



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO.110 OF 2016**

**BETWEEN**

**KENYA COUNCIL OF EMPLOYMENT AND  
MIGRATION AGENCIES.....PETITIONER**

**AND**

**FRANCIS MWANGI NJOROGE.....1<sup>ST</sup> RESPONDENT**

**MICHAEL MUBEA.....2<sup>ND</sup> RESPONDENT**

**CABINET SECRETARY EDUCATION, SCIENCE**

**AND TECHNOLOGY.....3<sup>RD</sup> RESPONDENT**

**CHIEF EXECUTIVE OFFICER, ETHICS AND**

**ANTI CORRUPTION COMMISSION.....4<sup>TH</sup> RESPONDENT**

**HON. ATTORNEY GENERAL.....5<sup>TH</sup> RESPONDENT**

**AND**

**MICHAEL DAUD AND COMPANY**

**ASSOCIATES.....1<sup>ST</sup> INTERESTED PARTY**

**HAMILTON, HARRISON AND MATTHEWS**

**ADVOCATES.....2<sup>ND</sup> INTERESTED PARTY**

**DR. BELIO KIPSANG.....3<sup>RD</sup> INTERESTED PARTY**

**KENNEDY OCHIENG, ADVOCATE.....4<sup>TH</sup> INTERESTED PARTY**

**ADEN DAUD.....5<sup>TH</sup> INTERESTED PARTY**

## CHIEF EXECUTIVE OFFICER, PUBLIC SERVICE

COMMISSION.....6<sup>TH</sup> INTERESTED PARTY

### RULING

#### Introduction

1. The Petitioner, the Kenya Council of Employment and Migration Agencies (Agency) filed a Petition and a verifying affidavit sworn by Mr. Evans Nyabega Akuma (Mr. Akuma) dated 23<sup>rd</sup> March 2016. In that Petition, it is claimed *inter alia* that the 1<sup>st</sup> Respondent, Mr. Francis Mwangi Njoroge (Mr. Njoroge) and the 2<sup>nd</sup> Respondent, Mr. Michael Mubea (Mr. Mubea) acted contrary to **Articles 10, 156 and 132B** of the **Constitution of Kenya, 2010** by engaging in corruption in the conduct of two criminal cases at the Nairobi Chief Magistrate's Court (**Criminal Case No. 1905 of 2016** and **Criminal Case No. 301 of 2016**).

2. In addition, the Agency alleges that Mr. Njoroge, acted contrary to **Chapter 6** of the **Constitution** and **Section 24(15)(iv)** of the **Office of the Attorney General Act No. 49 of 2012** when he received a bribe from the 1<sup>st</sup> Interested Party, M/s. Michael, Daud and Company Associates (Michael, Daud Associates) in **H. C. Civil Case No. 81 of 2007**, at Mombasa. It further claims that Mr. Njoroge had no authority to deregister the Agency (Society Registration No. 5545 and Certificate No. 106 of 2004) as he purported to do.

3. The Agency also claims that Mr. Njoroge acted without the written authorization of the Attorney General contrary to **Section 16(a), (c) and (d)** of the **Office of Attorney General Act** when he allegedly paid Kshs.600,000,000 to Michael, Daud Associates in **Civil Case No. 106 of 2004**, at Milimani High Court, Civil Division.

4. The Agency also contends that Mr. Mubea acted contrary to **Chapter 6** of the **Constitution** when he failed to investigate the bribery and money laundering allegations involving Michael, Daud Associates, a law firm in which he is allegedly a partner, while also working for the Ethics and Anti-Corruption Commission (EACC).

5. Before the Petition could be heard, The 2<sup>nd</sup> Interested Party, the firm of M/s. Hamilton Harrison and Matthews Advocates, filed a Notice of Motion Application dated 3<sup>rd</sup> May 2016 seeking the following orders;

*i. The application be heard prior to the Petitioner's application dated 23<sup>rd</sup> March 2016;*

*ii. The Petitioner's Petition dated 23<sup>rd</sup> March 2016 be struck out; and*

*iii. The costs in the application and the Petition be awarded to the 2<sup>nd</sup> Interested Party.*

6. That Application is supported by the following grounds as listed in the Application:

*a. The Petition does not disclose any violations of the Petitioner's fundamental rights and freedoms or the contravention of any constitutional provisions by the Respondents or the Interested Parties.*

*b. The Petition does not outline the reliefs being sought in the Petition making it impossible to respond to the Petition.*

*c. The Petitioner failed to particularise the details and the manner of contravention of the Constitution or infringement of its rights by the Respondents or Interested Parties.*

- d. In the circumstances there is no basis for the hearing and determination of the Petition.*
- e. There is no evidence of the violation of any constitutional provisions or infringement of any fundamental rights and freedoms that has been presented by the Petitioner.*
- f. The Petition has raised numerous issues which have made it impossible for the Respondents and/or the Interested Parties to know which allegations specifically concern them and what they are required to respond to.*
- g. The Petition is incompetent as it has been filed in the name of the society which is an unincorporated body and not in the name of the office bearers.*
- h. The Petition is without basis, scandalous, frivolous and vexatious.*
- i. It is just and fair that the Petition be struck out.*

### **The Applicant's case**

7. The Applicant, M/s. Hamilton Harrison and Matthews Advocates, states that the rules of pleadings and procedures must be adhered to in this era of increased public interest litigation under the **2010 Constitution** and submits that these rules play a critical role in ensuring that all suits are heard expeditiously. That therefore the application of rules should be encouraged, and must be adhered to. To support this submission, the case of **Thorpe v Holsworth (1876) 3 CH. D. 637** was cited.

8. In praying that the Petition dated 23<sup>rd</sup> March 2016 be struck, out the Applicant claims that the said Petition has a host of incurable defects that contravene **Rule 10(2)** of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Mutunga Rules)**. These defects include the fact that; (i) it does not clearly disclose the injury caused to the public (**Rule 10(2)(d)**); and (ii) it does not disclose the reliefs sought (**Rule 10(2)(g)**). To support the claims the Applicant refers to the cases of **Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 others [2013] eKLR**, **Anarita Karimi Njeru v The Republic (1976-1980) KLR 1272** and **A.K.M.M v. E.M.K.K & 2 others Petition No. 37 of 2014; [2014] eKLR** which have laid down the principles enshrined in **Rule 10** of the **Mutunga Rules**.

9. It is also the Applicant's case that the Respondents in the matter are being asked to respond to general statements under the Constitution and argues that, there is need for specificity of pleadings as the Agency's case keeps changing thus the Respondents and the Interested Parties would suffer prejudice as they would be unable to respond to the Petition as drafted.

10. The said law firm also contends that while the Agency is not a legal entity capable of suing, it concedes that **Article 260** of the **Constitution** would negate this argument as the definition of 'person' is broad. It reiterates in any event that the increasing habit of filing amorphous and frivolous Petitions should be stopped as they undermine the intent and purpose of litigation under the Constitution. The Applicant cited the cases of **Trustees of the Kenya Redeemed Church & Another v Samuel Móbuya Orara & 5 Others [2011] eKLR** and **African Orthodox Church of Kenya v Charles Omuruka & Another [2014] eKLR** to support this argument.

11. The Applicant therefore urges the Court to allow the application with costs as prayed.

### **The 2<sup>nd</sup> Respondent and the 5<sup>th</sup> Interested Party's case**

12. The 2<sup>nd</sup> Respondent, Mr. Mubea and the 5<sup>th</sup> Interested Party, Mr. Aden Daud support the Application. They rely on the affidavit of the 4<sup>th</sup> Interested Party dated 5<sup>th</sup> April 2016 and sworn by Mr. Kennedy Ochieng and argue that no evidence has been provided to show that the Agency has legitimate officials or that its officials know of the existence of the Petition.

13. They further submit that the Agency did not state the constitutional violations that the 1<sup>st</sup> to the 5<sup>th</sup> Respondents had committed and that, the issues complained of occurred even before M/s. Michael, Daud Associates was incorporated as a law firm.

14. They also contend that the Agency violated **Rule 7** of the **Mutunga Rules** as no leave was granted to enjoin the 1<sup>st</sup> to the 5<sup>th</sup> Interested Parties to the Petition and that the Agency had not made any request to amend the Petition and the verifying affidavit to bring them in line with the said Rules and that the Agency did not make any reference to any specific tender that was awarded to the Applicant at all and that the Petition is therefore frivolous and ought to be struck off.

15. I note that the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents also support the Application while the 4<sup>th</sup> Interested Party left the matter to Court.

### **The Petitioner's case**

16. The Petitioner, the Agency, opposes the Application and submits that the Petition deals with issues of transparency and accountability and that it was properly filed under **Articles 3, 22, 165(3)(d), 5 and 7, 258 and 260** of the **Constitution** as well as the **Mutunga Rules**.

17. Further, it has alleged that Kshs.1.5 Billion belonging to the public was misused and that M/s. the Hamilton Harrison and Matthews Advocates was improperly awarded a tender for legal services in **Nairobi High Court Judicial Review No. 106 of 2014**. It also urges the point that the Application for striking out the Petition is misguided as the Petitioner is protected by **Rule 2** of the **Mutunga Rules**.

18. The Agency in addition submits that although the Petition did not have any reliefs sought, **Rule 18** entitles it to seek leave and amend the pleadings to include the reliefs sought and has indeed sought such leave.

19. In conclusion, the Petitioner alleges that the 5<sup>th</sup> Interested Party's Bill of Costs in **H. C. Civil Case No. 181 of 2007** in Mombasa confirms the criminal enterprise and network, over time, between the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and therefore the Petition ought to be determined on its merits.

### **Determination**

20. I have perused the pleadings and the submissions of the parties. The issue that arises for determination is whether the Petition should be struck out on grounds that—

***(i) the Petitioner lacks the locus standi to institute it;***

***(ii) the Petition fails to precisely disclose the particulars of the constitutional violations allegedly committed by the Respondents;***

***(iii) the Petition does not disclose any reliefs sought; and***

***(iv) the Petition is vexatious, scandalous and frivolous.***

21. The Applicant in the above context argues that the Agency, as a society, does not have the *locus standi* to file the Petition before the Court and Mr. Mubea and Mr. Daud also submitted that the Petitioner had no legitimate officials who could have authorized the filing of the Petition.

22. In that regard, a perusal of the Petitioner's supporting affidavit as sworn by Mr. Akuma shows that he is the Chairman of the Petitioner, which is a registered society and in its annual general meeting held prior to the filing of the Petition, he was authorized to act on behalf of the Petitioner in legal proceedings and was also granted a power of attorney by the Agency. Mr. Akuma also submitted that the Agency was registered vide Certificate No. 30777, File No. IS SOC/55453 in terms of **Section 10** of the **Societies Act**

and that the Agency can therefore sue and be sued on matters of socio-economic development as envisaged in its objectives.

23. I note that indeed, the Agency has attached its Certificate of Registration No. 30777, marked as Exhibit “ENA 1a” to show that it is a properly registered society under the **Societies Act**. However, Mr. Akuma has not shown minutes of any annual general meeting in which he was authorized to act in the capacity of the Petitioner.

24. In that regard, in the case of **Trustees Kenya Redeemed Church, (supra)** *Waweru J* held that societies cannot sue in their own names but only through its duly registered office holders. That finding was also made in the case of **African Orthodox Church of Kenya (supra)** where the Court held that the Plaintiff and the 2<sup>nd</sup> Defendant, as societies and associations registered under the **Societies Act, Cap 108** of the **Laws of Kenya**, have no legal capacity to institute proceedings in any court in their own names and cannot maintain such proceedings because they can only sue through their Trustees or their registered officials.

