



Okoiti v Cabinet Secretary for Labour & 4 others; National Industrial Training Authority (Interested Party) (Petition E130 of 2022) [2022] KEELRC 13550 (KLR) (9 December 2022) (Ruling)

Neutral citation: [2022] KEELRC 13550 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E130 OF 2022
SC RUTTO, J
DECEMBER 9, 2022**

BETWEEN

OKIYA OMTATAH OKOITI PETITIONER

AND

THE CABINET SECRETARY FOR LABOUR 1ST RESPONDENT

THE PUBLIC SERVICE COMMISSION 2ND RESPONDENT

THE STATE CORPORATIONS ADVISORY COMMITTEE ... 3RD RESPONDENT

THE HON. ATTORNEY GENERAL 4TH RESPONDENT

PROF. DR. GACHIGI KAMAU 5TH RESPONDENT

AND

NATIONAL INDUSTRIAL TRAINING AUTHORITY INTERESTED PARTY

(IN THE MATTER OF: ARTICLES 3(1), 22(1) & (2)(C), 48, 50(1), 159(1) AND 258(1) & 2(C) OF THE CONSTITUTION OF KENYA 2010 IN THE MATTER OF: THE ALLEGED CONTRAVENTION AND VIOLATION OF ARTICLES 1(1), 2(1-4) 3(1), 10, 24, 73, 75, 29, 131(2)(A), 153(4) AND 232 OF THE CONSTITUTION IN THE MATTER OF: THE ALLEGED VIOLATION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 27, 41(1) AND 47 OF THE CONSTITUTION IN THE MATTER OF: THE ALLEGED VIOLATION OF SECTION 4(6) OF THE INDUSTRIAL TRAINING ACT (CAP.237) AND PARAGRAPHS 1.1.2 AND 1.5.1. OF CHAPTER 1 OF MWONGOZO (THE CODE OF GOVERNANCE FOR STATE CORPORATIONS) AND PARAGRAPH D5 OF ANNEXURE 1 THERETO IN THE MATTER OF: THE IRREGULAR RE-APPOINTMENT OF PROF. DR. GACHIGI KAMAU TO SERVE AS CHAIRMAN OF THE BOARD OF THE NATIONAL INDUSTRIAL AUTHORITY BEYOND THE MANDATORY TWO-TERM LIMIT SET IN LAW IN THE MATTER OF: THE DOCTRINES OF LEGITIMATE EXPECTATION AND VOID AB INITIO)



RULING

1. This Ruling is in respect of the 1st, 2nd, 3rd, and 4th Respondents' Notice of Preliminary Objection dated 29th August, 2022. The Preliminary Objection is premised on the following grounds:
 - a. This Honourable Court lacks jurisdiction to hear and determine the Petition by dint of Articles 162(2) (a) and 165(3) (a) of the Constitution and section 12 of the Employment and Labour Relations Court Act.
 - b. The Petitioner lacks locus to institute and prosecute the suit.
 - c. The suit is frivolous, vexatious and an abuse of court process.
 - d. The suit is incompetent and ought to be struck out with costs.
2. The Petitioner opposed the Preliminary Objection through its Grounds of Opposition dated 7th November, 2022. The Petitioner has termed the Objection as incompetent, vexatious, scandalous and that the same has been brought malafides. He further termed the same as an abuse of court process and asked the Court to dismiss it with costs.

Submissions

3. The Preliminary Objection was canvassed by way of written submissions. The Respondents submitted that this court lacks jurisdiction to hear and determine the matter. That the Petitioner does not fall within any of the categories of persons stated in section 12 of the Employment and Labour Relations Act (ELRC Act). That the governing statute does not contemplate a dispute in the nature of appointments to a statutory body such as the National Industrial Training Institute. The Respondents further submitted that there is no contract of service between the appointees to a statutory body with the Government and where the appointees earn sitting allowances for services rendered, the same does not amount to salary and wages. In support of its submissions, the Respondents placed reliance on the case of Kenya, Game, Hunting & Safaris Workers' Union vs Private Safaris (EA) Ltd (2002), Nairobi petition No. 11 of 2014, Nick Githi nji Ndichu vs Clerk, Kiambu County Assembly & another and Geoffrey Oriaro vs Cabinet Secretary Ministry of Labour Social Security & Services & Others (2015) eKLR.
4. Citing the case Samuel Mwangera Arachi & another vs 2 others (2015) eKLR, the Respondents further submitted that the constitutional issues raised in the instant Petition do not in any way arise from employment or labour issues. The Respondents further submitted that directors are not employees hence the Employment and Labour Relations Court has no jurisdiction to make any declaration on such appointments.
5. On its part, the Petitioner submitted that this court is the correct forum for resolution of all employment disputes. That under Article 162(2) (a) as read with Article 165(5) of the Constitution and section 12 of the ELRC Act, this court has jurisdiction to hear and determine the instant dispute which relates to the employment of public officials. In support of these submissions, the Petitioner cited several authorities including Republic vs Clerk County Assembly of Baringo ex parte William Kassait Kamket (2015) eKLR, Trusted Society of Human Rights Alliance vs Nakuru Water and Sanitation Services Company & another (2013) eKLR, Nick Githinji Ndichu vs Clerk Kiambu County Assembly and another (2014) eKLR and Okiya Omtata Okoiti vs Attorney General & 2 others, Francis K. Muthaura (Amb) & 5 others (interested parties) (2019) eKLR.



6. It was further submitted by the Petitioner that there is a lacuna in section 12 of this Court's Act to the extent that it does not list any examples of disputes concerning broader aspects of employment which are not labour relations such as recruitment of persons into public office.
7. The Petitioner stated in further submission that since the Employment and Labour Relations Court has the jurisdiction to hear any disputes concerning the employment of all public officers who are not elected but are recruited and appointed into office which includes the 5th Respondent, constitutional petitions concerning the employment of the two officers can only be determined by this Court in the first instance.
8. With regards to the question of locus standi, the Petitioner argued that the 2010 Constitution has broadened avenues of constitutional litigation hence he has a legal standing to institute these proceedings. To buttress this position, the Petitioner cited the case of *Albert Ruturi JK Wanywela & Kenya Bankers Association vs the minister of Finance & Attorney general and Central Bank of Kenya, John Harun Mwau and 3 others vs Attorney General and 2 others* (2012) eKLR and *Mumo Matemu vs Trusted Society of Human Right's Alliance & 5 others*.
9. The Petitioner further argued that a preliminary objection must be on a pure point of law and that the issues raised in the instant objection go to the root of the merits of case, which the Court cannot determine at face value unless it delves deeper. He cited several authorities including *Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors* (1969) EA 696, *Nitin Properties Ltd vs Signh Kalsi & another* (1995) eKLR, *Oraro vs Mbaja* (2007) KLR, 141. On this score, the Petitioner asked the Court to dismiss the Preliminary Objection with costs.
10. The 5th Respondent did not file any submissions and indicated its support to the Preliminary Objection.

Analysis and determination

11. For starters, I find it imperative to consider what constitutes a Preliminary Objection. The definition of a Preliminary Objection was well set out in the celebrated case of *Mukisa Biscuits Manufacturing Ltd vs West End Distributors* (1969) EA 696 where it was held thus:

“...a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration”.

In the same case, Sir Charles Newbold, P. stated:

“a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.

12. Essentially, for a preliminary objection to succeed, the following elements ought to be satisfied: -
 - a. It should raise a pure point of law;



- b. It is argued on the assumption that all the facts pleaded by the other side are correct; and
 - c. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.
13. In light of the above, this Court must now consider whether the issues raised in the instant Preliminary Objection are matters of fact or law and whether the facts pleaded, are correct and settled.
14. The first issue that has been raised by the Respondents is the question of the Court's Jurisdiction to hear and determine the dispute. An objection to the jurisdiction of the court has been cited as one of the preliminary objections that consists a point of law. In the celebrated case of Owners of the Motor Vessel "Lillian S" (supra) the Court held as follows:
- "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. A Court of Law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."
15. In support of its arguments on this issue, the Respondents have contended that the Court lacks jurisdiction to hear and determine the dispute as the parties in the Petition do not fall within any of the categories stated in Section 12 of the ELRC Act. The Respondents further submit that an appointee to a statutory body as the 5th Respondent and moreso, a board member, is not an employee hence does not have a contract of service. That even if such appointees earn sitting allowances for services rendered, the same does not amount to salary and wages within the Employment Act.
16. The Petitioner has taken a different position on the issue and has submitted that this Court has jurisdiction to hear the present Petition which concerns employment of public officials under the Constitution.
17. Indeed, it is worth mentioning that the parties have extensively submitted on the question of what constitutes an employment and whether the position of the 5th Respondent is that of an employee within the meaning of the Employment Act.
18. What this means is that the facts in this case particularly, whether the 5th Respondent is an employee for purposes of placing the dispute under section 12 of the ELRC Act, are heavily contested and parties have taken diametrically opposite positions in this respect.
19. It is not in doubt that a question as to whether a person is an employee under the Employment Act, is an issue of fact that must be interrogated from various angles. This entails considering the elements that normally exist in an employment contract. In this context, the issues that must be interrogated in order to resolve the jurisdictional question is whether the 5th Respondent is an employee? Does he have a contract of service? And if so, with who? Does he earn a salary? No doubt, these are not pure points of law. All these issues call for evidence and a deeper factual analysis.
20. Therefore, on the face of the Preliminary Objection, the issue of jurisdiction presents as a pure point of law but in order to resolve the same, factual issues calling for proof by way of evidence have to be considered.
21. Therefore, a resolution of this issue transcends issues of law thus placing the Preliminary Objection outside the realm of what constitutes a preliminary objection. At the risk of repeating myself, a



- preliminary objection can only be argued on the presumption that all facts pleaded by either side are correct and cannot be raised and sustained if any fact has to be ascertained by way of evidence.
22. Therefore, in light of the fact the factual issues are not settled, in my view, this is not an issue that can be determined at this point in time as it has failed to satisfy the ingredients for a preliminary objection.
 23. I would have stopped there but since the Respondents brought up the issue of locus standi in the Preliminary Objection, I am enjoined to consider the same.
 24. The issue of locus is provided for under Articles 22 and 258 of the Constitution.
 25. It is evident from the aforestated constitutional provisions that post the Constitution of Kenya, 2010, the doctrine of locus standi has been broadened and given a wider scope. There is therefore, a wide latitude as to who can move the Court to enforce the Constitution and the Bill of Rights.
 26. This position was amplified by the Supreme Court in *Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others* [2014] eKLR where it was 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...”
”
 27. The Petitioner in the instant case has described himself as a law abiding citizen of Kenya who is a public spirited individual and a human rights defender.
 28. As to who may move the Court, Article 258(2) of the Constitution identifies the following category of persons:
 - 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.
 29. Therefore, the Petitioner having identified himself as he has, qualifies him to move the Court as he has. Indeed, he has anchored the Petition under the provisions of Article 22 and 258 of the Constitution hence has locus before this Court. Over and above, 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.
 30. As stated herein, the Petition has been brought to challenge the appointment of the 5th Respondent as chairperson of the Interested Party. To this end, the Petitioner has cited the 1st Respondent for constitutional violations, which he has proceeded to highlight in the Petition.



31. For the foregoing reasons, I find that the Petitioner has locus to appear in these proceedings and argue the Petition.
32. 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 vs 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.”

33. In light of the foregoing and view of the reasons set out herein, the Respondent’s Preliminary Objection dated 29th August, 2022 is declined with no orders as to costs.

DATED, SIGNED and DELIVERED at NAIROBI this 9th day of December 2022.

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STELLA RUTTO

JUDGE

Appearance:

For the Petitioner In person

For the 1st, 3rd and 4th Respondents and Interested Party Mr. Odukenya

For the 2nd Respondent Ms. Iseme

For the 5th Respondent Mr. Farrah

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

