



**REPUBLIC OF KENYA**

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

**PETITIONER NO.5 OF 2018**

**KENYA COUNTY GOVERNMENT WORKERS UNION..... PETITIONER**

**VERSUS**

**COUNTY GOVERNMENT OF NAROK.....1<sup>ST</sup> RESPONDENT**

**NAROK COUNTY PUBLIC SERVICE BOARD.....2<sup>ND</sup> RESPONDENT**

**RULING**

The respondents filed Notice of Preliminary objection dated 29<sup>th</sup> June, 2018 on the grounds that the petitioner has failed to disclose the cause of action for the petitioner and that;

*a. A directive issued on 23<sup>rd</sup> April 2018 was directed at rangers who by dint of law fall into the category of uniformed and disciplined members of the Service as defined by and governed under the Wildlife Conservation and Management Act, 2013.*

*b. Pursuant to the provisions of Schedule 2, paragraph 5(1) and (2) of the said Act, all uniformed and disciplined members of the Service are prohibited from joining a trade union or any other such bodies, other than a staff association established and regulated by rules and regulations made under the Act.*

The respondents are therefore seeking to have the Notice of Motion together with the petition dated 5<sup>th</sup> June, 2018 be dismissed with costs.

The parties addressed the objection by written submissions.

The respondents as the applicants and on the objections made submitted that the backgrounds to the petition herein is that the chief warden of the Maasai Mara National Reserve issued an internal memo dated 23<sup>rd</sup> April, 2018 requiring all the officers stationed at the conservancy to withdraw their membership from the petitioner union with immediate effect. upon compliance by some wardens, others filed the petition on 5th June, 2018.

The respondents therefore submit that by dint of article 24 of the Constitution there is a limitation of rights of the rangers to be unionised under the petitioner. The directive from the chief warden is not a blanket directive against all members of the petitioner but specific to rangers stationed at the Maasai Mara National Reserve. Such is addressed under Article 24 of the Constitution and comprise a limitation which is reasonable and justifiable read together with article 41 of the Constitution.

The rangers especially those attached to field work and stationed at the Maasai Mara National Reserve and within other national parks, reserves and wildlife conservancies around the county belong to a class of persons whose duty is in the nature of that performed by officers in the Kenya Defence Forces and the National Police Service. the rights that have been limited fall within the meaning and category of article 24(5) of the Constitution. Rangers belong to uniformed wing, such as those to whom the impugned internal memo applied are intensively trained and drilled in the use of arms or the practice of paramilitary. Section 12 of the Wildlife Conservancy and Management Act, 2013 (WCMA) provides for the equipping of such members of the uniformed and disciplined cadre with firearms. Rangers fall into the category of uniformed and disciplined members of the service and section 2 defines them as such.

The respondents also submitted that the 1<sup>st</sup> and 2<sup>nd</sup> schedules to the WCMA enlists rangers as officers of the KWS established under section 7 as a body charged with conservation and management of the flora and fauna under the WCMA. The rangers play a critical role in the protection of wildlife and thus their work limited by statute and constitution. the WCMA prohibits all uniformed and disciplined members of the service from joining trade union or any other bodies other than staff association regulated under the Act.

The rangers are not denied the right of association secured under Article 36 of the Constitution but are limited in rights espoused under

article 41 of the Constitution with regard to joining trade unions.in **Gift Kambu Marandu versus Kenya Defence Forces Council and another [2017] eKLR** the court addressed the import of limitations on the rights and freedoms of officers governed under the Kenya Defence Forces Act and that section 52 of the Act limits what is termed as right to fair labour relations under article 41 of the Constitution.

In this case the petitioner cannot accord persons and officers covered under the Kenya Wildlife Service Rangers membership as its objective are to influence pay, pension and conditions of service of all unionisable employees which is not allowed under statute under the provisions of schedule 2 of the Wildlife and Management Act. as such the petition and the motions filed herein should be dismissed with costs.

