



**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, 40 ,41(1), 47, 73, 75, 77(3), 129, 131(2) (a), 153 (4) (a), 232, and 259(1) OF THE CONSTITUTION OF KENYA AND SECTION 7 (1) OF THE SIXTH SCHEDULE TO THE CONSTITUTION.**

**IN THE MATTER OF THE ALLEGED VIOLATION OF SECTIONS 3,4,5,6,7,8,9,11 AND 24 OF THE STATUTORY INSTRUMENTS ACT NO. 23 OF 2013; SECTION 4 (1) OF THE FAIR ADMINISTRATIVE ACTION ACT 2015; SECTIONS 3,25,26,27,28,30,34,37 AND 55 (2) OF THE PUBLIC SERVICE COMMISSION ACT NO. 10 OF 2017; SECTIONS 4 (B) AND 10 (1) OF THE PUBLIC SERVICE (VALUES AND PRINCIPLES) ACT NO. 1A OF 2015; SECTIONS 13(1)(a), 15 (1) 20 (1)(a) AND 48 OF THE UNIVERSITIES ACT NO. 48 OF 2012; SECTION 25 (1) AND THE FIRST SCHEDULE TO THE HEALTH ACT, 2017; THE KENYATTA UNIVERSITY CHARTER, 2013; AND STATUTE I PARAGRAPH 2, STATUTE IV PARAGRAPH xi, STATUTE XXII, STATUTE XXIV STATUTE XXVIII PARAGRAPHS v, vi AND xx, STATUTE XXXIV PARAGRAPH 1 AND STATUTE LII PARAGRAPHS 3,14,15,16 AND 17 OF THE KENYATTA UNIVERSITY STATUTES, 2013.**

**IN THE MATTER OF THE CONSTITUTIONAL VALIDITY OF SECTIONS 3,4,5, 5A(1) 6 AND 7 OF THE STATE CORPORATIONS ACT (CAP 446).**

**IN THE MATTER OF SECTIONS 24 AND 25 (1) OF THE REPEALED CONSTITUTION OF KENYA AND THE SCOPE OF EXECUTIVE ORDERS UNDER ARTICLES 132(4) 9(a) AND 234 (2)(a)(i) OF THE CONSTITUTION OF KENYA, 2010.**

**IN THE MATTER OF THE CONSTITUTIONAL AND LEGAL VALIDITY OF THE KENYATTA UNIVERSITY TEACHING, REFERRAL AND RESEARCH HOSPITAL ORDER, 2019 (LEGAL NOTICE NO. 4 OF 22<sup>ND</sup> JANUARY, 2019.**

**IN THE MATTER OF VIOLATING THE KENYATTA UNIVERSITY STRATEGIC AND VISION PLAN (2016 -2019)**

**IN THE MATTER OF ESTABLISHING AND ABOLISHING OFFICES IN THE PUBLIC SERVICE, OF APPOINTING PERSONS TO HOLD OR ACT IN OFFICES IN THE PUBLIC SERVICE, AND OF REMOVING PERSONS HOLDING OR ACTING IN THOSE OFFICES UNDER THE CONSTITUTION OF KENYA 2010.**

**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 BOARD 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 CONSTITUTIONAL AND LEGAL VALIDITY OF THE APPOINTMENT OF DR. JACOB ANDREW TORO TO BE THE ACTING CHIEF EXECUTIVE OFFICER OF THE KENYATTA UNIVERSITY TEACHING, REFERRAL AND RESEARCH HOSPITAL**

**IN THE MATTER OF: THE DOCTRINE OF LEGITIMATE EXPECTATION AND VOID FOR VAGUENESS.**

**-BETWEEN-**

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

**VERSUS**

**THE NATIONAL EXECUTIVE OF THE REPUBLIC.....1<sup>ST</sup> RESPONDENT**

THE HON. ATTORNEY GENERAL.....	2 <sup>ND</sup> RESPONDENT
THE PUBLIC SERVICE COMMISSION.....	3 <sup>RD</sup> RESPONDENT
THE STATE CORPORATIONS ADVISORY COMMITTEE.....	4 <sup>TH</sup> RESPONDENT
PROF. OLIVE MUGENDA.....	5 <sup>TH</sup> RESPONDENT
KITHINJI KIRAGU.....	6 <sup>TH</sup> RESPONDENT
GLADYS OGALLO.....	7 <sup>TH</sup> RESPONDENT
DR. JACOB ANDREW TORO.....	8 <sup>TH</sup> RESPONDENT
KENYATTA UNIVERSITY COUNCIL.....	9 <sup>TH</sup> RESPONDENT

AND

UNIVERSITY ACADEMIC STAFF UNION.....	1 <sup>ST</sup> INTERESTED PARTY
KATIBA INSTITUTE.....	2 <sup>ND</sup> INTERESTED PARTY

(Before Hon. Justice Byram Ongaya on Wednesday 31<sup>st</sup> July, 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 inter-partes and the Court delivered the ruling on 12.04.2019 declining to make conservatory orders as was prayed for. Consequential to delivery of the ruling the petitioner applied to amend the petition to introduce what he called hierarchy of laws. The respondents opposed the oral application and upon consideration of the parties' oral submissions, the Court ordered thus, **"3. The petitioner is granted leave to file and serve an amended petition by close of 18.04.2019."**

The petitioner filed an amended petition on 18.04.2019 by introducing the 8<sup>th</sup> respondent, the 9<sup>th</sup> respondent, and, the 1<sup>st</sup> and 2<sup>nd</sup> interested parties.

The 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, and 8<sup>th</sup> respondents filed on 01.07.2019 an application through Njoroge Regeru and Company Advocates. The application was under Article 159 of the Constitution of Kenya, 2010; Rule 3(8), 5(d) (i) and 19 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, and all other enabling provisions of law.

The applicants prayed for orders:

- a) That the Court be pleased to strike out and to remove the names of the 1<sup>st</sup> and 2<sup>nd</sup> interested parties from the proceedings.
- b) That the Court be pleased to strike out in entirety the amendments to the petition vide the Amended Petition dated 15.04.2019.
- c) That in alternative to prayer (b) herein above, the Court be pleased to strike out the following paragraphs of the amended petition dated 15.04.2019 thus, 13A (i); 13A (ii); 14A; 14E; 14F; 14G; 14H; 14 I; 14J; 14K; 14L; 14M; 14N; 14O; 14Q; 14R; 14S; 14T; 14U; 14V; 14X; 14Y; 29A (i), (ii), & (iii); 51C; 51E; 52I; 57D; an 59 (B), (C), (D), (F), (G), (H), (I), (J), (K), (L) & (O).
- d) That the costs of the Application be borne by the petitioner in any event.

The application was based upon the supporting affidavit of Dr. Jacob Andrew Toro and upon the following grounds:

- a) As initially filed the petition did not name interested parties.
- b) The 1<sup>st</sup> interested party applied to be enjoined. The respondents indicated that they would oppose the joinder.
- c) In orally applying for amendment the petitioner did not indicate that it was going to introduce new parties including those that the respondents were opposed to.
- d) In filing the amended petition the petitioner unilaterally introduced the 1<sup>st</sup> and 2<sup>nd</sup> interested parties in breach of the directions

given by the Court on the application by the 1<sup>st</sup> interested party for joinder.

e) The 1<sup>st</sup> and 2<sup>nd</sup> respondents have no identifiable stake in the matters in dispute.

f) The 1<sup>st</sup> and 2<sup>nd</sup> interested parties have a history of litigating against the 5<sup>th</sup> respondent to a point of betraying a vendetta against the respondent. The interested parties are therefore not proper parties for joinder in the proceedings.

g) Consequential to the amendment of the petition, the petitioner has introduced the issue of ownership of the hospital and the land on which it stands and which is clearly outside the jurisdiction of the Court.

h) It is obviously an abuse of Court process for the petitioner to introduce matters that are obviously outside the jurisdiction of the Court.

i) It is in the interest of justice that the application is allowed.

j) Granting the application will defeat abuse of Court process and uphold the integrity of the Court.

k) If the application is granted justice will be dispensed effectively, expeditiously, affordably, and in line with Article 159 of the Constitution of Kenya, 2010.

The petitioner filed his replying affidavit on 15.07.2019 to oppose the application upon the following grounds:

a) There were no orders limiting the nature of amendments the petitioner would introduce.

b) The deponent of the supporting affidavit has not exhibited authority to make the affidavit on behalf of the 5<sup>th</sup>, 6<sup>th</sup>, and 7<sup>th</sup> respondents.

c) The 1<sup>st</sup> interested party's application to be enjoined and the opposition by 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> respondents has been overtaken by the amended petition. The original petition the 1<sup>st</sup> interested party sought to be enjoined had died. The 1<sup>st</sup> interested party's application died with the original petition and it cannot be revived.

d) For matters outside the Court's jurisdiction such as monies used to construct the Hospital and other issues the petitioner will file another petition at the High Court.

e) It was not necessary to file a formal application to amend the petition. Rule 18 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 provides that a party that wishes to amend its pleadings at any stage of the proceedings may do so with the leave of the Court.

f) The interested parties are enjoined because they have identifiable stake or legal interest or duty in the proceedings.

g) There is no evidence that the petitioner and the interested party have vendetta against the 5<sup>th</sup> respondent.

h) The amendments are within the Court's jurisdiction per ruling delivered on 12.04.2019.

i) The application offends Rule 2 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules on what constitutes an interested party.

j) The application lacks merits.

The petitioner also filed on 15.07.2019 submissions on the application.

The 1st interested party filed on 15.07.2019 the grounds of opposition through J.A.Guserwa & Company Advocates. The 1st interested party also filed on 05.07.2019 the replying affidavit of Dr. George Lukoye Makokha. The 1st interested party urged as follows:

a) It is not for the applicants to determine who the petitioner can include as a party to the petition.

b) Once the petitioner filed the amended petition then the 1st respondent's application to be enjoined was overtaken by events. The leave to amend was properly obtained in view of the petitioner's application in that regard.

c) The applicants have not demonstrated prejudice they will suffer if the application is declined.

d) The Court's directives to amend did not limit the scope of permissible amendments.

e) The interested parties have a stake in the petition.

- f) The 1st respondent's members will be affected by decisions of the Court. The 1st interested party says it ought to have been involved in the recruitment of the 5th, 6th, 7th and 8th respondents to warrant the appointments in a transparent process.
- g) The 1st interested party will ventilate its right in so far as its members are concerned.
- h) The main issue in dispute is the unlawful appointments or nominations of the 5th, 6th, 7th and 8th respondents. It is about the interrogation of the flawed recruitment process by the respondent.
- i) The Court has jurisdiction to hear all the matters as introduced in the petition.
- j) The application is calculated to scuttle the expeditious hearing and disposal of the matter.
- k) The application does not lie and is an abuse of the Court process.

The 2nd interested part relied on the petitioner's case in opposing the application.

The Court has considered the parties' respective submissions and material as urged for opposing parties and makes findings as follows.

**First**, under the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 “**interested party**” means a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the Court but is not a party to the proceedings or may not be directly involved in the litigation. Rule 7 (1) thereof states that a person may, with leave of the Court, make an oral or written application to be enjoined as an interested party. Rule 7 (2) provides that a court may on its own motion join any interested party to the proceedings before it. In the present case, the 1st interested party was enjoined by the petitioner during the amendment and in the circumstances that the 1st interested party had applied to be enjoined. The 1st interested party's stake is that it is the trade union representing the academic staff and who would be affected by the orders the Court may make in the petition. To that extent the Court returns that the trade union has established an identifiable stake, duty and legal interest in the matter. It is true that the applicants had expressed opposition to the 1st interested party's application to be enjoined but in view of the finding that it is a proper party, the Court finds that the application for joinder is overtaken and the Court's discretion would be in favour of the 1st interested party.

The Court further finds that striking out the 1st interested party so that they prosecute the application for joinder would be superfluous and inconsistent with Article 159 (2) (b) of the Constitution which provides that justice shall not be delayed and section 3 (1) of the Employment and Labour relations Court Act, 2011 that provides that the Court shall facilitate the just, expeditious and proportionate resolution of disputes.

Further, there is no established challenge by the applicants that the 2nd interested party was established in 2011 to promote knowledge and studies of constitutionalism and to facilitate the implementation of the Constitution of Kenya, 2010. The petition is clear that it seeks implementation and interpretation of the provisions of the Constitution of Kenya as set out in the petition so that the Court returns that the 2nd interested party is properly so within the definition of an interested party. The 5th respondent has urged that 1<sup>st</sup> and 2<sup>nd</sup> interested parties have a history of litigating against the 5<sup>th</sup> respondent to a point of betraying a vendetta against the respondent. The interested parties are therefore not proper parties for joinder in the proceedings. The Court has considered the matters in dispute in the petition and finds that the interested parties have established a genuine status of an interested party within the definition in the rules and previous cases as may have been filed against the 5th respondent by one or other party in the present petition does not diminish the interested parties' established interest or duty.

**Second**, the Court has considered the parties respective positions on jurisdictional concerns raised for the applicants. Parties are in agreement that issues of ownership of the hospital in issue and the ownership of the land on which the hospital stands would fall outside the jurisdiction of the Court. It could be that issues of such ownership may be a useful background to the efficient and effectual determination of the present petition but invariably, they fall outside the jurisdiction of the Court for a remedy or determination.

The Court has revisited the petition as amended. The Court returns that the petition should not be dismembered or severed but should be heard and determined by the Court with focus on the predominant dispute which clearly falls within the Court's jurisdiction. The Court considers that prayers 60 (k) (l) and (o) and some of the paragraphs in the petition raise issues about the ownership of the hospital. To the extent that such background information is necessary for effectual determination of the real or predominant issues in dispute in the present petition, they would not be liable to being struck out in so far as they relate to a relevant background about ownership and property in the Kenyatta University Teaching, Referral and Research Hospital and related property rights. Within jurisdictional concerns, the Court considers that they would remain vestigial and therefore parties and the Court would treat them as useful only as relevant background information and the predominant dispute in the petition falling for determination will be heard and determined accordingly. While making that finding the Court has also considered that the petitioner has indicated that he will file another related petition for matters outside the jurisdiction of this Court. The Court has also considered that the Hospital and the University are public and the land they stand on are also public and to that extent, in the circumstances of the case, the real and predominant dispute in the petition is not about ownership or property rights but the appointments of the Hospital's Board Members and Chief Executive Officer in issue and the applicable law. Thus, the Court considers that the ownership issues are remote to the real issues in dispute and the predominant issues of appointment of the Hospital's Board Members and the Chief Executive Officer and applicable law clearly fall within the jurisdiction of the Court and fall for determination by the Court accordingly.

The Court has further considered the applicants' case that the petition relates to the interpretation of the Constitution and therefore the Court lacks jurisdiction. The Court returns that in matters predominantly within its jurisdiction like in the instant case, the Court has jurisdiction to interpret the Constitution. Thus Article 10(1) (a) of the Constitution provides that the national values and principles of governance in the Article bind all State Organs, State officers, public officers and all persons whenever any of them applies or interprets the Constitution. By that provision it is clear that the interpretation of the Constitution is impliedly taken away to every person and for the Court, for matters

within its jurisdiction and like for the predominant matters in the present petition, the Court has the necessary jurisdiction. The Court considers that no further emphasis beyond the liberal Article 10 of the Constitution is necessary to confirm the Court's jurisdiction to interpret the constitution whenever it is considering disputes within its jurisdiction.

In conclusion, the application dated 01.07.2019 and filed for the 5th, 6th, 7th, and 8th respondents is hereby determined with orders:

- a) The predominant dispute being about the appointment of the Hospital's Board Members and the Chief Executive Officer and, interpretation of related constitutional and statutory provisions, the Court has jurisdiction to hear and determine the petition.
- b) The matters on ownership and property in the Kenyatta University Teaching, Referral and Research Hospital and related property rights as pleaded would only constitute completeness of facts and background to the predominant dispute before the Court and shall not impair the Court's jurisdiction to hear and determine the predominant dispute in issue that falls within the Court's jurisdiction.
- c) Parties to take directions on further steps towards the expeditious hearing and determination of the petition.
- d) Costs of the application in the Cause.

**Signed, dated and delivered** in court at **Nairobi** this **Wednesday 31st July, 2019**.

**BYRAM ONGAYA**

**JUDGE**