



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT MERU

PETITION NO. 166 OF 2019 (NAIROBI)

IN THE MATTER OF: ARTICLES 19, 20, 21, 22, 23, 24, 26, 27, 39, 43, 46, & 159 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: STATUTORY INSTRUMENTS ACT, NO. 23 OF 2013

AND

IN THE MATTER OF: STATE CORPORATIONS ACT, CHAPTER 446 OF THE LAWS OF KENYA

AND

IN THE MATTER OF: THE PUBLIC SERVICE (VALUES & PRINCIPLES) ACT, 2015

AND

IN THE MATTER OF: THE IRREGULAR, ILLEGAL, UNPROCEDURAL AND BREACH OF NATIONAL VALUES AND PUBLIC INTEREST IN THE PROCESS OF RECRUITMENT OF THE MANAGING DIRECTOR OF THE EWASO NG'IRO NORTH DEVELOPMENT AUTHORITY

BETWEEN

ALLAN BOESACK ONYANGO.....PETITIONER

AND

THE EWASO NG'IRO NORTH

DEVELOPMENT AUTHORITY.....1ST RESPONDENT

CHAIRMAN OF THE BOARD OF DIRECTORS EWASO

NG'IRO NORTH DEVELOPMENT AUTHORITY.....2ND RESPONDENT

CABINET SECRETARY, MINISTRY OF EAST AFRICA

COMMUNITY & REGIONAL DEVELOPMENT.....3RD RESPONDENT

RULING

1. This Ruling is in respect of the 1st and 2nd Respondent's preliminary objection dated 19th September 2019. The objection is that the proceedings were drawn by an unqualified person contrary to Section 34 of the Advocates Act (Cap. 16) of the Laws of Kenya, that the offending undated, unstamped and uncommissioned affidavit offends the mandatory provisions of Section 5 of the Oaths and Statutory Declarations Act, (Cap 15.) Laws of Kenya, that one George Abudho who has purportedly stamped the affidavit as the Commissioner for Oaths cannot be located from the Advocates Search Engine hence an unqualified person, and that the suit is incurably defective, incompetent

and ought to be struck out with costs. The objection was urged by Mr. Odukenya for the 1st and 2nd Respondent. Mr. Kimaita for the 3rd Respondent supported the preliminary objection.

2. The objection is one that goes to the propriety of proceedings before me and is well couched as a preliminary objection ought to. In the case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696** the remit of the preliminary was well articulated by the Court of Appeal. It was held that a preliminary objection consists of a point of law which has been pleaded or which arises out of clear implication out of pleadings. It is raised on pure points of law and is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact is to be ascertained. In this instant, the preliminary objection is on a point of law. It is asserted that the proceedings are a nullity having been commenced by an unqualified person.

3. Section 5 of the Oaths and Statutory Declarations Act, (Cap 15.) Laws of Kenya makes provision on the jurat and the attestation to be made on the place and date the oath or affidavit is taken or made. Section 5 of the Oaths and Statutory Declarations Act provides in the material part as follows:-

5. Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made

In regard to qualification to act as an Advocate, Section 9(c) of the Advocates Act (Chapter 16) Law of Kenya provides as follows:-

9. Subject to this Act, no person shall be qualified to act as an advocate unless –

(c) he has in force a practising certificate; and for the purpose of this Act a practising certificate shall be deemed not to be in force at any time while he is suspended by virtue of Section 27 or by an order under Section 60(4).

The jurat of the affidavit is not clear as to the date it was made but the stamp of George Abudho the purported 'advocate and commissioner for oaths' has a date endorsed which is some unclear date in September 2019. This is not in keeping with the provisions of Section 5 of the Oaths and Statutory Declarations Act. In addition, the purported 'advocate' is not an advocate per the search on the Law Society of Kenya portal. He is therefore unqualified person in terms of Section 9 of the Advocates Act. As such, there is merit to the preliminary objection that the proceedings before the court are incurably defective, incompetent and ought to be and is hereby struck out with costs as I hereby proceed to do. The suit is struck out with no order as to costs.

It is so ordered.

Dated and delivered at Meru this 4th day of October 2019

Nzioki wa Makau

JUDGE

I certify that this is a true

Copy of the original

Deputy Registrar