



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO.316 OF 2011**

**IN THE MATTER OF ARTICLES 2(1), 10(2), 19, 20, 21,22, 23, 24, 73, 258, 259**

**AND**

**SECTION 7 OF THE SIXTH SCHEDULE OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLE 73 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF SECTION 5(1) OF THE STANDARDS ACT, CAP OF THE LAWS OF KENYA**

**BETWEEN**

**NELSON OMUTERE ANDALE.....PETITIONER**

**VERSUS**

**KENYA BUREAU OF STANDARDS.....1<sup>ST</sup> RESPONDENT**

**RULING ON A PRELIMINARY OBJECTION**

1. The Petition dated 15<sup>th</sup> December 2011 is premised on the provisions of **Articles 2(1), 10(2), 19, 20, 21, 22, 23, 24, 73, 258, 259** and **Section 7** of the **Sixth Schedule** of the **Constitution**. A perusal of it would show that it is the Petitioner’s case that one Eva Oduor, was unfit to be appointed the Managing Director of the Kenya Bureau of Standards (KBS).

Simultaneously with the Petition, a Chamber Summons dated the same day was filed and the Prayers sought were;

- (i) That the matter be certified as urgent and be heard forthwith on account of urgency.***
- (ii) That the Court be pleased to issue a temporary injunction to restrain the 2<sup>nd</sup> Respondent from appointing by notice in the Gazette the Managing Director of the 1<sup>st</sup> Respondent herein from the persons short listed and forwarded to him namely, Eva Oduor, Joseph Kosgey and Korir pending the***

*hearing and determination of the Application.*

*(iii) That the Court be pleased to issue a temporary injunction to restrain the 2<sup>nd</sup> Respondent from appointing by notice in the Gazette the Managing Director of the 1<sup>st</sup> Respondent herein from the persons short listed and forwarded to him namely, Eva Oduor, Joseph Kosgey and Korir pending the hearing and determination of the Petition.*

*(iv) The costs of this Application be provided be in the cause.*

2. Before the Petition could be heard, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed a Notice of Preliminary Objection which is worded as follows;

*“(1) That the Court lacks jurisdiction to entertain this Petition as well as the Chamber Summons Application.*

*(2) That the Applicant herein has no Locus Standi to institute these Proceedings.*

*(3) That the Orders sought herein cannot be granted given the nature of these Proceedings.*

*(4) That the Orders sought herein are primarily directed at persons who have not been joined in these Proceedings.*

*(5) That these proceedings constitute an abuse of the process of this Court.”*

3. The same was then argued on 19<sup>th</sup> December 2012 and Mr. Arwa's Submissions on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents can be summarized as follows;

**(i) Jurisdiction**

That the High Court sitting as a Constitutional Court can only hear constitutional matters raised before it. The Chamber Summons dated 15<sup>th</sup> December 2011 is premised on **Article 23(3)** of the **Constitution** which must necessarily be read with **Article 22** which provides for redress in cases of violations of fundamental rights of the individual. In this case, it is urged, the Applicant has not alleged that any of his fundamental rights have been violated and so no remedy is available to him. His case is premised on whether a provision of the Constitution has been breached and so no remedy lies under the Bill of Rights.

In any event, that National Values enshrined in **Article 10** of the **Constitution** are not justifiable matters and cannot be enforced and similarly the principles in **Section 73** of the **Constitution** on ethics and integrity cannot be enforced as part of the Bill of Rights because they are not part of the Bill.

On this point, reliance was placed on the decision in Owners of Motion Vessel Lillian vs Caltex Oil [1982] KLR I where it was held that where there is no jurisdiction, the Court must lay down its tools and strike out the matter.

**(ii) Locus Standi**

It is the argument on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents that **Article 258** of the **Constitution** deals with situations where a person seeks to prevent the violation of the Constitution but not the violations specifically related to the Bill of Rights.

The issue of *standi* arises from the fact that only a person acting in public interest can sue to protect that interest and that the Applicant is not such a person.

**(iii) The Orders sought cannot be granted**

That **Article 23** of the **Constitution** grants the High Court authority to grant injunctions where fundamental rights have been breached and since none has been breached in this case, then no injunction should issue.

In any event, recruitment for the position of Managing Director of the Kenya Bureau of Standards has already been done and so there is nothing to injunct.

**(iv) The Orders sought are directed at parties not enjoined in the Proceedings**

That in the Petition, three Respondents are named but no Orders are sought against any of them. Further, the 2<sup>nd</sup> Respondent's role is to appoint and since it is the recruitment process that is being challenged, then no orders can issue against him as he has committed no wrong.

**(v) The Proceedings are an abuse of Court process**

That the complaint that Eva Oduor, chaired a Sub-Committee of the 1<sup>st</sup> Respondent is not a matter for Constitutional interpretation. In the end, she was only one of the nominees for the position and there was no reason to bring in other Candidates into the proceedings and to attempt to invalidate their selection.

Further, there is no allegation of wrong doing on the part of the Selection Panel and there is no allegation that any Law was breached in the manner that they conducted the selection under the **Standards Act**.

4. Mr. Ojwang for the 1<sup>st</sup> Respondent supported the preliminary Objection but Mr. Kigen for the Applicant in answer thereto stated as follows;

5. That **Article 23** and Article 165 as read with **Article 22** of the **Constitution** establish the rights of the Petitioner to be before the Court. The rights that he is enforcing include the right to public participation in public appointments.

6. Further, that Eva Oduor did not meet the requirements of **Chapter six** of the **Constitution** which relate to integrity and ethics in the Public Service.

7. It is also the argument for the Petitioner/Applicant that the court should not limit itself in enforcing the Constitution but should do so whollistically and that a threatened right should be redressed.

8. On my part, I have considered the objection and I must begin by restating the words of Law, J.A. in Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969] E.A. 696 where he stated as follows;

***“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of Law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase cost and, on occasion, confuse issues. This improper practice should stop.”***

9. I have no doubt that the issues raised in the objection if upheld, should put to rest the Application for injunctive reliefs which is before me.

10. Firstly, it must be understood that the jurisdiction of the High Court is well set out in **Article 165(3)** of the **Constitution** which provides as follows;

***“(1) There is established the High Court, which—***

***(a) ...***

(b) ...

(2) ...

(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;*

(c) *jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;*

(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.”*

11. To break-down the issue of jurisdiction, I should say that it is as follows;

(i) Unlimited original jurisdiction in Civil and Criminal matters.

(ii) Determination whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened

(iii) Appeals from tribunals appointed under the Constitution save the one regarding the removal of the President.

(iv) Questions regarding interpretation of the Constitution.

(v) Such other jurisdiction as may conferred by Legislation.

In addition;

(vi) Supervisory jurisdiction over the Subordinate Courts and over any person, body or authority exercising a judicial, quasi-judicial function save superior courts (**Article 165 (b)**).

12. The Application dated 15<sup>th</sup> December 2011 is premised on the provisions of **Article 23(3)(b)** of the **Constitution** which provides as follows;

“(1) ...

(2) ...

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

(a) ...

(b) *an injunction.*”

13. Needless to say, **Article 22** relates to the “*enforcement of the Bill of Rights*“ and Article 23(1) reproduces the jurisdiction under **Article 165** to determine Applications for redress whose remedies are set out above.

14. **Is the Application one where redress for denial, violation, infringement or threat to a right or fundamental freedom is sought?** Clearly not. I have elsewhere above reproduced the Prayers in the Application and neither in the body of it, the grounds in support nor in the Supporting Affidavit is their mention of any fact in that regard. The whole Affidavit relates particularly to alleged conduct unbecoming on the part of one Eva Oduor and I am not satisfied that there is any jurisdiction to issue orders in vacuum.

Further, I am in agreement with Mr. Arwa that even if the jurisdiction of this Court had been properly invoked, I would still have declined to grant any injunctive reliefs because there is nothing to injunct. Eva Oduor has been appointed Managing Director of KBS. Injunctions cannot be granted to stop what has happened because the horse has long bolted. There is no reason, in any event, why an injunction should issue against Joseph Kosgey and one Korir who are not parties to the present proceeding.

It follows that I am minded to uphold grounds 1, 3 and 4 of the Preliminary Objection.

15. Secondly, and as a corollary to the above, the issue of *Locus Standi* is a matter with an untidy history in Kenya. For a long time our Courts would routinely shut out Applicants on the sole ground that they had no *Locus Standi*. In this case, on the whole, and reading his Petition and Application together, the Applicant may well have crafted it with inelegance but I am able to grasp that his complaint is grounded more on the need to interpret the actions of the Respondents *vis-a-sis* the **Constitution** and particularly **Articles 73** as opposed to violations of rights under the Bill of Rights. To that extent, the question whether he has *Locus Standi* or not cannot fairly be determined by way of a Preliminary Objection.

16. Thirdly, having ruled that the Application before me is improperly brought then it follows that no Orders can issue as prayed and I am satisfied that it is an abuse of Court process and will proceed to strike it out with costs to the Respondents

17. The Petition may proceed to hearing on the merits, if the Petitioner is minded to pursue it.

18. Orders accordingly.

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 16<sup>TH</sup> DAY OF MARCH, 2012**

**ISAAC LENAOLA**

**JUDGE**  
**CORAM**

ISAAC LENAOLA – JUDGE

Miron – Court Clerk

Mr. Arwa for Respondents

No appearance for Applicant

**ORDER**

Ruling duly read.

**ISAAC LENAOLA**

**JUDGE**

**16/3/2012**

**FURTHER ORDER**

Petition dated 15<sup>th</sup> December, 2011 is stood over for hearing on 11<sup>th</sup> June, 2012. Parties to file Submissions before then.

**ISAAC LENAOLA**

**JUDGE**

**16/3/2012**