



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO. 245 OF 2019

(Before Hon. Lady Justice Hellen S. Wasilwa on 25th June, 2020)

PAUL KIPCHIRCHIR BII.....PETITIONER

VERSUS

CABINET SECRETARY, WATER

& SANITATION & IRRIGATIONRESPONDENT

AND

ERIC OKEYO.....INTERESTED PARTY

RULING

1. Pending for determination before me is the Notice of Preliminary Objection dated 12th February, 2020 brought on grounds **THAT:-**

- 1. This suit is sub-judice by dint of ELRC Miscellaneous Application No. 164 of 2019 (Copies attached).***
- 2. The Claimants are circumventing the Employment Act and the Labour Relations Act by relying on the Constitutional provisions having realized the matter is statute barred under the Parent Acts which give effect to Constitutional rights.***
- 3. The Petitioner has another file as the present one; E & LRC Petition No. 207 of 2019.***
- 4. The Suit is an abuse to the Court process.***
- 5. The Suit is incompetent and ought to be struck out with costs.***

Submissions by the Parties

2. The Petitioner in his submissions maintained that this matter is not sub judice as the elements of sub judice as highlighted in the case of **Republic Vs Registrar of Societies – Kenya & 2 Others ex parte Moses Kirima & 2 Others (2017) eKLR** must be shown to exist. The Petitioner further cited the case of **ASL Credit Limited Vs Abdi Basid Sheikh Ali & Another (2019) eKLR** where the Court observed that:-

“Therefore the principle to apply certain conditions precedent must be shown to exist: First, the matter in issue in the subsequent suit must also be directly and substantially in issue in the previous instituted suit; proceedings must be between the same parties, or between parties under whom they or any of them claim, litigation under the same title; and such suit or proceedings must be pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed...”

3. The Petitioner further submitted that the issue of *sub judice* does not arise Petition No. 207 of 2019 having been effectively withdrawn on 20th December, 2019 vide a Notice of Withdrawal dated 18th December, 2019 leaving no pending case in the circumstances.

4. The Petitioner further submitted that the Judicial Review Application and proceedings of that nature are not governed by the Act and therefore do not constitute ‘suits’ or ‘proceedings’ as contemplated under Section 6 of the Civil Procedure Act. He therefore maintained that his Petition does not in relation to the Judicial Review Application offend the said provisions and is therefore not *sub judice*. For emphasis the Petitioner cited and relied on the case of **Edward Ouko Vs Speaker of the National Assembly & 4 Others (2017) eKLR** where it was

held that matters of Judicial Review are neither civil or criminal in nature.

5. Further emphasis is made on the cases of **Commissioner of Lands Vs Kunste Hotels Limited (1995 – 1998) 1 EA 1** and **Sanghani Investment Limited Vs Officer in Charge Nairobi Remand and Allocation prison (2007) 1 EA 354** where the Courts maintained that Section 6 of the Civil Procedure Act does not apply to Judicial Review proceedings.

6. The Petitioner further submitted that the JR Application merely challenges the administrative procedure that resulted in the publication of the Kenya Gazette Notice No. 9868 of 17th October, 2019 and that the same is different from the instant Petition to seeks to determine whether there is any infringement of his rights as protected under the provisions of the Constitution of Kenya, 2010.

7. The Petitioner further maintained that his case is not *sub judice* as the parties to the Petition and the JR Application are different. He averred that John Ochieng (the Applicant) in the JR Application is not a party to the Petition herein and therefore the suit cannot be said to be *sub-judice*.

8. The Petitioner further submitted that neither the Petitioner nor the Judicial Review Applicant can be said to be litigating under the same title and are therefore the two are divergent and therefore cannot be said to be *sub-judice*. For emphasis the Petitioner cited and relied on the case of **Ukay Estate Limited & Another Vs Shah Hirji Manek Limited & 2 Others (2006) eKLR**.

9. The Petitioner maintained that the Preliminary Objection filed by the Respondent herein is fatally defective and is premised on highly disputed facts especially on the plea of *sub-judice*. He therefore urged this Honourable Court to dismiss the same with costs to the Petitioner. To buttress this argument the Petitioner cited the cases of **Independent Electoral & Boundaries Commission Vs Jane Cheperenger & 2 Others (2015) eKLR**, **Grace Wanjiku Vs Joseph Wanaina Mararo & Another (2019) eKLR**, **Republic Vs Attorney General (Sued for and on behalf of the Ministry of Lands) & 2 Others Ex-parte South and Central (Thika) Investment Limited & Another (2016) eKLR** and **Oraro Vs Mbaja (2005) eKLR** where the Courts upheld the position held in the locus classical case of *Mukisa Biscuits Manufacturing Company Limited (1969) EA 696* where it was held that a Preliminary Objection should be raised on purely points of law which is argued on the assumption that all facts as 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.

10. On the issue of the Petition being time barred the Petitioner submitted that the same has no basis as the Petition's basis is the Respondent's publication in the Kenya Gazette on 17th October, 2019 and the instant Petition was subsequently filed on 20th December, 2019. He therefore maintained that the Petition is not time barred as contended by the Respondent.

11. In conclusion, the Petition submitted that the Preliminary Objection raised by the Respondent is fatally defective and premised on disputed facts. He therefore urged this Honourable Court to dismiss the same with costs to the Petitioner.

Respondent's Submissions

12. The Respondent on the other hand submitted that the instant Petition ought to be consolidated with Kisumu Miscellaneous Application No. 164 of 2019 as the two matters stem from the same legal issues being the appointment of the Interested Party as Chairman of Lake Victoria Water South Water Works Development Agency and that the revocation of the Petitioner's appointment violates Articles 27, 28, 41, 47 and 50 (1) of the Constitution, The Water Act, Fair Administration Action Act among others.

13. The Respondent further submitted that although the parties who moved the Court in the two matters are different, they both raise common questions of law and that the Respondents are the same. It urged this Honourable Court in the circumstances to order for the consolidation of the suits under Order 11 Rule 3 (1) (h) of the Civil Procedure Rules. To buttress this argument the Respondent cited and relied on the cases of **Law Society of Kenya Vs Centre for Human Rights & Democracy & 12 Others (2014) eKLR**, **David Ojwang Okebe & 11 Others Vs South Nyanza Sugar Company Limited & 2 Others (2009) eKLR** and **Hilton Walter Nabongo Osinya Vs Savings & Loan (K) Limited & Another, HCCC No. 274 of 1998** where the Courts pronounced themselves on the need for consolidation of suits that raise common questions of law to be tried together with a view of saving judicial time as well as avoiding the possibility of giving conflicting decisions on the same issues by the different courts.

14. The Respondent further urged this Honourable Court in the alternative to stay proceedings in the instant Petition pending hearing and determination of Miscellaneous Application No. 164 of 2019. The Respondent relies on the provisions of Section 6 of the Civil Procedure Act and Order 38 Rule 2 of the Civil Procedure Rules, 2010 and the case of **R M G Vs N G Interested Party S P Limited & M D Limited (2013) eKLR**.

15. The Respondent contended that the Petitioner stands to benefit from the grant of the Orders sought in the two suits and therefore urged this Honourable Court to consolidate the same. It further maintained that the Petitioner would not be prejudiced if the suits are consolidated.

16. In conclusion, the Respondent maintained that its Application dated 12th February, 2020 is merited and therefore urged this Honourable Court to allow the same as prayed.

17. I have considered the averments of both Parties herein. As determined in **Edward Ouko's case (supra)** Judicial Review applications and Petitions are distinct as Judicial Review are neither civil nor criminal in nature.

18. A Judicial Review Application basically seeks equitable reliefs of certiorari, prohibition and mandamus which attack administrative actions.

19. The matter before me is a Petition and therefore the Respondent cannot indicate that the matter is *subjudice* because in the long run, the

orders sought are different and the Parties are also different.

20. In the circumstances, the Preliminary Objection raised that the Petition is *subjudice* because there is a pending Judicial Review application does not have merit. I therefore dismiss it accordingly.

Dated and delivered in Chambers via zoom this 25th day of June, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Gikonyo holding brief Wahome for Petitioner – Present

Kioko for Respondent – Present