



Kulundu v Chief Executive Officer, Independent Electoral and Boundaries Commission & 9 others (Employment and Labour Relations Petition E170 of 2022) [2023] KEELRC 1808 (KLR) (27 July 2023) (Ruling)

Neutral citation: [2023] KEELRC 1808 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS PETITION E170 OF 2022

L NDOLO, J

JULY 27, 2023

IN THE MATTER OF ARTICLES 2, 19, 20(1-4), 21(1) & (3), 22(1) & (2)(B) & (C), 23(1) & (3), 25(A) & (C), 27, 28, 29(A), (C) & (D), 41(1) & (2)(B), 47, 48, 50(1), 73, 75, 159, 162(2)(A), 165(3)(B), 232, 258(1)&(2)(B)&(C) AND 259(1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE EMPLOYMENT ACT, 2007

AND

IN THE MATTER OF CONTRAVENTION OF THE PETITIONER'S FUNDAMENTAL RIGHTS AND FREEDOMS PROTECTED BY ARTICLES 27, 28, 31, 41, 48 AND 50 OF THE CONSTITUTION

AND

IN THE MATTER OF CONTRAVENTION OF NATIONAL VALUES AND PRINCIPLES OF GOVERNANCE UNDER ARTICLE 10, PRINCIPLES OF LEADERSHIP AND INTEGRITY UNDER ARTICLE 73 AND VALUES AND PRINCIPLES OF PUBLIC SERVICE UNDER ARTICLE 232 OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

RUTH KHATIEVI KULUNDU PETITIONER

AND

CHIEF EXECUTIVE OFFICER, INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 1ST RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

WAFULA CHEBUKATI 4TH RESPONDENT



| | |
|--|-----------------------------------|
| BOYA MOLU | 5TH RESPONDENT |
| PROFESSOR ABDI YAKUB GULIYE | 6TH RESPONDENT |
| JULIANA CHERERA | 7TH RESPONDENT |
| FRANCIS WANDERI | 8TH RESPONDENT |
| JUSTUS NYANG'AYA | 9TH RESPONDENT |
| IRENE MASIT | 10TH RESPONDENT |

RULING

1. On January 26, 2023, I delivered the first ruling in this Petition by which I issued the following orders:
 - a) The Petitioner's interdiction as communicated by the 1st Respondent's letter dated September 19, 2022 is suspended pending determination of the Petition;
 - b) The disciplinary process commenced against the Petitioner on account of the matters contained in the letter of interdiction dated September 19, 2022 is stayed pending determination of the Petition.

2. Subsequent to this ruling, the 1st and 2nd Respondents filed the present application dated April 4, 2023 seeking orders to strike out and/or expunge the 4th, 5th, 6th, 7th, 8th, 9th and 10th Respondents from the court record.

3. The application is supported by an affidavit sworn by Crispine Owiye, who describes himself as the Director of Legal Services and Public Affairs of the 2nd Respondent, the Independent Electoral and Boundaries Commission. It is based on the following grounds:
 - a) That the Petitioner has no reasonable cause of action against the 4th, 5th, 6th, 7th, 8th, 9th and 10th Respondents;
 - b) That the 2nd Respondent is an independent body corporate that is capable of suing and being sued in its own name and can thus be sued without enjoining the stated parties;
 - c) That the Petitioner does not have a valid cause of action against the Respondents in their personal capacity as the gist of the matter herein is a labour dispute between the 2nd Respondent and the Petitioner;
 - d) That the IEBC Act, 2011 under Section 15, insulates and protects the said Respondents, from being held personally liable for acts done in good faith and in the execution of the 2nd Respondent's functions and duties;
 - e) That further, the 4th, 5th and 6th Respondents' tenure of office expired on January 17, 2023 and have since then proceeded on terminal leave as their six-year term is non-renewable;
 - f) That in accordance with Article 251(2) of the *Constitution* of Kenya, 2010, the Farmers Party presented in the National Assembly, a Petition dated September 9, 2022 to have the 7th, 8th, 9th and 10th Respondents ousted for allegedly attempting to sabotage the August General Election;



