



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

NAIROBI INDUSTRIAL COURT

CAUSE NO.36 OF 2014

(Before D.K.N Marete)

KENYA COUNCIL OF

EMPLOYMENT MIGRATION AGENCY.....CLAIMANT

VERSUS

NATIONAL

POLICE SERVICE COMMISSION & 9 OTHERS.....RESPONDENTS

RULING

This is an application dated 17th January, 2014 and filed on 20th instant. It seeks the following orders of court;

1. *THAT an injunction do issue to restrain the respondents their agents and or their servants from interfering discussing, sacking or vetting or further mentioning anything to do with vetting National Police Service, vetting process National Police Service Commission, process stage 1, process stage II, process stage III*

Review and Appeal, Vetting panel Vetting Panel II, All commission, Vetting panel III, Vetting panel IV county time frame critical issue challenges and risks National Police Service Commission draft vetting toolkit, Vetting process frequently asked question National Police Service Commission until the matter is heard and determined inter parties.

2. *THAT the defendant be restrained from further victimizing, orchestrating the National Police Service Officers into psychological tormenting exposure of their private life to the public without the members of the panel themselves being vetted first by a selection panel and representatives of the interior ministry, in order to advertise and select the vetting team who will also dissolve themselves later and leave the selected vetted team to start the vetting the police officers, whose team should consist of professionals, businessmen, church members, youths, women disability and regional balancing gender, as to the vetting of judges and magistrates board was constituted.*
3. *THAT most members have themselves been involved in corruption and land grabbing, procurement mega deals kickbacks, and therefore incompetent to vet others in the same issues on vetting tools and as provided by Articles 10,27,47,50 and 232 of the constitution and public officers Ethics 2003 Revised 2009.*

and is grounded on the following

- a. *THAT the respondents have started **dismissing, sacking** officers of the National Police Service and preventing them from accessing and enjoying their quite possession of their jobs and their families will end up committing suicide, tormented and instilling psychological effects without due regard of pre counselling and post counselling as such was evident when the Government retrenched covers years back same to Telkom Kenya.*
- b. *The Respondents have been able to attend vetting but questions fielded to them by the chairman is of being a judge and prosecutor without due separation of powers and fair Administrative Action since all NPSC commission appears in all panelist including Appeals tribunal. The tribunal is not properly established according to judicial rules.*
- c. *THAT if the Respondent are not stopped from encroaching, asking for bribes many officers will or are likely to loss which cannot be compensated by the dismissal damages.*

The 1st, 2nd, 3rd, 4th, 6th, 7th and 8th Respondents vide Grounds of opposition dated 20th February, 2014 oppose the application and pray that the same be dismissed with costs to the 1st – 8th respondents.

1. *THAT the ongoing vetting of police officers is a legal requirement under Article 246(3) (a) (b) and (c) the constitution and the provisions of Section 7 of the National Police Service Act No.11 of 2011 which is an act passed by the members of parliament as thus reflect the aspiration of citizen of Kenya and 1st respondent has no choice but to comply with its provisions.*
2. *THAT article 246(3) (c) of the constitution gives mandate to the National Police Service commission to perform any other function as prescribed by national legislation.*
3. *THAT Section 10(3) (a) and 28 of the National Police Service Commission act 2011 gives the power exclusively to the National Police Service Commission to make legislation and regulation.*
4. *THAT 2nd, 3rd, 4th, 6th and 7th are wrong enjoined in this suit as there no any specific claim against them.(sic)*
5. *THAT the claimant claims does not relate to any employment issue and therefore the industrial court lack jurisdiction to entertain it.*
6. *THAT suit is frivolous, vexatious, and bad in law and an abuse of court process and should be dismissed with costs.*
7. *THAT the claimant claim lack locus standi to bring this suit on behalf of the police officers who are not members of the claimant association.*
8. *THAT the suit herein goes against Article 253 of the Constitution and Section 23(1) of National Police Service Commission Act.*

This is further buttressed by replying affidavit by the respondent sworn on 20th February, 2014.

The matter came to court severally until the 27th March, 2014 when the 10th Applicant prosecuted the application for cessation of inclusion in the proceedings. The claimant/applicant and the other respondents did not object and this was allowed by court. On subsequent dates the intended interest party came in and was without objection joined to the suit.

On 9th April,2014, the subject matter of this preliminary objection was raised and the parties agreed on a disposal of the same by way of written submissions and therefore today's ruling. The genesis of the preliminary objection is as follows;

1. *That the claimant claim does not relate to any employment issue and therefore industrial court lacks jurisdiction to entertain it. (sic)*
2. *That the suit is frivolous, vexatious and bad in law and an abuse of the court process and should be dismissed with costs.*
3. *The claimant lack (sic) locus standi to bring this suit on behalf of the police officers who are not members of the claimant association.*
4. *The suit herein goes against Article 253 of the Constitution and Section 23 (1) of the National Police Service Act.*
5. *That even in the suit hearing was an employment suit which is not the claimant lack the capacity to bring it on behalf of the police office (sic) as this will go against Article 22 of the Constitution.*
6. *That the suit herein is bad in law, brought in bad faith and should be dismissed with costs to the 1st to 8th respondents.*

In their written submissions, the 1st to 8th respondents recite the claim and posit that the police vetting exercise, according to the claimants is laced with illegality in that the participation of the Inspector General and two Deputy Inspector Generals as a result of conflict of interest.

The respondent identify the following issues for determination

- a. *The legality, or otherwise, of the ongoing vetting process for the serving police officers;*
- b. *whether the involvement of the members of the National Police Service Commission (NPSC) in the vetting process is illegal and/or precipitates a conflict of interest;*
- c. *Whether the law predicates the vetting of serving police officers upon the vetting of the members of the panel of the vettors;*

They therefore capitalize on and oppose the application on ground of lack of jurisdiction as expressed by the Court of Appeal , Nyarangi JA in **Owners of the Motor Vessel “Lillian S” v. Caltex Oil (Kenya) Ltd. (1989) KLR 1 (at p.14)**

“Without jurisdiction, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

The submission of the respondent is that this court as established under Article 162 (2) (a) of the Constitution of Kenya, 2010 and Section 12 of the Industrial Court Act, 2011 mandates this court to only hear and determine matters of employment and labour relations. The respondents further cite the authority of **Samuel Kamau Macharia and Another vs. Kenya Commercial Bank Ltd and 2 others 2012 eKLR** where it was observed as follows;

“A court's 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. Where the Constitution exhaustively provides for Jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor, can parliament confer jurisdiction upon a court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon parliament to set the jurisdiction of the court of law or tribunal, the legislature would be within its authority to prescribe the Jurisdiction of such court... by statute law.”

The respondent in the penultimate submit that the vetting process is lawful and constitutional as it is in compliance on both the constitution and the Employment Act, 2007. They therefore pray that the preliminary objection be upheld and the application and suit be dismissed.

The claimant in written submissions posits that all persons, natural or juristic are duty bound to uphold and defend the constitution. Further, Article 258 of the Constitution confers jurisdiction to all person where the Constitution has been contravened or is threatened with such contravention. Further, *locus standi* and therefore jurisdiction has been transformed by Articles 22 and 258 of the Constitution of Kenya, 2010 whereby Article 22 (3) has empowered the Chief Justice to make rules for the realisation of rights and fundamental freedoms. The Chief Justice has thereon made these rules and therefore the locus and jurisdiction to act and initiate this cause.

The claimant further seeks to rely on the authority of **S.P. Gupta v. President of India and others air (1982) SC 149** where it was observed as follows;

“... that the view has therefore been taken by the courts in many decisions that when there is a public wrong or public inquiry caused by an act or omission of the State or a public (body) all which is contrary to the public acting bona fide and having efficient interest can maintain an acting for redress is relaxed and a broad rule is evolved which gives who is not a mere busy body or meddling, interloper but who has sufficient interest in the proceedings”.

The claimant/applicant further sought to rely on the authority of **Priscilla Nyokabi Kinyua versus Attorney General and another, 2010 eKLR** where the court emphasized on a broad approach and interpretation on *locus standi* in order to realize and fulfill the constitutional courts mandate to uphold the constitution. The subject matter individually affects police officer constitutional rights and therefore this intervention.

The interested party on the other hand opposes the filing of this suit on the grounds of the courts lack of jurisdiction to act as such. It embraces, supports and associates with the sentiments of the respondents that Article 162 (2) (a) and Section 12(1) of the Industrial Court Act, 2011 deny this court jurisdiction to determine the issues raised in the application and suit.

The interested party seeks to rely on the authority of **Joshua Karianjahi Waiganjo vs. Attorney-General & 4 others (2013) eKLR** where the court made the following observations;

“Firstly, the petitioner to file this matter on behalf of Waiganjo, yet there is no nexus between the petitioner and Waiganjo demonstrated in the deposition. I appreciate that the, Article 22(1) and (2) has expanded the horizons of locus standi in matters of enforcement of fundamental rights and freedoms but even where one purports to enforce the rights of another there must be a nexus between the parties particularly where a case has a direct effect on the person whose rights are affected. After all, Article 22(2) (a) entitles a person to act, “on behalf of another person who cannot act in their own name.” it is not clear that Waiganjo cannot act in his own name.”

In the instant case, the interested party submits, there is no demonstration of nexus *inter parties*.

The interested party further relies on the authority of **United States International University (USIU) vs. Attorney General (2012) eKLR** where the court made the following observations on the subject of breach of fundamental rights and freedoms;

... The Industrial Court is a specialist court to deal with employment and labour relations matters. By virtue of Article 162(3), Section 12 of the Industrial Court Act, 2011 has set out matters within the exclusive domain of that court. Since the court is of the status of the High Court, it must have the jurisdiction to enforce labour rights in Article 41 and the jurisdiction to interpret the constitution and fundamental rights and freedoms is incidental to the exercise of jurisdiction over matters within its exclusive domain. In any matter falling within the provisions of Section 12 of the Industrial Court Act, then the Industrial Court has jurisdiction to enforce not

only Article 41 rights but also fundamental rights ancillary and incidental to the employment and labour relations including interpretation of the Constitution within a matter before it.”

In light of what I have stated, I find and hold that the Industrial Court as constituted under the Industrial Court Act, 2011 as court with the status of the High Court is competent to interpret the Constitution and enforce matters relating to breach of fundamental rights and freedoms in matters from disputes falling within the provisions of Section 12 of the Industrial Court Act, 2011”

The Interested Party continues;

In addition to Cap 185C, Parliament enacted the National Police Service Act, Cap 84, Laws of Kenya in order to give effect to Article 238, 239,243,244 and 247 of the Constitution. In particular, Section 7 of Cap 84 provides that;

- 1. All person who were immediately before the commencement of this Act, officers or employees of the Kenya Police Force and the Administration Police Force, established under the Police Act and the Administration Police Act (now repealed), including officers working with the Criminal Investigations Department, shall upon commencement of this Act become members of the service in accordance with the Constitution and this Act;*
- 2. Notwithstanding subsection (1), all officers shall undergo vetting by the Commission to assess their suitability and competence; (emphasis ours)*
- 3. The Commission shall discontinue the service of any police officer who fails in the vetting referred to under Subsection (2).*

The vetting process is totally grounded in the law and constitution. It not only touches on matters falling within Section 12 of the Industrial court Act but also delves onto Article 41 of the Constitution of Kenya, 2010. Even in the absence of this, which is not the case here, the vetting process would rightly be associated with rights ancillary and incidental to employment and labour relations.

Again, situations shall arise where the subject matter of litigation like in the instant case, surpasses the borderline of one area and discipline and moves onto the other. It is not in dispute that this cause is a constitutional matter. It falls within the Bill of Rights and traverses social economic rights which include appropriate labour rights as enshrined under Article 41 of the constitution. A matter of police vetting depending on the issues raised, can be managed by either this court or the constitutional court. The critical aspect is for the court to scrutinize the subject matter of the suit in a determination of where to place the same. This is the case in ambivalent situations like we now find ourselves. This suit therefore well fits into place and any challenge to the same on grounds of lack of jurisdiction is anomalous and should not be taken seriously.

This matter raises cogent constitutional issues that must be thrashed effectively in order to come out clear. The issue for consideration and determination indeed are;

1. Whether Article 162(2) (a) and Section 12(1) of the Constitution of Kenya 2010 and Industrial Court Act, 2011 ousts this court’s jurisdiction in this suit.
2. Whether Articles 258 and 22 of the Constitution confer jurisdiction onto the claimant/applicant in this cause?

To answer the 1st issue for consideration, one would have to interrogate vetting as a constitutional process and its relationship to employment. It is not in dispute that vetting of officers, public or otherwise touches on their constitutional and employment rights. This is because a determination of the vetting process at the close of the day determines the employment rights of the vetted officers one way or the other. Vetting therefore becomes a constitutional employment function and an issue that can rightly be attributed to Article 41 of the Constitution of Kenya, 2010. Article 162 (2) (a), 162 (3) and 165(5)

therefore come out to define the constitution jurisdiction of the Industrial Court of Kenya. These provide as follows;

162(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-

“162(2)(a) employment and labour relations;

(b)

(3) parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2)

165(5) The High court shall not have jurisdiction in respect of matters -

(a) reserved for the exclusive jurisdiction of the Supreme court under this constitution; or

(b) falling within the jurisdiction of the courts contemplated in Article 162(2)”

I disassociate with the submissions by the respondents and Interested Party that this court lacks jurisdiction to deal with the subject matter as presented in this cause. I further disassociate with the contention and submission by the Interested Party that the Claimant lacks the necessary nexus to the parties directly affected by the subject matter. The direct impact on the subject matter befalls individual police officers who are employees of the National Police Service Commission and would be subjected to vetting. However, one would appreciate the greater public interest that this matter entails and therefore the involvement and reliance on Article 22 of the constitution by the claimant. This is a matter of immense public importance which qualifies the intervention of the claimant.

The framing of the preliminary objection sounds like an application in these proceedings. I must emphasize that a preliminary objection dwells on strict matters of law and must be restrained to such. This was observed in the authority of **Mukhisa Biscuits Co. Ltd. v. West End Distributors Ltd**, supra, where the court observed as follows;

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point 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.”

Further,

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued 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 the judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.”

This is largely lacking in this exaggerated and worded preliminary objection. For these reasons, I feel inclined to dismiss this preliminary objection with costs to the Claimant.

Delivered, dated and signed this 5th day of December 2014.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Evans Nyambega Akuma for the claimants instructed by Kenya Council of Employment Migration Agency for the claimant.
2. Mr. Ojwang instructed by the State Law Office for the Respondents .
3. Mr. Nyasimi instructed by Independent Medical Legal Unit for the Interested Party.