



**Otiende v Public Service Commission & another; REG1, REG2, REG3, REG4, REG5, REG6, REG7, REG8 AND REG9 Being Advocates Employed in the Public Service in the Year 2020 and 2021 as Land Registrars under Land Registration Act, 2012 (Interested Party) (Petition E085 of 2024) [2024] KEELRC 13265 (KLR) (28 November 2024) (Ruling)**

Neutral citation: [2024] KEELRC 13265 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E085 OF 2024**

**B ONGAYA, J**

**NOVEMBER 28, 2024**

**IN THE MATTER OF ARTICLES 1, 2, 3, 10, 19, 20, 21, 22, 23, 24, 27, 28, 40, 41, 47, 48, 50, 162(2)(A), 232, 233, 234, 248, 249, 253, 258, 259 AND 260 OF THE CONSTITUTION OF KENYA, 2010;**

**AND**

**IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS**

**AND**

**IN THE MATTER OF INTERPRETATION AND ENFORCEMENT OF THE CONSTITUTION OF KENYA, 2010 RELATING TO THE REMUNERATION OF ADVOCATES OF THE HIGH COURT OF KENYA EMPLOYED IN THE PUBLIC SERVICE IN THE YEARS 2020 AND 2021 AS LAND REGISTRARS UNDER THE LAND REGISTRATION ACT, 2012**

**AND**

**IN THE MATTER OF THE PUBLIC SERVICE COMMISSION, A CONSTITUTIONAL COMMISSION ESTABLISHED PURSUANT TO ARTICLES 233 & 253 OF THE CONSTITUTION OF KENYA, 2010**

**BETWEEN**

**ANTHONY OTIENDE OTIENDE ..... PETITIONER**

**AND**

**PUBLIC SERVICE COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**REG1, REG2, REG3, REG4, REG5, REG6, REG7, REG8 AND REG9 BEING ADVOCATES EMPLOYED IN THE PUBLIC SERVICE IN THE YEAR 2020**



**AND 2021 AS LAND REGISTRARS UNDER LAND REGISTRATION ACT,  
2012 ..... INTERESTED PARTY**

*(Before Hon. Justice Byram Ongaya on Thursday 28th November 2024)*

**RULING**

1. For determination before this Honourable Court are the petitioner's applications dated 28.05.2024 and 25.10.2024, and the 2<sup>nd</sup> respondent's preliminary objection dated 17.10.2024.
2. The petitioner filed the notice of motion dated 28.05.2024 in person. The application was under Article 162(2) and 258 of *the Constitution*, the *Judicature Act*, Rules 3 and 4(2) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, and all enabling provisions of law. The applicant prayed for orders as follows:
  - i. Spent.
  - ii. Pending hearing and determination of this application and the petition filed herewith, this Honourable Court do order that the petitioner be granted leave to prosecute the application and the petition using the initials of the interested parties instead of their full names as prescribed in Rule 10(2)(a) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.
  - iii. During these proceedings, the identities of the interested parties be concealed in all pleadings, rulings, judgment, court processes, notices as well as in open Court.
  - iv. In the alternative, for reasons stated, that -
    - a. such disclosure of the identity of the interested parties be only to the Honourable Court in such circumstances as will not have the same revealed to the respondents or other third parties until the petition is heard and determined, or
    - b. the identities of the interested parties be only revealed to the respondents upon them executing written undertakings (to be filed in Court) to protect the petitioners and shield them from possible victimization, censure, opprobrium, harassment or unreasonable transfers or redeployment or some other adverse action on account of this suit.
  - v. The Honourable Court do issue such further directions and orders as may be necessary to give effect to its orders or as it may deem fit in the interests of justice.
  - vi. The costs of the application be provided for.
3. The application of 28.05.2024 was supported by the affidavit of the petitioner and based on the following grounds:
  - a. The petitioner brings the petition on his own behalf, on behalf of the interested parties and in the public interest as an end user of the services offered by the Ministry of Lands and Physical Planning.
  - b. He is challenging the 1<sup>st</sup> respondent's refusal to remunerate the interested parties with Non-Practice and Special Legal Allowances since their employment. His case is that the remuneration accorded to the interested parties compared to their colleagues employed



relatively at the same time and doing work of equal value, is unfair, discriminatory and unconstitutional.

