



IN THE HIGH COURT OF KENYA

AT NAKURU

PETITION NO. 54 OF 2015

JOY BRENDA MASINDE.....PETITIONER

VERSUS

LAW SOCIETY OF KENYA.....1ST RESPONDENT

THE HON. THE A.G.2ND RESPONDENT

RULING

The petitioner **Joy Brenda Masinde** filed this petition dated 25/9/2015 challenging the legality of an advertisement placed in the Daily Nation Newspaper of 20th August 2015 by the **Law Society of Kenya**, the 1st respondent. In that advertisement the 1st respondent invited applications for the position of Secretary/Chief Executive Officer. Certain requirements/qualifications were included in the said advertisement, being that the applicant must hold a Bachelor of Laws Degree, be an Advocate of the High Court of Kenya of not less than ten (10) years standing and be a Certified Public Secretary of not less than five (5) years standing. Finally the applicant is required to possess experience and knowledge in management. The applicant herein challenged the requirements that an applicant for the post must be a Certified Public Secretary arguing that such a requirement is not included in Section 26(a) of the Law Society of Kenya Act 2014.

Simultaneously with the petition the petitioner did also file an application also dated 25-9-2015 seeking an interlocutory injunction to restrain the respondents from acting upon the said advertisement pending the hearing and determination of the petition. The petitioner who describes herself as an advocate of the High Court with at least 10 years standing and a member of the Law Society of Kenya argues that the additional requirement (which she deems unlawful) serves to lock out herself and others like her from applying for the position of Secretary/CEO of the Law Society of Kenya.

The High Court in Nakuru did on 25/9/2015 certify the matter as urgent and directed that the petition be served upon the respondents. On 1/10/2015 the respondents filed a Notice of Preliminary Objection, objecting to both the petition as well as the notice of motion. The court directed that the preliminary objection be disposed of by way of written submissions which were duly filed by all parties. On 4/10/2015 the court heard counsel **Prof. Ojienda** for the 1st respondent and **Mr. Kipkoech** for the petitioner in the highlighting of their written submissions. The matter is now pending for the court's ruling. The grounds upon which the preliminary objection was premised are four as follows:-

“(1) That the petition and the Notice of Motion do not comply with Rule 4 of the Constitution of Kenya (protection of Rights and Fundamental Freedoms Practice and Procedure Rules) 2013 since the petitioner has not demonstrated the violation of any rights and fundamental freedoms.

2. **That the petitioner lacks prerequisite 'locus standi' to bring an action against the 1st respondent.**
3. **That the petition is purely an employment/labour related matter thus before the wrong forum.**
4. **That the application and petition do not raise substantial questions of law to merit the intervention of this court under Article 165 of the Constitution of Kenya 2010."**

I have carefully read the written submissions filed by both parties. I have similarly carefully considered the oral submissions made by both counsel. From the above therefore three main issues arise for determination:-

1. Whether this court has jurisdiction to determine this petition;
2. Whether the petitioner is clothed with the requisite locus standi to file this petition;
3. Whether the petition raises a substantive question of law meriting the intervention of the High Court in the manner sought.

I propose to proceed to consider each issue individually.

1) JURISDICTION:

It is trite law that jurisdiction is everything. The question of jurisdiction is fundamental and goes to the very root of any matter. Any court finding itself without proper jurisdiction has no option but to down its tools immediately. In **SAMUEL KAMAU MACHARIA & ANOTHER VS KENYA COMMERCIAL BANK & 2 OTHERS [2012] KLR** the Supreme Court of Kenya in discussing the crucial question of jurisdiction held that:-

"A courts jurisdiction flows from either the Constitution or Legislation or both thus a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law the issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one of mere technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings"

In Owners of the Motor Vessel "Lilian S. -vs- Caltex Oil (Kenya) LTD 1989 KLR 1 the court adopted the definition of jurisdiction provided for in **Saunders JR (1969) Words and Phases** legally defined as follows:-

"By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited."

Counsel for the respondent submitted that the proper forum for this matter was the Employment and Labour Relations Court which is established under Article 162(2)(b) of the Constitution of Kenya. Counsel submitted that the petitioner had indicated her interest in applying for the position of Secretary/CEO of the Law Society of Kenya. Counsel further argued that the question of unfair recruitment practices is one which ought to be determined by the Employment and Labour Relations Court. He suggested that this court transfer the matter to the Employment and Labour Relations Court.

Article 162(2) of the Constitution vested in Parliament the power to establish courts with the status of High Court to determine employment and labour relations matters. To this end Parliament enacted the Industrial Court Act No. 20 of 2011. Section 12(1) of that Act vests in the Employment and Labour Relations Court jurisdiction to determine matters relating to employment and labour relations.

From its wording Section 12(1) vests the court with jurisdiction over disputes which relate to employment

and labour as between employees, employers, trade unions and employer organizations or federations. The Employment and Labour Relations Court also has jurisdiction to interpret the Constitution and enforce matters relating to breach of fundamental rights and freedoms in matters arising from disputes falling within the provisions of Section 12(1) of the **Industrial Court Act 2011**.

