



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA AT KISUMU**

**CAUSE NO. 81/2014**

**(Before Hon. Justice Hellen Wasilwa on 15th July, 2014)**

**EVANS KAIGA INYANGALA ..... 1ST CLAIMANT**

**ELMANUS ANGALUKI VODOTI ..... 2ND CLAIMANT**

**NEWTON JOHN OKWIYA ..... 3RD CLAIMANT**

**-VERSUS-**

**COUNTY GOVERNMENT OF VIHIGA**

**& 2 OTHERS ..... RESPONDENTS**

**RULING**

The application before court is the one dated 15.4.2014. However, the respondents herein have raised a preliminary objection under para 14 of their reply to the claim on the grounds that:-

**(a) This court lacks the necessary jurisdiction to entertain the claim which is the preserve of the High Court under Article 165 of the Constitution.**

**(b) The claim amounts to an infringement on the doctrine as separation of powers and is unconstitutional in that it seeks to use the court to control the operations of the county assembly.**

**(c) The claim is subjudice and an abuse of the process of the Honourable Court.**

**(d) The suit ought to be otherwise dismissed with costs.**

The applicants have also raised a preliminary objection in relation to counsel for respondent who they aver is not properly on record and that this court be pleased to strike out the respondent's pleadings out of the record so that the claimants case stands unchallenged.

For purpose of proceedings with the case for ends of justice, this court directed that both applications be argued simultaneously.

Concerning issue of the counsel for respondents; the applicants submitted before court that the documents purported to have been filed for and on behalf of the respondents are not properly on record. It is their submission that the replying affidavit is incompetent having been deponed to by a person not competent to depone on behalf of the respondents. They submitted that Order 6 Rule 2 of the Civil Procedure Rules, is very clear on mode of appearance which is either by the defendants in person or though an advocate or

recognized agent. It is applicants contention that the memo of appearance dated 12.6.2014 is filed by “Legal Dept, Vihiga County Government” which is not an entity envisaged by Order 6 of the Civil Procedure. They aver that the law never anticipated an office within an entity will enter appearance and as such all documents filed should be expunged from the record.

Coupled with this, the applicants aver that the replying affidavit is deponed to by one James Oyundi Mukabi who describes himself as Legal Counsel employed in the County Government of Vihiga. It is the applicants contention that being an employee, he cannot enter appearance or file substantive matters on behalf of the institution without express authority from that institution. That the said Oyundi does not even depone that he is ceased of the matter and therefore court should not rely on his affidavit.

The applicants further submitted that under S. 9 of the Advocates Act, qualifications of persons qualified to act as an advocate are stated thus – he has been admitted as an advocate, and his name is for the time being on the roll and he has in force a practicing certificate. The County Government has not therefore been allowed to proceed under this section.

The respondents opposed the preliminary objection. It is their contention that the preliminary objection does not raise issues of law but of fact and this preliminary objection is misplaced. That whether James Oyundi has authority or not is an issue of fact and not law. The respondents aver that the issues raised are issues of form and that Order 1 rule 14 prohibits parties raising technical objection on pleadings for want of form.

On issue of Advocates act, the respondent's counsel aver that S. 22 of the Industrial Court Act gives him authority as an employee to appear. Further under Article 50(2)(g), they submit that any party has a right to be represented by an advocate of his/her choice. They asked court to avoid striking out pleadings in spirit of overriding objective to do justice.

On whether James Mukabi has authority or not, it is the respondents submission that any person contesting , the authorization should prove it.

The rejoinder by applicants on this is that it is the person alleging to have authority to prove it and the onus does not shift. They also aver that Legal Department is an amorphous entity and as such cannot be said to represent the respondents.

