



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO. E054 OF 2021

IN THE MATTER OF: ARTICLE 1, 2, 3 (1), 4, 10, 19, 20, 21, 33, 35, 41 (1), 47, 48, 50, 73, 165 AND 232 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF: THREAT AND VIOLATION OF ARTICLE 10 OF THE CONSTITUTION OF KENYA 2010 ON THE NATIONAL VALUES AND PRINCIPLES OF GOVERNANCE

IN THE MATTER OF: ARTICLE 35 OF THE CONSTITUTION ON THE PROTECTION OF FUNDAMENTAL RIGHTS TO ACCESS TO INFORMATION

IN THE MATTER OF: ARTICLE 4 (1) OF THE CONSTITUTION OF KENYA 2010 ON THE RIGHT TO FAIR LABOUR PRACTICES

IN THE MATTER OF: PUBLIC RIGHT TO INFORMATION AND ADHERENCE TO DUE PROCESS ON THE APPOINTMENT OF DIRECTOR (ROAD ASSETS AND CORRIDOR MANAGEMENT- KENYA NATIONAL HIGHWAY AUTHORITY)

BETWEEN

COMMISSION FOR HUMAN RIGHTS AND JUSTICES (CHRJ).....PETITIONER

AND

ENG. KUNG’U NDUNG’U.....1ST RESPONDENT
CHAIRMAN, BOARD OF DIRECTORS

KENYA NATIONAL HIGHWAY AUTHORITY.....2ND RESPONDENT
PUBLIC SERVICE COMMISSION.....3RD RESPONDENT

ADVISORY COMMITTEE

STATE CORPORATION.....4TH RESPONDENT
HEAD OF PUBLIC SERVICE.....5TH RESPONDENT
INSPECTOR OF STATE CORPORATION.....6TH RESPONDENT
CABINET SECRETARY

TRANSPORT & INFRASTRUCTURE.....7TH RESPONDENT
THE HONORABLE ATTORNEY GENERAL.....8TH RESPONDENT

AND

COMMISSIONER FOR UNIVERSITY

RULING

1. The 2nd respondent filed Notices of Preliminary Objection (PO) dated 23.4.2021 against the petitioner's suit on the following grounds:

- a. The suit against the 2nd Respondent offends section 3 of the Kenya Roads Act, 2007**
- b. The suit against the 2nd Respondent offends section 67 (a) of the Kenya Roads Act, 2007.**
- c. The Petitioner lacks the requisite locus standi to institute the present suit**
- d. The Petitioner lacks legal capacity to institute the suit as instituted.**
- e. The Petition is frivolous , vexatious and an abuse of the process of this Honorable Court**

2. Subsequently, the 1st Respondent filed another PO dated 26.4.2021 against the Petitioner's Petition and the Notice of Motion dated 15.4.2021 on the following grounds:

- a. The Petition herein is incurably defective and incompetent.**
- b. The Petition herein is a hollow shell that is null and void and should be struck out in limine.**
- c. The Petitioner's Petition must fail for lack of locus standi and failure to disclose the true identity of the Petitioner.**

3. The two POs were canvassed by way of written submission and which were highlighted on 18.5.2021 by the counsel for the two sides.

1st Respondent's submissions

4. The 1st Respondent argued that the Rule 11 (2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 (the Mutunga Rules) is couched on mandatory terms.

5. He submitted that as stated in paragraph 2 of the Petition, the Petitioner intends to rely on documents but no verifying affidavit or documents were annexed to the Petition. It was his submission that without an affidavit with the requisite documents, there is no evidence before the court that would enable the Petitioner to prove and maintain his claim. According to him , the Petition is fatally defective and incompetent.

6. For emphasis, he relied on the decisions in **Maureen Nyambura Ngigi Warui v Board of Directors, Kenya Power & Lighting Company Limited & 2 others [2020] eKLR** and **Patron Internally Displaced Persons & Kisii Steering Committee v Cabinet Secretary, Ministry of Devolution & planning of National Government [2016] eKLR**.

7. He further submitted that where a clear procedure for redress of any grievance is prescribed by the Constitution or statute or rules made thereunder, that procedure should be strictly followed. It relied on the finding of the Court of Appeal in **Scope Telemantics International Sales Limited v Stoic Company Limited [2017] eKLR**.

8. He further submitted that the Petitioner has not stated with certainty any violation of its rights thus there is no basis upon which the court can uphold the alleged violation of his rights. He relied on **S.W.M. v G.M.N. [2012] eKLR** where the Court cited **John Kimani Mwangi v Town Clerk Kangema Petition No. 039 of 2007** that for a party to prove violation of the rights under the constitution must state the provision of the Constitution that they allegedly was infringed in relation to them, the manner of infringement and the nature and extent of the infringement.

9. It further relied on the decisions in **Ibrahim Mohamud Ibrahim & ano v Kenya Wildlife Service & 4 others; Ibrahim Mohammed Yousuff (Interested Party) [2020] eKLR** and **Mumo Matemu v Trusted Society of Human Rights Alliance**.

10. He submitted that the Petitioner cannot benefit from the provisions of the Constitution without disclosing its true identity. He further submitted that there is no evidence that the Petitioner exists or whether it is a legal entity. Consequently, without proving its existence, it will be hard for him to recover costs should the petition be dismissed. He relied on the **Patron Internally Displaced Persons Case [Supra]** urged the Court to uphold his PO and strike out the Petition with costs.

2nd Respondent's submissions

11. The 2nd Respondent submitted that a PO ought to be premised on pure points of law which have been pleaded or have arisen by clear implication of the pleadings. For emphasis, he relied on **Quick Enterprises Ltd v Kenya Railways Corporation Kisumu HCCC No. 22 of 1999** and **Mukisa Biscuits Manufacturers Limited v Westend Distributors (1969) EA 696**.

12. It further submitted that section 3 of the Kenya Roads Act establishes the Kenya National Highways Authority and not the Kenya

National Highway Authority. Consequently, it contended that, the Petitioner sued a non-existent party and has deliberately refused to cure the defect by amending its pleadings.

13. In addition, he submitted that section 3 of the Kenya Roads Act provides that the authority is a body corporate that can sue or be sued in its own name but the departments within the Authority or its board of directors are not corporate persons capable of suing or being sued. It contended that section 42 of the Act protects the Authority's officials and submitted that if the Petitioner is aggrieved by any action, he should sue the Authority instead of the Chairman of its Board of Directors.

14. It relied on **Kipsiwo Community Self Help Group v Attorney General and 6 others [2013] eKLR** where the Court held that unincorporated entities have no legal capacity and cannot sue in their names but sue through an entity with legal capacity. It further relied on **Republic v The Secretary to the Board of Governors Musingu High School – Kakamega [2011] eKLR** where the Court held that the body capable of being sued was the board of governors of a school and not its officials.

15. He argued that the Petition contravenes section 67 (a) of the Kenya Roads Act which provides that legal proceedings shall not be commenced against the Authority until at least 1 month after written notice of the claim and the intention to commence legal proceedings is served upon it.

16. He submitted that though the Petitioner wrote a letter dated 31.3.2021 and filed the suit on 6.4.2021 which was too soon. He further argued that the letter requesting for information regarding the process of recruitment of Directors was addressed to the Chairman of the Board of Directors, instead of the Director- General, and that it was not a notice of intention to file the suit required by the law.

17. He cited the decision in **Simonsah Investment Ltd v Kenya National Highways Authority & 2 others [2019] eKLR** where the Court held that the requirement allows the Director General an opportunity to address a claim before legal action can be commenced against it in line with Article 159 (2) of the Constitution of Kenya.

18. He also relied on **Michael Otieno Nyagati & 5 Others v Kenya National Highways Authority & 5 Others [2015] eKLR** and **Sumac Developmeny Company Limited v George Munyui Kigathi & 2 Others [2017]** where the Courts pronounced themselves on the mandatory nature of the notice under section 67 (a) of the Act.

19. He urged the Court to allow the PO, and strike out the Petition together with the application with costs for failure to comply with both section 3 and section 6 (a) of the Kenya Road Act.

Petitioner's submissions

20. The Petitioner opposed the two POs contending that they raise issues of fact and procedural technicalities. It submitted that under Article 159 (2) (d) and (e) of the Constitution the court is required to administer justice without undue regard to technicalities and to promote the purpose and principles of the constitution.

21. It further submitted that the Respondents' contention that it lacks locus standi and legal capacity does not hold water because pursuant to Articles 22 and 260 of the Constitution and Rule 4 of the Mutunga Rules, both an incorporated or unincorporated person may institute proceedings asserting a violation of a right in the Bill of Rights.

22. It argued that the PO relate to typographical error on the 2nd repondent's name and that Rule 18 of the Mutunga Rules created a statutory solution to the questions of typographical errors.

23. It submitted that the Petition and Application are not subject to statutory limitation and subjecting them to a time frame makes the Constitution subservient to legislation. It relied on **Abdalla Miraj v Board of Directrs Coast Water Services Board and another** where the Court held that the under Article 22 of the Constitution, every person has a right to institute court proceedings.

24. It further relied on the **Mukisa Biscuit Case [Supra]** to submit that the 2 POs require evidence to be ascertained since they are based on facts and not points of law.

25. Finally, it argued that the Petition meets the threshold set out in **Anarita Karimi Njeru v Republic 1976-8 KLR 1283** and urged the Court to dismiss the 2 P.O's.

Issues for determination

26. The POs raise the following issues for determination:

- a. Whether the POs raises pure points of law.*
- b. Whether the petition is incurably defective and incompetent.*
- c. Whether the Petitioner has locus standi to file the suit.*
- d. Whether the Petition offends section 3 and 67(a) of the Kenya Roads Act.*

e. Whether the petition is a mere shell, frivolous, vexatious and an abuse of the process of the court.

Whether the POs raises pure points of law.

27. The threshold of a valid preliminary objection in civil proceedings was set out in the case of **Mukisa Biscuit Manufacturing Company Limited vs. West End Distributors Limited [1969] EA 696** where the Court stated as follows-

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. 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 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...”

28. Having carefully considered the POs, I am satisfied that the same raises pure points of law save for the ground that the petition is a mere shell, frivolous, vexatious and an abuse of the process of the court. The stated ground raises factual issues that require evidence to ascertain and as such the objection on that ground is overruled.

Whether the Petition is fatally defective and incompetent.

29. The 1st Respondent submitted that the Petition does not satisfy the mandatory requirements of Rule 11 (2) of the Mutunga Rules because no documents are annexed to the verifying affidavit. Counsel for the Petitioner relied on Rules 9 and 15 of the Rules to submit that a petition cannot be defeated for failure to file an affidavit.

30. Rule 11 (4) of the Mutunga Rules provide:

“(1) The petition filed under these rules may be supported by an affidavit.

(2) If a party wishes to rely on any document, the document shall be annexed to the supporting affidavit or the petition where there is no supporting affidavit.

31. The Petition is accompanied by a Verifying Affidavit sworn by the Julius Ogogoh. The documents in support of the Petition are contained in a List of Documents dated 15.4.2020 but were only produced in support of the Notice of Motion.

32. Though the Petitioner filed a Verifying Affidavit as opposed to a Supporting Affidavit, the documents it intends to rely on and which are listed in the List of Documents filed, ought to have been annexed to the Petition because Rule 11 (2) provides that documents may be annexed to a Petition where there is no supporting affidavit. The question that follows is whether that default renders the petition fatally defective and incompetent.

33. In my view, that procedural lapse is not fatal and it can be cured by leave of the court being sought before the hearing. The court has duty to protect parties to access justice in court and it cannot chase away a litigant at preliminary stage for failure to annex its documentary evidence to the petition. The far the court should go is to order the party to comply with the rules in order for the opposing parties to adequately prepare their defence. Consequently, this ground also fails.

Whether the Petitioner has *locus standi* to file the suit.

34. The 1st and 2nd Respondents contended that the Petition does not disclose the identity of the Petitioner. The Petitioner submitted that pursuant to Article 260 of the Constitution, an incorporated or unincorporated entity may institute a suit asserting a violation of a right.

35. The Petitioner at paragraph 2 of the Petition describes itself as follows:

“THAT the Petitioner is a registered organization based in Mombasa with mandate to operate in the whole republic of Kenya committed to the promotion of basic human rights and brings this petition on its behalf and the greater public in public interest.”

36. The above description is imprecise for one to understand what entity was formed after its registration. However, it is clear that it filed the petition in the public interest.

37. Article 22 (1) and (2) of the Constitution provide:

“(1)Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened

(2)In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

(a) a person acting on behalf of another person who cannot act in their own name;

(b) a person acting as a member of, or in the interest of, a group or class of persons;

(c) a person acting in the public interest; or

(d) an association acting in the interest of one or more of its members.”

38. A person is defined under Article 260 of the Constitution to include:

“a company, association or other body of persons whether incorporated or unincorporated” [Emphasis Added]

39. Section 2 of the Mutunga Rules defines a person as:

“an individual, organization, company, association or any other body of persons whether incorporated or unincorporated;

40. Although legal capacity is necessary for an entity to sue or be sued the above provisions does not require that a person approaching the Court under Article 22 (2) must be incorporated. The legal status of the Petitioner is immaterial as it has somewhat described itself and indicated that it is acting on its behalf and in the public interest.

41. Additionally, I do not find any reason to find that the Petitioner has no *locus standi* because Article 258 (2) (c) of the Constitution provides that a person acting in the public interest may have the right to institute court proceedings claiming its contravention.

42. The Supreme Court in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others** [2014] eKLR held:

“The NGO Act must be interpreted in conformity with the Constitution. Although Section 12(2) and (3) of the Act provides for the legal status of the 1st respondent, when read together with Articles 22, 258 and 260 of the Constitution, and in the public interest, it is to be inferred that the 1st respondent did not lose its locus standi, even if it were to be assumed to have lacked registered status. The three Articles give an enlarged view of locus standi, to the effect that every “person”, including persons acting in the public interest, can move a Court of law contesting infringements of any provisions in the Bill of Rights, or the Constitution...

In constitutional adjudication therefore, the traditional strictures of locus have been broken to allow every person the capacity to file a constitutional claim.”

43. Recently, the High Court in **International Community of Women Living With HIV Registered Trustees v Co-ordination Board & 2 others; Teresia Otieno (Interested Party)** [2021] eKLR held:

“There is in my view no requirement for a Petitioner to be either a company, or an association or other body of person so long as the person as defined under Article 260 of the Constitution is seeking remedies vide Article 22 and 258 as set out in the respective Articles.”

44. Accordingly, the Petitioner has *locus standi* under Article 260 of the Constitution to institute this suit seeking remedies under Article 22 and 258 of the Constitution. However, it is my view that whenever a petitioner describes itself as a registered entity, it is necessary to disclose how and where it is registered, for example if it is a company, NGO, a School or Church.

Whether the Petition offends Sections 3 and 67 (a) of the Kenya Roads Act

45. The 2nd Respondent contended that the suit cannot be sustained against a non-existent party as section 3 of the Kenya Roads Act establishes the Kenya National Highways Authority and not the Kenya National Highway Authority. The Petitioner on its part relies on Article 159 (2) (d) and (e) of the Constitution and contends that this was a typographical error.

46. In my view, the omission of letter “s” is too trivial to lead to a finding that the 2nd Respondent does not exist. It is a typographical error which can be treated as an accidental slip of the pen.

47. As regards the suit against the 2nd Respondent, it was submitted that the Petitioner ought to have sued the Authority as a corporate body because section 42 of the Kenya Roads Act protects its officials against liability. The Petitioner’s counsel argued that Rule 5 (d) of the Mutunga Rules provides that the Court may order that a party’s name be struck out or enjoined to the proceedings in order to effectively adjudicate upon a dispute.

48. Section 3 (a) of the Kenya Roads Act provides that the Kenya National Highways Authority (KeNHA) is capable of suing or being sued in its corporate name. Section 48 of the Act provides that an officer or employee of KeNHA cannot be personally liable to any action, in the execution of his duties.

49. The Petitioner has sued the Chairman, Board of Directors of KeNHA and has sought a prayer that it carries out proper recruitment of the Director Road Asset and Corridor Management. In accordance with section 3 (a) of the Kenya Road Act, this is a misjoinder. However, pursuant to Rule 5 (b) of the Mutunga Rules the Petition cannot be struck out for this misjoinder. The said Rule permits the court, with or without application, to strike out the name of a party who is improperly joined to a suit or to order for joinder of a party who ought to have been joined or who is necessary to enable the court adjudicate upon and settle the matter.

50. In this matter, the 2nd respondent complained that the petitioner appreciates the law but has deliberately not applied for leave to amend the petition in order to sue the correct person. The said argument is true because the petitioner's counsel did not attempt to seek leave even orally or suggest that he will seek the leave formally. In the circumstances, I proceed to strike out the second respondent from the petition because of misjoinder and lack of legal capacity of being sued on behalf of the Authority established under section 3 of the Kenya Roads Act, 2007.

51. On the other hand the 2nd Respondent argued that the suit is premature pursuant to section 67 (a) of the Kenya Roads Act since no notice was issued. The section provides:

“Where any action or other legal proceeding lies against an Authority for any act done in pursuance or execution, or intended execution of an order made pursuant to this Act or of any public duty, or in respect of any alleged neglect or default in the execution of this Act or of any such duty, the following provisions shall have effect—

(a) the action or legal proceeding shall not be commenced against the Authority until at least one month after written notice containing the particulars of the claim and of intention to commence the action or legal proceedings, has been served upon the Director-General by the plaintiff or his agent;”

52. Since the Authority has not been sued herein I do not think that I should consider the objection grounded on section 67 of the Act. In conclusion, I dismiss the 1st respondent's PO in its entirety but allow the 2nd Respondent's PO to the extent stated above, namely, striking out the name of the 2nd respondent from the proceedings herein with no order as to costs.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 2ND DAY OF SEPTEMBER, 2021.

ONESMUS N. MAKAU

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 April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE