law on civil disputes and undefined matters arising from National Government Constituencies Act, 2015 derogates from the right to equal protection and equal benefit of the law and cannot oust the jurisdiction of the court as alleged or at all.

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

**Judgement Dated, Signed and Delivered this 14th day of December, 2017**

**MATHEWS N. NDUMA**

**JUDGE**

**Appearances:-**

Mr. Momanyi for Claimant

Mr. Yogo for Respondent/Objector

CC. Chrispo Aura