REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

PETITION 31 OF 2013

KENYA MEDICAL RESEARCH INSTITUTE….....PETITIONER

VS

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

THE INDUSTRIAL COURT OF KENYA.....2ND RESPONDENT

AND

AGNES MUTHONI & 34 OTHERS.....1ST INTERESTED PARTY

UNION OF NATIONAL RESEARCH AND

ALLIED INSTITUTES STAFF OF KENYA.....2ND INTERESTED PARTY

RULING

Introduction

1. The petitioner herein, **Kenya Medical Research Institute**, is described in this petition as a State Corporation established under the ***Science and Technology (Amendment) Act*** of 1979 and the national body responsible for carrying out health research in Kenya.
2. In fulfilment of its said functions the petitioner employed some thirty five employees (hereinafter referred to as the interested parties) in accordance with the regulations for recruitment of staff set out by the Board of Management.
3. A dispute seems to have arisen between the petitioner and the said interested parties triggered by the petitioner's decision to terminate the appointment of the interested parties on allegations of irregular appointments.
4. Aggrieved by the said decision the interested parties commenced legal proceedings before the then Industrial Court (hereinafter referred to as the Tribunal) and in its decision delivered on 13th May, 2010, the Tribunal made an award reinstating the interested parties to their positions with the petitioner.
5. Aggrieved by this decision, the petitioner lodged Civil Appeal No. 15 of 2011 to the Court of Appeal purportedly pursuant to section 27 of the ***Labour Institutions Act*** which Appeal was however struck out on 10th May 2013 on the ground that it was incompetent as the Court of Appeal did not have the jurisdiction to entertain the said appeal.
6. It was this decision by the Court of Appeal which provoked the instant petition.
7. When this petition came before **Hon. Mr Justice D K Marete** on 23rd September, 2013 **Mr Wetangula**, learned counsel for the petitioner, applied under section 21(2) of the ***Industrial Court***

Act, 2011 (hereinafter referred to as the Act) as read with Article 165(4) of the Constitution for the referral of the matter to the Hon. The Chief Justice for empanelling of a Bench of not less than three Judges to hear and determine the petition which application the learned Judge acceded to.

8. By his directions made on 16th October, 2013, the **Hon. The Chief Justice** empaneled a three Judge Bench comprising **Hon. Mr Justice Nderi Nduma** (Presiding), **Hon. Lady Justice Mumbi Ngugi** and **Hon. Mr Justice George Odunga** to hear the petition hence the composition of this Bench. It is not in dispute that **Hon. Justice Nduma** is a Judge of the Industrial Court, a superior Court with the status of the High Court established under Article 162(2)(a) of the Constitution while the other two members of the Bench are Judges of the High Court established under Article 162(1) of the Constitution.
9. As the petitioner had initially raised the issue of the composition of this Bench, on 13th March, 2014, we directed the parties to address us on the issue as that was an issue that went to the jurisdiction of this Court.
10. This ruling is therefore in respect to and limited to the issue of the competency of this bench as constituted to hear and determine this petition.