The petitioner filed written submissions the and Affidavit of Roba Duba the general secretary and submitted that the objections by the respondent have no legal or constitutional basis and should be dismissed. The objections made do not meet the threshold as laid down in **Supreme Court in Civil Application No.6 of 2014 IEBC versus Jane Cheperenger & 2 others [2015] eKLR** or as in the case of **Mukisa Biscuits Manufacturers Co. Ltd versus West End Distributors [29179] EA**. There must be a pure issue of law and on the facts pleaded the court is able to deal and not require other facts to ascertain and address the suit instantly.

The directive issued on 23<sup>rd</sup> April, 2018 to the rangers requires interrogations and further hearing and cannot be determined on the averments made. The averments that the directive only related to uniformed and disciplined members of the Kenya Wildlife Service is without evidence. the petitioner's case is that the directive was aimed at all respondents' security personnel which included petitioner members. This is not discernible from the subject memo of the respondents.

There is employment of the persons referenced in the memo by the respondents and not by the KWS as stated. There is no pint of law to be addressed and the respondents are seeking to adduce evidence without authentication and as a matter of legal principles, preliminary objections filed should not be allowed to proceed.

The petitioners also submitted that n **Kenya Union of Commercial Food and Allied Workers versus Water Resources Management Authority 7 another [2015] eKLR** and in **Kenya Council of Employment Migration Agencies versus Nyamira County Government & 10 others [2015] eKLR** the court addressed the ingredients of preliminary objections which the respondent have herein failed to meet.

The averments that the petitioner members are governed by the WCMA, 2013 by virtue of being rangers is false. Section 3 of the WCMA defines a Ranger to mean a member of the service in the uniformed and disciplined cadre and includes corporal, sergeant, senior sergeant and sergeant major. 'service' is also defined to mean the KWS established under section 6 of the Act. the mandate of such service is defined under section 7 and has the power to sue and be sued in its own capacity.

KWS can thus only operate and carry out its mandate in national parks, wildlife conversation and in sanctuaries. The uniformed and armed personnel engaged by the respondents are separate and distinct from those engaged by the KWS who are governed by WCMA. The petitioner members are employees of the respondents with appointment and terms of reference and conditions of service governed under such employment. These are not uniformed employees as envisioned under the WCMA, 2013. The directive issued by the Warden at Maasai Mara Game Reserve is not administered by the KWS but by the respondents. The Maasai Mara Reserve which is in Narok County has not released its parks and reserves to the national government and remain the property of the county government.

The petitioners submitted that by dint of the Warden's directive issued on 23<sup>rd</sup> April, 2018 to the petitioner members for being uniformed and disciplined members of in essence, all KWS personnel are wardens but not all wardens are KWS personnel. The objections made should be dismissed with costs.

The petitioner filed petition herein on 5<sup>th</sup> June, 2018 on the basis that it is a trade union registered under the provisions of the Labour Relations Act, 2007 and enjoy recognition by the respondents and has concluded several Collective Agreements (CBA) spelling out terms and conditions of service for its members and the last CBA having been registered on 12th April, 2016. The petition is the respondent has directed the petitioner members to withdraw their membership with the petitioner despite being covered under the CBA.

The petition is thus seeking to restrain the respondents from compelling the petitioner members from withdrawing their membership and that the directive to withdrawal be deemed as intimidation and harassment contrary to article 41 of the constitution and the petitioner members be paid damages for the rights violations and costs.

The subject directive and one dated 23<sup>rd</sup> April, 2018 leading to the petition and objections made by the respondents herein is noted as follows;

Internal Memo

*To: All Narok County Government Security Personnel*

*From: Chief Park Warden*

*Date: 23<sup>rd</sup> April, 2018*

*Sub: Withdrawal From Union Membership*

...

