



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**(Coram: A. C. Mrima, J.)**

**PETITION NO. E268 OF 2021**

**-BETWEEN-**

**CONSTANTINE JOSEPH ADVOCATES LL.....PETITIONER**

**-VERSUS-**

**THE HON. ATTORNEY GENERAL.....RESPONDENT**

**RULING NO. 1**

1. On filing of the Petition in this matter, directions were issued on service.
2. When evidence of service was tendered, and in the absence of the Respondent, this Court went on to hear the Petition and scheduled a judgment date.
3. On a re-consideration of this matter, the Court's mind was drawn to the issue of whether the Court had the jurisdiction over the Petition. Since a Court must always satisfy itself of the jurisdiction in a mater, I will *suo moto* do so herein.
4. How is jurisdiction defined" *Jurisdiction* is defined in *Halsbury's Laws of England* (4<sup>th</sup> Ed.) Vol. 9 as "...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision.". *Black's Law Dictionary*, 9<sup>th</sup> Edition, defines *jurisdiction* as the Court's power to entertain, hear and determine a dispute before it.
5. In **Words and Phrases Legally Defined** Vol. 3, John Beecroft Saunders defines *jurisdiction* as follows:

By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.

6. That, jurisdiction is so central in judicial proceedings, is a well settled principle in law. A Court acting without jurisdiction is acting in vain. All it engages in is nullity. *Nyarangi, JA, in Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited [1989] KLR 1* expressed himself as follows on the issue of jurisdiction: -

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...

7. Indeed, so determinative is the issue of jurisdiction such that it can be raised at any stage of the proceedings. The Court of Appeal in *Jamal Salim v Yusuf Abdulahi Abdi & another* Civil Appeal No. 103 of 2016 [2018] eKLR stated as follows: -

Jurisdiction either exists or it does not. Neither can it be acquiesced or granted by consent of the parties. This much was appreciated by this Court in *Adero & Another vs. Ulinzi Sacco Society Limited [2002] 1 KLR 577*, as follows;

- 1) .....
- 2) The jurisdiction either exists or does not ab initio ...
- 3) Jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction.
- 4) Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal.

8. On the centrality of jurisdiction, the Court of Appeal in *Kakuta Maimai Hamisi -vs- Peris Pesi Tobiko & 2 Others (2013) eKLR* stated that: -

So central and determinative is the jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings in concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue in a consideration imposed on courts out of decent respect for economy and efficiency and necessary eschewing of a polite but ultimate futile undertaking of proceedings that will end in barren cui-de-sac. Courts, like nature, must not sit in vain.

9. On the source of a Court's jurisdiction, the **Supreme Court of Kenya** in *Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & others (2012) eKLR* stated as follows: -

A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsels for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings ... where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.

10. And, in *Orange Democratic Movement v Yusuf Ali Mohamed & 5 others [2018] eKLR*, the Court of Appeal further stated: -

[44] .... a party cannot through its pleadings confer jurisdiction to a court when none exists. In this context, a party cannot through draftsmanship and legal craftsmanship couch and convert an election petition into a constitutional petition and confer jurisdiction upon the High Court. Jurisdiction is conferred by law not through pleading and legal draftsmanship. It is both the substance of the claim and relief sought that determines the jurisdictional competence of a court...

11. From the foregoing, it is sufficiently settled that a Court's jurisdiction is derived from the Constitution, an Act of Parliament or

both.

12. As this matter is on the constitutionality of *Section 48* of the *Employment Act*, No. 11 of 2007, this Court will now ascertain whether it is the Employment and Labour Relations Court which has the requisite jurisdiction.

13. The guiding provisions are **Articles 165(3) and (5) and 162** of the **Constitution**. *Article 165(3) and (5)* elaborately sets out the jurisdiction of the High Court as follows: -

(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.

(6) *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).

14. Article 162(2) and (3) 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.

(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).

15. One of the pieces of legislation contemplated under Article 162(3) of the Constitution is the *Employment and Labour Relations*

Act, No. 20 of 2011 (hereinafter referred to as '*the ELRC Act*') which came into force on 30<sup>th</sup> August, 2011. It is an Act of Parliament establishing the *Employment and Labour Relations Court* (hereinafter referred to as '*the Labour Court*') with jurisdiction to hear and determine disputes relating to employment and labour relations and for connected purposes.

16. The jurisdiction of the Labour Court is provided for under **Section 12(1)** and **(2)** of the ELRC 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' 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 hereof;
- 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.

17. The powers of the Labour Court are provided for under **Section 12(3)** as follows: -

In exercise of its jurisdiction under this Act, the Court shall have 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.