- g) That the National Assembly sent the said Petition to the President after being satisfied that it discloses grounds for removal of a member of a Commission from office under Article 251(1) of the Constitution of Kenya;
 - h) That in accordance with Article 251(4), the President suspended the 7th, 8th, 9th and 10th Respondents from office and appointed a Tribunal to investigate them;
 - i) That following the said suspension and appointment of the Tribunal, the 7th, 8th and 9th Respondents opted to resign from office via resignation letters addressed to the President;
 - j) That the 10th Respondent opted to appear before the said Tribunal and defend her case. However, the Tribunal found that her actions on August 15, 2022, together with the 7th, 8th and 9th Respondents amounted to gross misconduct and proceeded to make a binding recommendation to the President that the 10th Respondent be removed from office as a member of the 2nd Respondent;
 - k) That from the foregoing, the 4th, 5th, 6th, 7th, 8th, 9th and 10th Respondents are no longer members of the Independent Electoral and Boundaries Commission and should be struck out of the suit herein. In any event, even they were still Commissioners, the IEBC Act under Section 15, insulates and protects the said Respondents from being held personally liable for any acts done in good faith and in the execution of the 2nd Respondent's functions and duties;
 - l) That the joinder of the stated parties in this matter will only prejudice the expeditious disposal of the suit;
 - m) That this application has been brought without undue delay;
 - n) That it is in the interest of justice that the said parties be struck out of the suit.
4. The Petitioner opposes the application by her replying affidavit sworn on April 17, 2023. She terms the application as frivolous and vexatious with the sole aim of convoluting issues and derailing the Petition.
 5. The Petitioner states that the 4th- 10th Respondents were Commissioners of the 2nd Respondent as at September 29, 2022, the date of filing of the Petition and were thus properly enjoined as Respondents.
 6. The Petitioner accuses the 4th, 5th and 6th Respondents of intentionally failing to enter appearance and/or file any response to the application and Petition dated September 29, 2022 in total disregard of the processes of the Court.
 7. The Petitioner further accuses the 1st and 2nd Respondents of seeking to connivingly prosecute the Petition, not only on their behalf but also for the 4th, 5th and 6th Respondents in their absence.
 8. The Petitioner asserts that the gravamen of her Petition arises from the actions, commissions and omissions of the 4th – 10th Respondents in their personal capacities, which resulted into unlawful and unfair institution of disciplinary proceedings against her.
 9. The Petitioner maintains that she has a valid cause of action as pleaded in the Petition against the 4th – 10th Respondents, who were state officers in exercise of public trust, functions and duties bestowed on Commissioners, power which they exercised in contravention of the Constitution.
 10. The 7th Respondent, Juliana Cherera swore a replying affidavit on her own behalf and on behalf of the 8th and 9th Respondents.



11. Cherera depones that the Petition is premised on the individual actions of each of the 4th, 5th, 6th, 7th, 8th, 9th and 10th Respondents.
12. She further depones that the 4th, 5th, 6th, 7th, 8th, 9th and 10th Respondents were privy to the dealings and the on-goings in the 2nd Respondent, giving rise to the Petition.
13. Cherera seeks to distance herself and the 8th and 9th Respondents from the impugned action taken against the Petitioner. She takes the view that the aim of the present application is to expunge the pleadings of the 7th, 8th and 9th Respondents.
14. The 7th, 8th and 9th Respondents also filed Grounds of Opposition dated May 12, 2023, reiterating the contents of the replying affidavit sworn by the 7th Respondent.
15. The single issue for determination in this application is whether the 4th to 10th Respondents are proper parties in the Petition pending determination before the Court.
16. In advancing their position, the 1st and 2nd Respondents rely on Section 15 of the *Independent Electoral and Boundaries Commission Act*, which insulates members of the Commission from personal liability on account of actions taken in good faith in the course of execution of the powers, functions or duties of the Commission.
17. I think however that the dispute before me is not simply one of assigning blame to members of the Commission. This is a complex matter involving a split Commission with members appearing to issue conflicting instructions to members of staff, including the Petitioner.
18. Were the Court to agree with the 1st and 2nd Respondents, the entire pleadings by the 7th-10th Respondents, which bring out details of the split in the Commission would be expunged. This would not only lock out important evidence in the Petition but would also prejudice the Petitioner's case.
19. What is more, the Respondents targeted for removal from these proceedings have not complained of misjoinder. The Court is therefore unable to understand the motivation of the 1st and 2nd Respondents to prosecute the case of the 4th to 10th Respondents.
20. For the foregoing reasons, I find the 1st and 2nd Respondents' application dated April 4, 2023 to be without merit and proceed to dismiss it.
21. The costs of the application will be in the Petition.
22. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 27TH DAY OF JULY 2023

LINNET NDOLO

JUDGE

Appearance:

Mr. Manwa for the Petitioner

Mr. Nura for the 1st and 2nd Respondents

Mr. Mboya for the 7th, 8th, 9th and 10th Respondents

No appearance for the 3rd, 4th, 5th and 6th Respondents

