



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO. 134 OF 2018

IN THE MATTER OF: ARTICLES 3(1), 22(1) & (2)(C), 23, 48, 50(1), 162(2)(A), 165 AND 258(1) & (2)(C) OF THE CONSTITUTION OF KENYA 2010

IN THE MATTER OF: THE ALLEGED CONTRAVENTION AND VIOLATION OF CONSTITUTIONAL PRINCIPLES UNDER ARTICLES 1(1), 2, 3, 4(2), 10, 19, 20, 21, 73, 232, AND 259 OF THE CONSTITUTION

IN THE MATTER OF: THE ALLEGED VIOLATION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 27, 40, 41(1) & (2)(A) & (B), AND 47 OF THE CONSTITUTION

IN THE MATTER OF: THE ALLEGED VIOLATION OF SECTION 5 OF THE EMPLOYMENT ACT, CHAPTER 226, REVISED EDITION 2012(2007)

IN THE MATTER OF: THE ALLEGED VIOLATION OF ARTICLES 7 AND 23 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS; ARTICLE 3 OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS; ARTICLE 7 OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS AND ARTICLE 15 OF THE AFRICAN CHARTER ON HUMAN AND PEOPLES RIGHTS

IN THE MATTER OF: THE ALLEGED VIOLATIONS OF THE KEMRI STAFF SERVICE REGULATIONS AND THE KEMRI HUMAN RESOURCE POLICY AND PROCEDURES MANUAL

IN THE MATTER OF: THE CONSTITUTIONAL AND LEGAL VALIDITY OF THE DISCRIMINATORY PAYMENT OF HEALTH RISK ALLOWANCES, HEALTH SERVICE ALLOWANCES, NON-PRACTICE ALLOWANCES, HEALTH WORKERS ALLOWANCES AND HEALTH WORKERS EXTRANEIOUS ALLOWANCES AT KEMRI

IN THE MATTER OF: DOCTRINES OF LEGITIMATE EXPECTATION AND EQUAL PAY FOR WORK OF EQUAL VALUE

BETWEEN

OKIYA OMTATAH OKOITI **1ST PETITIONER**

NYAKINA GISEBE WYCLIFE **2ND PETITIONER**

V

KEMRI BOARD OF MANAGEMENT **1ST RESPONDENT**

DIRECTOR, KENYA MEDICAL RESEARCH INSTITUTE (KEMRI) **2ND RESPONDENT**

PRINCIPAL SECRETARY, MINISTRY OF HEALTH **3RD RESPONDENT**

PRINCIPAL SECRETARY, STATE DEPARTMENT FOR LABOUR **4TH RESPONDENT**

HON. ATTORNEY GENERAL **5TH RESPONDENT**

AND

SALARIES AND REMUNERATION COMMISSION **INTERESTED PARTY**

JUDGMENT

1. Okiya Omtatah Okiiti and Nyakina Gisebe Wyclife (Petitioners) moved the Court on 11 December 2018 alleging that the failure by the Respondents to pay Research Scientists, biomedical and social scientists and support staff health risk allowances, health service allowances, non-practice allowances, health workers allowances and health workers extraneous allowances unlike their counterparts in the public health sector and hospitals was discriminatory and violated constitutional principles and rights and fundamental freedoms, the Employment Act, 2007, provisions of the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, the African Charter on Human and Peoples Rights, the Kenya Medical Research Institutes Staff Service Regulations and Human Resources Policy and Procedures Manual and doctrine of legitimate expectation on equal pay for work of equal value of the employees of the Kenya Medical Research Institute.

2. The Petitioners also contended that the Respondents had selectively implemented Circular No. MSPS/2/1/3A Vol. 111(77); Circular No. MSPS/2/1/3A Vol. (100) of 2012 and Circular No. SRC/TS/HWI/3/23 VOL 1(61) of 9 March 2017.

3. On 21 January 2019, the Court directed the Respondents and the Interested Party to file responses and submissions to the Petition on or before 2 February 2019 (the Petitioners filed written submissions on the same day).

4. The Respondents and the Interested Party did not file the requisite documents by 2 February 2019.

5. Instead the 3rd to 5th Respondents filed a *Notice of Preliminary Objection*, and submissions on 4 February 2019 while the 1st and 2nd Respondents only caused a replying affidavit to be filed on 6 February 2019. They filed submissions on 13 February 2019.

6. On 8 February 2019, the Petitioners filed grounds of opposition to the *Notice of Preliminary Objection*, a supplementary affidavit and *supplementary written submissions*.

7. The Interested Party filed a replying affidavit in opposition to the Petition through its Chief Executive Officer on 18 February 2019.

8. The Petitioners identified 8 Issues for determination in their submissions and these were

- (a) Whether the Petitioners had *locus standi* to institute these proceedings?
- (b) Whether the Petition qualifies as public interest litigation?
- (c) Whether the Court has jurisdiction to entertain the Petition?
- (d) Whether the Constitution was violated and the Court should intervene?
- (e) Whether procedural fairness has been afforded to the Respondents and the Interested Party in these proceedings?
- (f) Whether KEMRI engineers, biomedical and social scientists and their support staff are eligible to be paid health risk allowances, health service allowances, non-practice allowances, health workers allowances and health workers extraneous allowances?
- (g) Whether the decision by the Respondents not to pay health risk allowances, health service allowances, non-practice allowances, health workers allowances and health workers extraneous allowances, and any other allowances, to all its workers, including engineers, biomedical and social scientists, their support staff is discriminatory?
- (h) Whether costs are payable?

9. The 1st and 2nd Respondents on their part identified the questions for the Courts examination as

- i. Whether the Petitioners have *locus standi* to institute these proceedings.
- ii. Whether the Honourable Court has jurisdiction to hear and determine the Petition as filed herein.
- iii. Whether the Petition is hypothetical as it is not pleaded with precision and specificity.
- iv. The Petitioners having failed to disclose their source of information the evidence annexed ought not to be admitted as evidence.
- v. Whether the 1st and 2nd Respondents have a mandate to determine the salaries and allowances payable
- vi. Whether the Petition offends section 9(2) of the Fair Administrative Act.

10. The 3rd to 5th Respondents on the other hand identified only 4 Issues as being pertinent viz:

- (a) Whether the Petitioners have *locus standi* to file this Petition?

(b) Whether the Court has jurisdiction to hear and determine the Petition?

(c) Whether the order sought are private or public reliefs and whether they can be availed to the Petitioners?

(d) Whether the Petition offends section 9(2) of the Fair Administrative Act?

11. The Interested Party raised only 2 issues being

(a) Whether the Respondents and the Interested Party discriminated against the employees alleged by the Petitioners to be aggrieved, this violating section 5(5) of the Employment Act, Cap. 226 Laws of Kenya, articles 1(1), 3(1), 4(2), 10, 40, 41(1) and (2)(a) and (b), 47(1), 73(2)(b), Article 23 of the Universal Declaration of Human Rights, Article 3 of the International Covenant on Economic, Social and Cultural Rights, Article 15 of the African Charter on Human and Peoples Rights

(b) Whether the Petitioners are entitled to the relief of mandamus.

12. The Court has considered all the material placed before it. Save for language, the legal questions are broadly the same.

13. However, there are 2 jurisdictional questions raised which could be determinative of the Petition and the Court will therefore address them at the outset.

Locus standi of the Petitioners

14. The *locus standi* of the Petitioners was challenged on the ground that they had no employment relationship with any of the Respondents as contemplated by section 12(2) of the Employment and Labour Relations Court Act.

15. The instant Petition alleges violation(s) of constitutional rights and therefore in the view of the Court, it is the threshold set by Article 22 of the Constitution which is implicated.

16. The parameters of the threshold to meet in terms of Article 22 of the Constitution has been the subject of determination by the Supreme Court in *Mumo Matemo v Trusted Society of Human Rights Alliance & 5 Ors* (2014) eKLR.

17. In the aforesaid decision, the Supreme Court noted that *locus standi* in human rights and constitutional litigation had been enlarged beyond the previous narrow approach taken before 2010.

18. The Court also noted that the question of *locus standi* should be examined on a case by case basis depending on the nature of public interest involved/invoked.

19. The Petitioners did not allege that the public officers on behalf of whom they were agitating could not act on their own behalf.

20. The Petitioners did not equally contend that they were suing as members of a defined class of persons or an association acting in the interest of their members.

21. The Petitioners in presenting the Petition invoked the *public interest* jurisdiction in what they contended was discrimination in payment of allowances to employees of the *Kenya Medical Research Institute* as compared with health workers within the public health sector.

22. The question of discrimination in remuneration within the public health sector should be seen in the context of the right to fair remuneration and reasonable working conditions as provided for in Article 41(2)(a) & (b) of the Constitution.

23. Although the names of the health workers on whose behalf the Petition was filed were not disclosed, it is not lost to the Court that they form an identifiable class of *public officers*, and that the question of remuneration within the public health sector has been the subject of numerous industrial action in the recent past.

24. However, it is also in the public domain that most of the public officers in the public health sector have organised representation through unions such as the *Union of National Research & Allied Institutes Staff of Kenya*, the *Kenya National Union of Nurses* and the *Kenya Medical Practitioners and Dentists Union* among others.

25. Ordinarily, the proper course would be for such employees to fight for the terms and conditions of service at the first instance through the legal mechanisms outlined in the Labour Relations Act (negotiations through a *collective bargaining agreement*) instead of approaching the Court directly.

26. Despite the above, the Court is of the view that the broad question of remuneration and reasonable working conditions (terms and conditions of service in the public health sector) raises and implicates *public interest* as it is a constitutional imperative provided for in Article 41 and Chapter 12 of the Constitution.

27. The Court will therefore decline to uphold the *locus standi* jurisdiction objection.

Lis alibi pendens

28. The question as to whether a Court should assume jurisdiction over a cause of action already pending before a competent Court also goes to jurisdiction on the ground of the doctrine of *lis alibi pendens*.
29. In simple language, *lis alibi pendens* means *dispute elsewhere pending*. The philosophy being that a Court should not assume jurisdiction on a dispute on the same cause of action when such dispute is pending before another competent Court.
30. It is not difficult to find the legal rationale for the doctrine. It is to avoid inconsistent decisions which potentially will embarrass the arbiter or prejudice a Respondent.
31. The doctrine of *lis alibi pendens* has been given statutory underpinning in section 6 of the Civil Procedure Act.
32. In the view of this Court, its application extends beyond proceedings instituted under the Act and its attendant Rules as incorporated in the doctrine is the abuse of court process legal principle.
33. In the present case, it was asserted that the employees on whose behalf the Petitioners had purportedly invoked the Constitution had instituted legal proceedings in respect of the legal questions advanced in the instant Petition, being Cause No. 1545 of 2018, *Edward Githinji & 131 Ors v Kenya Medical Research Institute*.
34. The Petitioners did not make any response to the assertion that the employees had moved Court in Cause No. 1545 of 2018, *Edward Githinji & Ors v Kenya Medical Research Institute & Ors* (incidentally, that suit is before this Court and it raises the same legal questions posed by the Petitioners herein).
35. In the view of the Court, the institution of two legal proceedings on the same cause of action is more likely to occasion judicial embarrassment when inconsistent decisions are made and should not be condoned.
36. Such a move amounts to abuse of the Court process.
37. To exacerbate the abuse, the Court has noted that the Petitioners have in the supplementary affidavit of Okiya Omtatah Okoiti filed in Court on 8 February 2019 made reference to the judgment of this Court in *Union of National Research & Allied Institutes Staff of Kenya (UNRISK) v Kenya Medical Research Institute* (2017) eKLR.
38. The Court has looked at the judgment. At the centre of the dispute was implementation of the 2 Circulars now in contention.
39. The Court, in the judgment directed the 1st Respondent to implement the 2 Circulars.
40. If indeed there has been no implementation as stated in paragraphs 17 to 20 of the supplementary affidavit, the law has set out very clear avenues of enforcing compliance.
41. The Court has already alluded to the role of organised labour in setting of terms and conditions of service.
42. It is not in dispute that there is a Union already involved with the 1st Respondent on the issue of allowances for all unionisable employees of the 1st Respondent, on behalf of whom this Petition was filed.
43. The Union litigated on the same issues and got a favourable judgment and it should move to execute in terms of the applicable Rules so that the Court is saved the time and resources of addressing legal questions already decided upon.
44. *Res judicata*, though not raised appears to be lurking in the horizon.
45. It is the view of the Court, because of the imperative of optimal use of scarce judicial time and resources and need to avoid possibility of inconsistent decisions, it would be against public policy to ask the Courts or for the Courts to condone/consider the same legal issues by invoking different procedures and litigants in moving the Court.

Conclusion and Orders

46. From the foregoing, the Court finds that although the Petitioners may have had the *locus standi*, the instant Petition is an abuse of the Court process because there has been previous concluded litigation on the same issues presented for determination, and there is also pending litigation by the persons on whose behalf the Petition was instituted.
47. The Petition is dismissed.

Costs

48. The jurisprudence on costs in public interest litigation is now well developed. Where the Court finds abuse of the court process, it should not hesitate to make an adverse costs order against the offending party.
49. This time round, the Court will order that each party bears own costs.

Delivered, signed and dated in Nairobi on this 22nd day of March 2019.

Radido Stephen

Appearances

Petitioners in person

For 1st & 2nd Respondents Mr. Munge/Ms. Rotich instructed by Muriu Mungai & Co. Advocates

For 3rd to 5th Respondents Ms. Kinyua, Senior State Counsel, Office of the Hon. Attorney General

For Interested Party Rosalie Wafula, Advocate, Salaries & Remuneration Commission

Court Assistant Lindsey