



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION 209 OF 2019

IN THE MATTER OF VIOLATION OF ARTICLES 3, 10, 20, 21, 22, 23, 27, 28, 41, 47, 73, 79, 232, 234, 236 AND 258

OF THE CONSTITUTION OF KENYA

IN THE MATTER OF THE EMPLOYMENT ACT, ETHICS AND ANTI-CORRUPTION COMMISSION ACT AND LEADERSHIP AND INTEGRITY ACT

IN THE MATTER OF THE INVESTIGATION OF THE LIVE PROCEEDINGS OF THE COURT AND OTHERS BY ETHICS AND ANTI-CORRUPTION COMMISSION

BETWEEN

DR. PIUS WANJALA.....APPLICANT

VERSUS

ETHICS AND ANTI-CORRUPTION COMMISSION.....RESPONDENT

AND

MS. SICILY KARIUKI, CABINET SECRETARY

MINISTRY OF HEALTH.....1ST INTERESTED PARTY

THE LAW SOCIETY OF KENYA2ND INTERESTED PARTY

RULING

1. The Petitioner brought the petition herein on 17.11.2019 together with a Notice of Motion dated 6.11.2019. The petition was amended with the leave of the court on 16.3.2020. The gravamen of the petition is that the Respondent’s decision to investigate him on alleged gross misconduct at work place is an act of usurpation of the power and function of his employer and the Public Service Commission.

2. The Respondent filed Replying Affidavit on 17.12.2019 opposing the petition and further filed the instant Notice of Motion dated 16.12.2019 seeking for the following orders:

(a) THAT this Honourable Court be pleased to transfer this petition to the Anti-corruption and Economic Crimes Divisions of the High Court of Kenya for hearing and determination.

(b) Costs of this application be the cause.

3. The main grounds upon which the application stands are that, the petition is about claims of infringement of constitutional rights by it in the cause of investigations into corruption, economic crimes, violation of code of ethics and related offences by the Petitioner while in full time employment by the 1st interested party; that by dint of Gazette Notices number 9123 of 2015, 10263 of 2016 and 7262 of 2018 all petitions and judicial review applications on claims of infringement or the threatened infringement of constitutional rights relating to corruption and/or economic related matter shall be heard by the Anti-corruption and Economic Crimes Division of the High Court; and that the instant petition is the proper subject matter for the said Division of the High Court.

4. The Petitioner opposed the application vide his Replying Affidavit dated 6.7.2020 in which he contended that on 28.2.2020 the Respondent listed the following as the issues under investigation:

- (a) Suing his employer without exhausting other available avenues and procedures.
- (b) Filing matters in court for National Quality Control Laboratory (NQCL) and acting for it without express authority from the Board of Management and further without prior re-designation as Pharmacist.
- (c) Absconding duty to work at Masika & Koross Advocates as an Associate during working hours for gain and contracting the said law firm to act for NQCL.
- (d) Absconding duty to study law degree and subsequently attend Kenya School of Law without leave from the employer.

4. The Petitioner further contended that this court is the correct one to determine the petition because it relates to employment relations; and that the applicant is usurping the powers of Public Service Commission after a report of the alleged gross misconduct was made to it by the 1st interested party through James Mwenda.

5. The 1st Interested Party supported the application for transfer of the petition to the High Court. However, the 2nd interested party opposed the application vide the Replying Affidavit sworn by its CEO Ms. Mercy Wambua on 11.9.2020, in which she confirmed that the petitioner is an active member whose Admission Number is P105/11886/15 and is currently employed as a Civil Servant in the NQCL; that by letter dated 29.7.2020, the Petitioner drew the attention of the 2nd Interested Party that he had been suspended from work vide the letter dated 13.7.2020 for alleged gross misconduct stemming from matters he had conducted as an Advocate of the High Court of Kenya employed by the NQCL; that matters before the court relate to the intended disciplinary proceedings against the Petitioner from the alleged absenteeism from work at the NQCL for gain in the firm of Masika and Koross Advocates; that the dispute in the Amended petition arises out of employment between the Petitioner and his employer upon which this Honourable Court has exclusive original jurisdiction to determine by dint of section 12 of the ELRC Act and Article 162(2) of the Constitution.

SUBMISSIONS

5. The Applicant submitted that it is an independent Commission established pursuant to Article 79 of the Constitution and section 3 of Ethics and Anti-Corruption Commission Act, 2011 (EACCA) with the mandate to investigate the conduct of any person and/or body which in its opinion constitutes corruption or economic crime and unethical conduct pursuant to the provision of Chapter six of the Constitution of Kenya Anti-corruption and Economic Crimes Act, 2011 (AC & CA) EACC, Public Officers Ethics Act (POEA) and Leadership and integrity Act, 2012 (LIA).

6. The Applicant further submitted that under section 11 EACCA empowers it to receive complaints on breach of the Code of Ethics by Public Officers, investigate and recommend to the Director of Public Prosecutions the prosecution of any acts of corruption, bribery or economic crimes or violation of codes of ethics so other matter prescribed under the Act, ACECA or any other law enacted pursuant to Chapter Six of the Constitution.

7. The Applicant mentioned that it is investigating allegations of breach of Code of Ethics and conflict of interest by the Petitioner which fit within meaning of corruption or economic crimes under section 2, 40, 47 of ACECA. Accordingly, it contended that investigations of the foregoing does not fall within the regime of the Public Service Commission which is limited to disciplinary issues and not criminal conduct. It further contended that this court does not have jurisdiction over the dispute in the petition in view of the specific mandate given under section 12 of the ELRC Act and Article 162 (c) of the Constitution.

8. It maintained that the primary issue in the petition is investigations under the EACCA, and other relevant Acts while the Petitioner's employment Anti-corruption and Economic Crimes Division of relationship is a secondary issue. Therefore, it prayed for the petition to be transferred to the High Court for hearing and determination. For emphasis it relied on **Kenya Universities Staff Union v. University Council of Masinde Muliro University of Science and Technology & 2 Others [2018]eKLR** where Korir J held that the jurisdiction of the court to hear a matter is not determined by the employment relationship between the parties but the cause of action in the dispute since the employment relationship may be a secondary issue to the main issue for determination.

9. The 1st interested party supported the application for the transfer of the petition herein to the Anti-corruption and Economic Crimes Division of the High Court. She cited several judicial precedents in which the courts have held that criminal process do not bind the employers even where facts are the same/similar, and that the criminal process can run parallel to the disciplinary process at the same time. The precedents cited include **Geoffrey Kiragu Njogu v. Public Service Commission [2015]eKLR, Attorney General and Another. v Andrew Maina Githinji & Another and Brenda Achieng Okwach & 2 Others v. Charles Rotich SP, OCPD, Nyeri Central & 3 Others [2015]eKLR.**

10. On the other hand, the Petitioner submitted that this court is established to determine disputes relating to employment and labour relations under Article 167 of the Constitution and section 12(1) (a) of the Employment and Labour Relations Court Act. He contended that the issues being investigated are employment related matters which fall under the regime of this court. He relied on several precedents to demonstrate that Employment and Labour

Rights are part of the Bill of Rights and this court has equal status with the High Court and is endowed with the jurisdiction to hear and determine petitions seeking redress of violations fundamental rights arising from an employment relationship. The cited precedents includes **United States International University (USIU) V. Attorney General [2012]eKLR, Daniel N. Mugendi v. Kenyatta University & 3 Others [2013]eKLR and Judicial Service Commission v. Gladys Boss Shollei & Another[2014]eKLR.**

11. In conclusion, the Petitioner contended that the applicant has not demonstrated or pointed out an issue of economic crime or corruption in nature being investigated against him to warrant the transfer of the petition to the Anti-corruption and Economic Crimes Division of the High Court. Therefore, he prayed for the application to be dismissed.

12. The 2nd Interested Party basically associated itself with the submissions by the petitioner in opposing the application for the transfer of the petition to the High Court. In its view, there is no legal or factual basis of the transfer sought since the dispute in the petition relate to the alleged gross misconduct by the petitioner as employee of the NQCL which matter should be investigated by the Public Service Commission and not the applicant.

ISSUES FOR DETERMINATION

13. The issues for determination are:

(a) Whether the petition herein falls within the jurisdiction of this court or the mandate of the Anti-corruption and Economic Crimes Division of the High Court.

(b) Whether petition should be transferred to the said High Court Division.

JURISDICTION/MANDATE

14. It is common ground that Article 162(2) (a) of the Constitution delegated power to the Parliament to establish this court to determine all civil disputes related to employment and labour relations. Accordingly the Parliament established this court by enacting the ELRC Act in 2011 which provides for the jurisdiction of the court under section 12(1), thus:

“(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—

(a) disputes relating to or arising out of employment between an employer and an employee;

(b) disputes between an employer and a trade union;

c) disputes between an employers’ organisation and a trade union’s organisation;

(d) disputes between trade unions;

(e) disputes between employer organisations;

(f) disputes between an employers’ organisation and a trade union;

(g) disputes between a trade union and a member thereof;

(h) disputes between an employer’s organisation or a federation and a member thereof;

(i) disputes concerning the registration and election of trade union officials; and

(j) disputes relating to the registration and enforcement of collective agreements.”

15. The petition before this court is not brought by an employee against his employer. It is brought by a suspect of alleged criminal offence against an independent commission mandated to by law to investigate the alleged criminal offences. The primary issue in the petition is not the employment relationship but the investigations of the employees work related misconduct by a third party as opposed to the employer.

16. In the case of **Kenya Universities Staff Union v University Council of Masinde Muliro University of Science and Technology & 2 Others [2018]eKLR**. Korir J held that:

“As stated hereinabove, the jurisdiction of the Employment and Labour Relations Court in matters in respect of the violation of human rights and fundamental freedoms are confined to matters falling within Article 41 of the Constitution and hence that court cannot purport to grant judicial review orders outside employment matters as its judicial review jurisdiction is limited only in so far as employment matters are concerned. In other words the matters which fall within the ambit of Article 162(2) of the Constitution must be matters within the exclusive jurisdiction of the said specialised courts. That is my understanding of the holding in United States International University (USIU) vs. Attorney General [supra]. . .

In my view, this case revolves around the interpretation and application of section 42(7) of the Leadership and Integrity Act, 2012 as read with Regulation 25 of the Leadership and Integrity Regulations, 2015 to the circumstances of this case. It is my view that it is not in every case that some of the parties before the Court are in a relationship of employee and employer that such matters must as a matter of course be heard and determined by the Employment and Labour Relations Court. Rather, it is the cause of action that determines which Court is to hear the dispute. An employer may, for example lodge a complaint against an employee for say, theft by servant. The employee may institute judicial review proceedings challenging his intended

prosecution by the Director of Public Prosecution. The mere fact that there exist an employer/employee relationship in such a matter does not necessarily deprive this Court of the jurisdiction to hear and determine whether the DPP is exercising his powers lawfully and fairly. In those circumstances, just as in this case the employment relationship becomes a secondary issue, if at all, to the main issue for determination.”

17. I concur with Korir J in the foregoing decision because it is not uncommon for an employee to commit an offence at his work place which also amounts to a criminal offence. In such circumstances nothing bars the employer from taking disciplinary action against the employee and at the same, time institute criminal proceedings against him with relevant government agencies. It follows that the option of the employer to pursue criminal proceedings against his employee cannot be curtailed or bared by the fact that the law also provides for disciplinary proceedings.

18. Having found that the dispute herein is not between employer and employee, that the primary issue is not employment, and that nothing in law bars institution of criminal investigation and/or proceedings against an employee who is suspected of having committed criminal offence, I find and hold that this court lacks jurisdiction to determine the petition herein.

19. As regards the Anti-Corruption and Economic Crimes Division of the High Court, I have considered the Gazette Notices published by the Honourable Chief Justice in 2015, 2016 and 2018 Gazette Notice Number 9123 of 2015 stated as follows:

“It is notified . . .

1 . . . there shall be established Anti-Corruption and Economics Crimes Division . . .

2. In Nairobi, all disputes relating to corruption and Economic Crimes matters that may be filed under any law in the High Court shall be lodged and heard before the Anti- Corruption and Economic Crimes Division.”

20. Gazette Notice Number 10263 of 2016 provided the mandate of the Anti-Corruption and Economic Crimes Division of the High Court as follows:

“(a) petitions and judicial review applications on claims of infringement or the threatened infringement of constitutional rights relating to corruption and/or economic crimes related matters: . . .”

21. Gazette Notice Number 7262 of 2018 provided as follows in part:-

“8. All cases relating to corruption and economic crimes which have been filed before other stations or divisions of the High Court, in which hearing has not commenced shall be transferred to the Anti-Corruption and Economic Crimes Division.”

22. The petition dated 6.11.2019 sought for an order of certiorari to quash the decision of the Respondent contained in the letters dated 27.8.2019, 28.8.2019 and 25.9.2019. The petition further sought for order of prohibition to restrain the Respondent from interfering with his employment and from conducting further investigations against him in connection with the said letters dated 27.8.2019, 28.8.2019 and 25.9.2019.

23. After the instant application was filed the petitioner quickly amended the petition by deleting the foregoing prayers but that did not make any big difference. The new reliefs sought in (i) – (vii) remained materially the same, that the Petitioner is seeking to quash decision by the Respondent to investigate him on matters related to his employment and further prohibit it from continuing with the impugned investigation.

24. Having considered the Gazette Notices published by the Honourable Chief Justice to establish the Anti-Corruption and Economic Crimes Division of the High Court, and set out its mandate and upon considering the petition filed by the Petitioner, I am satisfied that the petition is the proper substance for determination by the Anti-Corruption and Economic Crimes Division of the High Court which has the mandate to hear and determine the same by dint of the said Practice Directions.

Whether the petition should be transferred

25. In view of the foregoing, I find that the petition ought to be, and is hereby transferred to the Anti-Corruption and Economic Crimes Division of the court for hearing and determination. Costs of the application shall be in the cause.

Dated, signed and delivered in Nairobi this 11th day of February, 2021.

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