



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

PETITION NO 446 OF 2013

BETWEEN

OKIYA OMTATAH OKOITL.....1ST PETITIONER

WYCLIFE GISEBE

NYAKINA.....2ND PETITIONER

AND

THE ATTORNEY GENERAL.....1ST RESPONDENT

THE PRINCIPAL SECRETARY, MINISTRY OF INTERIOR

AND CO-ORDINATION OF NATIONAL GOVERNMENT....2ND RESPONDENT

THE BOARD OF GOVERNORS

THE NATIONAL POLICE SERVICE COMMISSION.....3RD RESPONDENT

THE CORPORATION KENYA LTD.....4TH RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....5TH RESPONDENT

THE INSPECTOR GENERAL OF THE NATIONAL

POLICE SERVICE.....6TH RESPONDENT

THE ETHICS AND ANTI-CORRUPTION COMMISSION...7TH RESPONDENT

THE PUBLIC PROCUREMENT ADMINISTRATIVE

REVIEW BOARD.....8TH RESPONDENT

TETRA RADIO LIMITED.....INTERESTED PARTY

RULING

1. Before me is the Petitioner's Preliminary Objection dated 25th October 2013, raising one point of law; that the 1st Respondent, the Attorney General, cannot represent an independent Commission, the 3rd Respondent (the National Police Service Commission) and a body corporate, the Public Procurement Administrative Review Board, the 8th Respondent, in these or any other Court proceedings.
2. Mr. Omtatah, the 1st Petitioner appearing in person contends that the National Police Service Commission is an independent Commission, a body corporate with perpetual succession and capable of suing and being sued in its corporate name as stipulated by **Article 253** of the **Constitution**. He thus claims that as such, the 3rd Respondent is accountable as an entity and not as part of the National Government as envisaged under **Article 249** of the **Constitution** and further that it has been given a free hand to exercise its immense powers as stipulated by **Article 252** of the **Constitution**.
3. He submits that following from the above, the 3rd Respondent has no capacity to represent the 3rd Respondent, and claims that independent commissions, are not part of the National Government and that the Commissions and Independent Offices operate as the 'Fourth Arm of Government'. That it is through the Commissions and Independent Offices, that the Executive has been re-designed so as to make them accountable to the other arms of government thus ensuring a functional separation of power. He further alleges that no legal body or authority can lawfully and legitimately ignore and/or usurp the mandate and/or curtail the operational autonomy of Commissions and independent offices.
4. As regards the representation of the 8th Respondent, the Public Procurement Administrative Review Board by the AG, Mr. Omtatah contends that it is a body corporate established under the **Public Procurement and Disposal Act**, and as such it cannot be represented by the Attorney-General for the same reasons as those advanced against the representation of Commissions and Independent offices but has added a rider that the Attorney-General can only appear as a friend of the Court in civil suits where the Government has not been sued as is stipulated by **Article 156(5)** of the **Constitution**.
5. It was therefore Mr. Omtatah's position that the current practice dictates that Commissions such as the 7th Respondent and the Ethics and Anti-Corruption Commission, the Independent Electoral and Boundaries Commission, the Parliamentary Service Commission, the Teachers Service Commission, the Salaries and Remuneration Commission and corporate bodies such as the Sugar Board of Kenya should represent themselves in court, and that the Attorney-General has no capacity in law to represent them. He even gave an example of ***Petition No. 496 of 2013*** where the Commission for the Implementation of the Commission has sued the Attorney-General and in his mind that situation can be avoided if the Commissions act for themselves or appoint counsel to act for them.
6. He thus urged the court to stop the Attorney-General from representing the 3rd and 8th Respondents in this matter and hold him to be in contempt of Court together with the 3rd and 8th Respondents for their failure to honour several summonses issued by the Court for them to appear in the proceedings herein.

1st, 2nd, 6th and 8th Respondents case

7. Mr. Njoroge represented the case for the 1st, 2nd, 6th and 8th Respondents. It was his submission that **Article 156** of the **Constitution** underlines the fact that the Attorney-General must look to the public interest in his actions and **Section 34** of the **Government Proceedings Act** allows the Attorney-General to participate in any proceedings where the government is involved. And that all Commissions that draw funds from the government must be represented by the Attorney-General. He submitted that public interest in his actions remain the same before and in the present

Constitution and relied on the decisions in *Attorney General v Kenya Commercial Bank Ltd Civil suit No. 329 of 2001*, *Geoffrey Ndirangu v The Chairman of Mariakani Jua Kali Association, Civil Case No. 33 of 2004*, *Albert Mulindi v Public Service Commission & Anor, Petition No. 233 of 2013* and *Teachers Service Commission v Kenya Union of Post Primary Education Teachers Petition No. 22 of 2013* to buttress his position.

8. Mr. Mwenesi for the Interested Party did not make submissions on the Preliminary Objection and Mr. Kenneth for the 4th Respondent supported Mr. Njoroge's submissions. The 5th Respondent was not represented in the matter.

Findings

9. The singular issue for determination in this ruling is whether the Attorney-General can represent the National Police Commission, an Independent Commission.

10. It is uncontroverted that the 3rd Respondent, The National Police Commission is an independent Commission established under **Article 248(2)** of the **Constitution**. It is also clear under **Article 253**, that independent Commissions such as the 3rd Respondent, is a body corporate with perpetual succession and a seal and is capable of suing and being sued in its corporate name. To that extent it is clear to my mind that these independent commissions can sue and be sued on their own name. **But can the Attorney General now properly defend the 3rd Respondent in this and other proceedings?**

11. The office of the Attorney General is established under **Article 156** of the **Constitution** with the following functions *inter-alia*;

“1) ...

2) ...

3) ...

4) ***The Attorney-General-***

a) is the principal legal adviser to the Government;

b) shall represent the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings; and

c) shall perform any other functions conferred on the office by an Act of Parliament or by the President.”

12. Parliament pursuant to its functions as provided by **Article 156(4)(c)** enacted the **Office of the Attorney General Act of 2012** and **Section 5(1)** states that the functions of that office are as follows;

a) advising Government Ministries, Departments, Constitutional Commissions and State Corporations on legislative and other legal matters;

b) advising the Government on all matters relating to the Constitution, international law, human rights, consumer protection and legal aid;

(c) negotiating, drafting, vetting and interpreting local and international documents, agreements and treaties for and on behalf of the Government and its agencies;

(d) coordinating reporting obligations to international human rights treaty bodies to which

Kenya is a member or on any matter which member States are required to report;

(e) drafting legislative proposals for the Government and advising the Government and its agencies on legislative and other legal matters;

(f) reviewing and overseeing legal matters pertaining to the registration of companies, partnerships, business names, societies, adoptions, marriages, charities, chattels, hire Functions of the purchase and coat of arms;

(g) reviewing and overseeing legal matters pertaining to the administration of estates and trusts;

(h) in consultation with the Law Society of Kenya, advising the Government on the regulation of the legal profession;

(i) representing the national Government in all civil and constitutional matters in accordance with the Government Proceedings Act;

(j) representing the Government in matters before foreign courts and tribunals; and

(k) performing any function as may be necessary for the effective discharge of the duties and the exercise of the powers of the Attorney-General”

13. The Constitution and the enabling Act have deliberately limited the role of the Attorney-General to that of advise and representation of National Government in Court proceedings other than civil proceedings. This means for example that County Governments may not have the benefit of that advise and representation for the simple reason that they are not part of the National Government. But what is government?

Black's Law Dictionary, 8th Edition defines the term “government” as being;

“1) The structure of principles and rules determining how a State or Organization is regulated.

2) The sovereign power in a Nation or State.

3) An Organization through which a body of people exercises political authority; the machinery by which sovereign power is expressed.”

Taking the second definition of “*the sovereign power in a nation or state*” as the starting point, **Article 1** of the **Constitution** provides as follows;

“1) ...

2) ...

3) Sovereign power under this Constitution is delegated to the following State organs, which shall perform their functions in accordance with this constitution-

a) Parliament and the legislative assemblies in the county government;

b) the national executive and the executive structures in the county governments; and

c) the Judiciary and independent tribunals.”

“State” is defined at **Article 260** as “when used as a noun, means the collectivity of offices,

organs and other entities comprising the government of the Republic of Kenya under this Constitution”.

A “State organ” is then defined to mean “ ... a commission, office, agency or other body established by this Constitution” and “state office” includes “holder of an independent office or commission”

Article 248 of the **Constitution** creates Commissions some of which have been named above and also creates independent offices which are the Auditor-General and the Controller of Budget and taking all the definitions above together, it is difficult to understand the worth of the objection raised. One cannot reasonably fail to note that Commissions and Independent Offices are part of the national governmental structure of the State of Kenya and to say otherwise would be absurd.

14. It is also my view that the **Constitution 2010** has, created a structure of governance that has many institutions that draw their funds from the tax-payer and the law has not stopped them from seeking legal advice and representation by the Attorney General at no cost. I also heard the Petitioner to be saying that because the 3rd and 8th Respondents are body corporates, then for that reason alone they cannot be represented in Court by the Attorney-General. He has obviously misunderstood the law; suing and being sued in one's corporate name is different from representation. If the Attorney-General were to actually file a suit in his own name on behalf of a Commission or State agency then that would obviously be an error in judgment and that is why Ringera J. in Attorney-General vs Kenya Commercial Bank (supra) had this to say;-

“Indeed to accept the Submissions of the Attorney-General to the contrary would be tantamount to judicial amendment of the clear words of Section 3(1) of the Irrigation Act which provide that the Irrigation Board shall be a body corporate having perpetual succession and a common seal, with power to sue and be sued, and doing all things necessary for the proper performance of its duties and the discharge of its functions under the Act. Such a naked usurpation of the legislative function, does not appeal to me. I think it is a temptation to be firmly resisted. Furthermore, even if the matter were conceived of as perfectly acceptable judicial interpretation, it is an interpretation. I would shirk from as it would lead to uncertainty in the procedural law in two respects. First, it would mean that Public Corporations or bodies could either institute proceedings in their own names or the Attorney-General could do so on their behalf. That might in theory at least open the door to the Attorney-General occasionally instituting suits on behalf of Public Corporations even against the judgment of those who are charged with their management and control. Secondly, those who deal commercially or otherwise with Public Corporations would also be uncertain as to whom to sue for breaches of contract or torts committed by those entities. Would they institute proceedings against the Attorney-General or the corporations themselves? Those legal uncertainties are undesirable from a policy point of view.

All in all, I think the Attorney-General's institution of a suit for and on behalf of the National Irrigation Board which is a body corporate with power to sue and be sued in its own name is a legal misadventure. It is an action without juridical basis. The Attorney-General has no locus standi to do so and consequently the plaint filed herein discloses no cause of action against the defendant. I order that the same be struck out with costs to the defendant.”

I agree with the learned judge and turning back to the objection before me, it seems to me that the 1st Petitioner has taken a very narrow meaning of “government” to mean “executive” and in fact only “the national executive” in the traditional “serikali” meaning. The national executive as structured in the Constitution is quite different from the National Government.

I should also state that the Preliminary Objection was generally narrowly argued by the parties and the scope of the issue was thus limited but I should say this in passing; there is no bar to Commissions in the nature of their mandates to hire counsel when funds and circumstances allow. In fact the better and viable option would be for them to hire in-house counsel who can adequately represent them in Court when and if necessary. I am aware for example that the Ethics and Anti-Corruption Commission

has routinely done that. But the Attorney-General also has a mandate to represent the national interest in Court proceedings and where Commissions are minded to seek his representation, I see no bar either. To hold otherwise would be impractical and illogical given the structure of our Constitution. But where for example in specific cases the Attorney-General has to defend a claim by a Commission, for obvious reasons he cannot act and one cannot look at the office in the same way a law firm is looked at in the circumstances.

15. In the end, and given the narrow yet important issue raised, I find no merit in the objection and will overrule it with no order as to costs.

16. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 1ST DAY OF NOVEMBER, 2013.

ISAAC LENAOLA

JUDGE

In the presence of:

Irene – Court clerk

Mr. Omtata – present

Mr. Njoroge and Mr. Thande for 2nd, 6th and 8th Respondents

Mr. Amolo holding brief for Mr. Mwenesi

Mr. Kenneth holdingn brief for Interested Party for Mr. Kihara for 4th Respondent

Order

Ruling duly delivered.

ISAAC LENAOLA

JUDGE

Further Order

Production Order dated 24/10/2013 is to be argued on 3/12/2013.

In the meantime, the 7th Respondent to file a States Report by that date indicating the investigations conducted with respect to the subject matter of this Petition.

ISAAC LENAOLA

JUDGE