



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION 162 OF 2019

(Before Hon. Lady Justice Hellen S. Wasilwa on 24th September 2019)

OKIYA OMTATAH OKOITI.....PETITIONER

VERSUS

THE SELECTION PANEL FOR

THE NATIONAL LAND COMMISSION.....1ST RESPONDENT

THE NATIONAL EXECUTIVE.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

THE SPEAKER OF THE NATIONAL ASSEMBLY.....4TH RESPONDENT

AND

GERSHOM OTACHI BW'OMANWA.....1ST INTERESTED PARTY

ALISTER MURIMI MUTUGI.....2ND INTERESTED PARTY

JAMES K. TUITOEK.....3RD INTERESTED PARTY

GETRUDE NDUKU NGUKU.....4TH INTERESTED PARTY

REGINALD OKUMU.....5TH INTERESTED PARTY

SAMUEL KAZUNGU KAMBI.....6TH INTERESTED PARTY

HUBBIE HUSSEIN AL-HAJI.....7TH INTERESTED PARTY

ESTERH MURUGI MATHENGE.....8TH INTERESTED PARTY

TIYA GALGALO.....9TH INTERESTED PARTY

KATIBA INSTITUTE (KI).....8TH INTERESTED PARTY

RULING

1. Before this Court for determination, is the Respondents' Preliminary Objections in opposition to the Petition and the Petitioner's Application both dated and filed on 28th August 2019.

2. The grounds raised by the 1st, 2nd and 3rd Respondents in their Notice of Preliminary Objection dated 2nd September 2019 are that the Petitioner lacks the jurisdiction to file and prosecute this Petition having no sufficient interest to enforce these proceedings.

3. Further, this Court lacks the jurisdiction to entertain the matter since the Petition does not disclose a cause of action within the meaning of Section 12 (1) of the Employment and Labour Relations Court Act. Additionally, this matter is prematurely before this Court and offends the doctrine of ripeness.

4. The 4th Respondent's grounds filed on 2nd September 2019 are that active parliamentary proceedings concerning the approval of the Interested Parties are currently underway hence the Petitioner should await the outcome of the process. Further, the issues raised by the Petitioner should be raised during the public participation exercise and that this Court does not have jurisdiction to intervene in active parliamentary proceedings.

5. The 1st and 8th Interested Parties' grounds filed on 5th September 2019 are that this Court lacks the jurisdiction to hear the Petition or make orders relating to the same. Further that, the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013, do not contemplate an instance where a party is joined as an Interested Party without their consent and without the leave of Court.

6. The Petition was dispensed with through submissions. The parties filed their written submissions which they also highlighted in open Court.

3rd Respondents Submissions

7. Miss Mbilo for submitting on behalf of the 3rd Respondent submitted that this Court has no jurisdiction to handle the Petition because there was no employer-employee relationship. She further submitted that the Commissioners are not employees as they earn remuneration and benefits charged from the Consolidated Fund and not a salary.

8. In his written submissions, the 3rd Respondent submitted that pursuant to Article 250 of the Constitution, Sections 2, 5 (5), 7 and 17 of the Employment Act and the holding in **Kenya Game, Hunting & Safaris Workers' Union vs. Private Safaris (EA) Limited [2002] eKLR**, the Commissioners are not employees hence the employment and labour laws do not apply.

9. They assert that for there to be an employer-employee relationship, there must be a contract of service. In her view, appointees to a Constitutional Commission are independent contractors hence the employment and labour laws do not apply. Further, salary or wages are paid in a **contract of service** while remuneration and sitting allowances are paid in a **contract for service**.

10. The 3rd Respondent through Miss Mbilo submitted that the jurisdiction of this Court as set out in Section 12 of the Employment and Labour Relations Court Act is limited to matters arising out of an employer-employee relationship.

11. Further, that it was only the High Court that has the jurisdiction pursuant to Article 165 (3) (d) (ii) of the Constitution. Counsel relied on the Supreme Court case of **Republic vs. Karisa Chengo & 2 Others [2017] eKLR** where it was held that the Employment and Labour Relations Court, the Environment and Land Court and the High Court ought not to interfere with each other's jurisdiction.

12. It is the 3rd Respondent's view that the issue before this Court is a purely constitutional issue hence outside the jurisdiction of this Court and relies on the cases of **Kenya Council of Employment and Migration Agencies & Another vs. Samuel Mwangera Arachi & 2 Others [2015] eKLR** and **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank & 2 Others [2012] eKLR**.

