



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI**

**PETITION NO. 15 OF 2015**

**GEORGE MAINA KAMAU.....PETITIONER**

**VERSUS**

**THE COUNTY ASSEMBLY OF MURANG'A.....1<sup>ST</sup> RESPONDENT**

**THE SPEAKER, COUNTY ASSEMBLY OF MURANG'A.....2<sup>ND</sup> RESPONDENT**

**THE GOVERNOR, MURANG'A COUNTY.....3<sup>RD</sup> RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 9<sup>th</sup> October, 2015)

**RULING**

The petitioner filed the petition on 21.09.2015 invoking Articles 2, 3, 10, 41, 47, 174, 179, 185, 224, 226 and 236 of the Constitution. The petitioner also filed with the petition the notice of motion under Articles 22, 23, and 165 of the Constitution and under Rules 3, 4, 13, 19 and 23 of the Constitution of Kenya ( Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. The notice of motion was fixed for hearing or for further orders on 30.09.2015. By that date, a preliminary objection had been filed for the 1<sup>st</sup> and 2<sup>nd</sup> respondents challenging the jurisdiction of the court to hear and determine the petition and the application filed there under. The parties agreed to argue that preliminary objection.

The preliminary objection dated 28.09.2015 set out 6 grounds as follows:

1. That the notice of motion dated 18.09.2015 herein against the first and second respondent should be dismissed as it does not disclose any or any reasonable cause of action against the said first and second respondents.
2. That the honourable court has no jurisdiction to hear this matter because the issues raised herein are of constitutional nature and should be filed in the constitutional court.
3. That the petition herein against the respondents be dismissed for flouting rule 4 of the Industrial Court (Procedure) Rules, 2010.
4. The motion is not supported by an affidavit and is in contravention of Order 51(4) of the Civil Procedure Rules, 2010.
5. The select committee of the county assembly of Murang'a established pursuant to section 40 of the County Government Act and Standing Orders No. 66 of the Murang'a County Assembly has not been enjoined as a party.
6. The notice of motion dated 18.09.2015 does not comply with the substantive and procedural law rendering it irreparably defective and an abuse of court process.

The parties agreed to argue the objection on the jurisdiction of the court as set out in grounds 2 and 3 of the notice of preliminary objection.

The **1<sup>st</sup> issue** for determination is whether the petitioner was entitled to file a petition under the relevant provisions of the Constitution and the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.

It was submitted for the 1<sup>st</sup> and 2<sup>nd</sup> respondents that the petitioner having moved this court as a special court, the petitioner could not file a petition but could only file a statement of claim under rule 4 of the Industrial Court (Procedure) Rules, 2010. For the petitioner it was submitted that the petitioner sought to enforce fundamental rights and freedoms and other provisions of the Constitution and was therefore entitled to file the petition.

As submitted for the petitioner, the court finds that **“High Court”** under the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 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.

The court has considered the liberal provisions in Articles 22, 23 and 258 of the Constitution on enforcement of rights and fundamental freedoms and other provisions of the Constitution. Under Article 23(3) the remedies available include a declaration of rights; an injunction; a conservatory order; a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24; an order for compensation; and an order for judicial review. It was submitted for 1<sup>st</sup> and 2<sup>nd</sup> respondent that the petitioner should have of necessity filed a statement of claim under the rules of this court. It is the view of this court that taking such submission would introduce procedural bars to access to justice and this court upholds its opinion in **Peter Muchai Muhura –Versus- Teachers Service Commission [2015]eKLR** thus,

**“It is the opinion of this court that the barriers or ridge or valley between judicial review proceedings and the ordinary actions as they were has been collapsed by the Constitution of Kenya, 2010. The Constitution has opened avenues to access to justice and all stipulated remedies in the same proceedings; ordinary action or prescribed application. Thus, litigants need not file separate processes to access the different available remedies. It is true that universal procedural rules have not yet fully evolved in our judicial system to keep pace with the constitutional liberation of litigants; a legitimate and urgent project towards full realization of the constitutional principles in Article 159 that justice shall not be delayed; justice shall be administered without undue regard to procedural technicalities; and the purpose and principles of the Constitution shall be protected and promoted.”** It is the further opinion of the court that the opinion applies to judicial review applications, ordinary actions as much as to petitions like in the instant case.

The court, on the procedural manner litigants should invoke and approach the court’s jurisdiction, further upholds its opinion in **Professor Elijah Biama –Versus- University of Eldoret and 2 Others [2014]eKLR** thus,

**“...The court holds that a venture to distinguish the manner a litigant approaches or ought to approach the court merely on the basis of the remedy or the situ (prescription of the right or fundamental freedom as embedded in the Constitution or legislation or other formal source) of the right or fundamental freedom in issue is long dead under the former constitutional dispensation as the new constitutional order prescribes and favours universal approach towards the realization of the rights and fundamental rights irrespective their primary formal situ. In the opinion of the court, future measures of aligning court procedures to the new constitutional order will entail universal procedure for realization and enforcement of the rights and freedoms irrespective the formal source or residence of the right or fundamental freedom because the Constitution incorporates all as part of the Bill of Rights. If every dispute that comes to court entails enforcement of some legitimate right or fundamental freedom which the Constitution has incorporated in the constitutional Bill of Rights, then, in the court’s opinion, time for a universal**

**procedure by which parties should move the court has come and it would be pursuit in vanity to look for and attempt to sieve rights and fundamental freedoms that are expressly provided for in the Bill of Rights as was the case in the days of Harrikson –Versus- Attorney General of Trinidad and Tobacco (1980) AC 265. For the time being that the universal procedure is not in place, it is the opinion of the court that litigants will not be faulted for the option they shall adopt of the myriad procedural options that continue to peep their souls from the former constitutional dispensation to the new constitutional order.”**

Accordingly, to answer the 1<sup>st</sup> issue for determination, the court returns that the petitioner was entitled to file a petition and application as set out in the cited rules and Articles and the petitioner moved the court procedurally by way of a petition in view of the pleadings and prayers made in the petition as it was not necessary to file a statement of claim.

The 2<sup>nd</sup> issue for determination is whether this court had jurisdiction to hear and determine the petition seeking to enforce the fundamental rights and freedoms and other provisions of the Constitution.

It was submitted for 1<sup>st</sup> and 2<sup>nd</sup> respondents that only the High Court had jurisdiction to enforce fundamental rights and freedoms under Article 165 (3) (b) of the Constitution. It was submitted for the petitioner and the 3<sup>rd</sup> respondent that the court had such jurisdiction provided the dispute was about or related to employment and labour relations and in view of the provisions of Article 165(5) which barred the jurisdiction of the High Court for matters falling within this court’s jurisdiction.

The issue as stated in the 1<sup>st</sup> and 2<sup>nd</sup> respondents’ submissions is whether the Employment and Labour Relations Court has jurisdiction to entertain and determine claims of breach of fundamental rights under Articles 22 and 23 or enforcement of the Constitution under Article 258 of the Constitution as pertains to employment and labour relations matters. The Court of Appeal has resolved the issue in the case of **Prof. Daniel N. Mugendi –Versus- Kenyatta University and 3 Others, Civil Appeal No. 6 of 2012**. The court stated thus, **“The question now is whether the appellant should go back and ‘sever’ the composite petition alleging violation of his fundamental rights and breach of contract of employment. Much as severance would entail time and resources to effect the necessary amendments and make due motions, we are of the view that with necessary amendments, which appear imperative to make out a clear use of breach of rights being effected, the appellant can and should be heard by the Industrial Court on the two claims i.e. violation of rights and breach of contract of employment. The position that the Industrial Court can and should entertain the claim as laid by the appellant, is in line with the decision of Majanja, J. in Petition No. 170 of 2012 – United States International University(USIU) –Versus- The Attorney General & Others.”**

That this court enjoys the jurisdiction to hear and determine employment and labour relations matters alongside claims of fundamental rights (and enforcement of constitutional and statutory provisions) ancillary and incidental to those matters was upheld in the ruling delivered by this court on 30.04.2014 in **Geoffrey Makana Asanyo –Versus- Nakuru Water and Sanitation Services Company and 6 Others [2014]eKLR**. The Court of Appeal held as much in **Judicial Service Commission –Versus- Gladys Boss Shollei & Another [2014]eKLR** and this court follows the opinion by Kariuki, JA at paragraph 72 that the argument that this court cannot determine issues of violations of constitutional rights interwoven with employment and labour relations does not hold good as it would be antithetical to the letter and spirit of the Constitution.

The court further upholds its opinion in **Margaret Lorna Kariuki –Versus- Embu County Government [2015]eKLR** where it was stated, **“There is no dispute that the parties are in an employer-employee relationship and the court finds that it has the constitutional and statutory jurisdiction to hear and determine the dispute. While making this finding, the court is guided by Article 165(5) of the Constitution which expressly bars the High Court from entertaining cases whose jurisdiction is vested in this court under Article 162(2) of the Constitution and under the Employment and Labour Relations Court Act.”**

Again, in Karisa Chengo and 2 Others –Versus- Republic [2015]eKLR the Court of Appeal has stated thus,

**“...By being of equal status, the High Court therefore does not have the jurisdiction to superintend, supervise, direct, guide, shepherd, and or review the mistakes, real or perceived, of the ELRC and ELC administratively or judiciously as was the case in the past. The converse equally applies. At the end of the day however, ELRC and ELC are not the High Court and vice versa. However, it needs to be emphasized that status is not the same thing as jurisdiction. The constitution though does not define ‘status’. The intentions of the framers of the constitution in that regard are obvious given the choice of the words they used; that the three courts (High Court, ELRC and ELC) are of the same juridical hierarchy and therefore are of equal footing and standing. To us it simply means that the ELRC and ELC exercise the same powers as the High Court in performance of its judicial function, in its specialised jurisdiction but they are not the High Court.”** Taking into account that opinion by the Court of Appeal and in view of the provisions of Article 165(5) as read with Article 162(2) (a) of the Constitution, this court holds that the jurisdiction of this court is essentially the jurisdiction of the High Court but within this court’s jurisdictional subject matter being matters related to employment and labour relations. Thus, the court upholds its opinion in Grace Gacheri Muriithi –Versus- Kenya Literature Bureau [2012]eKLR, Industrial Court Cause No. 44 of 2011 at Nairobi, where it was stated thus, **“Further, sub-Article 165 (5) (b) of the Constitution provides that the High court shall not have jurisdiction in respect of the matters falling within the jurisdiction of the Industrial Court. Thus, in view of the High Court status of the Industrial Court and in view of the provisions of Sub-Article 165 (5) (b) of the Constitution and Subsections 12 (1) and (2) of the Act, the Industrial Court is also vested with the jurisdiction as follows:**

- a) **Unlimited original jurisdiction in disputes relating to employment and labour relations.**
- b) **Jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights provided for in the Constitution of Kenya, 2010, as far as employment and labour relations is concerned, has been denied, violated, infringed or threatened.**
- c) **Jurisdiction to hear appeals from decisions of tribunals of competent jurisdiction in disputes relating to employment and labour relations.**
- d) **Jurisdiction to hear and determine any question respecting the interpretation of the Constitution in employment and labour relations including the determination of:**
  - (i) **the question whether any law is inconsistent with, or is in contravention of the Constitution;**
  - (ii) **the question whether anything said to be done under the authority of the Constitution or of any other law is inconsistent with or is in contravention of the Constitution;**
  - (iii) **any matter relating to constitutional power of state organs in respect of county government and any matter relating to the constitutional relationship between levels of Government; and**
  - (iv) **a question relating to conflict of laws under Article 191 of the Constitution .**

The jurisdiction of the Industrial Court is therefore essentially the jurisdiction of the High Court as provided for in Sub- Article 165 (3) of the Constitution and with boundaries limited to the employment and labour relations as amplified in the Industrial Court Act, 2011. However, it is notable that the Constitution removes from the jurisdiction of the Industrial Court one aspect of employment and vests it in the exclusive jurisdiction of the High Court. Under Sub-Article 165 (3) (c), the High Court is vested with the exclusive jurisdiction to hear appeals from a decision of a tribunal appointed under the Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144 of the Constitution (being a decision by tribunal

appointed for removal of the President on grounds of incapacity). Finally, the Industrial Court is vested with the jurisdiction, original or appellate, as may be conferred by any legislation with respect to employment and labour relations matters.”

Again in applying the cited cases in the recent decision of 31.07.2015 in Abdikadir Suleiman –Versus-County Government of Isiolo and Another [2015]eKLR this court stated thus, “As stated by the court earlier in this judgment, the original and unlimited jurisdiction to make a finding on legitimacy or lawfulness of decisions in disputes between employers and employees rests with this court as vested with the appropriate jurisdiction under Articles 159(1), 162 (2) (a) as read with Article 165(5) and (6) of the Constitution; Articles 22(1) and 258(1) of the Constitution, and the provisions of the Employment and Labour Relations Act, 2011. The court holds that the jurisdiction spreads to all issues in the employment relationship and related matters including the enforcement of the fundamental rights and freedoms under Article 22 of the Constitution and enforcement of the Constitution under Article 258 as far as the issues in dispute are, evolve, revolve or relate to employment and labour relations. The court holds that the compass or golden test for the court’s jurisdiction is the subject matter in the dispute namely disputes relating to employment and labour relations as provided for Article 162 (a) of the Constitution and as amplified in the Employment and Labour Relations Act, 2011 and not the remedies sought or the procedure of moving the court or the situ of the applicable law or any other extraneous considerations as may be advanced by or for a litigant.”

Thus to answer the 2<sup>nd</sup> issue for determination, the court upholds the cited opinions and returns that it has the relevant jurisdiction to hear and determine the petition as there is no dispute that the matter is about and arises from the petitioner’s employment relationship with the respondents.

In conclusion, the preliminary objection as urged for 1<sup>st</sup> and 2<sup>nd</sup> respondents is dismissed with costs and parties are now invited to take further directions on the further steps towards hearing and determination of the application and the petition on record.

**Signed, dated and delivered in court at Nyeri this Friday, 9th October, 2015.**

**BYRAM ONGAYA**

**JUDGE**

**Parties' Advocates:**

1. Muchoki Kangata Njenga & Company Advocates for the Petitioner.
2. Gathenji & Company Advocates for 1<sup>st</sup> and 2<sup>nd</sup> Respondents.
3. Mbugua Ng’ang’a & Company Advocates for 3<sup>rd</sup> Respondent.