*In reference to the letter dated 12<sup>th</sup> April, 2018 stating that all Security Personnel should withdraw their membership from the Union with immediate effect.*

*I therefore expect all officers to comply with the orders and append their signatures for the purpose of acknowledgement.*

*[sign]*

*Moses P Kuyioni*

*Chief Park Warden*

*Maasai Mara National Reserve. ...*

The directive by the Chief Park Warden is therefore specific and to a given audience, the *Security Personnel*.

The context of the directive is also given that such relates to the *security personnel* at *Maasai Mara National Reserve*.

Both parties agree that the respondents manage the Maasai Mara National Reserve and therein are security personnel managed under the WCMA, 2013.

Under section 2 of the WCMA, there are key definitions which shall be applied herein in accordance to the meaning assigned under the Act;

*"national reserve" means an area of community land declared to be a national reserve under this Act or under any other applicable written law;*

And,

*"ranger" means a member of the Service in the uniformed and disciplined cadre and includes corporal, sergeant, senior sergeant and sergeant major;*

And,

*"Service" means the Kenya Wildlife Service established under section 6 of this Act;*

And,

*"Warden" means an officer of the Service above the rank of Sergeant Major;*

As the petitioner has correctly submitted, under the provisions of Section 6 read together with section 7 of the WCMA, 2013 the Kenya Wildlife Service is established with various functions part of which includes;

*(a) conserve and manage national parks, wildlife conservation areas, and sanctuaries under its jurisdiction;*

*(b) provide security for wildlife and visitors in national parks, wildlife conservation areas and sanctuaries;*

In this regard therefore, under the service and under the provision of the Act, a Warden is allowed to preside over the rangers in the national reserve to provide security for wildlife and visitors in the national parks such as the respondents are running over the Maasai Mara National Reserve. The national reserve under the respondents is by operation of the law.

The Chief Park Warden therefore has authority over the Service Personnel, the rangers, the Wardens and other security personnel in the national reserve for whom the WCMA, 2013 applies.

Are the petitioner members subject to this petition exempt from the application of the constitution in the enjoyment of rights under the Employment Act, 2007 and Labour Relations Act, 2007?

The court reading of Article 24 of the Constitution, 2010 is that Article 24 (1) provides, that;

***... a right or fundamental freedom in the Bill of Rights shall not be limited except by law, and only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account the nature of the right or fundamental freedom ;***

And thus account must be given to the importance and the purpose of limitation, the nature and the extent of limitation, the need to ensure that the enjoyment of the right and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and the relationship between the limitation and its purpose and whether there are less restrictive means to achieve the purpose of such limitation as held in the case of **Robert Alai versus The Hon Attorney General & another [2017] eKLR**.

there must be reasonable and justifiable reasons for the limitation to a right.

**Article 24** is in mandatory terms that the purported limitation must be justifiable in an open and democratic society based on human dignity, equality and freedom. Further, **Article 24 (3)** places an obligation to the state or person seeking to justify a particular limitation to demonstrate to the court or tribunal or other authority that the requirements of Article 24 have been satisfied.

in this case the respondents have applied the provisions of WCMA, 2013 and Schedule 2, paragraph 5(1) and (2) of the Act. that the subject rangers with regard to the directive issued by the Chief Warden on 23<sup>rd</sup> April, 2018 related to uniformed and disciplined officers and who are stationed within the Maasai Mara National Reserve and pursuant to the provisions of section 12 of the WCMA, 2013 these are uniformed and disciplined officers exempt and limited under the constitution from engaging in unionisation.

The petitioner does not challenge the fact that the directive by the chief Warden related to the uniformed and disciplined officers serving under the WCMA, 2013 save that these are the employees of the respondents and not employees of the KWS and thus not subject to the limitations relied upon. That such uniformed and disciplined officers are not under the administrative authority of the KWS and their employment terms and conditions of service are regulated under the CBA between the petitioner and the respondents.

Therefore the fact of the rangers/security personnel referenced under the directive of 23<sup>rd</sup> April, 2018 is as given. These are uniformed and discipline officers in the service of the respondents and stationed to offer security services under the parameters of WCMA, 2013 which is regulated under the service of the KWS.

In thus addressing the terms and conditions of service and for which the petitioner and the respondent must address in negotiating the CBA under the Labour Relations Act, 2007 or the Employment Act, 2007 the legal framework applicable is that Section 3 of the Employment Act, 2007 create specific exemptions on its application to the following officers/persons;

### **3. Application**

*(1) This Act shall apply to all employees employed by any employer under a contract of service.*

*(2) This Act shall not apply to—*

*(a) the armed forces or the reserve as respectively defined in the Armed Forces Act (Cap. 199);*

*(b) the Kenya Police, the Kenya Prisons Service or the Administration Police Force;*

*(c) the National Youth Service; and*

*(d) ...*

The Labour Relations Act, 2007 on the other hand replicate the same provisions under section 3 as follows;

### **3. Application**

*This Act shall not apply to any person in respect of his employment or service—*

*(a) in the armed forces, or in any reserve force thereof;*

*(b) in the Kenya Police, the Administrative Police Force, the Kenya Prisons Service and the National Youth Service, or in any reserve force or service thereof.*

The provisions of article 24 read with article 41 of the Constitution, 2010 thus brought into perspective allow possible limitations of fundamental human rights where addressed objectively in an open and democratic society based on **human** dignity, equality and freedom, taking into the nature of the rights limited there is a justification.

If that limitation is justifiable, then any incidental limitation of other rights will also be justifiable.

The *security personnel* serving under the Chief Warden within the Maasai Mara National Reserve under the respondents and regulated under the WCMA, 2013 and thus removed from the application of such stature from unionisation under the respondent under the provisions of section 3 of both the Labour Relations Act, 2007 and Employment Act, 2007 read together with section 7 of the WCMA, 2007 all read together with article 24 of the constitution, 2010 which specifically and directly address Article 41 of the Constitution, 2010. The rights in the Bill of Rights may be therefore be limited only in terms of the law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors,

including the limitation of uniformed and disciplined officers from unionisation and the importance of the limitation being these are uniformed and disciplined officers removed by statute from the application of the same.

In addressing the question of limitation of rights under the Bill of Rights the **Constitutional Court of South Africa in the case of S versus Bulwana 1996 (1) SA 388 (CC)**, at paragraph 18 held that;

*In sum, therefore, the Court places the purpose, effects and importance of the infringing legislation on one side of the scales and the nature and effect of the infringement caused by the legislation on the other. The more substantial the inroad into fundamental rights, the more persuasive the grounds of justification must be.*

And in **Republic versus Makwanyane 1995 (3) SA 391 (CC)** at paragraph 104 the same court held that;

*... there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case-by-case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process, the relevant considerations will include the nature of the right to that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation as to be necessary, whether the desired ends could reasonably have been achieved through other means less damaging to the right in question.*

In this regard therefore, the subject directive by the Chief Park Warden dated 23<sup>rd</sup> April, 2018 directed to the security personnel who are uniformed and disciplined officers covered and defined under the provisions of the WCMA, 2013 address a matter which the court now addressed under the objection of the respondents can address and deal at this stage with finality under the principles laid down in the case of **Mukisa Biscuits**, cited above;

*... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop.*

**Accordingly, the objections by the respondents are hereby found with merit. The outcome is that directive issued on 23<sup>rd</sup> April 2018 directed at rangers who by dint of law fall into the category of uniformed and disciplined members of the Service as defined by and governed under the Wildlife Conservation and Management Act, 2013 are removed from the jurisdiction of the court.**

**The petition is hereby struck out.**

**Both parties address an important point of law and no orders on costs.**

Delivered at Nakuru this 17<sup>th</sup> day of December, 2019.

**M. MBARU**

**JUDGE**

In the presence of: .....