



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NUMBER 154 OF 2015

GEORGE JOSHUA OKUNGU.....CLAIMANT

VERSUS

KENYA PIPELINE COMPANY LIMITED.....1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS3RD RESPONDENT

ETHICS AND ANTI-CORRUPTION

COMMISSION.....APPLICANT/4TH RESPONDENT

RULING

1. By an application dated 12th May, 2015, the 4th respondent sought orders that the suit against it be struck out with costs.
2. The application was premised on the grounds among others that since there was no employer-employee relationship between the claimant and the respondent, the claims against the 4th respondent could not be tried by this Court. That is to say the claims for malicious prosecution, defamation and discrimination against the 4th respondent were triable by the High Court since there was no employer employee relationship between the claimant and the 4th respondent.
3. Mr. Ayoo for the 4th respodnent submitted that the 4th respondent was not disputing the claimant’s claim but that the pleadings were in the wrong Court. The 4th respondent was therefore challenging the jurisdiction of this Court to determine the issues listed by the claimant.
4. According to counsel, article 162(1) of the Constitution establishes the system of Court while article 162(2) establishes the specialized Courts. The High Court does not have jurisdiction to deal with matters reserved for the specialized Courts. According to Mr. Ayoo Judges are appointed to the respective Courts and can only exercise jurisdiction with regard to the Courts to which they are appointed. In this respect Counsel sought reliance on the case of **Kariza Chengo, Jefferson Kalama Kenga & Kitsao Chara Ngati v. Republic (2015) eKLR.** Counsel further submitted that section 43 of the Interpretation and General Provisions Act provided that where a written law imposes duties on a certain office, those duties must be performed by the holder of the office for the time being.

5. On the issue of distinction between Judges and the Court, he submitted that a Court is a state organ created for the purpose of adjudication of disputes and is properly constituted when managed by a competent person duly appointed in accordance with the law. Mr. Ayoo further sought reliance on the case of **S.K. Macharia & Anor v. KCB & 20 Others (2012) eKLR** and submitted that a Court of law can only exercise jurisdiction conferred upon it by the Constitution, the statute or both.

6. Mr. Obura for the claimant on his part submitted that the claimant was wrongfully terminated from service by the 1st respondent as a result of malicious and fabricated investigation conducted by the 4th respondent which led to the claimant being arraigned in Anti-corruption Court on trumped up charges. The actions according to counsel were done in concert with all the four respondents which resulted in the claimant being defamed, discriminated and his property converted by the 4th respondent.

7. On the issue of jurisdiction counsel further submitted that this Court is established under article 162(2) of the Constitution with jurisdiction to hear and determine disputes relating to employment and labour relations. Under sub article (2) the Court is of equal status to the High Court. According to Mr. Obura, the High Court's jurisdiction is limited by article 165(5) of the Constitution to the extent that it has no power to preside over disputes relating to employment and labour relations. He further submitted that article 162(3) of the Constitution provided that Parliament would determine the jurisdiction and functions of this Court and that determination is contained at section 12 of the Industrial Court Act.

8. However, according to counsel, the Constitution fell short of stating the extent to which the Court should deal with matters that come before it which at the same time raise civil disputes on defamation, malicious prosecution, wrongful conversion of property and constitutional breaches touching on rights and fundamental freedoms of litigants.

9. On the question of the jurisdiction of the Court to determine constitutional or ordinary civil disputes arising out of or tied to employment relationship, Counsel cited the cases of **USIU Vs. The Ag (2012) eKLR, Prof. D. N. Muedi Vs. Kenyatta University & 3 Others, Civil Appeal No. 6 of 2012, TSC v. KNUT Petition No. 72 of 2015 and Dr. Anne Kinyua v. Nyayo Tea Zone (2012) eKLR** where the issue has been decided and held that this Court has jurisdiction to adjudicate constitutional issues arising out of or tied to employment and labour relations.

10. On the issue of joint-fortfeasers, Counsel relied on the cases of **Kenya Commercial Bank v. Titus Kilonzo and 24 others (2006) eKLR** where the Court held that joint tort feasers may be sued jointly or severally. According to Mr. Obura, to ask the claimant to file separate suits in separate Courts in a matter involving joint fortfeasers would amount to abuse of the Court process and further constitute a fetter on the claimant's pursuit of justice.

11. On the decision of the Court of Appeal in **Kerisa Chengo & Others** relied on by the 4th respondent, Mr. Obura submitted that the objection arose out of criminal proceedings and which had no relationship to matters which the Environment and Land Court had jurisdiction over. According to counsel the circumstances were different from the present situation where issues to be canvassed have arisen as a result of the claimant's employment by the 1st respondent and wrongs allegedly committed by all the respondents.

12. The creation of specialized Courts with status of the High Court under article 162(2) of the Constitution has somewhat created uncertainty among lawyers on the scope and extent of the jurisdiction of the specialised Courts vis-à-vis the High Court and vice versa. This uncertainty need not be resolved by any Judge. In fact no parametres need to be set since every case must be decided by its own circumstances. No litigation presents itself as a single-issue dispute. There are usually a potpourri of cross-cutting and conflicting issues which could span across the three equal status Courts namely High Court, ELC and ELRC.

13. This Court recently held in the case of **Wilbert Kipsang Choge & 6 Others v. Communication Authority of Kenya & Another (2016)eKLR** that its jurisdiction is not confined by the narrow path that employer-employee relationship must exist for it to have jurisdiction. The Court is granted jurisdiction

by the Constitution and Employment and Labour Relations Act over employment and labour relations and connected purposes and not employer-employee disputes only.

14. The Court has relied severally in other decisions where arguments over its jurisdiction have been raised on the Australian case of **Dean Patty v. Commonwealth Bank of Australia (2000) FCA 1072** where Justice Paul L. G. Brereton stated as follows:-

“When a Federal Law confers jurisdiction on a court in respect of a “matter” arising under the Constitution or a Federal statute, the jurisdiction so conferred extends to authorize determination of the whole “matter”. It has long been established that a matter is a “justiciable controversy”, the determination of which may involve both Federal and State law. The accrual of State jurisdiction to the High Court, so that it could determine non-federal parts of a “matter” arising under the Constitution or a federal law has been recognized for many years. This means that once the jurisdiction of the High Court is attracted by reason of the matter arising under Federal law, the Court is clothed with full authority essential for the complete adjudication of the “matter”, and not merely the federal aspect of it. Subsequently, it was recognized that other courts exercising federal jurisdiction also had accrued jurisdiction.

In an earlier Australian case of **Philip Morris Inc v. Adam P. Brown Male Fashions Ltd (1981) 148 CLR** at p. 535 Aickin J stated that:-

“The vesting of Judicial power in the specific matter permitted by the Constitution carries with it such implied power as is necessarily inherent in the nature of the judicial power itself”.

15. The main claim as pleaded by the claimant concerns the termination of his services by the 1st respondent for which he seeks compensation as set out in his memorandum of claim. He however contends that the termination of his services was triggered by investigations and consequential prosecution mounted by the 2nd, 3rd and 4th respondent. It his argument that the investigations and eventual prosecution were malicious and that he got defamed in the process.

16. According to him, he does not only seek compensation for wrongful and or unfair termination of his services from the 1st respondent but damages for defamation and malicious prosecution against the four respondents jointly and severally as joint tortfeasors. This means, the jurisdiction of this Court is attracted by the reason of the fact that the factual background of the claims presented by the claimant arose out his contract of employment with the 1st respondent and once the Court is clothed with the jurisdiction to determine that aspect, it has full authority to determine the whole matter by virtue of its accrued or consequential jurisdiction. It would not only create duplicity in evidence but also uneconomical use of judicial time to split claims with similar factual background and evidence among the equal status Courts. That is to say, Courts of equal status as the High Court, at the risk of sounding tautologous, are themselves High Court and are properly clothed with jurisdiction to determine consequential or accrued aspects of a dispute before them which would have otherwise been determined by the High Court. The same principle applies to the High Court finding itself in similar circumstances.

17. The objection is therefore overruled with the consequence that the application dated 12th May, 2015 is hereby dismissed with costs.

18. It is so ordered.

Dated at Nairobi this 2nd day of September 2016

Abuodha Jorum Nelson

Judge

Delivered this 2nd day of September 2016

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha Jorum Nelson

Judge