



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

JUDICIAL REVIEW CASE NO. 7 OF 2020

IN THE MATTER OF: AN APPLICATION FOR ORDERS OF MANDAMUS BY ALEX OYUGI OBONYO

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA, 2010, THE STATE CORPORATIONS ACT, CAP. 446 AND THE ACCOUNTANTS ACT CAP. 531

AND

IN THE MATTER OF: THE EMPLOYMENT OF AN UNQUALIFIED PERSON AS AN INTERNAL AUDITOR

REPUBLIC.....APPLICANT

VERSUS

LAKE VICTORIA SOUTH WATER WORKS

DEVELOPMENT AGENCY.....RESPONDENT

AND

MARK OUMA MWANGO.....INTERESTED PARTY

AND

ALEX OYUGI OBONYO.....EX-PARTE APPLICANT

JUDGMENT

1. On 16 June 2020, Alex Oyugi Obonyo (the *ex-parte* applicant) was granted leave to apply for an order of mandamus directed at Lake Victoria South Water Works Development Agency (the Respondent) compelling it to terminate the employment contract of Mark Ouma Mwango (the Interested Party).

2 . It was alleged in the application that the Interested Party was not qualified to serve as an Internal Auditor because he was not registered or licensed by the Institute of Certified Public Accountants and that he did not meet the qualifications set by section 18(2) of the Accountants Act.

3. The *ex-parte* applicant filed the substantive Motion on 17 June 2020.

4. On 14 August 2020, the Interested Party filed a Preliminary Objection contending

(i) THAT the application dated 17.06.2020 herein is misconceived, bad in law and an abuse of the court process.

(iii) THAT this Honourable Court has no jurisdiction to determine issues raised in the said application.

(iii) THAT the applicant has no capacity to seek for the orders sought in the application.

(iv) THAT by dint of the above, there is no competent application before the Court to warrant the grant of the orders sought.

5. The Court gave directions on 12 November 2020 wherein it directed that both the Preliminary Objection and the Motion would be taken together as a result of which the following were filed

(i) *Ex-parte* applicant's submissions on 3 December 2020.

(ii) The Interested Party's submissions on 14 December 2020.

6. The Respondent's submissions were not on record by the agreed timeline of 11 December 2020 (there is no affidavit of service on record attesting to service of the substantive Motion upon the Respondent).

7. The Court has considered the Motion, the Objection, the affidavits and submissions.

Jurisdiction

8. A Court of law can only adjudicate when it has jurisdiction, for it has been said that jurisdiction is everything and without it, a Court must put down its pen.

9. The Interested Party asserted that the Court had no jurisdiction because the *ex-parte* applicant had not provided any evidence that he was in an employment relationship with the Respondent.

10. Evidence can be documentary or oral (reduced into writing such as in an affidavit). The *ex-parte* applicant did not produce any *contract of service* between the Respondent and the Interested Party, but in the affidavit in support of the application for leave, it was deposed that the Respondent had appointed the Interested Party as an Internal Auditor.

11. In the view of the Court, whether that deposition without supporting documentation was sufficient to show a contractual nexus between the Respondent and the Interested Party is not one going to jurisdiction, but to proof of a disputed fact to the requisite standard.

12. The Court, in the circumstances, declines the invitation by the Interested Party to down its pen on the ground of jurisdiction.

Competence of the Motion

13. In objecting to the competence of the Motion, the Interested Party cited Order 53 of the Civil Procedure Rules and contended that the Motion should have been filed together with the Statutory Statement and Affidavits which had been filed with the application for leave, which was not the case.

14. Order 53 Rule 4 of the Civil Procedure Rules makes it mandatory that the Notice of Motion filed after the grant of leave should be accompanied with the Statutory Statement and any affidavits which were filed at the time of seeking leave.

15. The significance of the requirement should be understood within the context that usually an application for leave is made *ex-parte*, and it is only upon service of the statutory statement and the affidavits that the Respondent and other parties would understand the case presented by the *ex-parte* applicant.

16. In the case at hand, the *ex-parte* applicant did not respond to the Interested Party's deposition that the application for leave was not served.

17. The Notice of the Motion filed by the *ex-parte* applicant was not accompanied by the Statutory Statement. The affidavit which had accompanied the application for leave was also not exhibited, but instead the *ex-parte* applicant filed a fresh affidavit.

18. The Court agrees with the Interested Party's assertions and finds the Notice of Motion fatally defective and incompetent.

Merits of the Motion

19. Despite the finding on competence, the Court has reviewed the record and come to the conclusion that the Motion has no merit on the ground that the records presented to tie up the Interested Party with the Respondent came from an entity called *Lake Victoria South Water Services Board*, an entity whose legal relationship with the Respondent was not disclosed.

Conclusion and Orders

20. In consideration of the foregoing, the Court finds no merit in the Motion dated 17 June 2020. It is dismissed with costs to the Interested Party.

Delivered through Microsoft teams, dated and signed in Kisumu on this 10th day of February 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For ex-parte applicant Okoyo Omondi & Co. Advocates

For Respondent did not participate

For Interested Party Ken Omollo & Co. Advocates

Court Assistant Chrispo Aura