



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL SUIT NO 609 OF 2002

AGNES W KINUTHIA & 607 OTHERSPLAINTIFFS

VERSUS

UNIVERSITY OF NAIROBIDEFENDANT

AND

1. MINISTRY OF EDUCATION, SCIENCE & TECHNOLOGY

2. HON ATTORNEY GENERAL.....THIRD PARTIES

RULING

1. The suit herein is an employer/employee dispute. The Plaintiffs complain that termination of their various contracts of employment with the Defendant was unlawful. They have sought a declaration to that effect and various monetary reliefs. The Defendant filed defence denying the Plaintiffs' claims.
2. The Plaintiffs have now applied by a **notice of motion dated 27th February 2013** seeking an order for transfer of the suit to the **Industrial Court**. The grounds for the application stated on the face thereof are to the effect that the **Industrial Court** now enjoys exclusive jurisdiction in employer/employee disputes.
3. The Defendants have opposed the application by **replying affidavit filed on 5th June 2013**. It is sworn by one **Professor Peter Mbithi**, the **Deputy Vice-Chancellor, Administration and Finance** of the Defendant. The grounds of opposition emerging from the replying affidavit include –
 - (i) That when the cause of action in this suit arose, the **Employment Act, 2007** was then in place and the same did not provide for transfer of suits pending before the High Court to the Industrial Court.
 - (ii) That the **Labour Institutions Act, No. 20 of 2007** similarly does not provide for such transfer.
 - (iii) That transfer to the Industrial Court will prejudice the Defendant as it will cause delay in disposal of the case.
 - (iv) That transfer as sought is undesirable because pleadings in the High Court are different from

those obtaining in the Industrial Court.

(v) That the **Constitution of Kenya, 2010** does not provide for transfer of industrial dispute cases pending before the High Court to the Industrial Court.

The 3rd Parties have not filed any papers in response to the application.

5. I have considered the submissions of the learned counsels appearing. I have in the recent past dealt with a number of applications for transfer of suits to the Industrial Court. Two such applications were in **Nairobi HCCC No. 747 of 2005** and **Nairobi HCCC No. 848 of 2005**. In a **consolidated ruling dated 6th and delivered on 9th December 2011 (unreported)** I rendered myself as follows –

“Except for the transitional jurisdiction provided for in section 22 of the 6th Schedule to the Constitution, this court no longer has jurisdiction to deal with suits involving disputes relating to Article 162 of the Constitution provides as follows in Clauses (2)(a) and (3): -

“(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. **.....”**

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

And **Article 165 (5)(b)** of the Constitution provides as follows: -

“(5) The High Court shall not have jurisdiction in respect of matters-

a. **.....**

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

The transitional provision in section 22 of the 6th schedule is as follows: -

“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.”

In a recent ruling dated 30th November and delivered on 2nd December 2011 in **Nairobi HCC 515 of 2003** I had this to say regarding that transnational provision:-

“The term “...shall continue to be heard...” is in my view instructive. It can only mean that the “judicial proceedings pending” are those cases that are part-heard, not those whose hearing is yet to commence.

The Industrial Court has, since the promulgation of the new Constitution, been re-established under section 4 of the Industrial Court Act, No. 20 of 2011 in order to bring it within the new Constitution. That section provides: -

“4. (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”.

Jurisdiction of the Industrial Court is further provided for in section 12 of the said Act. Subsection (1) of that Act provides as follows in part:-

“12. (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...”

It is clear that the Constitution intends that the Industrial Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes and appeals involving employment and labour relations.

The Industrial Court is a superior court of record with the status of the High Court. The Court will no doubt in due course develop its own jurisprudence in employment and labour relations disputes.

On the other hand the Constitution specifically denies the High Court jurisdiction in disputes involving employment and labour relations.

In my considered view, the transitional provisions under section 22 of the 6th Schedule to the Constitution are not intended to facilitate two parallel but different jurisdictions with regard to employment and labour relations disputes. The intention is that where hearing of a matter filed in the High Court or in a subordinate court has already commenced, such hearing ought to be concluded in the High Court or in the subordinate court.

On the other hand, where actual hearing has not commenced, then such suit ought to be transferred to the right court, that court being the Industrial Court.

In the present suit, actual hearing has not commenced. For good conduct of cases involving employment and labour relations disputes, it is best that such cases pending in the High Court or in subordinate courts, where actual hearing has not commenced, be forwarded to the Industrial Court for disposal. I so hold”.

6. In the event this case is transferred to the Industrial Court for disposal. It is so ordered. Costs shall be in the cause.

DATED AND SIGNED AT NAIROBI THIS 25TH DAY OF SEPTEMBER 2013

H. P. G. WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 27TH DAY OF SEPTEMBER 2013