



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION. NO. 327 OF 2015

**KENYA COUNCIL OF EMPLOYMENT AND MIGRATION
AGENCIES.....1STPETITIONER**

**EVANS NYAMBEGA AKUMA.....2ND
PETITIONER**

VERSUS

**THE HON.
ATTORNEYGENERAL.....RESPONDENT**

AND

**JOSEPH KIMUTAI KERING.....1ST INTERESTED
PARTY**

**LINET MIREHANI.....2ND INTERESTED
PARTY**

**DR. ANTHONY OMERIKWA.....3RD INTERESTED
PARTY**

**NATIONAL BANK OF KENYA.....4TH INTERESTED
PARTY**

**NATIONAL SOCIAL SECURITY FUND.....5TH INTERESTED
PARTY**

RULING

Introduction

1. The Petition herein was filed on the 3rd day of August 2015. The 1st Petitioner is a civil society organization. The 2nd Petitioner is a private citizen. The Petitioners state that this is a public interest litigation and they simply aim to protect members of the public.

2. The Petition alleged that the 1st, 2nd and 3rd Interested Parties had been appointed to sit on the board of the 4th Interested Party by the 5th Interested Party, yet at the time of the appointments there existed no board duly constituted which could have acted to nominate and appoint the 1st, 2nd and 3rd Interested Parties. The Petitioners further alleged that there was a lack of fair administrative action on the part of the 5th Respondent whilst appointing the 1st, 2nd and 3rd Interested Parties. The Petitioners also stated that the appointments were all void for having been conducted in breach of the Constitutional provisions. With little or no specifics or essentials, the Petitioners listed Articles 19, 20, 21, 22, 23, 35, 40, 41, 43, 47, 48, 73, 74, 75, 76, 77 and 80 of the Constitution as the Articles which the Interested Parties had violated and infringed or threatened to violate and infringe. The Petitioners also stated that the Respondent had failed to observe Chapter 6 of the Constitution.

The Preliminary Objection

3. Promptly upon service of the Petition, the 3rd and 5th Interested Parties filed a Replying Affidavit. So did the 4th Interested Party. The Respondent did not and has not responded to the Petition or to the Application. Alongside the Replying Affidavit, the 1st, 2nd and 4th Interested Parties also filed a Notice of Preliminary Objection. The Notice read as follows:
 - a. ***That the Application and the entire Petition as filed is fatally defective as it is brought before a Court that lacks jurisdiction***
 - b. ***The First Petitioner lacks the locus standi to institute the Petition on its behalf and on the 2nd Petitioner's behalf.***
4. The Preliminary Objection was urged through the parties written submissions, highlighted by counsel on 29 September 2015.
5. For the 1st, 2nd and 4th Interested Parties, Ms. Nduta urged that the appropriate forum for adjudicating the current Petition was the Industrial Court, now known as the Employment and Labour Relations Court (“**the ELRC** “). Ms. Nduta submitted that the ELRC as constituted under the Employment and Labour Relations Court Act No. 12 of 2011 was the perfect forum for the Petitioners to relay their grievances as the matter before the court was a purely employment dispute. Counsel submitted that the ELRC had jurisdiction to handle constitutional issues. Counsel relied on the case of **Rob De Jong & Another v Charles Mureithi [2012]eKLR**. Counsel then submitted that the Petitioners lacked the necessary standing to commence and sustain or prosecute the instant petition as there could not be shown or identified any nexus between the Petitioners and the alleged breaches of fundamental rights and freedoms.
6. Mr. Sisule, for the 3rd and 5th Interested Parties argued in support of the Preliminary Objection in so far as the forum was challenged. Counsel however differed with the 1st, 2nd and 4th Interested Parties’ approach. According to counsel, the appropriate forum was the Retirement Benefits Authority Tribunal constituted under Section 48 of the Retirement Benefits Act (Cap 197) Laws of Kenya .
7. To counsel, the substratum of the Petition is all about pension benefits. In these respects, counsel submitted that any dispute touching on pensions as well as the investment of pensions was left to be resolved by the tribunal constituted under the Retirement Benefits Act. Such disputes were to be handled in the first instance by the Chief Executive Officer of the Retirement Benefits Authority. The Court had no remit to handle the same save on appeal. Mr. Sisule however did not support the objection as to the Petitioners’ locus standi.
8. In reply, the Petitioners’ counsel, Mr. Malinzi Kwesiga argued that there was no merit in the Preliminary Objection. Firstly, he pointed out that the parties were not even in agreement on several factual aspects of the Petition. Secondly, he argued that there was no nexus between the ELRC and the current dispute. To Mr. Malinzi, the Petition did not involve any employment dispute. Thirdly, counsel submitted that the dispute was not about the investment of pension funds but rather it was about the appointees designated by the 5th Interested Party to manage such investments. The provisions of the Retirement Benefits Act did not consequently apply. Counsel added that the Petition was about public policy issues and public interest.
9. On the issue of locus, counsel was firm that the Petitioner had the requisite standing as the current