- c. He has concealed the identities of the interested parties for fear of possible victimization, harassment or unreasonable transfers or redeployment or some other adverse action against the interested parties by the 1<sup>st</sup> respondent if the same is disclosed, published or publicized.
  - d. In the circumstances, he is seeking leave of the Court to disclose at an opportune time the identities of the interested parties exclusively to the Honourable Court for that purpose, if need be.
  - e. Courts have in the past allowed petitioners to prosecute petitions under Article 22 of *the Constitution* using initials in cases involving the right to health.
  - f. The respondents will not be prejudiced in any way if the Court allows the concealment of the identities of the interested parties.
  - g. The application has been brought timeously and without undue delay or malicious intent.
4. The 1<sup>st</sup> respondent's replying affidavit sworn by Paul Famba on 03.09.2024 was filed through the Public Service Commission. He averred as follows:
- a. The petitioner has no locus standi to institute the instant suit on his behalf and/or behalf of the interested parties as the same is not in line with the parameters set out in the case of John Wekesa Khaoya v Attorney General, High Court Petition No. 60 of 2012: that the intended suit must be brought in good faith and must be in the public interest; and the suit should not be aimed at giving any personal gain to the applicant.
  - b. The petitioner has filed this suit in the private interest of the unnamed interested parties and does not fall under the categories set out under *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, that is, court proceedings may be instituted by-
    - i. a person acting on behalf of another person who cannot act in their own name;
    - ii. a person acting as a member of, or in the interest of, a group or class of persons;
    - iii. a person acting in the public interest; or
    - iv. an association acting in the interest of one or more of its members.
  - c. The petitioner has not placed any evidence before this Court to show how the interested parties will be victimized, censured, condemned, harassed or otherwise as averred, if their names are set out in this suit. In any event, public officers are protected from victimization or harassment under Article 236 of *the Constitution*.
  - d. The Commission needs to know who the interested parties are for the purpose of execution of judgment that will be delivered in the matter.
5. In response, the petitioner/applicant swore a Further Affidavit on 15.09.2024 wherein he averred that the issue of persons employed in public service is a public interest issue, especially because the funds utilized in this regard are public funds drawn from public taxes and other revenue schemes supported by the public. That *the Constitution* of Kenya, 2010 has expanded locus standi with the intention of broadening access to courts by animating the values of substantive justice, public participation, inclusiveness, and transparency and accountability under Article 10. The Court is further enjoined



- to consider the right of access to justice under Article 48, and the imperatives of administering justice without undue regard to procedural technicalities under Article 159(2)(d).
6. The applicant further averred that the concerns relating to execution of judgments have been addressed by prayers 2, 3 and 4 as the concealment reliefs are meant to apply during the pendency of the application and petition, and not afterwards.
  7. The 2<sup>nd</sup> respondent, on its part, filed a notice of preliminary objection dated 17.10.2024 on the grounds that:
    1. The jurisdiction of the Court as enshrined under Article 162(2)(a) and section 12 of the *Employment and Labour Relations Court Act* Cap. 8E entails to hear and determine all disputes relating to employment and labour relations matters.
    2. The interested parties have not established any employer-employee contractual relationship to give this court jurisdiction over the subject matter.
    3. The issues before court are purely between the interested parties and the 1<sup>st</sup> respondent having an employer-employee relationship and purely fall under the privity of contract.
    4. The petitioner is not properly before the court in accordance with the provisions of Article 258 read with Section 12 of the Employment and Labour Relation Court Act Cap. 8E.
    5. The Attorney General, whose office is as established under Article 156 of *the Constitution*, is the principal legal adviser to the national government and represents it in courts in any legal proceedings which the national government is a party other than in criminal proceeding and has no role in this suit and should be struck out from these proceedings.
    6. The suit is incompetent and ought to be struck out with costs.
  8. Subsequently, the petitioner/applicant filed the notice of motion application dated 25.10.2024 seeking for orders that this Court strikes out of its record, the 2<sup>nd</sup> respondent's memorandum of appearance and notice of preliminary objection, both dated 17.10.2024. Further, that the costs of the application be awarded to the petitioner/applicant. This application was based on the grounds that:
    - i. The 2<sup>nd</sup> respondent filed the said memorandum of appearance and notice of preliminary objection without leave of this Court, and this Court is thus constrained to establish the cause and reasons for the delay.
    - ii. Allowing the pleadings filed by the 2<sup>nd</sup> respondent would negate the duty of this Court in furthering the overriding objective of expeditious, proportionate and affordable resolution of disputes before the Court. In addition, it would demonstrate scant respect and disdain for the Honourable Court, the law and the petitioner/applicant.
    - iii. This Court should therefore not deem the pleadings filed by the 2<sup>nd</sup> respondent out of time, as having been properly filed and the same should be struck out of the record of the Court.
    - iv. Granting the reliefs sought will not prejudice any party.
  9. The interested parties did not file any responses to the applications before the Court.
  10. The petitioner/applicant filed his written submissions dated 20.09.2024 and further submissions dated 15.10.2024, and the 1<sup>st</sup> respondent filed its written submissions dated 09.10.2024. The 2<sup>nd</sup> respondent relied on its preliminary objection before Court. The Court has considered the material on record and returns as follows:



- a. By application of 25.10.2024, the petitioner says the preliminary objection and memorandum of appearance for the 2<sup>nd</sup> respondent be struck out because they were filed belatedly without leave of Court. The petitioner has not exhibited an order by the Court or cited any provision in a statute or rule of the Court that limited the time within which the 2<sup>nd</sup> respondent was required to file and serve the preliminary objection or the memorandum of appearance. Upon that finding, the application is found not merited at all and is amenable to dismissal.
- b. The petitioner's application dated 28.05.2024 seeks to keep the interested parties and their personal identification by their names secret or to be disclosed only upon an undertaking by the respondents that they will not be victimised for filing the suit. The case is said to be about an alleged claim for the undisclosed public officers being Advocates and serving in the cadre of Land Registrars. The Court considers that Article 41 of *the Constitution* already entitled the alleged interested parties to fair labour practices including accessing the Court for purging any grievance about their terms and conditions of service including remuneration and benefits. Section 46 (h) of the *Employment Act*, 2007 has already protected employees by stating that it shall not constitute a fair reason for dismissal or for imposition of a disciplinary penalty upon the employee's initiation or proposed initiation of a complaint or other legal proceedings against his employer, except, where the complaint is shown to be irresponsible and without foundation. In view of the statutory protection and the constitutional provisions permitting every person including employees to access courts for hearing and determination of grievances including alleged breach of employees' rights, the Court returns that the application by the petitioner dated 28.05.2024 is lacking in merits. The alleged interested parties are required as they are entitled to file legal proceedings to urge grievances about their terms and conditions of service or other concerns at work in view of their contract of service or public service generally. As submitted for the respondents, Articles 27, 236, and 47 of *the Constitution* as well bind employers like the respondents and there cannot be valid or any victimization on account that the affected public officers such as the alleged interested parties instituted or propose to institute legal proceedings to advance their rights as employees. To that extent, the application is amenable to dismissal as unfounded.
- c. Turning to the preliminary objection that the Court lacks jurisdiction for want of employer-employee relationship, the Court finds that section 12 (2) of the *Employment and Labour Relations Court Act*, 2011 provides thus, "An application, claim or complaint may be lodged with the Court by or against an employee, an employer, a trade union, an employer's organisation, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose." The petitioner has moved against the respondents as employers and more so against the 1<sup>st</sup> respondent as a constitutional Commission vested with authority (powers and functions) to employ public officers like the alleged interested parties. The Court has the jurisdiction to hear and determine the dispute.
- d. On standing, the petitioner urges that he has moved the Court under Article 3(1) of *the Constitution*, which states that every person has an obligation to respect, uphold, and defend *the Constitution*. He also states that he has moved under Article 22(1) that states that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed, or is threatened. He further states that he has brought the petition on his own behalf and on behalf of the alleged interested parties pursuant to Article 22(2) (c), 258 (1) and (2). The petitioner then claims that the petition is about the respondents' failure to pay the alleged interested parties, as due under their respective contracts of service, remuneration being non-practice allowance of Kshs. 15,



000.00 per month; and, special allowance of Kshs. 30,000.00, which was later adjusted to Kshs. 45,000.00, per month. That is the foundational claim in the petition.

