



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

PETITION NO. E094 OF 2021

LUCAS OMONDI MWALO.....PETITIONER

VERSUS

JOSEPHINE MUENI MUTUNG'A.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

DIRECTOR OF IMMIGRATION &

REGISTRATION OF PERSONS..... 3RD RESPONDENT

DIRECTOR NATIONAL REGISTRATION BUREAU.4TH RESPONDENT

AND

LAW SOCIETY OF KENYA.....1ST INTERESTED PARTY

ENERGY & PETROLEUM

REGULATON AUTHORITY.....2ND INTERESTED PARTY

RULING

1. The Petitioner/Applicant filed a Notice of Motion Application dated 8th December 2020 seeking for Orders:

i. Spent.

ii. THAT pending the hearing and determination of this application *inter partes*, an Order does issue compelling the 3rd and 4th Respondent to supply the applicant with the reasoned basis for issuance of two conflicting identity documents to the 1st Respondent.

iii. THAT pending the hearing and determination of the application and petition herein *inter-partes*, an Order does issue directing the 2nd Interested party to commence investigation and/or disciplinary action against the 1st Respondent.

iv. THAT pending the hearing and determination of the application and petition herein *inter-partes*, an Order does issue compelling the 2nd Interested Party to supply the Petitioner with a Register of the 1st Respondent's Employment Record with particular details as to her age and when she is due for mandatory retirement.

v. THAT this Honourable court be pleased to issue such further or other order(s) as it may deem just and expedient for the ends of justice.

vi. THAT the costs of this application be provided for.

2. The Application is premised on the grounds that the letter and spirit of national registration and immigration system is to create certainty in the country's identification system and to assist employers particularly in public service in determining the mandatory retirement age of

public servants. The Applicant asserts that the variance on the 1st Respondent's age in both her National Identity Card and Passport bestows on her undeserved benefit out of the tax payers funds, puts in disrepute the Kenya's national registration and immigration system and also demeans the public office she holds. She asserts that the 1st Respondent in a demonstration of impunity and lack of integrity has never sworn an affidavit to account for such variance in her age on her national identification documents and that her continued employ of the 2nd Interested Party is unconstitutional, unlawful and total neglect of public interest. He asserts that the balance of convenience favours the granting of the orders sought in the application and that the Respondents and the Interested Parties will suffer no prejudice if the orders are granted. The Petitioner/Applicant depones in the Affidavit Supporting the Application that the 1st Respondent by her own admission vide the Sunday Nation Newspaper of 18th October 2020, lied about her age and which led to the variance in her passport and National Identity Card. He deponed that he immediately wrote to the 3rd and 4th Respondents on 20th October 2020 pointing out the anomaly and requested for the basis of issuance of two conflicting identity documents but the said Respondents ignored the letter and have failed to take remedial action and/or supply any detail to the Petitioner/Applicant. He avers that the actions of the 1st Respondent undermine the essence of Kenya's Identification documents and is a clear demonstration of impunity by a public officer out to unduly benefit from the computation of her age in determining her retirement. The Petitioner/Applicant further avers that this Honourable Court has unfettered powers and the jurisdiction to stop the blatant disregard for the rule of law and promote integrity at workplace and that if the said violations of the Constitution are not stopped, implementation of the Constitution of Kenya shall be undermined.

3. The 1st Respondent depones in her Replying Affidavit sworn on 15th February 2021 that from the time she joined the organization, her documentation has never been an issue and that her employer has an elaborate system of reviewing the said documents, including undertaking background checks. She denies the contents of the alleged newspaper article and challenges the Applicant to prove the correctness of the same and asserts that by law, her date of birth is the one stated in her birth certificate and which further determines her age of retirement. She further avers that the Applicant has not disclosed the legally enforceable interest he has with respect to the private contract of employment between her and the 2nd Interested Party. She asserts that the Applicant is only being used by the interdicted Director General of the 2nd Interested Party, one Mr Pavel Oimeke to fight his personal office battles following her appointment by the 1st Respondent to act in his place. She asserts that the instant application is made in bad faith and is a witch hunt to ensure she is removed from office. The 1st Respondent further avers that there is no evidence of public interest presented in this matter nor has the Applicant produced particulars of her lack of integrity as alleged. She asserts that her employment with the 2nd Interested Party is based on her academic qualifications which the Petitioner is not challenging and that she would be gravely prejudiced if the Court grants any of the orders sought in favour of the Applicant. She prays that the Application herein be dismissed with costs to the Respondents.

4. The 2nd Interested Party filed a Replying Affidavit sworn on 18th March 2021 by its Acting Director, Corporate Services, James Kilonzo. He depones that the orders sought by the Applicant cannot be granted because the Petitioner has not provided any specific and/or reliable evidence that would lead the 2nd Interested Party to initiate investigations or disciplinary action against the 1st Respondent. He deponed that the 2nd Interested Party purely relies on information provided at the time/date of employment and has not seen any contradictory birth dates from its human resource records and cannot further rely on documentation such as a newspaper cutting to determine the age of any of its employees. Further, that the Petitioner/Applicant has also not adduced any reliable evidence to warrant production of private employee records held by the 2nd Interested Party in respect of the 1st Respondent and whose disclosure would amount to breach of privacy.

5. The 2nd, 3rd and 4th Respondent filed Grounds of Opposition dated 10th February 2021 stating that the instant Application and Petition as instituted is an abuse of the court process, has no merit and based on a misconception of law. They assert that this Honourable Court has no jurisdiction to hear and determine the matter which raises issues of criminality and does not fall within the ambit of the Employment & Labour Relations Court as stipulated in Section 12(1) of the Employment & Labour Relations Court Act, Act No. 20 of 2011. They assert that the instant Application does not also raise any Constitutional issues with precision as was affirmed by the Court of Appeal in **Meme v Republic [2004] eKLR**. They pray that both the Petition and the Application herein be dismissed with costs to the 2nd, 3rd & 4th Respondents.

6. The Motion was disposed of by written submissions and the Petitioner/Applicant submitted that the right of access to information held by the State or its agencies is guaranteed by Article 35 of the Constitution which provides that every citizen has the right to access such information required for the exercise or protection of any right or fundamental freedom. He submitted that the importance of this right has been explained by the Constitutional Court of South Africa in **Stefaans Conrad Brümmer vs Minister for Social Development and Others [2009] ZACC 21; 2009 (6) SA 323 (CC); 2009 (11) BCLR 1075 (CC)** where the Court held that access to information is fundamental to the realisation of the rights guaranteed in the Bill of Rights. He submitted that further, the Access to Information Act, 2016 which was enacted to give effect to Article 35 of the Constitution, provides a framework for public entities and private bodies to proactively disclose information that they hold and to provide information on request, in line with the constitutional principles. He submitted that Section 4 of the Act provides that access to information held by a public entity or a private body shall be provided expeditiously at a reasonable cost. The Applicant wholly relies on the *dicta* in **Zebedeo John Opore v The Independent Electoral and Boundaries Commission [2017] eKLR** where the Court extensively analysed the constitutional right of access to information and the evidentiary burden of the same. The Petitioner/Applicant submitted that he seeks the said information to prove before this Honourable Court that his rights particularly under Articles 10, 232, 259 of the Constitution have been violated. He submitted that the decision by the 2nd Interested Party, the 3rd and 4th Respondents to deny him access to information necessary for the exercise of his constitutional rights and prove his case is inconsistent with the Bill of Rights. He submitted that it is the duty of this Court to interrogate policy and decisions and ensure they are consistent with the Bill of Rights. He further submitted that the reasoning by the Respondents fails to meet the principles of legality, access to information and further infringes upon the rights to fair administrative action and the principle that evidentiary burden rests with the holder of information and not with the requester.

7. The 3rd and 4th Respondents submitted that the 1st Respondent was issued with a National Identity Card Number in compliance with Sections 5 and 6 of the Registration of Persons Act. They further submit that as per their records, the 1st Respondent's date of birth has neither been altered nor tampered with and has further not been rebutted by any other primary document like the Birth Certificate.

8. The Petition seeks access to information. This is a recognized right under Article 35 of the Constitution. Article 35 provides as follows:-

35. (1) Every citizen has the right of access to—

(a) information held by the State; and

(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.

9. The actualisation of the salutary provisions of the aforesaid article of the Constitution was through the enactment of the Access to Information Act, 2016. The Act makes provision under Section 6 thereof as follows:-

6. (1) Pursuant to Article 24 of the Constitution, the right of access to information under Article 35 of the Constitution shall be limited in respect of information whose disclosure is likely to—

(a).....

(b).....

(c).....

(d) involve the unwarranted invasion of the privacy of an individual, other than the applicant or the person on whose behalf an application has, with proper authority, been made; (emphasis mine)

10. Whereas the Petitioner has every right to seek information from the 2nd to 4th Respondent and the Interested Parties, such information should not lead to unwarranted invasion of the privacy of an individual. Whereas the newspaper cutting exhibited as LO1 in the Petitioner's affidavit shows a discrepancy in the age of the 1st Respondent, it is only the 2nd – 4th Respondents who hold the information that would clear the air. In the premises, granted that the Petitioner seeks a raft of reliefs many of which cannot be granted at interlocutory stage and a majority of which are not directed at the appropriate parties, the only prayer that can be granted at present is the one seeking an Order to issue compelling the 2nd Interested Party to supply the Petitioner with a Register of the 1st Respondent's Employment Record with particular details as to her age. The details to be availed within 48 hours of this Ruling by the 2nd Interested Party.

It is so ordered.

Dated and delivered at Nairobi this 22nd day of July 2021

Nzioki wa Makau

JUDGE