



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

MISCELLANEOUS APPLICATION NO. 169 OF 2019

(Before Hon. Lady Justice Maureen Onyango)

**IN THE MATTER BETWEEN: KENYA COUNCIL OF EMPLOYMENT AND MIGRATION AGENCIES.....
APPLICANT**

AND

**IN THE MATTER THE HON. ATTORNEY GENERAL OF KENYA – ARTICLE 156 CONSTITUTION III KENYA
2010..... PUBLIC INTEREST**

AND

SECTION 8 AND 9 LAW REFORM CAP 26 LAWS OF KENYA

AND

ORDER 53 RULE 1, 2, 3, CIVIL PROCEDURE RULE 2010.

AND

**IN THE MATTER PRINCIPAL SECRETARY – MINISTRY OF STATE DEPARTMENT OF NATIONAL TREASURY AND
PLANNING**

AND

IN THE MATTER PRINCIPAL SECRETARY – MINISTRY OF STATE BASIC EDUCATION

AND

IN THE MATTER NACONETI KENYA SURCHARGE UNDER ARTICLE 226(5) CONSTITUTION OF KENYA 2010

AND

**MANDATORY AUTHORITY TO INCUR EXPENDITURE BY RETIRED OFFICERS PAID BY VOUCHERS IN THE
GOVERNMENT PAYROLL**

AND

1ST INTERESTED PARTY – STATE DEPARTMENT FOR PUBLIC SERVICE

AND

2ND INTERESTED PARTY – PUBLIC SERVICE COMMISSION OF KENYA

AND

3RD INTERESTED PARTY – ETHICS ANTI-CORRUPTION COMMISSION

BETWEEN

KENYA COUNCIL OF EMPLOYMENT AND

MIGRATION AGENCIES..... APPLICANT

VERSUS

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

THE PRINCIPAL SECRETARY,

NATIONAL TREASURY AND PLANNING.....2ND RESPONDENT

THE PRINCIPAL SECRETARY, MINISTRY OF STATE,

EARLY LEARNING BASIC EDUCATION..... 3RD RESPONDENT

ABDI ABAT..... 4TH RESPONDENT

AND

STATE DEPARTMENT FOR PUBLIC SERVICE.....1ST INTERESTED PARTY

PUBLIC SERVICE COMMISSION OF KENYA..... 2ND INTERESTED PARTY

ETHICS AND ANTI-CORRUPTION COMMISSION.....3RD INTERESTED PARTY

RULING

The 1st to 3rd Respondents and the 1st and 2nd Interested Parties filed a

Notice of Preliminary Objection dated 17th January 2020 against the Applicant's Chamber Summons dated 27th December, 2019 on the grounds: -

1. *That the proceedings offend the mandatory provisions of Order 53 Rule 7(1) of the Civil Procedure Rules.*
2. *That the Applicant lacks the locus standi to institute the present proceedings.*
3. *That this Court lacks jurisdiction to entertain the present application by dint of Article 162 (2) of the Constitution and Section 12 of the Employment and Labour Relations Act.*
4. *That the proceedings offend the mandatory provision of Order 53 Rule 2 of the Civil Procedure Rules.*
5. *That the suit is an abuse of the Court process.*
6. *That the suit is incompetent and ought to be struck out with costs.*

The Preliminary Objection was dispensed by way of written Submissions.

Submissions of the 1st, 2nd, 3rd Respondents and 1st & 2nd Interested Parties

They submit that the jurisdiction of this Court is guided and limited by **Section 12 of the Employment Labour Relations Court Act, Cap 234b** and **Article 162(2) of the Constitution**. That **Section 12(2) of the Employment Labour Relations Court Act** further provides that an application, claim, or complaint may be lodged with the Court by or against an employee, an employer, a trade union, an employer's organisation, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose. That these classes of people may be represented before Court either in person, an advocate duly authorized to practice law under the Advocates Act or a duly appointed and authorized Trade Union Official. That the Applicant is a civil society organization registered under the Societies Act and deals with the interest of workers who are not of Kenyan nationality and that the Applicant's certificate of registration is attached to the bundle.

The 1st Respondent submits that the Applicant does not fall among the categories of persons identified under section 12 (2) of the Act and that the Employment Labour Relations Court Act makes no provision for representation by civil society which the Applicant is registered under. That to that extent, this Court lacks jurisdiction to entertain and hear the Applicant's claim and they urge Your Ladyship to strike the

Applicant's Chamber Summons dated 27th December, 2019 and everything filed in support thereof with costs to the 1st to 3rd Respondents and the 1st and 2nd Interested Parties.

They further submit that the Application dated 27th December, 2019 is not clear on whose behalf the Petition has been brought save that the Petitioner is the Chairman of the Applicant. That the Petition does not fall within the remit of the kind of Constitutional Petitions over which the Employment & Labour Relations Court has jurisdiction. They refer this Court to the case of **Kenya Council of Employment and Migration Agencies & another v Samuel Mwangera Arachi & 2 Others (2015) eKLR**.

They also submit that **Order 53, Rule 7(1) of the Civil Procedure Rules** provides:

In the case of an application for an order of certiorari to remove any proceedings for the purpose of their being quashed, the applicant shall not question the validity of any order, warrant, commitment, conviction, inquisition or record, unless before the hearing of the motion he has lodged a copy thereof verified by affidavit with the registrar, or accounts for his failure to do so to the satisfaction of the High Court.

That if the party seeking an order of certiorari does not annex to his application a copy of the order he seeks to challenge, he must give the court a satisfactory reason for that failure. That Odera J. held in **Republic v County Assembly of Nakuru & 2 others Ex parte Samuel Waituku Njane & 21 Others (2017) eKLR** that the failure to annex the decision to be challenged is fatal as it remains uncertain whether there actually exists a decision which can be called into court for purposes of quashing. They submit that since the Applicant has not attached the decision to be brought to the court for purposes of quashing, the application is defective and that the entire proceedings are annuity.

They also submit that **Order 53, Rule 2 of the Civil Procedure Rules** states

Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

That annexed to the said Chamber Summons Application is a letter dated 25th July, 2013 by the CEO of National Police Service Commission appointing one, Jairus Omumu Ojango as AIE holder 2013/2014 financial year together with the Terms of Reference of AIE Holder and the Kenyan Gazette of 13th March 2015. They presume that the 4th Respondent has been enjoined to the proceedings because the Applicant is seeking to quash his appointment and that maybe the name of the 4th Respondent is gazetted in the said Kenya Gazette. That if that is the case, then the Applicant is seeking to impugn the Kenya Gazette Notice dated 13th March 2015. That six months lapsed on or around 12th September 2015 and the present application was filed on 30th December 2019, which is over 4 years. They submit that the Applicant's Application is therefore statute barred and that the Court does not have jurisdiction to extend time or at all. They invite this Court to make a similar finding made by Abuodha J. in **Kenya Council of Employment and Migration Agencies & another** (supra) and strike out the Applicant's Application with costs to the Respondents.

They conclude by submitting that the Applicant's application is frivolous for failing to disclose any cause of action and is against the rules on drafting of pleadings. They pray that the Preliminary Objection be upheld with costs.

Applicant's Submissions

The Applicant submits that it has locus standi by virtue of **Article 3 of the Constitution** which obligates every person to respect, uphold and defend the Constitution and hence bestows locus standi on anyone to institute proceedings as under **Article 22(1) & (2) of the Constitution**. That the Applicant is registered with the Office of the Attorney General and is therefore competent. That it is a lawfully existing body/organisation recognised under the Societies Act, with the legal capacity to commence or maintain proceedings. Further, that this Court should find that the organisation filed the suit on behalf of the public and bear in mind that it is classified as a "person" within the definition in **Article 260 of the Constitution 2010**. That the promulgation of the 2010 Constitution of Kenya enlarged the scope of locus standi with **Articles 22 and 258** empowering every person, whether corporate or non-incorporated, to move the Courts.

It submits that **Article 159 (2) of the Constitution of Kenya, 2010** which provides that justice must be administered "without undue regard to technicalities", has been misapplied generally and calls upon this Court to give appropriate direction by defining and interpreting the terms of that Article. That the said provision should be interpreted to mean that if injustice is caused on account of the rules, then the Court should not give undue regard to procedural technicalities. As to whether ascertainment of the proper status of a party can be typified as simple technicalities, it submits that because the matter transcends procedural technicalities, **Article 159(2)(d)** is not applicable in this instance.

It is submitted by the Applicant that the **Black's Law Dictionary, 9th Edition at page 1350** defines "**Public Interest**" as "the general welfare of the public that warrants recognition and protection or something in which the public as a whole has a stake, especially an interest that justifies governmental regulation. The Applicant calls upon this Court to consider the element of public interest in the terms of Article 159 of the Constitution.

With regards to costs, it submits that a litigant's right to recover the costs of an opposed application from his opponent will generally depend on whether he was in the right, either in making the application or in opposing it as the case may be, provided there are no grounds for exercising a judicial discretion to deprive him of these costs. The Applicant prays that its case be allowed and that the Preliminary objection herein be and is hereby dismissed with costs in favour of the Applicant.

The Applicant also filed a List of Authorities dated 22nd January 2020.

Analysis and Determination

Issues for determination

1. Whether the Applicant has locus standi to institute the present proceedings.
2. Whether this Court has jurisdiction to entertain the Application.
3. Whether the proceedings meet the mandatory provisions of Order 53 Rules 2 and 7(1) of the Civil Procedure Rules for a grant of an order of Certiorari.

Locus standi

The Objectors contend that the Applicant's Application is not clear on whose behalf the Petition has been brought. The Applicant has cited its obligation to defend the constitution under Article 3 of the Constitution and its rights to institute proceedings the ground that a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed, or is threatened as under Articles 22 and 258. The Applicant further contends that it is instituting the suit in the public interest.

Odunga J. in **Constitutional Petition No. 18 of 2018, Sollo Nzuki v Salaries and Remuneration Commission & 2 others [2019] eKLR** stated that it is now clear from the current constitutional dispensation that the Court ought to interpret the rule relating to *locus standi* liberally so as not to lock out persons with genuine grievances from accessing the seat of justice. He further held that:

“35. It is therefore clear that over time the issue of standing, particularly in public law litigation has been greatly relaxed and in our case the Constitution has opened the doors of the Courts very wide to welcome any person who has bona fide grounds that the Constitution has been or is threatened with contravention to approach the Court for an appropriate relief. In fact, since Article 3(1) of the Constitution places an obligation on every person to respect, uphold and defend the Constitution, the invitation to approach the Court for redress as long as the person hold bona fide grounds for believing that the Constitution is under threat ought to be welcome. I must however hasten to add that the liberal interpretation does not mean that the rule on locus standi is no longer relevant in constitutional petitions. Where it is clear that the Petitioner has completely no business in bringing the matter to Court to permit such proceedings to be litigated would amount to the Court itself abetting abuse of its process.

36. In this case the Petitioner not only contends that there is not only a threat to the violation of the Constitution but that the Constitution has in fact been violated by the Respondents. In light of such allegations I cannot fault the Petitioner for instituting these proceedings and I hold that he was within his right to commence these proceedings. As to whether his case is merited is another matter. Locus standi is a totally different thing from the merits of the petitioner's case.”

The Objectors have urged this Court to follow the decision of Abuodha J. in **Kenya Council of Employment and Migration Agencies & Another v Samuel Mwangera Arachi & 2 others (2015) eKLR** where he held that:

“Whereas and from the foregoing provisions of the law, the Court has jurisdiction to adjudicate constitutional questions, these questions must arise within the broad relationship parameters set out under section 12 of the Act and further they can only be agitated by persons identified under section 12(2) of the Act acting in person or through authorized representative as stated earlier. The Act makes no provision for representation by civil society which the applicant is.

Even assuming the applicant could have a right of audience before the Court, it is not clear on whose behalf the application has been brought. Judicial review orders are issued for the benefit of a person or class of persons aggrieved by a decision of a public body or a quasi-judicial body. They do not issue in the air. There has to be a person or persons aggrieved by such a decision.

In conclusion therefore the Court rules that the application is incompetent for two reasons, first, it was brought outside the time presented under order 53 rule 2 and second, the applicant lacks the locus standi to bring the same. The application is therefore struck out with costs.”

In the case of **Humphrey Makokha Nyongesa & another v Communications Authority of Kenya & 2 others [2018] eKLR**, this Court held that if there is no loss by the public, then the applicants, as members of the public, stand to suffer no disadvantage, meaning the matter does not fall in the public interest or arena. The Court further relied on the decision in **Communication Workers' Union & Another v Communication Authority of Kenya** where the Judge observed that employment is a matter of private law.

Jurisdiction

The Objectors contend that the court lacks jurisdiction because the Applicant does not fall among the categories of persons identified under Section 12(2) of the Act which makes no provision for representation by civil society; and the Petition does not fall within the remit of the kind of Constitutional Petition over which the Employment and Labour Relations Court has jurisdiction.

Jurisdiction is everything and without it, the court has no power to make one more step as was stated by the late Nyarangi J. in the case of **Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited (1989) KLR 1**. Further, in the High Court case of **Joyce Cherop Kaspondoy & 609 others v Kenya Power and Lighting Company [2019] eKLR**, Mativo J. held that:

“24. A court has no inherent jurisdiction to decline to entertain a matter within its jurisdiction. Jurisdiction is determined on the basis of pleadings and not the substantive merits of the case. The South African Constitutional Court (In the matter between **Vuyile Jackson Gcaba v Minister for Safety and Security First & Others Case CCT 64/08 [2009] ZACC 26**) had this to say: -

“... In the event of the court’s jurisdiction being challenged at the outset (in limine), the applicant’s pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court’s competence. While the pleadings – including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant’s claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognizable only in another court. If however the pleadings, properly interpreted, establish that the applicant is asserting a claim ..., one that is to be determined exclusively by..... {another court}, the High Court would lack jurisdiction...”

A perusal of the pleadings indicates that the Applicant is challenging the 4th Respondent’s appointment to the position of Authority to Incur Expenditure Holder at Naconeti Kenya for having been done without due process and being in breach of fundamental rights and freedoms under the Constitution among other grounds. The Applicant is also seeking interim suspension of the 4th Respondent’s appointment pending hearing and determination of its Application dated 27th December 2019. It is evident that the substance of the dispute involves an appointment of a person into a position of public service which in my opinion falls within the realm of this Court. I therefore find that this Court has jurisdiction to entertain the Application.

On the issue of whether the proceedings meet the mandatory provisions

of Order 53, the court in **Joyce Cherop case** above stated that:

“43. ... I find it useful to recall the words of the court in **Masai Mara (SOPA) Limited v Narok County Government, Nairobi High Court Petition Number 336 of 2015** that: -

“On the issue of the application of Order 53 of the Civil Procedure Rules to a constitutional petition where a party seeks judicial review reliefs, I must hasten to point out that since the promulgation of the Constitution in 2010, administrative law actions and remedies were also subsumed in the Constitution. This can be seen in the eyes of Article 47 which forms part of the Bill of Rights. It is safe to state that there is now substantive constitutional judicial review when one reads Article 47 as to the right to fair administrative action alongside Article 23(3) which confers jurisdiction, on the court hearing an application for redress of a denial or violation of a right or freedom in the Bill of rights, to grant by way of relief an order for judicial review. 55. Order 53 of the Civil Procedure Rules do not consequently apply to Constitutional Petitions where the court is expected to exercise a special jurisdiction which emanates from the Constitution and not a statute. 56. I consequently decline to accede to the Respondent’s contention that the Petitioner ought to be denied the reliefs sought on the basis that the Petition was filed more than six months after the action complained of took place.”

.....

47. The entrenchment of the power of Judicial Review, as a constitutional principle should of necessity expand the scope of the remedy. First, parties, who were once denied Judicial Review because of the public-private power dichotomy, should now access Judicial Review if the person, body or authority against whom it is claimed exercised a quasi-judicial function or a function that is likely to affect his rights. Second, the right to access the court is now guaranteed in the Constitution. This renders the time limit under Order 53 Rule 2 of the Civil Procedure Rules unnecessary, especially where a litigant moves the court under Article 47 of the Constitution citing violation of fundamental rights. Third, an order of Judicial Review is one of the reliefs for violation of fundamentals rights and freedoms under Article 23(3) (f). Fourth, section 7 of the Fair Administrative Action Act [43] provides that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision.

48. Court decisions should boldly recognize the Constitution as the basis for Judicial Review. Judicial review is now a constitutional supervision of public authorities involving a challenge to the legal validity of the decision. [44] Time has come for our courts to fully explore and develop the concept of Judicial Review in Kenya as a constitutional supervision of power and develop the law on this front. Courts must develop Judicial Review jurisprudence alongside the mainstreamed “theory of a holistic interpretation of the Constitution. Judicial Review is no longer a common law prerogative, but is now a constitutional principle to safeguard the constitutional principles, values and purposes. The Judicial Review powers that were previously regulated by the common law under the prerogative and the principles developed by the courts to control the exercise of public power are now regulated by the Constitution.

50. I am not persuaded by the invitation by the Respondent’s counsel to find that the prayer for certiorari is time barred. Such an interpretation cannot be read in a manner that is consistent with Articles 22, 23, 48 and 258 of the Constitution. Instead, I opt to hoist high the said constitutional provisions.”

The dispute before the Court is no doubt a matter of public interest as defined by the court in the **Humphrey Makokha Nyongesa case** above. **Article 258 of the Constitution** allows anyone in the interest of the public to institute proceedings in court as follows:

258. Enforcement of this Constitution

- (1) Every person has the right to institute court proceedings, claiming

that this Constitution has been contravened, or is threatened with contravention.

(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.*

Besides the foregoing, the application before the court is for leave to file the motions seeking orders to commence judicial review proceedings. There is no substantive application on record. The preliminary objection was thus filed prematurely as it is only after leave is granted that there would be a valid application capable of being struck out by way of preliminary objection.

For the foregoing reasons the notice of preliminary objection dated 17th January 2020 is dismissed. **The application dated 27th December 2019 is fixed for hearing on 26th October 2020.**

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 18TH DAY OF SEPTEMBER 2020

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