



Sanga v Public Service Commission & another (Constitutional Petition E024 of 2022) [2024] KEHC 8406 (KLR) (12 July 2024) (Ruling)

Neutral citation: [2024] KEHC 8406 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CONSTITUTIONAL PETITION E024 OF 2022**

OA SEWE, J

JULY 12, 2024

**IN THE MATTER OF THE PREAMBLE AND ARTICLES 2, 3, 10,
19, 20, 21, 22, 23, 41, 43, 47, 50(1), 159(1), 165 (3), 232, 233, 234,
248, 258 AND 259 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF THE PUBLIC SERVICE
COMMISSION ACT, NO. 10 OF 2017, LAWS OF KENYA**

AND

IN THE MATTER OF THE UNIVERSITIES ACT, NO. 42 OF 2012, LAWS OF KENYA

AND

IN THE MATTER OF VACANT POSITIONS IN PUBLIC UNIVERSITIES

BETWEEN

BARAWA SANGA PETITIONER

AND

THE PUBLIC SERVICE COMMISSION 1ST RESPONDENT

MAASAI MARA UNIVERSITY 2ND RESPONDENT

RULING

1 The petitioner, Barawa Sanga, is a resident of Mombasa. He described himself as a person with an obligation to respect, uphold and defend the Constitution in terms of Article 3. He accordingly filed this Petition in the public interest on 21st June 2022 seeking the following reliefs, among others:



- (a) A declaration that the act of the Public Service Commission in inviting applications for the position of Deputy Vice Chancellor (Administration, Finance and Strategy) for Maasai Mara University is invalid within the meaning of Article 2(4) of the Constitution.
 - (b) A declaration that the decision of the 1st respondent to advertise and invite applications for the position of Deputy Vice Chancellor (Administration, Finance and Strategy) for Maasai Mara University is a violation of Article 234(2)(a)(i) and (ii) of the Constitution, Sections 26, 27, 28 and 29 of the Public Service Commission Act and Section 63 of the Universities Act and such advertisement and invitation is invalid within the meaning of Article 2(4) of the Constitution of Kenya.
 - (c) An order of Certiorari to bring into this Court and quash the decision of the 1st respondent to advertise and invite applications for the position of Deputy Vice Chancellor (Administration, Finance and Strategy) for Maasai Mara University.
 - (d) An order of prohibition prohibiting the respondents from shortlisting, interviewing and or taking any other decision in respect to the received applications for the position of Maasai Mara University Deputy Vice Chancellor (Administration, Finance and Strategy) arising from the 1st respondent's invitations which was indicated to close at 5 p.m. on 30th May 2022.
 - (e) A declaration that the invitation for applications for the position of Deputy Vice Chancellor (Administration, Finance and Strategy) in the circumstances of this case is a violation of the right to fair labour practices of the holder of that office who has a pending appeal and includes a violation of the values and principles of public service of fair competition and merit as the basis of appointments and promotions as well as being afforded adequate opportunities for appointment, training and advancement.
- 2 Concomitantly, the petitioner filed a Notice of Motion dated 16th June 2022 seeking conservatory orders pending the hearing and determination of the application as well as the Petition. Upon interim orders being granted on 28th June 2022, the 1st respondent filed a Notice of Preliminary Objection dated 18th July 2022 on 19th September 2022 contesting the jurisdiction of the Court to handle either the application or the Petition. Likewise, the 2nd respondent filed a Notice of Preliminary Objection on 4th November 2022. Directions were then given that the respondents' Preliminary Objections be canvassed by way of written submissions and timelines given for that purpose. As of 10th July 2023 when the matter was reserved for ruling, the petitioner had not complied.
- 3 The 1st respondent's Preliminary Objection was premised on the grounds that:
- (a) The Court lacks jurisdiction to hear and determine the matter.
 - (b) The petitioner lacks the locus standi to bring this Petition.
- 4 Similarly, the 2nd respondent challenged the application and the Petition on the following main grounds:
- (a) That, as the matter herein relates to employment as per Article 162(2) of the Constitution, the same is exclusively the preserve of the Employment and Labour Relations Court; and therefore this Court lacks jurisdiction to hear and determine the same.
 - (b) That the Court does not have the territorial jurisdiction to hear and determine the Petition since the cause of action, if any, arose within Narok County where the 2nd respondent is situated and carries on its activities.



