



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. E075 OF 2021

IN THE MATTER OF: ARTICLE 1, 2, 3, 10, 19, 20, 21, 22, 23, 25, 27, 32, 33, 35, 46, 48,

56, 73, 159, 165 (3), 232, 234, 258 AND 260 OF THE CONSTITUTION OF KENYA, 2010;

IN THE MATTER OF: ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS

UNDER ARTICLE 10, 20, 27, 28, 32, 33, 232 AND 236 OF THE CONSTITUTION OF KENYA 2010;

IN THE MATTER OF: ENFORCEMENT OF THE CONSTITUTION OF KENYA, 2010'

IN THE MATTER OF: SECTION 5, 6, 7, 9, & 10 OF THE PUBLIC SERVICE

(VALUES AND PRINCIPLES) ACT NO.1 A OF 2015;

IN THE MATTER OF: SECTION 8, 9, 10, 13 & 22 OF THE

PUBLIC OFFICER ETHICS ACT CAP 183 OF 2003;

IN THE MATTER OF: SECTION 8, 9, 10, 11, 13 (a&b), 21 & 24 OF

THE LEADERSHIP & INTEGRITY ACT CAP 182 OF 2012;

IN THE MATTER OF: VICE CHANCELLOR OF MERU UNIVERSITY OF SCIENCE &

TECHNOLOGY; IN THE MATTER OF: PUBLIC SERVICE COMMISSION;

IN THE MATTER OF: THE UNIVERSITIES ACT 2012 AND THE

STATUTES LAW (MISCELLANEOUS AMENDMENT) ACT 2018;

IN THE MATTER OF: STATUTES FOR MERU UNIVERSITY OF SCIENCE AND TECHNOLOGY;

IN THE MATTER OF: RULES 4, 10, 11, 22, 23 AND 24 OF THE CONSTITUTION OF KENYA

(PROTECTION OF FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013.

BETWEEN

THURANIRA SALESIO MUTUMA.....PETITIONER

AND

ETHICS & ANTI-CORRUPTION COMMISSION.....1ST RESPONDENT

RULING

1. The petitioner brought this suit in November 2020 seeking the following reliefs:

- a) Declaration compelling the 1st respondent to forthwith perform its constitutional mandate and obligations and forthwith investigate the complaint lodged to it by the petitioner and take the necessary action to establish any corruption related activities involving and or perpetrated by the 2nd respondent in the course of his employment;
- b) An order that if the investigations by the 1st respondent establishes any corruption related activities involving and or perpetrated by the 2nd respondent in the course of his employment, the 2nd respondent shall be barred from performing his duties as the Vice Chancellor of Meru University of Science & Technology;
- c) An order that the respondents to ensure that seamless transition in leadership in public agencies be a norm rather than an exception and that the same should form what is envisaged under the rule of law and safeguarding public interest.
- d) That this Honourable Court do issue any other reliefs as it may deem fit to meet the ends of justice.
- e) Costs of the petition.

2. In response, the 2nd respondent filed Notices of Preliminary Objection dated 23.11.2020 against the petitioner's suit on the following grounds:

- a. The matters raised in the petition and the prayers sought by the petitioner are governed by the Public procurement & Assets Disposal Act (PPADA) of 2015 and as such this court has no jurisdiction;*
- b. The court cannot adjudicate on matters touching persons who are not parties to the suit;*
- c. The Petitioner lacks the requisite locus standi to institute the present suit;*
- d. The petition offends the cardinal judicial principle of exhaustion since there are other statutory bodies with the mandate to deal with the matters raised by the petition;*
- e. The petitioner seeks to direct 1st respondent on how to do its constitutional mandate yet it is an independent Commission yet he is not a party to the matters complained of.*
- f. The petitioner is a busy body and he should not be entertained by the court.*
- g. The Petition is frivolous , vexatious and an abuse of the process of this Honorable Court*

3. The objection was canvassed by way of written submission.

2nd respondent's submissions

4. The 2nd respondent submitted that the court lacks jurisdiction to entertain the suit and it offends the doctrine of exhaustion. He contended that there is no employment relationship between the petitioner and the respondents and for that reason the court's specialized jurisdiction cannot be invoked to determine the petition.