- e. As urged for the respondents, the Court finds that while the alleged interested parties are public officers, nothing has been shown as amounting to their incapacity to sue by themselves on contract of service as respondents' employees. Further, the emerging claim though by or for the alleged public officers, it turns out to be about their individual or private interest. The petitioner has failed to show a public interest that would justify his petition and as establishing locus stand under provisions of Articles 22 or 258 of *the Constitution*. In the circumstances, the respondents' objection to the petition for want of standing and being a claim for private and not public benefit of the alleged interested parties is upheld. The petition is therefore liable to being dismissed. Considering all circumstances of the case, each party to bear own costs of the petition.
- f. While making that finding the Court upholds its findings in *Trusted Society of Human Rights Alliance v Nakuru Water and Sanitation Services Company & Attorney General (Petition 5 of 2013)* [2013] KEELRC 881 (KLR) (8 November 2013) (Judgment) thus:

Who then is a proper person that can institute court proceedings under Article 258 claiming that *the Constitution* has been contravened or is threatened with contravention? The Article provides as follows:

“Enforcement of this Constitution

258.

- (1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.
- (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by:-
  - a. a person acting on behalf of another person who cannot act in their own name;
  - b. a person acting as a member of, or in the interest of, a group or class of persons;
  - c. a person acting in the public interest; or
  - d. an association acting in the interest of one or more of its members.”

The court has considered the wording of the Article and is of considered opinion that under Sub-Article 258(1) any person can initiate the proceedings to enforce or protect *the Constitution* provided that the person establishes that he or she is acting in own interest. In such proceedings, the person initiating must show what has traditionally been called “sufficient interest” which acts as the sieve to determine the proper party. The person initiating the proceedings must establish actual or threatened injury revolving upon the person's legal right or interest. Thus, in the opinion of the court, under Sub-Article 258 (1), “every person” means a person who can establish “sufficient interest”.

On the other hand, a person who cannot establish “sufficient” interest can initiate the proceedings to protect or enforce *the Constitution* under provisions of Sub-Article 258(2).



Such a person without sufficient interest will establish standing only and only if the person establishes any of the prescribed conditions namely:

- a. that the person is acting on behalf of another person who cannot act in their own name (such as the traditional incapacities of insanity, age of minority or disabling statutory prescriptions as may for example be suffered by those belabouring under bankruptcy or insolvency);
- a group or class of persons( for example as it happens in the traditional representative suits);
- c. a person acting in public interest ( in which event, in the opinion of the court, the person initiating the proceedings must establish the public interest, meaning, in the opinion of the court, that thing in which the general public has stakes as is protected by constitutional provision, executive policy, legislative provision, judicial determination or such other legitimate regulation like international law); or
- d. an association acting in the interest of one or more of its members.

It is the opinion of the court that the foregoing analysis of Article 258 applies to Article 22 of *the Constitution* which is worded in exactly similar language save that, as already found, Article 22 proceedings would strictly and exclusively relate to enforcement of the Bill of Rights.

Thus, the court holds that Articles 22 and 258 of *the Constitution* codify the traditional standing rules based on sufficient interest while at the same time expanding and liberalizing standing rules by conferring standing upon those without sufficient interest within an objective sieving system. The provisions do not therefore demolish all the walls of navigating access to courts and which sieving regime, in the opinion of the court, is a necessary safe-guard to fortify due process of the court that insulates proper parties to proceedings and removes persons who invariably would be improper parties in court proceedings. In the opinion of the court, the sieving regime enhances access to the courts and therefore justice by prescribing a simple objective criteria or standard for measuring presence or absence of standing.”

In the instant case, the Court has found that the petitioner has been sieved out because he seeks to pursue a private interest or right of the alleged interested parties who have not been shown to lack capacity to bring the proceedings upon their own sufficient interest and, the petition is not a group, class, or representative suit. The Court finds that the petitioner has not established public interest stakes in the matter that would entitle him to bring the petition. As lawyers familiar with the sieving system call it, the petitioner lacks locus standi or simply standing. The respondents’ submissions in that respect are upheld.

In conclusion and upon the findings herein, the petition is hereby dismissed and each party to bear own costs of the petition.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS THURSDAY 28<sup>TH</sup> NOVEMBER 2024.**

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

