



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 201 OF 2019

IN THE MATTER OF: ARTICLES 10 (2) (c), 22 (1) & (2) (a) (c) , 23 (1), 41 (1) (2)b, 48 , 47 (1) (2) , 50 (1). 165 , 236 , 179 (6) , 183 , 236 (a) (b) AND 258 (1) & 2 (c) OF THE CONSTITUTION OF KENYA

IN THE MATTER OF: THE ALLEGED CONTRAVENTION AND VIOLATION OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF: THE ENFORCEMENT OF THE BILL OF RIGHTS PARTICULARLY ARTICLES 27 (1) & 41 (1) (2b) OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF: THE EMPLOYMENT ACT 2007, LAWS OF KENYA

IN THE MATTER OF: THE COUNTY GOVERNMENTS ACT NO. 17 OF 2012

BETWEEN

KENNEDY WAMBUA MULWA.....PETITIONER

AND

KITUI COUNTY CHIEF OFFICER- HEALTH AND SANITATION1ST RESPONDENT

KITUI COUNTY PUBLIC SERVICE BOARD.....2ND RESPONDENT

COUNTY GOVERNMENT OF KITUI3RD RESPONDENT

AND

DR. RICHARD MUTHOKA.....CONTEMNOR

RULING

1. This ruling relates to the Petitioner’s Notice of Preliminary Objection dated 30.3.2020 which seeks the striking out of the Respondents’ Notice of Motion dated 18.3.2020 on grounds that it is incompetent, bad in law, vexatious and an abuse of Court Process for the following reason:

a. THAT the Supporting Affidavit sworn by the Contemnor on behalf of the 2nd and 3rd Respondents is incurably defective as it offends section 44 (3) (a) and 58 (1) of the County Government Act in that the affiant is neither the Head of the County Public Service nor is he a member of the County Public Service Board which are legal entities with substantive accounting officers.

b. THAT the representation of the 1st, 2nd and 3rd Applicants and the contemnors by the same law firm of Katunga Mbuvi & Co. Advocates is a clear conflict of interest in that the 2nd and 3rd Respondents are two distinct legal entities with very distinct functions established under section 57 of the County Government Act No. 17 of 2012 and Article 176 of the Constitution of Kenya 2010.

c. THAT the representation of M/s Katunga Mbuvi & Co. Advocates raises serious ethical issues arising from conflict of interest of the Kitui County Public Service Board mandates under Article 236 of the Constitution to protect public offices of

the 3rd Respondent in strict adherence to due process and the rule of law in exercising its disciplinary control.

d. THAT the application violates Order 51 Rule 13 (2) of the Civil Procedure Rules.

e. THAT the 1st Respondent having failed to purge the contempt, ought not be heard on his application dated 18.3.2020 and further the supporting affidavit to the application violates section 11 of Cap 15.

f. THAT the Orders sought by the Respondents having already been overtaken by events were marked by the Honourable Court as spent on 2.12.2019 and therefore the motion had been rendered nugatory and is purely academic as he Court is not in a position to grant them.

g. THAT the Respondents are indolent and guilty of laches as shown by the inordinate delay in moving the Court more than 5 months after the close of the prescribed period of fourteen days which delay has not sufficiently been explained, so as to warrant favourable discretion from the Court.

2. The Notice of Preliminary Objection is supported by the affidavit sworn by the petitioner on 30.3.2020 in which he reiterates the grounds in the preliminary objection.

3. The Respondents opposed the Preliminary Objection vide the Replying Affidavit sworn by Richard Mukula Muthoka, who deposed that he is a senior employee of the 3rd Respondent, sworn on 2.7.2020; that the Notice of Motion dated 18.3.2020 is competent and right before this Court and does not violate Order 51 Rule 13 (2) of the Civil Procedure Rules; that the firm of Katunga Mbuvi & Co. Advocates can represent the Respondents without creating a conflict of interest as all the Respondents are bodies within the County Government of Kitui; that the County Government of Kitui does not have a public service board and the board has not been in existence since July 2019; and that all matters regarding the same are handled by the County Government of Kitui the 3rd Respondent.

4. The preliminary objection was disposed of by written submissions which were filed on 5.3.2020.

Petitioner's submissions

5. The petitioner submitted that the supporting affidavit sworn by the contemnor who is also the 1st Respondent herein is fatally incompetent because the affiant is not the County Secretary (the head of the county public service), or the Secretary or a board member of the 2nd Respondent.

6. He argued that section 58 (1) of the County Governments Act gives the composition of the board members of the 2nd Respondent while section 59 (1) of the County Governments Act outlines its functions. In his view, the two entities should not be represented by one counsel in this suit. He averred that he is an employee of the Kitui County Public Service Board (CPSB), the 2nd Respondent, and as such Article 236 of the Constitution donates powers to the boards to protect public officers of the 3rd Respondents.

7. He argued that there will be conflict of interests and serious ethical issues if the 2nd and 3rd Respondents continue to be represented by M/s Katunga Mbuvi & Co. Advocates and that his right to due process will not be safeguarded as the county government will act as judge, advocate and investigator which is contrary to Article 27 (1) of the Constitution. For emphasis he relied on **June Mawia Munyao v Kitui county Public Service Board & 3 Others [2018] eKLR** where the Court held that there was conflict of interest where the county government and CPSB were represented by the same counsel thus they could not share a counsel.

8. The petitioner further argued that the application violates Order 51 Rule 13 (2) of the Civil Procedure Rules and that several courts have pronounced themselves on matters of strictly following the set rules and should a party ignore these rules, the court has a duty to strike out such an application for being competent.

9. He relied on **Nicholas Kiptoo Korir Salat v Independent Electoral and Boundaries Commission & 6 Others [2013] eKLR** that Article 159 and the oxygen principles were never meant to aid the overthrow or destructions of the rules of procedure and create an anarchy in the administration of justice. He further relied on the decision in **John Onger Mariaria & 2 Others v Paul Matundura (2004) 2 EA 163** that rules of procedure are meant to regulate administration of justice and not assist the indolent.

10. He argued that the Respondents have disobeyed the orders issued by this Court and that the Contemnor blatantly disobeyed the orders issued on 17.2.2020 when he appointed Jackline Kiema to continue performing the official duties of the Applicant which are of the Transport Officer- Kitui County Referral Hospital this leaving him without an office for 11 months.

11. He cited the Court of Appeal decision in **A.B & another v R.B [2016] eKLR** where the Court declined to hear the applicants until when they complied with the orders of the High Court. He further relied on **Teachers Service Commission v Kenya National Union of Teachers & 2 Others [2013] eKLR**, **Republic v Kenya School of Law & 2 Others ex parte Juliet Wanjiru Njoroge & 5 Others [2015] eKLR**, **B v Attorney General [2004] 1 KLR 431** and **James H Gitau Mwaura v Attorney General & another [2015] eKLR** all on disobedience of court orders and submitted that the contemnor has no business to have his application heard.

12. He argued that though the contemnor avers that he was never served with the pleadings, the letter dated 9.3.2020 by Dr. Allan Owino confirms that they were aware of the court's order issued on 17.2.2020.

13. He contended that the orders sought by the Respondents have already been overtaken by events as they were marked as spent on

2.12.2019 hence the application has been rendered nugatory and should be dismissed with costs for being incompetent, bad in law and an abuse of the court process.

Respondents' submissions

14. The Respondents submitted that the law on preliminary objections is set out in the case of **Mukisa Biscuit v West End Distributors Limited (1969) E.A 696** and the rule is that a preliminary objection should raise a pure point of law and not set out contestable facts. They submitted that in **George Oraro v Barak Eston Mbaja [2005] eKLR** the Court defined a preliminary objection as a point of law which must not be lured with factual details liable to be contested.

15. They argued that a person disputing authority to swear an affidavit should rebut the presumption that the officer has authority as stated on oath. It was their submission that this authority of the 1st Respondent to swear the affidavit on behalf of the 2nd and 3rd respondent has not been controverted by either affidavit evidence or otherwise. They relied on the decision of the Supreme Court of Philippines in **Antonio C. Bustillo v People of the Phillipines G.R. No. 1607718**.

16. They relied on sections 59 of the County Governments Act and argued that the functions of the CPSB are on behalf of the county government and that the 1st Respondent is an officer of the CPSB with requisite authority to depose on behalf of all the respondents.

17. They argued that this issue cannot be raised by way of preliminary objection because all matters of conflict of interest require an examination of facts such as the interest of parties and confidential information to be protected. They submitted that for the Court to interfere with the choice of counsel, exceptional circumstances must be proved as held in **William Audi Ododa & another v John Yier & another CA N. 360 of 2004**. They averred that the firm of Katunga Mbuvi & Co. advocates has clear instructions from the Respondents to represent them.

18. They submitted that the objection with respect to Order 51 Rule 13 (2) of the Civil Procedure Rules is a technicality and the Petitioner cannot use it to discredit their application dated 18.3.2020. They relied on Order 2 Rule 14 of the Civil Procedure Rules which provides that no technical objection may be raised to any pleading on the ground of any want or form. They further cited section 1 A of the Civil Procedure Act which provides for just, expeditious and affordable resolution of disputes.

19. They argued that the affidavit does not have any false statement or declaration to warrant penalty and that the 1st respondent has not provided any false statement knowingly or wilfully. They averred that the practice in this court is that it is not bound by the provisions of the Civil Procedure Rules and that Articles 48 and 50 of the Constitution of Kenya provides for access to justice for all persons and fair hearing of matters before the Court.

Issues for determination

20. The issues for determination are:

- a. **Whether the notice of preliminary objection has met the legal threshold for preliminary objection.**
- b. **Whether the 1st Respondent is competent to swear the supporting affidavit on behalf of the 2nd and 3rd Respondents.**
- c. **Whether there is a conflict of interest by virtue of the firm of Katunga Mbuvi & Co. Advocates representing the 2nd and 3rd Respondents.**
- d. **Whether the Court should hear the respondent's notice of motion dated 18.3.2020.**
- e. **Whether the application violates Order 51 Rule 13 (2) of the Civil Procedure Rules**

Legal threshold of preliminary objection.

21. A Preliminary Objection was defined by the **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969] EA 696** as follows:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law and it is argued on the assumption that all the facts pleaded are correct. It cannot be raised if any fact needs to be ascertained or if what is sought is the exercise of judicial discretion.”

22. Again in **George Oraro v Barak Eston Mbaja [2005] eKLR Ojwang J**, as he then was held that:

“The principle is abundantly clear. A preliminary objection correctly understood is now well defined and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of principle, a true preliminary objection which the court should allow to proceed.”

23. In the instant case, the petitioner averred that the application is bad in law, vexatious and it is an abuse of the process of the court because

the impugned motion is supported by an affidavit sworn on behalf of the 2nd applicant by an unqualified person; that the firm of Katunga Mbuvi & Company Advocates cannot represent the 2nd and the 3rd applicants because there is conflict of interest and ethical issues at stake; that the motion is fatally defective for want of form; that the 1st applicant should be denied audience because after being cited for contempt he has not purged the contempt; that the application is overtaken by events in view of the directions of the court dated 2.12.2019, and that the application has been made after inordinate delay.

24. Having considered the meaning of a preliminary objection given by ***Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969] EA 696***, and ***George Oraro v Barak Eston Mbaja [2005] eKLR***, it would appear that all the above points relied upon by the petitioner to raise his objection do not fall within the province of a preliminary objection except the issue of want of form, since they will all require factual arguments to establish them. As correctly argued by the Respondent evidence will be required to prove or disprove the said grounds because as it can be seen from the summary of submissions above, they are contested factual grounds and not legal points.

25. This case should be distinguished from ***June Mawia Munyao v Kitui county Public Service Board & 3 others [2018] eKLR*** because in the said case, the appointment of the counsel by both County Government and the Public Service Board was not in dispute. Secondly, the issue involved was allegation of redundancy and abolition of the claimant's office by an incoming Governor in what appeared to be an act of victimization and interference with the Board's mandate and as such the circumstances were different from the instant case where even the Board was not involved in the departmental transfer of the petitioner which is a function of the 1st Respondent under section 72 (1) of the County Government Act.

26. The issue of contempt of court is very serious and courts have indeed denied litigants audience until they purge the contempt. However in the instant case, the impugned application is an attempt by the contemnor to exonerate himself from the alleged contempt. It would therefore be unfair to deny him audience especially after it was acknowledged by the petitioner that he received a letter from Dr. Owino reinstating him pursuant to the said court order.

27. In view of the foregoing observations, I find and hold that save for the issue of form, the Notice of Preliminary Objection dated 30.3.2020 does not raise a true preliminary objection capable of disposing of the Notice of Motion dated 18.3.2020 *in limine*.

Whether Application is fatally defective and offends Order 51 Rule 13(2) of the Civil Procedure Rules

28. The above point of objection relates to want of form, and I find that the failure to comply with Order 51 Rule 13 (2) is a mere technicality which does not affect the substance of the impugned application. I also find that it would be harsh to strike out the application for reason that some words were not capture in the application. Order 51 Rule 10 (2) of the Civil Procedure Rules provides:

“No application shall be defeated on a technicality or for want of form that does not affect the substance of the application.”

Conclusion

29. I have found that the Notice of preliminary Objection dated 30.3.2020 does not raise a valid preliminary objection on pure points of law save for the issue of want of form which is a mere technicality and which does not affect the substance of the application. Consequently, the objection by the petitioner is overruled and dismissed with costs.

Dated and delivered at Nairobi this 11th day February, 2020.

ONESMUS N MAKAU

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 April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28(3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE