



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 177 OF 2017

JOHN MUIKIRIA WAWERU.....PETITIONER

VERSUS

KENYA RURAL ROADS AUTHORITY.....1ST RESPONDENT

HON. ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

1. Through the petition dated 2nd May 2017, the petitioner herein, who describes himself as an adult of sound mind working within the Republic of Kenya sued the respondents herein, a State Corporation and the Attorney General of the Republic respectively seeking the following orders:

- 1. A declaration that the petitioner's fundamental rights and freedom were contravened and grossly violated by the respondent's, servants, agents and/or employees during the process of short listing of candidates for position of General Manager(Finance) and Manager(Finance)***
- 2. A declaration that the petitioner is entitled to be shortlisted and interviewed for the position of General Manager (Finance) and Manager (Finance).***
- 3. A declaration that the respondents are escapists and have abdicated their duty to respect and uphold the constitution of Kenya in the recruitment for the position of General Manager (Finance) and Manager (Finance)***
- 4. A declaration that the process of short listing, interviewing, recruiting and appointment of persons to the positions of the General Manager (Finance) and Manager (Finance) is/was opaque, clandestine, shrouded in secrecy and riddled with suspicion and contrary to Article 10, 73 and 27 of the Constitution of Kenya hence unconstitutional and consequently null and void or in the alternative the process of short listing commences afresh.***
- 5. Any other orders, writs, directions as this honourable court may consider appropriate.***
- 6. Costs of the suit and interest.***

2. The petitioner's case is that sometimes in the month of October 2016, the respondent ran an advertisement inviting suitable applicants to apply for employment in the positions of General Manager and Manager (Finance) which advertisement enumerated a raft of qualifications in accordance with the provisions of the Constitution including clearance from Higher Education Loans Board (HELB).

3. The petitioner states that he duly submitted his application for consideration for employment to the 1st respondent upon satisfying himself that he possessed all the requisite ethics, academic and professional qualification for both positions only to learn that he was not shortlisted for the said positions for the reason that the copy of the HELB clearance certificate that he had attached to his application was not valid. He claims that the said reason given for the failure to include his name in the shortlist of the candidates who qualified for the interview is a blatant falsehood and an excuse to discriminate against him which amounted to a violation of his fundamental rights as enshrined in the Constitution.

4. He further states that malice, impunity and greed drove the 1st respondents to oust the provisions of the Constitution and instead set qualifications criteria that is unknown to the law thereby resulting in the skewed shortlisting of candidates that excluded the petitioner despite the fact that he had met all the qualifications and enumerated in the advertisement.

5. He contends that contrary to the 1st respondent's assertion that the petitioner does not have a valid HELB certificate of clearance, he has a valid HELB certificate of clearance that was duly issued to him on the 12 January 2015, after he fully paid up his higher education loan.

6. It is the petitioner's case that the failure to shortlist him was discriminatory, malicious, amounted to abuse of office and was an infringement of his constitutional rights and that the reason given by the respondent for not short listing him is outrageous, unfounded and a mere allegation that has not been substantiated.

7. The petitioner's case is that his fundamental rights and freedoms under Article 27, 41 and 47 of the Constitution were contravened and grossly violated by the 1st respondent Board of Directors as the Constitution guarantees the right to equal protection and benefit from the law, freedom from discrimination and the right to fair administrative action.

8. In a nutshell, the petitioner's case is that despite the fact that he met all the requirements set out for the position that he had applied for (Manager Finance and General Manager Finance) the 1st respondent did not shortlist him thus infringing on his constitutional rights.

9. In their submissions in favour of the petition, M/S Rodgers Ombachi & Company advocates reiterated the contents of the petition and added that the 1st respondent acted in contravention of Article 10 of the Constitution by failing to uphold the principles of non-discrimination, integrity, transparency and accountability in carrying out the recruitment exercise and added that the respondents also contravened Article 73(2) (a) of the Constitution which provides that selection into public service should be based on personal integrity, competence and suitability. For this argument counsel relied on the decision in the case of **Trusted Society of Human Rights Alliance and 3 Others vs Judicial Service Commission & Another [2016] eKLR** wherein the court noted that failure by the applicants to furnish reports from various bodies enumerated cannot be the sole basis for not short listing them. In the said decision the court further observed a report from HELB can only be considered at the interview stage and cannot be used as the basis upon which the commission ought to short list for the interview and who to reject at that nascent stage of the process.

Respondent's response

10. The respondents opposed the petition through the replying affidavit of the 1st respondents Human Resource & Administration Manager, **Judith A. Yamo**, who avers that indeed the 1st respondent posted adverts for vacancies in the positions of General Manager and Manager (Finance) which positions the petitioner applied for but that his application was not successful owing to the fact that a copy of the HELB certificate of clearance that he had attached to his application was found to be invalid. She attached copies of letters to that effect to the replying affidavit as annexure "JO1".

11. She further states that the recruitment and selection process for the advertised positions had been concluded and that the 1st respondent has entered into contracts of employment with the successful candidates.

12. In its submissions in opposition to the petition, M/S Mwangi, learned counsel for the state, submitted that the issue of the validity of HELB certificate was not pleaded by the petitioner in the pleadings and could therefore not be raised at the submissions stage. For this argument, counsel relied on the decision in the case of **Independent Electoral and Boundaries Commission vs Stephen Mutinda Mule & 3 Others [2014] eKLR** in which the court upheld the decision of the Supreme Court of Nigeria in **Adetoun Oladeji(NIG) Ltd vs Nigeria Breweries PLC** which held that:

"It is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded."

The learned judges in paragraph 11 stated that:

"As the authorities do accord with our own way of thinking, we hold them to be representative of the proper legal position that parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce."

13. Counsel further submitted that the petitioner had not proved his case to the required standards as regards the validity of his HELB clearance certificate. Counsel cited the decision in the case of **Jennifer Nyambura Kamau –vs – Humphrey Mbaka Nandi [2013] eKLR** where the court held that:

"We have considered the rival submissions on this point and state that Section 107 and 109 of the Evidence Act places the evidential burden upon the appellant to prove that the signature on these forms belong to the respondent. Section 107 of the Evidence Act provides that "whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence."

14. Counsel also submitted that owing to the fact that the 1st respondent had concluded the recruitment process and entered into employment contracts with third parties in respect to the vacant positions the prayers sought by the petitioners had been overtaken by events. Reliance was placed on the decision in the case of **Rose Wanjeri Magwi & another vs Arthur Magwi Kagema & Another** wherein it was held:

"It is also clear from the pleadings filed in this suit and the evidence adduced in respect thereof that some of the activities sought to be restrained and prohibited like taking possession and developing the portion of the suit property had happened before the applicants moved to court. The factual situation leads to the question, can an injunction be issued to restrain what has already

happened?

The answer to this question is negative. In this regard the case of Stanley Kirui v Westlands Pride Limited [2013] eKLR it where it was held: - “the court cannot injunct what has already happened.”

Analysis and determination

15. I have considered the instant petition, the respondents replying affidavit and the parties’ submissions together with the authorities that they cited. I discern the issues for determination to be as follows;

a) *The jurisdiction of this court to entertain this matter.*

b) *Whether the petitioner has made out a case to warrant the granting of the orders sought in the petition.*

Jurisdiction

16. A perusal of the petition and the prayers sought therein shows that it is mainly centered on the subject of employment and the petitioner’s claim that the recruitment was conducted in an unfair, opaque and clandestine manner. I therefore find that the most pertinent question which arises in this petition is whether this court has the jurisdiction to hear and determine this petition.

17. **Halsbury’s Laws of England (4th Ed.) Vol. 9 at page 350** defines “jurisdiction” as “...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision.” John Beecroft Saunders in his treatise **Words and Phrases Legally Defined Vol. 3, at page 113** reiterates the latter definition of the term ‘jurisdiction’ as follows:

“By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given”.

18. From these definitions, it is clear that the term “jurisdiction”, as further defined by **The Black’s Law Dictionary, 9th Edition**, is the Court’s power to entertain, hear and determine a dispute before it.

19. The subject matter of jurisdiction is as old as the judicial system. In the celebrated and oft cited case of **Owners of Motor Vessels Lillian S. Vs Caltex Oil (Kenya) Limited (1989) KLR 1** Nyaragi J, said as follows,

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there will be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

20. The Supreme Court in the case of **Re The matter of the Interim Independence Electoral Commission Constitutional Application No.2 of 2011** proffered that-

“Assumption of Jurisdiction by courts in Kenya is a subject regulated by the Constitution, by Statute law, and by principles laid out in judicial precedent... that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it... jurisdiction flows from the law, and the recipient-court is to apply the same, with any limitations embodied therein. Such a court may not arrogate to itself jurisdiction through the craft to interpretation, or by way of endeavors to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity.”

21. The above finding was also emphasized by the Supreme Court in the case of **Samwel Kamau Macharia & Another vs Kenya Commercial Bank and 2 others (2012)eKLR** where again the court observed as follows;

“A court’s Jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second Respondent in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the heart of the matter, for without jurisdiction, the court cannot entertain any proceedings.....where the Constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.”

22. The Constitution of Kenya, 2010 has elaborately pronounced itself clearly on the jurisdictional competencies of various Courts of law in Kenya. Besides the Constitution, there are several statutes which demarcate the jurisdictions of various Courts and tribunals. In the context of the present case, the most critical provisions of the Constitution worth considering are **Articles 162(2) 165(3) (a) and (b), and Article 163(5)**.

23. Article 165(3) (a) and (b) stipulates that:

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

(a) unlimited original jurisdiction in criminal and civil matters;

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

24. Article 165(5) stipulates that:

(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).

Article 162(2) on the other hand empowers Parliament to **“establish Courts with the status of the High Court to hear and determine disputes relating to**

(a) employment and labour relations; and

(b) the environment and the use and occupation of, and title to, land. (Emphasis mine).

Clause (3) thereof authorizes Parliament to **“determine the jurisdiction and functions of the Courts contemplated in clause (2).”**

25. **Section 12(1)** of the Employment and Labour Relations Court Act further provides for the jurisdiction of the ELRC in the following terms:

“(1) 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 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 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.”

26. Having regard to the above cited authorities on the subject of jurisdiction and the clear provisions of the Constitution and statute on the question of the courts’ jurisdiction, I find that the instant case falls within the purview of the Employment and Labour Relations Court the invocation of violation of constitutional rights by the petitioner notwithstanding. My finding is buttressed by the observations of court in the authority of **United States International University (USIU) Vs The Attorney General (2012) eKLR** as follows;

“Labour and employment rights are part of the Bill of Rights and are protected under Article 41 which is within the province of the Industrial Court. To exclude the jurisdiction of the Industrial Court from dealing with any other rights and fundamental

freedoms howsoever arising from the relationships defined in section 12 of the Industrial Court Act, 2011 or to (so) interpret the constitution would lead to a situation where there is parallel jurisdiction between the High Court and the Industrial Court. This would give rise to forum shopping thereby undermining a stable and consistent application of employment and labour law. Litigants and ingenious lawyers would contrive causes of action designed to remove them from the scope of the Industrial Court. Such a situation would lead to diminishing the status of the Industrial Court... to accept a position where the Industrial Court lacks jurisdiction to deal with constitutional matters arising within its competence (sic) would undermine the status of the court”

27. I am further guided by the decision by the Court of Appeal in the case of **Karisa Chengo, Jefferson Kalama Kengha & Kitsao Charo Ngati vs Republic [2015] eKLR**, where the learned judges observed as follows;

“It was the intention of the drafters in our view to give the ELRC and ELC independence from the High Court. This independence is essential to the role of the Courts as specialized courts charged with the responsibility of developing coherent and evolving labour relations, environment and land jurisprudence.”

28. My above finding that Article 165 (5) (b) delimits the jurisdiction of the High Court on matters falling within the jurisdiction contemplated under Article 162 (2) and essentially debars the High Court from dealing in matters of which the Employment and Labour Relations Court has jurisdiction is sufficient to determine this petition. Guided by the wisdom in the words of Nyarangi J. in the **Owners of Motor Vessel “Lillian”** case (supra), I must make no further step in this case but direct that it may be placed before the Employment and Labour Relations court for determination. I make no orders as to costs.

Dated, signed and delivered in open court at Nairobi this 12th day of April 2019

W. A. OKWANY

JUDGE

In the presence of:

In the absence of the parties

Court Assistant – Fred