



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT KISUMU
CONSTITUTIONAL PETITION NO. 12 OF 2014

**IN THE MATTER OF ENFORCEMENT OF THE BILL OF RIGHTS UNDER
ARTICLE 19(2), 20(1), 21(1), 23(1). (3)(a)(b)(c)(d) & (f) 48 and 165 (3) (b)(d) (i)& 4 OF THE
CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLE 27(1), (2), (4) &
ARTICLE 259 OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF SECTION 15 OF PERSONS WITH DISABILITES ACT, 2012

BETWEEN

SULEMAN ANGOLO1ST PETITIONER

THE REGISTERED OFFICIALS OF FLAMENGO COMMUNITY BASED

REHABILITATION FOR DISABLED SELF HELP GROUP 2ND PETITIONER

VERSUS

THE EXECUTIVE OFFICER, TEACHERS SERVICE COMMISSION RESPONDENT

RULING

On 18th June 2015 Suleman Angolo (the 1st Petitioner) and The Registered Officials of Flamengo Community Based Rehabilitation For Disabled Self Help Group (the 2nd Petitioner) filed a petition in the Employment and Labour Relations Court seeking declarations against the Teachers Service Commission (The Respondent) in regard to the retirement of its current secretary/Chief Executive Mr. Gabriel K. Lengoiboni and orders to restrain the subsequent filling of that position. It is their contention that Mr. Lengoiboni is a person with disability and that his right to retire at the age of 65 years has been infringed.

Together with that Petition they filed a Chamber Summons in which they seek an interim conservatory order to restrain the Respondent from conducting interviews for the position of secretary from gazettment of the nominees or their taking office pending the hearing and determination of this petition. They also want the Court to issue a declaration that the Respondent has unfairly discriminated them by advertising the vacancy in the position when indeed the holder has not reached his retirement age and denying him eligibility to apply. They also seek an order nullifying the process of application and

shortlisting of the applicants thereto as was advertised in the Kenya Dailies dated June 12th 2015 and further a mandatory order to stop the respondent frustrating the efforts of public spirited individuals who champion good governance at the Teachers Service Commission.

When the matter was placed before Maureen Onyango J, of the Employment and Labour Relations Court she recused herself on grounds that Mr. Lengoiboni, the subject of the Petition, was personally known to her and also because in her opinion this is a public interest litigation. She referred the matter to this Court for disposal.

Briefly the Petitioner's case is that they bring the petition as public spirited individuals acting in good faith – and that their reason is that Mr. Lengoiboni is a person with disability who has been retired at the age of 60 years instead of 65 years and that as such his rights under Articles 27 and 54 of the Constitution have been infringed. They place reliance on a decision of the Employment and Labour Relations Court being **Kudheha V. Association for the Physically disabled of Kenya [2013] eKLR** and a letter from Dr. Mukesh Joshi, Medical Director of Laser Eye Centre, dated May 5, 2015. Mr. Amondi Learned Advocate for the petitioners being alive to the fact that their application had been overtaken by events the position having been filled on 24th June 2015 urged this Court to issue an order to stop the nominee from taking the oath of office pending the hearing and determination of the petition. He submitted that being a constitutional commission the Respondent and indeed its officers are bound by Article 10 and especially Article 10(b) of the Constitution and they ought not to have filled the position especially after being served with this petition. He contended that Mr. Lengoiboni's right not to be discriminated has been and continues to be threatened and this Court has jurisdiction under Article 165(b) to stop further infringement. On Locus Standi, he urged this Court to be guided by the decision of the Supreme Court in **Mumo Mutemu V. Trusted Society of Human Rights Alliance & 5 Others [2014]eKLR**.

Mr. A. Situma Advocate for the Respondent vehemently opposed the application. He relied on the replying affidavit sworn by Josephine Maundu, the Respondent's Director in-charge of Human Resource Management and Development, in which it is disputed that the rights of Mr. Lengoiboni have been discriminated. Mr. Situma submitted that it has not been demonstrated Mr. Lengoiboni has a disability and that moreover Mr. Lengoiboni has not himself expressed his interest to continue in service. He submitted that one would have expected that the petitioners would have furnished this Court with a comprehensive report on Mr. Lengoiboni, A KRA Tax exempt certificate and a certificate of registration from the National Council of Persons with Disabilities all of which demonstrate that a person has a disability and hence entitled to the benefits under the Persons with Disabilities Act. He contended that nothing was adduced to prove that the respondent is gullible.

On Locus Standi he submitted that even granted that the same has been liberalized this Court should not lose sight of the fact that a contract of employment is one of a personal nature, and that whereas the applicants may mean well they cannot competently speak for Mr. Lengoiboni on whether he is interested in the position. He urged this Court to find that the Petitioners have no Locus Standi to bring this application/petition. He also wondered why this matter was brought to this Court rather than another Employment and Labour Relations Court after Onyango J, recused herself. He contended that the matter should be litigated in the correct forum. He further submitted that as the position has now been filled this application has been overtaken by events and this Court would be acting in vain if it were to grant the order sought. He contended that the Court would have no basis to grant the order to stop the new holder of the office from taking oath as the application was not amended to include that prayer.

He also took issue with the delay in bringing this application stating that Mr. Lengoiboni has been aware of his employer's intention to retire him since December 2014. Further that only a certificate of disability but not a letter from a Doctor, as was presented to this Court, that would evidence disability. He contended that even were the Court to find that the rights of Mr. Lengoiboni have been infringed damages would be an adequate remedy. He urged this Court not to allow the application.

The Petitioners have alleged that the rights of Mr. Lengoiboni under Articles 27 and 54 of the Constitution have been infringed and under Article 165(3)(b) and d(ii) of the Constitution this Court has

jurisdiction to determine whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened and to hear any question respecting the interpretation of the constitution including the determination of the question whether anything said to be done under the authority of the constitution or of any law is inconsistent with or in contravention of the constitution. The Petitioners very well recognized that the issues raised in their Petition were matters for the Employment and Labour Relations Court but when they went before that Court the Judge disqualified herself and referred the matter to this Court. By hearing the application this Court has not usurped the jurisdiction of that Court and I believe this deals adequately with the issue of jurisdiction.

So are the Petitioners entitled to the conservatory?

In **Petition NO. 16 of 2011 Center for Rights Education and Awareness (CREAW) & 7 Others** Musinga J. (as he then was) stated:-

"..... At this stage a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the Court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the constitution."

In **Muslims For Human Rights (MUHURI) & 2 Others V. Attorney General & 2 others [2011] eKLR** Ibrahim J. (as he then was) stated:-

" ... A conservatory order would enable the Court to maintain the status quo or existing situation or set of facts and circumstances so that it would be still possible that the rights and freedoms of the claimant would still be capable of protection and enforcement upon determination of the Petition and the trial was not a futile academic discourse or exercise."

In the instant case I am not persuaded that the Petitioners have demonstrated that they have a prima facie case with a likelihood of success to warrant this Court to issue a conservatory order. This is for the simple reason that whereas they bring this application on the ground that Mr. Lengoiboni is a person with disability they have not provided this Court with proof that that is so. Persons with Disabilities enjoy certain rights and benefits as provided in the Persons with Disabilities Act. These include tax exemption as provided in the Persons with Disabilities (Income Tax Deductions and Exemptions) order. To enjoy such benefits however one must be registered with the Council – The National Council for Persons with Disabilities . The same would apply in the area of retirement. One has to be registered and issued with a certificate of Disability. The letter by Dr. Mukesh Josh does not suffice to prove disability under the Act. Moreover Mr. Situma's submission that Mr. Lengoiboni's alleged disability has never been brought to the attention of his employer was not controverted. Mr. Lengoiboni has since 15th December 2014 been aware of his employer's intention to retire him on age grounds. The letter expressing this intention clearly indicates that he was to be retired at the age of 60 years. The process to fill his position was instituted

on 4th May 2015. Mr. Lengoiboni never raised any issue which brings me to the issue good faith. If the applicants were acting in good faith why did they leave it to the very last minute to bring these proceedings and on account of somebody who has himself not alleged any discrimination? I believe that is a question to be answered and determined in the petition where the issue of Locus Standi will also be dealt with. Suffice it, at this stage to say, that the petitioners/applicants have not persuaded this Court that they are entitled to an order to halt the process of filling Mr. Lengoiboni's position pending the hearing and determination of the main petition. Their application is dismissed with an order that the costs thereof shall abide the petition.

Signed, dated and delivered this 6th day of July 2015

E. N. MAINA

JUDGE

In the presence of:-

Mr. Amondi for the Petitioners

N/A for the Respondent

CC: Moses Okumu CA