



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

PETITION NO. 66 OF 2019

IN THE MATTER OF : ARTICLES 3(1), 22, 23, 48, 50(1), 162 (2) (A), 165(5), 258 AND 259(1) OF THE CONSTITUTION OF KENYA

IN THE MATTER OF : THE ALLEGED VIOLATION OF ARTICLES 1, 2, 3,4(2), 10, 19, 20, 21, 22, 24, 27, 41(1), 47, 73, 75, 77(3), 129, 131(2) (A), 153 (4) (A), 232, AND 259(1) OF THE CONSTITUTION OF KENYA

IN THE MATTER OF : THE CONSTITUTIONAL AND LEGAL VALIDITY OF THE KENYA GAZETTE NOTICE NOS. 3223 AND 3224 OF 01.04.2019 APPOINTING, RESPECTIVELY, PROF. OLIVE MUGENDA TO BE THE NON-EXECUTIVE CHAIRPERSON, AND, KITHINJI KIRAGU AND GLADYS OGALLO TO BE MEMBERS OF THE KENYATTA UNIVERSITY TEACHING, REFERRAL AND RESEARCH HOSPITAL, FOR A PERIOD OF THREE (3) YEARS WITH EFFECT FROM 01.04.2019

IN THE MATTER OF: THE DOCTRINE OF LEGITIMATE EXPECTATION

-BETWEEN-

OKIYA OMTATAH OKOITI.....PETITIONER

- VERSUS -

THE NATIONAL EXECUTIVE OF THE REPUBLIC.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

THE PUBLIC SERVICE COMMISSION.....3RD RESPONDENT

THE STATE CORPORATIONS ADVISORY COMMITTEE.....4TH RESPONDENT

PROF. OLIVE MUGENDA.....5TH RESPONDENT

KITHINJI KIRAGU.....6TH RESPONDENT

GLADYS OGALLO.....7TH RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 12th April, 2019)

RULING

The petitioner Okiya Omtatah Okoiti filed a petition on 09.04.2019 in person. Together with the petition he filed an urgent application by way of the Notice of Motion under Articles 20, 22, 50(1), 23(3), 159 (2) (d), 162 (2) (a), 165(5), and 258 of the Constitution of Kenya 2010; Rules 2, 7(2), 18, 19 and 24 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013; and all other enabling provisions of the law. The application was heard ex-parte on 09.04.2019 when the Court ordered that the same is served for further consideration of the prayers for interim orders in presence of all the parties on 11.04.2019. The prayers in the application were as follows:

1. That the application be certified urgent and be heard ex-parte and service thereof be dispensed with in the first instance.

2. That pending the inter-partes hearing and determination of the application or the petition herein the Honourable Court be pleased to grant an order suspending the Gazette Notice Nos. 3223 and 3224 of 01.04.2019 appointing, respectively, Prof. Olive Mugenda to be the Non-executive Chairperson, and Kithinji Kiragu and Gladys Ogallo to be members, of the Kenyatta University Teaching, Referral and Research Hospital, for a period of three (3) years, with effect from 01.04.2019.
3. That pending the inter-partes hearing and determination of the application or the petition herein the Honourable Court be pleased to issue a temporary order of prohibition prohibiting the 1st respondent, whether by itself, or any of its employees or agents or any person claiming to act under its authority from proceeding to give effect, in any way whatsoever, to the Gazette Notice Nos. 3223 and 3224 of 01.04.2019, appointing, respectively, Prof. Olive Mugenda to be the Non-Executive Chairperson, and Kithinji Kiragu and Gladys Ogallo to be members of the Kenyatta University Teaching, Referral and Research Hospital, for a period of three (3) years, with effect from 01.04.2019.
4. That pending the inter-partes hearing and determination of the application or the petition herein the Honourable Court be pleased to issue an interim injunction prohibiting Prof. Olive Mugenda from functioning as the Non-Executive Chairperson, and Kithinji Kiragu and Gladys Ogallo from functioning as members of the Kenyatta University Teaching, Referral and Research Hospital.
5. That the Honourable Court be pleased to join other parties relevant to this application or petition as and when it deems fit.
6. That consequent to the grant of the prayers above the Honourable Court be pleased to issue such further directions and orders as may be necessary to give effect to the foregoing orders, or favour the cause of justice.
7. That costs be in the cause.

The petitioner's case is that the appointments in the Gazette Notice Nos. 3223 and 3224 of 01.04.2019 were made without subjecting the three appointees to fair, open, competitive, merit based, and inclusive recruitment process, and that violates the law as pronounced by the Employment and Labour Relations Court in **Nairobi ELRC Constitutional Petition No. 19 of 2016, Okiya Omtatah Okoiti –Versus- the National Executive of the Republic & 3 Others**, where the National Executive, the Hon. Attorney General, the Public Service Commission, the State Corporations Advisory Committee, who are the 1st, 2nd, 3rd and 4th respondents herein, were parties, and Wasilwa J made an order thus, **"I make an order that future appointments should be based on the law, on the Constitution and should be fair, open, competitive, merit based and through an inclusive process"**. Further the offices in issue are public offices in the public service subject to the Public Service Commission and the petitioner submitted that they must be filled through a fair, open, competitive, merit based and inclusive recruitment process. The Petitioner urged that under the law, the process for filling offices in the public service begins with the Commission advertising vacancies for the positions and inviting applications from qualified interested parties. The Commission then publishes the names of all applicants and later the shortlist. Further the petitioner states that the Commission conducts interviews and avails an opportunity for public participation before appointing persons to the offices or submitting the names of successful candidates to appointing authorities for appointment.

The petitioner's further case is that on 21.11.2016 in **Nairobi ELRC Constitutional Petition No. 78 of 2016, Okiya Omtatah Okoiti –Versus- Kenyatta University Council & 5 Others** the parties recorded consent thus, **"1. That the 1st Respondent's letter Ref. KU/CC/App/F1/Vol.1 (1), dated 4th May 2016, appointing the 5th Respondent as the Chief Executive Officer, Kenyatta University Health Care System Limited be and is hereby withdrawn. 2. That the Petition be and is hereby marked as settled."** The 5th respondent in that petition was Professor Olive Mwihiaki Mugenda and the petitioner's case is that the appointment of Prof. Olive Mugenda as per the Gazette Notice of 01.04.2019 is contrary to the consent order settling the petition. The petitioner further urges that Prof. Olive Mugenda is not qualified for appointment as already done because she is an employee of the Kenyatta University and the University's Council is already represented on the Board of the Hospital and the appointment of Prof. Olive Mugenda creates a conflict of interest; she has no special knowledge as appointed and is contrary to circular Ref. OP/SCAC.9/73 VOL.1/(84) OF 30.07.2015 against public officers serving as chairpersons and board members of public universities and state corporations; the Professor is a pensioner having retired as Vice Chancellor of the Kenyatta University and is contrary to Article 77(3) of the Constitution for her to draw a salary as a member of Judicial Service Commission as earlier appointed and then as a chairperson of the Hospital's Board as appointed; and that her integrity is questionable as a result of proceedings the petitioner has filed and said to be pending before the Judicial Service Commission.

The petitioner further urged that the 5th to 7th respondents had been simply handpicked for the appointments contrary to the constitutional, statutory and policy provisions governing public appointments.

The parties attended Court on 11.04.2019 and Mr. Regeru Advocate for 5th to 7th respondents raised a preliminary objection that the Court lacked jurisdiction to entertain the petition and the application. The Court directed parties to file their respective submissions on the jurisdictional question and on the issue whether the Court should grant any conservatory orders at this stage. The parties have urged their respective positions. The Court has warned itself that at this early stage of the proceedings the pleadings have not closed and the parties will have an opportunity to urge their respective cases at the full inter-partes hearing of the application.

The Court has considered all the material on record and the submissions made for the parties and makes findings as follows.

The respondents have submitted that the Court lacks jurisdiction because the subject matter of the dispute falls outside the Court's jurisdiction under section 12 of the Employment and Labour Relations Court Act. The petitioner has submitted that the subject in the dispute is whether the 5th to 7th respondents as appointed in the gazette notices have been appointed in accordance with the Constitution of Kenya 2010 as vesting in the Public Service Commission the function and power to make appointments in the public service.

There is no dispute that the 5th to 7th respondents were appointed under section 6 (1) (a) and (k) of the Kenyatta University Teaching, Referral and Research Hospital Order, 2019. The Court returns that those are clearly public offices within the public service as defined in

Article 260 of the Constitution. Those being public offices within the public service, the Court find that they are governed by constitutional and statutory provisions on employment of public officers. The 5th to 7th respondents are therefore public officers and questions of their appointment and applicable law and policies as urged for the petitioner will fall within the jurisdiction of the Court as per Article 162(2) (a) as read with Article 165(5)(b) of the Constitution and, section 12 of the Employment and Labour Relations Court Act.

In Abdikadir Suleiman –Versus-County Government of Isiolo and Another [2015]eKLR the court held as follows:

“As stated by the court earlier in this judgment, the original and unlimited jurisdiction to make a finding on legitimacy or lawfulness of decisions in disputes between employers and employees rests with this court as vested with the appropriate jurisdiction under Articles 159(1), 162 (2) (a) as read with Article 165(5) and (6) of the Constitution; Articles 22(1) and 258(1) of the Constitution, and the provisions of the Employment and Labour Relations Act, 2011. The court holds that the jurisdiction spreads to all issues in the employment relationship and related matters including the enforcement of the fundamental rights and freedoms under Article 22 of the Constitution and enforcement of the Constitution under Article 258 as far as the issues in dispute are, evolve, revolve or relate to employment and labour relations. The court holds that the compass or golden test for the court’s jurisdiction is the subject matter in the dispute namely disputes relating to employment and labour relations as provided for Article 162 (a) of the Constitution and as amplified in the Employment and Labour Relations Court Act, 2011 and not the remedies sought or the procedure of moving the court or the situ of the applicable law or any other extraneous considerations as may be advanced by or for a litigant.”

The Court of Appeal held as much in Judicial Service Commission –Versus- Gladys Boss Shollei & Another [2014]eKLR. Further in Prof. Daniel N. Mugendi –Versus- Kenyatta University and 3 Others, Civil Appeal No. 6 of 2012. The court stated thus,

“The question now is whether the appellant should go back and ‘sever’ the composite petition alleging violation of his fundamental rights and breach of contract of employment. Much as severance would entail time and resources to effect the necessary amendments and make due motions, we are of the view that with necessary amendments, which appear imperative to make out a clear use of breach of rights being effected, the appellant can and should be heard by the Industrial Court on the two claims i.e. violation of rights and breach of contract of employment. The position that the Industrial Court can and should entertain the claim as laid by the appellant, is in line with the decision of Majanja, J. in Petition No. 170 of 2012 – United States International University(USIU) –Versus- The Attorney General & Others.”

The Court has also held that in the public service under the Constitution of Kenya 2010, there are no masters and servants so that in public service in the new Republic, the test of master – servant does not obtain towards establishing existence of employment. In Paul Nyadewo Onyango –Versus- Parliamentary Service Commission and Another [2018]eKLR the Court stated, **“In the present case, the Court will not therefore place emphasis on the relationships between individual public or state officers. None was a servant or master of the other. What is paramount, in the opinion of the Court, is that the officers interrelate and work together within the lawful prescription of the standards of a good public service delivery. They have no private treaties binding one officer to the other but only the constitutional, statutory and lawful policies or practices that are applicable to the public service and incorporated in the individual officer’s contract of service.”**

Again in Richard Bwogo Birir –Versus- Narok County Government and 2 Others [2014] eKLR the Court stated **“The court has carefully considered the enumerated constitutional provisions and holds that all persons holding public or state office in Kenya in the executive, the legislature, the judiciary or any other public body and in national or county government are servants of the people of Kenya. The court holds that despite the level of rank of state or public office as may be held, no public or state officer is a servant of the other but all are servants of the people. Thus, the court holds that the idea of servants of the crown is substituted with the doctrine of servants of the people under the new Republic as nurtured in the Constitution of Kenya, 2010. The hierarchy of state and public officers can be complex, detailed and conceivably very long vertically and horizontally but despite the rank or position held, the court holds that they are each a servant of the people and not of each other as state or public officers. They are all the servants of the people. The court holds that there are no masters and servants within the hierarchies of the ranks of state and public officers in our new Republic.”**

Thus to answer the preliminary issue the Court returns that it has jurisdiction to entertain the present petition. The Court adds that whether it is about employment law or policy or about individual public officer’s grievances, the jurisdiction of the Court would properly be available in that regard.

Turning to the whether the Court should make conservatory orders as prayed for, the Court returns as follows:

First, the Public Service Commission is established under Article 233 of the Constitution of Kenya 2010. The Commission’s functions and powers are provided for in Article 234 of the Constitution. Article 233 (3) of the Constitution provides that the constitutional functions and powers of the Commission shall not apply to:

- a. State offices;
- b. An office of high commissioner, ambassador, or other diplomatic or consular representative of the Republic;
- c. An office or position subject to the Parliamentary Service Commission; the Judicial Service Commission; the Teachers Service Commission; the National Police Service Commission; or an office in the service of a county government, except as contemplated in clause (2) (i) – on hearing and determining appeals in respect of county governments’ public service.

The Court holds that the Kenyatta University Teaching, Referral and Research Hospital as established in its Order under Legal Notice No. 4 of 20.01.2019 is not one of the entities excluded from the Commission’s constitutional functions and powers.

Second, the Order establishing the Hospital was made in exercise of the powers conferred upon the President under section 3(1) of the State Corporations Act, Cap.446. The section provides that the President may, by Order, establish a state corporation as a body corporate to perform the functions specified in that Order. It is true as submitted for the petitioner that the section was enacted prior to the promulgation and coming into operation of the Constitution of Kenya, 2010. Section 7(1) of the 6th Schedule on Transitional and Consequential Provisions to the Constitution of Kenya 2010 provides, “**All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution.**” However, parties will need to make proper pleadings and submissions for a finding whether section 3(1) of the State Corporations Act is unconstitutional or needs to be interpreted one way or the other.

What is clear to the Court as for now is that the section is in place and the section confers the power for making of the Order as already done by the President and the Order has not been set aside or otherwise varied.

Third, the Court has considered the Constitutional powers of the Public Service Commission in Article 234 of the Constitution including creation and abolition of offices. The Court has considered the petitioner’s submissions that under Article 132 (4) (a) the President may establish an office in the public service in accordance with the recommendation of the Public Service Commission.

The issue for determination is whether the statutory power vested in the President to make the Order and then create the offices as established by the President in the Order was chained by that constitutional provision.

What is clear to the Court at this stage is that the Commission is one of the Commissions and Independent Offices subject to Chapter Fifteen of the Constitution and Article 249 (2) (a) of the Constitution states that the Commission is subject only to the Constitution and the law. Further, Article 234(2) (a) of the Constitution provides that the Commission shall, subject to the Constitution and legislation establish and abolish offices in the public service; and appoint persons to hold or act in those offices, and to confirm appointments. Taking into account those constitutional provisions, it is the Court’s Opinion that Section 3 (1) of the State Corporations Act and the Order made thereunder is such legislation that has been made by the Parliament and the Order made by the President is as well, a subsidiary legislation. The constitutionality or otherwise lawfulness of the statutory provisions and the Order having not been set aside, the Court considers that the offices as established and the appointments as made would have been undertaken lawfully.

Thus the President and the Cabinet Secretary have acted in good faith and in accordance with the prevailing law. The Court holds that the cited provisions that direct the Commission to be subject to law and legislation give the Parliament a window to specifically legislate on functions and powers vested under Article 234 (2) of the Constitution. Accordingly, in appropriate cases, Parliament has created or abolished offices by legislation and has conferred power to appoint or appointed by legislation (such as by office) and has prescribed special recruitment and appointment criteria. Such are creations of office and appointments that are contemplated in the constitutional wording of the Commission’s functions and powers to create and abolish offices or, to appoint. If Parliament has by legislation specifically taken the creation of office or appointment away from the Commission, then that would be constitutional legislation until the legislation is shown to be unconstitutional and repealed or declared by a Court with competent jurisdiction to be unconstitutional.

The Court appreciates the serious concerns raised by the petitioner but in view of the considered findings, as at this stage of the proceedings, the President and the Cabinet Secretary appear to have validly and in good faith acted in accordance with the statutory provisions and until that is specifically challenged and the statutory provisions declared unconstitutional or repealed, the Court will be reluctant to interfere with the appointments at this stage of the proceedings.

Parties made detailed submissions on issue of the Kenyatta University owning the Hospital as established in the order and the government’s financial stakes in the Hospital but such are matters best delved into after close of pleadings and at full hearing.

The petitioner also sought to show and alleged that the 5th respondent’s integrity and public offices she already held would be a bar to her being qualified for appointment as made by the President. The Court considers that qualification of the 5th respondent to hold a public office is matter of fact that she ought to be heard about prior to making final determinations. Further the Court considers that the legislation implementing Chapter 6 on Leadership and Integrity and the legislation on the public service integrity and ethics such as the Public Officer Ethics Act, the Ethics and Anti-Corruption Commission Act, the Leadership and Integrity Act, and the legislation on the values and principles of public service would have sufficient provisions to deal with any alleged want of integrity on the part of public officers such as the 5th to 7th respondents now duly appointed as public officers in accordance with the provisions of the Order.

As submitted for the respondents, if there is anything unconstitutional or unlawful about the appointments then the same will be set aside or revoked in accordance with the law or by Court order after the full hearing of the petition.

The gazette notices that appointed the 5th to 7th respondents appear not to have specifically stated that they were being so appointed to the offices of chairperson and member of the Hospital’s Board but as submitted by Counsel for 5th to 7th respondents, when the notices are read together with section 6(1) of the Order, it is clear that they have been appointed to the Board of the Hospital.

The Court returns that the subject matter was the appointment of the 5th to 7th respondents and not the Hospital’s ownership or services rendered by the Hospital. In view of the findings, the Court will not at this stage make orders to disturb the appointments because the President and the Cabinet secretary have not been shown to have acted in contravention of the prevailing statutory provision and the provision is not obviously unconstitutional – so that until the constitutionality of the provision is determined, the appointments should, for the time being, be allowed to rest.

In conclusion, the Court will decline to make the conservatory orders as prayed for and direct the parties to comply with the directions as already made towards the expeditious hearing and determination of the application and subsequently, the main petition.

Signed, dated and delivered in court at **Nairobi** this **Friday 12th April, 2019**.

BYRAM ONGAYA

JUDGE