



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**PETITION NO. 110 OF 2017**

**IN THE MATTER OF: ARTICLES 1, 2, 3, 4(2), 10, 12(1)(a), 19, 20, 21, 22, 23, 24, 27, 41(1), 47, 48, 50(1), 73, 156, 159, 162, 165, 232, 234, 258 and 259 OF THE CONSTITUTION OF KENYA.**

**IN THE MATTER OF: THE ALLEGED VIOLATION OF SECTION 80 OF THE PUBLIC SERVICE COMMISSION ACT 2017; GOVERNMENT CIRCULAR REF. NO. OP.CBA. 2/7A OF 20<sup>TH</sup> MARCH 2009 ON THE MANDATORY RETIREMENT AGE FOR PUBLIC SERVANTS; AND GOVERNMENT CIRCULAR REF. NO. OP.CAB.2/7A OF 14<sup>TH</sup> FEBRUARY 2014 ON THE RETENTION IN SERVICE OF OFFICERS BEYOND THE MANDATORY RETIREMENT AGE.**

**IN THE MATTER OF: THE 60 YEAR MANDATORY RETIREMENT AGE FOR PUBLIC SERVANTS.**

**IN THE MATTER OF : THE CONSTITUTIONAL AND LEGAL VALIDITY OF FAILING TO RETIRE DR. KEPHA M. OMBACHO AS THE DIRECTOR OF PUBLIC HEALTH AND RETAINING HIM IN THE PUBLIC SERVICE BEYOND THE MANDATORY RETIREMENT AGE OF 60 YEARS.**

**BETWEEN**

**OKIYA OMTATAH OKOITI.....PETITIONER**

**VERSUS**

**CABINET SECRETARY,**

**MINISTRY OF HEALTH.....1<sup>st</sup> RESPONDENT**

**PUBLIC SERVICE COMMISSION.....2<sup>nd</sup> RESPONDENT**

**DR. KEPHA MOGERE OMBACHO.....3<sup>rd</sup> RESPONDENT**

**RULING**

1. Okiya Omtatah Okoiti (Petitioner) moved the Court on 20 December 2017 alleging violations of the Constitution by the Respondents.
2. Filed together with the Petition was a motion under certificate of urgency seeking temporary conservatory orders.
3. When the application was placed before the Court on the same day, the Court certified it as urgent and directed that service be effected upon the Respondents for *inter partes* hearing on 6 February 2018.
4. On 6 February 2018, the Petitioner informed the Court that he wished to abandon the application in favour of having the Petition heard on an expedited basis.
5. The Respondents did not object and the Court set deadlines for the filing and exchange of responses to the Petition, and set 6 March 2018 for mention to confirm compliance.
6. The Respondents did not comply (1<sup>st</sup> and 2<sup>nd</sup> Respondents served their responses in Court). The 3<sup>rd</sup> Respondent sought for 7 more days.
7. The Court directed the 1<sup>st</sup> and 3<sup>rd</sup> Respondents to file and serve replying affidavits before 6 April 2018 with liberty to the Petitioner to file a further affidavit within 7 days of service.

8. When the Petition next came up on 10 April 2018, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents applied for 3 more days to file replying affidavits and because the Petitioner did not object, the Court directed them to file and serve the affidavits by 13 April 2018.
9. The Petitioner was directed to file and serve a further affidavit and submissions within 7 days of service by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents of their replying affidavits. The Respondents were ordered to file submissions before 4 May 2018.
10. On 4 May 2018, the Petitioner did not attend Court while the 3<sup>rd</sup> Respondent sought for 7 days to file submissions.
11. In the absence of the Petitioner, the Petition was stood over generally.
12. The Petitioner caused the Petition to be mentioned on 31 July 2018, and he informed the Court that he had filed a supplementary affidavit on 24 July 2018 and sought its admission.
13. The Court admitted the affidavit and directed that the Petitioner file and serve his submissions before 17 August 2018 and the Respondents before 22 September 2018 (the Petitioner only filed the submissions on 20 November 2018, 3 months after the agreed and set timeline).
14. The Court directed that the submissions would be highlighted on 20 November 2018.
15. Come 20 November 2018, the Respondents informed the Court that the Petitioner had not served them with submissions and applied to have the Petition dismissed.
16. Since the Petitioner was absent when the highlighting of the submissions was expected to be made, the Court conceded to the Respondents application and dismissed the Petition.
17. The Petitioner was aggrieved and he moved the Court on 21 November 2018 seeking an order reinstating the Petition.
18. When the application came for *inter partes* hearing on 4 December 2018, the Court directed the Respondents to file their responses and set 24 January 2019 for hearing.
19. The Petitioner did not attend Court on 24 January 2019 and the Court stood over the application.
20. The Petitioner again moved Court under certificate of urgency on 29 January 2019 seeking an order that the application be heard on a priority basis. The Duty Court scheduled the certificate for directions on 14 February 2019.
21. Ultimately, on this latter day, the Court directed the Respondents to file responses/submissions on the application and ruling was set for today.
22. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed a replying affidavit in opposition to the application on 8 January 2019 and submissions on 22 February 2019.
23. The 3<sup>rd</sup> Respondent filed his submissions on 25 February 2019.
24. The Court has considered the grounds in support of the application, the replying affidavits and submissions.
25. At the time the Court was dismissing the Petition on 20 November 2018 at 9.34 am, the Petitioner's submissions were not on file. The submissions must have been filed later, in the course of the day.
26. The submissions were filed 3 months after the agreed timeline (on 4 April 2018, the Petitioner was initially directed to file the submissions within 7 days of service by Respondents and mention was set for 4 May 2018, and the deadline was extended on 31 July 2018).
27. When moving the Court, the Petitioner had convinced the Court that the Petition raised urgent constitutional issues and the Court certified the Petition as urgent.
28. The Petitioner's conduct after the certification of urgency has been wanting as far as complying with timelines and attendance in Court was concerned.
29. Submissions, within the context of Constitutional Petition litigation is an integral part of the hearing as in most cases *viva voce* evidence is not taken.
30. The conduct of the Respondents herein has also been wanting.
31. The Petitioner was aware that the Petition was coming up for highlighting of submissions on 20 November 2018 but he was not in Court when the Petition was called out.
32. In that respect, it is ingenious of the Petitioner to argue that he should have been given a notice that the Petition would be dismissed.

33. The parties here have exhibited unparalleled conduct by failing to adhere to timelines set by this Court for the filing and exchange of documents meant to facilitate the proportionate and expeditious hearing of the Petition.

34. It is the view of this Court that it is an imperative flowing directly from the overriding objective that all litigants, parties and advocates should cooperate with a Court when it issues directives meant to achieve and facilitate an expeditious and proportional hearing of a dispute.

35. The Court therefore declines the application dated 20 November 2018. Each party to bear own costs.

**Delivered, dated and signed in Nairobi on this 1<sup>st</sup> day of March 2019.**

**Radido Stephen**

**Judge**

**Appearances**

Petitioner in person

For 1<sup>st</sup> and 2<sup>nd</sup> Respondents Ms. Odhiambo, State Counsel, Office of the Attorney General

For 3<sup>rd</sup> Respondent Mr. Mwinzi instructed by Mwendwa Mwinzi & Associates

Court Assistant Lindsey