25. Having so said however, **Article 22** of the **Constitution** deals with the institution of Court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been violated and it stipulates thus:

*“22.(1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.*

*(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—*

- (a) a person acting on behalf of another person who cannot act in their own name;*
- (b) a person acting as a member of, or in the interest of, a group or class of persons;*
- (c) a person acting in the public interest; or*
- (d) an association acting in the interest of one or more of its members.”*

*Further, Article 258 of the Constitution reads:*

*“258. (1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.*

*(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—*

- (a) a person acting on behalf of another person who cannot act in their own name;*
- (b) a person acting as a member of, or in the interest of, a group or class of persons;*
- (c) a person acting in the public interest; or*
- (d) an association acting in the interest of one or more of its members.”*

26. Furthermore, **Article 260** of the **Constitution** defines a person to “include a company, association or other body of persons” and therefore a reading of **Articles 22, 258** and **260** of the **Constitution** would show that any person, including an association or other body of persons, can institute proceedings claiming that any right or provision of the Constitution has been contravened.

27. That is why in the case of **Kenya Council of Employment and Migration Agency v. National Police Service Commission Cause No. 212 of 2014; [2014] eKLR**, the Court interrogated whether the present Petitioner had *locus standi* to file a Petition under the Constitution and held that the Petitioner, did indeed have the legal standing to file the Petition therein and categorically stated:

***“Locus standi has in the past been used as an excuse and a stumpler to the realization of fundamental freedoms under the Bill of Rights. It enabled litigants and courts to short circuit the realization of fundamental freedoms under the Bill or Rights. It served as a disabler to public interest litigation. The Constitution of Kenya, 2010 under Articles 22 and 258 inter alia came in to pre-empt this ugly practice by enabling persons and organisations to come out and pursue issues of infringement of the Constitution and fundamental freedoms under the Bill of Rights without fetter.”***

28. That is the law as I understand it and I have noted that the cases referred to by the Applicant where it was held that societies are not legal entities and therefore cannot sue or be sued in their names are all civil and not constitutional in nature. Such as the present one. This is also because, over time, *locus standi* in constitutional proceedings which involve the public interest has been given a broader meaning in order to provide parties with access to justice. In this instance, the Petitioner has filed the Petition as a society which deals with issues of governance, transparency, equity and the protection of the Constitution and has claimed that certain constitutional provisions have been contravened. Therefore, although a society is not a legal person that can sue or be sued in its name in civil proceedings, the broader meaning of “person” under **Article 260** and *locus standi* under **Articles 22** and **258** of the **Constitution** enables such an organization to sue in the interest of the Kenyan people.

29. I further note that the Applicant also submitted that the Petition should be struck out because it does not disclose, with precision, the particulars of the violation of any constitutional rights neither does it have particulars of the remedies sought. In response, the Petitioner urges that although the Petition does not indeed have any reliefs that it seeks, he has sought leave under **Rule 18** of the **Mutunga Rules** to amend the pleadings to include the said reliefs.

30. With regards to the ground that the Agency has not disclosed, with precision, the particulars of the violation of constitutional provisions, I have read through the Petition and the Affidavit in support thereof and it is obvious to me that the Agency has raised several general and specific allegations against the Respondents and the Interested Parties. The question therefore is whether the Petitioner has sufficiently provided particulars that the parties violated any provisions of the Constitution. In that context, in the case of **Anarita Karimi Njeru v The Republic [1976-80]1 KLR 1272 (Anarita Njeru)** at 1275, the High Court held that—

***“[I]f a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that Justice is done to his case) that he should set out with reasonable precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”***

31. The above holding, although made before the promulgation of the Constitution 2010 has been applied liberally by our Courts including in **Mumo Matemu v Trusted Society of Human Rights Alliance and 5 Others [2013] eKLR**, where the Court of Appeal dealt with the issue of whether a complaint regarding an alleged constitutional violation had been set out with precision as stated in the **Anarita Njeru** case (supra). The Court reaffirmed the decision in **Anarita Njeru (supra)** and further held that pleadings aid the Court in dealing with cases justly and parties must therefore frame their issues properly in order to ensure substantive justice. In addition, in **Thorp v Holdworth (1876) 3 Ch. D. 637** it was held that the importance of pleadings is to aid the parties to narrow issues and diminish expenses and delays.

32. Notwithstanding the general rules above, our Courts have also held that the formula in the **Anarita Njeru** case must not be used to impede justice and that is why in **Peter Michobo Muiru v Barclays Bank of Kenya Ltd & Another [2016] eKLR** the Court stated thus:—

***“9. The principle [in Annarita Karimi], as this court has previously stated, does not however equate absolute precision. There is no need for absolute and artificial specificity... The general approach should be that each case must be independently viewed and understood by the court and where the court as well as the Respondent can painlessly identify and understand the petitioner’s case as well as the constitutional trajectory the case takes, then the merits of the case ought to be ventured into. Stalling the case through the technicality of want of formal competence will take a back seat...”***

33. I agree and I note that in the title to the present Petition, the Petitioner has stated that there are alleged violations of **Articles 10, 21, 27(4), 35(1)(A), 47, 73 and 232** of the **Constitution**. However, the allegations premised on those Articles as raised by the Petitioner are not clear and in my opinion seem to be blanket accusations in several instances. For example, the allegation as contained at page 15 of the Petition is that the 1<sup>st</sup> Respondent, Mr. Njoroge, who works at the Office of the Attorney-General, assisted his opponents to draw up Court pleadings against the Government with the intention of defeating the administration of justice. In addition, the Agency claims at page 16 of the Petition that Mr. Njoroge received a bribe of Kshs.239,600 from Michael and Daud Advocates, which resulted in a party to party Bill of Costs against the Attorney General being taxed at Kshs.119, 251,327.60. Having so pleaded however, the Petitioner did not provide any shred of evidence to show that the 1<sup>st</sup> Respondent assisted the 1<sup>st</sup> Interested Party to draft its pleadings and neither did it show when or how the 1<sup>st</sup> Respondent received a bribe from the law firm in order to influence the bill of costs. A receipt of a bribe is a serious allegation and should not be made casually as the Petitioner has done. At the very least particulars and instances of all the said allegations should have been provided but none was so provided.

34. The Petitioner also claims at page 16 of the Petition that M/s. Michael and Daud Advocates has been involved in attempted theft and money laundering while the 2<sup>nd</sup> Respondent, Mr. Mubea, who is allegedly a senior partner in that law firm, is also an employee of the EACC and is thus caught in a conflict of interest situation. Further, that the law firm was aware that Mr. Mubea would ‘illegally’ protect it despite the Attorney General writing to the EACC to investigate the said allegations as being contrary to the integrity of public servants. Although the Agency states that these actions were contrary to **Article 10** and **Chapter 6** of the **Constitution**, it has not provided or shown any evidence to support this allegation, for example the form of communication in which the 5<sup>th</sup> Respondent, the Attorney General, wrote to the EACC asking them to investigate the 1<sup>st</sup> Respondent, Mr. Njoroge. It has also not shown how the 2<sup>nd</sup> Respondent hindered any investigation being carried out against him and the 1<sup>st</sup> Respondent, Mr. Njoroge. All the allegations therefore remain in the realm of rumours and conjecture.

35. The Petitioner has also raised a myriad of other allegations against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, including, that they had breached **Articles 10, 156 and 132B** of the **Constitution** by: (i) being dishonest in their public or private affairs; (ii) abuse of office, misuse of public funds, falsification of records and non-declaration of conflict of interest in business corporations engaged in business with their public offices (iii) engaging in actions that would lead to their removal from office and commission of offences under **Parts XV and XVI** of the **Penal Code Cap 63** of the **Laws of Kenya** and the **Leadership and Integrity Act No. 19 of 2012**; and (iv) failing to disclose a conflict of interest between Michael and Daud Associates and the EACC.

