



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT AT MOMBASA**

**PETITION NO. 342 OF 2014**

**IN THE MATTER OF: ARTICLES 1, 2, 3, 19, 20, 21, 23, 47 OF THE CONSTITUTION OF KENYA**

**IN THE MATTER OF: THE CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS**

**AND**

**IN THE MATTER OF: THE COUNTY GOVERNMENT ACT**

**AND**

**IN THE MATTER OF: THE EMPLOYMENT ACT**

**BETWEEN**

**WALID KHALID ..... PETITIONER**

**=VERSUS=**

**THE COUNTY ASSEMBLY OF MOMBASA..... 1ST RESPONDENT**

**THE SPEAKER OF THE COUNTY ASSEMBLY OF MOMBASA..... 2ND RESPONDENT**

**THE GOVERNOR COUNTY GOVERNMENT OF MOMBASA.....3RD RESPONDENT**

**AND**

**MOMBASA COUNTY GOVERNMENT.....INTERESTED PARTY**

**RULING**

**Introduction**

1. This is a ruling on the Preliminary Objections raised against the suit herein. The Objections are filed by the Interested Party and 1<sup>st</sup> and 2<sup>nd</sup> Respondents against the petition and the interlocutory motion basically on the grounds that:

(a) The court lacks jurisdiction to grant the orders sought.

(b) The petition and the interlocutory motion are bad in law, and fatally defective with respect to procedure for seeking Certiorari and Prohibition.

In other words the Respondents are challenging the jurisdiction of this court as the forum for determining the dispute, and the form in which the suit has been initiated.

## **Background**

2. On 25<sup>th</sup> July 2014, the Petitioner filed a petition under Articles 1, 2, 3, 19, 20, 21, 22, 23, 24 and 47 of the Constitution of Kenya alleging that his Fundamental Rights and Freedoms had been infringed by the Respondents through an unlawful and unconstitutional impeachment from his office as the executive committee member in charge of finance for the County Government of Mombasa. The petition is also founded on the County Governments Act (CGA) and the Employment Act. He averred that on 21<sup>st</sup> July 2014, he appeared before a Sub-Committee of the 1<sup>st</sup> Respondent (County Assembly) to answer allegations of incompetence, abuse of office and violation of the constitution and other laws. After tendering his evidence and submissions on the said allegations, the sub committee made a decision that the allegations against the Petitioner were unsubstantiated.

3. According to the Petitioner the matter ought to have ended there under Section 40(5)(a) of the (CGA). However, contrary to the said provision of the law and Article 47 of the Constitution, the Respondent proceeded to table the report of the sub-committee before the County Assembly which voted for and recommended for the impeached of the Petitioner from office. The Petitioner considered the action by the County Assembly to have been illegal and ultra vires her power and mandate with respect to Section 40(5)(a) of CGA. As a result, the Petitioner averred that he was deprived of his right to the protection of the law as guaranteed under the Bill of Rights in the Constitution.

4. The Petitioner therefore prayed that:

(a) A declaration to issue that the 1<sup>st</sup> Respondent's decision to recommend the impeachment and removal from office of the Petitioner is unconstitutional and therefore unlawful on account of violation of section 40 of the County Government Act 2012 as read together with Article 47 and 236 of the Constitution and section 41 of the Employment Act.

(b) That an order of certiorari does issue to bring into this Honourable Court for purposes of quashing the 1<sup>st</sup> Respondent's decision purporting to impeach the Petitioner.

(c) Orders of prohibition do issue to prohibit the Respondents by themselves, servants or agents or whomsoever from recommending the impeachment of the Petitioner or impeaching the Petitioner.

(d) Costs of the Petition be borne by the Respondents.

(e) Any other Orders that the court shall deem just.

5. Simultaneously, with the petition, the Petitioner filed the Notice of Motion dated 25<sup>th</sup> July 2014 seeking:

(a) Injunction to restrain the 1<sup>st</sup> and 2<sup>nd</sup> Respondent from presenting the recommendation for the impeachment to the 3<sup>rd</sup> Respondent (Governor).

