



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

PETITION NO. E084 OF 2021

JAMES AMBUSO OMONDI.....PETITIONER/APPLICANT

VERSUS

DR. ALICE MERCY WAHOME.....1ST RESPONDENT

KENYA UNIVERSITIES AND COLLEGES

CENTRAL PLACEMENT SERVICES (KUCCPS).....2ND RESPONDENT

ETHICS & ANTI-CORRUPTION COMMISSION.....3RD RESPONDENT

ATTORNEY GENERAL.....4TH RESPONDENT

RULING

1. The Petitioner sought vide his application dated 20th September 2021 for orders that:-

(a) *Spent*;

(b) This Petition be certified as raising substantial questions of law for reference to the Chief Justice for empanelment per Article 165(4).

The application was premised on the grounds that Article 165(4) of the Constitution, and Section 21 of the Employment and Labour Relations Court Act, make provision that a matter certified by the Court as raising a substantial question of law is to be heard by an uneven number of judges being not less than three, assigned by the Chief Justice. The Petitioner asserts that his petition raises substantial questions of law under Article 165(3)(d)(ii) touching on the aspect of violation of Petitioner's right to fair trial (because he was indefinitely suspended without pay for being party to a criminal case where he is yet to be convicted) and his right to a fair hearing (by penalizing him for filing a labour cause against his former employer); whether the EACC can ban, from public employment, an employee who has not been convicted under section 64 of the Anti-Corruption and Economic Crimes Act (ACECA). The Petitioner asserts that this issue invokes the delicate balance between integrity in public office and the right to a fair trial which is unlimited under Article 50 which includes the presumption of innocence. The Petitioner seeks to challenge the constitutionality of Section 42(1) and 47(6) of the Employment Act, 2007 as far as they discriminate between employees in probationary contract and other employees. The Petitioner asserts that his petition raises matters of general public importance which transcend the litigation interests of the parties and impact the public interest and that the questions are open and have never been finally settled by the Supreme Court. The Petitioner asserts that the questions are not free from difficulty and call for debate of alternative views by an expanded bench, that the questions are novel (they do not rise frequently before the court) and are complex (requiring debate of conflicting viewpoints). He asserts the questions also present unique facts not covered by any controlling precedents or settled by the law of the land and have a material bearing on the case's decision, if answered either way concerning the parties' rights. Additionally, he asserts, the questions posed are substantial and originate from the pleadings on record and thus emerge from the sustainable findings of fact which the court must necessarily decide for a just and proper determination of the case. The application is supported by the annexed affidavit of the Petitioner and the grounds on the said application and grounds, reasons and arguments as may be made at the hearing of the application.

2. The Petitioner asserts that his Petition, therefore, raises the substantial question of law whether the 3rd Respondent can bar an employee from public office where that employee has not been convicted under Section 64 of the ACECA. The Petitioner asserts that this requires a delicate balance between integrity in public office and the unlimited Article 50 right to a fair trial which includes the presumption of innocence. The Petitioner argues that his petition also raises the question whether Section 42(1) and 47(6) of the Employment Act, 2007 are both unconstitutional and invalid as far as they discriminate between employees in probationary contract and other employees. He depones

that he is now aware that Section 42(1) has since been held unconstitutional for being discriminatory in the case of **Monica Munira Kibuchi & 6 Others v Mount Kenya University; Attorney General (Interested Party) [2021] eKLR**. The Petitioner asserts that this court should similarly certify the question of constitutionality of Section 47(6) of the Employment Act, 2007 as equally raising a substantial question of law.

3. The 1st Respondent in a replying affidavit opposing the certification surmises that the Petitioner has not made a case for certification. She depones that the real question in controversy is the decision made by the 2nd Respondent in dismissing the Petitioner because he lied on oath when filing the self-declaration form under Chapter 6 of the Constitution by lying that he has never been subject of any criminal proceedings yet he was the accused in **Anti-Corruption and Economic Crimes Division Criminal Case No. 5 of 2019 - Republic v James Ambuso Omondi**. The 1st and 2nd Respondents thus oppose the certification as they are of the view the petition does not raise a novel or weighty constitutional question.

4. The 3rd Respondent filed grounds of opposition to the effect that the petition does not raise matters of general public importance as the issues raised in the petition concern the petitioner as an employee and touch on his integrity and suitability to hold public office when he has already been charged with corruption and economic crimes offences. The 3rd Respondent posits that the net effect of the provisions of Section 47(6) of the Employment Act on termination of an employee who is on probationary terms is similar to that of Section 42(1) of the said Act and the declaration of unconstitutionality of the latter section applies *mutatis mutandis* to the former section. The 3rd Respondent is of the view that therefore, the Petitioner's Notice of Motion seeking empanelment is frivolous and vexatious and an abuse of the court process and the orders sought that this application be referred to the Chief Justice to empanel a bench of an unequal number of judges to hear the petition fails to meet the threshold set by the Constitution as well as case law, and therefore should be disallowed with costs.

5. The Petition is stated to raise such substantial points of law that the Petitioner is of the opinion that the Chief Justice should empanel a bench of not less than three Judges of this Court to determine the issues raised in the said Petition. In a Ruling delivered on 7th July 2021 when there were only 2 Respondents in the suit, the Court held as follows:-

1) *The Petitioner herein has set out the events preceding the suspension he now challenges and the ongoing disciplinary process at the Respondent. He had been the 2nd Respondent's employee for 10 days when the Respondents suspended him from work. He perhaps has a prima facie case in as far as the suspension goes as he asserts he was suspended by a letter that suggests the suspension was for an indefinite period and without pay. This satisfies the prima facie limb of the test. On the second limb, the Court held that an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. The Petitioner having been suspended within the first fortnight of his employ, the Court is convinced that the injury he has suffered is not irreparable as it can be adequately compensated by an award of damages. Under Section 49(1) of the Employment Act, the Petitioner has a raft of remedies available to him and indeed he can receive up to the maximum 12 months salary compensation for the injury he has suffered should he demonstrate such injury and the entitlement to this award of damages. Granted that he has failed to cross the threshold for the grant of the interim relief he seeks, the motion is therefore denied. The costs of the said application are to abide the outcome of the Petition herein.*

2) *The Respondents at the time of the hearing of this matter indicated that the Petitioner holds the MacBook Pro laptop, iPad and chargers belonging to the 2nd Respondent which the Petitioner acknowledged having custody of. The Respondents assert the Petitioner has declined to return them and that it why it has withheld the pay the Petitioner is entitled to. The Petitioner on his part asserts that the Court should expunge the paragraphs referring to the electronic gadgets and the demand for them. The Petitioner asserts that he has not received any request for the return of the items. Granted that the items belong to the Respondent and there is no valid reason why the Petitioner should continue holding on to them, the Petitioner is hereby ordered to return the MacBook Pro laptop and the iPad plus their chargers within the next 24 hours. The Respondents must release the funds they have withheld from the Petitioner within 24 hours following the return of the electronic gadgets subject of this finding. The Petition will be mentioned on 13th July 2021 for directions on its hearing and disposal. (emphasis mine)*

6. It is apparent that the gist of the Petitioner's Amended Petition is the 2nd Respondent's decision made on 6th July 2021 to summarily dismiss the Petitioner from employment. The Petitioner protests that this dismissal was meted contrary to and in violation of his fundamental rights and freedoms. Having read the Petition herein I see nothing substantial in it and indeed the Petition ought to have been filed as an ordinary cause since it is plainly a suit about the dismissal of an employee and has nothing constitutional about it. The Court has been able to make determinations of part of the claim expressed in the Petition as this Ruling demonstrates and we do not need a bench of three Judges of this Court to determine any of the issues in contention which any single Judge of this Court can easily determine as has been done before in even more complex cases than this simple one. I believe the Petitioner is only seeking certification to further delay this case as directions on the last paragraph of the Ruling of 7th July 2021 indicated that there were to be directions on the disposal of the Petition and perhaps realising his claim is fickle has sought certification to give it a glimmer of hope and legitimacy of continuing to be on the cause list for longer than it should. Having made this Ruling I am of the firm view that the position taken by this Court will not allow me to dispassionately hear the Petitioner, I hereby recuse myself and direct that the Petition be mentioned before the Principal Judge of this Court so that it can be placed for determination before another Judge of this Court. Directions should be given for the filing of submissions and a Judgment date be set since there is nothing much left in it other than a determination as to whether the dismissal of the Petitioner was fair or not. He even admits in his motion for certification that one of the issues he has raised has already been determined by the Court in the case of **Monica Munira Kibuchi & 6 Others v Mount Kenya University; Attorney General (Interested Party) [2021] eKLR** wherein Section 42(1) of the Employment Act was declared to be unconstitutional for being discriminatory. Mention on 8th November 2021 before the Principal Judge of the Court for directions as to the Court to deal with the singular remaining question in the Petition. The notice of motion application dated 20th September 2021 is dismissed with costs to the 1st, 2nd 3rd and 4th Respondents.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF NOVEMBER 2021

NZIOKI WA MAKAU

JUDGE