



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

PETITION NO 18 OF 2015

JAMES OMARIBA NYAOGA 1ST PETITIONER

JOSEPH MARANGA AMENYA 2ND PETITIONER

VERSUS

THE SPEAKER OF THE COUNTY ASSEMBLY KISII COUNTY....1ST RESPONDENT

THE KISII COUNTY ASSEMBLY 2ND RESPONDENT

THE COUNTY ASSEMBLY SERVICE BOARD KISII COUNTY 3RD RESPONDENT

RULING

1. On 20th August 2015, the Respondents herein filed Notice of Preliminary Objections on the following grounds;

- 1. That this Court lacks jurisdiction to hear and determine the present petition by dint of the provisions of section 12 of the Powers and Privileges Act;*
- 2. That these [proceedings are one and the same as the proceedings currently pending before Kisumu Petition No. 12 of 2015 and therefore this amounts to sub judice;*
- 3. That the Petitioners have not invoked the provisions of section 77 of the County Government Act before commencing the current proceedings;*
- 4. That no judicial review proceedings shall be commenced without seeking leave of the Court as required by law;*
- 5. That the application and the entire petition be struck out with costs.*

2. Both parties made their oral submissions in Court on the objections raised by the Respondents. The Respondents submitted that the petition filed herein and dated 12th August 2015 and the prayers therein seek to declare the impeachment proceedings against the Petitioners by the 2nd Respondent a nullity. The 2nd Respondent as a legislative organ of the government of Kisii County and its actions done by its members are protected by section 12 of the Powers and Privileges Act and no decision of the assembly shall be questioned by any court. That the petition seeks to challenge the decision of the 2nd Respondent in their legislative mandate but the powers given to all county assemblies cannot be subject to question by the court. This will affect the doctrine of separation of powers and as such the jurisdiction of the Court has been ousted as set out in the principles laid down in the case of **Owners of the Motor Vessel "Lillian S" v. Caltex Oil, (Kenya) Ltd [1989] KLR 1.**

3. The Respondent s also submit that legislators at the counties and senators have power to legislate and

cannot be subjected to judicial question unless there is an unconstitutional challenge under article 165 of the constitution.

4. The Respondent also submit that this matter is *sub judice* under the provisions of section 6 of the Civil Procedure Act which guide parties on filing of suits. There is a petition No.12 of 2015 filed by similar parties over similar facts in Kisumu Court. By virtue of the provisions of section 12 of the Civil Procedure Act, the matter herein cannot proceed before petition No.12 of 2015 is concluded.

5. The Petitioners were employed by the Public Service Commission and seconded to Kisii County in accordance with the County Government Act. Upon such secondment, a party that challenges the County Government must cite section 77 of the County Government Act. The Petitioners have not applied section 77 and hence are in abuse of the Court process.

6. Order 53 of the Civil Procedure Rules and article 23 of the Constitution allow judicial Review applications and the process is set out under order 53. A party must seek leave of the Court before moving the Court with the application as herein submitted by the Petitioners that has no leave. Prayers (i) and (j) seek certiorari and mandamus orders yet the Petitioners have not sought leave of court. Such leave is mandatory and there is no compliance herein. The preliminary objections should be allowed the petition dismissed.

7. In reply, the Petitioners submitted that the objections made by the Respondents are misconceived. This Court has jurisdiction under article 162(2) of the Constitution where the Court is conferred with the mandate over employment and labour relations. The petition is premised on the violation of article 41 and 50(1) of the constitution. The questions that the Petitioners will address relate to article 236 of the Constitution as therein there is protection of employees while executing their constitutional mandate. The 2nd Respondent has used their legislative mandate to send the Petitioners on leave. The 2nd responding is not the employer of the Petitioners as the 3rd Respondent holds such mandate. These are the circumstances that have brought the Petitioners to Court over the violation of their constitutional rights.

8. The Petitioners also submitted that the 2nd Respondent is an organ created under the Constitution and thus bound by article 10 and 23 of the Constitution and their operations must be done per the constitution. The Court has the power to interrogate any unconstitutional action as held in the case of Nick Githinji versus the Kiambu County Assembly, Petition No.11 of 2014. Also in the case of **Coalition for Reforms and Democracy & Another versus Republic of Kenya & Others, Petition No.628 and 630 of 2014**, where the Court held that the Court has power to interrogate the legislative power of parliament. The powers of the Court were outlined with regard to what must be addressed in this regard. The Constitution is supreme and the courts have power to ensure parliament and county assemblies comply.

9. Section 12 of the Powers and privileges Act is not of help in this case as the law must fit into the Constitution and where there is a derogation, the same is a nullity. The statute in this case must be read in line with the Constitution and not separately.

10. The Petitioners also submitted that the question of *sub judice* does not apply in this case. the petition before Court is challenging the compulsory leave notice issued by the 2nd Respondent to the Petitioners without the sanction and or consent of the 3rd Respondent on account that the Petitioners refused to pay the County Assembly members of the 2nd Respondent a seating allowances when the house/assembly was on recess. In this case, a non-employer sent an employee of the 3rd Respondent on compulsory leave. This illegality is the one challenged in this petitioner. With regard to Petition No.12 of 2015 filed in Kisumu, the issue in dispute is the suspension of the Petitioners on account of a medical scheme awarded to a medical provider, APA Insurance and the issues that arose as a result. The suspension of the Petitioners was on 15th May 2015 and the compulsory leave was on 7th August 2015. There are separate causes of action in each case and the two suits cannot be said to be similar even though the parties are the same. The time difference and the issues in dispute as separate.

11. Section 77 of the County Government Act does not apply to the Petitioners. The submission that the

Petitioners were employees of the Public Service Commission seconded to the 3rd Respondent and thus should have mounted appeals to the Public Service Commission is misleading. The Petitioners are full time employees of the 3rd Respondent and have no recourse before their former employer. The 1st Petitioners is an employee of the 3rd Respondent as Clerk and not a seconded officer.

12. The leave that is required before filing of Judicial Review applications was not necessary in this case. The suit is commenced by way of a petition under the provisions of article 23 of the Constitution as under the same article, there are Practice Rules and no leave is require to file a petition as this one.

13. The Respondent has relied on the following cases – **the Attorney General & Another versus CORD & others, Court of Appeal (Nbi) No.2 of 2015; the County Governor of Nyeri & Another versus Cecilia Wangechi ndungu, Court of Appeal (Nyeri) No.2 of 2015; Mrao Limited versus First National Bank of Kenya & 2 Others [2003] KLR.**

Determination

The issues for determination herein are;

Whether the Court has jurisdiction;

Whether the Petition is *sub judice*;

The effect of section 77 of the County Government Act to this Petition; and

Whether leave to institute and seek the remedies are herein is necessary.

14. Jurisdiction, whenever raised, must be examined and determined forthwith because jurisdiction is the bedrock on which our litigation system is based. Jurisdiction is basic to the court's adjudicatory function, such that if it is challenged and made an issue, it thus ought to be addressed and determined forthwith. In order to determine whether the Court has jurisdiction to hear the Applicants, the task must be to examine the law, issues raised in the preliminary objections, the arguments of counsel, as well as authorities on the subject as held in **Central Organisation of Trade Unions Kenya versus The Cabinet Secretary Social Security and Services, Cause No.2013 of 2014.**

15. The rationale for this and I agree with the submissions by the Petitioners is; jurisdiction is everything and without it, a Court must lay down its tools as held Nyarangi J. in **Owners of the Motor Vessel "Lillian S" v. Caltex Oil,(Kenya) Ltd [1989] KLR 1).** Indeed if I may further quote these submissions and the various authorities submitted in support of the Respondent's objections, the Supreme Court in **Re the Matter of the Interim Independent Electoral Commission, S.C., Constitutional Application No. 2 of 2011; [2011] eKLR,** and in **Samuel Kamau Macharia & Another v. Kenya Commercial Bank Limited & 2 Others, S.C. Application No. 2 of 2012; [2012] eKLR** (Macharia Case), held that the assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, statute law, and judicial precedent. It was stated:

A Court's jurisdiction flows from either the Constitution or legislation or both. Such 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 wording of legislation is clear and there is no ambiguity.

The Lillian 'S' case therefore establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Industrial Court the respective jurisdiction is donated by the Constitution and Acts of Parliament.

