



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 13 OF 2018

IN THE MATTER OF: ARTICLES 10(2C), 22(1) & (2)(a)(c), 23(1),

41(1)(2b), 48, 47(1)(2), 50(1), 165, 236, 179(6), 183, 236(a)(b) AND

258(1) & (2)(c) OF THE CONSTITUTION OF KENYA 2010

IN THE MATTER OF: THE ALLEGED CONTRAVENTION AND

VIOLATION OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF: THE ENFORCEMENT OF THE BILL OF

RIGHTS PARTICULARLY ARTICLES 27(1) & 41 (1)(2B)

OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF: THE CONSTITUTIONAL VALIDITY OF THE

DECISION BY THE 1ST RESPONDENT OF INTERDICTING THE

PETITIONER WITHOUT GIVING A FAIR HEARING IN

TOTAL VIOLATION OF ARTICLE 47 (1) AND (2)

OF THE CONSTITUTION OF KENYA

IN THE MATTER OF: THE EMPLOYMENT ACT 2007, LAWS OF KENYA

IN THE MATTER OF: THE COUNTY GOVERNMENTS ACT NO. 17 OF 2012

IN THE MATTER OF: FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015

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

BETWEEN

JUNE MAWIA MUNYAO.....CLAIMANT

VERSUS

KITUI COUNTY PUBLIC SERVICE BOARD.....1ST RESPONDENT

COUNTY SECRETARY COUNTY

GOVERNMENT OF KITUI.....2ND RESPONDENT

COUNTY EXECUTIVE COMMITTEE

FINANCE AND PLANNING.....3RD RESPONDENT

THE COUNTY GOVERNMENT OF KITUI.....4TH RESPONDENT

RULING

Introduction

1. The Preliminary Objection before the court is dated 19th March, 2018, brought by the Petitioner and it raises the following grounds:

- a) That the Replying affidavits by Alexander Kimanzi and Japheth Mbiti Muthengi respectively signed at Kitui Town but commissioned in Nairobi on 2nd March, 2018, by Patrick K. Kiprop a Commissioner for Oaths on the same day contravene the provisions of Section of the Oaths and Statutory Declarations Act.
- b) That the 1st respondent's affidavit dated 2nd March, 2018, sworn on behalf of the County Public Service Board-Kitui without any evidence of a meeting or resolution by the Kitui County Public Service Board's minutes and resolution under the hand and seal of the Kitui County Public Service Board offends the provisions of section 54 of the Interpretation and General Provisions Act
- c) That representation by Chelanga Kihungi & Associates without any evidence of a meeting or resolution by Kitui County Public Service Board appointing the said firm of Advocates herein offends the provisions of Section 54 of the Interpretation and General Provisions Act.
- d) That the said Affidavits sworn by Japhet Mbiti Muthengi and Alexander Kimanzi on 2nd March 2018 and exhibits annexed thereto are in the premises incurable and ought to be struck out.
- e) That none of the exhibits annexed to the 1st and 2nd Respondents' Affidavits dated 2nd March, 2018 and commissioned by Mr. Patrick K. Kiprop a Commissioner for Oaths are admissible in evidence for non-compliance with the requirements of the Provisions of Rule 9 of the Oaths and Statutory Declarations Rules.
- f) That alterations by Mr. Chelanga Advocate of the place of swearing of the affidavit from Kitui to Nairobi has been altered from the primary mandate of taking the oath thereof in contravention of provisions of the Oaths and Statutory Declarations Act, Cap 15.
- g) That representation by Chelanga Kihungi & Associates Advocates raises serious ethical issues arising from conflict of interest of the Kitui County Public Service Board mandated under Article 236 of the Constitution to protect public offices of the 4th Respondent strict adherence to due process and the rule of law in exercising its disciplinary control.

2. The P.O was opposed by the respondents who before the hearing filed the Notice of Motion dated 21.5.2018 seeking to regularize the errors on the exhibits annexed to the Replying Affidavit and for any other court orders as the court may deem fit to meets the ends of justice. The P.O was disposed of by written submissions which were highlighted on 5.6.2018.

Background

3. The Petitioner brought this petition on 21.2.2018 together with a Notice of Motion under certificate of urgency. The respondents appointed the law firm of Chelanga Kihungi & Associates Advocates to represent them in the suit and on 22.2.2018 the petitioner counsel verbally raised objection to the said counsel representing the first Respondent together with the other 3 respondents on ground of conflict of interest because the County Public Service Board (CPSB) and the County Government are two distinct legal entities.

4. Mr. Chelanga verbally opposed the said objection by contending that there was no conflict of interest. Mr. Wamalwa for the petitioner never pressed the Preliminary objection (P.O) and instead urged for a conservatory orders in favour of the petitioner which Mr. Chelanga never opposed but sought leave to reply to the motion and the petition. The leave and the conservatory orders being unopposed were both granted and the motion fixed for hearing on 7.3.2018.

5. On 6.3.2018, the respondents filed two impugned Replying Affidavits sworn on 2.3.2018 and on 7.3.2018 the parties recorded a consent to compromising the motion by confirming the interim conservatory order issued on 22.2.2018 in order to pave way to faster disposal of the petition. It was further agreed that the petitioner was at liberty to file supplementary affidavit within 7 days and that the petition and the replying affidavit filed were to form the pleadings. Finally, the parties took directions to dispense with calling of witnesses and instead counsel to make oral submissions in the open court on 20.3.2018.

6. On 19.3.2018 the petitioner filed the present P.O. which essentially seeks for the striking out of the 2 Replying Affidavit filed by the respondents and also reviving of the objection that law firm currently representing the defence cannot continue to do so for both the CPSB and the County Government. The parties filed written submissions to dispose of the P.O and highlighted the same in Court on 5.6.2018.

Petitioner's submissions.

7. In support of the Preliminary Objection it is submitted that: the affidavit by Japhet Mbiti Muthengi sworn on 2nd March, 2018, is

incompetent for voicing evidence on behalf of the Kitui County Service Board without any evidence of authority to give evidence to any authority or Board. It is further submitted that the mere fact that the said Japheth Mbiti Muthengi is a secretary to the Kitui County Public Service Board does not give him an automatic right to give evidence on behalf of the Board. He cites the case of **Oduor Vs Afro Freight Forwarders (2007) 2KLR 652** where it was held:

“Before making final orders this Court must note with dismay that the Replying Affidavit was drawn and sworn by Oruko Nyawida Advocate who is the Counsel for the Plaintiff in conduct of this case. The mere fact that he acts for the Plaintiff in no way gave him authority to swear affidavit. Nor does he on the affidavit claim to have authority by the plaintiff to swear the said affidavit.

In my opinion therefore the Replying Affidavit was sworn by a stranger in view of the fact that the deponent fails to reveal the source of his authority to swear it. The failure in my view is a substantial defect which renders the said affidavit incompetent and therefore amenable to striking it out. I accordingly hereby strike it out.”

8. Mr. Wamalwa submits that the said Japheth Mbiti also contravened the provisions of sections 62 and 63 of the Evidence Act. That in his affidavit he refers to actions by the Kitui County Public Service Board contained in minutes, decisions, resolutions, delegation of disciplinary power, authorisation or recommendation to any of the Respondents or otherwise. That such oral affidavit evidence about contents of such decisions contravenes section 64 and 98 of the Evidence Act.

9. That the Affidavits by the 1st and 2nd Respondents claiming without any evidence that the Kitui County Government at a quorate session decided to delegate to the 2nd Respondent disciplinary control of public officers is incompetent for the reason that no evidence has been exhibited before the Court showing authority authenticated by the seal of the County Public Service Board and signature of the Chairman authorising the 1st Respondent to give any such evidence by way of affidavit.

10. It is also submitted that the Respondents have also not shown authority by the Kitui County Public Service Board delegating disciplinary control of Public Officers in the service of the 4th Respondent to the 2nd Respondent. That the Affidavits as filed offend the provision of sections 4 and 5 of the Oaths and Statutory Declarations Act, Cap 15, by altering the place of commission to read Nairobi. That the alteration proves that the oath was administered in the absence of the deponents. He relied on the case of **C.M.C Motors Group Ltd Vs Bengeria Arap Korir Trading as Marben School & Another (2013) eKLR** where the Court found that the affidavit was signed in Nairobi and commissioned in Mombasa and the Court struck out the affidavit in question.

11. It is further submitted on behalf of the Petitioner that the exhibits attached to the affidavit are not sealed in accordance with Rule 9 of the Oaths and Statutory Declarations Rules. Counsel cites the case of **Abraham Mwangi Vs S.O. Obo and Another** where Hayanga J. struck out improperly marked exhibits from the record.

12. Mr. Wamalwa also submits that there is conflict of interest by the continued representation of the Respondents by the same firm of Advocates. It is submitted that the Petitioner will be prejudiced if this continues because right to due process will not be safeguarded as the County Government will act as judge, advocate and investigator which in their view is unfair and contrary to Article 27 (1) of the Constitution. Counsel prays for the Preliminary Objection to be allowed as drawn.

Respondents' submissions

13. The Respondent submits that the law on Preliminary Objection is set out in the case of **Mukisa Biscuit Vs West End Distributors Limited (1969) E.A. 696**. The rule on Preliminary Objection therein is that it should raise a pure point of law and not set out contestable facts. Mr. Chelanga for the Respondent submits that the Preliminary Objection is bad in law since it raises matters of fact as opposed to law. That no answer to the Preliminary objection can be proffered without ascertaining the factual bedrock of the issue and therefore it should fail. He cites the case of **George Oraro Vs Barak Eston Mbaja (2005) eKLR** where Ojwang J defined a Preliminary Objection as a point of law which must not be blurred with factual details liable to be contested. Where a court needs to investigate fact, a matter cannot be raised as a preliminary point.

14. It is argued on behalf of the Respondent that the Petitioner cannot raise a preliminary objection in her own suit as it must be directed at disposing of a suit or an application without hearing on merit. Mr Chelanga cited the case of **Mukisa Biscuit vs West End Distributors (supra)** at Page 700, per Law JA:

“A preliminary Objection consists of a point of law which has been pleaded or arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.”

15. On conflict of interest it is submitted by the Respondent's counsel that such an allegation is a serious one which must be specified by adducing evidence of such conflict of interest. That the same cannot be raised by way of preliminary objection because all matters of conflict of interest require an examination of facts such as interests of parties and confidential information to be protected. He relied on the case of **National Bank of Kenya Limited vs Kipkoech Korat & Another (2005)eKLR** to buttress this position.

16. Counsel submits that for the Court to interfere with the choice of counsel exceptional circumstances must be proved as was held in the case of **William Audi Ododa & Another Vs John Yier & Another Nairobi CA No. 360 of 2004 (UR)**. Further Mr. Chelanga was of the view that the law presumes that the Respondents have a common interest in defeating the case against them. Therefore, a stranger has no *locus standi* to raise an issue of conflict of interest.

17. As to the impugned affidavits Counsel submits that the Affidavit of Alex Kimanzi had a typographical error reading Nairobi which typo was corrected by cancellation by pen and countersigned, a standard practice in pleadings. That the allegation that the deponent s were not present when the oath was being commissioned counsel submits that it is only the deponents who can prove whether they were present or not at the commissioning of the affidavit or not. That it was the firm of Chelanga Kihungi & Associates drafted the affidavits and in good faith noticed the typographical error and in good faith countersigned the correction. He cites the case of **Hamzan Musuri Kevogo Vs IEBC & 3 Others (2017) eKLR** where Sitati J stated:

“In the instant case, I do not think that swearing the affidavit in Nairobi and having it commissioned in Kakamega is either misleading or prejudicial to the Applicant. This court notes that in Kenya, there no statutory limitations as to where a commissioner for oaths can take oath. Her/she can do so in any part of the country. In the instant case the Oath was administered in Nairobi though the commissioner’s stamp gives an address in Kakamega.”

18. Further that the place of swearing the affidavit is immaterial provided it is in Kenya as was stated in the case of **Tom Okello Vs NSSF (1999) eKLR**. Counsel also submitted that the issue of the affidavits was one of form and not substance. He relied on section 72 of the Interpretation and General Provisions Act which provides:

“Save as otherwise expressly provided, whenever a form is prescribed by a written law, an instrument or document which purports to be in that form shall not be void by reason of a deviation therefrom which does not affect the substance of the instrument or document, or which is not calculated to mislead.”

19. On the issue of the Deponents lacking the authority to swear the affidavits it is submitted that any person disputing authority should rebut the presumption that the officers have authority as stated on oath. That this authority has not been controverted by either the affidavit evidence or otherwise. That this position is a long standing common law presumption enunciated in the case of **Antonio C. Bustillo Vs People of the Philippines G.R. No. 160718 Supreme Court of Philippines**.

20. Regarding non-compliance with Rule 9 of the Oaths and Statutory Declarations Rules it is submitted that the annexures are marked only that they are not commissioned. To correct this anomaly the Respondent has filed an application to be allowed to correct it. It is submitted that the Court is enjoined to ensure a fair hearing which right includes an opportunity to introduce evidence that is available. Counsel cited the case of **Francis Mbalanya Vs Cecilia N. Waema (2017) eKLR** where it was held:

“I say so because under the provision of Order 51 rule of the Civil Procedure Rules, an Application can proceed for hearing notwithstanding that it is not accompanied by an affidavit, meaning that where annexure on an affidavit are expunged, the applicant can still introduce those annexures by way of supplementary affidavit without having the application, or the initial affidavit struck out.”

21. As to the issue of the retainer to the firm of Chelanga Kihungi & Associates Advocates it is submitted that this is an issue of privity of contract that the Petitioner cannot be party to and as such cannot raise any issue on the same. He concluded by urging that section 54 of the Interpretation and General Provisions Act is inapplicable in the instant case as the section addresses the form of authentication as opposed to whether a document should be authenticated or not. The Respondent seeks for the Preliminary objection to be dismissed with costs.

Analysis and Determination

22. After careful consideration of the grounds raised in the P.O and the submissions by counsel. The following issues arose for consideration:

(a) Whether the Replying Affidavits are incompetent by dint of the provision of the Oaths and Statutory Declarations Act and the Interpretation and General Provisions Act.

(b) Whether there is conflict of interest for one counsel to represent both the CPSB and the County Government.

23. I have carefully considered the arguments made by both counsel. There is no doubt that the answer to the two issues will have a far reaching consequences to the proceedings before the Court. As correctly argued by the petitioner counsel, the first respondent has legal obligation to be impartial in any disciplinary proceedings between the County Government and officers posted to her by the CPSB. It is expected that the latter is to play the role of an arbiter for disputes between the County Government and its officers. In that context, the County Government and the CPSB cannot share the same counsel because there is conflict of interest. The counsel cannot therefore continue to represent the two entities because of the said conflict.

24. In addition, the authority of the counsel to represent the CPSB has been challenged in the P.O to suggest that the counsel is acting without instructions. That sounds interesting that the petitioner is enjoying interim orders given courtesy of a consent by the same defence counsel whose instructions are impugned. That is a factual argument which requires evidence to be take but it will however delay trial. Since I have directed that the defence counsel should not continue representing the CPSB and the County Government, I will not belabor the point.

25. As regards the defects on the affidavits, there is no dispute that much of what is raised are matters which require evidence to prove save for the annexed exhibits which are not properly sealed and marked by the commissioner for oaths as required under Rule 9 of Oaths and Statutory Declaration Rules. In **George Oraro Vs Barak Eston Mbaja [2005] eKLR** Ojwang J (as he then was) defined P.O. as a point of law which must not be blurred with factual details liable to be contested and that where a Court needs to investigate a fact, a matter cannot be raised as a preliminary point.

26. Having found that there is conflict of interest in the defence counsel acting for the CPSB and the County Government, I will direct that the respondents to chose who to represent them within 14 days from today. In the meanwhile, set aside all the consent orders entered by Mr.

Chelanga committing the respondents with the full knowledge and without objection from the petitioner including the interim orders granted on 22.2.2018; and the orders granted on 7.3.2018 confirming the interim orders and directing that the petition to be disposed by oral submissions by on the basis of the petition and the Replying Affidavits. In that way no one will have taken advantage of the other.

27. The effect of this Ruling is that the Pleadings are reopened and once the issue of representation by the respondents is sorted, they can apply for whatever reliefs they may wish to seek towards normalizing their responses. Likewise, the petitioner is at liberty to apply for any reliefs she may deem fit to seek in the meanwhile.

Conclusion and Disposition

28. For the reasons stated above, the petitioner's P.O is partially successful only to the extent stated above and subject to orders and directions made herein above.

29. Parties shall take fresh directions on the manner of disposal of the petition and the Notice of Motion dated 20.2.2018.

30. Costs shall abide the outcome of the petition.

31. Orders accordingly.

Dated, Signed and Delivered in Open Court at Nairobi this 22nd day of June, 2018

ONESMUS N. MAKAU

JUDGE