



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

PETITION NO.97 OF 2016

OKIYA OMTATAH OKOITI PETITIONER

VERSUS

CABINET SECRETARY FOR WATER AND IRRIGATION 1ST RESPONDENT

PUBLIC SERVICE COMMISSION 2ND RESPONDENT

STATE CORPORATIONS ADVISORY COMMITTEE 3RD RESPONDENT

THE HON. ATTORNEY GENERAL..... 4TH RESPONDENT

AND

THE KENYA WATER INSTITUTE1ST INTERESTED PARTY

BENJAMIN MUEMA 2ND INTERESTED PARTY

LEUNITA ASANDE SUMBA3RD INTERESTED PARTY

RULING

1. The Petition herein was filed on 29th June 2016 together with application and Notice of Motion. The 1st, 2nd and 3rd Interested Party parties in response filed Notice of Preliminary Objections on the grounds that;

a) This Court as competently constituted, though, lacks jurisdiction to hear and the petitioner's Notice of Motion and application dated 27th June 2016 by Okiya Omtatah Okoiti (the petitioner) as well as the Petition dated and filed the same date.

b) The application and the Petition is an abuse of the process of the court.

c) The application as well as Petition are fatally defective and cannot stand as it offends mandatory provisions of article 162 (2) of the Constitution of Kenya, 2010.

d) The application as well as the Petition offends mandatory provisions of Employment and Labour Relations [Court] Act (formerly industrial Court Act) section 2 and 12.

e) The Petition is not justiciable.

f) The jurisdiction of this Court is not invoked at all.

g) The orders sought by the Petitioner cannot be granted.

That on these grounds the Petition and application should be dismissed with costs.

2. The parties filed their written submissions.

3. The Interested Party parties submit that the allegations in the Petition are that the appointments of both the chairman of the governing council and the director of the Kenya Water Institute was not in accordance with the law and seeks to annul the two appointments and then compel the respondent to recruit. That these appointments are irregular, unreasonable, illegitimate, unlawful and unconstitutional and therefore null and void. That where the appointments were done through handpicking and without adhering to constitutional values and principles, the same are contrary to the rule of law. The Petition sets out that articles 19c, 492), 10, 22, 23, 50(1), 159, 162, 258 and 259 of the Constitution as read together with section 12 of the Industrial Court Act [Employment and Labour Relations Court Act] vests jurisdiction in this Court to hear any question regarding the violation of labour rights and workplace disputes.

4. The Petitioner is therefore inviting the Court to annul the two appointments and to compel the Respondents to recruit in both positions. That the Court should quash gazette notices announcing the appointment of the 1st respondent of the 2nd and 3rd Interested Party parties as chairman and director of the Kenya Water Institute and that the Respondents should commence the recruitment process for these positions in compliance with the law.

5. The Interested Parties submit that the Court has no jurisdiction over the matter and Petition issues as set out. In **Samuel Kamau Macharia & Another versus Kenya Commercial bank & 2 Others, Civil Application No.2 of 2012, eKLR**, the Supreme Court held that jurisdiction flows from either the Constitution or statute or both. A Court cannot abrogate or exceed its jurisdiction that is not conferred by the Constitution or statute.

6. The nature of dispute herein and based on the pleadings does not relate to an employer and employee relationship as between the Petitioner and the IP. The Petition does not comply with section 2 and 12 of the Employment and Labour Relations Court Act. The Court only deals with employer and employee disputes and therefore as constituted the Court lacks jurisdiction to hear this matter. As the orders sought relate to compelling the Respondents to act, the Petitioner should file a judicial review application. The special process of judicial review has to be invoked and the Petitioner has not done that.

7. The Interested Parties also submit that article 162(2) of the constitution, the issues of jurisdiction of the Court deal with employment and labour relations as held in **Civil Appeal No.6 of 2012, Prof. Daniel Mugendi versus Kenyatta university 7 3 Others**. That the jurisdiction of the Court has further been set out in **United States International University [USIU] versus AG [2013] eKLR**. In this Petition the pleadings as framed if allowed to proceed before this Court amount to jurisdiction in a wrong forum and a misapplication of the law. The Petition and application should be dismissed.

8. The Petitioner submit that a valid objection must raise questions of law that can be argued on the assumption that all facts pleaded are correct as an objection should not address questions of facts where the Court is called to exercise discretion as held in **Mukisa biscuit Co. versus West End Distributors (1969) EA 696**. The matters set out by the Interested Parties in objection require the issues set out to be addressed on merits as these are not purely matters of law.

