



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KERICHO**

**PETITION NO. E007 OF 2021**

THOMAS KERONGO.....1<sup>ST</sup> PETITIONER

BEL MOSETI MIGIRO.....2<sup>ND</sup> PETITIONER

RIGENA HUMAN RIGHTS WATCHDOG ORGANIZATION.....3<sup>RD</sup> PETITIONER

**VERSUS**

JAMES OMARIBA NYAOGA.....1<sup>ST</sup> RESPONDENT

HON. DAVINS O. ONUSO.....2<sup>ND</sup> RESPONDENT

HON. CHARLES NYANGOTO.....3<sup>RD</sup> RESPONDENT

DR. JOASH MORARA KERONGO..... 4<sup>TH</sup> RESPONDENT

KISII COUNTY ASSEMBLY SERVICE BOARD.....5<sup>TH</sup> RESPONDENT

ETHICS & ANTI-CORUPTION COMMISSION.....6<sup>TH</sup> RESPONDENT

**AND**

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS...1<sup>ST</sup> INTERESTED PARTY

FEDERATION OF WOMEN LAYERS-KENYA.....2<sup>ND</sup> INTERESTED PARTY

**RULING**

1. This ruling relates to the Notice of preliminary objection dated 29/6/2021 filed by the 1<sup>st</sup> respondent against the Petition herein. The objection stands on the following grounds:-

*a) The filing of the petition in this court amounts to forum shopping*

*b) The Petitioners lack capacity or locus standing to bring the petition since they lack privity, and are not parties to the employment contract between the 1<sup>st</sup> and 5<sup>th</sup> Respondents herein.*

*c) The court lacks jurisdiction to entertain the petition herein and cannot grant the orders sought.*

*d) The petition raises issues which are similar to issues covered in the suspension letter dated 5.7.2017 which were determined by the court and are now res judicata.*

*e) The petition is fatally defective and / or deficient for contravening Rule 11 of the Constitution of Kenya (protection of Rights and Fundamental freedom) practice Rules, 2013(Mutungu Rules).*

*f) The petition is sterile and / or stale for want of supporting affidavit.*

*g) The petition is unconstitutional for failure to comply with Rule 10 of the Mutunga Rules.*

*h) The petition does not establish a reasonable cause of action known to law or otherwise.*

*i) The issues raised vide the petition are private to law matters which do not touch on the constitution and as such they fall within the realm of private law dispute resolution.*

*j) The petition is an abuse of the due process of the court.*

## **FACTS OF THE CASE**

2. The female staff of the 5<sup>th</sup> Respondent lodged complaint to the interested parties about sexual harassment by the 1<sup>st</sup> respondent and on 11/5/2021 the interested parties wrote separate letters to the Chairman of the 5<sup>th</sup> Respondent indicating that they were going to undertake investigations into the matter. They also requested for provision to go ahead with the investigations and for cooperation from the employer

3. As a result, the 5<sup>th</sup> respondent met on 21/5/2021 and discussed the report from the interested parties, and resolved to suspend the petitioner pending the said investigation. A letter to that effect dated the same date was served on him.

4. However, in a strange turn of events, the Speaker who is the chairman of the 5<sup>th</sup> Respondent, was impeached on 26/5/2021 by the county Assembly and on 27/5/2021 the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents met as the 5<sup>th</sup> Respondent and resolved to lift the suspension of the petitioner. Therefore, the Chairman was fired and no action was taken against the 1<sup>st</sup> Respondent by the employer and no evidence has been tendered to confirm that the interested parties were allowed to undertake the investigations against the alleged sexual harassment by the 1<sup>st</sup> respondent.

5. As a result the petitioners a non-governmental organization (NGO) brought the instant sit on behalf of the victims of the said sexual harassments seeking among others:

*(a) Declaration that the petitioners are entitled to protection under the constitution of Kenya 2010.*

*(b) Declaration that the 1<sup>st</sup> Respondent is in the office as Clerk of the 5<sup>th</sup> Respondent illegally.*

*(c) Declaration that duties being performed by the 1<sup>st</sup> Respondent while he is supposed to be on compulsory leave from 5/7/2017 were null and void*

*(d) Declaration that duties done by the 1<sup>st</sup> respondent while he was supposed to be on suspension from 21/5/2021 are also null and void.*

*(e) Injunction restraining the 1<sup>st</sup> respondent from further discharging of his duties, functions and activities of the Clerk Kisii County Assembly.*

*(f) Declaration that the 5<sup>th</sup> Respondent has failed to discharge its function in law by failing to discipline the*

*(g) 1<sup>st</sup> Respondent for gross misconduct and / or abuse of office.*

*(h) Order directing 5<sup>th</sup> Respondent to take disciplinary action against the 1<sup>st</sup> Respondent for gross misconduct and / or abuse of office*

*(i) An order directing the 1<sup>st</sup> Respondent to step aside from the office of the clerk of the 5<sup>th</sup> Respondent until the conclusion of the investigation by the interested parties.*

*(j) Order quashing the decision by 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents on 27/5/2021 by which the suspension of 1<sup>st</sup> Respondent was lifted.*

*(k) Order directing the 6<sup>th</sup> Respondent to commence investigations and/or conclude investigations against the 1<sup>st</sup> respondent over allegations of abuse of office, entering into fraudulent contract with APA Insurance Company limited for Kisii County Assembly staff produced cover and alleged practice of nepotism and that the 1<sup>st</sup> Respondent various suspected while the investigation are being conducted.*

*(l) Any other reliefs*

*(m) Costs of the Petition*

## **1<sup>ST</sup> RESPONDENT SUBMISSIONS**

6. The 1<sup>st</sup> Respondent submitted that he is employed by the 5<sup>th</sup> Respondent and as such there exists a contract of employment between the two. He contended that the petitioners are neither employees of the 5<sup>th</sup> Respondent nor do they enjoy priority in contract in the said contract employment. Consequently, he urged that the petitioners have no locus standi to sue bring this petition against them.

7. He further submitted that the issue of suspension is employment and supervisory, matter that squarely falls under the 5<sup>th</sup> respondents as his employer and the petitioner has no locus to sue. He further submitted that the alleged failure to make policy on sexual harassment under section 6 and 7 of the Employment Act also falls under the 5<sup>th</sup> respondent, which exercise supervisory power over him.

8. As regards the order against the 6<sup>th</sup> respondent, the 1<sup>st</sup> respondent submitted that the same is an independent commission established by the constitution with clearly set out mandate and the court cannot interfere with the exercise of that mandate. For emphasis, he relied on Law Society of Kenya -V- Commissioner of Lands & 2 Others [2001] eKLR when the court defined locus – standi to means a right to be heard and explained that a person must have sufficient interest to sustain his standing to sue.

9. The 1<sup>st</sup> Respondent further submitted that the petitioners are seeking relief in the contract between him and the 5<sup>th</sup> Respondent and also questioning the employer's decision to lift his suspension, which in his view are matters over which the court has no jurisdiction to determine. He also relied on Savings & Loan (K) Ltd –vs- Kanyenje Karagita Gakombe & Another {2015}eKLR where the court held that the privity rule is that a contract cannot confer rights or impose obligations on any person other than the parties to the contract and as such a contract cannot be either enforced by or against a third part.

10. On the basis of the foregoing matter, the 1<sup>st</sup> respondent anger the court to find that the petitioner have no locus standi to bring this petition, and that they have also failed to show that the court has jurisdiction to grant the reliefs sought.

11. On the other hand, the 1<sup>st</sup> respondent submitted that the filing of the petition in this court amounts to forum shopping because the proper court station to file the same is E&RLC Kisumu, both geographically and also considering that it in Kisumu where the petitioners filed **Petition no 32 of 2017** against him. Again, he contended that there is still his **Petition no. 18 of 2020** pending trial in Kisumu, which he filed after being sent on compulsory leave the allegations raised in the instant petition.

12. He contended that the issues being raised in the instant Petition should have been raised in the said **Petition No. 18 of 2020**. He further contended that the issues in the current Petition were also determined in **Petition no 32 of 2017** and they were settled because the petitioners never preferred any appeal. Therefore, he contended that bringing fresh sit in a different court station amounts to forum shopping and therefore an abuse of the court process.

13. For emphasis, he relied on **Fortis Tower Management Ltd & Another –vs Trade Mark Ltd [2018] eKLR** where the court held that jurisdiction should be declined, if it is shown that a party has filed suit in a court in bad faith or in a manner that signals forum seeking.

14. The 1<sup>st</sup> respondent further submitted that the court lacks jurisdiction interfere with the employment relationship between him and the 5<sup>th</sup> respondent. He contended that the decision by the employer to lift his suspension followed his protest letter in which he contended that his right to fair, administrative action and right to fair hearing under Article 47 and 50 of the constitution had been violated. He further contended that the Speaker who issued the suspensions letter had been impeached before he issued the suspension letter.

15. He submitted that court cannot intervene in disciplinary process unless the rules of national justice have not been followed. For emphasis he relied on **Gladys J. Cheronu -V- Board of trustee NSSF & another[2020] eKLR**.

16. He maintained that after his protest letter the employer considered the same on merits and agreed with him that the suspension was irregular since he was not accorded any haring and his accusers were not revealed. He contended that the issue of nepotism abuse of office and medical cover to which on is employment and it is only he employer who can receive any complains and deal with them in a disciplinary process.

17. He further submitted that the court lacks jurisdiction to direct the 6<sup>th</sup> respondent on how to exercise its constitutions mandate o investigating the alleged fraud involving medical cover by APA Insurance Company limited, nepotism and abuse of office. In support of the abuse submission he relied on **Judicial Service Commission vs Salaries and Remuneration Commission and Another [eKLR]** where the court held that commissions and independent offices have administrative, decisional financial independence when discharged their constitutional mandate and that is enjoyed at the exclusion of other organs of the rate, authorities and persons. He further relied on the Supreme Court decision in **the Matter of Interim Independent Electoral Commission [2011] eKLR** where the court underscored the independence of commissions and independent officers established under the constitution. Therefore, the 1<sup>st</sup> respondent maintained that the court has no jurisdiction to divert the 6<sup>th</sup> respondent.

18. The 1<sup>st</sup> respondent further submitted that the petition herein is res judicata because the issues raised have been canvassed and determined in **petition no. 32 of 2017**. He submitted that the petitioners havewithheld the information fromthe court and assuch, they have come to court with uncleanhands.

19. He relied on **John Florence Maritime Ltd and another –vs- Cabinet Secretary for Transport and Infrastructure and 3 others [2015] eKLR** where the court gave the meaning of *res judicata* and its purpose in the administration of justice and the rule of land. He also relied on **Daniel ToroitchArap Moi –vs- Mwangi Stephen Muriithi& another [2014] eKLR** where the court held that the essence of res judicata I to close litigation so that the same parties and issues do not keep on coming before the court.

20. The 1<sup>st</sup> respondent further submitted that the petition as crafted does not comply with Rule 10 of the **Constitution of Kenya (protection of Rights and Fundamental freedom practice Rules, 2013** also known as Mutunga Rules. He contended that the petition is a general pleading, which is difficult to discern the violation of the rights and fundamental freedom complained and the injury caused. For emphasis, he relied on the court of Appeal decision in **MumoMatemu – vs Trusted Society of Human Rights Alliance & 5 others [2013] eKLR** where the court held constitution petitions should be pleaded with some degree of precision with respect to the provision violated, the manner of violation and the injury caused by the violation.

21. Further, the 1<sup>st</sup> respondent submitted that the petition is not compliance with Rule 11 of Mutunga Rules because it is annexing a verifying affidavit as opposed in a supporting affidavit. The petition is also not annexing any documentary evidence and as such it is based on hearsay and it is therefore stale.

22. The 1<sup>st</sup> respondent further submitted that the petition herein is a disguised appeal against the decision of the court in **petition No. 32 of 2017** at Kisumu and it amounts to abuse of the court process. He contended that the petitioners have raised issues already raised and determined by a different court. He relied on **Gitau Kamau –v- Ndungu Kamau and Another [2017] eKLR** where the court dealt with a similar case of abuse of process of the court. He further relied on **Godfrey Paul Okuuoti –vs- Habil Olaka & another [2018] eKLR** to urge that the petition has been brought in bad faith. He also cited **Alice KeruboNyambati –vs- Ochoki Mogakaa & another Kisii HCC No 263 for 2009[unreported]** where the court held that the suit was like a previous one in Kitale and therefore it amounted to abuse of court process as the particulars was just trying his luck in the other court

#### **Petitioners' submissions.**

23. The petitioners submitted only on the issue of forum shopping and locus standi to bring the petition. On the first issue, they submitted that this court is the proper place to bring the instant petition because it is conveniently located and geographically close to where the cause of action arose compared to ELRC Kisumu. They contended that there are many other matters filed before this courts involving causes of action that arose in the same area as the instant petition.

24. In addition they urged that since the 1<sup>st</sup> respondent entered an unconditional appearance in the petition he has accepted the jurisdiction of the court. For emphasis he relied on **Kanti and Company Ltd –vs South British Insurance Co. Ltd [1981] eKLR** where it was held that by entering unconditional appearance, the defendant submitted to the jurisdiction of the Court. Therefore, the petitioners submitted that the allegation of forum shopping is an afterthought by the 1<sup>st</sup> respondent.

25. As regards the second issue, the petitioners submitted that there locus standi springs from article 22 and 258 of the constitution which confers capacity on any person or group of persons to commence and/or seek redress before court where it is alleged that the constitution is contravened and/or threatened with contravention from emphasis. They relied on **MumoMatemu case, supra** where the court of Appeal discussed the broader context of *Locus Standi* under the constitution of Kenya 2020.

26. The petitioners argued that the decision to lift the suspension of the 1<sup>st</sup> respondent was done without quorum and it was convened and presided over by unqualified person for emphasis they relied on **Gladys J Cherono case, Supra**, where the court held that the court can interfere with disciplinary process when it is flawed in order to put it back on watch.

27. They denied the allegation that the petition is res judicata and contending that the petition only raises new set of facts founded on the suspension letter issued on 25 /6/ 2021.

28. They submitted that the objection does not meet the legal threshold of pure points law set in **Mukisa Biscuits –vs Westend Distributor Ltd [1969] EA 696**. Consequently, they prayed for the objection to be dismissed with costs.

#### **ISSUES FOR DETERMINATION AND ANALYSIS**

29. The issues for determination arising from the pleadings, Reply preliminary objection, and the written submissions are:-

- a) *Whether the objection raises pure points of law.*
- b) *Whether the petitioners lack locus standi.*
- c) *Whether the petition is res judicata and abuse of court process.*
- d) *Whether the court has jurisdiction to direct the 6<sup>th</sup> respondent or intervene in the employer's disciplinary process.*
- e) *Whether filing the petition before this court amounts to form shopping.*
- f) *Whether the petition is incompetent and fatally defective.*

#### **THRESHOLD OF POINTS OF LAW**

30. The petitioners contends that the objection herein does not raise pure points of law but the 1<sup>st</sup> respondent is of a different view. I have considered the grounds raised in the objection and I find that they are grounds of law. They do not need evidence to establish. Therefore they within the meaning of preliminary objection as discussed in **Mukisa Biscuits case, Supra**, this,

*“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...”*

### **LOCUS STANDI**

31. The 1<sup>st</sup> Respondent submits that the petitioners lack *locus standi* to bring this petition because they have no privity in the contract between him and the 5<sup>th</sup> respondent. He further averred that the petitioners are not employees of the 5<sup>th</sup> respondent and as such they have no right to sue before this court. The petitioners aver that they have locus to sue under Article 22 and 258 of the Constitution if there is contravention or threatened contravention of the constitution.

32. I have considered the arguments by the two sides and the cited provision for the constitution and I agree with the petitioners that they have the locus standi to bring petition to this court on allegation of constitutional violation or violation of a right or fundamental freedom enshrined in the constitution.

33. The court of Appeal in **Mumo Matemu case, Supra**, held that

*“It still remains to reiterate that the landscape of locus standi has been fundamentally transformed by the enactment of the constitution in 2010 by the people themselves. In our view the hitherto stringent locus standi requirements of consent of the Attorney General or demonstration of some special interest in a private citizen seeking to enforce a public right have been buried in the annals of history,”*

### **RES JUDICATA**

34. The 1<sup>st</sup> respondent contends that the petition is res judicata because it raises some matters which were raised in **petition No. 32 of 2017** and which were determined. The said issues include fraudulent award of tender to APA insurance company, the alleged abuse of office, harassment of staff among other matters raised in the suspension letter dated 5.7.2017.

35. In addition he contended that some of the other issues raised in the impugned petition are pending determination in **Petition 18 of 2021** at ELRC Kisumu and therefore the petition is also *Sub Judice*.

36. Again the 1<sup>st</sup> respondent contends that the petition is also a disguised appeal against the judgment in **Petition 32 of 2017**. The petitioners have denied all the above arguments and maintained that the instant petition only concerns matters related to the suspension letter dated 21.5.2021.

37. I have considered the above arguments by the two sides. I agree with the 1<sup>st</sup> respondent that most of the issues raised in the instant petition were raised by the Speaker of the county Assembly (chairman of the 5<sup>th</sup> Respondent) in the letter dated 5/7/2017 vide which the 1<sup>st</sup> respondent was sent on compulsory leave. The issues ranged from fraudulent tendering, abuse of office, misuse of public resources, staff harassment, negligence of duty and discrimination among others. The court considered the said matters in the judgment in **Petition 32 of 2017** on merits and found the same to be valid because the 1<sup>st</sup> respondent did not deny them. Therefore those issues were determined by a competent court and they cannot be re-litigated before this court since they are now res judicata.

38. As regard the rule of Sub Judice, I have not seen the complete pleadings in the **Kisumu E&LRC Petition 18 of 2021**. Only a court ruling dated 11/5/2021 is annexed to the Replying affidavit and it deals with compulsory leave given by the letter dated 5/3/2021.

39. The current petition was caused by the lifting of suspension of the 1<sup>st</sup> respondent vide the letter dated 27/5/2021 which came shortly after the said ruling in **Petition no. 18 of 2021**. However, as already observed above, a careful reading of the petition and the supporting affidavit reveals that most of the issues raised herein were raised in the **Petition no 32 of 2017** and are also the subject of **Petition No. 18 of 2021**. The issues are not new except the alleged failure by the 5<sup>th</sup> respondent to take disciplinary action against the 1<sup>st</sup> respondent in respect of gross misconduct, abuse of office and staff harassment and the recent lifting of the suspension before the alleged sexual harassment is investigated by the interested parties.

### **JURISDICTION TO DIRECT 6<sup>TH</sup> RESPONDENT AND GRANT THE RELIEFS SOUGHT.**

40. It is now trite law that the Commissions established by the Constitution of Kenya are independent bodies which have a well cut out mandate which is not to be exercised subject to any state organs or person. Therefore this court does not have jurisdiction to direct the 6<sup>th</sup> respondent on how and when to perform its constitutional mandate of investigating complaints filed with it by any person.

41. As regards intervening into the internal disciplinary process at the workplace, it is now well settled that the court will ordinarily be a bystander unless there is breach of the rules of natural justice, or the procedure set out in a statute or the employer's Policies and Procedures regulations, in which case the court will only intervene to correct the procedural flaws and not to stop the process all together. Once the procedural breach is corrected, the court should shy away from the process until any dissatisfied party challenges the outcome.

### **FORUM SHOPPING**

42. The respondent contends that the suit ought to be filed in Kisumu ELRC because of geographical reasons and because all the other

previous matters were filed here. The petitioner sees Kericho as the nearest court station and convenient to access. I may not have the guidance on that matter since I am still new in the station and I am currently working from Nakuru. There must be a Gazette Notice which gazetted the two Court Stations which if referred will give guidance. I will not condemn any one for forum shopping. However, on the basis that the other matters on the subject have been filed in Kisumu ELRC, I see no harm having this matter considered together with **Petition 18 of 2021** because similar issues are raised. Proceedings with the matters separately poses the danger of having conflicting decision on similar matters.

#### **INCOMPETENCE AND DEFICIENCY**

43. The respondent objects to the petition on ground that it is not pleaded with reasonable precision as required under the Mutunga Rules, and it not annexing documentary evidence. I believe this is a matter that can be cured by granting the petitioner leave to add what is missing. The purposes of the court should not be to chase away parties from the seat of justice but to sustain proceedings towards achieving substantive justice.

#### **CONCLUSION**

44. I have found that most of the issues raised herein were/are the subject of previous matters filed in Kisumu ELRC by both the petitioners and the 1<sup>st</sup> respondent. I have also found that the new issues raised relate to the issue leading to the sending of the 1<sup>st</sup> respondent to compulsory leave and which is the subject matter in **Petition No 18 of 2021** pending before Kisumu E&LRC. It follows that the objection by the 1<sup>st</sup> respondent succeeds to the extent stated above.

45. Consequently, I order transfer of this suit to Kisumu ELRC for hearing and determination together with **Petition No. 18 of 2021**. The petition will be mentioned before the Presiding Judge of the ELRC Kisumu on 14. 12. 2021 for direction. Costs shall be in the cause.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25<sup>TH</sup> DAY NOVEMBER, 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 15<sup>th</sup> 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**