



**Ocharo v Office of Director of Public Prosecutions & another;
Speaker of the Senate & 3 others (Interested Parties) (Petition
E055 of 2022) [2022] KEELRC 3881 (KLR) (2 September 2022) (Ruling)**

Neutral citation: [2022] KEELRC 3881 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E055 OF 2022
SC RUTTO, J
SEPTEMBER 2, 2022
**IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 2,
10, 22, 23, 27, 73, 75 AND 232 OF THE CONSTITUTION OF KENYA, 2010**
AND
IN THE MATTER OF ARTICLE 158(2) OF THE CONSTITUTION
AND
IN THE MATTER OF SECTION 4 OF THE FAIR ADMINISTRATIVE ACTION ACT
AND
IN THE MATTER OF THE LEADERSHIP AND INTEGRITY ACT NO.19 OF 2012
AND
**IN THE MATTER OF CONTRAVENTION OF PROVISIONS
OF THE PUBLIC OFFICER ETHICS ACT 183 OF 2003**
AND
**IN THE MATTER OF INFRINGEMENT OF CHAPTER
SIX OF THE CONSTITUTION OF KENYA, 2010**
BETWEEN
MEMBA OCHARO PETITIONER
AND
OFFICE OF DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT
PUBLIC SERVICE COMMISSION 2ND RESPONDENT
AND



SPEAKER OF THE SENATE INTERESTED PARTY
NATIONAL TREASURY INTERESTED PARTY
COMMISSION ON ADMINISTRATIVE JUSTICE
(OMDUSMAN) INTERESTED PARTY
ETHICS AND ANTI-CORRUPTION COMMISSION INTERESTED PARTY

RULING

1. What comes up for determination is the 1st respondent's preliminary objection dated May 10, 2022. Before I delve into the objection, I will give a brief highlight of the dispute. The petitioner through a petition dated April 4, 2022 moved the court citing the 1st respondent for contravention of amongst other constitutional provisions, article 27, 73(2) and 232 of the Constitution.
2. The petition was triggered by an advertisement placed in the print media by the 1st respondent on May 11, 2021, through which it invited applications for various positions to be filled within its establishment. The petitioner avers that the subsequent shortlist which was published on the 1st respondent's website, in respect of the positions for principal administrative officer, senior supply chain management officer 1 and senior principal finance officer, consist of persons from the same ethnic background. This, the petitioner avers, do not embrace representation of Kenya's diverse communities as envisaged under article 232 of the Constitution. The petitioner has further cited the 1st respondent for discrimination on account of religion.
3. Contemporaneous with filing the petition, the petitioner filed an application seeking conservatory orders to restrain the 1st respondent from carrying out interviews, background and/or reference checks, causing gazettement, offering an employment contract and eventually assigning duty to the successful candidates for the positions of principal administrative officer, senior supply chain management officer 1 and senior principal finance officer.
4. When the application came up for hearing on May 18, 2022, the 1st respondent informed the court that it had responded to the petition and application and that it had also filed a preliminary objection.
5. Subsequently, the court directed that the objection be dispensed with at the first instance, through written submissions.
6. It is worth mentioning at this juncture that the 3rd interested party stated that it will align itself with the pleadings filed by the 1st respondent. The other interested parties indicated their wish not to participate in the dispute opining that they had no role to play.

The Preliminary Objection

7. The 1st respondent's preliminary objection dated May 10, 2022, is premised on the following grounds: -
 - i. The application and petition as drawn and filed do not meet the threshold of a constitutional petition in substance as held in the *locus classicus* Anarita Karimi Njeru vs Republic (1979) eKLR.
 - ii. The petition as drafted does not set out the constitutional provisions violated or the nature of injury or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community



contrary to rule 10 (2) (c) and (d) of the [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules, 2013](#).

- iii. The application and the petition are an abuse of court process on account of the fact that the petitioner/applicant lacks *locus standi* as he is acting in bad faith and with malice, as the petition is motivated by a personal, political and religious vendetta against the office holder of the 1st respondent.
- iv. The petition does not contain the constitutional provisions violated and the nature (sic) the applications and petition are fatally and incurably defective as they offend the provisions of section 12 of the [Employment and Labour Relations Court Act](#) no 20 of 2012 and as such, cannot be ventilated before this honourable court.
- v. The orders sought will have been overtaken by events at the date of hearing and thus would amount to an academic exercise.
- vi. The application and petition are bad in law, misconceived and disclose no reasonable cause of action against the 1st respondent thus rendering it fatally and incurably defective.

Submission

8. As stated herein, the objection was canvassed by way of written submissions. The 1st respondent submitted that the petitioner has failed to present material particulars as to demonstrate any constitutional provision violated or the nature of injury. Citing the case of [Anarita Karimi Njeru vs Republic](#) (1979) eKLR, the 1st respondent submitted that under article 22 of the [Constitution](#), a petitioner is required to state the constitutional provision violated and the manner in which they have alleged to be infringed, with a reasonable degree of specificity.
9. It was the 1st respondent's further submission that the petition do not therefore satisfy rule 10(2) of the [Mutunga Rules, 2013](#). To buttress this argument, the 1st respondent cited the decisions in [Mustafa Tobiko Ole Tampul v Hassan Ole Naado & 17 others](#) (2021) eKLR, [James Makura M'Abira v Director of Public Prosecutions](#) (2020) eKLR, and [James Miriithi v Office of the Director of Public Prosecutions Advisory Board](#) (2021) eKLR.
10. With respect to *locus standi*, the 1st respondent submitted that the petitioner does not disclose the basis for his claims hence has no legal or factual basis for seeking the orders he seeks. That the petitioner is a meddlesome interloper seeking orders without legal and factual basis and has no *locus standi* before this court. Several authorities including [Humphrey Makokha Nyongesa & another v Communications Authority of Kenya & 2 others](#) (2018) eKLR, [Sachidanad Pandey v State of West Bengal](#) (1987) SCC 295, [Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 Others](#) (2014) eKLR and [Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others](#) (2013) eKLR were cited in support of this argument.
11. It was further submitted by the 1st respondent that the demeanor of the petitioner demonstrates that his intention is to malign the Director of Public Prosecutions and taint the image of the 1st respondent. In further submission, the 1st respondent submitted that the petition is frivolous, scandalous, vexatious and made in bad faith and is therefore an abuse of the court process. The 1st respondent thus asked the court to strike out the application and petition.
12. On the other hand, the petitioner submitted that the arguments propounded by the 1st respondent are misguided since article 22 (1) of the [Constitution](#) expressly provides that every person has the right to



institute court proceedings. That it does not provide for a specific person or mention any names, hence the argument by the 1st respondent is mis founded.

13. The petitioner in further submissions, implored the court to adopt the reasonable man test. That the 1st respondent is a state officer and as such, should exercise his powers according to the provisions of article 73 of the Constitution. That the manner in which the 1st respondent exercised his powers in carrying out the recruitment process for the positions of principal administrative officer, senior supply chain management officer 1 and senior principal finance officer, did not exhibit any confidence in the public and this was specifically pleaded in both the application and the petition.
14. The petitioner further argued that he was relying on article 232(1) (i) of the Constitution which provides for the values and principles of public service and specifically, affording adequate and equal opportunities for appointment which should be across members of all ethnic groups. That the 1st respondent clearly went against this constitutional provision and decided to recruit members of one ethnic group for the positions aforesated. That as such, the petition had met the threshold for a constitutional petition.
15. Placing reliance on the provisions of articles 22 and 258 of the Constitution, the petitioner submitted that it fits in the categories of the persons laid out under article 258 of the Constitution.

Analysis and Determination

16. From the grounds raised in the objection as well as the parties' submissions, the following issues stand out for determination: -
 - a) Whether the petition has satisfied the legal threshold for a constitutional petition
 - b) Whether the petitioner has *locus standi* in this matter constitutional petition threshold?
17. The 1st respondent has submitted that the pleadings do not satisfy rule 10 (2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 (hereinafter, the Mutunga Rules). The petitioner is of the contrary view and maintain that on the face of it, the petition has met the threshold for a constitutional petition.
18. The principle on the legal threshold for a constitutional petition was established in the decision of Anarita Karimi Njeru v Attorney General [1979] KLR 154 in the following manner: -

“We would however again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with reasonable degree of precision that of which he complains, the provision said to be infringed.”
19. This principle was further developed under rule 10(1) of the Mutunga Rules as follows: -

“[10] The petition shall disclose the following—
 - (a) the petitioner’s name and address;
 - (b) the facts relied upon;
 - (c) the constitutional provision violated;”



- (d) the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;
- (e) details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;
- (f) the petition shall be signed by the petitioner or the advocate of the petitioner; and
- (g) the relief sought by the petitioner.”

20. As regards case law, the Court of Appeal in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR, reaffirmed this principle as follows: -

“(43) The petition before the High Court referred to articles 1, 2, 3, 4, 10, 19, 20 and 73 of the Constitution in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements. For example, in paragraph 2 of the petition, the 1st respondent averred that the appointing organs ignored concerns touching on the integrity of the appellant. No particulars were enumerated. Further, paragraph 4 of the petition alleged that the Government of Kenya had overthrown the Constitution, again, without any particulars. At paragraph 5 of the amended petition, it was alleged that the respondents have no respect for the spirit of the Constitution and the rule of law, without any particulars.

(44) We wish to reaffirm the principle holding on this question in Anarita Karimi Njeru (supra). In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1st respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court referred to. In view of the substantive nature of these shortcomings, it was not enough for the superior court below to lament that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting,” without requiring remedy by the 1st respondent.”

21. The court proceeded in the *Mumo Matemu case* (supra) to underscore the need for precision in pleadings as it allows parties and the court to know the issues in controversy. The court was further emphatic that pleadings are a tenet of substantive justice, as they give fair notice to the other party.

22. A look at the instant petition reveals that the petitioner has highlighted a number of constitutional provisions it deems as constituting its legal foundation. In as much as the petitioner has not identified each and every constitutional provision against the alleged constitutional violation, the body of the petition is explicit that the 1st respondent has allegedly contravened the provisions of articles 73 (2) of the Constitution as regards leadership and integrity.

23. The petitioner has further alleged that the candidates shortlisted by the 1st respondent for the positions aforesaid, are from the same ethnic background, hence the composition of the said candidates, do not reflect representation of Kenya’s diverse communities as envisaged under article 232 of the Constitution.



24. As was held by the learned judges of the Court of Appeal in the *Mumo Matemu case* (supra): -

“(41) ... However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude *ex ante* is to miss the point.”

25. Aligning myself to the expressions above, I am of the view that the manner and form in which the constitutional rights violation is framed and presented is not important. Rather, the specific rights alleged to have been infringed and the particulars as to how these rights are alleged to be infringed must be discernible from the pleadings.

26. The thread that runs through the body of the instant petition is the manner in which the 1st respondent has undertaken the recruitment process of the position of principal administrative officer, senior supply chain management officer 1 and senior principal finance officer, vis a vis the relevant constitutional provisions. In this regard, the petitioner has singled out articles 27, 73(2) and 232 of the *Constitution*.

27. The foregoing provisions when read in context of the petition as a whole, it is easy to identify the constitutional violations complained of by the petitioner and the alleged manner of violation. In my view that would be sufficient to constitute a reasonable degree of precision.

28. I am therefore satisfied that the petition has demonstrated with a reasonable degree of precision, the constitutional violations alleged against the 1st respondent.

Locus standi

29. It is the 1st respondent’s position that the standard guide for locus standi must remain the command in articles 22 and 258 of the *Constitution*. That the petitioner does not disclose the basis for his claim hence has no factual basis for seeking the orders he seeks. The petitioner on its part contends that pursuant to the provisions of articles 22 and 258 of the *Constitution*, every person has the right to institute court proceedings.

30. Articles 22 and 258 of the *Constitution* are key hence I will reproduce the same hereunder.

article 22 provides as follows: -

“[22]. Enforcement of bill of rights

(1) 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 or infringed, or is threatened.

(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”

While article 258 of the Constitution is couched as follows: -

“[258] Enforcement of this constitution

- (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.”

31. It is therefore evident that post the Constitution 2010, the rule of *locus standi* has been broadened and there is a wide latitude as to who can move the court to enforce the Constitution and the bill of rights.

32. Indeed, the Supreme Court in Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others [2014] eKLR held that: -

“(67) It is to be noted that the promulgation of the 2010 Constitution enlarged the scope of *locus standi*, in Kenya. Articles 22 and 258 have empowered every person, whether corporate or non-incorporated, to move the courts, contesting any contravention of the bill of rights, or the Constitution in general. In John Wekesa Khaoya v Attorney General, Petition No 60 of 2012; [2013] eKLR the High Court thus expressed the principle (paragraph 4):

“...the *locus standi* to file judicial proceedings, representative or otherwise, has been greatly enlarged by the Constitution in articles 22 and 258 of the Constitution which ensures unhindered access to justice...”

33. The petitioner in the instant case has described himself as a citizen of the republic of Kenya who is by right entitled to defend and uphold the sanctity of constitutionalism preserved under the Constitution. The petitioner has submitted that he falls under the category of persons identified under article 258(2) of the Constitution.

34. The category of persons identified are: -



- 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.
35. As stated herein, the petition has been brought to challenge the recruitment of persons to fill certain positions within the 1st respondent’s establishment. The 1st respondent is an independent office established under article 157 (1) of the Constitution. It therefore follows that a recruitment exercise undertaken by the 1st respondent is a matter that impacts on the public as it flows from its general functions and powers as donated by article 252(1) (c) of the Constitution. This therefore brings the instant dispute within the realm of public interest.
36. Coupled with foregoing, article 3 of the Constitution enjoins every person, to respect, uphold and defend this Constitution. Essentially, this grants *locus standi* on anyone to institute court proceedings to enforce the Constitution.
37. In concluding on this issue, I will reiterate the position taken by the Court of Appeal in its determination in the case of Nature Foundation Limited v Minister for Information and Communication & another [2015] eKLR, thus: -
- “The Constitution of Kenya, 2010 had been in force for almost a year, by the time the learned judge was delivering her ruling. She therefore, with greatest respect, erred in finding that the appellant had no *locus standi* to sustain the suit. We think that courts had departed from the strict and stringent requirement of sufficient interest long before the current matter was instituted. As stated by other courts before us, we cannot cling to an outdated relic of law when in actual sense there has been a remarkable development and fundamental departure from the old school of legal thinking and approach. Courts must make themselves aware of the new jurisprudential trend and avoid living in the annals of the dark legal history of this country which limited judicial intervention in judicial review and constitutional litigation through narrow and strict interpretation. We are past that stage, and any court clinging to the old approach would with utmost respect, be frowned upon.”
38. It is against this background that I find that the petitioner has *locus standi* to bring the instant petition.
39. The total sum of the foregoing is that the 1st respondent’s preliminary objection dated May 10, 2022 is dismissed entirely with costs being in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 2ND DAY OF SEPTEMBER 2022.

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STELLA RUTTO

JUDGE

Appearance:

For the Petitioner Ms. Matina

For the 1st Respondent Mr. Mule appearing together with Ms. Thugiri, Ms. Tamina, Ms. Obuo

For the 2nd Respondent Mr. Ongosso



For the 1st Interested Party No appearance

For the 2nd Interested Party No appearance

For the 3rd interested party Ms. Mwangi

For the 4th Interested Party No appearance

For the 5th Interested Party No appearance

Court assistant Abdimalik Hussein

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 had 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.

STELLA RUTTO

JUDGE

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