



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

PETITION NO.E079 OF 2020

IN THE MATER OF ARTICLES 19, 20, 22, 23, 33, 41, 47, 48, 50, 159, 161, 171, 172, 236 AND 258

AND

IN THE MATTER OF THE JUDICIAL SERVICE COMMISSION

PART OF – ARTICLE 171 AND 172 OF THE CONSTITUTION, 2010

AND

IN THE MATTER OF THE EMPLOYMENT ACT

SECTION 5(1), (2), (3) (b), 87(1) AND (2)

AND

IN THE MATTER OF CONTRAVENTION OF RIGHT TO FAIR ADMINISTRATIVE ACTION, DISCRIMIANTION AND UNFIAR LABOUR PRACTICES

BETWEEN

**SAMMY OSUNDU LIKARONI – INTERESTED PARTY (ON BEHALF OF SENIOR COURT ASSISTANTS – JSG.7)
FORMERLY (SENIOR CLERICAL OFFICERS)**

AND ALL OTHER AFFECTED JUDICIAL STAFF PETITIONER

VERSUS

JUDICIAL SERVICE COMMISSION 1ST RESPONDENT

CHIEF REGISTRAR OF THE JUDICIARY 2ND RESPONDENT

JUDICIAL LEADERS ADVISORY COUNCIL 3RD RESPONDENT

HUMAN RESOURCE MANAGEMENT & ADMINISTRATION 4TH RESPONDENT

RULING

The petitioner filed the Petition herein on 13th November 2020 and in reply the respondents filed Notice of Preliminary Objection seeking to have the petition struck out on the grounds that;

1. The petitioner herein lacks the locus standi to present the petition claiming denial, violation, infringement or threats to right(s) or fundamental freedom(s) under Articles 22(2)(a)(b)(c) and (d) of the constitution for the specific reason that:

a. The petitioner is not an employee of the judiciary.

b. Matters ensuing out of employment relationships are matters in-personam and no judicial officer has presented a complaint/claim/petition on the issues in question.

The petitioner filed his Replying Affidavit in response to the objections by the respondents and avers that the petition is filed for and on behalf of the affected/disenfranchised judicial staff (Senior Court Assistants) and conversant with the facts of the petition and has authority from the affected staff to respond hereto on their behalf pursuant to article 22(2)(a), (b) and (c) and Articles 258(a), (2)(a), (b), (c) and (d) of the Constitution, 2010.

The petitioner also avers that on the objections made by the respondents, the petition and the petitioner cannot be locked out of the seat of justice as there exists genuine grievances and he is a proper party herein as the petition is filed pursuant to article 22(1), (2)(a), (b) and (c) on the enforcement of the Bill of Rights as read together with article 258(1), (2)(a), (b), (c) and (d) on enforcement of the constitution.

The face of the application and petition cites article 258 and all enabling provisions of the law as the basis of the petitioner filing the petition. The petition is also anchored on various articles of the constitution and the Employment Act, 2007 and the constitution supersedes all law.

Contrary to the objections filed by the respondents, the main mandate of the judiciary is to expeditiously administer justice to all have come to seek justice without undue regard to technicalities and promote the purpose and principles of the constitution.

The petitioner is representing many members of judiciary staff throughout the courts are aggrieved by the criteria used by the respondents in conducting interviews which are discriminative and biased against the constitution. The actions of the respondents adversely impact on the administration of justice to junior members of staff.

The objections made by the respondents are similar to what the court addressed in **Machakos High Court Petition No.18 of 2018 – Sollo Nzuki versus Salaries and Remuneration Commission & 2 others [2019] eKLR** with a finding that the issue of *locus standi* in public law litigation does not apply any person who has a *bona fides* grounds that the constitution has been or is threatened with contravention is welcome to approach the court for an appropriate relief. The Petitioner is a member of the public who filed the petition on behalf of disenfranchised judges and is not an employee of the judiciary.

The petition is filed in good faith and is not in abuse of court process as it raises substantive constitutional issues as held in the case of **Mumo Matemu versus Trusted Society of Human Rights Alliance & others Civil Appeal No.290 of 2012** that the standard guide for *locus standi* must remain the command in article 258 of the constitution.

The petitioner also avers that with regard to objections that there is no employment relationship and no judicial employee has presented a complaint, this is a constitutional petition and the court is with jurisdiction to address the dispute arising out of employment between employer and employees and in the present case the employees, senior court assistants and other staff are affected by the interviews conducted by the JSC as the employer.

The cause of action in this petition relates to the relationship between employees and employer therefore this court has jurisdiction to hear and determine the same.

The judicial staff has previously raised complaints to the employer on stagnation in one cadre and lack of promotion for members who have served for many years.

The petitioner has attached internal memos from the 4th respondent stalling all pending promotions. There are print media articles on employees dissatisfaction with regard to lack of promotion; there is communication from Kenya judiciary Staff Association (KJSA) notifying its members that they were aware of organisation reviews and promotions and asked them to be patient; and the KJSA wrote letter dated 14th February, 2019 articulating issues affecting judicial staff including job promotion. These records confirm there have been complaints and which have not been addressed by the respondents.

The petitioner also avers that the objections made are in abuse of court process and should be dismissed with costs and to allow the hearing of the petition.

Both parties attended and made oral submissions.

The respondents submitted that the petitioner is not an employee of the judiciary and there is no complaint made by any employee of the judiciary to justify the petition herein. This is private law and articles cited by the petitioner and the claim that there are rights violations lacks clarity as to what is being sought as held in the case of **Anarita Karimi Njeru versus Republic [1979] eKLR** that a person who refers to a constitutional petition should set out with a reasonable degree of precision the nature of complaint(s) complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.

The respondent is not clear on the rights of the petitioner said to be infringed and there is no demonstration in what capacity the petition is filed. The petition should be dismissed.

The petitioner submitted that the petition is properly filed pursuant to articles 22, 251 and 258 of the constitution. Under Article 258 of the constitution, any person acting on own interest or for another person/party who cannot act on his own the petitioner can address.

This is a public interest case and the persons represented cannot come and speak for fear of intimidation and victimisation and article 258 of the constitution allow such persons to be represented as the petitioner has done.

Article 159 of the constitution provide for justice to all irrespective of status and undue regard to technicalities. The objections made are not in good faith but meant to further infringe on the petitioner's rights and there should be no impediment to this kind of litigation.

Determination

The sole issue for determination is the *locus standi* of the petitioner to attend in this petition as a non-employee of the judiciary on matters relating to the senior court assistants who are aggrieved and dissatisfied with the criteria used by the respondents in carrying out interviews of court administrators from 21st October to 11th November, 2020 pursuant to the 1st respondent's memo dated 7th October, 2020.

As correctly submitted by the respondents, a person seeking redress from the court on a matter which involves a reference to the Constitution, it is important that he should set out with a reasonable degree of precision his complaints, the provisions said to be infringed, and the manner in which they are alleged to be infringed. See

Patrick Okoth Otieno & another versus Director of Public Prosecution [2019] eKLR;

the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court... Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle.

The petitioner has opted to move the court by way of a constitutional petition and has cited the provisions under which the petition is premised on being articles 19, 20, 22, 23, 33, 41, 47, 48, 50, 159, 161, 171, 172, 236 and 258 and these provisions read together with section 5(1), (2), (3) (b), 87(1) and (2) of the Employment Act, 2007.

The petitioner under clause B (a) of his petition defines himself as *suing on behalf of the Judicial staff cadre – Senior Assistants (formerly Senior Clerical officers) at the judiciary and other judicial staff who are aggrieved and dissatisfied with the criteria used by the 1st, 2nd and 3rd respondents in carrying out the scheduled interviews of Court Administration from 21st October, 2020 to 11th November, 2020 as per the Chief Registrar memo dated 7th October, 2020.*

Of importance at this instance is the standing of the petitioner to urge this petition *on behalf of the judicial staff* that are aggrieved by the criteria being used by the respondents in carrying out interviews and which may lead to promotions.

In the case of **Sollo Nzuki versus Salaries and Remuneration Commission & 2 others [2019] eKLR**, as cited by the petitioner with regard to similar objections by the respondents as herein, the court held that;

... [on the issue of] locus standi of the petitioner in these proceedings. As stated above the petitioner's case is that the actions of the respondents adversely impact on the due administration of justice since they discriminate against some judges contrary to the various provisions of the Constitution. In Ms. Priscilla Nyokabi Kanyua vs. Attorney General & Interim Independent Electoral Commission Nairobi HCCP No. 1 of 2010 it was appreciated that: ...

*... In the interest of the realisation of effective and meaningful human rights, the common law position in regard to **locus standi** has to change in public interest litigation. Many people whose fundamental rights are violated may not actually be in a position to approach the Court for relief, for instance, because they are unsophisticated and indigent, which in effect means that they are incapable of enforcing their fundamental rights, which remain merely on paper. Bearing this in mind, where large numbers of persons are affected in this way, there is merit in one person or organisation being able to approach the court on behalf of all those persons whose rights are allegedly infringed. This means that human rights become accessible to the metaphorical man or woman in the street. Accessibility to justice is fundamental to rendering the Constitution legitimate. In this sense, a broad approach to **locus standi** is required to fulfil the Constitutional court's mandate to uphold the Constitution as this would ensure that Constitutional rights enjoy the full measure of protection to which they are entitled*

The petitioner having anchored the petition under the provisions of Article 258 of the Constitution enjoys special standing with the court to attend and urge the matters set out therein. He 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.

Article 258 of the Constitution provides as follows;

(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.

In light of the allegations comprised in the petition, the court finds the petitioner meets the threshold of Article 258 and 22 of the Constitution, 2010 and cannot fault the Petitioner for instituting these proceedings and I hold that he is within his right to commence the same. See **Mumo Matemu versus Trusted Society of Human Rights Alliance & 5 Others Civil Appeal No. 290 of 2012.**

As to whether the petition is with merit, such can only be determined in a full trial. *Locus standi* is a totally different matter from the merits of the petitioner's case.

Accordingly the Preliminary Objections dated 19th November, 2020 by the respondents are found without merit and are hereby dismissed. Costs shall follow the cause.

Delivered at Nairobi this 16th day of December, 2020.

M. MBARU

JUDGE