



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 505 OF 2019

IN THE MATTER OF ARTICLE 2, 10, 19, 22, 23, 35, 40, 41, 46,

47 AND 48 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS

AND FREEDOMS UNDER THE ABOVE ARTICLES OF THE CONSTITUTION

AND

IN THE MATTER OF THE LAW SOCIETY OF KENYA ACT, CAP 18 LAWS OF KENYA

AND

IN THE MATTER OF THE VIOLATION OF THE PROVISIONS OF THE ADVOCATES ACT,

CHAPTER 16 LAWS OF KENYA

AND

IN THE MATTER OF THE EMPLOYMENT AND LABOUR RELATIONS COURT ACT NO. 20 OF 2011

BETWEEN

LAW SOCIETY OF KENYA.....PETITIONER

VERSUS

THE FEDERATION OF KENYA EMPLOYERS.....RESPONDENT

RULING

PETITION

1. The Petitioner through a Petition dated 16th December 2019 and filed on 17th December 2019 supported by an affidavit sworn by Mercy K. Wambua seek the following reliefs:-

a) A declaration that the advertisement by the Respondent as to its offering of legal services over and above what is set out under Section 22 of the Employment and Labour Relations Court Act, No. 20 of 2011 constitutes an infringement of the Petitioner's member's rights and practice of an exclusive profession under Article 19 of the Constitution of Kenya, 2010, Article 35 of the Constitution of Kenya, Article 40 of the Constitution of Kenya, 2010 and a threat to consumer rights under Article 46 of the Constitution of Kenya, 2010;

b) A declaration that the Respondent's advertisement on its bill board as to be 'offering legal services' is unlawful and

misleading to the general public.

c) An order for a permanent injunction restraining the Respondent whether by itself, its officers employees and/or agents from advertising, providing or purporting to provide legal services save as set out under Section 22 of the Employment and Labour Relations Court Act, No.20 of 2011.

d) An order for a permanent injunction restraining the Respondent from charging legal fees to members outside the membership fees paid by its members.

e) An order for a mandatory injunction compelling the Respondent to forthwith correct the information contained in their billboard, website and any other communication to their members or the general public to reflect their qualified or limited legal representative role.

f) Any other orders that this Honourable Court may deem necessary to grant.

g) Costs of this Petition.

RESPONDENT'S PRELIMINARY OBJECTION

2. The Respondent filed a Preliminary point of law dated 20th February 2020 on 21st February 2020 pursuant to **Article 165(5)(b)** read together with **Article 162(2)(a)** that the High Court lacks jurisdiction to entertain the Petition on the following grounds:-

i. The Respondent is registered as a trade union under the Labour Relations Act 2007 and the Petitioner is questioning the extent of the Respondent's role in representing its members under that Act and under the Employment Act 2007.

ii. The Petition is challenging medium through which the Respondent communicates to its members and prospective members

iii. The Petitioner is also questioning the extent to which the Respondent can represent its members in legal disputes.

iv. The Petitioner questions the right of the Respondent to charge fees for the services it renders to its members which otherwise is the Respondent's right to do so under the Labour Relations Act.

v. The Respondent on its part contends inter alia that the Petition if allowed would violate its rights and its members' rights under article 36 of the Constitution on Freedom of Association and Convention No.87 of the International Labour Organization.

vi. The Respondent also contends that the Petition if allowed shall violate its rights and its members' rights under Article 41(4) and 41(3) respectively of the Constitution.

vii. The Respondent further maintains that the Petition is an affront to the rights of its members and that of the Respondent under Section 7 and 8 of the Labour Relations Act.

PETITIONERS' CASE

3. The Petitioner is Kenyan's Premier bar association which was established pursuant to **Section 3 of the Law Society of Kenya Act** in Kenya. It regulates the practice of Law in Kenya as principally governed by the **Advocates Act, Chapter 16, Laws of Kenya**.

4. The Petitioner filed the instant Petition dated 16th December 2019, challenging the Respondent's erection of a billboard at the roundabout of Silver Springs Hotel, next to the Doctor's Plaza at Nairobi Hospital in Nairobi County posturing to the members of the public it is a person qualified to offer general legal services in Kenya.

5. The Petitioner is aggrieved with the advertisement, since it purports that the Respondent has overstepped its mandate as it is according to the Petitioner allowed by law to offer limited legal services of representing its members' rights in Employment and Labour Relations Court and other Labour dispute resolution bodies as provided by **Section 22 of the Employment and Labour Relations Act**.

6. The Petitioner aver that the Respondent herein continues to pass off as practising law and offering broad based legal services in contravention of the relevant provisions of the Advocates Act and the Regulations made thereunder, yet the law only allows legal representation in Court of the permitted legal service that the Respondent can offer to its members. It further contended the Respondent also charges fee for the general legal services in contravention of various provisions of the Advocates Act.

7. The Petitioner also challenges the Respondent's participation on its website <http://www.fke-kenya.org/> that;

“Because we monitor all emerging issues in employment and labour laws both in Kenya and beyond, we are uniquely equipped to advise and represent our members on complex employment and labour issues at reasonable fee.”

8. Its Petitioner's contention that the Respondent's impugned actions violate inter alia **Sections 9, 10, 33, 34, 37, 43 and 82 of the Advocates Act, Sections 7 of the Law Society Act** and certain applicable subsidiary legislations.

9. The Petitioner contend further that the Respondent has breached the Petitioner's members and the members of public fundamental rights protected by **Articles 10, 19, 35, 40 and 46 of the Constitution**. Further the Petitioner state that the Respondent purports to provide general legal services outside the ambit of the Petitioner as the regulator of the legal profession and thus not subjecting to bar regulations highlighted in the Petition. As such, the provision of general legal services by the Respondent militates against protection of the public interest and the guarantee of the right to consumer protection as enshrined in **Article 46 of the Constitution**.

RESPONDENT'S CASE

10. The Respondent is an employers' organization registered under the **Labour Relations Act 2007**. The Respondent has filed grounds of opposition in response urging that the prayers being sought by the Petitioner will be in breach of its rights and fundamental freedoms as guaranteed to it by the **International Labour Organization Convention No.87 on Freedom of Association and Protection of the Right to Organize**. The Respondent further contend that the reliefs sought in the petition will impinge on it rights and fundamental freedom under **Article 41(3) and (4) of the Constitution**.

11. The Respondent also filed Notice of Preliminary Objection dated 20th January 2020 setting out 7 grounds of objection as already captured in the preliminary objection herein above.

ANALYSIS AND DETERMINATION

12. Upon consideration of the Petition, the Respondent's Preliminary Objection, the parties rival submissions and authorities relied upon as well as provisions of law relied upon, I find that at this stage only one (1) issue arise for consideration thus:-

a) Whether the High Court has jurisdiction to hear and determine the petition herein dated 16th December 2019.

13. The Respondent contend that pursuant to **Article 165(5)** read with **Article 162(2)(a) of the Constitution** that the High Court lacks jurisdiction to entertain the Petition by the Petitioner herein. **Article 165(5) of the Constitution** provides as follows:-

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

(a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or

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

14. Whereas **Article 162(2)(a) of the Constitution** provides thus:-

“162(2). Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to

(a) employment and labour relations;”

15. The Petitioner refers to **Article 23 of the Constitution** which it contends gives this court the jurisdiction to hear and determine matters involving violation of fundamental rights under the Bill of Rights. **Article 23(1)(a) –(f) of the Constitution** provides:-

“23. Authority of courts to uphold and enforce the Bill of Rights

(1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

(2) Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

(3) In any proceedings brought under Article 22, a court may grant appropriate relief, including—

a) a declaration of rights;

b) an injunction;

c) a conservatory order;

d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;

e) an order for compensation; and

f) an order of judicial review.”

16. Further the Petitioner contend that the jurisdiction of the High Court to determine issue of violation of fundamental rights is provided under **Article 165(3)(b) of the Constitution** which gives jurisdiction to the High Court to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied , violated, infringed or threatened.

17. The Respondent urges that the Petitioner at paragraph A5, the Petitioner contends that the Respondent overstepped its mandate as an employer's organization representing its members and further at paragraph A6 that the Respondent **"is only allowed by law to offer limited legal services limited to representation of its members in Employment and Labour Relations Court and other labour dispute resolution bodies."** Further it is averred at paragraph A7 that the Respondent states that the Petitioner argues that the Respondent is offering broad based legal services but the Petitioner has neither elaborated on that allegation nor provided particulars.

18. The Respondent in view of the above contend that this Petition is over a dispute over labour relations as it touches on the relationships of the Respondent and its members in the field of labour where it represents them and further as it touches on the Respondent's method of member recruitment and attracting prospective members by listing the services to provide on a billboard.

19. The Respondent further states the issue to be determined by the Court hearing the dispute would be whether imparting the information on its role through a billboard is protected by **ILO Convention 87; Article 41 of the Constitution** and **Sections 7 and 8 of the Labour Relations Act**.

20. It is Respondent's averment that provisions of **Article 162(2)(a) of the Constitution** establishing Courts with status of the High Court to hear and determine disputes relating to Employment and Labour Relations is mandatory that such courts must hear and determine labour relations disputes. The Respondent further argue that the present Petition touches on matters akin to or having a bearing on the Respondent's role in labour relations and as such it is submitted that the Court created under **Article 162(2) of the Constitution** is the only court with jurisdiction to hear and determine a dispute involving issues of that nature.

21. Under **Section 12(1) of the Employment and Labour Relations Court Act No. 20 of 2011**, it is contended by the Respondent supplements **Article 162(2) of the Constitution** by providing as follows with respect to the Employment and Labour Relations Court:-

"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..."

22. From the above Section it appears that the law expressly provides that in a dispute where issues relating to freedom of association of employer and employer's organization is involved the dispute should be adjudicated upon the Employment and Labour Relations Court after the conciliation process has been satisfied.

23. The Respondent therefore submit that Article 162(2) of the Constitution, **Section 2(1) of the Employment and Labour Relations Court Act** and **Section 10 of the Labour Relations Act**, should be read against the provision of **Article 165(5)(b) of the Constitution** which states as follows with respect to jurisdiction of the High Court:-

Article 165(5)(b) of the Constitution "165(5) The High Court shall not have jurisdiction in respect of matters –

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

24. The Respondent further argument is that an attempt to limit the right of the Respondent to reach out to its members and the general public through billboard advertisement would amount to an interference with the Respondent's freedom of association under **Convention 87** and therefore an issue related to labour relations. The Respondent further argue that issues of whether the High Court has jurisdiction to entertain the alleged breaches of constitutional provisions related to employment and labour relations had already been settled in the case of **United States International University versus Eric Outa [2012] eKLR** where the High Court held that the **Employment and Labour Relations Court** is a Court of the same status as the High Court and that disputes touching on employment and labour relation involving alleged breach of rights and fundamental freedoms must be referred to the **Employment and Labour Relations Court** and not the High Court. The decision in the **United States University case** was eventually followed by the Court of Appeal with approval in the case of **Prof. Daniel N. Mugendi versus Kenyatta University [2013] eKLR**.

25. On the question whether the High Court has jurisdiction to entertain a dispute over an alleged illegal fees being charged by the Respondent. The Respondent referred to **Section 53 of the Labour Relations Act** which provides:-

"53. Payment by members to employers' organizations

An employers' organization may provide in its constitution for its members to-

a) Pay subscriptions or levies as a condition of their membership of the employers' organization; and

b) To charge its members a fee for services rendered to, and expenses incurred on behalf of the member."

26. The Respondent submits on dispute under **Section 35(b) of the Labour Relations Act** on the fees being charged by the Respondent that the right forum to settle the dispute would be the **Employment and Labour Relations Court**.

27. In order to determine the issue of whether this Court is vested with jurisdiction to determine the present Petition, the Court should

consider the facts of the matter and reliefs sought. Looking at the reliefs sought and facts of the Petition, it appears the Petition raises serious questions of contravention of constitutional and statutory provisions, violation of constitutional rights, and constitutionality of acts of the Respondent in so far as the right of member of Petitioner and public are concerned and who are not members of the Respondent. This Court's jurisdiction in constitutional matters is expressly spelled out under **Article 23 and 165 of the Constitution** in respect of matters raised in the instant Petition. The Petitioner urge that this Court has requisite original jurisdiction to entertain this Petition and in support relies in the decision in **A.O.O. & 6 others vs. Attorney General & another (2017) eKLR** where Hon. Justice Mativo held that:-

“Article 165(3)(d)(i) & (ii) of the Constitution vests power to the High Court to hear any question respecting the interpretation of the Constitution including the determination of the question whether or not any law is inconsistent with or in contravention of the constitution and also the question whether anything said to be done under the authority of the constitution or of any law is inconsistent with, or in contravention of, the constitution. An unconstitutional statute is not law; and more important judicial functions includes the power to determine and apply the law, and this necessarily includes the power to determine the legality of statutes. The Judiciary has a special role in our system with respect to constitutional interpretation. Courts are bound by the constitution and must interpret it when a dispute so requires.[11]”

28. Looking at Respondent's grounds of opposition and more specifically paragraphs 9, 10, 11, 12 and Preliminary Objection 1, 2, 3, 4, 5, 6, and 7 it is clear contrary to Respondent's submissions, the issues before this Court are whether the Respondent's acts of **“offering legal services”** and charging legal fees contravene various statutory and constitutional provisions as pleaded in the Petition; which Petition only outlines and raises pure statutory and constitutional violations under the following:-

h) Various violations of statutory and regulatory provisions and violation of Article 10 of the Constitution.

ii) Breach of Article 46 of the Constitution

iii) Breach of Article 19 of the Constitution

iv) Breach of Article 35 of the Constitution

v) Breach of Article 40 of the Constitution

29. In view of the above it turns out that the Petition as drawn and filed raises various issues in contention relating to various provisions of **the Advocates Act; the Law Society Act and Articles 10, 19, 35, 40 and 46 of the Constitution** and not purely the employment and Labour Relations matters as raised by the Respondent in the Preliminary Objection. However the only relevant employment and labour related provisions in the Petition is **Section 22 of the Employment and Labour Relations Court Act** which allows the Respondent to represent its members in Court. I find there is no contention over that provision.

30. The petition on the other hand does not challenge or raise issue as to who should or should not join the Respondents Union, neither does it raise issue limiting such a right, nor do the Petition seek orders barring the Respondent from passing information to its members as alluded to by the Respondent or challenge membership of the Respondent Federation. Therefore the assertion that Petition contravenes **Article 36 of the Constitution** on the right to freedom of association is not well placed and tenable and relevant. The provisions cited of **ILO Convention, Article 41 of the Constitution and Sections 7 and 8 of the Labour Relations Act** on the right to associate are not relevant in the instant Petition as the member of the Respondent are free to choose to associate in whichever way they wish, so long as the Respondent does not contravene the Law nor should the Petitioner interfere with the rights of the Respondent to associate. I find the allegations are made herein in an attempt to demonstrate that this court has no jurisdiction.

31. The Petitioner contend that the definition of employer's association has to be construed in Kenyan context where the legal system is given that an employers association is not permitted to offer legal service save as limited by **Section 22 of the Employment and Labour Relations Act**.

32. Considering clear provisions of **Article 165(3) (d) (i) and (ii) of the Constitution** this Court has unfettered and wide jurisdiction to entertain and determine this Petition.

Article 165(3)(d) (i) and (ii) of the Constitution provides:-

“165(3) Subject to clause (5), the High Court shall have—

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

(iv) a question relating to conflict of laws under Article 191; and

(e) any other jurisdiction, original or appellate, conferred on it by legislation.”

33. Section 12(1) of the Employment and Labour Relations Court Act No. 20 of 2011 provides thus:-

“12. Jurisdiction of the court

(1) The court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extend jurisdiction not the Court relating to employment and labour relations including:-

- a) Disputes relating to or arising out of employment between an employer and an employee;**
- b) Disputes between an employer and a trade union;**
- c) Disputes between an employers’ organization and a trade union’s organization;**
- d) Disputes between trade unions;**
- e) Disputes between employer organizations;**
- f) Disputes between an employers’ organization and a trade union;**
- g) Disputes between a trade union and a member thereof;**
- h) Disputes between an employer’s organization or a federation and a member thereof;**
- i) Disputes concerning the registration and election of trade union officials; and**
- j) Disputes relating to the registration and enforcement of collective agreements.**

34. From clear reading of Section 12(1) of the Employment and Labour Relations Court Act there is no relationship that has been established to exist between the Petitioner and the Respondent herein falling to what can be referred to employment and Labour Relationship between Petitioner and the Respondent. The constitutional questions raised in the Petition and relief sought in the Petition do not in any way fall within any of the categories or classes as captured by Section 12 of the Employment and Labour Relations Court Act No. 20 of 2011. I find that no issue has been demonstrated to arise as labour relations between the Respondent and its members. The issue that arise in whether the indication by the Respondent on its Bill board that it provides “legal services” is in contravention of the Advocates Act, the Law society Act and various provisions of the Constitution.

35. The Court is alive to the fact that both the High Court and Employment and Labour Relations Court have concurred and coordinate jurisdiction to determine violations of constitutional rights but the Employment and Labour Relations Courts jurisdiction is invoked when the dispute relates to employment and labour relations. I find from the constitutional questions and issues raised that this dispute does not relate to employment and labour relations.

36. The issue of shared jurisdiction between the High Court and Employment and Labour Relations Court has severally been raised and determined by Courts. In the case of *Sollo Nzuki vs. Salaries and Remuneration Commission & 2 others (2019) eKLR*, Hon. Justice Odunga faced with similar matter held that:-

“51. Similarly, pursuant to Article 23(3) of the Constitution as read with Section 12(3) of the Employment and Labour Relations Court Act, it is my view that the Employment and Labour Relations Court can grant reliefs in a constitutional petition. However, the jurisdiction to do so is confined to matters falling within Article 41 of the Constitution as read with section 12 of the Employment and Labour Relations Court Act. The Court cannot therefore purport to entertain petitions outside the aforesaid matters as its jurisdiction is limited only in so far as employment matter and matters related thereto are concerned. In my view the matters which fall within the ambit of Article 162(2) of the Constitution must be matters within the exclusive jurisdiction of the said specialised courts. However, as stated above, the Employment and Labour Relations Court may not embark on a generalized handling of Petitions but is entitled to and is jurisdictionally empowered to address such matters if they arise directly and in relation to the matters within the court’s jurisdictional competence and specialization. Accordingly, where the matters raised fall both within their jurisdiction and outside, it would be a travesty of justice for the High Court to decline jurisdiction since it would mean that in that event a litigant would be forced to institute two sets of legal proceedings. Such eventuality would do violence to the provision of Article 159 of the Constitution. As was held in Nairobi High Court Petition No. 613 of 2014 – Patrick Musimba vs. The National Land Commission and Others:

“...it would be ridiculous and fundamentally wrong, in our view, for any court to adopt a separationistic view or approach and insist on splitting issues between the Courts where a court is properly seized with a matter but a constitutional issue not within its obvious exclusive jurisdiction is raised.”

52. The Musimba decision therefore concluded on this issue that:

“...both the High Court and the ELC Court have a concurrent and or coordinate jurisdiction and can determine constitutional matters when raised and do touch on the environment and land. Neither the Constitution or the ELC Act limit the High Court’s jurisdiction in this respect while a closer reading of the ELC Act reveals that the ELC Court’s jurisdiction was in 2012 limited by Parliament in so far as constitutional issues touching on land and environment are concerned but the Court of Appeal in Mugendi expressed the view that the ELC when dealing with disputes concerning the environment and land may also deal with claims of breaches of fundamental rights touching on the subject at hand. We hold that in matters of constitution the ELC has jurisdiction not just when it involves clean and healthy environment but also land.”

53. This window, it has been held, is to empower the Employment and Labour Relations Court to fully handle employment matters that are exclusively reserved for it under Article 162(2) of the Constitution of Kenya 2010. This position, in my view is the true interpretation of Section 12 of the Employment and Labour Relations Act Cap 234B, Laws of Kenya.”

37. Further upon consideration of the issues raised in the Petition, I find the Petition does not in my view relate to any issue touching on **Article 41 of the Constitution** nor **Section 12 of the Employment and Labour Relations Act 2010**. The Petition before this Court does not raise an employment and labour issue but raises issues related to gross violation of Petitioner’s rights and those of its members as well as the rights of the general public to quality services, subsequently the Respondent’s Preliminary Objection dated 20th February 2020 is without merit. I find that the Petition herein is rightly before this Court.

38. ***The upshot is that the Preliminary Objection dated 20th February 2020 lacks merit and is accordingly dismissed with costs and Petition allowed to proceed to hearing at the High Court.***

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 17TH DAY OF MARCH, 2021.

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J. A. MAKAU

JUDGE