9. The Petitioner also submit that the Court has the requisite jurisdiction to hear the Petition as held in **Anne Kinyua versus Nyayo Tea Zone Development Corporation & 3 others [2012] eKLR; Karisa Chengo & Others versus Republic [2015] eKLR; Joseph mutuura Mberia 7 Another versus Cabinet Secretary for Education, Science 7 Technology 7 2 Others [2014] eKLR**. The principles set out in these cases are that this Court is clothed with the necessary jurisdiction to address matters of employment and labour relations under article 162(2) of the Constitution with regard to matters of

appointment of persons to public office. Under the Water Institute Act, the appointments of the Interested Parties relate to their employment and labour relations and the Petition is before the proper forum.

10. That any disputes relating to The appointments based on article 232 read together with 132(2) (a) to (f) of the Constitution fall within the jurisdiction of the court. The Water Institute Act came into force on 1st July 2002 and is subject to section 7(1) of the 6th schedule to the Constitution any law in force before the effective date of the Constitution must be construed with the necessary adaptations to conform with the same. Appointments therefore made pursuant to the Water institute Act must comply with article 41(1) of the Constitution on fair labour relations as held in the **Jospheh Mutuura mberia case**, cited above.

11. This Court is vested with jurisdiction to deal with constitutional issues arising from employment and labour relations which matters are removed from the jurisdiction of the high Court by the constitution. The jurisdiction of the Court can be traced in article 2(4), 2291) 23, 41, 16292), 165(5) (b) and 258(1) and section 12 of the Constitution and Employment and Labour Relations Court Act respectively.

12. The Petitioner also submit that under article 22, 23, 41 and 159, 16091), 16292), 165(5) of the Constitution and section 12 of the Employment and Labour Relations Court Act this Court has exclusive original and appellate jurisdiction to hear and determine all disputes relating to employment and labour relations and including he violation of the Bill of Rights. There need not be an employer/employee relationship for the Court to be moved thus in addressing questions of contradiction between any law and the constitution. The list of matters set out under section 12 of the Employment and Labour Relations Court Act are not exhaustive and in the application and invocation of the Bill of Rights, a party replying on article 22 and 41 must come before this Court as against the High Court as set out in by the **Court of Appeal in, Karisa Chengo & Others versus Republic**.

13. That in **Geoffrey Oriaro versus Cabinet secretary Ministry of Labour Social Security and Services & 4 Others [2015] eKLR**, the Court held that the trustees of NSSF were not employees within the meaning of section 2 of the Employment Act, but the Court went on to find that it had jurisdiction over the matter. And where the Court finds that it has no jurisdiction, there is power to transfer the matter to the High Court in the spirit of article 51, 259 and 159 of the constitution.

14. The Petition should not be dismissed *in limine* as the Interested Parties and Respondents have not demonstrated that the Petition has failed to disclose triable issues and that prejudice will be occasioned to any of them if the matter proceeds for hearing. The prayer seeking the dismissal of the motion and Petition is based on procedural technicalities and should be refused and regard be given to articles 159(2) (d) and (e) of the constitution.

15. On whether this Court has jurisdiction to strike out article 22 proceedings, the Petitioner submits that there is distinction between criminal and civil proceedings as well as proceedings under constitutional law, those concerned with the interpretation and implementation of the constitution. Civil procedure proceedings are not rigidly applicable to constitutional proceedings which are addressed pursuant to the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013*. As such, an application to strike out the Petition under article 22 has no merit. The Petitioner referenced **Luka Kipkorir Kigen versus National Oil Corporation ltd [2014] eKLR**.

16. The Petitioner also submit that he moved the Court seeking the nullification of appointments of public officers, 2nd and 3rd Interested Parties noting the violation of the constitution. To proceed by Judicial Review and under Order 53 of the Civil Procedure Rules would restrict the Petitioner due to the nature of procedures required therein as the matters herein require to be considered on merits. To proceed by judicial review would require seeking leave and the motions of Order 53 and the Court of Appeal in **Peter Odoyo Odaga & 9 Others versus IEBC & 14 Others [2013] eKLR**, that where a party is dissatisfied with a decision of the IEBC under article 89 and requires a review, the person need not go by way of judicial review procedures under Order 53 and filing a Petition is sufficient.

17. As such the orders sought by the Petitioner can be granted by the Court and the objections by the

Interested Parties should be dismissed.

18. The Respondents on the part submit that the petitioner's case is that of judicial review as it challenges the process through which the 2nd and 3rd Interested Parties were appointed into office. Such proceedings should be by way of Judicial Review vide order 53 and the rules thereto. Where the legality of an administrative action is in contest, an applicant must move by way of judicial review as held in **Republic versus national Transport & Safety authority 7 10 Others ex Parte James Maina Mugo [2015] eKLR**. the Petitioner is therefore using the Constitution as a general substitute to invoke judicial control of administrative action as held in **Alphonse Mwangemi Munga & 10 Others versus Africa Safari Club Limited [2008] eKLR** that not all allegations of threatened constitutional right give a licence to parties to come to Court under constitutional applications even where there are adequate remedies provided in law in such situations. That the Constitution is not a general substitute for the normal procedures of invoking judicial control of administrative action as held in **Uhuru Muigai Kenyatta versus Nairobi Star publications limited [2013] eKLR**.

