



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

PETITION NO. 225 OF 2019

KATIBA INSTITUTE.....1<sup>ST</sup> PETITIONER

KARIOBANGI PARALEGALS.....2<sup>ND</sup> PETITIONER

VERSUS

THE ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT

THE INDEPENDENT POLICING

OVERSIGHT AUTHORITY (IPOA).....2<sup>ND</sup> RESPONDENT

JOSEPH KINYUA.....3<sup>RD</sup> RESPONDENT

AND

MUTHAURA DOREEN NKATHA.....1<sup>ST</sup> INTERESTED PARTY

TOROREY PRAXEDES CHEPKOECH..... 2<sup>ND</sup> INTERESTED PARTY

HON. WAIGANJO JOHN MIRIITHI.....3<sup>RD</sup> INTERESTED PARTY

ANNE MAKORI.....4<sup>TH</sup> INTERESTED PARTY

FATUMA MOHAMUD MOHAMED.....5<sup>TH</sup> INTERESTED PARTY

JONATHAN LTIPALEI LODUMPOI.....6<sup>TH</sup> INTERESTED PARTY

DR. WALTER OWEN OWUOR OGONY.....7<sup>TH</sup> INTERESTED PARTY

DR. JIMMY MUTUKU MWITHI.....8<sup>TH</sup> INTERESTED PARTY

SALARIES & REMUNERATION

COMMISSION (SRC).....9<sup>TH</sup> INTERESTED PARTY

INDEPENDENT MEDICO-LEGAL

UNIT (IMLU).....10<sup>TH</sup> INTENDED INTERESTED PARTY

RULING

1. The 1<sup>st</sup> Interested Party, Muthaura Doreen Nkatha filed a Notice of Preliminary Objection dated 9<sup>th</sup> December 2019 against the suit with respect to her, on the grounds that this Honourable Court lacks jurisdiction by virtue of Section 14 of the Independent Policing Oversight Authority Act No. 35 of 2011; and that the alleged cause of action is Statute barred by virtue of Section 9(3) of the Law Reform Act (Cap 26) Laws of Kenya. The 2<sup>nd</sup> Respondent, The Independent Policing Oversight Authority (IPOA) also filed Grounds of Opposition against the Petition asserting that the Petition is incompetent as it violates:

1. The mandatory provisions of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013;
2. The mandatory provisions of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedures Rules 2006;
3. Article 234 of the Constitution read together with Part X and XI of the Public Service Commission Act No.10 of 2017;
4. Article 236 of the Constitution;
5. Article 259 of the Constitution;
6. Article 239(5) and (6) of the Constitution;
7. Section 14 of the Independent Policing Oversight Authority Act No. 35 of 2011 (IPOA Act);
8. The Second Schedule of the IPOA Act.

2. The 2<sup>nd</sup> Respondent further asserts that the prayers sought in the Petition will prejudice the rights of the Interested Parties under Article 41 of the Constitution. The 2<sup>nd</sup> Respondent asserts that the Members of the IPOA Board were legally and procedurally appointed and hold office pursuant to the Constitution and the IPOA Act and their remuneration and terms of engagement are all within law. The 2<sup>nd</sup> Respondent asserts that the Petitioners are therefore estopped by law from questioning and or challenging the appointment of the Chairman and Members of the IPOA Board and it is in the interest of justice and spirit of the Constitution that the Petition be dismissed. The 2<sup>nd</sup> Respondent cites the celebrated case of **Mukisa Biscuit Co v West End Distributors Limited [1969] EA 696** where Law J.A stated as follows with respect to a preliminary objection in a suit:

*"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration"*

The 2<sup>nd</sup> Respondent submits that whereas the Petitioners are seeking enforcement of rights and protection of fundamental freedoms under some 27 Articles of the Constitution, they only allege contravention of about 5 Articles of the Constitution in the body of the Petition being Articles 10(2), 35(3), 47(1), 232(1) (f) and 234(2). That the Petitioners simultaneously rely on the Fair Administration Actions Act, 2016 (FAA) and seek Judicial Review of administrative action which is provided for under Part III of the FAA. The 2<sup>nd</sup> Respondent asserts that under Section 9(2) of the FAA, a Court of law shall not review an administrative action or decision under the Constitution unless mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted. That even though the said section refers to the High Court it applies equally to the Employment and Labour Relations Court before which the present Petition is filed and which observation has been reiterated by the Court of Appeal in **Prof. Daniel N. Mugendi v Kenyatta University [2013] eKLR**. The 2<sup>nd</sup> Respondent submits that consequently, the Employment & Labour Relations Court should not review an administrative action or decision under the Constitution unless all remedies available under any other written law are first exhausted.

3. The 2<sup>nd</sup> Respondent submits that the Petition further falls squarely under Section 14 of the IPOA Act to the extent that the Petitioners' complaint being that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties were appointed to posts they did not apply for. Further, Section 14(1)(a) recognizes serious violation of the Constitution as a ground for applying for removal of a member of the 2<sup>nd</sup> Respondent Board. That the said Section 14 of the IPOA Act provides for the removal of a member of the Board through presentation of a petition to the Public Service Commission setting out the alleged facts constituting the specific ground for removal. Further, if two-thirds of the members of the commission agree on a ground for removal, they shall recommend to the National Assembly the removal from office of the chairperson or member as the case may be. The National Assembly then forwards the petition to the President if satisfied that it discloses a ground for removal and the President shall then appoint a tribunal to hear and determine the petition and suspend the member pending the outcome of the tribunal.

4. The 2<sup>nd</sup> Respondent further submits that it is important to first underscore the import of Section 9(2) of FAA read together with Section 14 of the IPOA Act. It asserts that the said unlimited jurisdiction can still be limited by the Constitution and in the present case, the limitation is effectuated by FAA, a legislation founded on Article 47(3) of the Constitution which is the same Article invoked by the Petitioners to propagate the unlimited jurisdiction theory. It is the 2<sup>nd</sup> Respondent's submission that the Petitioners cannot be allowed to apply the provisions of Article 47 selectively by ignoring those parts which limit the jurisdiction of the Court in favour of alternative dispute settlement machinery and which in any case the Court is obliged to abide with pursuant to Article 159(2)(d) of the Constitution. It submits that under Section 9(3) of the Fair Administrative Actions Act, if the Court is not satisfied that the remedies referred to in Section 9(2) have been exhausted, the Court should direct that the applicant first exhausts such remedy before instituting proceedings. The 2<sup>nd</sup> Respondent submits that under Section 9(4) of Fair Administrative Actions Act, the Court may still allow the Petitioners to proceed with prosecution of their Petition only after they show the exceptional circumstances involved in their case and which is not apparent in the present case.

5. The 2<sup>nd</sup> Respondent cites and relies on various authorities in support of its submission of strictly adhering to procedure for redress of any grievance as prescribed by the Constitution or Statute as an alternative remedy and which cases include: the Court of Appeal cases of **Speaker of The National Assembly v James Njenga Karume [1992] eKLR**; **Cortec Mining Kenya Limited v The Cabinet Secretary Ministry of Mining & The Attorney General [2017] eKLR**; and **Geoffrey Muthinja & Another v Samuel Muguna Henry & 6 Others [2015] eKLR**. The 2<sup>nd</sup> Respondent submitted that the doctrine of exhausting available mechanisms for settling disputes including internal mechanisms of appeal or review and remedies available under any other written law is now deeply embedded in our jurisprudence as confirmed by the Supreme Court in the case of **Sammy Ndung'u Waity v Independent Electoral and Boundaries Commission & 3 Others [2019] eKLR**. The 2<sup>nd</sup> Respondent submits that the decisions of the Court of Appeal and the Supreme Court set out above are binding on this Honourable Court which should therefore dismiss the Petitioners' Petition without hesitation. It further contends that the holdings in the **Nyabaro** case (*infra*) and in the **FIDA** case (*infra*), both cited by the Petitioners, are obsolete precedents.

6. The 2<sup>nd</sup> Respondent submits that the Constitution requires Petitions seeking review of administrative actions to be instituted without unreasonable delay and therefore the question which this Court needs to be answered is whether a delay of over one year by the Petitioners herein before they instituted the present proceedings was reasonable. It submits that the delay is inordinate and unreasonable and that **Blacks Law Dictionary** defines 'unreasonable' to mean *not guided by reason, irrational or capricious; and not supported by a valid exception to the warrant requirement*. The 2<sup>nd</sup> Respondent submits that the Petitioners have further not justified the delay in filing their Petition and which in itself is a violation of the Constitution and Section 9(1) of Fair Administrative Actions Act which provides that judicial review cases should be instituted promptly without unreasonable delay. It further submits that this Court cannot condone such inordinate delay in filing the Petition on the ground that the same serves public interest and if anything, allowing the Petition to proceed in not in the best interest of the public. It is the 2<sup>nd</sup> Respondent's prayer that the Court should conclude it has no jurisdiction to entertain the Petition and even if it were to have jurisdiction, there has been inordinate delay in instituting the Petition and that entertaining the Petition further would be contrary to Section 9(1) of Fair Administrative Actions Act.

7. The 7<sup>th</sup> Interested Party associates himself with the submissions of the 2<sup>nd</sup> Respondent and further submits that from the provisions of Article 162(2) of the Constitution and Section 12(1) of the Employment and Labour Relations Court Act, the jurisdiction of the Employment and Labour Relations Court is precise and limited rather than unlimited as was held by the Court of Appeal in **Attorney General & 2 Others v Okiya Omtata Okoiti & 14 Others [2020] eKLR**. He urges this Court to interrogate whether the Petitioners in the Petition and prayers sought therein fall within the meaning of a dispute relating to employment and labour relations. He submits that it is clear the prayers sought in the Petition do not involve any of the parties or raise any of the employment and labour relations issues contemplated under Section 12 of the Employment and Labour Relations Court Act and concludes that the ELRC does not therefore have any jurisdiction to entertain the Petition.

8. The Petitioners submit that this Court has jurisdiction to entertain this Petition as the issue before Court is whether the 1<sup>st</sup> to 3<sup>rd</sup> Respondents violated the law and the Constitution when they recruited, vetted, and appointed the chairperson and members of the IPOA Board, and which fit squarely within this Court's jurisdictional authority. The Petitioners submit that the 1<sup>st</sup> Interested Party's argument that Section 14 of the IPOA Act and Section 9(3) of the Law Reform Act divest this Court of the jurisdiction conveyed under the Constitution has routinely been rejected by Courts. This is because the Constitution is the supreme law of the Republic and Acts passed by Parliament are subordinate to the Constitution and cannot override it. The Petitioner's cite the case of **Republic v County Assembly of Nyamira Committee of Powers & Privileges & 4 Others; Ex-parte Thaddeus Nyabaro & Another [2019] eKLR Misc. JR 2 of 2019**. They submit that this Court has the Constitutional jurisdiction to determine the propriety of the appointment and that the fact the IPOA Board has been sworn in and is now carrying out its functions does not alter the jurisdiction of the Court to hear this Petition.

9. The Petitioners rely on the case of **Federation of Women Lawyers (FIDA-K) & Others v the Attorney General & Another High Court Petition No. 102 of 2011** where the Court addressed a near-identical issue and rejected a near-identical argument and held that the Court's jurisdiction to determine whether an individual's appointment complied with the Constitution was not affected by the fact that the individual had assumed office. They submitted that the rationale in the **Fida-K** case (*supra*) applies in the instant case in that the removal process under Section 14 would only apply if the Court found that the chairman and members had already been properly recruited, vetted, and appointed, and which question their Petition seeks to resolve.

10. The Petitioners submit that Section 9(3) of the Law Reform Act (Cap 26) affecting civil procedure is similarly inapposite and that it addresses the timing to appeal a court decision and sets no time constraints on filing of an original petition for enforcement of the Constitution under Articles 22 and 258. That there is no statutory limitation for commencement of such Petitions as was held in the case of **Kiluwa Limited & Another v Commissioner of Lands & 3 Others [2015] eKLR, Constitutional Pet. 8 of 2012**. They submit that Article 50(1) of the Constitution further provides the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before the Honourable Court. That the grant of reliefs or remedies in such instances are therefore not subject to any statute or period of limitation either under the Limitation of Actions Act (Cap 22, Laws of Kenya), or the Law Reform Act aforesaid. They further cite the Supreme Court case of **In the Matter of the Interim Independent Electoral Commission [2011] eKLR** where the Court observed that a court of law can only exercise jurisdiction as conferred by the Constitution or other written laws. The Petitioners submit that in the instant petition, the Court's jurisdiction is vested by the provisions of Rule 7(1) of the Employment and Labour Relations Court (Procedure) Rules, 2016 which provides that a party who wishes to institute a petition shall do so in accordance with the Constitution of Kenya (Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution) Practice and Procedure Rules, 2012. The Petitioners submit that Rule 7(3) additionally states that a party is at liberty to seek the enforcement of any constitutional rights and freedoms or any constitutional provision in a statement of claim or other suit filed before the Court. The Petitioners submit that it is within the remit of the ELRC Rules, ELRC Act and the Constitution of Kenya 2010 that the Petition is properly before Court and ought to be heard on its merits.

11. The Petitioners also cite the case of **Judicial Service Commission v Gladys Boss Shollei & Another [2014] eKLR** where the Court of Appeal held that the Labour Relations Court had jurisdiction to handle complaints relating to violation of constitutional rights arising out of a labour dispute. They submit that the 2<sup>nd</sup> Respondent cannot therefore fall back to the law under Section 14 of the IPOA Act as a magical shield to oust the jurisdiction of the Court, in order to prevent judicial scrutiny of unlawful appointment. Further, that in **Okiya Omtatah Okoiti v National Executive of the Republic of Kenya & 10 Others; Capital Markets Authority (CMA) (Interested Party) [2021] eKLR**, the court held that holders of office in the public or state office in Kenya in the executive, the legislative, the judiciary or any other public body and in National or County Government are servants of the people of Kenya hence the court has jurisdiction whether the issue is

about employment law or policy or about individual public officer's grievances. They also urge the Court to consider the holding in the case of **Okiya Omtatah Okoiti v Attorney General & 2 Others; Francis K Muthaura (AMB) & 5 others (Interested Parties) [2019] eKLR**. The Petitioners also referred to the case of **Republic v Clerk, County Assembly of Baringo ex parte William Kassait Kamket [2015] eKLR** at para 90-96 where Radido J. noted that the definition of employer, employee and contract of service in the Employment Act, 2007 was not meant to limit or restrict the jurisdiction granted to the Court by Section 12 of the Employment and Labour Relations Court Act. The Honourable Court went on to hold that such approach involving limitation or restriction is the source of the uncertainty currently being experienced. The Petitioners submits that in the context of their case, Section 14 of the IPOA Act was not meant to limit or restrict the jurisdiction granted to the Court by Section 12 of the Employment and Labour Relations Court Act. They urge this Court to therefore strike out the Preliminary Objection with costs to the Petitioners and proceed to hear the Petition on merit.

12. The preliminary objection by the 1<sup>st</sup> Interested Party and the 2<sup>nd</sup> Respondent hovers around the exhaustion doctrine. It is asserted that the jurisdiction of this Court has been ousted as the Petitioners have not exhausted the internal mechanisms under the law before moving the Court seeking the myriad reliefs in this Petition. The objection in my view is well taken given the parameters of a preliminary objection as stated in the celebrated case of **Mukisa Biscuit Co v West End Distributors Limited [1969] EA 696**. Law J.A. stated as follows:-

*"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration"*

13. The objection taken is a point of law and as such falls for determination as it is founded on the pleadings and the law giving rise to the objection. The dispute in the main is in relation to the alleged appointment of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties to posts they did not apply for. Under Section 14 of the Independent Policing Oversight Authority Act, the law provides for the removal of a member of the Board through presentation of a petition to the Public Service Commission setting out the facts constituting the specific ground for removal. Upon the consideration of the petition by the Commission, if two-thirds of the members of the Commission agree there is ground for removal, the Commission shall recommend to the National Assembly the removal from office of the person in question whether a member or the chairperson. The National Assembly shall then forward the petition to the President if satisfied that it discloses a ground for removal and the President shall then appoint a tribunal to hear and determine the petition and suspend the member pending the outcome of the tribunal. The foregoing is clear indication that the Petitioners have not exhausted the internal mechanisms for the resolution of the dispute before moving the Court. As has been held in a string of decisions of this Court and the High Court, the exhaustion doctrine does not permit a party to leapfrog the process of resolution of disputes. Where a statute provides for a mechanism of handling of a complaint, then that mechanism must be triggered before any party can properly approach the Court. The Petition herein was filed after a considerable period of time and in contravention of the law. A petition to the Public Service Commission ought to have been filed and as such this Petition is incompetent to that extent and is struck out with costs to the 2<sup>nd</sup> Respondent and the 1<sup>st</sup> Interested Party.

It is so ordered

**Dated and delivered at Nairobi this 28<sup>th</sup> day of July 2021**

**Nzioki wa Makau**

**JUDGE**