Petition was a public interest litigation. Counsel referred the court to both Articles 22 and 258 of the Constitution. Counsel also relied on the cases of **Gupta v President of India & Others [1982] SC 149** as well as **Kenya Council of Employment & Migration Agency v National Police Service Commission & Others [2014] eKLR** for the proposition that the approach when it came to constitutional matters was liberal and any person could move the court to ensure that the principle of constitutionalism was adhered.

Determination

10. I have read the written submissions and considered the parties' oral arguments. I have also perused the Petition itself as well as the affidavit in support thereof.
11. In my view, two issues stand out for determination. Has the court the requisite jurisdiction to hear and determine this Petition? Secondly, are the Petitioners seized with the necessary legal standing to prosecute this petition.

A question of forum non conveniens?

12. As was stated in the case of **The Lillian S [1989] KLR 1**, jurisdiction is everything. Without it the court cannot move an inch. The court must thus always be satisfied that it has jurisdiction.
13. In its strict sense, jurisdiction refers to matters that a court as an organ is competent to deal with and the reliefs it is competent to grant. Courts are only competent to deal with matters that the instrument, whether it is the Constitution or a piece of legislation, creating the court empowers the court to deal with: see **Mulla, The Code of Civil Procedure 12th Ed; Halsbury's Laws of England 4th Ed Vol 9 page 350** and **Seven Seas Technologies Ltd v Eric Chege [2014] eKLR**. As jurisdiction is a matter purely of law, it ideally does not matter if there exists a dispute on facts. The court need only address and ascertain the substratum of the Claimant's case to help determine whether there exists jurisdiction.
14. The Interested Parties' plea of *forum non conveniens* is two-fold. First, it is submitted that the appropriate forum with full jurisdiction is the ELRC established under the Employment and Labour Relations Act (Cap 234 B) Laws of Kenya. Secondly, it is submitted that the appropriate forum to adjudicate the dispute herein is the Retirement Benefits Authority Tribunal.
15. The ELRC finds its jurisdiction under Section 12 of the Employment and Labour Relations Act (Cap 234B). The said statute is clear on the jurisdiction of the Employment and Labour Relations Court.
16. It is evident that pursuant to Article 162(2) of the Constitution, the ELRC was intended to and indeed does exercise jurisdiction over matters touching generally on employment and labour relations. Section 12 of the Employment and Labour Relations Act, 2011 has proceeded to set out certain matters within the exclusive domain of the ELRC. No doubt too the court has the jurisdiction to resolve disputes arising under Article 41 of the Constitution and all other fundamental rights ancillary and incidental to employment and labour relations: see **Daniel N Mugendi v Kenyatta University & 3 Others CACA No. 6 of 2012 [2013] eKLR**
17. From my reading of the Petition and my understanding of the parties' submissions, it is not in dispute that that save for the 3rd Interested Party, there is no employer –employee engagement or association between the 5th Interested Party and any of the other parties including the Petitioners. An even closer reading of the Petition does not reveal the substratum thereof to involve a labour dispute worthy of invoking the provisions of Section 12 of the Employment and Labour Relations Act.
18. I agree with Ms. Nduta's submissions that the ELRC has jurisdiction to determine constitutional matters and issues. However, it can only be invited to determine such issues where they arise in the context of a labour dispute or within the context and province of Article 41 of the Constitution. This position of the law has been made clear by this Court in the case of **United States International University v Attorney General HCCP No 170 of 2012 [2012] eKLR**.
19. The court was confirming the position that the ELRC can determine industrial and labour relations matters alongside claims of fundamental rights ancillary and incidental to such matters. I need say no more.
20. With regard to the instant Petition, the substratum is certainly not close to the jurisdiction

anticipated by Article 162(3) of the Constitution as ensconced under Section 12 of the Employment and Labour Relations Act. The Petition seeks to challenge, albeit in a round about manner the appointment of the 1st to the 3rd Interested Parties to the 4th Interested Party's board of directors. It also seeks to challenge the appointment of the 3rd Interested Party to the helm of the 5th Interested Party, albeit in an acting capacity. It is alleged by the Petitioners that certain constitutional values and principles were not observed nor adhered to in the making of the said appointments. It is also alleged that certain fundamental rights and freedoms under the Constitution have been violated. As to whether that is true, it is not for the court to make a finding now. It must be reserved for a later date. Suffice to point out now that I am satisfied that the substratum of the dispute is not of an industrial and labour relations nature. That is merely ancillary, if at all. In my judgment, the ELRC is not and would not be the appropriate forum in the circumstances.

