



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTION PETITION NO.E024 OF 2021

IN THE MATTER OF: ARTICLES 1, 2, 4, 10, 73(2)(B)

AND 232 OF THE CONSTITUTION OF KENYA, 2010.

AND

IN THE MATTER OF: THREAT AND VIOLATION OF ARTICLES 10, 73 AND 232 OF

THE CONSTITUTION OF KENYA, 2010 ON THE NATIONAL VALUES AND

PRINCIPLES OF GOVERNANCE AND SECTION 16 OF LEADERSHIP

AND INTEGRITY ACT (ACT NO.19 OF 2012) MWONGOSO (CODE OF

GOVERNANCE FOR GOVERNMENT OWNED ENTITIES)

PRESIDENTIAL EXECUTIVE ORDER NO.7 OF MARCH 2015.

AND

IN THE MATTER OF: CAPABILITY OF HOLDING A PUBLIC OFFICE

BETWEEN

COMMISSION FOR HUMAN RIGHTS AND JUSTICE.....PETITIONER

VERSUS

JACOB KIMUTAI TORUTT.....1ST RESPONDENT

HEAD OF PUBLIC SERVICE2ND RESPONDENT

PUBLIC SERVICE COMMISSION3RD RESPONDENT

ETHICS AND ANTI-CORRUPTION COMMISSION.....4TH RESPONDENT

THE DIRECTOR OF CRIMINAL INVESTIGATIONS.....5TH RESPONDENT

THE ATTORNEY GENERAL6TH RESPONDENT

RULING

1. On 24th May 2021, when the matter was placed before this Court, **Mr. Mkan**, learned counsel for the Petitioner informed court that the matter was coming up for hearing of the Petition and that besides having been served with the same, the Respondents had failed and or neglected to file any responses. In the learned counsel's view, the Petition was unopposed and he sought to have the court grant the prayers

that had been sought in the Petition. All the other parties, save for the 1st Respondent were represented. For clarity, **Mr. Makuto** appeared for the 2nd, 3rd, 5th and 6th Respondents while **M/S Songole** appeared for the 4th Respondent.

2. On behalf of the Ethics and Anti-corruption commission, the 4th Respondent herein, **M/S Songole** submitted that she had filed a **Replying Affidavit** on **20th May, 2021** and was in the process of serving the Petitioner. However, in her view, she submitted that this was not the proper stage to enjoin the Ethics and Anti-corruption Commission which is now an independent body established under **Chapter 6** of the **Constitution** and empowered under **Article 252** of the **Constitution** to conduct investigations whether on its own initiative or on complaint made by a member of public.

3. She added that in this matter, the 4th Respondent received an anonymous complaint against the 1st Respondent and investigations are underway and once completed, then the 4th Respondent will make the necessary recommendations to the Office of Director of Public Prosecution. **M/S Songole** was of further view that the Petitioner could have awaited for the investigations to be complete before enjoining the 4th Respondent and thus for the present time, the 4th Respondent's involvement on the matter was very minimal.

4. **Mr. Makuto**, counsel for the 2nd, 3rd, 5th and 6th Respondents was of a much divergent view. He submitted that there was a different matter being **ELRC Petition No.E004 of 2021**, which was filed by the 1st Respondent herein before the Employment and Labour Relations Court. The Petitioner herein was an Interested Party in that Petition and **Judgment** therein was delivered on **21st May, 2021**.

5. In that Petition, **ELRC Petition No.E004 of 2021**, the Petitioner, who is the 1st Respondent in the present Petition was seeking orders for extension of his term in **the Coast Water Limited** but those orders were denied. In this case, the Petitioners seek the 1st Respondent to be barred from holding any office positions in the public service and in **Mr. Makuto's** view, the orders sought are employment matters which should be addressed by the Employment and Labour Relations Court. He sought this court to order for the transfer of this Petition to the Employment and Labour Relations Court which had dealt with the initial matter. He pleaded with the court to determine on that issue first before even delving into the application dated **11th May, 2021** by the Petitioner.

6. In response, **Mr. Mkan** submitted that the issue under consideration in the present Petition is whether the 1st Respondent has violated the Articles indicated in this Petition but not issues for labour or any employment issue. He insists that this Court is properly seized with the jurisdiction to hear and determine the constitutional issues that have been raised.

7. I have read through the court record in line with the submissions by counsel on record for all the parties, as summarized above, however, I wish to point out that the matter was placed before Hon. Justice E. K. Ogolla on **11th May 2021** and he addressed an application filed concurrent with the Petition herein. He then directed that the application be served for an interparties hearing before this Court on **24th May, 2021**. This is contrary to what **Mr. Mkan** intimated to court that the hearing date was for the main Petition despite the clear directions that the hearing date was for an application dated **24th May, 2021**.

8. Nonetheless, I have read through the application dated **24th May 2021** and confirm that the nature of prayers sought therein personally affect the 1st Respondent and hence there is need for this Court to be satisfied that the 1st Respondent was served with the said application and or other pleadings before any orders are made in his absence. It was **Mr. Mkan's** submissions that, all the Respondents had been served, that is, including the 1st Respondent. I note that there is also on record an **Affidavit of Service** sworn by **Michael I. Otieno**, a licensed Process Server, who avers that on **13th May, 2021**, he caused service upon the 1st Respondent by **Email** and **Whatsapp Number**. He indicates that the **Email** is tortut166@yahoo.com while the **Whatsapp** No. is **0722 849185**. These details are provided for under paragraph 3 and repeated under paragraph 10 of Michael's affidavit.

