



REPUBLIC OF KENYA

Industrial Court of Kenya

Petition 21 of 2012

IN THE MATTER OF ARTICLES 22 AND 23 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 3,20,27,28,40,41,73(1)(A), 156 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

BETWEEN

**DR. SAMSON GWER.....1ST
PETITIONER**

**DR. MICHEAL MWANIKI.....
.....2ND PETITIONER**

**DR. NAHASHON THUO3RD
PETITIONER**

**DR. JOHN WAGAI4TH
PETITIONER**

**DR. MOSES NDIRITU5TH
PETITIONER**

**DR. ALBERT KOMBA.....6TH
PETITIONER**

VS

**KENYA MEDICAL RESEARCH INSTITUTE (KEMRI).....
.....1ST RESPONDENT**

**MINISTRY OF PUBLIC HEALTH AND SANITATION
2ND RESPONDENT**

**THE HON. ATTORNEY GENERAL 3RD
RESPONDENT**

UNION OF NATIONAL RESEARCH AND ALLIED

**INSTITUTES STAFF OF KENYA.....
.....INTERESTED PARTY**

RULING

This matter was initially filed at the High Court of Kenya at Nairobi as Petition No.295 of 2011 in terms of Article 22 and 23 of the CONSTITUTION OF KENYA 2010. The High Court issued an order dated 28th September 2012. The matter was transferred to the Industrial Court on grounds that the issue for determination arises from an employee/employer relationship.

When the matter came before me for hearing on 16th January 2013, Mr. Chigit appeared for the Petitioners; Mr. Munge for 1st Respondent; M/s Wahu for 2nd & 3rd Respondents and Mr. Enonda for the Interested Party.

All the parties had filed written submissions and Mr. Munge at the outset raised a Preliminary Objection as follows;

1. Whether the Honourable Court has jurisdiction to hear and determine this matter.
2. Whether the Petitioners' claim is resjudicata.

In support of the first point, Mr. Munge submitted that the matter was initially filed before a court that had no jurisdiction consequently, the High Court had no matter before it and therefore had non to transfer. The petitioners did not seek to amend the initial petition as initially filed or seek to file fresh suit in the Industrial Court which court has the jurisdiction to entertain and determine the issues pleaded in the petition.

The 1st Respondent referred the court to the case of Lilian S. Vs. Caltex Oil

Kenya Ltd [1989] KLR as follows;

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything, without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

This proposition is put forth to persuade the court that at the time this matter was filed before the High Court, the court had no jurisdiction to entertain the matter and therefore, it had no ability to make any order in respect of it, other than dismiss it for want of jurisdiction. Accordingly the court had no ability to make an order transferring the suit to the Industrial Court at all. It follows that nothing was transferred to the Industrial Court and this matter should be dismissed outright therefore as the court has no jurisdiction to determine the issues pleaded by the petitioners in the petition filed on 5th December 2011.

The 1st Respondent further submits that the matter before the court is a trade dispute or an employee's and employer dispute which has been couched or framed as a Constitutional reference in the Petition filed herein. KEMRI had employed the Petitioners in their respective capacities as set out in their respective employment contracts and the dispute herein arose in the course of their employment.

Accordingly, the matter should have been filed in the first instance at the Industrial Court in that Article 162(2) provides that Parliament shall establish courts with status of the High Court to hear and determine disputes relating to;

(a) Employment and Labour Relations, and

Article 165(5) provides that the High Court shall not have jurisdiction in respect of matters falling within the jurisdiction of the courts contemplated in Article 162(2).

The Industrial Court was pursuant to these Constitutional provisions established under Section 4 of the Industrial Court Act, Number 20 of 2011 which provides, *inter alia*, that;

- (1) In pursuance of Article 162(2)(a) of the Constitution, there is established the Industrial Court for the purpose of settling employment and industrial relations disputes and the furtherance, securing and maintenance of good Employment and Labour Relations in Kenya.
- (2) The court shall be a superior court of record with the status of the High Court.
- (3) The Court shall have and exercise jurisdiction throughout Kenya.

