



Koria v Cabinet Secretary, Ministry of Gender, Culture, Arts & Heritage & 6 others (Employment and Labour Relations Petition E215 of 2023) [2023] KEELRC 3340 (KLR) (20 December 2023) (Ruling)

Neutral citation: [2023] KEELRC 3340 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E215 OF 2023
AN MWAURE, J
DECEMBER 20, 2023**

BETWEEN

PETER GITAA KORIA PETITIONER

AND

**CABINET SECRETARY, MINISTRY OF GENDER, CULTURE, ARTS & HERITAGE 1ST RESPONDENT
ETHICS & ANTI CORRUPTION COMMISSION 2ND RESPONDENT
CHIEF OF STAFF & HEAD OF PUBLIC SERVICE 3RD RESPONDENT
OFFICE OF THE PRESIDENT 4TH RESPONDENT
CHAIRPERSON, BOARD OF DIRECTORS, BOMAS OF KENYA 5TH RESPONDENT
PUBLIC SERVICE COMMISSION 6TH RESPONDENT
HON. ATTORNEY GENERAL 7TH RESPONDENT**

RULING

1. The 2nd Respondent filed a Notice of Preliminary Objection dated 1st December 2023 in opposition to the Petitioner’s Petition dated 22nd November 2023 and Notice of Motion applications dated 21st and 22nd November 2023 on the grounds that:
 1. The Petition and Applications are an abuse of the court process and are incompetent in law for want of jurisdiction.
 2. The foundation of the Petitioner’s suspension by the 1st Respondent on the recommendation of the 2nd Respondent is an allegation relating to corruption



and economic crime under the *Anti-Corruption and Economic Crimes Act* (ACECA)

3. The impugned suspension of the Applicant is not pursuant to the *employment Act* but is a mandatory requirement in the enforcement of Section 42 of the *Leadership and Integrity Act*. (LIA)
4. The Petition and Applications are an abuse of the court process and are incompetent in law for failing to establish a breach of employment in the employer employee relationship as the impugned suspension is a temporary measure against persons under investigations.
5. The Petition and Applications have been filed before this court against the directives of the Chief Justice Hon. D. Maraga issued on 26th June 2018, vide Gazette Notice No. 7262 ('Maraga Directions') directing that all Petitions on claims of infringement or threatened infringement of constitutional rights relating to corruption and/or economic crimes related matters shall be heard by the Anti-Corruption and Economic Crimes Division of the High Court.
6. The Petition and Applications herein ought to be heard by the Anti-Corruption and Economic Crimes (ACEC) Division of the High Court.

2. The Notice of Preliminary Objection was canvassed by way of written submissions.

2nd Respondent's Submissions

3. The 2nd Respondent submitted that the jurisdiction of this court is exclusive, original and appellate. It has exclusive jurisdiction to the extent that it is the only court with the special powers donated to it. It has original jurisdiction to the extent that it deals only with the disputes specified under Article 162 of the *Constitution* and the *Employment Act*. It has appellate jurisdiction to the extent that is mandated to hear appeals specified under Section 12(5) of the *Employment Act*.
4. The 2nd Respondent submitted that the petition herein is a matter which the High Court is reserved to hear. It relied on *Adrian Kamotho Njenga v Attorney General; Judicial Service Commission & 2 others (Interested Parties)* [2020] eKLR and *Republic v Karisa Chengo & 2 others* [2017] eKLR.
5. The 2nd Respondent submitted that the matters raised in the Petition and Applications do not fall within exclusive original and appellate jurisdiction of this court. The basis of the pleadings is the letter written by EACC dated 10th November 2023 recommending his suspension from Bomas of Kenya following investigation into allegations against him of corruption and economic crime.
6. The 2nd Respondent submitted that the letter was issued pursuant to the mandate of the EACC to investigate corruption and economic crime and to enforce Chapter Six of the *Constitution*. The suspension challenged is a provided under Section 42(7) of the *Leadership and Integrity Act* read with regulation 25 of the Leadership and Integrity Regulations, 2015 and do not fall within Section 12 of the *Employment and Labour Relations Court Act*.
7. The 2nd Respondent submitted that the issue of interpretation and application of Section 42(7) of the *Leadership and Integrity Act* as held in *Kenya Universities Staff Union v University Council of Masinde Muliro University of Science and Technology & 2 others* [2018] eKLR as follows:-

“In my view this case revolves around the interpretation and application of section 42(7) of the *Leadership and Integrity Act*, 2012 as read with Regulation 25 of the Leadership and



Integrity Regulations, 2015 to the circumstances of this case. It is my view that it is not in every case that some of the parties before the Court are in a relationship of employee and employer that such matters must as a matter of course be heard and determined by the Employment and Labour Relations Court.”

8. The 2nd Respondent submitted that the issues raised in the Petition challenging the action of the 2nd Respondent can only be challenged in the Anti-Corruption division of the High Court for interpretation whether the action was inconsistent with or in contravention of the Constitution.
9. The 2nd Respondent submitted that the Anti-Corruption division of the High Court is for effective case management and expeditious disposal of cases relating to corruption and economic crimes considering their nature and public interest involved.
10. The 2nd Respondent submitted that the suspension challenged is a recommendation made pursuant to Section 42(7) of the Leadership and Integrity Act read with regulation 25 of the Leadership and Integrity Regulations, 2015. It has nothing to do with a disciplinary issue leading to administrative action by the employer.
11. The 2nd Respondent submitted that Petitioner was suspended on recommendation of the 2nd Respondent and not as a result of any disciplinary issue leading to administrative action by his employer.

Petitioner’s Case

12. The Petitioner submitted that the matter herein is a dispute relating to employment and labour relations and that this Court has jurisdiction to deal with the matters in issue as the Petitioner is an employee of Bomas of Kenya under the direct control of the 1st Respondent and there is a contract of service to that effect.
13. The Petitioner submitted that the Petitioner being a public officer can bring a claim before this court where there is a dispute arising from their appointment, recruitment and/ or discipline. His suspension is the core issue in this matter and it speaks to the disciplinary process of a public officer, who is an employee of Bomas of Kenya.
14. The Petitioner submitted that at no point does the Petition question the ongoing investigations by the 2nd Respondent and as such the matter cannot be deemed as one that should be handled by the Anti-Corruption and Economic Crimes Division.
15. The Petitioner submitted that the dispute relating to the process of suspension of the Petitioner herein is in the purview of this court.

Analysis and Determination

16. The main issue for determination is whether this court has jurisdiction to hear and determine the Petition and subsequent Applications.
17. The Petitioner sought orders in the Petition that this court revokes the decision of the 2nd Respondent contained in the Letter dated 10th November 2023 directing the 1st Respondent to suspend him and decision of the 1st Respondent to suspend him vide a letter dated 20th November 2023.
18. It is the 2nd Respondent’s submission that the issues raised in the Petition solely challenges the action of the 2nd Respondent can only be challenged in the High Court for interpretation whether the action was in contravention of the Constitution.



19. The jurisdiction of the High Court has been laid down under Article 165(3) of the Constitution as follows:

“ the High Court shall have—

- a. unlimited original jurisdiction in criminal and civil matters;
- b. jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
- c. jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
- d. jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
 - i. the question whether any law is inconsistent with or in contravention of this Constitution;
 - ii. the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
 - iii. any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
 - iv. a question relating to conflict of laws under Article 191; and
- e. any other jurisdiction, original or appellate, conferred on it by legislation.”

20. In contrast, Article 162 (2) of the Constitution establishes this court with the status of the High Court to hear and determine disputes relating to employment and labour relations.

21. The jurisdiction of the Employment and Labour Relations Court has been clearly laid down under Section 12 (1) and (5) as follows:

“(1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including —

- a. disputes relating to or arising out of employment between an employer and an employee;
- b. disputes between an employer and a trade union;
- c. disputes between an employers' organisation and a trade unions organisation;
- d. disputes between trade unions;



- e. disputes between employer organizations;
- f. disputes between an employers' organisation and a trade union;
- g. disputes between a trade union and a member thereof;
- h. disputes between an employer's organisation or a federation and a member thereof;
- i. disputes concerning the registration and election of trade union officials; and
- j. disputes relating to the registration and enforcement of collective agreements.

- (5) The Court shall have jurisdiction to hear and determine appeals arising from –
- a. decisions of the Registrar of Trade Unions; and
 - b. decisions of any other local tribunal or commission as may be prescribed under any written law.”

22. In the case relied by the 2nd Respondent, *Kenya Universities Staff Union v University Council of Masinde Muliro University of Science and Technology & 2 Others* [*Supra*] in which the Court held:

“As stated hereinabove, the jurisdiction of the Employment and Labour Relations Court’s in matters in respect of the violation of human rights and fundamental freedoms are confined to matters falling within Article 41 of the *Constitution* and hence that Court cannot purport to grant judicial review orders outside employment matters as its judicial review jurisdiction is limited only in so far as employment matters are concerned. In other words, the matters which fall within the ambit of Article 162(2) of the *Constitution* must be matters within the exclusive jurisdiction of the said specialised Courts. That is my understanding of the holding in *United States International University (USIU) v. Attorney General* (*supra*).

23. In this, the Petitioner is an employee of the 5th Respondent and the 1st Respondent being the Ministry to oversee the 5th respondent. The 1st Respondent issued the Petitioner with a suspension letter apparently as directed by 2nd respondent. The 5th Respondent is now in the process of recruiting an Acting Chief Executive Officer in the place of the Petitioner.
24. The Petitioner being a public officer is an employee and Chief Executive Officer of the 5th Respondent.
25. The issue for determination here is whether this Employment and Labour Relations Court has jurisdiction to determine this Petition? The Notice of Motion dated 21st November, 2023 and the Petition are premised on suspension of a contract of service between the Petitioner and the 5th Respondent dated 11th March, 2021.
26. The 2nd Respondent has submitted that the Petitioner ought to have moved to the High Court. They rely on Section 42(7) of *Leadership and Integrity Act* and Regulation 25 of the said Act.
27. The 2nd Respondent’s submissions are that a person aggrieved by a decision made by a public entity ought to seek redress from the High Court. The petition referred to and dated 21st November, 2023 refers to suspension of the Petitioner by the Ministry of Gender, Culture and Arts and Heritage the employer.



28. The Court is of the very considered averment that the suspension of the Petitioner was issued by the 1st Respondent in exercise of power of employer in disciplinary process.
29. The court holds that the application and the petition herein was premised on an employer/employee relationship. The employer's and employee's rights must not be infringed upon and the employee's right to accessing this court as provided in article 162 of the Constitution must be judiciously safeguarded as well as the Employment and Labour Relations Court Act and other laws conferring jurisdiction on this court.
30. In the case of Okiya Omtatah Okoiti – v- Selection Panel for the National Land Commission & 3 others; Gershom Otachi & BW'omanwa & 7 others (Interested Parties) (2019) eKLR, the court held:-
- “In relation to the National Land Commissioners, they have an obligation to work only for one employer, there are provisions on how they would work, how they may be removed and when and how to be paid. Their positions fall squarely under a definition of a would be employee and therefore their appointment is a matter for which this Court is ceased with jurisdiction. I therefore return the verdict that this court had jurisdiction to entertain this Petition.”
31. Further in the case of Eng Antony Tawayi Wamukota – v- Kenya Electricity Transmission Company Limited & Others unreported the court observed that:
- “that it had jurisdiction to determine the matter as it related to the suspension of a contract of service. The court further found that the Respondent was exercising his employer's power of disciplinary control and so this court had authority to hear and determine the matter.”
32. The court therefore in view of the foregoing returns a finding that this court has jurisdiction to hear this case and hence holds that the preliminary objection is declined.
33. The parties will proceed with the hearing of the application and petition before any other judge of the Division. This court will not wish to proceed with this hearing for personal reasons and in any event the judge will be proceeding on leave after the recess and that might cause delay to the determination of the matter. Case will be mentioned before the Principal Judge Hon. Justice Byram Ongaya on 13th February, 2024 to allocate the same appropriately and give further directions. The interim orders are extended to 13th February, 2024.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 20TH DAY OF DECEMBER 2023.

ANNA NGIBUINI MWAURE

JUDGE

Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the



right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

Anna Ngibuini Mwaure

Judge