(b) Injunction to restrain the Governor from impeaching and removing the Petitioner from office based on the said recommendation by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent.

6. The interlocutory injunction was granted on the interim basis but it seems they were either disobeyed

or overtaken by events because so far no contempt proceedings have been preferred. Instead on 31<sup>st</sup> July 2014, the Petitioner brought another motion dated the same date confirming that his services were terminated by the Governor vide letter dated 30<sup>th</sup> July 2014 based on the said recommendation by the County Assembly and for that reason he sought conservatory orders pending inter partes hearing of the said motion.

7. The court granted the Conservatory Orders staying and or suspending the decision of the Governor contained in his letter dated 30<sup>th</sup> July 2014, which purported to remove the Petitioner from office. None of the above 2 court orders made against the Respondents were ever challenged either on appeal or review. Instead the 1<sup>st</sup> and 2<sup>nd</sup> Respondent filed the Preliminary Objections under consideration on 6<sup>th</sup> August 2014 simultaneously with the Interested Party who had applied to be enjoined as a party to the suit and prosecuted them on 3<sup>rd</sup> September 2014

### **Submissions by KADIMA Advocate for Interested Party**

8. Mr. Kadima, learned counsel for the Interested Party, led the defence case in prosecuting the Preliminary Objection. He submitted that this court lacks jurisdiction to determine the petition as framed as the dispute involved does not fall within the ambit of Section 12 of the Industrial Court Act (ICA). According to the counsel, the petition concerns matters done by the County Assembly acting in her Legislative Capacity. The counsel contended that the entire averments in the petition do not fall within the Employment Act and prayed that the petition to be struck out for being frivolous. According to the counsel, Article 162(2) of the Constitution and Section 12(3) of the Industrial Court Act intended to give this court only a portion of the Judicial Review Powers while the High Court was given the power to give all the Judicial Review orders under Article 22 of the Constitution. He submitted that the orders sought involved the procedure of the removal of the Petitioner from office under Section 40 of CGA and breach of fair Administrative Action under Article 47 of the Constitution which according to the counsel can only be granted by the constitutional court under Section 22 and 23 and not this court.

### **Submissions by Mr. Mutiso Advocate for 1<sup>st</sup> and 2<sup>nd</sup> Respondent's**

9. Mr. Mutiso adopted the submission by Mr. Kadima to prosecute the Preliminary Objection by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent. He however submitted that this court is deficient of the jurisdiction in Judicial Review matters as that is the province only reserved for the High Court under the Law Reform Act. According to Mr. Mutiso, although Article 162 of the Constitution gives this court the status of the High Court, the court is not a High Court. He maintained that Section 40 of the CGA relates to a legislative duty over which this court lacks jurisdiction. He cited ***Republic vs. Public Procurement Administrative Review Board and another Exparte Selex Sitemi Integrati [2008] eKLR and Republic vs. Permanent Secretary/Secretary to the Cabinet & Head of Public Service Office of the President & 2 others, Exparte Stanely Kamanga Ng'ang'a [2006] eKLR*** to support his submissions that the court has no jurisdiction to interfere with Legislative exercise. He prayed for the suit to be struck out with costs because the court lacks jurisdiction.

### **3<sup>rd</sup> Respondent's Submissions**

10. Mr. Mohamed learned counsel for the 3<sup>rd</sup> Respondent adopted the submissions by Mr. Kadima and Mr. Mutiso and asked the court to strike out the suit for the court's lack of jurisdiction.

### **Petitioner's Submissions**

11. Mr. Wafula, learned counsel for the Petitioner opposed the Preliminary Objection. He submitted that Article 162(2) (a) of the Constitution created this court with the status of the High Court to determine all disputes related to employment and Labour whether instituted as constitution case or otherwise. He cited several decisions of the High Court whereby the court has been unanimous on the opinion that this court has jurisdiction to determine all employment and labour disputes. In particular, he cited ***Petition No. 459 of 2011, Samson Onyango Ngonga vs. Public Service Commission and others*** where Lenaola J, held

that Labour and Employment rights are part of the Bill of Rights protected under Article 41 of the Constitution and as such any dispute arising therefrom fall within the jurisdiction of this court.

12. Mr. Wafula further submitted that the proceedings to impeach the Petitioner was not a legislative exercise but supervisory exercise which was subject to the law. He contended that under Section 40 of CGA the procedure for removal of Executive Members from office includes lodging a complaint against the Executive Member, followed by investigation by a sub committee of the Assembly. That if the sub-committee exonerates the Executive Member, no further proceedings against him should be brought to the Assembly on the same charges. In the present case, the Petitioner submits that he was investigated by a sub committee and on 24<sup>th</sup> July 2014, the committee exonerated him from all the allegations and the matter ended there under Section 40(5)(a) of the CGA. He submitted however that his right to fair labour practice enshrined under Article 41 of the Constitution were violated when the County Assembly recommended for his impeachment based on the sub committee's report which exonerated him.

13. According to the Petitioner the only best court to go was this court because it deals with Employment and Labour Disputes. Mr. Wafula disputed the submissions by the defence counsel that the only court with jurisdiction to arbitrate this dispute was the High Court. He observed that the Law Reform Act was enacted before the present constitution and submitted that it should be construed to give effect to the Constitution.

14. He further submitted that the procedure followed to initiate the petition under Article 23 of the Constitution was proper even for seeking Judicial Review order. He submitted that under Article 23(3) of the Constitution the court can grant Judicial Review Orders. In addition, he submitted that Article 22 and 159 bar the court from being unreasonably restricted by procedural technicalities. He prayed for the petition to be heard by this court and reminded the court that striking out a suit should be the last resort for the court. He also observed that the authorities cited by the Respondents were obsolete because they were made before the new Constitution.

### **Rejoinder on behalf of the Interested Party**

15. Mr. Kadima submitted that Section 8 of the Law Reform Act has never been repealed and as such, there is particular court which is empowered to deal with Judicial Review and not this court. He however admitted that Section 12(3)(ii) of the ICA, the court has power to make Prohibitory Orders.

### **Rejoinder on behalf of 1<sup>st</sup> and 2<sup>nd</sup> Respondent**

16. Mr. Mutiso submitted that the *USIU Case* cited by the Petitioner was distinguishable from the present case. He further submitted that the *Samson Onyango case* cited by the Petitioner confirmed that the jurisdiction of this court is as set out under Section 12 of the ICA and does not include Judicial Review matters. He observed that the *Birir Case* cited by the Petitioner is not a good authority because the court lacked jurisdiction to entertain the suit. He concluded by submitting that Article 159 of the Constitution was not a panacea for every wrong doing including cases where the jurisdiction of the court is wrongfully invoked.

### **Analysis and Determination**

17. The court has carefully perused and considered the pleadings and the submissions by the learned counsel for all the parties herein. There is no dispute that the Petitioner was the Executive Committee Member in charge of finance for the Interested Party. It is also not disputed that he was investigated by a sub committee of the County Assembly, over allegations related to his conduct, performance and competence as the County Executive Member in charge of finance in the Interested Party. It has also not been disputed that the said sub committee of the Assembly made a report on 24<sup>th</sup> July 2014 by which it exonerated the Petitioner of all the allegations made against him. It has also not been disputed that under Section 40(5)(a) of the CGA, once the sub committee exonerates an Executive Member from blame, the matter ends there and no further investigations or proceedings can be conducted by the County Assembly on the same matters or allegations for which the sub committee has acquitted the Executive Member.

18. The main issue in dispute is whether this court has jurisdiction to interpret the Constitution and issue Judicial Review Orders. To answer this question one has to consider Article 162(2) of the Constitution which establishes the court and Section 12 of the Industrial Court Act which prescribes the jurisdiction. Article 162 empowers the Parliament to establish a court with the status of the High Court to hear and determine disputes relating to employment and labour relations. The Parliament is also empowered to determine the jurisdiction of the said special court.

19. The Parliament exercised the said power in 2011 when it enacted the Industrial Court Act (ICA). Under Section 12(1) of the Act the court has a wide jurisdiction including 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 provision of the 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 employee; ...”***

Under Section 12(3) (ICA) the court has the power to make any of the following orders -

***“(i) interim preservation orders including injunctions in cases of urgency;***

***(ii) a prohibitory order;***

***(iii) an order for specific performance;***

***(iv) a declaratory order;***

***(v) an award of compensation in any circumstances contemplated under this act or any written law;***

***(vi) an award of damages in any circumstances contemplated under this Act or any written law;***

***(vii) an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law; or***

***(viii) any other appropriate relief as the Court may deem fit to grant.”***

20. The following provisions clearly demonstrate that this court has a very wide jurisdiction on all disputes arising from or related to employment and labour relations including interpretation of the Constitution and granting Judicial Review. The preamble to the ICA and Section 21 of the ICA, corroborates the view that the jurisdiction of this court is much wider than determining disputes related to private law contracts of employment. The preamble of ICA states as follows:

***“An Act of Parliament to establish the Industrial Court as a superior court of record; to confer jurisdiction of the court with respect to employment and labour relations and for connected purposes .....*”**

Section 21(2) of the ICA on the other hand provides that:

***“ ... any matter certified by the court as raising a substantial question of law under Article 165(3)(b) or (d) of the Constitution shall be heard by an uneven number of judges, being not less than three assigned by the Chief Justice.”***

21. It is obvious from the foregoing that this court enjoys exclusive original and appellate jurisdiction on all matters related to employment and labour relations. This position has been re-affirmed by both the High Court and the Industrial Court in the cases cited by the Petitioner. In one more relevant decision by Rika J. in ***ICC No. 103 of 2014 Tom Luusa Munyasya and another vs. Governor Makeni County and***

*another* (unreported), held:

***“The Industrial Court is created under the Industrial Court Act 2011 pursuant to Article 162(2) of the Constitution, and has the status of the High court. Jurisdiction flows from this Constitutional fountain and from Section 12 of the ICA as well as Section 87(2) of the Employment Act 2007. The court has the full power to adjudicate on constitutionality of legislation which touches on Labour and employment disputes.”***

In this court's view the fountain of jurisdiction should be deemed as still flowing in this matter because the Petitioner has submitted that his right to employment and protection of the law from unfair labour practice and unfair dismissal was violated by the Respondents when they acted in breach of Section 40(5)(a) of the CGA.

22. The fundamental factor to consider when deciding whether this court has jurisdiction in any matter is the existence or lack of employment and labour relationship. In this matter all the Respondent counsel did not attempt to prove that the Petitioner was not an employee of either or both of the Respondents or the Interested Party. None even attempted to give the meaning of an employee or employment or labour relationship. The court was therefore left fishing for such from the documents filed. The court's attention has been drawn by the Appointment letter dated 30<sup>th</sup> May 2013, annexed as WK1 to the Petitioner's Supporting Affidavit. The letter is copied below:

***“30<sup>th</sup> May, 2013***

***Ref: GMC/5-13/1-016***

***Walid Khalid***

***P.O. Box 76632-00508***

***Nairobi***

***RE: APPOINTMENT AS COUNTY EXECUTIVE MEMBER***

***Following your successful vetting and ratification by the county assembly, I am pleased to officially appoint you as County Executive Member – Finance and Economic Planning in accordance with The County Government Act 2012 Section 35.***

***Your functions and roles are as envisaged in The County Government Act 2012 Sec. 36 – 42.***

***The oath taking ceremony will be on 27<sup>th</sup> May 2013 at 10.00am at the County Assembly of Mombasa as per The County Government Act 2012 Section 38.***

***I wish you all the best in your new office.***

***H.E. Hassan Ali Joho***

***GOVERNOR”***

23. The foregoing letter is evidence that the Petitioner was employed by the Governor to serve the Interested Party subject to the provisions of Section 35 – 42. His service was at the pleasure of the Governor and subject to dismissal by the Governor at will. On the other hand, the Petitioner could be dismissed by the governor on a valid recommendation by the County Assembly under Section 40 of the CGA. In this case, the Petitioner was dismissed by the Governor on recommendation by the County Assembly as per the letter dated 30<sup>th</sup> July 2014 which read as follows:

"30<sup>th</sup> July 2014

**Our Ref: MCL/01/63/14**

**Hon. Walid Khalid,**

**Mombasa.**

**Dear Sir**

**RE: IN THE MATTER OF YOUR IMPEACHMENT BY THE  
COUNTY ASSEMBLY OF MOMBASA**

***I make reference to the matter mentioned above.***

***I am in receipt of a resolution by the County Assembly of Mombasa dated the 24<sup>th</sup> of July 2014 confirming your removal from office following the process subject matter herein.***

***I am therefore obliged to act, in accordance with Section 40 of the County Governments Act 2012, to confirm your dismissal as the County Executive Committee Member for Finance and Planning. Kindly make the necessary arrangements to hand over office immediately.***

***I wish you well in your future endeavors.***

***Yours Faithfully,***

***H.E. HASSAN ALI JOHO”***

24. It follows therefore that if the Petitioner had the reason to believe that he was dismissed from employment through a process that was unfair and that breaches the said Section 40(5)(a) of the CGA, he has the right to move the court to challenge the perceived violation. The opinion of this court is that, one of the courts he can go to is this court because the dispute arises from or relates to loss of an alleged employment. Article 236 provides that -

***“A public officer shall not be -***

***(b) dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law.”***

The question in the petition is whether Petitioner was a Public Officer and whether his dismissal was in accordance with the law or or in breach of the Law and the Constitution over which this court has the jurisdiction to determine.

25. The second limb of the Preliminary objection is whether this court can grant Judicial Review Orders. The answer is similar to the question of interpretation of the Constitution. This court is of the opinion that it has the jurisdiction to make orders including certiorari whether instituted under Article 22 and 23 of the Constitution or Section 8 of the Law Reform Act. Section 7(1) of the Sixth Schedule of the Constitution provides that all law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the new Constitution and in case of any conflict, the Constitution shall prevail to the extent of the conflict. In view of the foregoing the court is of the view that it has the jurisdiction to entertain judicial review disputes provided that they arise from or are related to employment and labour relations.

26. In conclusion, the court observes that the Respondents did not give the meaning of an employee or

employment and labour relations. They also did not give the meaning of legislative action and whether it included the investigation and voting for the impeachment of a County Executive Committee member. They also did not contest the Petitioner's submission that the County Assembly was exercising oversight or supervision over the Petitioner which was subject to review by this court when they recommended for his dismissal from office. Time has come when the Kenyans should know whether Executive Committee Members serving in the County Governments are employees with rights as such or not. It is also the right time for Kenyans to know whether henceforth such category of State Officers can petition the Employment and Labour Relations Court for interpretation of their rights arising from or related to their dismissal from office. Unless this legal issue is settled administration of justice may be hampered by the numerous Preliminary Objections which are being raised in every such suits being brought to this court by the concerned County Executive Committee members. Consequently, I certify that there is a substantial question of Law in this matter concerning the employment status of the County Executive Committee members and the jurisdiction of this court to determine Constitutional Petitions and Judicial Review Applications brought by the said State Officers relating to or arising from their dismissal or removal from office. This file is therefore referred to the Honourable Chief Justice of this great Republic to appoint a bench of 3 Judges to determine the aforesaid substantial question of Law.

## **27. Disposition**

For the reasons and findings stated above the two Preliminary Objections filed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and the Interested Party on 6<sup>th</sup> August 2014 are to be determined by a 3 Judge Bench to be constituted by the Honourable Chief Justice as requested above.

Orders accordingly.

**Dated and Delivered in Mombasa this 10<sup>th</sup> day of October, 2014.**

**O.N. Makau**

**Judge**