On the second preliminary objection raised by the respondents, they have submitted that this court does not have jurisdiction to entertain this claim. They cited Article 165(3)(3) of the Constitution. Their contention is that this dispute relates to organs of the County Government and revolves around removal from office of claimants who are Ministers in the County Government. The respondents contend that this is an issue which is a preserve of the High Court. They aver that in relation to Article 162(2) of the Constitution, the Industrial Court is given the status of the High Court but jurisdiction is limited to employment and labour relations and that S. 12 of Industrial Court Act, does not confer jurisdiction to Industrial Court to determine matters of County Government.

They contend that issues of employment of Ministers in County Government are governed by County Government Act and S. 40 of County Government Act gives clear provisions on process of removal which is initiated by County Assembly. The respondents submitted that it is a complex procedure which oust the jurisdiction of the Industrial Court. The contention is that issues of the County Assembly are political in nature and the court should desist from hearing them in an attempt not to infringe on the jurisdiction of the County Assembly.

The respondents also aver that this case is subjudice as the applications had already filed other cases in the High Court in Kakamega and the status of those cases has not been disclosed to this court. The cases in question relate to Kakamega Judicial Review Nos, 7/2014, 8/2014 and 19/2014. They asked court to strike out this claim. In reply the applicants opposed this preliminary objection. They argue that the application has no merit. They submitted that Article 176 of the Constitution defines what a County Government is – being the County Assembly and the County Executive and therefore 1st respondent

meets requirement of Article 176. They aver that under their para 11, 12 and 13 of their statement of claim they have elaborately highlighted the relationship between the claimants and the respondents and have attached copies of appointment letters and not election results. This is appendix EAV1 (a) and (b) showing salary and its graduation and the applicants argue that that indicates an employer – employee relationship which brings this case within the purview of S. 12 of the Industrial Court Act 2011 and Article 162(2) of the Constitution. It is the applicants contention that the claimants were employees and were not elected.

On issue of subjudice, the applicant contends that, subjudice can never render pleadings annulity. It is the applicants further contention that what they sought in High Court Petition No. 7 was to block certain meeting on 25.3.2014 but the case in court is on termination. They also informed court that those suits in High Court Kakamega have since been withdrawn. Furthermore, the applicants contend that Judicial Review deals with administrative action but on this case, they are challenging unlawful dismissals. They argue that the respondents have not suffered any prejudice in respect of the existence of the two cases and that the claimants were terminated on same day they filed the Judicial Review application which were then overtaken by events. They **cited Mary Gikunju V Republic & 3 Others C.A No. 275/2011** where JJA held that in a Judicial Review matter, where notice of motion has not been filed, the court has not been moved to adjudicate the Judicial Review hence the issue of subjudice does not apply.

The respondents insist that by filing this case after they filed the Judicial Review applications, the applicants abused the court process. Further, they aver that S. 40(3) of County government Act is clear on process of removal of County Executives and it is not an ordinary employment relationship.

Upon hearing the submissions of both sides, the issues for determination are framed as follows:-

1. **Whether this court has jurisdiction to entertain this matter.**
2. **Whether the claim amounts to an infringement of the doctrine of separation of powers by curtailing the operations of the County Assembly.**
3. **Whether the claim is subjudice and an abuse of the court process.**
4. **Whether the pleadings filed by the respondents herein are properly before court having been filed by “unknown entities”.**

On the first issue, the jurisdiction of the Industrial Court is derived from Article 162(2)(a) of the Constitution which provides that:-

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

**(a) employment and labour relations ---”**

In establishing this court, Parliament enacted the Industrial Court Act 2011 where the jurisdiction of the Industrial Court is stated as follows:-

**“S. 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 —**

**(a) disputes relating to or arising out of employment between an employer and an employee;**

**(b) disputes between an employer and a trade union;**

**(c) disputes between an employers’ organization and a trade unions organization;**

- (d) disputes between trade unions;
- (e) disputes between employer organizations;
- (f) disputes between an employers' organization and a trade union;
- (g) disputes between a trade union and a member thereof;
- (h) disputes between an employer's organization or a federation and a member thereof;
- (i) disputes concerning the registration and election of trade union officials; and
- (j) disputes relating to the registration and enforcement of collective agreements.