36. These allegations, serious as they are, also seem to be blanket allegations that are not supported by documentation or other evidence. For example, had the Petitioner shown that indeed there was a conflict of interest between the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and the EACC it should also have gone ahead to specify how that conflict has arisen and which offences have been committed and the particulars thereof under the **Penal Code** and the **Leadership and Integrity Act**.

37. I also note that as against the Applicant, the Agency has argued that the 1<sup>st</sup> Respondent threatened to pay Kshs.600,000,000 to the Applicant in H. C. **Civil Case No. 106 of 2004**, without the written authorization of the Attorney General. However, there is no evidence to support the allegations of threats to make payments and the lack of authorization from the Attorney General to allow the said payment of Kshs.600,000,000 to the Applicant.

38. Indeed, as stated in **Rule 10(2)(d)** of the **Mutungu Rules**, every Petition should contain “*the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community.*” In this instance, I agree with the Applicant that the allegations as framed by the Petitioner are convoluted to an extent that the Respondents will not be able to adequately respond to the Petition.

39. In addition to the above, the Petitioner did not also indicate what reliefs he seeks from this Court. This will not only make it difficult for the opposing parties to respond to the Petition but also for the Court to issue orders where the party has not sought any reliefs. It is in fact a mandatory prerequisite under **Rule 10(2)(g)** of the **Mutungu Rules** that a Petition must contain reliefs sought.

40. the Petitioner now concedes that the Petition lacks any reliefs, he now claims that he will be seeking leave to rectify this error by relying on **Rule 18** of the **Mutungu Rules** which reads—

***“A party that wishes to amend its pleadings at any stage of the proceedings may do so with the leave of the Court.”***

41. The above Rule is couched in discretionary terms and whereas in other circumstances, I may have been inclined to allow arguments on amendments of the Petition, I have taken into account the fact that the application for amendment is not before me (it is pending hearing) and that all I am looking at is the Petition as presently worded. I have noted in that regard that the Petition is verbous but bare of real facts for determination. I have also said that it is based on allegations that are more speculative than anything else and falls more in the realm of frivolous than serious. Coupled with the fact that as things now stand there are no reliefs sought against the Respondents, what is there for this Court to determine? I submit nothing.

42. While finding as I have done above, I bear in mind that Courts have generally observed that striking out of pleadings both civil and constitutional in nature must be done cautiously and only in instances where the pleadings are incurable and irredeemable (see **D.T. Dobie & Company (Kenya) Limited v Muchina [1982] KLR 1**). That is why in **Dickson Karaba v John Ngata Kariuki and Another [2010] eKLR**, the Court stated thus:

***“...striking out is a very serious matter, it is draconian and it should be resorted to as an avenue when the cause filed is hopeless or it is meant or intended to abuse the process of the court...”***

43. I agree with the above exposition of the law and find that in this case, a totality of the defects in the Petition leave me with no option than to strike out the entire Petition. In other instances, more so in litigation premised on allegations of alleged violation of the Constitution, this Court would have been very hesitant to strike out any Petition but the present one falls in that rare category whose sustenance would be grossly unfair to the Respondents. No life should in the circumstances be breathed into it.

### **Disposition**

44. From the findings above, I hereby make the following orders:

- i. The Application dated 3<sup>rd</sup> of May 2016 is allowed.**
- ii. Petition No. 110 of 2016, dated 23<sup>rd</sup> March 2016 is struck out.**
- iii. Each party shall bear their costs as I see no reason to tax any Party with further proceedings in an incurably defective Petition.**

45. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 13<sup>TH</sup> DAY OF MARCH, 2017**

**ISAAC LENAOLA**

**JUDGE**

**DELIVERED AND SIGNED AT NAIROBI THIS 22<sup>ND</sup> DAY**

**OF MARCH, 2017**

**E. CHACHA MWITA**

**JUDGE**