



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

PETITION NO.60 OF 2020

OKIYA OMTATAH OKOITI.....PETITIONER

VERSUS

THE NATIONAL EXECUTIVE OF THE REPUBLIC OF KENYA.....1ST RESPONDENT

THE PUBLIC SERVICE COMMISSION.....2ND RESPONDENT

THE STATE CORPORATIONS ADVISORY COMMITTEE.....3RD RESPONDENT

HON. ATTORNEY GENERAL.....4TH RESPONDENT

BENJAMIN CHEBOI.....5TH RESPONDENT

JEAN NJIRU..... 6TH RESPONDENT

CLADYS KISIA NGAO.....7TH RESPONDENT

JOHN OWUOR ONGANGO K'OBADO..... 8TH RESPONDENT

HASSAN OSMAN.....9TH RESPONDENT

TABITHA MBUNGU MAUNGI.....10TH RESPONDENT

MARTIN OGINDO.....11TH RESPONDENT

PAUL KIBET CHEBOR.....12TH RESPONDENT

ROBA SHARU DUBA13TH RESPONDENT

PETER CHEMUIGUT..... 14TH RESPONDENT

MOHAMMED M BULLE.....15TH RESPONDENT

AND

AGRICULTURAL DEVELOPMENT CORPORATION (ADC).....INTERESTED PARTY

RULING

The ruling herein relates to the 5th to 15th respondents Notice of Preliminary Objections dated 30th July, 2020 and on the grounds that;

1. That the court lacks the requisite jurisdiction to hear and determine matters relating to the administrative decisions, including quorums, budgeting and financial expenditure of the Board of the Interested Party by dint of Article 47(3) and 162(2) of the Constitution, section 12 of the Employment and Labour Relations Court Act, section 18, 19, 20, 21, 23 of the State Corporations Act and section 7(3) of the Fair Administrative Action Act.

2. The petitioner, through his Supporting Affidavit sworn on 22nd April, 2020 has adduced illegally obtained documents contrary to Article 50(4) of the Constitution and section 35, 80 and 83 of the Evidence Act, CAP 80 rendering the documents inadmissible and the same should be expunged from the record of court.

3. That there is no legal entity known as the National Executive of the Republic of Kenya, Capable of suing and being sued.

And on these grounds the 15th respondent seeks the court to strike out the aspects of the petitioner's claim with costs.

Parties attended and agreed to address these objections by way of written submissions.

The 5th to 15th respondents submitted that the petition is premised on the appointment and decision making processes of the 5th to the 15th respondents, which matters, the court lacks jurisdiction to address as required under article 162(2) of the Constitution and section 12 of the Employment Act¹ and extends to matters relating to labour rights or disputes. The court jurisdiction does not extend to the decisions, actions and authority of the interested party board which are regulated in law under State Corporations Act and where such administrative decisions are taken, a challenge thereof can only be through judicial review proceedings in accordance with Article 47 of the Constitutional section 21 and 22 of the State Corporations Act and the Fair Administrative Actions Act.

The respondents also submitted that there is an appellate Tribunal under section 21 of the State Corporations Act which allow a party to challenge any decision taken by the Inspector General (Corporations) and which Tribunal has power to quash, review or vary any decision taken and the High Court is granted power to address any second appeals.

In the case of **Speaker of the National Assembly v James Njenga Karume [1992] eKLR** the court held that;

In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.

The respondents also submitted that the petitioner has submitted memos, minutes, board resolutions, reports and documents which are prepared by and maintained by public officers and under section 80 of the Evidence Act such documents cannot be produced without the certificate of the maker. The illegally obtained documents should be expunged from the record as held in **Okiya Omtatah Okiiti v Attorney General & another [2020] eKLR** that;

We reiterate that the appellants claimed to have been supplied with the contentious documents by "conscientious citizens" and "whistleblowers". Based on the foregoing, the appellants ought to have requested the concerned Government Departments to supply them with the information they required, and to which they were entitled to receive in accordance with Article 35 of the Constitution. It was not necessary for the appellants to resort to unorthodox or undisclosed means to obtain public documents. If they deemed the documents were relevant (as indeed they were) then, they ought to have invoked the laid down procedure of production of documents.

84. We therefore agree with the learned Judge that it would be detrimental to the administration of justice and against the principle underlying Article 50(4) of the Constitution to in effect countenance illicit actions by admission of irregularly obtained documents. However well intentioned "conscientious citizens" or "whistleblowers" might be in checking public officers, there can be no justification, as pointed out by the Supreme Court, for not following proper procedures in the procurement of evidence. We do not have any basis for interfering with the decision of the High Court to expunge the documents in question.

That This position is reiterated in **Njonjo Mue & Another vs. Chairperson of Independent Electoral and Boundaries Commission & 3 Others [2017] eKLR** and this court should expunge these documents and without jurisdiction dismiss the instant petition with costs.

The 1st to the 4th respondents supported the objections made by the 5th to 15th respondents and submitted that the petitioner is inviting the court to look into the administrative decisions of the respondents including quorum, budgeting and financial expenditure of the interested party but this court lacks jurisdiction in this regard as held in the case of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd (1969) eKLR** and **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR** that a question of jurisdiction ought to be raised at the earliest opportunity and court seized of the matter is then obliged to decide the issue right away.

Under article 162(2) of the Constitution and section 12 of the Employment and Labour Relations Court Act The jurisdiction of the court relates to matters of employment and labour relations disputes and the violation or threat of violation of labour rights under the constitution. such jurisdiction does not extend to matters of decisions, actions or authority of the interested party board and as such matters of quorum, budget and decisions of the board are outside of this court's jurisdiction. There is an established procedure for challenging the financial and budgetary decisions of the members of the interested party and under section 18 of the State Corporations Act, the Inspector General (Corporations) has power to call and inspect books, records, returns and documents of accounts of any state corporation including the interested party. There is an appellate procedure under section 21 with the State Corporations Appeal Tribunal having mandate to address.

The decisions of the interested party Board being administrative such are not labour issues but administrative and can only be challenged by way of judicial review in accordance with Article 47 of the Constitution and the Fair Administrative Actions Act. without jurisdiction, the

court ought to down its tools and dismiss the petition with costs.

The 1st to 4th respondents also submitted that the petitioner has based the petition with illegally obtained documents and under article 50(4) of the constitution, section 35, 80 and 83 of the Evidence Act provides for the production of documentary evidence and the petitioner has not produced any certificates from any public officers as the makers of such documents. These are illegally obtained documents and source not disclosed with authorisation for production and should therefore be expunged from the record as held in **Okiya Omtatah Okoiti & 2 others v Attorney General & 3 others [2014] eKLR** that;

It is clear therefore that the documents produced in this Court fall short of the criteria established under the Constitution and the Evidence Act. The photocopies of the documents are not certified in accordance with the law and it therefore follows that this Court cannot rely on them because they are not admissible. In addition, Section 35 of the Evidence Act also provides for the admissibility of documentary evidence as follows;

“(1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say –

The petitioner should not be allowed the benefit of an illegality and use of illegally obtained documents as they are inadmissible and should be expunged from the record and the objections allowed.

The petitioner submitted that the objections by the respondents challenge the court jurisdiction to determine alleged incompetence, fraud and abuse of power by the board of the interested party and a challenge to the petitioner's documents and objection to suing the *National Executive of the Republic of Kenya* and which issues are moot as the President, Republic of Kenya on 7th august, 2020 removed and replaced the chair and board members of the interested party pursuant to section 7(3) of the State Corporations Act vide Gazette Notice Numbers 5451 and 5453. The President invoked his powers under the law and revoked the appointment of the 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, and 14th being Benjamin Cheboi, Jean Njiru, Gladys Kisia Ngao, John Owuor Oyango K'Obado, Hassan Osman, Tabitha Mbugu Maungu, Martin Ogindo, Paul Kibet Chebor, Roba Sharu Duba and peter Chemuigut who are chair and board members of the interested party.