16. The question of jurisdiction is crucial to any matter that comes before court. Jurisdiction of the Court flow from the Constitution and statute and the Court cannot arrogate to itself jurisdiction it does not have. In my reading of the **Macharia case**, the decision of the Supreme Court can clearly be distinguished from this one in that the issue of jurisdiction was framed as to whether the case as presented by the Applicant had met the threshold set by law for filing before the Supreme Court. That the law applied by the Applicant was not applicable. In this case, the jurisdiction of the Employment and labour Relations Court is clearly set out under the Constitution under **Article 162(2)**, under section 12 of the Employment and labour Relations Court Act any other written law that extends jurisdiction to the Court. That jurisdiction is outlined under the Constitution as;

162. (1) the superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts mentioned in clause (2).

(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

(a) Employment and labour relations; and

(b) The environment and the use and occupation of, and title to, land.

(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).

[Emphasis added].

17. Therefore, Article 162 of the Constitution is the architecture of the Employment and Labour Relations Court by establishing the contextual framework for labour relations in Kenya and the jurisdiction bestowed on the Court is that of addressing *employment* and *labour relations* matters the nature of which is elaborated by an Act of Parliament as outlined under Article 162(3). In this regard, in 2011, Parliament enacted the Industrial Court Act [now the Employment and Labour Relations Court Act] and at section 4 sets the purpose for it, that of;

4. (1) In pursuance of Article 162(2)(a) of the Constitution, there is established the Industrial Court for the purpose of settling employment and industrial relations disputes and the furtherance, securing and maintenance of good employment and labour relations in Kenya.

18. The Act further elaborately outlines the jurisdiction of the Court at section 12 as;

12. (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—

19. Thus the jurisdiction of the Court must be seen from the provisions of article 162 of the Constitution as read together with section 12 of the Employment and Labour Relations Court Act. All matters employment and labour relations, whether commenced as a petition, judicial review or claim and or plaint all lie at the Employment and Labour relations court. See decision in **United States International University (USIU) versus Attorney General [2013] eKLR**.

20. The challenge here is that the 2nd Respondent cannot be challenged while undertaking its legislative mandate. That a parliament or assembly such as the 2nd Respondent ousts the jurisdiction of the Court to challenge their legislative power in view of separation of powers. However, noting the analysis above it is not in dispute that the Petitioners are employees of the 3rd Respondent, whatever mandate the 2nd Respondent has in terms of section 12 of the Powers and Privileges Act or the County Government Act, conformity to the Constitution and applicable law with regard to employees must take precedence.

21. My reading of the Petition herein is that the Petitioners are defined as Clerk, Kisii County Assembly and Director Finance, Kisii County Assembly respectively. The petition is premised on the violation of articles 2(1), 10(2) (c), 22(1), 23(1) and (3), 27, 41, 47(1), 50(1), 75(1) (a), 185, 236, 258 and 259 of the constitution. The remedies sought as premised on the alleged violations of these constitutional provisions. The form and procedure adopted by the petitioner to approach the Court is by of a petition. Without going into the merits of the case, the Petitioners outline their case as being that they are employees of the 3rd Respondent. Section 13 of the County Government Act create the office of Clerk to the County Assembly which office is appointed by the County Service Board and the office of the 2nd petitioner is appointed and supervised by the 3rd Respondent. The suspension of the Petitioners by the 2nd Respondent is thus challenged as there is no power by such a body to suspend officers who are not their employees. These submissions must however be addressed within the context of the petition which I find establish a *prima facie* case a ground sufficient to warrant the petitioners being given a chance to be heard at the first instances, hence the subsisting interim orders.

22. Without going into the merits of the case, where a party claim the violation of their constitutional rights, rights as set out by the Petitioners in their petition herein, recourse must be to this court. The legislative power of the 2nd Respondent notwithstanding, such a mandate must be undertaken within constitutional boundaries. To go outside the Constitution or act contrary to a constitutional mandate, this Court must intervene and address. The contest as to who the employer of the Petitioners is so as to qualify and commence disciplinary action such as a suspension or compulsory leave must be resolved by this court. Whether the employer is the 2nd Respondent or the 3rd Respondent must be addressed by call of evidence. To claim legislative powers and or authority in this regard so as to remove the Court from such arbitration is unconstitutional and contrary to article 41 of the constitution. The Court must interrogate the action by the Respondents for its constitutionality. This is what is required of this Court under article 165(3) of the constitution. This role cannot be taken away from this court.

23. I find this Court has the requisite jurisdiction to hear and determine the issues presented in this petition. There are constitutional questions for the Court to determine as vested by the Constitution under articles 2(1), 10(2) (c), 22(1), 23(1) and (3), 27, 41, 47(1), 50(1), 75(1) (a), 185, 236, 258 and 259. These questions cannot be addressed anywhere else other than before this court.

24. On the question of the matter being *sub judice* I have gone through petition No.12 of 2015 and the instant petition. As correctly submitted by the Petitioners, the cause of action with regard to petition No.12 of 2015 relate to the suspension of the Petitioners way back on 15th May 2015 whereas the cause of action herein relate to the compulsory leave of 7th August 2015 directed by the 2nd Respondent to the Petitioners. The circumstances, cause of action and remedies sought in each suit as separate and distinct and different. Even though the parties are similar, the facts forming the basis of each petition cannot be said to be the same. This objection must therefore fail.

25. The Court reading of section 77 of the County Government Act, the powers vested upon the 3rd Respondent under section 12 of the same Act and in view of the letters of appointment issued to both Petitioners, I find no relationship and or requirement for the Petitioners to appear or file any appeal against their compulsory appointment to the Public Service Commission. To require the Petitioners to file an appeal before the Public Service Commission in view of section 77 of the County Government Act is a misreading of the law and cannot form a good basis for objection to the petition herein being heard by the court. I find a fundamental difference between the mandate of the 3rd respondent and the County Public Service Board.

26. On the question of the petition being filed without leave as under Order 53 of the Civil Procedure Rules, parties should first appreciate that this Court has its own objectives distinct and separate from any other Court of the land that guide parties that approach the Court for any relief. These objectives are set out under section 3(1) of the Employment and Labour Relations Court Act thus;

3. (1) the principal objective of this Act is to enable the Court to *facilitate the just, expeditious and proportionate resolution of disputes governed by this Act.*

27. Before application of the Rules which are subsidiary to the legislation constituting the court, parties are bound by the provisions of statute. The objectives of the Court therefore sets the preamble within which matters before the Court must be addressed. This is to ensure the just, expeditious and fair administration of justice without undue delay. Therefore any rules that create clawbacks in time and procedure so as to impede access to justice must be addressed in view of the provisions under section 3 of the Employment and Labour Relations Court Act. Parties approach this Court because their livelihood in terms of employment is under threat and to require such a party first apply and seek leave of the Court to approach and file and required application is a technicality that does not promote the provisions of article 159 of the constitution.

28. That said, different Courts in Kenya have in my view, addressed this question of seeking leave to file judicial review applications in a very progressive manner. As submitted by the petitioner in the case of **County Governor of Nyeri & Another versus Cecilia Wangechi ndungu, Court of Appeal (Nyeri)**, the Court reaffirmed the applicable law which a replicate here thus;

*The appellants took issue with the orders that were issued by the trial court. They argued that the orders were judicial review orders yet what was before the Court was not judicial review proceedings. The Respondent filed the Petition in the Industrial Court pursuant to **Article 22 of the Constitution**. On this issue we can do no better than reproduce **Article 23 (3) (f) of the Constitution**: -*

“Article 22 (3) In any proceedings brought under Article 22, a Court may grant appropriate relief including-

(a).....

.....

(f) an order of judicial review.”

29. To add anything herein would be inappropriate save to confirm, indeed this is the position as under the Constitution and any law or rules of procedure which circumvent the constitutional procedure is a nullity. In this case, the petitioner have filed a petition and whatever remedies are sought can include orders of certiorari and mandamus as well as applied herein.

In the penultimate, the objections submitted by the Respondents must fail. Noting the salient issues raised in objections and the legal advancements made, I take it that in the growth of our jurisprudence and appreciation of constitutional provisions vis-a-vies devolved governments mandate, such questions of law and Constitution only help to expand such jurisprudence and no party should be penalised herein in costs at this point. Costs shall therefore be in the cause.

Parties shall set the petition for hearing.

Delivered, dated and signed in open Court at Nairobi this 23rd Day of September 2015.

M. Mbaru

JUDGE

In the presence of:

Court Assistant.....

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