



**Said v Principal Secretary, Ministry of Defence (Miscellaneous Civil Application E083 of 2023) [2024] KEHC 271 (KLR) (Judicial Review) (25 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 271 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
JUDICIAL REVIEW**

**MISCELLANEOUS CIVIL APPLICATION E083 OF 2023**

**JM CHIGITI, J**

**JANUARY 25, 2024**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW  
ORDERS MANDAMUS BY 87850 SPTE KASSIM RASHID SAID -19KR**

**AND**

**IN THE MATTER OF ARTICLES 10 OF THE CONSTITUTION OF KENYA, 2010**

**BETWEEN**

**87850 SPTE KASSIM RASHID SAID - 19KR ..... APPLICANT**

**AND**

**PRINCIPAL SECRETARY, MINISTRY OF DEFENCE ..... RESPONDENT**

**RULING**

1. What is before the court is the notice of preliminary objection dated May 30, 2023 to the effect that;
  - a. The High Court lacks jurisdiction in respect of matter herein.
  - b. The High Court Criminal Division lacks jurisdiction to issue orders of reinstatement of an employee.
  - c. The instant court lacks jurisdiction.
2. *Vide* Summons dated April 13, 2023, the Applicant herein sought inter alia for;
  - a. An order of *mandamus* compelling the Respondent herein to fully comply with the orders of this court to wit the Criminal Division of the High Court issued by Justice J.M Bwononga on the October 19, 2022 where in the high court judge allowed the appeal in its entirety and ordered that the Appellant be reinstated to his rank of a senior private.



- b. The Judgement in Criminal Appeal E144 of 2021 sprouted from Court Martial Suit 9 of 2021 filed at Langata Barracks where the Appellant had been sentenced to serve a custodial sentence as well as being dismissed from service.
3. The High Court has jurisdiction in respect of matter herein under article 165 of the Constitution which inter alia provides as follows;
- “ 165 (1) There is established the High Court, which--
- (a) shall consist of the number of judges prescribed by an Act of Parliament; and
  - (b) shall be organised and administered in the manner prescribed by an Act of Parliament.
- (2) There shall be a Principal Judge of the High Court, who shall be elected by the judges of the High Court from among themselves. (3) Subject to clause (5), the High Court shall have--
- (a) unlimited original jurisdiction in criminal and civil matters;
  - (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
  - (c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
  - (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of--
    - (i) the question whether any law is inconsistent with or in contravention of this Constitution; (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution; (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and (iv) a question relating to conflict of laws under article 191; and
  - (e) any other jurisdiction, original or appellate, conferred on it by legislation.”
4. According to the applicant, he is simply seeking to have the orders of Justice JM Bwononga adhered to the letter, and this Court certainly has jurisdiction.
5. The applicant relied in the Court of Appeal in Kenya Power & Lighting Company Limited v Benzene Holdings Limited t/a Wyco Paints [2016] eKLR held as follows;



‘... Section 3A of the Civil Procedure Act appears to have been introduced to augment the provisions of Section 3, vesting in the courts inherent power to make any orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

This was stated by the Court of Appeal in the case of Kenya Power & Lighting Company Limited v Benzene Holdings Limited t/a Wyco Paints [2016] eKLR.

For avoidance of doubt, the Court of Appeal further stated as follows;

“Of course this power has now been broadened by the introduction in 2009 of overriding objective in sections 1A & 1B and in 2010 by Article 159 of the Constitution.

The extent of inherent powers of the court was eloquently explained by the authors of the Halsbury’s Laws of England, 4th Edn. Vol. 37 Para. 14 as follows;

“The jurisdiction of the court which is comprised within the term “inherent” is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of substantive law; it is exercisable by summary process, without plenary trial; it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of court. The inherent jurisdiction of the court enables it to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process ... In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.” See also Meshallum Waweru Wanguku (supra)

This inherent jurisdiction is a residual intrinsic authority which the court may resort to in order to put right that which would otherwise be an injustice...’

In Kenya Country Bus Owners’ Association (Through Paul G. Muthumbi – Chairman, Samuel Njuguna – Secretary, Joseph Kimiri – Treasurer & 8 others v Cabinet Secretary For Transport & Infrastructure & 5 others [2014] eKLR, Justice Odunga stated as follows;

‘...In any case a Court of law always retains residual powers to implement its orders. To contend that the Court has no power to give orders whose effect would be to implement the decision given by the Court is in my view misconceived. As was held Kimaru, J in *Rev. Madara Evans Okanga Dondo v. Housing Finance Company of Kenya Nakuru* HCCC No. 262 of 2005:

“The court will always invoke its inherent jurisdiction to prevent the abuse of the due process of the court. The jurisdiction of the court, which is comprised within the term “inherent”, is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of the substantive law; it is exercisable by summary process, without plenary



trial, it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of the court. The inherent jurisdiction of the court enables the court to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process. In sum, it may be said that the inherent jurisdiction of the court is virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.”

One of the instances in which the court exercises its residual inherent power is in the fulfilment of its obligation to ensure that the orders it issues are not issued in vain...’

6. The applicant argues that the High Court (Criminal Division) exercising its inherent jurisdiction has jurisdiction to issue the orders herein for the ends of justice to be met.
7. He believes the respondent is inviting this court to sit as an appellate court albeit through the back in a matter that has been dealt with by a court of concurrent jurisdiction.
8. The judgement in Criminal Appeal E144 of 2021 still being unchallenged, the same is regular, valid, procedural and also the persuasive precedent (of course together with Criminal Appeal 122 of 2014 where Justice G.W Ngenye ordered for the reinstatement of the Appellant to the rank of Warrant officer 11 ...) in matters of the same nature.
9. The respondent has no option but to obey the orders in Criminal Appeal E144 of 2021. In *Trusted Society of Human Rights Alliance v Cabinet Secretary for Devolution and Planning & 3 others* [2017] eKLR, Justice Mativo held as follows;

‘...The Court does not, and ought not to be seen to make orders in vain; otherwise the Court would be exposed to ridicule, and no agency of the constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people.

A Court order is binding on the party against whom it is addressed and until set aside remains valid and is to be complied with. I shudder to think of the place of our judicial system if parties are left to freely decide what court orders to obey and which ones to ignore. Parties must realize that once they are brought to court they are subject to the jurisdiction of the Court. Under article 159(1) of the *Constitution*, Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under the *Constitution*. In exercising judicial authority the Courts and Tribunals are, *inter alia*, to be guided by the principle that the purpose and principles of the *Constitution* shall be protected and promoted. Under article 10(1) of the *Constitution* the national values and principles of governance in the Article bind all State organs, State officers, public officers and all persons whenever any of them (a) applies or interprets the *Constitution*; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions. Under clause (2)(a) of the same Article the national values and principles of governance include the rule of law.



Musinga, J (as he then was) in *Moses P N Njoroge & Others v. Reverend Musa Njuguna & Another* was of the view, which view I respectfully associate with, that the rule of law requires that orders of the Court be respected and obeyed and that duty equally applies even where a party is dissatisfied with an order and has appealed to an appellate court against the order, ruling or judgment. Willful and flagrant disobedience of court orders undermines the authority and dignity of the Courts and must be dealt with firmly so that the Court's authority is not brought into disrepute...'

### **Analysis and determination:**

- i. Whether this court has jurisdiction
- ii. Whether the Preliminary objection should be upheld.

### **Jurisdiction;**

10. I will start by restating the place of a challenge to the jurisdiction of this court and rely on the classic case of *Samuel Kamau Macharia v KCB & 2 others*, (2012) eKLR where the Court held that:-

“A Court's jurisdiction flows from either the *Constitution* or Legislation or both and that the court cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by Law. Also relies on *The Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* (1989) KLR for the submission that a question of jurisdiction ought to be raised and decided at the earliest opportunity further that 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.”

11. In the Supreme Court of Kenya decision in the case of *Republic v. Karisa Chengo & 2 others*, Petition No. 5 of 2015 it was stated that: -

“...we note that pursuant to Article 162(3) of *the Constitution*, Parliament enacted the *Environment and Land Court Act* and the *Employment and Labour Relations Act* and respectively outlined the separate jurisdiction of the ELC and the ELRC as stated above. From a reading of the *Constitution* and these Acts of Parliament, it is clear that a special cadre of Courts, with *suis generis* jurisdiction, is provided for. We therefore entirely concur with the Court of Appeal's decision that such parity of hierarchical stature does not imply that either ELC or ELRC is the High Court or vice versa. The three are different and autonomous Courts and exercise different and distinct jurisdiction. As article 165(5) precludes the High Court from entertaining matters reserved to the ELC and ELRC, it should, by the same token, be inferred that the ELC and ELRC too cannot hear matters reserved to the jurisdiction of the High Court.” (Emphasis added)

12. Justice J. M. Bwononga on the October 19, 2022 where in the high court judge allowed the appeal in its entirety and ordered that the Appellant be reinstated to his rank of a senior private.

13. The Judgement in Criminal Appeal E144 of 2021

This relief is related to an employment dispute and applying the jurisprudence, flowing from the various decisions cited herein above, the reliefs sought can be granted by the Employment and labour Court which Court is clothed with jurisdiction in terms of article 23(3)(f) of the *Constitution* as read



with Section 12 of the Employment and labour Act to determine issues of employment dispute and use and fundamental freedoms, in the Bill of Rights associated with employment dispute.

14. The Employment and Labour Relations Court is established under Section 4 of the Employment and Labour Relations Act, 2012 as read with article 162(2) (a) of the *Constitution*. The court's jurisdiction is provided for under section 12 of the *Employment and Labour Relations Court Act* as follows: -

- “(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' organisation and a trade union's organisation;
  - d. disputes between trade unions;
  - e. disputes between employer organisations;
  - f. disputes between an employers' organisation and a trade union;
  - g. disputes between a trade union and a member thereof;
  - h. disputes between an employer's organisation 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.
2. An application, claim or complaint may be lodged with the Court by or against an employee, an employer, a trade union, an employer's organization, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose.”

Article 165(5) of the *Constitution* provides that-

- “The High Court shall not have jurisdiction in respect of matters—
- i. reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or
  - ii. falling within the jurisdiction of the courts contemplated in Article 162 (2).”

Article 162 (2) provides as follows:

- “(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—



- (a) employment and labour relations; and
- (b) the environment and the use and occupation of, and title to, land.”

15. I find therefore that this Honourable Court lacks the jurisdiction to hear and determine the instant Application since it relates to an employment matter.

**Disposition:**

16. The Notice of preliminary objection dated May 30, 2023 has merit.

**Order:**

- i. The Notice of preliminary objection dated May 30, 2023 is upheld.
- ii. The matter is transferred to the Employment and Labour Relations Court.

**DATED, SIGNED, AND DELIVERED AT NAIROBI THIS 25<sup>TH</sup> DAY OF JANUARY 2024.**

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**J. CHIGITI (SC)**

**JUDGE**

JR. MISC. E038 OF 2023 RULING 6 | Page

