



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 472 OF 2013

MWAKAI KIKONDE SIO.....PETITIONER

AND

THE KENYA UTALII COLLEGE.....1st RESPONDENT

THE HON. ATTORNEY - GENERAL.....2nd RESPONDENT

RULING ON JURISDICTION

1. The Petition dated 20th September 2013 seeks the following Orders;

a. General damages against the Respondents for losses and inconveniences suffered by the Petitioner.

b. Specific damages to be calculated at the rate of the Petitioner's then pay including attendant benefits, Pension, Security, Medical Cover, Insurance, Housing and Utilities, Servants, from November 2003 until the 12th September 2007.

c. Costs consequent upon this Petition be borne by the Respondents in any event on indemnity basis;

d. The Honourable Court do make any such other orders or further Orders as it may deem just and expedient in the circumstances in enforcing violation of fundamental rights of the Petitioner.

2. On 26th June 2014, and before the Petition could be heard, Parties agreed that it was necessary for this Court to determine the issue of Jurisdiction in limine and submissions were thereafter filed in that regard.

3. The Petitioner on his part has strongly urged this Court to accept that it has jurisdiction to hear, determine and grant the orders sought above by fact of its unlimited original civil and criminal jurisdiction as well as its jurisdiction to determine whether a fundamental right or freedom has been denied, violated, infringed or threatened, which jurisdiction flows from the express language of Article 165(3) of the Constitution which provides as follows;

"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. In relying on the above Article, the Petitioner's submission is that in his Petition, he has clearly invoked the jurisdiction conferred on the High Court by Article 165(3)(b) above and in

addition, that he has emphasized that Article 23 of the Constitution also applies to his case. Article 23, for avoidance of doubt, provides that:

"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.

2. Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts 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.

3. In any proceedings brought under Article 22, a court may grant appropriate relief, including-

(a) a declaration of rights;

(b) an injunction;

(c) a conservatory order;

(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;

(e) an order for compensation; and

(f) an order of judicial review."

5. He has also submitted that the proposition that only the Industrial Court can grant him relief is misguided as Article 23(3) of the Constitution above, confers on this Court the Jurisdiction to grant all and other reliefs, set out therein.

4. Conversely, that the Industrial Court Act, 2012 under Section 12(2] thereof sets out matters that fall under the jurisdiction of the Industrial Court. They are the following;

(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.

7. It is his argument in invoking and applying the above section to the present matter, that none of the matters complained of in the Petition nor any of the reliefs sought in it fall under the purview of the said section.

8. In support of his stated position, the Petitioner relies on the decisions in **Dennis Mongare vs AG & 3 others [2011] eKLR** and **Christabel Akinvi Onvango vs Kenya Airports Authority [2014] Eklr** where the High Court inter-alia held that where there are allegations of violations or infringements of fundamental rights and freedoms, then the High Court is properly vested with jurisdiction to determine such allegations.

In a nutshell, the Petitioner has urged the Court to proceed and determine the Petition without further ado.

9. The Respondents on their part took a completely contrary position and the 1st Respondent in its submissions asserted that the dispute between the parties is one relating to whether the Petitioner is entitled to salary, benefits and related emoluments arising from his employment and later, dismissal, as the Principal of Utalii College. Such a dispute, it is further contended, is one between an employee and an employer and therefore falls squarely within the jurisdiction of the Industrial Court.

10. It is the 1st Respondent's further submission that what constitutes Constitutional breach leading to a party resorting to the Constitutional Court is a matter that was adjudicated upon

in **Nzioka vs AG & others (2006) 2 KLR 882** and **EPCO Builders Ltd vs Marjan & Another [2006] 2 KLR1** where the Courts held that where another remedy exists under a legislation or on some other basis in law, then that remedy should be pursued at the appropriate forum to avoid trivialization of the constitutional jurisdiction.

11. Reliance was also placed on the decision in **Speaker of the National Assembly vs Hon. Njenga Karume. Civil Appl. No.92 of 1992** for the proposition that where a specific procedure is provided by the Constitution or an Act of Parliament, there is considerable merit in such a procedure being followed. The point made in that regard is that because Article 162(2) of the Constitution creates a court with the status of the High Court to hear and determine issues relating to employment and labour relations, then the present dispute should be properly determined in the Industrial Court.

12. The 2nd Respondent, in supporting the position taken by the 1st Respondent states further that looking at the dispute before the Court in the context of Section 12 of the Industrial Court Act, no other conclusion can be reached than that this Court should cede jurisdiction to the Industrial Court and decline to hear and/or determine the instant Petition.

13. I have considered the rival submissions before me and the issue of jurisdiction is certainly an important one. That is why in **S.K. Macharia vs KCB. Civil Application No. 2 of 2012** the Supreme Court stated that jurisdiction can only be conferred on a court by the Constitution or statute and a court cannot therefore otherwise act than within jurisdiction properly conferred on it.

14. I also adopt the reasoning in **Re: Owners of Motor Vessel "Lillian S" vs Caltex Oil (kl Ltd [1989] KLR 1** where the oft-quoted statement that jurisdiction is everything and without it, a court cannot take a further step, was made.