Section 12 of the Industrial Court Act emphasizes the jurisdiction of the Industrial Court as follows;

“the court shall have exclusive 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 or arising out of employment between an employer and an employee”.

The Industrial Court Act, No.20 of 2011, was assented to by the President on 27th August 2011 and its commencement date was 30th August 2011. The Act was therefore in force when the petitioners herein filed the present suit on 5th December 2011. At the time, the 1st Respondent submits, it is only the Industrial Court in the Republic of Kenya that had jurisdiction to hear and determine employment and labour relations disputes such as that pleaded by the petitioners in the petition filed on 5th December 2011 as the statute gives it exclusive jurisdiction.

The court was referred to a recent decision in H.C.C. No.382 of 2010 Davy K. Koech –Vs- Kenya Medical Research Institute, where Hon. Justice Musinga held, *inter alia*, that;

“Whereas I am aware that in various High Court pronouncements, it has been held that the High Court is still vested with jurisdiction to hear and determine disputes relating to employers and employees. My appreciation of Section 12 of the Labour Institutions Act as well as Section 12(1) of the Industrial Court Act is that it is only the Industrial Court that is vested with such jurisdiction”.

Whereas this court has no difficulty in accepting the sound reasoning by the Hon. Judge, I hasten to point out that the entire part 111 of the Labour Institutions Act, 2007 was repealed by Section 31 of the Industrial Court Act, 2011 which reads;

“Part 111 of the Labour Institutions Act, 2007 is repealed”. It is noteworthy that part 111 of the Labour Institutions, Act titled “The Industrial Court” covers Section 12 and therefore that provision is no longer operational.

We were also referred to Civil Appeal No.187 of 1999 Niazsons (K) Limited –Vs- China Road & Bridge Corporations (Kenya) where the Court of Appeal held, *inter alia*, that;

“it is trite that there can be no estoppel against the statute. Nor can jurisdiction be conferred by estoppel, consent, acquiescence or default.”

It was submitted therefore that there can be no estoppel against a statute and jurisdiction cannot be waived in any way even in cases of default as the case herein in the commencement of the suit.

Further, the court was told, the petitioner had initially referred this dispute before a Conciliator under the provisions of the Labour Relations Act, on the same issue as that pleaded in the petition filed herein. A conciliator, Mrs. M.M. Kezzah heard the dispute and came up with recommendations. The petitioner however, consciously opted to move to the Constitution and Human Rights Division of the High Court at the Milimani Commercial Court in Nairobi in breach of the law. This was in spite of Section 37(1) of the Labour Relations Act which provides, *inter alia*, that;

“if a trade dispute is not resolved after conciliation, a party to the dispute may refer it to the Industrial Court in accordance with the rules of the Industrial Court”.

The petitioners therefore, were patently aware of the right court to approach but deliberately chose not to.

The court was also referred to H.C. Misc. Application No.308 of 2002, Charles Omwalo Omwoyo –Vs- African Highlands & Produce Co., Limited where it was held;

“I am of the view that if a court has no jurisdiction to do something it cannot do so in what is said to be the interest of justice. The interest of justice are forever best served by upholding the law and not bending it to suit the individual circumstances of cases before the court.....”

In Civil Appeal No.137 of 2009, Rob Dejong & Direct Maintenance E.A. Limited –Vs- Charles Mureithi Wachira, it was held, *inter alia*, that;

“I will start by saying that jurisdiction means everything to the court, without it the court cannot take one step and in case it does the whole proceedings will be a nullity”.

The court went further to hold that;

“The Legislature has in its wisdom created a specialized court for adjudication upon labour related disputes. The law created the Industrial Court as a specialized court..... it is clear that the law gives exclusive jurisdiction to the Industrial Court to hear and determine all industrial related matters. It is therefore, wrong for other courts at the instigation of litigants to take away or attempt to share jurisdiction with the Industrial Court” and on the issue whether the court could order transfer of matters, the court held in the same decision that;

“The second issue is whether this court can direct the transfer of the suit before the Magistrate’s Court to the Industrial Court. I concur with the position taken by Counsel for the Appellant that to invoke this power the matter should be before a court with jurisdiction. If the matter was filed in a court without jurisdiction then the suit is a nullity and there is nothing capable of being transferred.”

In yet another decision, Bishop Christopher Ndungu –Vs- Andrew Abungu alias Christopher Abungu Ouma (2006) EKLR, it was held *inter alia* that;

“The applicant cannot apply to transfer a suit which was filed in a court which had no jurisdiction to a court which has jurisdiction. The applicant cannot purport to cure a mistake which he made when he filed the suit in a court which lacked jurisdiction-----Before this court can order the said transfer, it must be satisfied that the court where the suit was filed had jurisdiction to hear and determine it”.

The position was restated in the case of Private Development Company Limited

-Vs- Rebecca Ngonyo & Samuel Kamau Macharia (2000)EKLR, where it was held *inter alia* that;

“The applicant waits to remedy the situation by transferring the suit from a court without jurisdiction to a court with jurisdiction, whereas I agree with the applicant that under Section 18(1) of the Civil Procedure Act, this court has jurisdiction to transfer a suit from one court to the other, I also agree with the submission made by the Respondent that the power of this court under this Section is circumvented by the requirement that this court can only transfer a suit from a court with competent jurisdiction to

another of competent jurisdiction”.

The High Court in H.C.C.C. No. 1209 of 2006 Savings & Loans Kenya Ltd –Vs- George Sirengo Masese, followed this legal position stating;

“CMCC No. 6089 of 2005 having been filed in a court without jurisdiction to hear and determine it, this court has no jurisdiction to withdraw that suit from that court and transfer it to another court (including itself) that has jurisdiction to hear and determine it.”

On the basis of these authorities cited, the court was urged to dismiss this petition on the basis that the High Court had no jurisdiction to entertain the petitioners’ case in the first instance and in the premises it had no power, to order its transfer to the Industrial Court. The court should therefore find that the order made on 20th September, 2012 for transfer of the petition to the Industrial Court were made without jurisdiction hence were of no effect.

The Court was further asked in the event it declines those submissions, the matter should be referred back to the Constitutional and Human Rights Division of the High Court at the Milimani Law Courts for the parties to make submissions on the aforesaid issue.

Counsel for 1st Respondent further submitted that he was aware of Section 20 of the Industrial Court Act, which stipulates that the Industrial Court shall act without undue regard to technicalities and shall not be bound by rules of evidence except in criminal proceedings. He submitted however that the issue of jurisdiction do not relate to technicalities or rules of evidence but jurisdiction goes to the root of the matter as was stated in the Lilian’s case. The matter should therefore be dismissed accordingly.

The petitioner filed Supplementary submissions in response to the Preliminary Objections raised by the 1st Respondent as follows;

Jurisdiction

The prayers sought emanate from the violations of human rights under Article 27, 28, 29, 40 and 41 of the Constitution.

That the Employment and Labour Relations Court contemplated under Article 162(2) of the Constitution was established by the enactment of the Industrial Court Act, No.20 of 2011. Even though the Act, came into operation on 30th August 2011, the judges of that court were appointed on 12th July 2012, vide Gazette Notice No.9797 of 19th July 2012.

That establishment of the court is only complete once judges to the court have been appointed. The court was referred for that proposition to the case of Brookside Dairy Limited -Vs- Attorney General and the Industrial Court Petition No.33 of 2011 (unreported) in which was held that the Industrial Court as earlier established under Section 12 of the Labour Institutions Act No.12 of 2007 was a tribunal subordinate to the High Court, and therefore it had no jurisdiction over human rights violations hence the reason why this petition was lodged at the High Court at the time since the new Industrial Court was not operational as the judges of the court had not been appointed.

There are several contradictory decisions of the High Court on the status of the erstwhile Industrial Court, under the Labour Institutions Act. In the case of Mecol Limited -Vs- the Attorney General and others Nairobi H.C. Misc. Appl. 1784 of 2004 (unreported); the High Court had similarly held that the Industrial Court as earlier constituted was a subordinate court for the purpose of the exercise of the supervisory jurisdiction of the High Court under Section 65 of the former Constitution.

In the contrary, the High Court held in Kenya Guards and Allied Workers Union

–Vs- Security Guards Services and 38 others, Nairobi H.C. Misc. 1139 of 2007 (unreported); that the

Industrial Court as earlier constituted was not a subordinate court subject to the supervisory jurisdiction of the High Court.

The fact of the matter is that the earlier court was not anchored in the Constitution and therefore even though Section 12(1) of the Labour Institutions Act, provided;

“The Industrial Court shall have exclusive jurisdiction to hear, determine and grant any appropriate relief in respect of an application, claim or complaint or infringement of any of the provisions of this Act or any other Legislation which extends jurisdiction to the Industrial Court, or in respect of any matter which may arise at common law between an employer and employee in the cause of employment...”. It could not oust the unlimited jurisdiction of the High Court under Section 65 of the former Constitution.

The Industrial Court is presently established under Section 162(1) as read with Section 162(2)(a) as a Superior Court of record to hear and determine disputes relating to Employment and Labour Relations and Section 4 and 12 of the Industrial Court Act have clothed the Court with exclusive jurisdiction in this respect.

It is the petitioners’ submission that at the time, they lodged their petition, the High Court was the only operational Court with jurisdiction to hear and determine human rights violations under the Bill of Rights and therefore the Court rightly transferred the petition to the Industrial Court once it became operational and the Court should proceed to hear and determine the case on the merits.

Analysis

The parties are agreed that the Industrial Court is presently the proper court to hear and determine the matter. What is in dispute is whether the High Court had authority to transfer the matter to the Industrial Court, the Respondents holding the position that since it had no jurisdiction in the first place, and because there was already in existence a court with proper jurisdiction to entertain the matter at the time the suit was filed, then the High Court had nothing before it to transfer and the only option the petitioners’ have is to file their matter afresh at the Industrial Court.

Indeed Article Section 165(5) provides;

“The High Court shall not have jurisdiction in respect of matters:-

(b) falling within the jurisdiction of the Courts contemplated in Article 162(2)”.

At the same time Article 23 entitled;

“Authority of Courts to uphold and enforce the Bill of Rights”, provides;

“23(1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to a right or fundamental freedom in the Bill of Rights”.

There is not in the Bill of Rights, a similar provision with respect to court’s established pursuant to Article 162 as read with Article 165(5)(b) of the Constitution.

Furthermore Article 259(1)(b) of the Constitution provides;

“This Constitution shall be interpreted in a manner that;

(b) Advances the rule of law and human rights and fundamental freedoms in the Bill of Rights.”

In this regard, the court will be most hesitant to find that between the effective date of the Constitution of Kenya, 2010 and the time the Industrial Court of Kenya as presently established became fully operational

with the appointment of the Industrial Court Judges, there was no court in the Republic of Kenya which could hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights if the cause of action arose out of an employee and employer relationship.

It is undeniable that the High Court duly constituted under Article 65 of the Old Constitution had unlimited Jurisdiction over such matters and indeed was the only one with original jurisdiction over Constitutional matters in the Country. This position was anticipated to change with regard to Labour and Employment matters once a court established pursuant to Articles 162(1) and (2)(a) was established.

Section 22 to the Sixth Schedule pursuant to Article 202 of the Constitution, which took effect on the effective date reads;

“Judicial proceedings and pending matters

22 - *All judicial proceedings pending before any court shall continue to be heard and shall be determined by the same court or a corresponding court established under this Constitution or as directed by the Chief Justice or the Registrar of the High Court.*”

I am clear in my mind that the establishment of the Industrial Court as presently constituted was in transition at the time this petition was filed at the High Court on 5th December, 2011 because there was not in place a functional Industrial Court, that could entertain, hear and determine, matters preserved for the High Court under Article 23(1) of the Constitution of Kenya 2010. This was only realized on 19th July 2012 when the judges of the new Industrial Court duly appointed on 12th July 2012 were gazetted via Gazette Notice No.9797 of 2012.

It is therefore my considered decision that the High Court had at the time the matter was filed, jurisdiction to entertain, hear and determine this petition and therefore had power and authority to transfer it to the Industrial Court when it became duly established and legally functional.

It would be unreasonable and dis-proportionate to order the petitioner to start their proceedings afresh, before this court, in a matter where all the pleadings have closed and final submissions filed both on the Preliminary issues and on the merits of the case. Indeed the proceedings run into more than a thousand pages including those submitted in electronic form.

Such an order would be against the letter and the spirit of the Constitution, and in particular Article 159(2) which reads;

“In exercising judicial authority the courts and tribunals shall be guided by the following principles:-

(b) justice shall not be delayed

(d) Justice shall be administered without undue regard to procedural technicalities;

and

(e) the purpose and principles of this Constitution shall be protected and promoted”.

No real prejudice would in my view be occasioned the Respondents in this case as they are all agreed that it is the Industrial Court as presently constituted which has jurisdiction to hear and determine this matter. Directing them to file the matter afresh would in my view be a mere procedural technicality with great financial implications let alone the delay in finalizing the matter that would be occasioned by such decision.

The Preliminary Objection is accordingly dismissed.

Resjudicata

The 2nd Preliminary issue raised by the petitioner which the court shall not take much time to dwell in is;

“whether the petitioners’ claim as pleaded in the petition filed is Resjudicata.”

This matter is raised on the basis that the petitioners lodged a trade dispute before a conciliator under the provisions of the Labour Relations Act on the issues pleaded in the petition pending herein. The final recommendations were made by the conciliator but the petitioners opted to file the same issues afresh before the High Court.

The consequences of a conciliation process under part V111 of the Labour Relations Act No.14 of 2007 are stated under Sections 68 and 69 of the Act.

In terms of Section 68(1), if a trade dispute is settled in conciliation, the terms of the agreement shall be:-

- (a) recorded in writing; and
- (b) signed by the parties and the conciliator.

A copy of the agreement is then lodged with the Minister for Labour.

According to Section 69, a trade dispute is deemed to be unresolved after conciliation if the;

- “(a) conciliator issues a Certificate that the dispute has not been resolved by conciliation; or*
- (c) thirty days period from the appointment of the conciliator; or any longer period agreed to by the parties, expires”.*

In terms of Section 73(1), if a trade dispute is not resolved after conciliation, a party to the dispute may refer it to the Industrial Court in accordance with the rules of the Industrial Court.

With respect to the counsel for the 1st Respondent, equating this process to a determination by a Court of Law is far fetched and does not therefore hold any water. The only real value from this submission is to show that the petitioners were aware that the dispute at hand was a labour dispute within the meaning of the Labour Relations Act, 2007 and other enabling legislation including the Employment Act, 2007 at the time they referred it to the High Court for adjudication, a matter we have already dealt with in the 1st Preliminary Objection. This point in limine is therefore dismissed.

The matter will take its normal course.

Dated and Delivered in Nairobi this 3rd day of May, 2013.

Mathews N. Nduma
PRINCIPAL JUDGE – INDUSTRIAL COURT

Appearances:-

Mr. Chigit for Petitioners
Mr. Munge for 1st Respondent
M/S Wahu for 2nd & 3rd Respondents
Mr. Enonda for Interested Party