



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**PETITION NO. 75 OF 2019**

**IN THE MATTER OF ARTICLES 2, 3 (1), 10, 19, 20, 21, 22, 23(1) &(3), 27, 47(1), 49(2),  
50(1), 50(2), 157(4), 159(2) (c), 159(2) (e) AND 258(1) OF THE CONSTITUTION OF KENYA, 2010**

**IN THE MATTER OF RULES 10, 11, 22, 23 AND 24 OF THE CONSTITUTION OF KENYA  
(PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

**IN THE MATTER OF ALLEGED VIOLATION OF SECTIONS 6, 41(2)**

**AND 44(3) OF THE EMPLOYMENT ACT, 2007**

**IN THE MATTER OF CONSTITUTIONALITY AND LEGALITY OF THE IMPENDING  
PROSECUTION OF THE PETITIONER, ONE JEREMIAH MWANGI NJOROGE**

**AS INSTIGATED BY MASTERWAYS SACCO SOCIETY LIMITED**

**IN THE MATTER OF ALLEGED VIOLATION OF SECTIONS 4, 6, AND 12 OF THE**

**FAIR ADMINISTRATIVE ACTION ACT (NO.4 OF 2015)**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS**

**AND FREEDOMS UNDER ARTICLES 2, 3 (1), 10, 19, 20, 21, 22, 23(1) &(3), 27, 47(1),  
49(2), 50(1), 50(2), 157(4), 159(2) (c), 159(2) (e) AND 258(1) OF THE CONSTITUTION OF KENYA, 2010**

**- BETWEEN -**

**JEREMIAH MWANGI NJOROGE.....PETITIONER**

**- AND -**

**MASTERWAYS SACCO LIMITED.....1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTION....2<sup>ND</sup> RESPONDENT**

**INSPECTOR GENERAL OF**

**NATIONAL POLICE SERVICE.....3<sup>RD</sup> RESPONDENT**

**(Before Hon. Justice Byram Ongaya on Friday 14<sup>th</sup> June, 2019)**

**RULING**

The petitioner filed the petition on 02.05.2019 through Salim Ali Mwadumbo of Mwadumbo & Company Advocates. The petitioner prayed for judgment against the respondents for:

- a) A declaration that the decision of the respondents to charge the petitioner with stealing by servant contrary to section 281 of the Penal Code, while conspicuously failing to charge one Tabitha Muthoni Kibanga alongside the Petitioner was malafides, irrational, unreasonable, illegal and an abuse of the discretion by the 2<sup>nd</sup> respondent under Article 157(6) of the Constitution, breached the petitioner's constitutional rights under the provisions of Articles 27(1), 27(4), 27(5), 35(1), 47(1), 50(2) (a) and 50(2) (j) of the Constitution of Kenya, and violated Article 157(11) of the Constitution, hence void for all intents and purposes.
- b) A declaration that the action of the respondents failing to avail to the petitioner in advance the evidence against him or afford him an opportunity to defend himself before the 1<sup>st</sup> respondent breached the petitioners' constitutional rights under the provisions of Articles 27(1), 27(4), 27(5), 35(1), 47(1), 50(2) of the Constitution of Kenya, and violated Articles 157(11) of the Constitution, hence void for all intents and purposes.
- c) Judicial Review by way of an order of certiorari to remove into the Court and quash the decision of the respondents, jointly and severally, to charge the petitioner with the offence of stealing by servant or any other offence pertaining to the 1<sup>st</sup> respondent's alleged missing funds.
- d) Any other or further remedy that the Honourable Court shall deem fit to grant.
- e) The respondents to bear the costs of the petition.

The petitioner filed the petition together with an application by way of a notice of motion praying for a conservatory order to issue restraining the respondents, their agents, assigns or any other person claiming through them from instituting, prosecuting or continuing any criminal charges against the petitioner or issuing any summons or warrants of arrest against the petitioner for alleged offence of stealing by servant on account of the 1<sup>st</sup> respondent's alleged missing funds, pending the inter parties hearing and determination of the application.

The 1<sup>st</sup> respondent filed on 15.05.2019 grounds of opposition through Mwenda Kinyua & Company Advocates seeking that the petition and the application be dismissed with costs upon the grounds:

- a) That the petition and application do not raise any cause of action against the 1<sup>st</sup> respondent and the entire petition is incompetent and bad in law.
- b) That the petition and the application do not raise any constitutional question or issue to be determined by the Honourable Court.
- c) That the orders sought by the petitioner are premature and an abuse of court process.
- d) That the petition and application are bad in law and fatally defective.

The 2<sup>nd</sup> respondent filed on 16.05.2019 the preliminary objection in respect of the application and the petition through Njoki Kihara and upon the following grounds:

- a) That the petition does not fall within the jurisdiction of the Court but the judicial and constitutional division.
- b) That the issues and prayers sought do not relate to violation of any employment or labour relation rights or claims.
- c) That the application and petition should therefore be struck out.

The parties filed submissions. The Court has considered the material on record, the submissions and the parties' respective cases in view of the preliminary objections and makes findings as follows:

1) It is obvious from the prayers made that the petitioner is seeking substantive reliefs against the respondents including the 1<sup>st</sup> respondent. On the face of the petition, the petitioner has raised arguable points of alleged constitutional violations including whether the criminal charges in issue are appropriate and whether the cited constitutional rights have been violated. The petitioner says that the offensive criminal proceedings by way of investigations and prosecution have already been initiated and the cash bail receipt No. 1473658 has been exhibited so that the Court returns that the 1<sup>st</sup> respondent's position that the petition was premature is unfounded. In any event the fact that the petition would be premature is an issue which in the Court's opinion would require analysis of evidence thereby rendering the preliminary objection for the 1<sup>st</sup> respondent to collapse – as the objection is founded upon disputed facts or facts that would require to be considered against evidence and a decision made one way or the other. In so far as specific reliefs have been prayed for against the 1<sup>st</sup> respondent, the 1<sup>st</sup> respondent is thereby a proper party.

2) For the 2<sup>nd</sup> respondent it is submitted that the Court lacks jurisdiction because the Court being a specialised Court cannot hear and determine matters reserved for the High Court as was held in **Republic-Versus- Karisa Chengo & 2 Others [2017]eKLR**. The 2<sup>nd</sup> respondent has nevertheless not identified the matter in dispute in this case which is otherwise reserved for the High Court. Under section 12 of the Employment and Labour Relations Court Act Cap 234B, the Court's jurisdiction extends to all matters between employers and employees arising out of the contract of service. In the Court's opinion the jurisdiction is over civil, criminal and other disputes within the jurisdictional subject as set out in the section – and by reason of section 29 of the Act, the Court's original

jurisdiction over criminal cases has been vested in the appropriate Magistrates' Courts. In the instant case the petitioner has alleged that the criminal investigation and prosecution emerges out of his employment relationship with the 1<sup>st</sup> respondent. Accordingly the matter squarely falls within the Court's jurisdiction. As submitted for the petitioner, the Court of Appeal has confirmed the holding by Majanja J in **United States International University (USIU) –Versus- Attorney General & 2 Others [2012]eKLR**, that the Court has jurisdiction to interpret the Constitution and deal with rights and fundamental freedoms howsoever arising from the relationships defined in section 12 of the Employment and Labour Relations Court Act Cap 234B.

Accordingly the preliminary objections will fail.

In conclusion the preliminary objections filed for the 1<sup>st</sup> and 2<sup>nd</sup> respondents are hereby dismissed with costs and parties directed to take further steps towards the expeditious and just determination of the application and the petition.

**Signed, dated and delivered in court at Nairobi this Friday 14<sup>th</sup> June, 2019.**

**BYRAM ONGAYA**

**JUDGE**