



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATION COURT
AT NAIROBI
PETITION 114 OF 2019

(Before Hon. Lady Justice Maureen Onyango)

I

IN THE MATTER OF: ARTICLES 1, 2, 3, 4(2), 6, 10, 12(1)(a), 19, 20, 21, 22,23, 24, 47, 41(1), 47, 48, 50(1), 73, 75, 156, 159, 162, 165(5), 232, 234, 236, 256 AND 259 OF THE CONSTITUTION OF KENYA, 2010

AND

I

IN THE MATTER OF: ALLEGED VIOLATION AND INFRINGEMENT OF THE RIGHTS AND FREEDOMS IN ARTICLES 27, 41(1), 4 AND 50(1) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: ALLEGED VIOLATION AND INFRINGEMENT OF THE CONSTITUTION IN ARTICLES 2(6), 10, 21(1) AND (3), 22(1),23, 73, 232(1)(b), (d), (e), (f), (g) AND (2), 234, 236, 256 AND 259 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: ALLEGED VIOLATION OF THE CONSTITUTION AND THE NATIONAL LEGISLATION IN THE IMPLEMENTATION OF THE KENYA RAILWAYS CORPORATION'S APPROVED STAFF RESTRUCTURING THROUGH AN IRREGULAR PROCESS ARBITRARY RUSHED AND TILED TO SUIT CERTAIN PREFERRED INDIVIDUALS

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF SECTION 4(1) OF THE FAIR ADMINISTRATIVE ACTION ACT 2015

BETWEEN

PROSCOVIA VITSENGWA.....PETITIONER

VERSUS

THE CHAIRPERSON,

KENYA RAILWAY CORPORATION BOARD.....1ST RESPONDENT

THE KENYA RAILWAY CORPORATION.....2ND RESPONDENT

THE MANAGING DIRECTOR,

KENYA RAILWAY CORPORATION.....3RD RESPONDENT

PUBLIC SERVICE COMMISSION.....4TH RESPONDENT

STATE CORPORATIONS ADVISORY COMMITTEE...5TH RESPONDENT

THE ATTORNEY GENERAL.....INTERESTED PARTY

RULING

The petitioner herein filed her petition together with a notice of motion under certificate of urgency on 2nd July 2019 seeking orders suspending the filling of some 27 positions in Senior Management advertised in the Standard Newspaper of 17th May 2019 by the 2nd respondent the Kenya Railways Corporation, and the ongoing staff restructuring exercise. The application was certified urgent and fixed for *interpartes* hearing on 18th July 2019.

Upon being served with the application the 1st, 2nd and 3rd respondents filed a notice of preliminary objection raising the following grounds –

1. The Petition is res-judicata to *ELRC Petition No. 21 of 2018 (Okiya Omtatah Okoiti vs. Kenya Railways Board of Directors & 4 Others)* since;

- a. The matter directly and substantially in issue herein was directly and substantially in issue in ELRC Petition No. 21 of 2018 since they both challenge the Human Resource Policy and Guidelines and the implementation of the ongoing restructuring process at KRC.
- b. The Petitioners in both Petitions plead that they are litigating the Petitions under the title of the public while the Respondents are exactly the same parties.
- c. Both Petitions were instituted before this court which court is competent to try the challenge to the staff restructuring exercise at Kenya Railways Corporation.
- d. ELRC Petition No. 21 of 2018 matter was heard and finally decided by the court.

2. Consequently these proceedings are an abuse of the court process because they are instituted despite the Petitioner acknowledging in ground 1 and 3 of the certificate of urgency dated 2nd July 2019 that there has been a previous suit over the same issues, between the same parties or substantially the same parties, that a final determination was made, and that the determination is subsisting.

3. The court lacks jurisdiction to hear this dispute as a constitutional petition because,

- a. It is settled law that Constitutional Petitions should not be used as substitutes for proceedings which should be instituted as ordinary claims under the applicable statutes.
- b. The petitioner has not pleaded why the proceedings cannot be brought as a claim under the Employment Act, trade dispute under the Labour Relations Act, and the Employment and Labour Relations Court Act.
- c. The Petitioner has not pleaded or shown that the said statutes governing employment and Labour Relations are defective, do not give sufficient remedies, are not applicable, or are unconstitutional.