19. That Order 53 Rule (1) of the Civil Procedure Rules is clear and requires all proceedings for orders of mandamus, certiorari and prohibition to be commenced by way of seeking leave of court. Orders compelling a public officer to do their duty cannot be through Petition as to do so there would be a vacuum created. To invoke article 22 and 23 of the Constitution on the enforcement of the Bill of Rights can only relate to rights under article 26 to 57 and application of any other articles save for these one, one would have to move by way to civil law and in this case Order 53.

The objections by Interested Parties should be allowed and where Court finds there is jurisdiction, the Petitioner should be directed to move by way of judicial review.

Determination

20. The question of jurisdiction is core to any judicial proceedings as once such is determined, then the Court can proceed to address other matters before it as without jurisdiction, the Court must stop and **Owners of the Motor Vehicle Vessel 'Lillian S' versus Caltex Oil (Kenya) Ltd Civil Appeal No. 50 of 1989**. This was given emphasis by this Court in **Central organisation of Trade Unions (K) & Another versus Cabinet Secretary of Labour, Social Security and Service, Cause No.2013 of 2014** that;

*Before a Court delves into a matter, jurisdiction must be established as held in **Owners of the Motor Vehicle Vessel 'Lillian S' versus Caltex Oil (Kenya) Ltd Civil Appeal No. 50 of 1989** where the Court of Appeal defined what jurisdiction entails and this applies to this Court with regard to the provisions of the Constitution and the provisions of the Industrial Court Act [Employment and Labour Relations Court Act] which restricts the Court jurisdiction. Secondly, The subject matter of a suit also set out which Court a party may file a matter as without the proper jurisdiction, a Court entertain any matter becomes a nullity and the Court must strike out all proceedings as held in **Samuel Kamau Macharia & Another versus Kenya Commercial Bank Limited & 2 others [2012] eKLR**, a decision of the Supreme Court that binds this Court where a Court canto arrogate jurisdiction to itself as jurisdiction goes to the heart of the matter. A Court cannot through any craft or innovation go beyond the jurisdiction granted by the Constitution or legislation.*

21. All the parties agree that article 162(2) of the Constitution sets the foundational framework for the Court in terms of its jurisdiction and further article 162(3) requires Parliament to enact law setting out the jurisdiction of the Court and with that, the Employment and labour Relations Court Act sets the Court mandate.

22. The Petition herein relates to alleged violations of article 1, 2, 3, 49(2), 10, 27, 41(1), 47, 232, 234 and 259 of the constitution. The basis is that under the Water institute Act the Respondents acted contrary to constitutional principles and violated the set out articles when the 2nd and 3rd Interested Parties were handpicked as chairman and director of the Kenya Water Institute without going through a fair, open,

competitive, merit based, and inclusive process. the Court thus moved must established as to whether there was appointment of the Interested Parties through a fair, open, competitive and inclusive process and whether in doing so there was a violation of the alleged constitutional provisions.

Such are matters which require parties to make submissions and the same addressed by the Court on merit. Is this Court then the appropriate Court to address such issues?

Article 162(2) (a) of the Constitution provides;

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

(a) Employment and labour relations;

23. ‘Employment’ and ‘labour relations’ are therefore the broad constitutional mandate of the court. ‘employment’ is not defined under the Employment Act but this can be discerned from the jurisdictional matters set out under section 12 of the Employment and Labour Relations Court Act as involving employer and employee relations, trade unions and employer organisation(s) matters of collective bargaining and unionisation and employers organisation within employment relations. ‘Labour relations’ is equally not defined and can also be discerned from the work environment; socio-economic rights; and in some cases the civil and political rights within employment and labour relations as the aim and purpose of ‘labour relations’ is to promote economic development, social justice, labour peace and democracy in the workplace. Each case must be looked at in its circumstances and the labour context. This was aptly captured in **Wilbert Kipsang Choge 7 8 others versus Communications Authority of Kenya & Another [2016] eKLR** at paragraphs 30 to 32 thus;

30. Whereas it is true that there is no contract of service between the Board and the company, the jurisdiction of this Court 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 the Employment & Labour Relations Court Act, over employment and labour relations and connected purposes and not employer-employee dispute only.

31. As stated above, the interaction among the Board, the company and employees constitute the complete context of labour relations over which the Court has jurisdiction. Further the close connectivity of the Board to work environment bring them under the rubric of “related to” or “connected purposes” contemplated by the Constitution and the Employment & Labour Relations Act respectively.

32. Cases where employees or their unions have found themselves in dispute with the Board of Directors of an organization over labour relations are not rare. Would it therefore be a sustainable legal argument that in absence of a contract of employment between the Board and the disputing employees the Court lacks jurisdiction? I refuse to be so persuaded.

24. The Court held that there was jurisdiction even where there was no employer-employee relationship as the appointment of board members and their role in the labour relations of the company were sufficient to confer the Court with jurisdiction. That the process of recruiting and functions of board members constitute the broader picture of labour relations over which the Court has jurisdiction.

25. Therefore, a claim relate to alleged violation of fundamental rights and freedoms or that fair administrative procedure has not been followed in the course of employer-employee relations and equally in the context of labour relations is a dispute where by virtue of article 162(2) (a) and section 12 Employment and Labour Relations Court Act, this Court has the original and exclusive jurisdiction to hear and determine. Where article 165(30) gives the high Court jurisdiction to determine questions of the application and interpretation of the Constitution as set out under the Bill of Rights, the same Constitution specifically oust such jurisdiction from the High Court with regard to matters to be addressed by this court. I find great persuasion to this analysis in the cases of **Anne Kinyua versus Nyayo Tea Zone**

Development Corporation 7 3 others and United States International University versus the AG, cited above.

26. There is a thin line between appointment to a board where one seats as a non-executive member as against an appointment where one is paid a salary. The Interested Parties have not set out the terms of engagement for each Interested Parties for the Court to ascertain this line of separation. However what is clear is that the 2nd Interested Party was appointed the chairperson of the council while the 3rd Interested Party was appointed director and chief executive officer of the Kenya Water Institute. A chief officer of an organisation is a person paid a salary and or engaged on full time basis and paid a periodic remuneration. As such, any disputes relating to such an office in terms of recruitment, appointment, and functions lie with the court. from the pleadings it is apparent that the appointments of the Interested Parties form same series and to separate one from the other for purposes of allocating to the High Court or any other Court the other would be visit injustice on the Petitioner and not only mar the issues herein for determination.

27. I find the nature of the Petition herein relate to appointments and recruitment of the Interested Parties into positions that relate to employment and labour relations in the context where this Court is clothed with the requisite jurisdiction to hear and determine. This Court has the requisite jurisdiction to hear matters of constitutional interpretation, rights violations, judicial review and rights due within employment and labour relations.

28. Section 12(3) Employment and Labour Relations Court Act give the Court jurisdiction to issue appropriate orders upon being moved as appropriate. Where the Petition has moved the Court through Petition or judicial review, such are matters to be addressed in their own merits and where appropriate, orders sought granted or disallowed on their merits and or demerit. As such, the Petitioner cannot be locked out of this Court where there is jurisdiction on the basis that the wrong procedure has been applied and should have come through judicial review application. The Petition sets out the articles under which the Petitioner has based the same, such are to be left for the Petitioner to move and address accordingly.

29. In this regard, the Interested Parties relied at length on the case of **Communications Commission of Kenya and 5 others versus Royal Media Services Ltd [2014] eKLR**, and indeed my reading of the entire text and the facts leading to the matter before the Supreme Court is that the Constitution should be interpreted in a holistic manner and parties should avoid *stereotyped recourse to the interpretive rules of common law, statutes or foreign cases*. As such, where there is clarity as to the nature or orders sought by the petitioner, to make him approach the Court through judicial review and not by Petition as has been done is to engage in the technicalities addressed by the Supreme Court in the above cited case and contrary to the application of article 159 of the constitution.

30. In any event the Rules of the Court vide Kenya Gazette Supplement No.129 and published on 5th August 2016 and the Rules preceding, allow the Petitioner to move the Court without technicalities. The Rules, 2016 further allow a party at Rule 7(3) to;

(3) Notwithstanding anything contained in this Rules, a party is at liberty to seek the enforcement of any constitutional rights and freedoms or any constitutional provisions in a statement of claim of other suit filed before the court.

31. My reading of the entire Rule 7 is that a party is at liberty to file any dispute by way of claim setting out the rights violated and remedies sought. To therefore file a petition or application for judicial review or memorandum of Claim as per Rule 7(1) and (2) or pursuant to Rule 7(3) is thus not restricted as a party can appropriately move the Court by a memorandum of Claim. Such is to ensure the party is heard expeditiously and without undue regard to technicalities and for the Court to meet the objectives set out under section 3 of the Employment and Labour Relations Court Act.

Without going into the merits of the main Petition, the objections by the Interested Parties are found without merit. The objections are hereby dismissed in their entirety. Costs in the Petition.

Delivered in open court at Nairobi this 13th day of October 2016.

M. MBARU

JUDGE

In the presence of

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