The petition against these persons is overtaken by events.

What remains of the petition is the challenge to the constitutional and legal validity of the appointment of the 15th respondent, Mohammed M Bulle as the acting managing director of the interested party.

The petitioner also submitted that the court has jurisdiction to address the petition with regard to the appointment of the interested party chairperson and board members and the appointment of the 15th respondent as acting managing director. The 5th to the 14th respondents are incompetent, fraudulent and in abuse of power acting in cohorts with the 15th respondent contrary to Article 236 of the constitution. They have victimised staff members who stood up to the fraud and faults the national executive for not taking action.

The orders sought in the petition fall within the exclusive jurisdiction of this court. The payer for refund of funds, falls within the powers of this court to grant as the claims relates to employment related issues that can only be heard by this court pursuant to section 12 of the Employment and Labour Relations Court Act.

In the case of **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd 1989 KLR** the court held that jurisdiction is everything. Without it the court must down its tools. Under Article 162(2) (a) of the Constitution this court is given jurisdiction to hear and determine employment and labour relations claims and Parliament enacted the Employment and Labour Relations Court Act and under section 12 the jurisdiction of the court is outlined. In **Samuel Kamau Macharia v KCB & 2 others Civil Appeal No.2 of 2011** the Supreme Court held that a court's jurisdiction must flow from the constitution of legislation or both. In this case, the court is given jurisdiction under the Constitution and the law. the court can deal with any matter arising out of an employment relationship and the petition raise matters which emanate from an employment relationship as held in **Republic v Clerk County Assembly of Baringo ex parte William Kassait Kamket [2015] eKLR** and in the case of **Trusted Society of Human rights Alliance v Nakuru Water and Sanitation Services Company & another [2013] eKLR**. The law is not concerned with the method of acquiring employment or whether the person was appointed or elected. Rather the must be having an oral or written contract of service or is receiving a wage for services rendered as held in **Nick Githinji Ndichu v Clerk Kiambu County Assembly & another [2014] eKLR**.

The petitioner also submitted that the documents relied on in the petition were obtained legally and he is ready to file an affidavit at the full hearing of the petition to demonstrate how he acquired these documents. The allegations that these documents are inadmissible are just but a barrier to access justice under article 48 and 50(1) of the Constitution. The 15th respondent has not filed any affidavit in support of his claims that these documents were acquired in violation of the law.

Objections in their nature should be based on a pint of law and not of fact as held in the case of **Mukisa Biscuit Manufacturing Co. Ltd v**

West End Distributors Ltd [1969] EA and in the case of **Moses Wanjala Lukoye v Bernard Alfred Wekesa Sambu & 3 others [2013] eKLR**. The objectives by the respondents with regard to the documents filed are a matter of fact and not on law and should be dismissed.

The *National Executive of the Republic of Kenya* is a constitutional officer established under Article 130(1) of the Constitution and comprise of the President, the Deputy President and the rest of the Cabinet. For this petition, Article 260 of the Constitution provides that;

“Person” includes a company. Association or other body of persons whether incorporated or unincorporated

The 1st respondent is a person capable of being sued as done herein. Rule 5 of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** provides for the addition, joinder substitution and striking out of parties and in this case, the 1st respondent is a proper party. And in totality the objections should be dismissed with costs.

Determination

The objections made and the submissions by the parties analysed, the issues which emerge for determination as summarised as follows;

Whether the court has the requisite jurisdiction to hear and determine matters relating to the administrative decisions of the interested party;

Whether the documents attached to the Supporting Affidavit of the petition sworn on 22nd April, 2020 were illegally obtained and should be expunged; and

Whether the 1st respondent is capable of suing and being sued.