4. The Petitioner does not have locus standi to litigate on behalf of the employees who are allegedly affected by the restructuring because;

- a. In the locus donated by Section 12(2) of the Employment and Labour Relations Court, she is not an employee, an employer, Trade Union, an employer's organisation, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established by any written law or a lawfully authorised agent of any.
- b. In the locus donated by Section 73 (1) of the Labour Relations Act 2007, the Petitioner is not a party to the 'trade dispute' defined by section 2 thereof which defines a trade dispute as "***a dispute or difference, an apprehended dispute or difference, between employers and employees, between employers and trade unions, or between an employer's organisation and employees or trade unions, concerning any employment matter, and includes disputes regarding the dismissal, suspension or redundancy of employees, allocation or work or the recognition of a trade union.***"

5. The petitioner is unlawfully usurping the functions of a trade union without constituting herself as a trade union and registering under Sections 12 and 13 of the Labour Relations Act 2007.

6. This Court does not have jurisdiction to deal with hypothetical claims, trade disputes or hypothetical breaches of the Constitution.

On 17th July 2019 the 1st, 2nd and 3rd respondents filed another notice of supplementary preliminary objection raising the following other grounds of objection–

1. The affidavit of Proscovia Vitsengwa sworn on 2nd July 2019 in support of the Notice of Motion offends Order 19 rule 3 of the Civil Procedure Rules requiring affidavits to be confined to such facts as the deponent is able of his own knowledge to prove as shown below –

a. The reference to paragraphs 50-117 of the petition makes grave allegations of fact accusing the 1st -3rd Respondents of victimization, discrimination, lack of consultation, intimidation, nepotism, bias, arbitrariness, harassment, demotions, subjectivity, bad faith, lack of professionalism, unfairness, without disclosing the materials are of her own knowledge or information.

b. Proscovia, the deponent cannot of her own knowledge prove the allegations since –

i. She is an advocate working in a Law Firm.

ii. She is neither an employee nor employer at Kenya Railways or otherwise engaged with Kenya Railways.

iii. She has not stated the sources of her information or documents.

2. Order 19(6) provides for striking out affidavits that are scandalous, irrelevant or oppressive.

3. The affidavit and the allegations therein are oppressive to the Respondents since the undisclosed source of the materials cannot be verified or challenged.

4. Without prejudice to the foregoing, the affidavit is defective since it purports to reiterate the allegations the petition yet –

a. The identity of the person who wrote or made the allegations in the Petition is not disclosed and remains unknown.

b. The petition is not annexed to the Affidavit and commissioned by a Commissioner of Oaths as an annexures or otherwise produced as an exhibit in the affidavit of Proscovia or otherwise.

c. In reading the affidavit the application, a Court of law cannot rely to purported evidence if the material is not produced as evidence by affidavit or orally.

The Petitioner filed submissions in response to the preliminary objections.

At the hearing of the preliminary objection Mr. Ndegwa for the 1st, 2nd and 3rd respondents argued the objections under three (d) heads being that the petition is *res judicata*, the affidavit filed by the petitioner violate Order 39 Rule 3 and finally *locus standi*.

On *res judicata*, Mr. Ndegwa submitted that this suit is *res judicata* as the same issues were litigated in Petition No. 21 of 2018 filed by Okiya Omutata. That the petitioner has at paragraph 134 stated that this court issued interim orders suspending staff restructuring exercise. That at paragraph 136 it is conceded that a consent was recorded and adopted by the court. That in this suit at prayer 4 of the notice of motion, the petitioner seeks orders suspending the restructuring exercise and at prayer 5 she seeks an order suspending the restructuring exercise. That both issues were the subject of Petition No. 21 of 2018. That the petitioner appreciates this and at ground 1 of the certificate of urgency, she claims that the staff restructuring is being done despite there being a court order and at paragraph 3 of the certificate of urgency she states that the restructuring is in contempt of the court orders.

Mr. Ndegwa submitted that the reliefs sought in the two petitions are similar and that the parties are litigating under the same title. That the petitioner herein and in Petition 21 of 2018 litigate under the banner of public interest under Article 238 of the Constitution.

He relied on the decision in ***Kenya Commercial Bank Limited –V- Muiri Coffee Estate Limited and Another (2016) eKLR*** in which the Supreme Court stated that *res judicata* is a doctrine of substantive law and applies in all categories of cases including constitutional rights, and that the doctrine is not affected by Article 159 of the Constitution on the principle of substantive justice. That the Supreme Court further stated that the courts must be vigilant to avoid pleadings crafted to avoid *res judicata*.

On the second ground of objection Mr. Ndegwa submitted that the two affidavits filed by the petitioner offended Order 39 Rule 3 as it adopts what is pleaded in the petition which she states is true to the best of her knowledge, information and belief. Relying on the decision of the Court of Appeal in ***Judicial Service Commission –V- Gladys Boss Sholei***, Mr. Ndegwa submitted that the court must interrogate the basis upon which all the allegations in the petition are anchored as the source of the information remains doubtful, and the same remained no more than rumours, hearsay and conjecture.

He further referred to the case of ***Kamlesh Masuku/Damji Pattni -V- Nasir Ibrahim and 2 Others (2005) eKLR*** where the Court of Appeal clarified that the Evidence Act applied to affidavit evidence and that the rules of admissibility and relevance would apply where an affidavit does not state the source of information. He submitted the affidavit is oppressive and should be struck out.

The second issue with the affidavit is that it refers to matters pleaded in the petition, which is not signed by the petitioner. That Section 63(2) of the Evidence Act has a very strict test.

Mr. Ndegwa further submitted that this matter should not have come as a petition but under the Employment Act. For this he relied on the case of ***Mwavumbo Group Ranch -V- National Land Commission and 3 Others (2019) eKLR*** where the Court of Appeal held that where a party has a remedy easily available through a prescribed speedy and straightforward procedure, such party should not obfuscate matters by making the dispute constitutional. He further relied on the case of ***Gabriel Mutava and 2 Others -V- Managing Director Kenya Prots***

Authority Another (2016) where the Court stated that the Constitution should not be turned into a thoroughfare of every kind of common grievance.

Counsel further relied on the decision in **Dockworkers Union Limited –V- Messina Kenya Limited (2019) eKLR** where both the Employment and Labour Relations Court and the Court of Appeal dismissed the petition on grounds that it was a labour dispute and there was no justification to invoke the provisions of the Constitution.

On the third ground of preliminary objection, Mr. Ndegwa submitted that the petitioner had no *locus standi* to file a suit to implement orders in another suit by filing a fresh suit.

Mr. Mukina for the petitioner opposed the preliminary objections. On the issue of *res judicata* he stated that Petition Number 21 of 2018 related to an advertisement of 6th March 2018 for 15 positions while the present petition was precipitated by an advertisement of 17th March 2019 for 27 positions and was different from the earlier advertisement.

He further submitted that the parties are different in the two petitions.

Mr. Mukina submitted that jurisprudence developed on *res judicata* tends towards the position that the doctrine should be sparingly used in a constitutional petition. He referred to the decision in **Isaac Kamau Kabira and 3 Others -V- Commissioner of Lands and 7 Others** where Lenaola J. as he then was stated that *res judicata* should be invoked in the clearest of cases and where a party has re-litigated a matter in a manner amounting to abuse of court process.

He submitted that the petitioner herein was not a party to Petition No. 21 of 2018 or discussions that led to the settlement of the petition by consent. He submitted that at the hearing of the petition the petitioner will submit that the consent order was not complied with.

He further relied on the case of **Wycliffe Gisebe Nyakina -V- Attorney General and Another** where the court again observed that the principle of *res judicata* must be used sparingly although courts must be vigilant to guard against litigants who are clearly evading the doctrine by introducing new causes of action.

He submitted that the last time parties were in court, Counsel for the respondents submitted that the Civil Procedure Act does not apply to these proceedings but rather, the Mutunga Rules and the Employment and Labour Relations Court (Procedure) Rules. That Counsel cannot now turnaround and rely on the petition that was determined by this court to argue the doctrine of *res judicata*.

On the striking out of the petition, Counsel submitted that rules for striking out are very clear. He submitted that the Petitioner has stated that the matters she had deposed to in the affidavits are within her knowledge, that at this stage the court cannot determine whether or not the facts are correct as this can only be ascertained in a trial process. That the respondent will be free to cross-examine the deponent of the affidavits during trial. That this is a matter that cannot be the subject of a preliminary objection as defined in the case of **Mukisa Biscuit Manufacturing Company Limited -V- West End Distributors**.

Counsel for the petitioner further referred to the decisions of the Supreme Court in **Aviation and Allied Workers Union -V- Kenya Airways** where the Court held that a preliminary objection may only be raised on a pure question of law after establishing that there is no contest on facts as presented in the pleadings.

On the question of jurisdiction counsel submitted that the respondents cannot rely on Petition No. 21 of 2018 filed in this court to claim this court has no jurisdiction. He submitted that there is sufficient jurisprudence that has confirmed the jurisdiction of this court in constitutional matters.

On *locus standi*, Counsel submitted that this is a public interest litigation of violation of Article 41 of the Constitution. He referred to the provisions of Article 22(1), 22(2)(c) on *locus standi* in matters falling under the Bill of Rights. He submitted that the petitioner is a Counsel who took oath to protect the Constitution and all she needs to prove is that rights and freedoms under the Constitution have been violated and the violations have the potential to affect negatively a number of people.

Counsel further submitted that at this preliminary stage this cannot be ascertained as it can only be demonstrated in the trial.

Counsel finally submitted that in Petition No. 21 of 2018, parties entered into a consent and the court did not have an opportunity to determine the issues raised in the petition. That this court is in a unique position to apply its mind to the issue. That only the petitioner in that case can cite the respondent for contempt. That this court has to consider the fundamental question whether upon entering a consent in a constitutional petition, the respondent can engage in *ultra vires* processes and violate fundamental rights and freedoms without any other person having a recourse to the courts.

Counsel complained about the number of documents filed by the respondents without leave of court, which he likened to abuse of court process intended to confuse and embarrass the petitioner.

Determination

I have considered the submissions of the parties on the grounds of preliminary objection. I have further considered the authorities relied upon by both parties.

The grounds of objection raised in the notices of preliminary objection are *res judicata*, *locus standi* of petitioner and admissibility of the averments in the petitioner's affidavit. Counsel also raised the issue of jurisdiction of this court to hear constitutional matters but did not

submit on the same.

A preliminary objection as was defined in the case of *Mukisa Biscuit Manufacturing Company Limited -V- West End Distributors* and as further expounded by the Supreme Court in *Aviation and Allied Workers Union Kenya -V- Kenya Airways Limited and 3 Others* to be a pure question of law that can only be raised where there is no contest on the facts.

Applying this test on the grounds of preliminary objection herein, the objection on admissibility of the facts pleaded in the affidavit must fail, as the same are matters that can only be ascertained upon cross-examination of the deponent of the affidavits. The mere fact that the said facts are adopted from the petition does not mean that they are not admissible.

There is no provision in law that in an affidavit a deponent cannot adopt the averments in the pleadings. Order 19 Rule 2 of the Civil Procedure Rules provides for cross examination of a deponent of an affidavit while Rule 3 provides that affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, statements of information and belief showing the sources and grounds thereof. The credibility of the averments in the affidavit can only be tested during hearing and in my view, are not suitable to be canvassed by way of preliminary objection.

The other ground is res judicata. As set out in the cases referred to by both parties and specifically in the case of *Isaack Kamau Kabira and 3 Others -V- Commission of Lands and 7 Others* and again in *Okiya Omtata -V- Attorney General and 2 Others* in *Petition No. 593 of 2013*, the principle of res judicata should only invoked in the clearest of cases.

In the present case, the respondent's position is that the subject matter herein is similar to that in Petition 21 of 2018. It is an acknowledged fact that the petitioners in this petition and Petition 21 of 2018 are different, although both filed the petitions under the same interest, that of public interest. It is further not in contest that the two petitions were precipitated by different advertisements, the former on 6th March 2018 for 15 positions and the latter on 17th March 2017 for 27 positions. It is further not contested that the respondents are not the same. Though some are common for both petitions, they are sued in different capacities. Further, the basis of the two petitions and the grounds in support of the same are different.

From the foregoing, it is obvious that the issue of *res judicata* as brought herein is not suitable for disposal as a matter of preliminary objection as the court would have to first establish the facts in the two petition before it can to determine whether or not the petition herein is affected by the doctrine of *res judicata*.

The last ground is *locus standi*. Again, in my opinion locus standi is a matter that would require parties to go into the merits of the prayers sought and therefore a matter that should be subjected to trial. On the face of it, Articles 22(2) and 258(2) would appear to extend locus to practically any person to file suit where they allege that the Constitution has been contravened or is threatened with contravention. This therefore in my view is also a matter that is not suitable for argument as a preliminary objection.

For these reasons I find that the two preliminary objections dated 15th and 17th July 2019 have no merit and dismiss the same with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 2ND DAY OF AUGUST 2019

MAUREEN ONYANGO

JUDGE