



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

PETITION NO.64 OF 2015

BONVENTURE KIOKO MUTUKUPETITIONER

VERSUS

ATTORNEY GENERAL.....1ST RESPONDENT

BRITISH COUNCIL, KENYA2ND RESPONDENT

RULING

1. The ruling herein relates to Notice of Preliminary Objections filed by the 2nd respondent on 21st July 2015. This follows application and Petition filed by the petitioner on 13th June 2015. The objections are that;

- 1. In so far as the claimant [Petitioner] seeks declaration that sections 41, 42(1) and 45(3) of the Employment Act, 2007 are inconsistent with the constitution of Kenya 2010, this honourable court lacks jurisdiction to entertain the suit or to grant declaratory orders by reason of the provisions of article 165(3) (d)(i) of the constitution.*
- 2. Any interpretation of sections of statute or assertions that sections of statute are inconsistent with the constitution require to be by a three judge bench of the High Court. The jurisdiction of this 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.*
- 3. This claim [petition] is therefore an abuse of the court process and should be struck out with costs to the 2nd respondent.*

2. Counsel for the 2nd respondent thus submitted that the petitioner was employed by the 2nd respondent whose contract has since expired. The petition is premised on the grounds that the applicable law under which the contract was premised on is unconstitutional and that sections 41, 42 and 45(3) of the Employment Act should be declared a nullity. The 2nd respondent thus submitted that Sections 41 and 42 of the Employment Act are not a bar to the Petitioner's rights.

3. The 2nd respondent also submitted that in this case jurisdiction of the court is contested as article 162(2)(a) of the constitution and section 12 of the Employment and Labour Relations Court Act do not grant the court jurisdiction to determine whether sections 41, 42 and 45(3) of the Employment Act are inconsistent with the constitution. Where the court finds that it has jurisdiction, under the provisions of section 165(5) of the Constitution, the file should be referred to the Chief Justice to constitute a 3 judge bench to look at the matters raised by the petitioner with regard to sections 42, 43 and 45(3) being unconstitutional.

4. The 1st respondent on their part [the Attorney General] supported the submissions by the 2nd respondent with regard to that the petition raises serious matters of law that should not be arbitrated upon by a single judge as provided for under article 165(4) of the Constitution on the constitutionality of sections 41, 42 and 45 of the Employment Act.

5. The petitioner on his part is opposed to the preliminary objections raised by the 2nd respondent and submitted that the court has jurisdiction to hear the petition and determine all the issues before it as this is a court with similar status as the High Court under article 165 of the constitution with a mandate to determine constitutional petitions on employment disputes. Article 162(2) of the constitution gives the court mandate over matters of employment and labour relations as well matters covering Bill of Rights as under article 41 of the constitution. Thus when the court is exercising its jurisdiction, it can consider matters and context of article 165(5(b) of the constitution in order to do justice.

6. The petitioner relied on the following cases, **United States International University (USIU) versus Attorney General [2012] eKLR; Judicial Service Commission versus Gladys Boss Shollei & Another, Civil Appeal No. 50 of 2014; Prof. Daniel N. Mugendi versus Kenyatta University & Others, Civil Appeal No.6 of 2012; Owners of Motor Vehicle “Lilian S” versus Caltex Oil (K) Ltd [1989] KLR; Board of Governors, Moi High School Kabarak versus Malcom Bell & Another, Supreme Court Petition No.6 & 7 of 2013; Samuel G Momanyi versus AG & Another Petition No.341 of 2011; Benjamin Nyambati Odiba versus Egerton University, Industrial Cause No.1099 of 2012.**

Determination

7. Article 165(5) (b) of the Constitution of Kenya, 2010 provides inter alia that the High Court has no jurisdiction to deal with matters falling within the jurisdiction of the courts contemplated under article 162(2). Article 162(2) (a) on the other hand empowered parliament to establish courts with the status of the High Court to hear and determine disputes relating to employment and labour relations and to determine their jurisdiction and functions. Whereas the High court was a creature of the Constitution itself, setting out the functions and jurisdiction thereof, the Employment and Labour Relations Court was a creature of Parliament, in that its powers and jurisdiction is established under the Employment and Labour Relations Court Act, though the court is of equal status as the High Court. Such ‘equal status as the High Court’ give the Employment and Labour Relations Court *equal status* powers to issue orders such as a High Court can issue in the ‘exercise of its jurisdiction’ under the Employment and Labour Relations Court Act at section 12. Such jurisdiction is thus conferred upon the Employment and Labour Relations Court by the constitution and legislation. See **Republic v Principal Secretary Agriculture, Livestock and 3 others ex - parte Douglas M Barasa & 2 others. Civil Miscellaneous Application No. 168 of 2015 (JR).**

8. I find no contest that this is an employment matter. As such, the court finds jurisdiction properly applied. The petition is premised on a contract of employment that has since been terminated under provisions of the law that are now challenged as being unconstitutional. That far, I find the court has jurisdiction on the basis of article 162(2) of the Constitution. Equally, the sections of the law challenged in their application are section 41, 43 and 45(3) of the Employment Act, one of the statutes that outline the rights and responsibilities of employees as well as the duties and obligations of employers. Such are matters employment and labour relations that the operative statute for the court, the Employment and Labour Relations Court Act, firmly give the court exclusive jurisdiction over.

9. On whether the matter is ripe for reference to the Chief justice to constitute a 3 Judge bench, this is based on the grounds that the petition raises weighty issues on the constitutionality of sections 41, 43 and 45(3) of the Constitution and that such matters require the Chief Justice to constitute a 3 judge bench to determine. What is apparent, the petitioner came to court under certificate of urgency and with it a Notice of Motion. With the application is a petition that is yet to be assessed and or analysed. To determine matters in the petition before an application brought before this Court under Certificate of urgency would be pre-emptive. Where indeed the petition should be determined on its merit and found that indeed it requires a panel as suggested by the 2nd respondent with support from the 1st respondent, the petitioner

would be denied such due process as to be heard on his application and orders sought.

In that case, on the finding that the court has jurisdiction, the Petitioner shall be heard on his application dated 14th July 2015, and the issues on the main petition shall be gone into once the pending application is addressed and determined.

Delivered, dated and signed in open Court at Nairobi this 28th Day of September, 2015.

M. Mbaru

JUDGE

In the presence of:

Court Assistant - Lilian Njenga

Makori for 2nd Respondent

Akumo h/b Mumo for AG

Applicant absent