21. The alternate submission advanced by the Interested Parties was that the appropriate forum is the Retirement Benefits Tribunal.
22. A cursory glance at the Retirement Benefits Act will reveal that the Retirement Benefits Tribunal constituted under Section 48 of the Retirement Benefits Act is enjoined under the Act to determine issues relating to disputes between members of retirement schemes and managers, administrators, trustees and custodians of any such scheme. The dispute goes to the tribunal after it has been considered by the Chief Executive Officer of the Retirement Benefits Authority. Another set of disputes considered by the Tribunal established under the Retirement Benefits Act, are disputes prompted by any person aggrieved by a decision of the Authority or the Chief Executive Officer of the Authority.
23. My reading of the section which is relatively clear is that the disputes falling within the Tribunal's remit are limited. The tribunal is not open to every person. The person prompting it must be a member of a scheme registered by the Retirement Benefits Authority.
24. I am not satisfied that the instant dispute falls within the ambit of the provisions of Sections 46 or 48 of the Retirement Benefits Act. Neither the Respondent nor any of the Interested Parties is a manager, an administrator, a custodian or a trustee so recognized under the Retirement Benefits Act (Cap 197).
25. I conclude, flowing from the foregoing that the plea of *forum non conveniens* for want of jurisdiction is not merited. The court with the requisite jurisdiction pursuant to Article 165(3) of the Constitution is the High Court. The Petition is thus appropriately before this court for determination.

An issue of standing?

26. The Interested Parties' brief submissions were to the effect that the Petitioners lacked the requisite legal standing to commence this Petition and now prosecute it.
27. The Petitioners' riposte was that they have the requisite legal standing. Further the Petitioners contended that both Articles 22 and 258 permit the filing of Petitions seeking to protect and defend the Constitution especially where there is a violation or threat thereof. For completeness, the Petitioners also added that the Petition is a public interest claim filed on behalf of all workers who have subscribed to the 5th Interested Party. The Petition is an alarm bell intended to make sure the 5th Interested Party does not sleep on issues of proper corporate governance.
28. I intend to make the determination of this issue as short as possible. There is no controversy that the Petitioner has a right to file a petition on behalf of other parties. It has been alleged but without any inkling that the Petition was brought in bad faith and for personal gains. Secondly, I am satisfied that the Petitioner, if the action has been commenced on behalf of others need not show any personal prejudice.
29. Articles 22 (2)(b) and 258(2)(b) of the Constitution grant standing to third parties to institute proceedings on behalf of another party in relation to violation of human rights and other constitutional violations. An association acting in the interest of one or more of its members may also commence proceedings. The fairly universal Article 258, further allows every person the right to institute court proceedings claiming that the Constitution has been contravened or is threatened with contravention. Both Articles 22 and 258 of the Constitution allow persons with or without direct interest in a matter to approach the courts. The rather progressive Article 258 has ensured to

a greater extent that access to justice for all persons as required under Article 48 is achieved with minimal restrictions as well. With caution, the standard guide should be that access to justice ought not to be impeded by a requirement as to standing and Article 258 should always be liberally interpreted with a view to admitting constitutional petitions rather than locking them out : see **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others [2015]eKLR**

30. In the circumstances of this Petition, I am not convinced that the Petitioner is a mere busybody. There would certainly be a genuine concern by members of the public over the appointment of board members to the 5th Interested Party, more so as the 5th Interested Party is not a private corporate entity. I am also not satisfied that the Petition was prompted by personal gain. Rather, I am satisfied that the Petitioner has the requisite capacity and standing to sustain the instant Petition.

Disposal

31. I would dismiss the objections raised by the Interested Party as to forum as well as standing. They are so dismissed.

32. The costs of the Preliminary Objection will however abide the outcome of the Petition.

33. Orders accordingly.

Dated, Signed and Delivered at Nairobi this 7th day of October 2015.

J. L. ONGUTO

JUDGE