- (c) That the Petition falls short of the test and threshold established by the Court of Appeal in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others* 2013 eKLR, and as such is incompetent, bad in law and deserves to be dismissed forthwith with costs.
- (d) That the instant Petition is res judicata the former suits, namely: Nairobi ELRC Misc. Application No. 52 of 2020, Nakuru ELRC No. 75 of 2019: *Prof. Mohammed Abdille v Maasai Mara University & Another* and Nairobi Civil Appeal (Application) No. E191 of 2021: *Prof Mohammed Abdille v Okiya Omtatah Okiiti & Another*.
- 5 In its written submissions dated 24th April 2023, the 2nd respondent proposed the following issues for determination:
- (a) Whether the Petition is res judicata;
- (b) Whether the Court has jurisdiction to entertain the instant Petition;
- (c) Whether the Notice of Preliminary Objection dated 31st October 2022 is meritorious; and
- (d) Whether costs should issue.
- 6 The 2nd applicant reiterated the factual background of the application and emphasized the fact that the issues raised in the Petition have been raised and determined in previous suits, namely, Nairobi ELRC Misc. Application No. 52 of 2020, Nakuru ELRC No. 75 of 2019: *Prof. Mohammed Abdille v Maasai Mara University & Another* and Nairobi Civil Appeal (Application) No. E191 of 2021: *Prof Mohammed Abdille v Okiya Omtatah Okiiti & Another*. Hence, the 2nd respondent placed reliance on Section 7 of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya, and the cases of *John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others* 2015 eKLR and *Okiya Omtatah Okiiti v Communications Authority of Kenya & 14 Others* 2015 eKLR, among other authorities, in urging the Court to find that the Petition is an abuse of the process of the Court.
- 7 Other than res judicata, the 2nd respondent reiterated all the other grounds set out in its Notice of Preliminary Objection and submitted, on the authority of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* 1969 EA 696, that its Preliminary Objection qualifies on all aspects and raises pure points of law; and therefore that justification has been shown for the dismissal of the Petition with costs.
- 8 I have given careful consideration to the grounds raised in the Notices of Preliminary Objection filed herein in the light of the pleadings thus far filed by the parties. I have likewise considered the written submissions as well as the useful authorities cited by counsel for respondents. As was well-explicated in *Mukisa Biscuits Manufacturers Ltd v West End Distributors Ltd* (supra), a preliminary objection consists of:
- ...a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit, to refer the dispute to arbitration.”
- 9 Accordingly, a Preliminary Objection ought not to be raised where reliance is placed on disputed facts which are yet to be proved; or where, to arrive at its determination on the preliminary points raised,



the Court must embark on an inquiry to ascertain the underlying facts. In this regard, the expressions of Sir Newbold, P. in the Mukisa Biscuits Case are apt. Here is what he had to say:

A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually raised 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.”

10 With that in mind, I have considered the grounds set out in the respondents’ Notices of Preliminary Objection. There is no gainsaying that res judicata is a plea that goes to the jurisdiction of the Court, and which, if successfully raised, has the potential of disposing of the entire suit; for Section 7 of the Civil Procedure Act, states:

No Court shall try any suit or issue in which the matter in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title...and has been heard and finally decided by such Court.”

11 However, the question as to whether or not the issues arising herein were the same issues that arose in the previous suits is something that cannot be determined on the basis of the averments set out in the Petition. Indeed, it is evident from the submissions of the 2nd respondent that heavy reliance was placed by it on the 2nd respondent’s Replying Affidavit and the documents annexed thereto, which include the decisions made in the previous suits. This is evident at paragraphs 2, 5, 6,7, 8 and 11 of the 2nd respondent’s written submissions.

12 It is therefore plain that the issue of res judicata was wrongly taken by way of a preliminary objection. In this regard, I adopt the words of Hon. Ojwang, J. (as he then was) in *Oraro v Mbaja* 2005 1 KLR 141 that:

...The principle is abundantly clear. A "preliminary objection" correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed...Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence..."

13 The second issue raised by the respondents by way of Preliminary Objection is whether the Petition complies with *Anarita Karimi Njeru v Republic* 1976-1980 KLR 1272 in terms of specificity. In that case, the Court of Appeal held:

...if 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 a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

14 A perusal of the Petition reveals that the petitioner did set out in detail the capacity in which he has approached the Court, the applicable provisions of the Constitution which he alleges to have been



infringed, the exact nature of the alleged denial, violation, infringement or threats of contraventions alleged, as well as the provisions pursuant to which he seeks relief. Moreover, the exact nature of the remedies sought were also set out by the petitioner at paragraph 5. Accordingly, the Petition cannot be faulted on the ground of specificity.

- 15 In this respect, I am in agreement with the position taken by Hon. Odunga, J. in *Michael Osundwa Sakwa v Chief Justice and President of the Supreme Court of Kenya & Another* 2016 eKLR that:

On the issue whether this Court can determine the constitutional issues raised without compliance with the requirements stipulated in *Anarita Karimi Njeru vs. Attorney General* (supra), it is my view that the said decision must now be read in light of the provisions of Article 22(3)(b) and (d) of the *Constitution* under which the Chief Justice is enjoined to make rules providing for the court proceedings which satisfy the criteria that formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation and that the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities. Whereas it is prudent that the applicant ought to set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed, to dismiss a petition merely because these requirements are not adhered to would in my view defeat the spirit of Article 22(3)(b) under which these proceedings may even be commenced on the basis of informal documentation...”

- 16 And, in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others* 2013 eKLR the Court of Appeal held that:

We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.”

- 17 I therefore find no merit on that ground. Accordingly, the only valid point for determination is whether the Court has jurisdiction to hear and determine this Petition.

- 18 Simply put, jurisdiction is the power that a court of law has to make decisions and without it, a court is required to down its tools. The Supreme Court in the case of *Ngugi v Commissioner of Lands; Owindo & 63 others (Interested Parties) (Petition 9 of 2019)* 2023 KESC 20 (KLR) (Civ) (31 March 2023) (Judgment) held:

36. Jurisdiction goes to the root of any cause or dispute before a court of law. A court must exercise restraint to avoid overstepping its constitutional role in order to maintain its legitimacy. If a court has no jurisdiction, a judgment rendered therein does not adjudicate the dispute. It does not bind the parties, nor can it be made the foundation of any right. It is a nullity without life or authority. In short, it is coram non iudice and amounts to a nullity...

37. It is, therefore a basic rule of procedure that jurisdiction must exist when the proceedings are initiated. Because the question of jurisdiction is so fundamental, a limitation on the authority



of the court, it can be raised at any stage of the proceedings by any party or even by the court suo motu. As a matter of practice, this court has a duty of jurisdictional inquiry to satisfy itself that it is properly seized of any matter before it.