15. In the instant Petition therefore, a casual reading of it would show that;

I) Paragraphs 4, 5, 6, 7, 8, 9, 10,11,12,13,14, 15,16,17, 18 and 19 have facts which relate to the Petitioner's employment history with the 1st Respondent

until October 2003, when his services were terminated, allegedly without notice and his name removed from the payroll.

ii) Paragraphs 20, 21, 22, 23, 24, 25, 26 contain the alleged breaches of his constitutional rights under both the Repealed Constitution and the Constitution, 2010. Some of these breaches include the right to fair hearing and due process, right not to be subjected to degrading and inhuman treatment, right to legitimate expectation and the right to a livelihood.

iii) Paragraphs 27, 28, 30, 31, 32, 33, 34, 35 contain the efforts he made and the results of those efforts, to get payments from the 1st Respondent for what he considered was his entitlement upon termination of his employment.

iv) Paragraphs 36 and 37 are alleged violations of the right to property and to fair administrative action contrary to Articles 40 and 47 of the Constitution, 2010.

v) Paragraphs 38 and 39 explain his losses, damage suffered and therefore the need for constitutional redress for his alleged losses and suffering.

16. Prior to seeking the specific prayers elsewhere set out above, the Petitioner in the Petition has also sought a number of declarations premised on alleged violations of his right to fair hearing, due process, legitimate expectations, right not to be subjected to inhuman and degrading treatment, right to property and fair administrative action.

17. The specific orders sought then relate to general damages for losses and inconvenience allegedly suffered by him, specific damages for attendant benefits, pension, security, medical cover, insurance, housing, utilities, servants etc from November 2003 to September 2007 and costs thereof.

18. In the above context, the jurisdiction of this court stems from Article 165(3) of the Constitution which has been set out elsewhere above.

19. The jurisdiction of the Industrial Court on the other hand stems from Article 162(2) of the Constitution which provides as follows:

"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.

20. The High Court is then specifically barred from purporting to determine any matter reserved for the jurisdiction of the Industrial Court by Article 165(5) which provides thus:

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

a) Reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or

b) Falling within the jurisdiction of the courts contemplated in Article 162(2)."

21. Applying the law as set out above and also the holding in the **S.K. Macharia Case** (supra), it follows that the High Court cannot assume jurisdiction where the Constitution has specifically denied it of such jurisdiction. It clearly has no jurisdiction in matters relating to employment and labour relations and I need not belabor that point.

22. In saying so, elsewhere above, I reproduced Section 12 of the Industrial Court Act and also summarized the averments in the Petition leading to the declarations sought and the specific orders to be granted as a consequence of those declarations being issued.

23. I need not repeat them but the only point in contention would seem to be whether the invocation of the Bill of Rights and the clothing of an employment dispute with the garb of alleged breaches of fundamental rights and freedoms would divest the Industrial Court of jurisdiction and instead vest exclusive jurisdiction on this Court

24. The issue is simple and I do not see much difficulty in resolving it, if all the matters set out above are looked at objectively. My mind is therefore the same as that of Majanja J. **in USIU vs AG [2012] eKLR** where the Learned Judge in a well reasoned decision reached the following conclusion in similar circumstances as in this Petition:

"The intention to provide for a specialist court is further underpinned by the provisions of ARTICLE 165(6) which specifically prohibits the High Court from exercising supervisory jurisdiction over superior courts. To accept a position where the Industrial Court lacks jurisdiction to deal with constitutional matters arising within its competence would undermine the status of the court. Reference of a constitutional matter to the High Court for determination or permitting the filing of constitutional matters incidental to labour relations matters would lead to

the High Court supervising a superior Court. Ordinarily where the High Court exercises jurisdiction to interpret the Constitution or enforce fundamental rights, its decision, even where declaratory orders in nature {are issued} will require the court to follow or observe the direction. This would mean that the High Court would be supervising the Industrial Court which is prohibited by Article 165(6).

In the final analysis, I would adopt the position of the Constitutional Court of South Africa in Gcaba v Minister of Safety and Security (Supra). The Industrial Court is a specialist Court to deal with employment and labour relations matters. By virtue of Article 162(3), section 12 of the Industrial Court Act, 2011 has set out matters within the exclusive domain of that court. Since the Court is of the status of the High Court, it must have the jurisdiction to enforce labour rights in Article 41 and the jurisdiction to interpret the constitution and fundamental rights and freedoms is incidental to the exercise of jurisdiction over matters within its exclusive domain. In any matter falling within the provisions of section 12 of the Industrial Court Act, then 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 interpretation of the Constitution within a matter before it.

In light of what I have stated, I find and hold that the Industrial Court as constituted under the Industrial Court Act, 2011 as a court within the status of the High Court is competent to interpret the Constitution and enforce matters relating to breach of fundamental rights and freedoms in matters arising from disputes falling within the provisions of Section 12 of the Industrial Court Act, 2011".

25. I am in full agreement and I am not persuaded by the submissions by the Petitioner to the contrary. It is also obvious to me that looking at all the averments in the Petition and the prayers sought in it, one can only reach the conclusion that this is a matter of a man battling his employer for his dues and that battle must necessarily attract incidental constitutional questions which the Industrial Court is fully clothed to determine under Article 41 of the Constitution as read with the cited provisions of Articles 40 and 47 the Constitution inter-alia.

26. Without saying more, I am convinced that this Court lacks jurisdiction to determine this Petition and it is hereby ordered to be transferred forthwith to the Industrial Court for hearing and determination on the merits.

27. Costs shall abide the outcome of the Petition.

28. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF OCTOBER 2014.

ISAAC LENAOLA

JUDGE

In the presence of:

Mr. Ouma for Petitioner

Mr. Moset holding brief for Mr. Gichuru for 1st Respondent

Mr. Mohamed for 2nd Respondent



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