9. Needless to say, the **Civil Procedure (Amendment) Rules, 2020** now embrace the Electronic Mail Service and service via Mobile Enabled Messaging applications. The Rules further provide that the person affecting service shall attach the Electronic Mail Service delivery receipt upon confirming service, and in case of service via Mobile Enable Messaging application also attach delivery receipts confirming service (See Order 5 rules 22B and rule 22 respectively). In the instant Petition, the Process Server annexed a receipt of delivery for Electronic Mail Service but did not annex receipts for delivery of service via Whatsapp. I have further scrutinized the receipts of delivery attached and they show that service was effected on a different email from the one provided under paragraph 3 and 10 of the Affidavit of Service. To be specific, whereas the Process Server deponed that he served the 1st Respondent via email tortut166@yahoo.com which is a different email address. As such, this court is not satisfied that service was properly effected upon the 1st Respondent and it is therefore right that the Petitioner properly serves 1st Respondent before the pending application dated **1st May, 2021** is heard.

10. The other issue to be considered is the jurisdictional issue that has been raised by **Mr. Makuto**, counsel for the 2nd, 3rd, 5th and 6th Respondents and whether the Petition should be transferred to the Employment and Labour Relations Court for the reason that the issues that have been raised by the Petitioner in the present Petition are employment issues which are a preserve of the Employment and Labour Relations court. He added that there is a related Petition being **No.E004 of 2021** before the said court.

11. In the opposing the objection, **Mr. Mkan** for the Petitioner submitted that the issue to be determined has violated the identified Articles of the Constitution and if so grant the declarations sought.

12. In view of that, I have read through the Petition and the cause of action appears to be a complaint against the misuse of the position of employment of the 1st Respondent in his tenure as the Acting Executive Officer of the **Coast Water Development Agency**. It is averred that during his term, the 1st Respondent failed to heed to qualities of good governance and transparency as was expected of him and instead turned the state agency to a personal entity and went on to withdraw and embezzle the agencies funds even with approval of the Directors. The 1st Respondent is further accused of contempt and failing to remit the agency's employee's statutory deductions to the relevant

authorities and thus prompted impunity. By his acts in serving as Chief Executive Officer of the **Coast Water Development Agency**, it is averred that the 1st Respondent contravened **Articles 10, 73 and 232** and a declaration sought to that effect. It is further prayed that the court declares the 1st Respondent as unfair to hold any public office present and in future. Infact, it is averred that the 2nd to 6th Respondents were joined here for not acting and exercising their mandate to prevent the public and tax payers' money from being looted by the 1st Respondent not even withstanding numerous complaints from members of the public.

11. **Section 12** of the **Employment and Labour Relations Court Act, No. 20 of 2011**, provides for the jurisdiction of the Employment and Labour Relations Court as established under **Article 162(a)** of the **Constitution**, more specifically, **Section 72(1)(a)** of **Act No.2011** which reads as follows:

“12. Jurisdiction of the Court.

(1) The court shall have exclusive original and appellate jurisdiction to hear and determine all dispute referred to it in accordance with Article 162(2) of the written law which extends jurisdiction to the court relating to Employment and Labour Relations including;

(c) dispute relating to or arising out of the employment between an employer and employee.

12. However, it is agreed that there are times when the jurisdiction of this Court and that of the Employment and Labour Relations Court overlap for incidental concurrent jurisdiction. It is on this ground that both courts can hear and determine any additional other issues raised or pleaded in a case which is primarily on the areas of specialization. Therefore, on that basis, the court deals with any issue raised respecting violation of the Bill of rights. The test therefrom is whether an employee-employer relationship exists to support jurisdiction of the Employment and Labour Relations Court under **Section 12** of the Act established pursuant to **Article 162(2)(c)** of the **Constitution** to the exclusion of this Court.

13. In this Petition, the 1st Respondent is merely accused of contravening certain Articles of the Constitution in his term of employment with **Coast Water Worker Development Agency**, and the substratum of employer-employee relationship necessary for founding jurisdiction of Employment and Labour Relations Court under **Section 12(1)** is not present established between the Petitioner and the 1st Respondent.

14. For that reason, I decline to grant the prayer by **Mr. Makuto** seeking to have the Petition (matter) to the Employment and Labour Relations Court. In the end, and for reasons singled out hereinabove, the Petitioner is directed to properly serve the 1st Respondent and a proper Affidavit of Service to be filed in court. Thereafter, the Petitioner can fix an interparties hearing of the application dated **11th May, 2021** on a date convenient from the court registry. In the meantime, the other Respondents be at liberty to respond to both the Notice of Motion application dated **11th May, 2021** as well as the Petition of even date.

SIGNED, DATED and DELIVERED VIRTUALLY at MOMBASA this 25TH day of MAY , 2021.

D. O. CHEPKWONY

JUDGE