18. It is further settled that Courts of equal status as the High Court have jurisdiction to deal with any constitutional issue in a matter in which they have jurisdiction over. (See *United States International University -vs- Attorney General & 2 Others (2012) eKLR*, *Christopher Gatuiri v Commissioner of Police (2008) eKLR*, *Jane Frances Angalia v Masinde Muliro University of Science and Technology and Others (2010) eKLR* among others).

19. The issue of the jurisdiction of the specialized Courts was further settled with finality by the superior Courts in the famous *Karisa Chengo & 2 others v Republic case*. The Court of Appeal in *Karisa Chengo & 2 others v Republic* Civil Appeal Nos. 44, 45 & 76 of 2014 [2015] eKLR observed as follows: -

The Committee of Experts in its Final Report thus, adverted to three main factors in securing anchorage in the Constitution for the specialized Courts. These were, first, setting out in broad terms the jurisdiction of the ELC as covering matters of land and environment ... but leaving it to the discretion of Parliament to elaborate on the limits of those jurisdictions in legislations. Secondly, and more fundamentally, the establishment of the ELC was inspired by the objective of specialization in land and environment matters by requiring that ELC Judges were, in addition to the general criteria for appointment as Judges of the superior Courts, to have some measure of experience in land and environment matters. Lastly, the Committee of Experts ensured the insertion in the Constitution of a statement on the status of the specialised Courts as being equal to that of the High Court, obviously to stem the jurisdictional rivalry that had hitherto been experienced between the High Court and the Industrial Court.....

20. The matter was appealed to the Supreme Court in Petition No. 5 of 2015 *Republic vs. Karisa Chengo & 2 Others* [2017] eKLR. The Supreme Court rendered itself as follows: -

[50] ... Article 162(1) categorises the ELC and ELRC among the superior Courts and it may be inferred, then, that the drafters of the Constitution intended to delineate the roles of ELC and ELRC, for the purpose of achieving specialization, and conferring equality of the status of the High Court and the new category of Courts. Concurring with this view, the learned Judges of the Court of Appeal in the present matter observed that both the specialised Courts are of “equal rank and none has the jurisdiction to superintend, supervise, direct, shepherd and/or review the mistake, real or perceived, of the other”. Thus, a decision of the ELC or the ELRC cannot be the subject of appeal to the High Court; and none of these Courts is subject to supervision or direction from another.

[51] .....

[52] In addition to the above, 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 jurisdictions 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 jurisdictions. 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.

[79] It follows from the above analysis that, although the High Court and the specialized Courts are of the same status, as stated, they are different Courts. It also follows that the Judges appointed to those Courts exercise varying jurisdictions, depending upon the particular Courts to which they were appointed. From a reading of the statutes regulating the specialized Courts, it is a logical inference, in our view, that their jurisdictions are limited to the matters provided for in those statutes. Such an inference is reinforced by and flows from Article 165(5) of the Constitution, which prohibits the High Court from exercising jurisdiction in respect of matters “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. The matter, however, did not end there. A further jurisdictional problem arose. It was on the cases raising ‘cross-cutting’ or ‘cocktail’ or ‘mixed grill’ issues within either Courts.

22. Initially there were two schools of thought in the High Court on the matter. One school favoured the ‘**pre-dorminant purpose test**’ whereas the other school rooted for the ‘**pre-dorminant issue before Court test**’.

23. The proponents of the former include *Ngugi, J* who rendered himself in *Suzanne Achieng Butler & 4 Others vs Redhill Heights Investments Limited & Another (2016) EKL*R as follows: -

23. When faced with a controversy whether a particular case is a dispute about land (which should be litigated at the ELC) or not, the Courts utilize the Pre-Dominant Purpose Test: In a transaction involving both a sale of land and other services or goods, jurisdiction lies at the ELC if the transaction is predominantly for land, but the High Court has jurisdiction if the transaction is predominantly for the provision of goods, construction, or works.

24. The Court must first determine whether the pre-dominant purpose of the transaction is the sale of land or construction. Whether the High Court or the ELC has jurisdiction hinges on the predominant purpose of the transaction, that is, whether the contract primarily concerns the sale of land or, in this case, the construction of a townhouse.