5. He further contended that section 9(h) of the Public Procurement and Assets Disposal Act 2015 provides for the functions of the Public Procurement Regulatory Authority as including among others, investigation and acting on complaints received on procurement and asset disposal proceedings from procuring entities, tenderers, contractors or the general public that are not subject of administrative review.

6. In addition, the 2nd respondent submitted that the petitioner has not shown that the Public Procurement Regulatory Authority has been notified of the matters raised in the petition and failed to investigate or exhausted its investigations on the same.

7. On the other hand he submitted that the court cannot direct the 1st respondent to investigate or perform its constitutional mandate. For emphasis it relied on **Towett Geoffrey & another v Thomas Kimeli Cheruiyot & 5 others [2020] eKLR** where the court held that the court cannot be called upon to direct statutory Bodies on how to perform their duties and can only intervene where the body has acted illegally or *ultra vires* its powers.

8. He further relied on the case of **Communication Commission of Kenya & 5 others v royal Media Services limited & 5 others [2014] eKLR** where the court held that constitutional claims can be raised before the Public Procurement Administrative Review Tribunal.

1st Respondent's submissions

9. The 1st Respondent supported the objection by filing written submissions dated 11.11.2020 in which it collapsed the grounds of the objection into three:

- (a) The matters herein strictly belong to jurisdiction of the Public Procurement Administrative Review Board;
- (b) The court does not have the jurisdiction to entertain the petition as there is no employment relationship between the petitioner, 1st respondent and the 2nd respondent;
- (c) The petition is unconstitutional and an affront to the constitutional independence of the 1st respondent.

10. As regards the issue of jurisdiction, the 1st respondent submitted that there is no employment relationship between the parties herein and as such the court lacks jurisdiction. It contended that the jurisdiction of this court to interpret the constitution is limited to matters of employment and labour relations as was held in **Daniel N. Mugendi v Kehyatta University & 38 others [2013] eKLR**.

11. In view of the foregoing, the 1st respondent urged that the court should down its tools and strike out the petition for want of jurisdiction. For emphasis, it relied on **The Owners of the Motor vessel "Lilian S" v Caltex Oil (K) Ltd [1989] eKLR**, and **S.K. Macharia v Kenya Commercial Bank & 2 others [2012] eKLR** where the court were unanimous that where the court lacks jurisdiction in a matter it must down its tools.

12. With respect to its constitutional independence, the 1st respondent submitted that section 28 of the Ethics and Anti-corruption Act provides for its independence by stating that except as provided by the constitution and the Act, the commission is not subject to the direction or control of any person or authority in the performance of its functions. Consequently, it contended that granting the order sought to compel it to investigate and establish corruption related activities against the 2nd respondent is tantamount to interfering with the commission's investigative mandate or fettering the same.

13. For emphasis, it relied on **R v Anti-counterfeit Agency & 2 others Exparte Surghipharm [2015] eKLR** and **R v Commissioner of Police & another Exparte Monari & another [2012] eKLR** where the court held that the courts ought not to usurp the statutory mandate of investigating and prosecuting authorities through judicial review so long as the said authorities act in a reasonable manner. Accordingly, the 1st respondent contended that no court can issue an order directing a law enforcement agency on the manner in which it should investigate a complaint.

Petitioner's submissions

14. The petitioner submitted that the preliminary objection herein does not meet the threshold of genuine preliminary objection and prayed for it to be dismissed for being an abuse of the court process. He contended that the objection herein does not raise a pure point of law cable of disposing of the suit *in limine*.

15. For emphasis he relied on the case of **Nitin Properties Limited v Jagjit Sing Kalsi & another** where the Court of Appeal cited with approval **Mukisa Biscuit Company v Westend Distributors Limited [1969] EA 696 at page 701** where the meaning of a preliminary objection was discussed.

16. On other hand, he submitted that the court has jurisdiction to determine the petition under Article 162(2) read with Article 41 of the constitution of Kenya. For emphasis he relied on **Richard Maina Mwangi v John Kaguchia Chairman Mukurwe-ini CDF Committee & another [2015] eKLR**.