The objections with regard to the joinder of 1st respondent, the National Executive of the Republic of Kenya is on the grounds that under Article 129(1) of the Constitution, 2010 *the Executive authority derives for the people of Kenya and shall be exercised in accordance with this Constitution* and as such the *executive* is an arm of government that derives its authority from the people of Kenya and thus has no legal rights and obligations and there is no entity known as *National Executive of the Republic of Kenya* which is capable suing or being sued.

The petitioner relied on the provisions of Article 130(1) and 260 of the Constitution, 2010 that the *National Executive of the Republic of Kenya* is a constitutional office and comprises the President, Deputy President and the Cabinet and incorporation is a person capable of being sued.

Under paragraph 1 of the Petition, the petitioner defines the 1st respondent as the entity under Article 130 of the constitution and has been sued for handpicking and appointing persons to the office of chairperson and members of the interested party without subjecting them to a fair, open, and competitive and merit based recruitment process.

The petition is also premised on facts set out under paragraphs 17 to 33 and under paragraphs 20(i) and (ii) and 21 the petitioner’s case is that vide Gazette Notice No.557 and 5604 dated 5th June, 2018 H.E. President Uhuru Kenyatta appointed the

5th respondent as chairperson of the interested party and the Cabinet Secretary for Agriculture and Irrigation appointed the 6th to 15th respondents to be members of the Board of the interested party respectively. That the President and the Cabinet Secretary acted *ultra vires* in appointing the 5th to 15th respondents to public office without subjecting them to an open process.

There is no legal entity attached and ascribed under Article 130 of the Constitution. The components of the Executive are discernible and have the offices of the President, Deputy President and Cabinet.

The above taken into account, a petitioner while filing a petition, there is the right to enjoin any respondent found necessary. Under the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 a *Respondent* is defined as follows;

“Respondent” means a person who is alleged to have denied, violated or infringed, or threatened to deny, violate or infringe a right or fundamental freedom;

Under Rule 2 of the Employment and Labour Relations Court (Procedure) Rules, 2016 a *respondent* is defined as follows;

“Respondent” means a person against whom a suit has been instituted in the Court or who replies to any proceedings in Court;

However, the misjoinder of a party in a petition is not fatal. Under Rule of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 a party is allowed to address pursuant to Rule 5(b)

(b) A petition shall not be defeated by reason of the misjoinder or nonjoinder of parties, and the Court may in every proceeding deal

with the matter in dispute.

The Court has the discretion to allow for an amendment or issue directions in this regard to ensure the substantive issue is addressed in a manner that is fair and just.

In this regard, the facts of the petition as addressed above, there being no constitutional entity known as the 1st respondent, *The National Executive of the Republic of Kenya* such is a non-suited party herein. Such entity does not exist in law and cannot sue or be sued. The petitioner is at liberty to amend the petition in accordance with the applicable Rules.

With regard to the court jurisdiction, the respondents case is that the court lacks jurisdiction to determine matters relating to the administrative decisions of the interested party with regard to quorum, budgeting and financial expenditure by dint of Article 47(3) and 162(2) of the Constitution, section 12 of the Employment and Labour Relations Court Act, section 18, 19, 20, 21, 23 of the State Corporations Act and section 7(3) of the Fair Administrative Action Act.

The jurisdiction of the court is derived from Article 162(2) (a) of the Constitution, 2010 read together with the court's constitutive legislation, the Employment and Labour Relations Court Act, 2011. As held in the case of **Samuel Kamau Macharia v KCB & 2 others Civil Appeal No.2 of 2011**, the Supreme Court Held that;

A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. ...

