



Njoroge v Cabinet Secretary, Ministry of Education & 3 others; Bunyi & 2 others (Interested Parties) (Petition E015 of 2022) [2022] KEELRC 13343 (KLR) (1 December 2022) (Ruling)

Neutral citation: [2022] KEELRC 13343 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
PETITION E015 OF 2022
HS WASILWA, J
DECEMBER 1, 2022**

BETWEEN

MARTIN NJOROGE PETITIONER

AND

CABINET SECRETARY, MINISTRY OF EDUCATION 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

KENYA NATIONAL COMMISSION OF UNESCO 3RD RESPONDENT

EVANGELINE NJOKA 4TH RESPONDENT

AND

GRACE BUNYI INTERESTED PARTY

ANTONINA LENTOIJONI INTERESTED PARTY

PATRICK OCHICH INTERESTED PARTY

RULING

1. The petition in this case was filed together with an application notice of motion dated November 1, 2022, seeking the following orders; -
 1. Spent.
 2. Spent.
 3. Spent.
 4. Spent.



5. Pending hearing and determination of the petition herein, a conservatory order in form of an injunction be and is hereby issued directing Dr Evangeline Njoka, the secretary General/Chief Executive Officer of the Kenya National Commission for UNESCO to proceed on terminal leave effective November 30, 2022, being six (6) months before her contract of employment expires on May 31, 2023.
 6. Pending hearing and determination of the petition, a conservatory order be and is hereby issued suspending the appointment of Patrick Ochich, Antonina Lentoijoni and Prof Grace Bunyi as members of the board of Kenya National Commission for UNESCO and restraining them from performing the functions of the members thereof.
 7. Pending hearing and determination of the petition herein, a conservatory order be and is hereby issued restraining the 1st and 3rd respondents from extending, re-appointing and renewing the employment contract of Dr Evangeline Njoka as the Secretary General/ Chief Executive Officer of the Kenya National for UNSECO beyond the May 30, 2023 or expiry of her two -term contract of five years each.
 8. That costs of this application be provided for.
2. The basis upon which the application is made is that; -
- a. The Kenya National Commission for UNESCO, (herein after referred to as the commission) is a state corporation established under *Kenya National Commission for UNESCO Act*, no 5 of 2013, with section 17(1) of the said Act establishing the office of the secretary general/ chief executive officer.
 - b. It is stated that the said CEO is appointed by the 1st respondent in consultation with the board of the commission.
 - c. The commission pursuant to section 18 and with the approval of the State Corporation Advisory Committee of the said Act, promulgated the Human Resource Policy and Procedure Manual, 2019 which provides at clause 2.5.3 that the CEO shall be appointed on a contract of five (5) years, renewable once subject to performance.
 - d. It is contended that the 4th respondent was appointed by the 1st and 3rd respondent in 2013 in a process that was devoid of transparency, public participation and accountability contrary article 10(2) & 232(1) of the *Constitution*.
 - e. It is averred that no advertisement or interviews were conducted before the said appointment.
 - f. By the letter of 19th and October 26, 2022, the petitioner has sought from the commission for information with regard to advertisement, interview and appointment of the 4th respondent, which letter have not elicited any response.
 - g. It is the petitioner's case that despite the appointment of the 4th respondent being opaque, she was re-appointed for a second term in the year 2018 with effect from June 1, 2018 which contract is to expire on May 30, 2023.
 - h. The petitioner avers that despite the contract of the 4th respondent coming to an end, he has established that the 1st and 3rd respondent are working in cahoots with the 4th respondent to secure a third term contract in violation of clause 2.5.3 of the respondent's manual.
 - i. He states that the *State Corporation Act*, the Code of Governance for state corporation, 2015 and the Government Circular, Ref No OP/CAB.9/IA dated November 23, 2010 provides



that existing CEOs of state corporation whose contracts are expiring on May 31, 2023, should proceed on terminal leave of six months and the acting CEO to be appointed during this transition period.

- j. That the 4th respondent has refused to heed the law and go for the said leave to allow his successor be recruited.
 - k. That the interested parties, who are in office in the capacity of members of the board were not appointed by the 1st respondent as envisaged under section 6(1)(g) of the UNESCO Act, as such continue to illegally draw allowances from the commission.
 - l. The petitioner urged this court to move with speed and direct the 4th respondent to proceed on terminal leave, failure to which the 4th respondent is likely to run-down UNESCO Commission.
3. Before this application could be heard and determined, the 3rd and 4th respondents together with the interested parties filed a preliminary objection dated November 7, 2022 in which they content as follows;
1. This court lacks territorial and administrative jurisdiction to deal with this matter.
 2. This petition offends the provisions of sections 15, 16 and 19 of the *Civil Procedure Act*.
 3. This petition offends the provisions of *Kenya National Commission for UNESCO Act*, No 5 of 2013.
 4. This petition offends the provisions of *Basic Education Act*.
 5. This court lack jurisdiction to entertain the petition on account of doctrine of lack of exhaustion.
 6. The petition is grossly and fundamentally defective.
 7. The suit is re-judicata in light of the judgement of the court in Nairobi Petition number 169 of 2020.
 8. This petition is an abuse of court process.
4. Directions were taken for the preliminary objection to be heard first because it touches on the jurisdiction of this court. The preliminary objection was disposed of by way of written submissions with all parties filing their respective submissions on the November 21, 2022.

Respondents Submissions.

5. The respondents submitted from the onset that the issue before court has nothing to do with employment relationship between the petitioner and the respondents as contemplated under article 162(2) of the *Constitution* as read with section 12(1) of the *Employment Act*, as such this court does not have jurisdiction to hear and determine this petition. It is argued that the petitioner has no indicated clearly the basis of his petition to invoke the jurisdiction of this court.
6. It is submitted on the contrary that the petition challenges the establishment of the board of the 3rd respondent, whose membership infact are not employees of the said board but public servants in other organizations who not draw any salaries from the 3rd respondent. It is clarified that section 6 of *State Corporation Act* provides for membership of a board of a corporation to include; the chairman, the chief executive, the permanent secretary of the parent ministry, permanent secretary to the treasury,



Attorney General and 11 other members who are not employees of the corporation, appointed by the minister. On that basis that the law does not allow employees of the corporation to be board members as such the 4th respondent is not an employee of the 3rd respondent as alleged, therefore there is no employment relationship issues to be adjudicated by this court.

7. To support its argument, the respondents cited the case of *Attorney General and 2 others v Okiya Omtata Okiiti & 14 others* [2020] eKLR where the court dealt with the issue of jurisdiction of this court with regard to appointment of chairperson of constitutional bodies and statutory boards and held that;

“what all these suggest to us is that the appointment and removal from office of the commissioners of these independent commissions is not a labour and employment issue as ELRC erroneously held, but a special constitutional innovation, a *sui generis* device to address the challenging governance needs and gaps. The appointment of the chairperson and members of the commission did not involve any of the parties or raise any of the employment and labour relations issues contemplated under section 12 of the Act.”
8. On the issue of exhaustion of remedies, the respondent, submitted that state corporations have internal dispute resolution mechanisms called State Corporation Advisory Committees which are provided for under section 26 of the *State Corporation Act*, with its functions stipulated under section 27 of the said Act. Therefore the petitioner ought to have raised the said issues in the advisory committee before bringing this issue before this court. In this he cited the case of *Republic v National Environmental Management Authority* [2011] eKLR.
9. The respondent further submitted that even if this court had jurisdiction to hear and determine this petition, then the right forum ought to be the Employment and Labour Relations Court in Nairobi in light of section 15 of the *Civil Procedure Act* and section 15 of the *State Corporation Act*, which provides for place of suing as the place where the corporation carries out its business which is in the principal office, which in this case, the 3rd respondent's principal office is in Nairobi. To emphasize on this they relied on the case of *Michael Adib Azzam V Zakhem Construction (K) Limited* [2022] eKLR, where the court held that in selecting where to institute a suit, the respondent's location should be a main consideration.
10. In conclusion, the respondent urged this court to be persuaded by their argument and find in their favour and uphold the preliminary objection and strike out the petition herein for lacking merit.

Petitioner's Submissions.

11. The petitioners on the other hand submitted that article 162(2) of the *Constitution*, grants this court jurisdiction that extends to all matters relating to employment and labour relations and all disputes relating to or arising out of employment between an employer and an employee. To support this argument, he relied on the case of *Prof Daniel N Mugendi v Kenyatta University and others* [2013] eKLR, where the court was categorical that the Employment Court has jurisdiction to hear employment and labour relations matters alongside claims of fundamental rights ancillary and incidental to these matters.
12. He also cited the case of *Okiya Omtata Okiiti v Kenyatta University Council and others* [2015] eKLR where the court held that it has jurisdiction to determine the legality of a recruitment process and ensure due process not only during the subsistence of an employment relation but also in the pre-employment process which is the advertisement and interview process.
13. Accordingly, that the petitioner herein is calling upon this court to interrogate the appointment and re-appointment of the 4th respondent as the chief executive officer of the 3rd respondent and determine whether it complies with article 10 and 232 of the *Constitution*. He argued that the appointment of



the 4th respondent is a matter that is ancillary and incidental to an employment dispute, therefore this court is vested with the requisite jurisdiction.

14. The petitioner submitted also that the respondent and the interested parties have alleged that the suit herein offends the provisions of UNESCO Act and the *Basic Education Act*, without laying basis for the said violation or quoting the specific sections the suit offends. Further that the argument that the petition offends sections 15, 16 and 19 of the *Civil Procedure Act* is baseless on the reason that the provisions of the *Civil Procedure Act*, do not apply in this court. In this he cited the case of *Vincent Mwatsuma Nguma and 5 others v Kilifi Water and sewerage Company Limited (KIMAWASCO)* [2021] Eklr.
15. The petitioner submitted that he is a resident of Ngata area in Nakuru County and a well meaning citizen who has gone out of his way to raise concern on the illegal and unconstitutional appointment of the 4th respondent. He added that the respondents are persons of means and thus are able to attend to court without any difficulty and the access to justice right under article 48 is to enable all person to access the court without any difficulties, therefore urged this court to handle the petition in this court and not transfer it to Nairobi.
16. On the question of re-judicata raise in the preliminary objection, the petitioner submitted that the issues raised in High Court case of *Jeremiah Mmemba Ocharo V Evangeline Njoka and 3 others* [2022]] eklr was for removal of Evangeline Njoka for allegedly violating the constitution, however that his claim herein is for barring the re-appointment of the said Evangeline Njoka for an illegal 3rd term which are two separate issues. In this he relied on the case of *Moses Mbatia v Joseph Wamburu Kihara* [2021] eklr.
17. In conclusion, the petitioner reiterated that this court has jurisdiction to hear and determine the issues raised in his petition and prayed that the preliminary objection raised be dismissed and the petition set down for hearing.
18. I have examined the averments of the parties herein. The main contention by the respondent applicant is that this court has no jurisdiction to handle this matter in terms of its jurisdictional and geographical position.
19. In submitting lack of jurisdiction, the applicant cited the Court of Appeal in *AG & 2 others v Okiya Omtata Okoiti & 14 others* (2020) eKLR where the court indicated that this court has no jurisdiction to handle matters of appointment and removal from office of commissioners of these independent commissions.
20. The respondent on the other hand cited *Okiya Omtata Okoiti v Kenyatta University Council & others* where the Court of Appeal held that this court has jurisdiction to determine the legality of a recruitment process and ensure due process not only during the subsistence of an employment process.
21. I have considered these authorities cited and I am alive of the decision of the 2 different benches of the Court of Appeal.
22. I take cognizance of the fact that in the case of NLC the court was alive of the fact that this court had no jurisdiction of dealing with the matter as it concerned an independent commission.
23. In the current matter, I am not dealing with any independent commission as established under the constitution.
24. The respondents herein are varied being the AG, Ministry of Education and some individuals.
25. The Kenya National Commission of UNESCO on the other hand is a department under the Ministry of Education. The commission is not an independent commission.



26. It cannot fall under independent commissions established under the constitution as was discussed in the NLC matters above.
27. The authority as cited is distinguishable and does not affect the jurisdiction of this court in dealing with the claim before me.
28. As concerns the geographical jurisdiction of this court, this court is a court the status of the High Court which has jurisdiction in the entire Republic of Kenya. The jurisdiction is set out under article 162 (2) (a) of the Constitution which states as follows;

“162. System of Courts

- (1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause
 - (2). Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—
 - (a) employment and labour relations; and
 - (b) the environment and the use and occupation of, and title to, land.
 - (3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).
 - (4) The subordinate courts are the courts established under article 169, or by Parliament in accordance with that article.”
29. The submissions of the applicant in limiting this court’s jurisdiction to geographical boundaries within Kenya is therefore misconceived and is therefore rejected.
 30. I therefore return the verdict that the preliminary objection before me is without merit and the same is dismissed accordingly.
 31. I therefore direct the parties to proceed with the main application/petition before the court.
 32. Costs in the petition.

RULING DELIVERED VIRTUALLY THIS 1ST DAY OF DECEMBER, 2022.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Kotoiya holding brief for Opar for the Petitioner - present

Ojago for 3rd & 4th Respondents – present

Ms. Twei holding brief for Kirimi for Interested Parties – present

Court Assistant - Fred

