



Okoti v The Tourism Fund Board Of Trustees & 11 others (Petition E124 of 2021) [2022] KEELRC 4025 (KLR) (19 May 2022) (Ruling)

Neutral citation: [2022] KEELRC 4025 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E124 OF 2021**

**M MBARŪ, J
MAY 19, 2022**

BETWEEN

OKIYA OMTATAH OKOITI PETITIONER

AND

- THE TOURISM FUND BOARD OF TRUSTEES 1ST RESPONDENT**
- THE PUBLIC SERVICE COMMISSION 2ND RESPONDENT**
- THE CABINET SECRETARY, TOURISM AND WILDLIFE ... 3RD RESPONDENT**
- STATE CORPORATIONS ADVISORY COMMITTEE 4TH RESPONDENT**
- THE ATTORNEY GENERAL 5TH RESPONDENT**
- ALFONSE KIOKO 6TH RESPONDENT**
- ELISHA KIPKORIR CHIRCHIR 7TH RESPONDENT**
- SUSAN OGOLLA 8TH RESPONDENT**
- CAROLINE E NGANGA 9TH RESPONDENT**
- STEVE GWENDO BIKO 10TH RESPONDENT**
- ABDUL HAKIM BALALA 11TH RESPONDENT**
- PETER NGORI 12TH RESPONDENT**

RULING

1. On August 2, 2021 the petitioner filed the instant petition and in reply, the respondents filed notice of preliminary objections dated August 11, 2021 on the grounds that;



1. Unlike the High Court under article 165(3)(a) which has unlimited original jurisdiction in criminal and civil matters, this court lacks jurisdiction to entertain these proceedings by dint of section 12 of the *Employment and Labour Relations Court Act*.
 2. The *Constitution* under article 162(2) (a) as read together with article 162(3) as well as section 12 of the *Employment and Labour Relations Court Act* from which provision for this court derives its jurisdiction excludes the appointment and/or removal from office of the chairman and independent members of the board of the 1st respondent as this is not a labour and employment issue since directors by their very nature are not and can never be employees but representatives of the entity.
 3. There is no employer-employee relationship between the petitioner and the 1st respondent or any other respondents hence the jurisdiction of this court has not been established.
 4. The suit is an abuse of the court process as the prayers sought are disguised as an attack on the recruitment of the CEO while in essence the petitioner is seeking to quash gazette notices through which the chairman and the independent board members were appointed.
 5. The suit is unfounded and premature as the High Court has not declared the board improperly constituted to enable a challenge of its decisions including the decision to recruit a CEO for the fund.
 6. This court lack statutory jurisdiction to interfere with internal matters concerning the running and regulation of boards of state corporations and the suit is incompetent in so far as it is attempting to invite the court to micro manage the affairs and operations of the Tourism Board of Trustees as well as usurping the powers roles and functions of State Corporations Advisory Committee.
 7. In so far as the petitioner has not complied with the provisions of section 8 of the *Access to Information Act* the order seeking information should not and ought not to have been granted.
 8. This is not a matter that meets the threshold for public interest litigation but the suit is a contrived attempt to paralyse the operations of the 1st respondent since it has not been demonstrated how the petitioner or the public will be harmed if the recruitment is allowed to proceed on the other hand it is not in the public interest for the 1st respondent to run without a substantive Chief Executive Officer.
 9. The suit is incompetent and ought to be struck out with costs.
2. The parties agreed to address the objections by way of written submissions.
 3. The respondents submitted that the petitioner has filed the instant petition challenging the recruitment of the CEO and corporation secretary to the 1st respondent and founded on the grounds that the Board of Trustees is itself unconstitutional as its chairman and members were handpicked and appointed to office without being subjected to a transparent, competitive and merit based recruitment process. The petitioner wants this court to declare the board unconstitutional and consequently quash the recruitment process for the CEO and the corporation secretary.
 4. When the matter came up in court on August 3, 2021 the court granted orders suspending the interviews set to commence on August 5, 2021 upon which these objections were filed.
 5. There is no employment relationship between the petitioner and the respondents within the meaning of the *ELRC Act* to justify the petitioner invoking the jurisdiction of this court pursuant to article 162



- (2) of the Constitution and section 12(1) of the ELRC Act. The petitioner is a private citizen with no identifiable relationship with the 1st respondent or any respondent and not a party addressed under section 12 of the ELRC Act and has filed the petitioner herein for personal gain.
6. In the case of Casmir Nyakuru Nyaberi v Mwakikar Agencies Limited [2016] eKLR the court held that the ELRC only relates to employment and labour relations only. Section 143(1) of the Companies Act clearly show that directors are not employees of the company of the company and therefore do not fall under the jurisdiction of the ELRC. In Geoffrey Makana Asanyo v Nakuru Water and Sanitation Services Co & 6 others [2014] eKLR the court held that the court only has jurisdiction over matters where employment relationship is established to exist.
 7. In this case under section 67 of the Tourism Act which establishes the Tourism Fund Board of Trustees the board chairperson is appointed by the president and other members representing various sectors appointed by the minister through a competitive process. In this regard, the board members are not employees with a salary or under supervision subject to the jurisdiction of this court. the Court of Appeal in Attorney General v Okiya Omtata & 14 others Civil Appeal No 621 of 2020 held that the appointment of the chairperson and members of commissions did not involve any employment relations and therefore not subject to this court jurisdiction.
 8. In reply to the objections, the petitioner filed grounds in opposition on the grounds that the court has jurisdiction to hear employment and labour relations matters including the violation and enforcement of fundamental rights and freedoms under article 41 of the Constitution. The petition relates to the recruitment and appointments in government and due to these aspects, an employment aspect is assumed conferring the court with jurisdiction.
 9. The petition is filed under the spectrum of article 22 and 258 of the Constitution and in the public interest and not meant to paralyse the operations of the Tourism Fund which has an acting CEO and the suit is meant to ensure that the recruitment process for the CEO and Corporation Secretary and Manager legal services is done in a fair, transparent and accountable manner.
 10. The petitioner also submitted that he has standing to file this petition under article 22 and 258 of the Constitution in the public interest as held in Timothy Otuya Afubwa & another v County Government of Trans Nzoia & 3 others [2016] eKLR; Khelef Khalif E-Busaidy v Commissioner of Lands & 2 others [2002] eKLR. Under these provisions the court is given power to address public interest litigation meant to benefit the public and not just the individual directly.
 11. The court under article 159 of the Constitution is bound not to look at technicalities but address the substantive issue before it and hence clothed with jurisdiction. under article 162(2) and (3) of the Constitution the court has jurisdiction to determine disputes of employment and labour relations and article 165(5)(b) the High Court cannot address such matters. The petition herein relates to an employment recruitment process falling under the mandate of this court. The court cannot be limited to disputes arising from contracts of service only since that was not the intention of the drafters of the Constitution as held in Republic v Clerk County Assembly of Baringo ex parte William Kassait Kamket [2015] eKLR.
 12. Recruitment is a proper element of employment the objections made is without merit and should be dismissed with costs.

Determination

13. The petitioner herein filed the petition based on the provisions on various Articles of the Constitution particularly article 22 and 258. Such articles and the provisions thereof allow a party to act in the



public interest or for another person/party who cannot act on his own or cannot come and speak for fear of intimidation and victimisation and article 258 of the constitution allow such person(s) to be represented as the petitioner has done as held in Sammy Osundu Likaroni – Interested Party (On Behalf of Senior Court Assistants – JSG 7) Formerly (Senior Clerical Officers) and all other affected Judicial Staff v Judicial Service Commission & 3 others [2020] eKLR.

14. The petitioner having anchored the petition under the provisions of Article 258 of the Constitution enjoys special standing with the court to attend and urge the matters set out therein and cannot fault the petitioner for instituting these proceedings and I hold that he is within his right to commence the same. See Mumo Matemu versus Trusted Society of Human Rights Alliance & 5 Others Civil Appeal No 290 of 2012.
15. On the question of jurisdiction, the *locus classicus* is the celebrated case of Owners of the Motor Vessel “Lillian S’v Caltex Oil (Kenya) Ltd [1989] KLR 1 where the court held that;

...Jurisdiction is everything. Without it, 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. ...”
17. In the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR the Supreme Court of Kenya in addressing the question of jurisdiction held that;

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. We agree with counsel for the first and second respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings. ...”
16. On the record, the facts of the petition are that the position of the Tourism Fund’s CEO and that of the Corporation Secretary have been vacant since June 25, 2020 and during the 132nd board meeting the board approved the recruitment of a substantive CEO. There was an advertisement on June 15, 2021 for the CEO and Corporation Secretary positions but the board has to date not published the long or short lists of all the applicants who applied and got shortlisted. On these facts the petitioner is aggrieved and has prayed for various declarations and orders.
17. The respondents cannot frame the facts of the petition for the petitioner to state that it relates to the appointment and removal of the Fund’s Board of trustees. Where the facts and orders sought are at variance, the petitioner must be allowed to urge the petition and the same be heard on the merits. The issue(s) at hand must be framed by the petitioner himself.
18. The facts hence noted, the recruitment of a CEO and corporation secretary under public service is a matter situate under employment and labour relations and for connected purposes and cannot be removed from the jurisdiction of this court pursuant to article 162(2) (a) and 165(5) of the Constitution read together with section 12(1) of the ELRC Act and its preamble that;
19. An act of parliament to establish the Employment and Labour Relations Court to hear and determine disputes relating to employment and labour relations and for connected purposes.
20. In addressing the employment and labour relationships within which the court is allowed to address, the list outlined under section 12(1) is not limited. the use of the term *including* in section 12 is



significant as it helps to construe the jurisdiction of the court in a way which promotes the purposes, values and principles of the Constitution in establishing a specialist court to deal with employment and labour relations disputes as held in Republic v Clerk County Assembly of Baringo ex parte William Kassait Kamket [2015] eKLR.

21. Section 12(1) of the ELRC Act is therefore deliberate and measured in that;
 - (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—
22. The issue at hand hence being the recruitment of the CEO and corporation secretary of the Tourism Fund cannot be removed and placed before any other court. Such would deny the petitioner a fundamental right to urge his case before the right forum, this court.
23. With regard to the petitioner seeking information from the respondents, such is a matter to be addressed within his application filed under certificate of urgency together with his petition. To urge such matter herein would deny the petitioner and the court crucial evidence and material.
24. Accordingly, objections made by the respondents are found without merit and are hereby dismissed. Costs shall abide the outcome of the petition.

DELIVERED IN COURT AT NAIROBI THIS 19TH DAY OF MAY, 2022.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Okodoi

..... and