In this regard, the Court in the case of **Kenya Council of Employment and Migration Agencies & another v Samuel Mwangera Arachi & 2 others [2015] eKLR** held that;

... the Court has jurisdiction to adjudicate constitutional questions, these questions must arise within the broad employment relationship parameters set out under section 12 of the Act [Employment and Labour Relations Court Act, 2011] and further they can only be agitated by persons identified under section 12(2) of the Act acting in person or through authorised representative

The substratum of the petition is the appointment of the 5th to 15th respondents by the 1st respondent and the Cabinet Secretary for Agriculture and Irrigation; that there abuse of office and powers by the interested party board; that the 16th respondent was unprocedurally appointed and ought to have retired having attained 60 years and for these reasons the petitioner is seeking for various declaratory orders to address the appointment of board members and this be quashed and a new board be appointed; for a refund for funds spent by the Board members in excess of the budget; the 16 respondent be found unqualified to hold office of the acting managing director of the interested party; and the petitioner be paid costs.

The court reading of the objections and the nature of the petition, the orders sought weighed, there is the requisite jurisdiction to hear and determine the same. Such cannot be removed from this court. to do so would be to abdicate the mandate bestowed upon this court pursuant to Article 162(2) (a) of the Constitution.

In the case of **Daniel N Mugendi v Kenyatta University & 3 others [2013] eKLR** and the case of **Abdikadir Suleiman v County Government of Isiolo & another [2016] eKLR** the court held that;

... the original and unlimited jurisdiction to make a finding on legitimacy or lawfulness of decisions in disputes between employers and employees rests with this court as vested with the appropriate jurisdiction under Articles 159(1), 162 (2) (a) as read with Article 165(5) and (6) of the Constitution; Articles 22(1) and 258(1) of the Constitution, and the provisions of the Employment and Labour Relations Act, 2011. The court holds that the jurisdiction spreads to all issues in the employment relationship and related matters including the enforcement of the fundamental rights and freedoms under Article 22 of the Constitution and enforcement of the Constitution under Article 258 as far as the issues in dispute are, evolve, revolve or relate to employment and labour relations. The court holds that the compass or golden test for the court's jurisdiction is the subject matter in the dispute namely disputes relating to employment and labour relations as provided for Article 162 (a) of the Constitution and as amplified in the Employment and Labour Relations Act, 2011 and not the remedies sought or the procedure of moving the court or the situ of the applicable law or any other extraneous considerations as may be advanced by or for a litigant.

The court is clothed with the required jurisdiction to hear and determine the instant petition.

On the issue of documents attached to the petition and the Supporting Affidavit of the petitioner, The court in addressing the issue of production of illegally obtained evidence in the case of **Chris Oanda v Kenya Airways [2018] eKLR** relied on the case of **Okiya Omtatah Okoiti v the AG, and Baseline Architects Ltd & 2 others Versus National Hospital Insurance Fund Board Management (2008) eKLR** where the court held that;

a party to litigation is not obliged to produce documents which do not belong to him but which have been entrusted to his company by a third party in confidence. It would be an abuse of that confidence to disclose it, without permission of the owner of the original

documents...It is also clear in my mind that justice is administered in civil disputes on the principles that you cannot use an advantage obtained improperly or illegally in a manner prejudicial and/or detrimental to the interests of the opposite party.

The principle is based and/or founded on fair play if we allow parties to steal a march by relying on documents improperly obtained from the other side.

The challenged documents are attached to the Supporting Affidavit of the petitioner and dated 22nd April, 2020. Affidavits in their nature comprise matters of fact and not the law. in this regard, parties are allowed to counter matters of fact through Supplementary Affidavits of Further Affidavits as to deposit all matters relating to the facts of each case and have the court seized of the same before close of pleading to allow an analysis and application of the law.

A challenge to facts and related documents in support of such facts are removed from matters which can be addressed through preliminary objections. The standing rule is long established in the case of **Mukisa Biscuit Manufacturer Ltd v Westend Distributers Ltd (1969) E A** that;

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 facts challenged with regard to the Supporting Affidavit of the petitioner and dated 22nd April, 2020 can well be gone into during the hearing of the petition.

Accordingly, the objections made are hereby found without merit and are dismissed. costs shall abide the petition.

DELIVERED IN OPEN COURT AT NAIROBI THIS 2ND DAY OF MARCH, 2021.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Okodoi

..... and