17. The petitioner concluded by urging the court not to strike out the suit if it finds that it has no jurisdiction and instead refer the same to the proper forum with the jurisdiction to deal with the matter,

Issues for determination

18. Having considered the petition, and the submissions by both sides, the following issues arise for determination:

- a. *Whether the Preliminary Objection raises pure points of law;*
- b. *Whether the court lacks jurisdiction to entertain the petition herein;*
- c. *Whether the court can grant the prayers sought in the suit.*

Whether the Objection raises pure points of law.

19. The threshold of a valid preliminary objection in civil proceedings was set out in the case of **Mukisa Biscuit Manufacturing Company Limited vs. West End Distributors Limited [1969] EA 696** where the Court stated as follows-

"The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if

any fact has to be ascertained or if what is sought is the exercise of judicial discretion...”

20. Having carefully considered the grounds set out in the Notice of the Preliminary Objection dated 23.11.2020, I am satisfied that the same raises pure points of law which have the potential of disposing of the entire petition for example the issue of jurisdiction.

Whether the court lacks jurisdiction to entertain the Petition.

21. The Respondents’ case is that the court lacks jurisdiction over the matters raised in the petition because there is no employment relationship between the parties herein and further because, there are public bodies established by the Public Procurement and Assets Disposal Act 2015 to deal with such matters. They contend that such process for addressing the petitioner’s complaints have not been exhausted and there is even no evidence that the petitioner has invoked the same.

22. The petitioner has not endeavored to establish any employment relationship between the three parties or any employment issue that would place the dispute in the petition within the specialized jurisdiction of the court.

23. The jurisdiction of this court is set out by section 12 of the ELRC Act pursuant to the provisions of Article 162(2) of the Constitution, namely to determine disputes related to employment and labour relations. Even though under Article 165(5) the court has the jurisdiction to interpret the constitution, such mandate is limited to matters related to employment and labour relations and not the general interpretation of the constitution.

24. I gather support from the Case of **Attorney General & 20 others v Okiya Omtata Okiot & 14 others [2020] eKLR** where the Court of Appeal held that:

“ We have no doubt that the ELRC and the ELC have jurisdiction to interpret and apply the Constitution as held by the High Court in the United States International University (USIU) v The Attorney General & others [2012] eKLR and this court in Daniel N. Mugendi v Kenyatta University [2013] eKLR. However the jurisdiction of those specialized courts to interpret and apply the constitution is not original or unlimited like that of the High Court. It is limited to constitutional issues that arise in the context of disputes on employment and labour relations or environment and land matters.”

25. In this case the petitioner is asking the court to direct the 1st respondent to do its constitutional mandate of investigating report of alleged corruption by the 2nd respondent and if it establishes that the corruption has been committed, the 2nd respondent be barred from discharging his duties as the Vice Chancellor of Meru University. This court has intervened in stopping public officers from discharging their duties where it has been established that the officers were violating the constitution in the cause of their employment. The court has also intervened and nullified appointments upon establishment that they were done in contravention of the law.

26. In this case, however, there is no evidence that the 2nd respondent is violating the Constitution. The petitioner is in fact asking the court to compel the 1st respondent to investigate the 2nd respondent for the alleged corrupt dealings. It follows that the jurisdiction of this court has been prematurely and improperly invoked. It is only after investigations have been done by the relevant authority and the 2nd respondent is implicated when the petitioner can move the court.

27. Having observed that this court’s jurisdiction in interpreting the constitution is limited to the employment and labour relations matters contemplated by Article 162(2) of the Constitution and section 12 of the ELRC Act, I now hold that the court lack jurisdiction to entertain and grant the orders sought in this petition. Consequently, I allow the objection to the extent stated above and proceed to down my tools. Since the petition is in the nature of public litigation, I direct that each party shall bear own costs.

28. The petitioner asked me not strike out the petition and instead refer it to the forum with the jurisdiction. It has been the practice between the High Court and the Courts of equal status to refer disputes to the relevant court once it is established the suit is before the wrong court with respect to jurisdiction. Consequently, I refer the petition to the High Court, Anti-Corruption and Economic Crimes Division at Nairobi for determination.

DATED, SIGNED AND DELIVERED IN NAKURU THIS 22ND DAY OF OCTOBER, 2021.

ONESMUS N. MAKAU

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE