



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

PETITION NO. 19 OF 2020

(Before Hon. Lady Justice Maureen Onyango)

OKIYA OMTATAH OKOITI PETITIONER

VERSUS

- THE CABINET SECRETARY,**
- INDUSTRY, TRADE AND CO-OPERATIVES.....1st RESPONDENT**
- THE PUBLIC SERVICE COMMISSION.....2nd RESPONDENT**
- THE STATE CORPORATIONS ADVISORY COMMITTEE.....3rd RESPONDENT**
- THE HON. ATTORNEY GENERAL.....4th RESPONDENT**
- BERNARD M. NGORE, CHAIRPERSON**
- NATIONAL STANDARDS COUNCIL.....5TH RESPONDENT**
- MARY WANJA MATU, INDEPENDENT MEMBER**
- NATIONAL STANDARDS COUNCIL.....6th RESPONDENT**
- HELEN KABETI NANGITHIA,**
- INDEPENDENT MEMBER NATIONAL STANDARDS COUNCIL.....7th RESPONDENT**
- FOUZIA A. ABDIRAHAAAN,**
- INDEPENDENT MEMBER NATIONAL STANDARDS COUNCIL.....8th RESPONDENT**
- PATRICK M. MUSILA,**
- INDEPENDENT MEMBER NATIONAL STANDARDS COUNCIL.....9th RESPONDENT**
- EDWARD NJOROGE, INDEPENDENT MEMBER**
- NATIONAL STANDARDS COUNCIL.....10th RESPONDENT**
- ERIC MUNGAI, INDEPENDENT MEMBER**
- NATIONAL STANDARDS COUNCIL.....11th RESPONDENT**

GILBERT LANG'AT, INDEPENDENT MEMBER

NATIONAL STANDARDS COUNCIL.....12th RESPONDENT

ROGERS OCHAKO ABISAI, INDEPENDENT MEMBER

NATIONAL STANDARDS COUNCIL.....13th RESPONDENT

BERNARD NJIINU NJIRAINI,

MANAGING DIRECTOR KENYA BUREAU OF STANDARDS.....14th RESPONDENT

AND

KENYA BUREAU OF STANDARDS.....1st INTERESTED PARTY

GEORGE ODHIAMBO.....2nd INTERESTED PARTY

RULING

1. Before me, for determination is a Notice of Motion Application dated 8th February, 2021 filed by the 5th Respondent herein. The said motion seeks the following orders:

(i) Spent.

(ii) That this suit be consolidated with **ELRC Petition No. 091 of 2020**.

(iii) That cost be in the cause.

(iv) That this Court be pleased to issue any other or further orders it may deem just and fit to grant in this circumstance.

2. The Application is premised on the following grounds;

i. That this suit and ELRC Petition No. 091 of 2020 relate to the same subject matter and parties.

ii. That the Legal and factual issues in dispute in the two suits are substantially similar and cross-cutting.

iii. That it will save the Court's time and expenses if the two suits are tried together.

iv. That it may embarrass the court if the two suits bear conflicting decisions as the law and facts are the same. This may erode the dignity of the court.

v. That no prejudice will be occasioned to the Respondents if this application is allowed since the Respondent will still have a chance to defend their case.

vi. That ELRC Petition No. 091 OF 2020 was instituted in respect to the validity of de-gazetment of the 5th Respondent/Applicant by the 1st Respondent whereas this suit was instituted in relation to the validity of the Gazettement of the 5th -14th Respondents as members of the National Standards Council of Kenya Bureau of Standards by the then Cabinet Secretary, Industry', Trade and Co-operatives who performed the functions of the 1st Respondent herein.

vii. That ELRC Petition No. 091 OF 2020 Challenges the powers of the de-gazettement of the Petitioner as chairman of the National Standards Council by the Cabinet Secretary for Industrialization, Trade and Enterprise Development unprocedurally whereas this suit challenges the powers of the Gazettement of the Petitioners and other members of the National Standards Council by the Cabinet Secretary for Industrialization, Trade and Enterprise Development.

viii. That the two suits in all respects touched on same subject, the Law and relates to similar facts.

3. The petitioner herein in opposition to the instant Application filed his grounds of opposition. In the said grounds of opposition, he avers that contrary to the averments by the Applicant/5th Respondent he is not a party to Petition No. E091 of 2020. That having filed the instant Application after proceedings in the Petition 19 of 2020 had been closed it is impossible to stay the delivery of judgment herein. The petitioner further avers that if the issues for determination in Petition No. E091 of 2020 replicate those herein, then, having been filed much later, Petition No. E091 of 2020 is *res subjudice* to these proceedings and should be stayed to await the determination of this petition.

4. The Petitioner further questions the timing of the instant Application and terms it an abuse of the court process. That the 5th Respondent

herein is the Petitioner in Petition No. E091 of 2020 and being represented by the same Advocates in both petitions, he was seized of the facts in the instant petition and therefore ought to have filed a cross-petition and not institute separate proceedings vide Petition No. E092 of 2020. That there is no good faith on the applicant's side and that this application serves no purpose other than to delay delivery of the judgment in the instant petition. The petitioner urges this Court to reject the procedural tactic employed by the 5th Respondent in this matter and dismiss the Application with costs to the petitioner.

5. Only the petitioner responded to the application by filing his grounds of opposition. Parties, thereafter agreed to dispose of the application by way of written submissions.

5th Respondent/Applicant's Submissions

6. The 5th Respondent submits that the instant petition and ELRC Petition No. 091 of 2020 relate to the same subject matter and parties and that the legal and factual issues in dispute in both petitions are substantially similar and cross-cutting. That it may embarrass the court if the two suits bear conflicting decisions as the Law and facts are the same and no prejudice will be occasioned to the Respondents if this application is allowed since the Respondent will still have a chance to defend their case.

7. The 5th Respondent submits that the principles to consider were amply set out in the case of **Nairobi ELC Suit No. 1000 of 2012 Joseph Okoyo v Edwin Dickson Wasunna (2014) eKLR**, which cited with approval the case in **Mombasa HCCC No. 992 of 1994 Nyati Security Guards and Services v Municipal Council of Mombasa** where the factors were enumerated as follows:-

"...the situations in which consolidation can be ordered include where there are two or more suits or matters pending in the same court where:-

(a) Some common question of law or fact arises in both or all of them; or

(b) The rights or relief claimed in them are in respect of or arise out of the same transaction or series of transactions, or

(c) For some other reason it is desirable to make an order for consolidating them."

8. Counsel further submits that ELRC Petition No. 091 of 2020 questions the validity of de-gazettement of the 5th Respondent/Applicant by the 1st Respondent whereas Petition 19 of 2020 questions the validity of the Gazettement of the 5th -14th Respondents as members of the National Standards Council of Kenya Bureau of Standards. That the two suits should therefore be consolidated and heard together as they relate to the same subject matter and between same parties.

Determination

9. I have carefully considered the pleadings and submissions made by the parties. The issue for determination is whether the suit herein is amenable to consolidation with **ELRC Petition No. 091 of 2020**. The Employment and Labour Relations Court (Procedure) Rules, 2016 mandate this court to consider consolidation of suits with a view of furthering expeditious disposal of cases under Rule 23 which provides that;

The Court may consolidate suits if it appears that in any number of suits—

a) some common question of fact or law arises; or

b) it is practical and appropriate to proceed with the issues raised in the suits simultaneously.

10. The principles involved when a court is considering consolidation of suits were amply set out in the case of **Nyati Security Guards & Services Ltd v - Municipal Council of Mombasa [2004] eKLR** as follows:

"The situations in which consolidation can be ordered include where there are two or more suits or matters pending in the same court where:-

1) Some common question of law or fact arises in both or all of them; or

2) The rights or relief claimed in them are in respect of, or arise out of the same transaction or series of transactions, or

3) For some other reason it is desirable to make an order for consolidating them."

11. In **Law Society of Kenya v The Centre for Human Rights and Democracy**, the Supreme Court of Kenya stated: -

"The essence of consolidation is to facilitate the efficient and expeditious disposal of disputes and to provide a framework for a fair and impartial dispensation of justice to the parties. Consolidation was never meant to confer any undue advantage upon the party that seeks it, nor was it intended to occasion any disadvantage towards the party that opposes it."

12. The task before this court is therefore one of comparing the petitions seeking to be consolidated, to determine whether they involve common questions of law or fact, whether the reliefs claimed arise out of the same transaction and whether it is convenient and efficient to pursue the same in a consolidated suit.

13. The reason advanced by the Petitioner herein in opposing the instant application is that it was filed too late in the day. That unlike Petition E091 of 2020, the proceedings in Petition 19 of 2020 are at an advanced stage as the parties have closed their cases, filed submissions and the matter, prior to filing of this application, was slated for judgment.

14. A court can order the consolidation of suits at any stage. This was stated in **Benson G. Mutahi v Raphael Gichovi Munene Kabutu & 4 others [2014] eKLR** where the court stated;

*“That explanation sounds plausible and in any event, delay alone, if reasonably explained, cannot be a bar to the consolidation of suits in appropriate cases and especially when there is no evidence to suggest that any party will suffer prejudice. It is true that this case is part heard and the plaintiff has closed his case. Only the plaintiff testified in support of his case and no other witnesses were called and so there is no fear that the plaintiff cannot be recalled to testify afresh if need be. It is also clear from a reading of the Court of Appeal’s decision in **Ngumbao v Mwatate & 2 Others 1988 K.L.R 549** that a part heard case can still be consolidated with a fresh case and parties who had testified can be recalled or the case can continue from the evidence earlier recorded. Therefore, the submissions by Mr. Muyodi, that this case cannot be consolidated with **Kerugoya ELC Case No. 809 of 2013 (OS)** because it is part heard, does not find support in case law and in any case, no case was cited for the proposition.”*

15. The court fully associates itself with the holding in the above case.

16. The Court must now determine whether the two petitions involve common questions of law or fact, whether the reliefs claimed arise out of the same transaction or whether it is convenient and efficient to pursue the same in a consolidated suit.

17. As aptly put by the 5th Respondent, PET NO. 091 OF 2020 questions the validity of de-gazettement of the 5th Respondent/Applicant by the 1st Respondent whereas Petition 19 of 2020 questions the validity of the Gazettement of the 5th -14th Respondents as members of the National Standards Council of Kenya Bureau of Standards. In Petition No. E091 of 2020, the Petitioner seeks the following prayers;

*a. That an order of permanent stay be issued staying the implementation of the **Gazette Notice No 9589** dated 20th November 2020 by the 1st Respondent revoking the appointment of the Petitioner as the Chairman of the National Standards Council.*

b. That a declaration be issued that the gazette Notice No 9589 dated 20th November 2020 by the 1st Respondent revoking the appointment of the applicant as the chairman of the National Standards Council is unlawful, unconstitutional, and null and void.

c. That Permanent Order of injunction be granted restraining the 1st Respondent from filling the position of and/or making any appointment to the position of the Chairman of the National Standards Council until the petitioner’s terms of appointment lawfully comes to an end.

18. Petition No. 19 of 2020 on the other hand seeks, inter alia, the following reliefs;

a. A declaration that the 1st Respondent’s impugned decision to handpick and appoint the chairperson and independent members of the National Standards Council was contrary to the law which requires that public offices be filled through a transparent, competitive, inclusive and merit based recruitment process open to public participation was irregular, unlawful and unconstitutional and therefore invalid, null and void ab initio.

b. A declaration that the 1st Respondent’s decision to revoke a valid presidential appointment, by purporting to appoint Bernard M. Ngore to replace Ken Wathome Mwatu who was appointed by the President is invalid, null and void.

c. A declaration that Bernard M. Ngore, the 5th Respondent is conflicted and therefore, his appointment as the Chairperson of the National Standards Council Board was unconstitutional and void ab initio.

19. I find the two petitions neither emanated from the same transaction nor do they seek similar reliefs. While Petition No. 19 of 2020 challenges the process of appointing the 5th Respondent among others, Petition No. E091 of 2020 challenges the process used to de-gazette the 5th respondent. The Petitioner in 91 of 2020 challenges the validity of Gazette Notice 9589 and dated 10th November, 2020 while the Petitioner in Petition No. 19 of 2020 challenges the validity of Gazette Notice No 10752 and dated 14th November 2019. In Petition 19, the Petitioner’s main claim is that the 5th Respondent was appointed without being subjected to a transparent, competitive and merit based recruitment process while the Petitioner in Petition No. E091 of 2020 claims that he was not given reasons for revocation of his appointment and was therefore condemned unheard. In my view, the facts in the two petitions are not similar. The court in Petition No. 19 of 2020 will be determining the validity of the appointment of the 5th Respondent, among others, while the court in Petition 91 will focus on the process that led to the revocation of the 5th Respondent’s appointment.

20. In the circumstances therefore, having considered the issues above, I find the Notice of Motion dated 8th February 2021 wholly unmeritorious. The same is accordingly dismissed with costs to the Petitioner.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 9TH DAY OF JULY 2021

MAUREEN ONYANGO

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 March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE