



REPUBLIC OF KENYA



KENYA LAW
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Commission for Human Rights And Justice(Chrj v Kenya Shipyards Limited & 2 others (Petition 3 of 2022) [2022] KEELRC 1101 (KLR) (1 July 2022) (Ruling)

Neutral citation: [2022] KEELRC 1101 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
PETITION 3 OF 2022**

**B ONGAYA, J
JULY 1, 2022**

BETWEEN

COMMISSION FOR HUMAN RIGHTS AND JUSTICE(CHRJ) APPLICANT

AND

KENYA SHIPYARDS LIMITED 1ST RESPONDENT

STATE CORPORATION ADVISORY COMMITTEE 2ND RESPONDENT

INSPECTORATE OF STATE CORPORATION 3RD RESPONDENT

RULING

1. The petitioner filed on 10.05.2022 an application by notice of motion through Shabaan Associates LLP. The application is under section 3A, and 80 of the *Civil Procedure Act* Cap 21, Order 45 rule 1 and 2 and Order 51 rule 1 of the *Civil Procedure Rules 2010* and all enabling provisions of law. The applicant prays for:
 - 1) The application be certified as urgent.
 - 2) That the honourable court hear and determine this matter in the first instance and service of the application be dispensed with.
 - 3) That the honourable court be pleased to set aside, vacate, review or vary the ruling or orders made on 28th April 2022.
 - 4) That the costs of this application be provided for.
 - 5) That such further and other relief be granted to as this court deems fit and expedient in the circumstances.
2. The application was based on the annexed supporting affidavit of Julius Ogogoh, the petitioner's Executive Director and upon the following grounds:



- 1) That the honourable court on 28th April 2022 dismissed the petitioner's case on account that the petitioner does not exist.
 - 2) That the honourable court did not consider the petitioner's replying affidavit and the documents annexed thereto which are crucial to the evidence that the petitioner is a registered entity, with legal capacity.
 - 3) That the honourable court did not consider the trust deed relied upon by the petitioner which cements its legal capacity and hence the Locus Standi.
 - 4) That the honourable court did not consider Article 22, 258 and 260 of *the Constitution* of Kenya, 2010 in rendering its decision.
 - 5) That the said orders are erroneous and there are sufficient grounds for the court to review its earlier orders or ruling.
 - 6) That the said ruling or orders are highly prejudicial to the applicant and the general public who will have their taxes expenditure not accounted for and put to proper use.
 - 7) That there has been no unreasonable delay in making this application.
 - 8) That the application is brought in good faith and it is only just and expedient that the application be allowed.
3. The 2nd, 3rd and 4th Respondents opposed the application by filing on 10.06.2022 and on 22.06.2022 grounds of opposition through learned Senior State Counsel Njau E.M. Mvoi for Attorney General. The grounds of opposition are as follows:
- 1) That the application is null and void ab initio since;

The suit herein seeks nullification of the appointment of the board directors of Kenya Shipyard by the Cabinet Secretary Ministry of Defence and thus seeks orders that the appointment of the Managing Director violates article 10 and 232 of *the Constitution* and if thus null and void
 - 2) That this Honourable court lacks jurisdiction to determine the application or any suit.
 - 3) That the suit disputes the procedure of appointment of the directors of the respondent alleging that it contravened Article 10 and 232 of *the Constitution* of Kenya 2010.
 - 4) That the provisions therein Article 10, 232 call for transparency and accountability in the public service; which includes state organs and state corporations.
 - 5) That under the provisions of section 26 of the *State Corporations Act*, an alternative dispute resolution process is provided vide the 2nd Respondent who has the powers to review and investigate the affairs of the state corporations and make recommendations to the President in consultation with the 4th Respondent
 - 6) That the 2nd Respondent has an internal dispute resolution mechanism that enables the public to lodge complaints and ensure that such disputes are handled expeditiously within seven days
 - 7) That similarly the *Public Service (Values and Principles) Act* No 1A of 2015 establishes a complaints process for individuals aggrieved by the administrative action including unfair and or unmerited appointment of any public officer.



- 8) That the *Commission on Administrative Justice Act* No 23 of 2011 section 32 provides for dispute resolution process available vide the commission on administrative justice which has jurisdiction of handling the nature of dispute arising in this suit.
 - 9) That section 29 of the Act empowers the Commission to exercise the jurisdictions in any matter arising from the carrying out of an administrative action of—
 - (a) a public office;
 - (b) a state corporation within the meaning of the State Corporations;
 - (c) any other body or agency of the State.
 - (2) The Commission shall endeavour to resolve any matter brought before it by conciliation, mediation or negotiation.
 - 10) That the respondents herein aver that this court has no jurisdiction to determine the application and suit herein and rely on Court of Appeal case of *Geoffrey Muthinja Kabiru & 2 others v Samuel Munga Kenry & 1756 others* eKLR and in the court of appeal decision of *Aldifra Enterprfres Ltd v Nairobi City County Government* [2018]eKLR.
 - 11) Indeed, The High Court's power to exercise its jurisdiction under Article 165 of *the Constitution* was therefore limited or restricted by statute in this instance as found by the Judge. The appellant had complained before this Court that the learned Judge erred in failing to appreciate that though there exists an alternative procedure for redress the same was less convenient, we concur with its finding that it lacked jurisdiction to entertain and determine the proceedings.
4. The grounds of opposition filed for the 2nd, 3rd and 4th respondents on 22.06.2022 appear to be in the nature of submissions with authorities attached and whose substance appear to support the application by the 1st respondent dated 11.03.2022 on merits.
 5. The petitioner and the 1st respondent filed their respective submissions and the 2nd, 3rd and 4th respondents relied on their grounds of opposition and authorities filed on 22.06.2022. The court has considered those submissions as filed for the parties and which largely address the merits of the 1st respondent's application dated 11.03.2022 but which obviously is not subject of determination in this ruling. The application subject of this ruling is the petitioner's application dated 10.05.2022 for setting aside the orders given on 28.04.2022.
 6. The 1st respondent on 14.03.2022 filed a notice of motion through learned Special State Counsel Mr V.G.Kabi, for the Attorney General. The 1st respondent prayed for orders, inter alia, that the court be pleased to find that the petitioner does not legally exist in law; and the court be pleased to dismiss or strike out the petition with costs. The application came up for hearing on 28.04.2022 when counsel for the 1st respondent was present and counsel for the petitioner as well as for the 2nd, 3rd and 4th respondents were absent. The court considered the submissions made by counsel for the 1st respondent and ordered;

“I have considered the submission by counsel for applicant with respect to the application dated 11.03.2022 and considered the supporting affidavit of Dr Ibrahim M Mohammed and exhibits thereto and considered the petitioner has failed to file and serve a replying affidavit and further considered that the applicant has established that the petitioner is not a registered NGO or a person-in-law at all and order that the petition is hereby dismissed or struck out with no costs on account the petitioner does not exist. Decree to



issue accordingly.’ In making that order, counsel for 1st respondent had submitted that the petitioner had not filed and served a replying affidavit to oppose the 1st respondent’s application for dismissal of the petition”

7. The court has perused the court file and it appears that the petitioner filed grounds of opposition on 06.04.2022 against the 1st respondent’s application dated 11.03.2022. The record also shows that the petitioner also filed on 06.04.2022 the replying affidavit of Julius Oogoh to oppose the application. However, there is no affidavit of service of the grounds of opposition and the replying affidavit upon the 1st respondent or other parties. The court finds that in view of the grounds of opposition and the replying affidavit, the petitioner has established that it raises serious arguable grounds in opposition to the 1st respondent’s application dated 11.03.2022. The petitioner’s counsel failed to attend court on 28.04.2022 for undisclosed reasons and on account that an undisclosed counsel instructed to hold brief had failed to attend court. While the reason for non-attendance appears not well established, the court considers that the petitioner by the present application has established an arguable ground to oppose the 1st respondent’s application dated 11.03.2022, namely, that the petitioner exists. It therefore appears to the court that the orders given on 28.04.2022 are amenable to setting aside so that the application dated 11.03.2022 is heard on merits or determined as may be directed by the Court.
8. While making that finding, the court observes that the parties and more so the respondents have purported to urge the issues raised for the 1st respondent in the application dated 11.03.2022 such as whether the petitioner has locus standi to institute the petition; whether the court lacks jurisdiction; and whether the petitioner has violated laid down administrative procedures anchored in *the Constitution* of Kenya, 2010 and statutes .In the opinion of the court, all those issues are matters which the parties have not been heard upon and considered by the court on their merits. In view of the 1st respondent’s application dated 11.03.2022, the court will not therefore delve into making a finding on those issues because the application of 11.03.2022 has not been heard on merits and the application subject of this Ruling is limited to the prayer for setting aside the orders given on 28.04.2022. Further, the parties in considering further steps in the suit may recall the order by consent given on 09.03.2022 that the application by the petitioner dated 08.02.2022 was dispensed with so as to pave way for hearing and determination of the main petition.
9. In conclusion, the application by the notice of motion dated and filed 10.05.2022 for the petitioner is hereby allowed with orders;
 - 1) The order given by the court on 28.04.2022 that the petition is dismissed or struck out with no costs on account the petitioner does not exist is hereby set aside.
 - 2) The parties to take further directions towards expeditious determination of any pending application and the petition as appropriate.
 - 3) Costs of the application in the cause.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 1ST JULY, 2022.

BYRAM ONGAYA

JUDGE

