



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 86 OF 2017

IN THE MATTER OF: ARTICLES 19, 20, 22(1) & (2)

(a), 23, 162(2) (a), 165(5) (b) and 258(1) & (2) OF

THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF: THE ALLEGED CONTRAVENTION AND VIOLATION

OF THE NATIONAL VALUES AND PRINCIPLES OF GOVERNANCE IN

ARTICLES 1, 2, 3(1), 10(1) & (2)(a) & (c), 73,75(1) AND 232(1)(a),(d),(e),

(f) & 2 AND 259(1) OF THE CONSTITUTION OF KENYA,2010

IN THE MATTER OF: THE ALLEGED CONTRAVENTION AND VIOLATION

OF THE RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES

27, 41(1) AND 47 OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF: THE ALLEGED FAILURE TO TAKE DISCIPLINARY

ACTION AGAINST DR. HEZEKIAH CHEPKWONY AND DR. PIUS WANJALA

BETWEEN

OKIYA OMTATAH OKOITI.....PETITIONER

v

MINISTRY OF HEALTH.....1st RESPONDENT

PUBLIC SERVICE COMMISSION.....2nd RESPONDENT

THE ATTORNEY GENERAL.....3rd RESPONDENT

DR. HEZEKIAH CHEPKWONY.....4th RESPONDENT

DR. PIUS WANJALA.....5th RESPONDENT

RULING NO. 2

1. Mr. Okiya Omtatah Okoiti (Petitioner) moved Court on 11 October 2017 alleging that the Ministry of Health (1st Respondent) and the Public Service Commission (2nd Respondent) had violated the Constitution, 2010 by failing to take disciplinary action against Dr. Hezekiah

Chepkwony (4th Respondent) and Dr. Pius Wanjala (5th Respondent) and further that the 4th and 5th Respondents had created a hostile work environment for employees of the National Quality Control Laboratory (there were other allegations).

2. Filed at the same time was a motion under certificate of urgency seeking directions as would facilitate the course of justice.

3. Wasilwa J certified the application as urgent and directed that it be served upon the Respondents and be mentioned before Ndolo J on 17 October 2017.

4. When the application came up before Ndolo J on 17 October 2017, none of the parties were in Court and it was taken out of the cause list.

5. The file was next in Court on 18 October 2017 when Mbaru J directed that it be placed before Ndolo J on 25 October 2017 (it was not).

6. On 7 November 2017, Abuodha J directed that the application be placed before Ndolo J on 20 November 2017 for directions (file was presented before Deputy Registrar and she fixed mention for 23 November 2017. It appears Ndolo J did not sit on that day).

7. On 18 December 2017, the 4th and 5th Respondents filed an application under urgency seeking a declaration that the Employment and Labour Relations Court had no jurisdiction to entertain the Petition and therefore it should be struck out.

8. Wasilwa J certified the application urgent and directed that it be served for directions to be given on 19 December 2017.

9. On 19 December 2017, Ndolo J directed that parties appear in Court on 23 January 2018 for directions.

10. When the parties appeared before me on 23 January 2018, the Petitioner proposed that the 4th and 5th Respondents application on jurisdiction be treated as a Response to the Petition (Petitioner had filed a motion dated 19 January 2018 seeking orders in that respect).

11. The 1st to 3rd Respondents supported the proposal by the Petitioner. The 4th and 5th Respondents opposed the proposal.

12. In a ruling delivered on 26 January 2018, the Court gave the following directions

(i) The 4th and 5th Respondents application dated 18 December 2017 to be taken as part of their answer/replies to the Petition.

(ii) The Respondents to file and serve their substantive answers/replies to the Petition on or before 16 February 2018.

(iii) Petitioner at liberty to file and serve replies (if any) to the Respondents answers/replies and submissions on or before 23 February 2018.

(iv) Respondents to file and serve submissions on or before 2 March 2018.

(v) Submissions to be highlighted on a convenient date to be fixed on 2 March 2018.

13. On the same day, the 4th and 5th Respondents filed a motion seeking orders that the *National Quality Control Laboratory* be enjoined as an Interested Party to the Petition.

14. The Court directed the Petitioner and 1st to 3rd Respondents to respond to the joinder application and *inter partes* hearing was fixed for 7 February 2018.

15. On 1 February 2018, the 4th and 5th Respondents filed another motion under certificate of urgency seeking a review and vacation of the directions issued on 26 January 2018.

16. When the parties appeared in Court on 7 February 2018, the Court directed that the joinder application would be heard on 22 February 2018, and the review application would be determined thereafter.

17. On 22 February 2018 it turned out that the 1st to 3rd Respondents had not served their replying affidavit to the joinder application and the application was rescheduled to 8 March 2018.

18. On 27 February 2018, the 4th and 5th Respondents filed yet another application seeking the attendance of Julius Korir and Francis Musyimi for cross examination in respect of a replying affidavit filed in Court on behalf the 1st to 3rd Respondents on 22 February 2018 in opposition to the joinder application.

19. Wasilwa J directed that the application be served and further directions be given on 8 March 2018.

20. When the parties appeared in Court on 8 March 2018, Ms. Odhiambo, State Counsel for the 1st to 3rd Respondents made an oral application to have the replying affidavit withdrawn for having been deposed by the wrong person.

21. Ms. Odhiambo also requested for leave to be allowed to put on record another replying affidavit (sworn by the correct person).
22. The Petitioner in a brief oral response urged that since an affidavit was evidential, it could not be withdrawn and that the proper course would be for the Court to expunge it from the record.
23. The 4th and 5th Respondents strongly objected to the request by Ms. Odhiambo and urged that the request was an afterthought as it came after they had filed the application raising objections to the replying affidavit.
24. These Respondents also objected to the grant of leave to replace the replying affidavit.
25. According to these Respondents, the 1st to 3rd Respondents were intent on delaying the determination of the dispute before Court.
26. It appears to the Court that there might be forces out to derail a proportionate and expeditious determination of the Petition.
27. That appears to be so because the Petitioner in his initial motion just sought procedural directions as to the determination of the Petition.
28. However, application after application seeking orders which may not favour the proportionate determination of the Petition have become the tactic of choice (despite directions by the Court).
29. What was before Court, was an application for joinder of the *National Quality Control Laboratory* as an Interested Party.
30. The 1st to 3rd Respondents had indicated an intention to oppose that application but filed a replying affidavit sworn by a person other than the one named therein.
31. That is a false affidavit and the Court has no hesitation in expunging it from the record.
32. Any of the parties who wish to pursue the question of falsity should follow an appropriate cause but which cause should not be detrimental to the determination of the Petition herein.
33. The Court will not accede to the request by the 1st to the 3rd Respondent to replace the replying affidavit.
34. The Court therefore orders that the application for joinder of the *National Quality Control Laboratory* proceeds to hearing forthwith, and further that the 1st to 3rd Respondents may address the Court on the legal questions implicated by the joinder.
35. Costs in the Cause.

Delivered, dated and signed in Nairobi on this 13th day of March 2018.

RADIDO STEPHEN

JUDGE

Appearance

Petitioner Okiya Omtatah Okoiti (in person)

For 1st to 3rd Respondents Ms. Odhiambo, State Counsel

For 4th and 5th Respondents Ms. Kiarie instructed by Kinyanjui Njuguna & Co. Advocates

Court Assistant Lindsey