38. It is a settled legal proposition that conferment of jurisdiction is a legislative function and it can only be conferred by the *Constitution* or statute. It cannot be conferred by judicial craft. See Samuel Kamau Macharia & another v Kenya commercial Bank & 2 others, SC Application No 2 of 2011; 2012 eKLR. Nor can parties, by consent confer on a court power it does not have.
- 19 It is therefore important for this court to first and foremost determine whether it has the requisite jurisdiction to entertain the matter herein, granted the provisions of Article 162(2)(a) as read with Article 165(5)(b) of the Constitution.
- 20 I have looked at the Petition and the facts as deposed therein are that the 2nd respondent made a recommendation for the appointment of a Vice Chancellor and Deputy Vice Chancellors. For the Deputy Vice Chancellor positions, the functions were divided into Deputy Vice-Chancellor in charge of administration, finance and planning and Deputy Vice Chancellor in charge of academic and student affairs. The petitioner explained that one Prof. Mohammed Abdille was appointed as a Deputy Vice-Chancellor in charge of administration, finance and planning in February 2019 but was suspended and thereafter summarily dismissed on the 5th March 2020. Prof. Mohammed Abdille appealed to the Ad Hoc Appeals Committee and was reinstated on the 2nd June 2020, but the decision of the Committee was quashed by the court in Judicial Review Miscellaneous Application No. 52 of 2020: Republic v Maasai Mara University Council & another; Ex parte Okiya Omtatah Okoiti.
- 21 Being aggrieved by the decision of the court in Judicial Review Miscellaneous Application No. 52 of 2020, Prof. Mohammed Abdille filed an Appeal before the Court of Appeal, vide Civil Appeal No. E371 of 2022, which is said to be pending hearing and determination. Thus, the petitioner's complaint is that, in spite of the pending appeal, the 1st respondent proceeded to advertise four (4) vacancies in three (3) public universities among them the 2nd respondent for the position of Deputy Vice-Chancellor in charge of administration, finance and strategy.
- 22 According to the petitioner, the 1st respondent has evidently abolished the position of Deputy Vice-Chancellor in charge of administration, finance and planning and created the position of Deputy Vice-Chancellor in charge of administration, finance and strategy in contravention of Article 234 (2) (a) (i) and (ii) of the Constitution. The petitioner posited that in the event of the appeal being allowed by the Court of Appeal, Professor Abdille will have no office to occupy. Thus, the petitioner contended that the abolishment of an office when there is a pending appeal is a threat to constitutionalism and the rule of law.
- 23 The petitioner further stated that the advertisement does not only violate Article 234 (2) (a) (i) and (ii) of the Constitution, but also Sections 26, 27, 28 and 29 of the *Public Service Commission Act* and Section 63 of the *Universities Act*. The Petitioner also posited that the invitation for applications for the Deputy Vice-Chancellor in charge of administration, finance and strategy violates the right to fair labour practices.
- 24 From the above facts, it is manifest that the predominant issue as evinced in the Petition, is the alleged abolition of the office of Deputy Vice Chancellor, Administration, Finance and Planning during the pendency of an appeal. That being the case, Section 2 of the *Employment Act*, as read with Sections 76 and 77 makes it plain that the question of the abolition of office is one that falls within the jurisdiction of the Employment and Labour Relations Court. Similarly, the Employment and Labour Relations



court has the jurisdiction to hear and determine issues around advertisement of vacancies. Indeed, the petitioner has relied on provisions of the law that invoke the jurisdiction of the Employment Court.

- 25 Needless to add that the Environment and Labour Relations Court has the requisite jurisdiction to determine any constitutional issues arising from the aforementioned issues. The Court of Appeal in the case of Daniel N Mugendi v Kenyatta University & 3 others 2013 eKLR, pointed out that:

...it is a basic principle in the administration of justice that once an adjudicating body finds that it has no jurisdiction to entertain a given matter, then it must there and then down its tools and proceed no more to the other parts of that matter...

...we venture to put forth the position that as we have concluded that the Industrial Court can determine industrial and labour relations matters alongside claims of fundamental rights ancillary and incident to those matters, the same should go for the Environment & Land Court, when dealing with disputes involving environment and land with any claims of breaches of fundamental rights associated with the two subjects..."

- 26 In view of the above, the Preliminary Objection dated 31st October 2022 succeeds to the extent of the question of jurisdiction of the court under Article 162(2) (b) of the Constitution. The Petition dated 16th June 2022 is, therefore, struck out.

Each party to bear their own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 12TH DAY OF JULY, 2024

OLGA SEWE

JUDGE