1st Interested Parties' Case

11. On behalf of the interested parties, it was submitted that under Article 162 of the Constitution, the Industrial Court is a creature of the Constitution and pursuant to Clause (3) thereof, the Legislature passed the Act which established the Industrial Court as the Superior Court dealing with employment and labour relations matters as contemplated under Article 162(2)(a) of the Constitution. It was therefore submitted that Parliament and not the Chief Justice had a constitutional duty to determine the jurisdiction and functions of the Industrial Court which were provided for under section 12 of the Act.
12. In the interested parties' view, since the Constitution only states that the Industrial Court has the status of the High Court and not that it is a High Court, to constitute a Bench of High Court Judges mixed with an Industrial Court Judge is unconstitutional. In support of this contention, the interested parties relied on Article 165(5)(b) of the Constitution which they argued bars the High Court from hearing matters within the jurisdiction of the Industrial Court.
13. It was therefore submitted on their behalf that for the Chief Justice to ask Judges of the High Court to handle matters specifically conferred upon the Industrial Court is a violation of the express provisions of the Constitution. To them, though the Industrial Court has striking resemblances with the High Court, in that both its Principal Judge and Judges must meet the criteria for appointment under Article 165(2) and 166(2) respectively of the Constitution, this does not equate the Industrial Court Judge to a High Court Judge or vice versa.
14. To the interested parties, the Industrial Court may be said to be sui generis as it is neither the High Court nor is it an administrative tribunal or a subordinate court. Its existence, it was submitted, was as a result of the previous ambiguity of the status of the then Industrial Court vis-à-vis the High Court. The rationale for its establishment is to exclusively determine employment and labour relations issues which issues are unique. Apart from that there was a perception that the High Court mechanisms were unduly technical and cumbersome, hence a desire for specialisation and expertise among judicial officers on industrial and employment matters. Therefore, it was submitted, constituting a Bench with Judges from two different court systems is a violation of the constitutional principles and the independence and interdependence of the two courts with parallel, though related jurisdictions.
15. The interested parties' contention is that not being a High Court but a Court with the status of the High Court, the Industrial Court's powers must be provided for by the Constitution or legislation and since Parliament has not given the Industrial Court jurisdiction to handle violations arising from the Bill of Rights or interpreting the validity or otherwise of legislation vis-à-vis the provisions of the Constitution, the Industrial Court has no jurisdiction to determine issues relating to redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights which task is preserved for the High Court and not just any Superior Court, unless otherwise provided by legislation under Article 23(2) of the Constitution.
16. Notwithstanding the fact that the Act gives the Cabinet Secretary in charge of matters relating to employment and labour relations to make Regulations and establishes an Employment and Labour

Relations Rules Committee, the Chief Justice, it was submitted, without consulting the Committee but in purported exercise of the powers conferred on him by Article 22(3) as read with Article 23 and 165(3)(b) of the Constitution of Kenya, by Legal Notice No. 117 of 2013 gazetted ***The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules***, 2013 in which Rule 2 equates the Industrial Court to the High Court. To the interested parties the result was the creation of unconstitutional and illegal overlaps between the High Court and the Industrial Court.

17. Citing **Brookside Dairy Ltd vs. The Attorney General and Another Petition No. 33 of 2011** and **Samuel G. Momanyi vs. The Hon. Attorney General & Another High Court Petition No. 341 of 2011** it was submitted that the Industrial Court's jurisdiction is curtailed by both the Constitution and the Law and hence it cannot handle, hear and determine *inter alia*, issues relating to redress of a denial, violation or infringement of, or a threat to, a right or fundamental freedom in the Bill of Rights which is the purview of the High Court. Conversely, it is unconstitutional and illegal to have the High Court Judges handling issues related to employment and labour relations and pro tem having a Bench consisting of a mixed grill of Industrial Court and High Court Judges.
18. It was contended that whereas the Judges of both Courts may be of the same or similar calibre, they are different in terms of experience and specialisation and the law envisages, predicts, expects and contemplates them to remain as such – brothers and sisters performing and carrying out distinct (though sometimes parallel and overlapping jurisdictions) within constitutional and legal confines.
19. It was therefore the interested parties' position that the petition is improperly before the Court and the Bench as constituted is unconstitutional and a violation of the principles, norms and spirit of the Constitution notwithstanding the principle of avoidance of technicalities embedded in the Constitution since this is a jurisdictional issue that goes to the core of the validity of the suit.
20. In his oral highlighting, **Mr Enonda**, learned counsel for the interested parties, while reiterating the written submissions, emphasised that though both the High Court and the Industrial Court are Superior Courts, there are additional qualifications for the Judges of the Industrial Court specified in the Act. While conceding that in the emerging jurisprudential issues the Industrial Court has jurisdiction to handle constitutional matters in employment related issues, he submitted that it is not the same thing as saying that High Court Judges can sit together with Industrial Court Judges dealing with labour related matters. The Industrial Court historically was set up to deal with employment matters distinct from the High Court and unless this distinction is maintained, counsel submitted, we may lose the set-up of the said Court. By constituting the present Bench, it was contended that the Chief Justice may have erred since the action took us back to where we were when there was no distinction.

The 2nd Interested Party's Case

21. On behalf of the 2nd interested party, **Union Of National Research and Allied Institutes Staff of Kenya**, (hereinafter referred to as the Union), it was submitted by its learned counsel, **Mr Chacha**, while associating himself with the 1st interested partie's submissions that the issue of jurisdiction was brought about by the petitioner who also requested for the empanelling of a three-judge Bench to hear the petition. At that time, it was submitted that the petitioner was not specific about the composition of the bench. Under Article 165(4) of the Constitution and section 22(2) of the Act, the Chief Justice is assigned the duty to appoint a Bench. However the Act is not specific as its composition.
22. While clarifying that the Union was not questioning the integrity of the Bench, learned counsel submitted that they would like the Bench to decide on the matter once and for all because the affected employees have been out of employment for too long.

The Petitioner's Case

23. For the petitioner, it was submitted that Article 165(4) of the Constitution provides that any matter certified by the Court as raising a substantial question of law under clause (3)(b) or (d) shall be heard by an uneven number of Judges not being less than three, assigned by the Chief Justice. According to the petitioner, while the term 'Judge' is not defined by the Constitution, by dint of

interpretation a Judge is easily discernible as a person meeting the qualification and duly appointed as a Judge of a Superior Court as provided by Article 166 of the Constitution. Since the Judges of the Supreme Court and the Court of Appeal do not have original jurisdiction on questions of enforcement of fundamental rights under Article 165(3) of the Constitution, it was submitted that the said Judges cannot be among the Judges empanelled.

24. It was further submitted that the basic qualification for appointment of a Judge is the Constitution of Kenya and any law espousing a contrary view must be deemed to be null and void to the extent of its inconsistency. Since under Article 159(1) of the Constitution the judicial authority is derived from the people and vests in, and is exercised by, the courts and tribunals established under the Constitution of Kenya, a Judge or any judicial officer does not exercise any power vested in her/him as a Judge personally. Accordingly, any Judge, whether of the Supreme Court, Court of Appeal, the High Court or any other Superior Court created under Article 162 of the Constitution does not exercise any power vested in her/him but merely exercises a power vested in the institution and must hence meet the qualification set out in the Constitution. It was therefore submitted that it is the courts that are vested with specific powers and not the Judges presiding over these institutions. However, the creation of the courts by the Constitution and by Parliament would not be complete without the appointment of Judges to preside over them.

25. While relying on **United States International University (USIU) vs. Attorney General [2012] eKLR** it was submitted that since the Industrial Court has the status of the High Court, it has the jurisdiction to enforce labour rights and freedoms incidental to the exercise of jurisdiction over matters within its exclusive domain. Therefore in any matter falling within the provisions of section 12 of the Act, the Industrial Court has jurisdiction to enforce not only Article 41 rights but also all fundamental rights ancillary and incidental to the employment and labour relations including the interpretation of the Constitution within a matter before it.

26. It was the petitioner's submission that the Petition before this Court is a matter for enforcement of fundamental rights which the Industrial Court has power to enforce since the power is vested in the Court and not on any specific person or Judge. Article 166(5) provides for qualifications for appointment of a Judge of the High Court, which under Article 162 of the Constitution is of equal status as the Courts established thereunder and both of which are superior courts with similar qualifications. Citing **Hassan Ali Joho vs. Suleiman Said Shahbal & 2 Others [2014] KLR**, it was submitted that any other law containing extra qualification for appointment of Judge of superior courts of Kenya is unconstitutional to the extent of its inconsistency. To the petitioner, under Article 166 of the Constitution, there are only Judges of superior courts since the Article does not create any office known as Judge of the Industrial Court, Judge of the High Court and/or Judge of the Land and Environmental Court.

27. It was submitted that the appointment of a Judge is pursuant to the Constitution of Kenya and the subsequent deployment of the Judges by the Chief Justice and/or the Judicial Service Commission through a gazette notice to preside over the High Court of any superior court with the status of the High Court does not amount to appointment as a Judge of any of the superior court and therefore if the gazette attempts to create any new office not contemplated by the Constitution by deployment, then the said notice would be void to the extent of the inconsistency.

28. It was contended that the gazette notice deploying a Judge to preside over the High Court and other superior courts of the status of the High Court is only for purpose of public notification and is not part of the process contemplated for appointment of a Judge. In comparison the Petitioner cited the appointment of magistrates and their deployment to serve different functions yet retain the status of magistracy.

29. According to the petitioner, the Court having certified that the matter raises a substantial question of law, it was only sensible that the constituted bench comprise of Judges from the Industrial Court, the Constitutional and Human Rights Division and the Judicial Review Division. In interpreting the Constitution, it was submitted the court is enjoined by Article 259 to do so in a manner that promotes its purposes, values and principles, advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; permits development of the law; and contributes to good governance. In this regard it was submitted based on **United States International University (USIU) vs. Attorney General** (supra) and **Daniel Mugendi vs. Kenyatta University & 3 Others** that the only interpretation that advances the above principles is the one that ensures that the superior courts with the status of the High Court are not diminished

and undermined.

30. In highlighting the foregoing submissions, **Mr Wetangula** learned Counsel for the petitioner emphasised that a Judge once appointed only exercises the powers in accordance with the Constitution and in support of his submissions learned Counsel further relied on **Samson Matende vs. Republic Malindi High Court Criminal Appeal No. 141 of 2009**.

Respondent's Case

31. On behalf of the Respondent it was submitted by learned Counsel, Mr. Munene, that a three Judge bench is conferred with higher authority to resolve issues raising substantial question of law respecting the interpretation of the Constitution. However Article 165(4) of the Constitution does not disclose the qualifications of the three judges Bench is to comprise of but simply provides that the matter is to be heard by an uneven number of judges not being less than three and by so stating is meant any judge.
32. Citing **Benson Ndwiga Njue & 108 Others vs. Central Glass Industries Limited Nairobi HCCC No. 515 of 2003**, it was submitted that the constitution of the Bench by the Chief Justice gives each of the judges a fresh mandate conferred by virtue of Article 165(4) of the Constitution hence the Bench has full authority and competence to hear and determine the same. It was further submitted that under Article 166 of the Constitution there are no categories of Puisne Judges who serve various superior courts and in particular the High Court, the Industrial Court and the Land and Environment Court and that all the Puisne Judges take the same oath of office to protect, administer, and defend the Constitution.
33. In the Respondent's view, the matters to be determined by this Court are legal issues to be determined by the Court on a strict interpretation of the law and as such the Chief Justice must have placed a lot of consideration on that before constituting a mixed Bench.
34. According to the respondent and based on **Apex Finance Limited & Another vs. Kenya Anti-Corruption Commission [2012] KLR**, **Joseph Kimani & 2 Others vs. Attorney General & 2 Others [2010] eKLR**, **Kenya Bankers Association vs. Minister for Finance & Another (No. 3) [2002] KLR 56**, **Ali Said Chizondo & 2 Others vs. Republic Mombasa Misc. Criminal Application No. 8 of 1998**, the decision whether or not to empanel a Bench of more than one judge is administrative.

Determinations

35. We have considered the submissions made before us and this is the view we form of the matter.
36. In questioning the jurisdiction of the Court, parties ought, in our view, to take the holding in the case of **East African Railways Corp. vs. Anthony Sefu Dar-Es-Salaam HCCA No. 19 of 1971 [1973] EA 327,** into account. In that case it was held that **"It is, a well established principle that no statute shall be so construed as to oust or restrict the jurisdiction of the Superior Courts, in the absence of clear and unambiguous language to that effect."**
37. *The power to empanel a Bench composed of not less than 3 judges is provided for under Article 165(4) of the Constitution. Therefore, by empanelling this Bench, the Chief Justice was carrying out his constitutional mandate as opposed to similar functions under the former Constitution which were not hinged on the constitutional provisions and were merely administrative. The exercise of the power of the Chief Justice to empanel the Bench has not been challenged. It is arguable whether this Court can go round the exercise by the Chief Justice of his constitutional mandate and make a decision whose effect is to set aside the said decision when the said decision has not been challenged. To hold, as the interested parties have urged this Court to do, that the Bench as empanelled has no jurisdiction to deal with the matter would in our view amount to overturning the decision made by the Chief Justice. We hold this view without necessarily deciding that a decision made by the Chief Justice empanelling a Bench ought to form part of the proceedings since it is in our view not just a legal process but a constitutionally mandated process.*
38. *Article 165(4) of the Constitution stipulates circumstances under which the Chief Justice can exercise his powers under that Article. It is a requirement that the substantial question of law which justifies the invocation of the said provision must either be where the Court is required to*

make a determination of the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened or a determination in respect of a question respecting the interpretation of the Constitution. It is therefore clear that Article 165(4) can only be invoked in specific and limited circumstances. This is therefore, in our view, not an ordinary jurisdiction. A Bench empanelled under the said provision cannot therefore be termed as an Industrial Court so as to be constituted solely of Industrial Court Judges. In any case, it is not contended that this Court as constituted is not properly seised of the jurisdiction to determine the twin issues contemplated under Article 165(4) of the Constitution.

39. This Bench is comprised of Judges assigned to sit in the Employment and Labour Relations Court (otherwise referred to as the Industrial Court), the Constitutional and Human Rights Division of the High Court and the Judicial Review Division of the High Court. It is now trite law supported by the decision in **United States International University (USIU) vs. Attorney General** (supra) that the Industrial Court has jurisdiction to deal with constitutional issues arising in matters before it. Therefore, since this Bench is constituted by at least one Judge of the Industrial Court, it cannot therefore be correct to contend that this Court is not properly constituted to deal with the issues before it.

40. *As was held in* **Samson Matende vs. Republic** *(supra), Article 259 of the Constitution provides that a function or power conferred by the Constitution on an office may be performed or exercised as occasion requires by a person holding such an office. Article 165(4) mandates the Chief Justice to assign Judges to hear a matter falling thereunder. It does not provide that the Chief Justice is to set up the Court to hear the matter. So that even if it was to be argued that the High Court is a distinct Court from the Industrial Court, in interpreting the Constitution, we are bound under Article 259 of the Constitution to do so in a manner that promotes its purpose, values and principles and advances the Rule of law, human rights and fundamental freedoms in the Bill of Rights. To interpret the Constitution in a manner that limits or constrains the powers granted to the Chief Justice under Article 165(4) would not in our view advance these principles.*

41. Similarly, in **Kigula and Others vs. Attorney-General [2005] 1 EA 132,** the Uganda Court of Appeal sitting as a Constitutional Court held that the principles of constitutional interpretation are (1) that the principles which govern the construction of statutes also apply to the interpretation of constitutional provisions and that the widest construction possible, in its context, should be given according to the ordinary meaning of the words used; (2) that the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other; (3) that all provisions bearing on a particular issue should be considered together to give effect to the purpose of the instrument; (3) that a Constitution and in particular that part of it which protects and entrenches fundamental rights and freedoms are to be given a generous and purposive interpretation to realise the full benefit of the rights guaranteed; (4) that in determining constitutionality, both purpose and the effect are relevant; and (5) that Article 126(1) of the Constitution enjoins Courts to exercise judicial power in conformity with law and with the values, norms and aspirations of the people. See also **Besigye and Others vs. The Attorney-General [2008] 1 EA 37** and **Foundation for Human Rights Initiatives vs. Attorney General HCCP NO. 20 of 2006 (CCU) [2008] 1 EA 120.**

42. *A finding that this Court is not properly constituted would not in our view* promote the purposes, values and principles of the Constitution, advance the rule of law and the human rights and fundamental freedoms in the Bill of Rights; permit development of the law; or contribute to good governance. In our view to make such a finding would go against the principle that Courts established under Article 162(2) are superior courts of the same status as the High Court. What the interested parties are urging this Court to do is in effect to find that the status of the High Court is not the same as the Industrial Court, which finding would go against both the letter and the spirit of the Constitution.

43. *Furthermore, even if we were to find that the High Court is differently constituted from the Industrial Court, we would still be bound to find that the Constitution only creates Courts. It does not create different cadres of Judges. It only provides for the mode of appointment of Judges and their qualifications. The Courts having been so created by the Constitution, it is the mandate of the Judicial Service Commission to appoint Judges to preside over the said Courts. It is therefore not the person of the Judge which determines the kind of disputes the Court is seised of. Rather it is the Court which dictates the kind of disputes the Judge presiding therein will deal with.*

44. *To argue, as was done by the interested party that a High Court Judge is not competent to preside over employment and labour disputes but is competent to do so if elevated to the Court of Appeal is with due respect absurd. Similar reasoning applies to an Industrial Court Judge who is elevated to the Court of Appeal if it were to be contended that that Judge is not competent to, for example, deal with road traffic accident matters. To our mind it is impossible to demonstrate the absurdity of that proposition more clearly than by just stating it.*
45. *In our view, the additional competencies stipulated under the Act do not render an otherwise constitutionally qualified Judge incompetent to preside over the Industrial Court. Although the interested parties argued that the Court of Appeal presiding over a matter arising from the Industrial Court has no power to re-evaluate the evidence, a power donated to the appellate courts on first appeal, rule 29(1) of the Court of Appeal Rules empowers the Court of Appeal, o*n any appeal from a decision of a superior court acting in the exercise of it's original jurisdiction, to not only re-appraise the evidence and to draw inferences of fact but also to take additional evidence.
46. Even if, for argument's sake, we were to agree with the interested parties' position that the qualifications of the High Court Judges are different from those of the Industrial Court Judges, a position we do not with respect subscribe to, under Article 165(3) (b) and (d) of the Constitution, a single Judge is properly constituted to hear and determine all other matters. In any case, it is not the law that all matters falling within the realm of Article 165(3) (b) and (d) must be referred to the Chief Justice to empanel a Bench of judges of not less than 3. The said provision requires that apart from meeting the threshold of falling within Article 165(3) (b) and (d), the issue must raise a substantial question of law.
47. We have been urged to find that the provisions in the ***Industrial Court Act***, 2011 which provide for further qualifications for Industrial Court judges, over and above those provided for Judges in the Constitution, are null and void to the extent of their inconsistency. We are however unable to do so in this judgement as we do not feel that we have been sufficiently addressed on the matter to enable us make such a finding.
48. *In our view in assigning Judges under Article 165(4) of the Constitution the Chief Justice is free to appoint any Judge of the High Court or a Judge of the Court with the status of the High Court.*
49. *It follows that the objection raised by the interested parties on the composition of this bench cannot be sustained and the same must be dismissed.*
50. *We accordingly dismiss the said objection but with no order as to costs.*

Dated and Signed at Nairobi this 8th day of May, 2014.

NDERI NDUMA MUMBI NGUGI G V ODUNGA

JUDGE JUDGE JUDGE

Signed, Dated and Delivered at Nairobi this 8th day of May 2014.

MATHEWS N. NDUMA

PRINCIPAL JUDGE

Delivered in the presence of:

ADVOCATE FOR THE PETITIONER ……..……..

ADVOCATE FOR THE 1ST RESPONDENT ……..…….

ADVOCATE FOR THE 2ND RESPONDENT ……..……

1ST INTERESTED PARTY ……..…….

2ND INTERESTED PARTY ……..