24. *Munyao, J* was for the other test. In *Lydia Nyambura Mbugua v Diamond Trust Bank Kenya Limited & Another [2018] eKLR* the Learned Judge argued as follows: -

25. .... On my part, I would modify the above test, and hold the position that what is important when determining whether the court has jurisdiction, is not so much the purpose of the transaction, but the subject matter or issue before court, for I think that the purpose of the transaction, may at times be different from the issue or subject matter before court. Let us take the transaction of a charge as an example. The predominant purpose of creating a charge is for one to be advanced some financial facilities. However, when it comes to litigation, the predominant issue may not necessary be the money, but the manner in which the chargee, is exercising its statutory power of sale. Here, I trust that you will see the distinction between the predominant purpose of the transaction and the predominant issue before court. That is why I hold the view, that in making a choice of which court to appear before, one needs to find out what the predominant issue in his case is, and not necessarily, the predominant purpose of the transaction. If the litigant’s predominant issue will touch on the use of land, or occupation of land, or a matter that affects in one or another, title to land, then such issue would fall for determination before the ELC.

25. The Court of Appeal had an occasion and dealt with the issue. In *Co-operative Bank of Kenya Limited v Patrick Kang’ethe Njuguna & 5 others*, Civil Appeal No. 83 of 2016 [2017] eKLR, the Court dealt with the issue as follows: -

[30] Article 260 aforesaid echoes the traditional definition of land under the common law doctrine known as Cujus est solum, eius est usque ad coelum et ad inferos (cujus doctrine) which translates to ‘whoever owns [the] soil, [it] is theirs all the way [up] to Heaven and [down] to Hell’. As with our Constitution, the doctrine defines land as the surface thereof, everything above it and below it as well.....

[31] Indeed, considering the above definitions, the inevitable conclusion to be drawn is that land connotes the surface of the land, and/or the surface above it and/or below it.”

[35] ...[F]or land use to occur, the land must be utilized for the purpose for which the surface of the land, air above it or ground below it is adapted. To the law therefore, land use entails the application or employment of the surface of the land and/or the air above it and/or ground below it according to the purpose for which that land is adapted.

26. The Court of Appeal, therefore, settled for the ‘**pre-dorminant purpose test**’. Therefore, that is the test I will use in this case.

27. The Petitioner herein challenged the constitutionality of Section 48 of the Employment Act. The provision states as follows: -

In any complaint made under section 47, no advocate shall represent a party in the proceedings before a labour officer, but any party

may be assisted or represented by an official of a trade union or an official of an employer's organisation notwithstanding the fact that the official is an advocate.

28. Section 47 of the Employment Act provides as follows: -

Complaint of summary dismissal and unfair termination.

(1) Where an employee has been summarily dismissed or his employer has unfairly terminated his employment without justification, the employee may, within three months of the date of dismissal, present a complaint to a labour officer and the complaint shall be dealt with as a complaint lodged under section 87.

(2) A labour officer who is presented with a claim under this section shall, after affording every opportunity to both the employee and the employer to state their case, recommend to the parties what in his opinion would be the best means of settling the dispute in accordance with the provisions of section 49.

(3) The right of the employee to present a complaint under this section shall be in addition to his right to complain to the Industrial Court on the same issue and to the right to complain of any other infringement of his statutory rights.

(4) The right of an employee to make a complaint under this section shall be in addition to any right an employee may enjoy under a collective agreement.

(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

(6) No employee whose services have been terminated or who has been summarily dismissed during a probationary contract shall make a complaint under this section.

29. The purpose of the Employment Act as stated in the Preamble is as follows: -

An Act of Parliament to repeal the Employment Act, declare and define the fundamental rights of employees, to provide basic conditions of employment of employees, to regulate employment of children, and to provide for matters connected with the foregoing

30. Whereas the Preamble of the Employment Act provides that one of the purposes of the said Act is to declare and define the fundamental rights of employees, Section 12(1)(a) of the ELRC Act grants jurisdiction to the Labour Court to hear and determine disputes relating to or arising out of employment between an employer and an employee.

31. The disputes contemplated under Section 48 of the Employment Act are those which may arise under Section 47 of the said Act. They are complaints of summary dismissal and unfair termination. Those are complaints between employers and employees by dint of Section 2 of the Employment Act and Section 2 of ELRC Act. As such, the appropriate Court to deal with any constitutional issue on the said provisions, like the one raised in the Petition herein, is the Labour Court.

32. Having so found, this Court hereby issues the following final orders:

**a. The High Court has no jurisdiction over the Petition in this matter.**

**b. This matter is hereby transferred to the Employment and Labour Relations Court in Nairobi.**

**c. Costs in course.**

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 27<sup>TH</sup> DAY OF JANUARY, 2022**

**A. C. MRIMA**

**JUDGE**

**Ruling No. 1 virtually delivered in the presence of:**

**Mr. Osoro**, Counsel for the Petitioner.

**Elizabeth Wanjohi** – Court Assistant



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