The respondents have argued this court has no jurisdiction to entertain this claim and they cited Article 165(3)(3) of the Constitution. Article 165 of the Constitution establishes the High Court and grants it its jurisdiction which includes unlimited jurisdiction in criminal and civil rights, appeals from a tribunal, etc.

It is true that Article 165(3) deals with the jurisdiction of the High Court. However, Article 162(2) deals with the jurisdiction of the Industrial Court which is a superior court with status of the High Court but dealing with labour and industrial relations issues. The jurisdiction of the Industrial Court has been discussed in several decisions amongst them **Petition No. 170 of 2012** where issue for determination was whether the High Court could continue to hear and determine labour and employment matters following the establishment of the Industrial Court as contemplated by Article 162(2) of the Constitution. **J Majanja** held that the Industrial Court as constituted under the Industrial Court Act 2011 as the court with the status of the High Court is competent to interpret the Constitution and enforce matters relating to breach of fundamental rights and freedom in matters arising from disputes falling with the provisions of Section 12 of the Industrial Court Act 2011.

The same issue of the Industrial Court's jurisdiction was addressed by **Hon. P. J. Mathews N. Nduma** in **Nick Githinji Ndichu V Kiambu County Assembly and Kiambu County Assembly**.

The petitioner was the Speaker of the Kiambu County Assembly elected pursuant to Article 178 of the Constitution. The petitioner was removed from the position of Speaker pursuant to a motion of impeachment moved by a member of the County Assembly. This petition was initially filed at the High Court and was transferred to the Industrial Court by **Hon. Majanja J** pursuant to a consent dated 4th March 2014. In this case, the parties voluntarily submitted to the jurisdiction of the Industrial Court. That notwithstanding the respondents raised a preliminary objection to the effect that the Industrial Court has no jurisdiction to adjudicate over the question of removal of the petitioner as Speaker of the County Assembly of Kiambu. In deciding whether the court had jurisdiction or not the **Hon. P. J. Mathews Nduma** held that; **"It is clear from the foregoing that the law is not concerned with the method of acquiring an employment. The law does not concern itself with whether the person was appointed or elected. Rather the person must;**

- "(i) be having an oral or written contract of service,**
- (ii) be providing a service to a real or legal person**
- (iii) be receiving a wage/salary for the services rendered.**

**If such a person has a dispute with the person with whom he/she has a contract of service and to whom he/she provides services for a wage on salary, the court has jurisdiction over such a dispute and has available remedies for that purpose---**"

I do concur with the findings of the **Hon. P. J. Mathews Nduma** in deciding whether an employer – employee relationship exists. Section 2 of the Employment Act defines an employee as follows:-

**“employee means a person employed for wages or a salary and includes an apprentice and indentured learner”**

The same Section defines employer as follows:-

**“employer means any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman manager or factor of such a person, public body, firm, corporation or company”.**

The claimant herein was indeed employed by the respondents. He was issued with an appointment letter dated 21.6.2013 detailing his salary payable monthly. He was paid monthly as per the payslip exhibited.

It is true as submitted by the respondents that S. 40 of the County Government Act details the manner of removal of any county executive. Indeed due process must be followed and this process exhibits fairness and justice which is similar to what is provided for under S. 41 of Employment Act 2007. The respondents also submitted to this court that this process is a political process and therefore by virtue of the doctrine of separation of powers, politics should be left to politicians and courts should not interfere.

This submission is in my view far from the truth. The High Court and this includes the Industrial Court where issues relate to Labour and Industrial relations, have powers under the Constitution to entertain any dispute where anybody feels aggrieved by an action of an individual or the State. Article 159(1) of the Constitution is explicit that:-

**“justice shall be done to all, irrespective of status”**

In the case of Hon Martin Nyaga Wambora Vs County Government of Embu and Others – High Court of Kenya at Kerugoya Pet. No. 3/2014, a similar issue arose as to separation of powers. The learned judges in adopting the Court of Appeal decision in Mumo Matemo Vs Trusted Society of Human Rights Alliance held that;

**“It is not in doubt that the doctrine of separation of power is a feature of a Constitutional design and a per-commitment in our Constitutional edifice. However separation of powers does not only prescribe organs of government from interfering with the other functions. It also entails empowering each organ of government with countervailing powers which provides checks and balances or action taken by other organs of government. Such powers are, however not a licence to take over functions vested elsewhere. There must be judicial, legislature and executive deference to the repository of the functions. We therefore agree with the High Courts dicta in the petition the subject of this appeal that separation of powers must mean that the courts must show deference to the independence of the legislature as an important institution in the maintenance of our Constitution democracy as well as accord the executive sufficient latitude to implement legislative intent. Yet as the respondents concede, the courts have an interpreter role, including the last word in determining the Constitutionality of all government actions”**

The learned judges further made a finding that:-

**“The court being the only arm of government vested with the power to interpret the Constitution and to safeguard, protect and promote its provisions, has the duty and obligation to intervene in an action of other arms of government and State organs where it is alleged or demonstrated that the Constitution has either been violated, or threatened with violation ---”**

I do agree with the findings of my learned colleagues and in this petition and I do find that it will not be an infringement of powers of the County Assembly under the doctrine of separation of powers by this court handling this claim. The argument therefore that this court has no jurisdiction to entertain this cause has no merit and I dismiss it accordingly. In the same vein, in answering the 2nd issue I do not find this court infringing on the jurisdiction of the County Assembly and breaching the doctrine of separation of powers for the reasons given.

The next question relates to subjudice. The question is whether the matter before court is an abuse of the court process, the applicants having filed other cases before the High Court at Kakamega. The respondents have exhibited and the applicants concede that they had filed other matter in Kakamega High Court under Judicial Review.

The applicants on their part submitted before court that the cases filed before High Court Kakamega were substantially different seeking prayers under Judicial Review which cases were overtaken by events. They cited Mary Gikunju V R & 3 others C. A 275/2011 where the JJA held that where a notice of motion has not been filed, then the court has not been moved to adjudicate the matter and so the issue of subjudice does not apply.

The matter that were in Kakamega High Court have also since been withdrawn. It is my finding that issues of Judicial Review are substantially different from issues under employment law. The former are directed at administrative action where the contention is basically an illegality is being or has been committed and needs correction. Under employment law, the applicant does not just stop at the finding of the illegality but goes beyond even to compensation for the wrong done. The existence of a Judicial Review Petition is not in any case a bar to another case being filed on the same issues. It is therefore not true that the case before court is subjudice in relation to other matters filed before the High Court in Kakamega.

The last issue is in relation to the status of the counsel for the respondents herein who the applicants submitted is unknown in law and therefore the court should find the pleadings incompetent and strike them out.

It is true that the pleadings as filed by Legal Department, Vihiga County Government are filed by an entity who is unknown as is expected under the Advocates Act. The person filing must be a real advocate or the respondent himself/herself. The provision under the Advocates Act is meant to ensure that only qualified persons engage with the court. The pleadings therefore as filed by the Vihiga County Legal Department are incompetent as the court needs to know who they are dealing with, whether an advocate qualified with a current practicing certificate or an individual.

However for ends of justice, I decline to strike out the pleadings filed. I apply Article 159(5) of Constitution. I direct that the respondents do amend their pleadings to reflect the name of the advocate that is handling this case. This should be corrected within 7 days.

**HELLEN WASILWA**

**JUDGE**

**15/7/2014**

**Appearances:-**

Osabwa h/b for Wesonga for 1st claimant present

Osabwa for 2nd & 3rd claimants present

Musiega for respondents

CC. Wamache