The petitioner herein had merely expressed an intention to apply for the advertised position. She had not yet been recruited and as such cannot be said to be an employee. Section 2 of the Industrial Court Act defines an employee as:-

“a person employed for wages or a salary and includes an apprentice and indentured learner.”

From the above definition it is quite clear that no employment relationship exists between the petitioner and the 1st respondent. A mere intention to apply for a position does not confer employee status upon the petitioner.

The matter or question in issue in this petition is the legality of the decision by the 1st respondent to introduce a qualification for the position of Secretary/CEO which is not provided by Statute being Section 26(4) of the Law Society of Kenya Act. The matter for determination is **not** a recruitment issue. Rather it is a purely constitutional issue which this court has jurisdiction to determine by virtue of Article 165(3) of the Constitution. The question is whether the 1st respondent a statutory body in any way exceeded its mandate and in so doing infringed upon the rights of the petitioner. This is not a labour dispute. I find that these are questions not for the Employment and Labour Relations Court but rather are for determination by the High Court.

2. LOCUS STANDI.

Counsel for the respondent submitted that the petition and application were flawed in that they did not comply with Rule 4 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013. Rule 4(1) of the said Rules provides as follows:-

“Where any right or fundamental freedom provided for in the Constitution is denied, violated or threatened, a person so affected, may make an application to the High Court in accordance with these rules.”

It was submitted for the respondent that the petitioner has not demonstrated precisely which of her rights had been violated and how her rights have been violated by the advertisement in question. It was further submitted that the petitioner did not have locus standi as she had not tendered any proof to show that she possessed the minimum qualifications for the post of Secretary/CEO provided for by Section 26 of the Law Society of Kenya Act i.e. the petitioner did not annex any evidenced document to prove that she was in fact an advocate of the High Court of Kenya of ten (10) years standing.

Counsel for the petitioner countered that by adding qualifications not provided for by Section 26(4) the 1st respondent was effectively discriminating against all interested candidates who possessed the minimum statutory qualification. Counsel also submitted that the petitioner has pleaded precisely the Articles of the Constitution alleged to have been so violated.

What the court is dealing with at this point is a “Preliminary Objection”. In the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors [1969] E.A. 696** the definition of a preliminary objection was clearly set out thus:-

“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication of pleadings and which if argued as a preliminary point may dispose of the suit....”

The petitioner has approached the court as a Kenyan Citizen who has an interest in applying for the advertised post. The question of her qualifications and whether they meet the minimum requirement is

not a point of law but is one of fact. In the case of **Mureithi & 2 Others (for Mbari y Mutathinu Clan) vs Attorney General [2006]1KLR 443** it was held inter alia that:-

“...Judicial Review Courts have generally adopted a very liberal approach on standing for the reason that judicial review is now regarded as an important pillar in vindicating the rule of law and constitutionalism. Thus a party who wants to challenge illegality, unreasonableness, arbitrariness, irrationality and abuse of power just to name a few interventions ought to be given a hearing by a court of law....”

In her petition and affidavit in support the petitioner has pleaded her qualifications. Admittedly she has not annexed any documents but this in my view is not a point of law as set out in the **Mukisa Biscuit** case. Rather it is a question of fact and one to which the petitioner will be put to strict proof. Further more the petitioner has invoked the High Court’s supervisory jurisdiction over public bodies and has challenged the legality of the 1st respondent added requirement that an applicant must be a Certified Public Secretary of five years standing in order to qualify for appointment as Secretary/CEO of the Law Society of Kenya. The 1st respondent is a public body whose mandate is set out by statute being the Law Society of Kenya Act. The petitioner being a Kenyan Citizen has the right to approach the court for appropriate relief whether it be on her own behalf or in the public interest. It is in the public interest to ensure that public bodies act only within their legal mandate. Therefore even without evidence of personal interest I find that the petitioner as a Citizen of Kenya does have locus standi in this matter.

DOES THE PETITION RAISE SUBSTANTIVE QUESTION OF LAW?

Counsel for the respondent submitted that the petition does not disclose a substantive question of law requiring determination by a constitutional court. He submitted that the petition was for striking out. With respect I cannot agree. Based on my above findings it is quite apparent that the question of the legality of advertisement made by the 1st respondent on 20th August 2015 is infact a substantive question of law. The question of whether a public body has acted outside of its mandate and/or outside of the law is to my mind a substantive question. It is a question which has been properly presented before the High Court for determination.

Finally it was submitted by counsel for the respondent that the application dated 25/9/2015 seeking interim injunctive relief was substantially defective as it bore no heading as it was not indicated to be either a Notice of Motion or a Chamber Summons application. The lack of a heading did not in any way prejudice the respondents. The orders sought and the grounds upon which they were premised were clear to all parties. To my mind the lack of heading is a mere technicality which given the provisions of Article 15(2)(d) of the Constitution I am inclined to overlook.

Finally I find no merit in this preliminary objection. The same is hereby dismissed in its entirety with costs to the petitioner/applicant.

Dated in Nakuru this 19th day of October 2015.

MAUREEN A. ODERO

JUDGE