



**REPUBLIC OF KENYA**

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

**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**CONSTITUTIONAL PETITION NO. E 253 OF 2020**

**IN THE MATTER OF ARTICLES 22(1), 23, 27, 47, 50(1)**

**AND 165(3) (B) (D) & (E) OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF VIOLATION OF FUNDAMENTAL RIGHT AND**

**FREEDOM UNDER ARTICLES 10, 20, 21, 27, 28, 47, 50(1) OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION**

**OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

**AND**

**IN THE MATTER OF BREACH OF SECTION 4(1) 7 96)**

**OF THE FAIR ADMINISTRATIVE ACTION ACT**

**BETWEEN**

**PETER OKENO GISORE.....PETITIONER**

**VERSUS**

**KENYATTA NATIONAL HOSPITAL.....RESPONDENT**

**RULING**

**PETITION**

1. The Petitioner through a Petition dated 19<sup>th</sup> August 2020 and supported by Supporting Affidavit sworn by Peter Okeno Gesora, the Petitioner herein, on even date seeks the following orders:-

*a) A declaration that the adverse actions taken by the Respondent in withdrawing the Petitioner's practicing rights at the Centre infringed on the Petitioner's rights under Articles 20, 27, 28, 47 and 50 of the Constitution and are therefore unconstitutional, null and void.*

*b) An order of certiorari to bring into this Honourable Court for the purpose of being quashed, the Respondent's letters dated 30 March 2020 (Ref. KNH/DCS/25/VOL.III/40) and 11 June 2020 (Ref. KNH/HR/66/A(19) issued to the Petitioner.*

*c) That in the alternative to prayer (b) above, this Honourable Court be pleased to issue an order of mandamus compelling the Respondent to forthwith withdraw, retract or vacate the letters dated 30 March 2020 (Ref. KNH/DCS/25/VOL.III/40) and 11*

June 2020 (Ref. KNH/HR/66/A(19) issued to the Petitioner.

*d) An order of permanent injunction barring the Respondent from withdrawing, removing or suspending or otherwise altering the petitioner's practicing rights in any manner not provided for in their letter of offer dated 21 March 2019 and/or by law.*

*e) A mandatory injunction to compel the Respondent to immediately rescind the decision withdrawing the Petitioner's admission rights at the Centre and reinstate him.*

*f) That this Honourable Court be pleased to award the Petitioner damages for loss of income and breach of his fundamental rights.*

*g) That this Honourable Court be pleased to order that the Respondent pay the costs of these proceedings on a full indemnity basis.*

*h) That this Honourable Court be pleased to grant any such other or further orders as it may deem just and appropriate in the circumstances.*

#### **PETITIONER'S APPLICATION**

2. The Petitioner simultaneously filed a Notice of Motion of even date seeking the following orders:-

*a) Prayer No. 1 spent.*

*b) A conservatory order be granted lifting the arbitrary and/or unlawful termination of the Petitioner's practicing rights at the Centre pending inter partes hearing and determination of this Application.*

*c) A conservatory order suspending the Respondent's letters dated 30 March 2020 (Ref. KNH/DCS/25/VOL.III/40) and 11 June 2020 (Ref. KNH/HR/66/A(19) issued to the Petitioner pending inter partes hearing and determination of this Application.*

*d) An Order do issue restraining the Respondent from withdrawing, removing or suspending or otherwise altering the Petitioner's practicing rights in any manner not provided for in their letter of offer dated 21 March 2019 and/or by law.*

*e) This Honourable Court be pleased to issue any other or such further orders for the expeditious hearing and determination of the Application and the Petition herein.*

*f) The costs of this Application be provided for.*

#### **RESPONDENT'S RESPONSE**

3. The Respondent filed response to the Petition dated 16<sup>th</sup> September 2020 together with a Replying Affidavit by Dr. Irene Inwani sworn on even date.

#### **BREIF FACTS OF PETITION**

4. The Petitioner by an application letter dated 18<sup>th</sup> February 2019, applied for grant of practising rights at the Respondent's Prime Care center (the Center) which is a strategic business unit established to argument budgetary requirements of the Respondent. The Centre affects both in-patient and out-patient health centre services.

5. The Petitioner received a letter of offer dated 21<sup>st</sup> March 2019 accepting his application for private practice at the Centre with effect from the date he would sign the said letter to signify his acceptance to the offer. The Petitioner accepted the offer on 26<sup>th</sup> March 2019 by duly signing a copy of the said letter and commenced working at the centre. The Petitioner worked until 30<sup>th</sup> March 2020 when he was served with a letter by the Respondent temporarily suspending his practicing rights at the centre, owing to "several alleged complaints" against his professional and ethical conduct.

6. The Petitioner avers that because of the seriousness of the unfounded and false allegations against him his reputation that he has painstakingly cultivated over a long period of time, as well as his name which is held in high regard by his fellow professionals in the medical industry and the wider public is at a grave risk of suffering irreparable harm.

7. The Petitioner further aver that the termination of his practising rights at the centre was unlawful, oppressive, and done in bad faith and for ulterior motives other than to advance the objective of justice.

#### **SUBMISSIONS**

8. The Petitioner filed written submission on the Notice of Motion dated 19<sup>th</sup> August 2020. The Respondent subsequently filed submissions in response dated 29<sup>th</sup> October 2020 in which the Respondent raised the issue of whether this honourable Court has jurisdiction to entertain this matter.

## ANALYSIS AND DETERMINATION

9. I have very carefully perused the Petition, the Notice of Motion, the Respondent's response and Replying affidavit and counsel rival submission and from the same the following issues arise for consideration:-

**a) Whether this Honourable Court has jurisdiction to entertain this matter?**

**b) If the Court has jurisdiction whether the Petitioner has met the threshold for granting orders sought in the Notice of Motion dated 19<sup>th</sup> August 2020?**

### **A. WHETHER THIS HONOURABLE COURT HAS JURISDICTION TO ENTERTAIN THIS MATTER?**

10. This Court is alive to the fact that whenever an issue of jurisdiction is raised the Court is obligated to deal with such issue before it can move on to deal with any other issues, as jurisdiction is everything and without it Court cannot move any further but to down its tools.

11. The grant of practising rights at the Respondents private care Centre is a privilege granted to any doctor by the Respondent to practice at the hospital. The admission rights granted to the Petitioner was to grant him rights to practice at the Respondent's private wing facility, the KPCC. The ground at issue were private law rights which could be determined through the means contemplated by the **Employment and Labour Relations Court (Procedure) Rules, 2016**. I find that it appears clearly that what the Petitioner is alleging can only be dealt with as a breach of contract under the **Employment and Labour Relations Court** and not before this Court.

12. **Article 162(2) of the Constitution** envisaged Parliament establishing courts with the status of the High Court to hear and determine disputes relating to employment and labour relations. **Article 162(3)** provides parliament shall determine the jurisdiction and functions of the courts contemplated in **clause (2)**.

13. Pursuant to **Article 162 of the Constitution of Kenya 2010**, Parliament enacted the **Employment and Labour Relations Court Act** in which the jurisdiction of the Court is set out in **Section 12** thereto. It is thereto where it is clearly provided that the Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to 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.

14. The High Court in dealing with powers of the Employment and Labour Relations Court in the Case of **Cabinet Secretary, Ministry of Mining & Another vs. National Environment management Authority & 3 Others Ex-Parte Cortex Mining Kenya Limited, JR Misc. Appl. No. 298 of 2013** the Court expressed itself as follows:-

***“The High Court’s power and authority is derived from the Constitution and where the Constitution limits the jurisdiction of the High Court, that limit is legal and proper. Therefore it is my view that such High Court Divisions cannot be equated to the Courts established pursuant to the provisions of Article 162(2) of the Constitution. In my view by specifically creating the Courts with the status of the High Court to deal with employment and labour relations disputes on one hand and environment and land disputes on the other, the people of Kenya appreciated the importance of these specialised courts.”***

15. Similarly, in **United States International University (USIU) vs. Attorney General [2012] eKLR** it was held that:-

***“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 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 and recurrence of the situation obtaining before the establishment of the current Industrial Court.”***

16. Further it was clearly stated Environment Labour Relations Court (ELRC) can determine claims of fundamental rights ancillary and incident to other matters in the case of **Daniel N. Mugendi vs. Kenyatta University & 3 Others CACA No. 6/2012 [2013] eKLR** where the Court expressed itself as hereunder:-

***“...the Industrial Court can determine industrial and labour relations matters alongside claims for fundamental rights ancillary and incident to those matters, the same should go for the environment and land court, when dealing with disputes involving environment and land with any claims of breaches of fundamental rights associated with the two subjects... In the same token we venture to put forth the position that as we have concluded that the Industrial Court can determine Industrial and labour relations matters alongside acclaims 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 fundamentals rights associated with two subjects.”***

17. In the instant Petition the Petitioner's claim is related to Employment and Relations matters alongside claim for fundamental rights ancillary and incidental to these matters, which can effectively be heard and determined by ELRC, Court, when dealing with the dispute involving Employment and Labour Relations with any claim of breaches of fundamental rights associated with the subject matter. I find that the matter should be dealt with by Employment, Labour and Relations Court.

18. *In view of the aforesaid I agree with Respondents' submissions that this court has no jurisdiction to hear and determine the issue of Employment, Labour and Relations though it can deal with the other issues. In the interest of justice I decline to proceed with the other issues and refer this matter to Employment, Labour and Relations Court for hearing and a determination of this matter.*

19. *Costs be in the cause.*

**Dated, Signed and Delivered at Nairobi on this 1<sup>st</sup> day of February, 2021.**

.....

**J. A. MAKAU**

**JUDGE**