13. It is the 3rd Respondent's submissions that no Court should give audience to the Petitioner before he exhausts other statutory mechanisms set out in sections 6 and 7 of the Public Appointments (Parliamentary Approval) Act 2011 and relies on the case of **James Kuria vs. Attorney General [2018] eKLR** and **Geoffrey Muthinja & Another vs. Samuel Muguna Henry & 1756 Others [2015] eKLR**.

14. It is her position that the Petition is premature as the issues raised in the Petition can be addressed by Parliament during the vetting process. The burden of proving that all avenues have been exhausted should lie with the Petitioner as was held in the case of **Anchor Limited vs. Sports Kenya [2017] eKLR** and **Mui Coal Basin Local Community & 15 Others vs. Permanent Secretary Ministry of Energy & 17 others [2015] eKLR**.

Petitioner's submissions

15. The Petitioner submitted the jurisdiction of court or tribunal is derived from the Constitution, statute or by principle laid out in judicial precedent. He relied on the Supreme Court's finding in **Samuel Kamau Macharia v Kenya Commercial Bank & 2 Others [2012] eKLR** where the Court held:-

“A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law...”

16. It is his submission that the matter herein is a dispute relating to employment and labour relations and that this Court has jurisdiction to deal with the matters in issue. He further submitted that the Court is not automatically stripped of jurisdiction simply because issues concerning the interpretation and application of the Constitution arise in matters relating to employment and labour relations and Article 162

(2) (a) of the Constitution.

17. It is the Petitioner's submission that this Court has jurisdiction to determine questions or disputes arising from any appointments governed by Articles 10, 27, 41 (1), 47, 73 (2) (a) and 232 of the Constitution.

18. He further submitted that there is no provision in the Constitution, express or implied which exempts the impugned appointments from Article 162 (2)(a) of the Constitution. Therefore, the appointments made under the NLC Act are therefore subject to Article 41 (1) of the Constitution.

19. He submitted that it is settled law that this court is vested with the jurisdiction to deal with constitutional issues arising within matters under its jurisdiction. In support of his argument he relied on the decisions by this Court in **Okiya Omtatah Okoiti v President of Kenya & 9 Others [2016] eKLR** and **Okiya Omtatah Okoiti v The National Executive of the Republic & 6 Others [2019] eKLR** and submitted though the decisions are persuasive the legal principles involved herein and in the cases therein is the same and the facts are similar.

20. The Petitioner submitted that it is totally wrong for the Respondents and the Interested Parties to argue that this Court only has jurisdiction to hear and determine disputes relating to or arising out of employment or contracts.

21. According to the Petitioner, such an argument amounts to ousting the provisions of Article 22 (2) (b) & (c) and Article 258 (2) (b) & (c) in matters concerning Article 41 and related issues. In addition, Article 23 (1) must be read with Article 162 (2) (a) of the Constitution. He relied on the decision in **Karisa Chengo, Jefferson Kalama Kengha & Kitsao Charo Ngati v Republic [2015] eKLR** where the Court of Appeal held:-

“By being of equal status, the High Court therefore does not have the jurisdiction to superintend, supervise, direct, guide, shepherd and/or review the mistakes, real or perceived, of the ELRC and ELC administratively or judiciously as was the case in the past. The converse equally applies. At the end of the day however, ELRC and ELC are not the High Court and vice versa.”

22. The Petitioner submitted that the 4th Respondent argued wrongly that the jurisdiction of this Court over the approval process of nominees to public office carried out by Parliament is activated upon conclusion of the process and not before the process.

23. In respect of this, he submitted that whenever the issue of jurisdiction is raised due to the existence of a dispute resolution process that is provided under statute, the Court should examine the nature of the case and the reliefs sought to determine whether or not the aggrieved party would get redress elsewhere.

24. He submitted that Parliament does not have jurisdiction to determine disputes regarding the violations of the Constitution and/or to issue remedies for the violation of the Constitution. He relied on the decision in **Mohamed Ali Baadi and Others v Attorney General & 11 others [2018] eKLR**.

25. He further submitted that the issues raised in the Petition can only be addressed by a court of law. In support of this he relied on the decision in **Federation of Women Lawyers (FIDA-K) & 5 Others v Attorney General & Another [2011] eKLR**.

26. He submitted that the parliamentary approval committee focuses on the capacity or the suitability of the nominee to hold office and not the constitutionality or otherwise of the appointing authority.

27. In addition, the reliefs sought in the Petition require the authoritative interpretation and application of the Constitution and statute, which is not within the mandate of the National Assembly. He maintained that the cause of action does not arise from the actions of the National Assembly but those of the President and Selection Panel.

28. The Petitioner submitted that there was neither misjoinder of interested parties nor omission of any party to the proceedings omitted. It was his submission that the interested parties are persons with a legitimate stake and an identifiable interest since the orders sought negatively affect them. He relied on Rule 5 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 which provides for the addition, joinder, substitution and striking out of parties.

29. He urged the Court to dismiss the Preliminary Objection with costs being borne by the Respondents and 1st and 8th Interested Parties and should the Court find that the Preliminary Objection is successful it should not award the costs as the suit is one between a private citizen and the state.

4th Respondent's submissions

30. The 4th Respondent submitted that it is trite law that the issue of jurisdiction of a court or tribunal once raised must be determined *in limine* and where the Court or tribunal finds that it lacks jurisdiction, it must put its tools down. He relied on the decision in **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited [1989] eKLR** where the court held that jurisdiction is everything and without it a Court has no power to make one more step.

31. The 4TH Respondent submitted that the Petitioner's Notice of Motion and Petition offend the doctrine of separation of powers & principles enunciated by the Supreme Court in **Justus Kariuki Mate & another v Martin Nyaga Wamvora & another [2017] eKLR** where it held:-

“From the course of reasoning emerging from such cases, it is possible to formulate certain principles, as follows:

- a) each arm of Government has an obligation to recognize the independence of other arms of Government;*
- b) each arm of Government is under duty to refrain from directing another Organ on how to exercise its mandate;*
- c) the Courts of law are the proper judge of compliance with constitutional edict, for all public agencies; but this is attended with the duty of objectivity and specificity, in the exercise of judgment;*
- d) for the due functioning of constitutional governance, the Courts be guided by restraint, limiting themselves to intervention in requisite instances, upon appreciating the prevailing circumstances, and the objective needs and public interests attending each case;*
- e) in the performance of the respective functions, every arm of Government is subject to the law.”*

32. He submitted that the issues raised by the Petitioner are matters undergoing active consideration by the National Assembly and/or Committee of the National assembly thus this Court can only interfere upon the conclusion by the National Assembly, of the process and not before the process.

33. He further submitted that the Application and the Petition violate Article 117 of the Constitution which as read with Article 19 (3) (c) of the Constitution, has the effect of suspending the application of the Bill of Rights and by implication he application of Article 165 (3) (b) in relation to matters undergoing active consideration by Parliament or any of its Committees. He relied on the decision in Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR and Robert N Gakuru v Governor Kiambu County & 3 Others [2013] eKLR.

34. He submitted that the under the doctrine of ripeness this Court has no jurisdiction to entertain the instant application for reason that Section 7 of the Public Appointments (Parliamentary Approval) sets out the issues for consideration by the relevant House of Parliament and pursuant to this section the National Assembly ascertains whether in making the appointments, the President took into account national values and principle of governance in Article 10 including integrity, suitability and regional balance. He relied on the Court of Appeal decision in National Assembly of Kenya & another v Institute for Social Accountability & 6 Others [2017] eKLR where the Court held:-

“Since there was no actual live dispute between the national and county governments about CDF and if any, the mechanisms for resolving such disputes was not employed, the questions which were brought to High Court for determination had not reached constitutional ripeness for adjudication by the Court”

35. He submitted that the principle of avoidance provides that the court will not determine a Constitutional question where there is some other basis upon which the question could have been determined. It relied on the decisions in Communications Commission of Kenya & 5 Others and Royal Media Services & 5 Others [2014] eKLR and Okiya Omtatah Okoiti v National Assembly of Kenya & 4 Others Interested Party; Edward Ouko 5 Others [2019] eKLR and submitted that this Court lacks jurisdiction to intervene during active parliamentary proceedings.

1st and 8th Interested Parties Submissions

36. The 1st and 8th Interested Parties submitted that this Honourable Court lacks jurisdiction to make any orders relating to this Petition and/or dispose of the Petition on the following grounds:-

“Firstly, this Honourable Court being a specialized Court enjoys limited jurisdiction both by the Constitution of Kenya, 2010 and the Employment and Labour Relations Court Act (No. 20 of 2010 and that the High Court still enjoys jurisdiction in matters as indicated under Article 165(3) of the Constitution of Kenya, 2010”.

37. It is further submitted that the Petitioner is incapable of lodging the Petition as he is neither an employee vis-à-vis any of the other parties to the Petition, nor is he an employer. The 1st and 8th Interested Parties contend that there is no employer/employee relationship that exists between the Petitioner and any of the parties to the Petition.

38. The 1st and 8th Interested Parties further contend that the Petition as filed is not a Labour Dispute as defined in the Collins Dictionary and therefore this Honourable Court lacks jurisdiction to entertain the same. Ultimately, it is further submitted that the Employment and labour Relations Court Act does not recognize the disputes of the nature lodged in the instant Petition.

39. The 1st and 8th Interested parties further contend that they have been joined in this proceedings without leave of this Honourable Court which goes against the spirit of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and in particular Rule 7 thereto. To fortify their arguments the 1st and 8th Interested Parties relied on the Supreme Court decision in the case of Republic vs. Karisa Chengo & 2 Others (2017) eKLR.

3rd Respondent's Further Submissions

40. In his further submissions, the 3rd Respondent submits that a Court's jurisdiction is determined on the basis of the pleadings and not the merits of the case. He disagrees with the Petitioner's submissions that there need not exist an employment relationship for this Court to have jurisdiction.

41. It is his view that Courts are prohibited from arrogating jurisdiction to themselves where the law does not grant them such jurisdiction. This Court's jurisdiction should therefore be exercised within the provisions of section 12 of the Employment and Labour Relations Act.

42. The 3rd Respondent also submits that this Court lacks the jurisdiction to transfer this matter to another Court of competent jurisdiction. It is also his submissions that any action undertaken by a Court after finding that it lacks jurisdiction is a nullity. To buttress this position, he relies on the cases of County Assembly of Kisumu & 2 Others vs. Kisumu County Assembly Service Board & 6 Others [2015] eKLR and Kenya Ports Authority vs. Modern Holdings (EA) Limited [2017] eKLR.

43. The 3rd Respondent also reiterates that where a specific dispute resolution mechanism has been prescribed by the Constitution or statute, parties should first exhaust that mechanism before invoking the jurisdiction of the Court and relies on the cases of Council of County Governors vs. Lake Basin Development Authority & 6 Others [2017] eKLR, Speaker of the National Assembly vs. Njenga Karume [2008] eKLR, Bethwell Allan Omondi Okal vs. Telkom (K) Limited (Founder) & 9 Others [2017] eKLR and Dickson Mukweluine vs. Attorney General & 4 Others HCC Petition 390 of 2012.

44. It is his view that the Court has the option of staying the proceedings where it finds it has jurisdiction until the other mechanism is exhausted or bringing the proceedings to an end to give the Petitioner the opportunity to explore that mechanism.

45. The 3rd Respondent submits that the Petitioner should be condemned to pay the Respondents' costs as the Application has not been brought in good faith hence an abuse of the Court process. He relies on the case of Ashok Kumar Pandey vs. State of West Bengal AIR 2004 SC 280.

46. I have considered the averments of all the Parties. I consolidate issues of determination as follows:-

1. Whether the Petitioner has locus standi for file this Petition.

2. Whether the application succeeds.

3. Who bears costs

47. On the first issue, this Court's jurisdiction has long been established and is settled in law that under Article 162(2) of the Constitution, this Court has jurisdiction to handle any matter relating to employment and labour relations. The instant Petition relates to the appointment of National Land Commission Commissioners who are elected and appointed under Chapter 15 of the Constitution of Kenya and Acts of Parliament.

48. Article 248 of the Constitution specifically lists the National Land Commission as one of such independent commissions but the composition and appointment and terms of office is provided for in the National Land Commission Act. It is envisaged that the Commissioners so appointment will be remunerated out of funds taken out of the consolidated fund.

49. In determining whether this Court has jurisdiction therefore in this Petition relating to National Land Commission Commissioners, I would need to determine whether the nature of engagement and work they will be conducting will be in the form of an employment.

50. Halsbury's Laws of England Vol. 1 26, 4th Edition - paragraph 3 states that:-

“There is no single test for determining whether a person is an employee, the test that used to be considered sufficient, that is to say the control test, can no longer be considered sufficient, especially in the case of the employment of highly skilled individuals, and is now only one of the particular factors which may assist a court or tribunal in deciding the point. The question whether the person was integrated into the enterprise or remained apart from and independent of it has been suggested as an appropriate test, but is likewise only one of the relevant factors, for the modern approach is to balance all of those factors in deciding on the overall classification of the individual. The factors relevant in a particular case may include, in addition to control and integration: the method of payment; any obligation to work only for that employer, stipulations as to hours; overtime, holidays etc; arrangements for payment of income tax and national insurance contribution; how the contract may be terminated; whether the individual may delegate work; who provides tools and equipment; and who, ultimately, bears the risk of loss and the chance of profit. In some cases, the nature of the work itself may be an important consideration”.

51. In relation to the National Land Commission Commissioners, they have an obligation to work only for one employer, there are provisions on how they would work, how they may be removed and even how to be paid. Their positions fall squarely under a definition of a would be employee and therefore their appointment is a matter for which this Court is ceased with jurisdiction. I therefore return the verdict that this Court had jurisdiction to entertain this Petition.

52. On the second issue, the Applicants have argued that the Petitioner has no locus to file this Petition. I note that this Petition is filed under Article 22 of the Constitution amongst other articles. Article 22 of the Constitution provides as follows:-

1) “Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

2) *In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by:-*

- a) a person acting on behalf of another person who cannot act in their own name;*
- b) a person acting as a member of, or in the interest of, a group or class of persons;*
- c) a person acting in the public interest; or*
- d) an association acting in the interest of one or more of its members.*

53. It is clear from this provision that every person has a right to institute a Petition such as the one before Court. To claim that the Petitioner has no locus is therefore to miss the point and I return the verdict that the Petitioner has a locus to institute this Petition and the Petitioner is rightly before Court.

54. On the issue of remedies sought, the Applicants have alluded to two issues. First in the doctrine of ripeness and exhaustion and the issue of separation of powers.

55. Section 6(9) of the Public Appointments (Parliamentary Approval) Act No. 33 of 2011 states as follows:-

“Any person may, prior to the approval hearing, and by written statement on oath, provide the Clerk with evidence contesting the suitability of a candidate to hold the office to which the candidate has been nominated”.

56. This implies that the Petitioner herein has the right to question the suitability or otherwise of the candidate nominated even before Parliament proceeds with the approval process.

57. In the same vein, under Section 7 of the Public Appointments (Parliamentary Approval) Act, Parliament also considers a raft of issues before the approval process which includes the procedure used to arrive at the nominees which is what is in issue in the current Petition.

58. In this case then it is true that the Petitioner has an opportunity to still question the mode of appointment of the National Land Commission Commissioners before Parliament and raise issues being raised in the current Petition. He had therefore not exhausted the process before coming to this Court.

59. On the issue of separation of powers, the Supreme Court has pronounced itself on this matter in **Justus Kariuki Mate & Another vs Martin Nyaga Wambora & Another (2017) eKLR** where the Court opined as follows:-

“From the course of reasoning emerging from such cases, it is possible to formulate certain principles, as follows:-

- a) each arm of Government has an obligation to recognize the independence of other arms of Government;***
- b) each arm of Government is under duty to refrain from directing another Organ on how to exercise its mandate;***
- c) the Courts of law are the proper judge of compliance with constitutional edict, for all public agencies; but this is attended with the duty of objectivity and specificity, in the exercise of judgment;***
- d) for the due functioning of constitutional governance, the Courts be guided by restraint, limiting themselves to intervention in requisite instances, upon appreciating the prevailing circumstances, and the objective needs and public interests attending each case;***
- e) in the performance of the respective functions, every arm of Government is subject to the law”.***

60. In **Communication Commission of Kenya & 5 Others and Royal Media Services & 5 Others (2014) eKLR** at paragraph 256, similar issues arose and the Court determined that where there is some other basis upon which the question could have been determined the Court will not determine a constitution question. This was same position arrived at by the Court in **Okiya Omtata Okoiti vs National Assembly of Kenya and 4 others Interested Party: Edward Ouko & 5 Others eKLR (2019)**.

61. The Court opined that issues raised in the Petition could be raised before the relevant committee of the National Assembly for its consideration before it made its decision.

62. Having considered the arguments above, it is my finding that this Court will not interfere with the process currently before the Parliamentary Committee because the Petitioner still has a chance to raise issues he is currently raising before that committee. I therefore find that though this Court has jurisdiction to entertain this Petition, by virtue of the doctrine of ripeness and exhaustion of process, I will not delve into the issues as raised at the moment.

63. On issue of costs, I have already alluded to the fact that this is a matter which the Petitioner has locus to file and which in my view is in the public interest given the nature of work the National Land Commissioner is to perform and which in essence revolves along custody of public land. In the circumstances, I will order that each party will bear its own costs.

Dated and delivered in open Court this 24th day of September, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Omtatah - Petitioner – Present

Obuo holding brief Gatonye & Nderitu for 1st to 9th Interested Parties - Present

Kinyua for 1st and 3rd Respondents – Present

Mwendwa for 4th Respondent – Present