REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 51 OF 2018

IN THE MATTER OF:

ARTICLES 1, 2, 3, 4(2), 10, 12(1)(A), 19, 20, 21, 22, 23, 24, 27, 41(1), 47, 48, 50(1), 73, 75, 156, 159, 162, 165, 232, 234, 236, 258, AND 259 OF THE CONSTITUTION OF KENYA.

IN THE MATTER OF:

THE ALLEGED VIOLATION OF ARTICLES 1, 2, 4(2), 10, 27, 41(1), 47, 73, 232, 234, 249(2)(b) AND 259(1) OF THE CONSTITUTION;

IN THE MATTER OF: THE CONSTITUTIONAL AND LEGAL VALIDITY OF THE PRESIDENT EXECUTING THE MANDATE OF THE PUBLIC SERVICE COMMISSION

IN THE MATTER OF: THE CONSTITUTIONAL AND LEGAL VALIDITY OF THE CIRCULAR REF. NO. OP/CAB.39/1A OF 4TH JUNE 2018 ISSUED BY JOSEPH KINYUA PURPORTING TO SEND HEADS OF PROCUREMENT AND ACCOUNTING UNITS IN GOVERNMENT MINISTRIES, DEPARTMENTS AND AGENCIES INCLUDING STATE CORPORATIONS AND INDEPENDENT OFFICES AND COMMISSIONS, ON COMPULSORY LEAVE FOR 30 WORKING DAYS.

IN THE MATTER OF: THE CONSTITUTIONAL VALIDITY OF PRESIDENTIAL FIAT AND THE MASS SACKINGS OF PUBLIC OFFICERS BASED ON ROADSIDE DECLARATIONS ISSUED BY THE PRESIDENT.

IN THE MATTER OF:THE ABUSE OF DELEGATED LEGISLATION BY THE EXECUTIVE AND THE REGULATORY BURDEN IMPOSED ON THE PEOPLE OF KENYA

IN THE MATTER OF: THE DOCTRINES OF LEGITIMATE EXPECTATION, AND *VOID AB INITIO*.

BETWEEN

OKIYA OMTATAH OKOITI.....PETITIONER

~VERSUS~

JOSEPH KINYUA.....1ST RESPONDENT

THE PUBLIC SERVICE COMMISSION.....2ND RESPONDENT

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

RULING

Introduction

1. On 6.6.2018 I made exparte orders in favour of the petitioner suspending the first respondent's circular No. OP/CAB. 39/1A of 4.6.2018, and prohibited its implementation pending inter partes hearing of the petitioner's Notice of Motion dated 6.6.2018 on 13.6.2018. The first and third Respondents were aggrieved and brought the Notice of Motion dated 8.6.2018 seeking the following orders:-

> 1) **THAT** this Application be certified as urgent and heard *ex-parte*, in the first instance.
>
> 2) **THAT** the Honourable Court be pleased to review, vary and/or set aside its ex parte orders issued on 07th of June 2018 pending determination of the Petition
>
> 3) **THAT** any orders purporting to extend the ex parte orders issued on 07th of June 2018 be set pending determination of the Petition.
>
> 4) **THAT** the Respondents/Applicants be at liberty to apply for any further orders or directions as this Honourable Court may deem fit to grant.
>
> 5) **THAT** the costs of this application be provided for.

2. The grounds of the application are set out on the body of the motion and the supporting affidavit sworn by Dr. Eng. Karanja Kibicho on 8.6.2018. The application is opposed by the Petitioner by filing Grounds of Opposition and Replying Affidavit dated 11.6.2018. The application was argued on 11.6.2018 in the open Court and reserved for ruling today.

Applicants Case

3. Mr. Oraro Senior Counsel, led Mr. Nyamodi, Mr. Bita and Mr. Ogeto, learned counsel and the Solicitor General respectively, in prosecuting the Application. He submitted that integrity is at the Centre of the Constitution of Kenya and under Article 73(3) (c) service is only in the public interest. He further submitted that Constitution has provided for establishment of Ethics and Anti-Corruption Commission (EACC) and the Public Service Commission (PSC) for maintenance of ethics and to report to the President under section 27 of EACC Act and 63 of the PSC Act respectively. He further submitted that the President is the person who is accountable for ethics and under Article 132, the President is required to address the nation periodically to give account of his government. In addition, the Senior Counsel contended that the President has the power to coordinate functions of the government under Article 132(2) (b).

4. He urged that the ex parte order suspending the impugned circular was made without full disclosure of all material facts which were within the knowledge of the petitioner. He relied on ***The King Vs The General Commissioners for the purposes of Income Tax Acts for the District of Kensington [1917] 1 K.B. 486***, ***Brinks MAT Limited Vs Elcombe and other [1988] 3 ALL ER 188*** *and* ***Uhuru Highway Development Limited Vs Central Bank of Kenya & 2 Others [1995]eKLR*** to urge that an ex parte applicant has a duty to make full and frank disclosure of all facts known to it or which should be known to it and in default that party should not derive any advantage from the ex parte order obtained from the said proceedings.

5. The Senior Counsel submitted that the Petitioner falsely and wrongly pleaded that the first respondent is a busy body who has no role in the public service, and that he made the impugned circular to terminate the services of the concerned public officers. He further submitted that, in order to obtain the exparte orders herein, the petitioner failed to disclose to the court that he had filed Petition No 24 of 2018 wherein he has prayed for similar relief against the first respondent to the one sought against him in herein.

6. The Senior Counsel contended that the circular was not a disciplinary process but rather an issue of ethics and accountability based on EACC Act which requires that public officers must make declaration of wealth for accountability and record. He further contended that the said records is kept by the PSC as the custodian but any person can access it upon making an application. He relied on ***Justice Amraphael Mbogholi Msagha vs The chief Justice of the Republic of Kenya [2006] eKLR*** were Nyamu J. held that the Judiciary should interpret the Constitution in a manner that gives effect and promote good governance. He urged that corruption in Kenya is now a pillage and urged that

there will be a legal framework dealing with the matter without violating the rights of the contended public officers.

7. Mr. Nyamodi supported the submissions by the Senior Counsel and referred the court to a recent decision of the this Court's decision in ***Ezra Chiloba Vs Wafula Wanyonyi Chibukati & 7 others [2018] eKLR*** where it was held that compulsory leave does not amount to disciplinary action.

8. Mr. Ogeto, the Solicitor General of the Republic of Kenya submitted from the bar that the implementation of the impugned circular will be carried out in good faith and the process will be done strictly within the provisions of the law and the Constitution, and that the rights of the concerned officers will be fully protected. He gave an undertaking that sanctions will not be taken against the officers who failed to provide the required information by 8.6.2018, but they will be allowed to provide the same within the limits of reasonableness.

Petitioner's Case

9. Mr. Omtatah commenced his submission by asking that the submission by the solicitor General to be expunged from the record because they were not properly introduced to the Court.

10. On the issue of material non-disclosure the petitioner urged that the failure to disclose the Petition No. 24 of 2018 was not material to this case. He maintained that this petition and the Petition No. 24 of 2018 are dealing with two distinct circulars and as such he is not estopped from bringing the present petition. He further urged that the second circular was made by the first Respondent fully aware that his capacity to hold the office of the Head of Public service is challenged vide petition No. 24 of 2018. In his view he is only lawfully barred from filing a new petition if the issues involved were determined in an earlier case.

11. He observed that before making the ex parte order the Court looked through the impugned circular, presumed its Constitutionality, and considered its merits. He however contended that he made full disclosure of all the material facts by his petition and the supporting affidavits before the circular was injuncted. He concluded this point by maintaining that even if the petition No. 24 of 2018 was disclosed, the facts of the present case would not have changed and the order would still have been issued.

12. On the other hand, the Petitioner submitted that the impugned circular is incompetent because it is not from the Public Service Commission but from the office of the President who does not supervise the Public Service. He maintained that the first respondent who made the impugned circular is not the Head of Public Service of Kenya. In addition, he submitted that the Affidavit by Dr. Eng. Kibicho sworn to support the motion herein is incompetent because he is a stranger to this case and he has not demonstrated the authority to swear the affidavit. He relied on ***Microsoft Corporation Vs Mitsumi Computer Garage Ltd and another [2001] eKLR*** to support the foregoing submission.

13. The Petitioner further submitted that his petition meets the threshold for public interest case because there is threat of violation of a right and the constitution also is under threat. He urged that the will of the people is embodies in the Constitution and it is not to be exercised at the whims of any person including the President. He referred to Article 129(1) and (2) which prescribes the presidential power and how it is to be exercised. He maintained that the bill of rights cannot be suspended even during a state of emergency as per Article 58 of the Constitution.

14. As regards the ***Ezra Chiloba Case*** aforesaid, the Petitioner submitted that the facts of that case are distinguishable from this case because in the said case Mr. Chiloba was served with personal letter setting out the specific allegations as opposed to this case where the concerned officers are being bullied with a general circular contrary to Article 73 of the Constitution. He urged that at the individual level, Article 47 of the Constitution is violated because there is no reason given to any individual employee. He maintained that under Article 19 of the Constitution, rights belonging to individuals and as such, individuals cannot be addressed by circulars. He relied on ***Hannan Lucy Elizabeth Vs The Cabinet Secretary Interior and Coordination of National Government and another [2017] eKLR*** to support the foregoing submission.

15. The petitioner raised concern over why the Public Service Commission has shied away from responding to the proceedings herein yet the matter concerns her employees. He further wondered why the first respondent would want to seek information vide the impugned circular yet there is a legal frame, that is section 26 of Public Officers Ethics Act, in existence by which the concerned employees submit to the employer

periodical declaration of wealth. He submitted that the said statutory provision cannot be amended by a circular but only by the parliament.

16. The Petitioner pointed out that the petition here is about the rule of law at the work place because public officers are protected by the law. He relied on Article 236 of the Constitution to support the foregoing submission. The said Article 236 protects the public officers against victimization, demotion or disciplinary action without the process of the law. He urged that while section 25(1) of the repealed constitution provided that appointment in the public service was at the pleasure of the President, Article 73(2) (9) of the current constitution provides that appointment of public officers is based on merits and competence. He maintained that only the PSC is bestowed with the functions of the public service while the President deals with state officers.

17. Finally, the petitioner submitted that the impugned circular is discriminatory and it is against the Constitutional presumption of innocence until proved guilty. He contended that it was discriminatory because it is targeting a particular category of relatively junior officers leaving out their seniors. He further viewed the circular as discriminatory because it contemplates vetting of the concerned officers while on compulsory leave yet Judicial Officers and National Police Officers who were vetted while still in office. He further contended that the concerned employees are being told to avail evidence which may be self-incriminating for use to determine whether to continue in office and/or for prosecution. He concluded by observing that the impugned circular exceeded the category of the government officers, parastatals and agencies which were contemplated by the President in his speech to the Nation on 1.6.2018. He referred to a copy of the said speech which he downloaded from the official website of the Presidency to urge that Commissions and Independent offices where not contemplated. He urged the Court not to vary, review or set aside the ex parte orders given on 6.6.2018 because that will render the petition nugatory if it succeeds after the hearing.

Applicants Rejoinder

18. Senior Counsel Mr. Oraro maintained that the case before the Court is whether full disclosure was given before the exparte order was made and he urged that materiality of the facts to be disclosed is a matter to be determined by the Court. He further maintained that the impugned circular was competent and it was made by a competent person who is the Head of the Public Service.

19. On the other hand, he submitted that Article 47 of the constitution is not applicable in this case because there is no administrative action being taken contrary to the law. He urged that the impugned circular was not addressed to individual employees but to Departments to follow up the concerned employees. He further urged that the exercise being done vide the impugned circular is in line with the power of the President under Article 132 (c) to supervise the functions of government in the Ministries and to receive report from the public service under Article 234(2) (h) of the Constitution. In his view, the impugned circular is a means by which the president is demanding the concerned people to do their job under the law. He denied that the exercise is vetting of the officers and maintained that it only calls for declaration of wealth before the stipulated periodical declaration.

20. The Senior Counsel concluded by denying that the exercise was discriminatory. He further denied that if the conservatory order is set aside the petition will be prejudiced by the impugned circular. He urged the Court to balance the private rights of the officers concerned and the Public interest in the constitutional obligation to perform their duties as per the constitution.

Analysis and Determination

21. There is no dispute that this Court made the impugned ex parte orders on 6.6.2018 and on 7.6.2018 as stated in prayer 2 and 3 of the current motion. The only issue for determination herein is whether the Applicants have met the threshold for reviewing, varying or setting aside the ex parte order.

Threshold for reviewing, varying or setting aside of ex parte order

22. There seems to be no dispute from the two sides that the test for the recalling an exparte order is whether or not the order was obtained without the ex parte applicant making a full disclosure of material facts or through misrepresentation of material facts. The applicants herein have relied on several judicial precedents from the English as well as Kenya Courts to support the said threshold for recalling of exparte orders. ***In The King –Vs- The General Commissioners for the Purposes of the Income Tax Act for the District of Kensington [1917]1 K.B. 486*** the Court laid down the legal principle that exparte applicant must make a full and fair disclosure of all material facts. Warrington LJ had

the following to the say at page 509:

> "***It is perfectly well settled that a person who makes an ex parte application to the Court that is to say, in the absence of the person who will be affected by that which the Court is asked to do is under an obligation to the Court to make the fullest disclosure possible of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the said proceedings, and he will be deprived of any advantage he may have already obtained by means of an order which has thus wrongly been obtained."***

23. Still in the same case, Scrutton L. J. held the following at page 514:

> "***...It has been for many years the rule of the Court, and one which it is of the greatest importance to maintain, that when an applicant comes to Court to obtain relief on an ex parte statement, he should make a full and fair disclosure of all the material facts, not the law. He must not misstate the law if he can help it – the Court is supposed to know the law. But it knows nothing about the facts and the applicant must state fully and fairly the facts, and the penalty by which the Court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the court will set aside any action which it has taken on the faith of the imperfect statement."***

24. In ***Sidhu & another –Vs- Memory Corporation PLC No. CHANI 1999/0636/A3*** the Court of Appeal in England had the following to say about material non-disclosure and misrepresentation of facts at the ex parte stage:

> "***In the context of what should be disclosed to the Court on a without notice application, the distinction between facts and law is not clear-cut. Many of the authorities already cited refer almost interchangeably to non-disclosure of 'material facts' or 'relevant matters.' Little weight can be attached to these slight variations in language. But some statements of principle of full disclosure extend to what the Court was told about matters of law."***

25. In D. Bank Mellat –V- Nikpour [1985] FSR 87, 92, Donalson J stated the sanction for material non-disclosure even more candidly at page 90:

> "***The principle that no injunction obtained ex parte shall stand if it has been obtained in circumstances which there was a breach of the duty to make the fullest and frankest disclosure is of great antiquity. Indeed it is so well enshrined in the law that it is difficult to find authority for the proposition; we all know, it is trite law."***

26. In ***Uhuru Highway development Limited –V- Central Bank of Kenya & others [1995] eKLR*** the Court of Appeal of Kenya held that the foregoing principles of full disclosure of all material facts in ex parte applications apply in Kenya in the same way as in England. The Court therefore proceeded to adopt the principles set out is ***R –V-Kensington Income Tax Commissioner*** and ***Brink's MAT Ltd Vs Elcombe*** in upholding the decision of the high Court whereby ex parte injunction was declined due to non- disclosure of material facts.

27. In this case, the applicants content that the petitioner did not discharge his duty of making a full disclosure of all the material facts before obtaining the ex parte order. They accuse the petitioner of concealment of material facts and also of misrepresentation of material facts to the Court at the ex parte state including the failure to disclose that he had filed petition No. 24 of 2018 against the first respondent herein where he is seeking similar reliefs; misrepresenting to the Court that the impugned circular was disciplinary process and had terminated the employment of the concerned officers; misleading the Court that the impugned circular was made by a busy body who has no role in the public service and that it is invalid, null and void.

28. The Petitioner has however denied the alleged non-disclosure and misrepresentation of material facts, and maintained that he made a full disclosure of all the material facts by annexing the impugned circular. He further maintained that his failure to disclose the existence of petition 24 of 2018 had no effect on the present petition because the two petitions are based on two distinct circulars by the first respondent herein.

29. There is no dispute that this Court is bound by the Court of Appeal decision in the ***Uhuru Highway Development Limited Case***, which adopted the principle of full disclosure in ex parte application from the English Courts. It is therefore my duty to consider whether, in view of

the material presented by applicants in the present motion, the petitioner discharged his burden of making a full and frank disclosure of all the material during the ex parte stage before obtaining the Court orders dated 6.6.2018. I however, tread carefully on the matter because the petition and Notice of Motion dated 6.6.2018 which gave rise to the exparte orders are still pending and the defence has not yet filed any responses thereto. I will also avoid making findings which may prejudice or go to the merits of Petition 24 of 2018 which is also pending before another Judge.

30. The petitioner has admitted and it is obvious that he never disclosed the fact that he had filed Petition No.24 of 2018 challenging the appointment of the first respondent herein as the Head of the Public Service and had sought similar orders as the ones being sought herein. He further failed to disclose that the said respondent had filed a replying affidavit annexing an appointment letter among other documents to prove that he was appointed to that position. Instead the petitioner reiterated his averments in Petition 24 of 2018 that, the first respondent was not the head of the public service and that the impugned circular was made without any legal authority and as such it was invalid, null and void. In addition, the petitioner misrepresented some facts to the court by stating that the concerned officers are being subjected to collective punishment without following the due process of the law and they being dismissed from the office using an invalid circular. He further led the court to believe that the impugned circular was made ***ultra vires*** the president's speech and the law. Without going to the merits of this petition and Petition 24 of 2018, and having considered the rival submissions presented by both sides, I am satisfied that the ex parte conservatory order dated 6.6.2018 were issued without full and frank disclosure of all material facts and upon misrepresentation of some material facts as stated above.

31. Notwithstanding the foregoing finding that the petitioner failed to make a full and frank disclosure of all the material facts known to him and even misrepresented some facts, I dare state that the petitioner did indeed disclosed sufficient material which led me to make a finding that the case had raised genuine and pertinent issues touching on the rights of employees as enshrined under Articles 41, 47, 50 and 236 of the constitution. In particular I considered the manner in which the communication of the circular was handled and the time given to the concerned employees who are scattered all over the country, to provide some mandatory information which was in the hands of third parties and the warning that default to meet the deadline was to expose the concerned employees to disciplinary action. Although the circular was not addressed to the concerned employees, it was meant for them to comply and there was no room left for compromise on the time lines.

32. Having found that the petitioner failed to make a full and frank disclosure of all the material facts known to him and even misrepresented some facts during the ex parte stage, the order to issue in the circumstances would have been obvious going by the precedents cited above. However, I have also made a finding that the petitioner disclosed sufficient material to warrant the protection of the court from threat to a violation of constitutional rights of the concerned employees. Consequently, I now must answer the most difficult question whether or not the ex parte should be reviewed, varied or set aside. In dealing with that question, I was invited to balance between the private interest of the individual employees concerned on one hand, and the public interest of the wider population which is in the integrity of the public officers and the resolve by the National Government to fight against corruption, on the other hand.

33. None of the parties before me denies that corruption in Kenya has increased tremendously and that the Government has an obligation to fight against it. It has also not been denied that some public officers have been involved in the vice and therefore they cannot insulate themselves from the legal and policy frame work that are put in place to deal with persons who are involved in the vice. The only way to identify the culprits is through investigations in the best way the Executive knows how. In this case, the Executive chose to send the concerned officers on compulsory leave for 30 days with full remuneration. The defence has relied on the decision of this Court in ***Ezra Chiloba –V- Wafula Wanyonyi Chebukati & 7 others [2018] eKLR*** where Radido J. held that:

> "***20. … our constitution has made fundamental in roads to that common law position but there is no indication as to whether compulsory leave would amount to a disciplinary action.***
>
> ***25. The only prejudice or injustice if it amounts to it at this juncture is that the applicant will not be reporting to work, but as regards remuneration, that is a tangible (sic) which can be exactly computed."***

34. The defence has shown willingness to compromise the timelines for compliance with the impugned circular provided that it is done within limits of reasonableness. Indeed the Solicitor General of the Republic of Kenya who drew the present application on behalf of the Attorney General, attended the Court and made the said undertaking on behalf of the Government. I find that undertaking genuine and a gesture of good faith considering the fact that the ex parte order was mainly to protect the concerned employees from victimization through

disciplinary action for failing to provide the required information within the short duration given by the impugned circular.

35. I agree with Radido J. in the ***Ezra Chiloba case*** that a mere compulsory leave does not amount to disciplinary action unless the employee is denied his rightful remuneration as a result of the said absence from work. The employer has every right to ask his employee to stay away while the employer verifies some matters about the conduct and performance of duty by the concerned employee. However the employee must expressly be notified of the reason why he is required to stay away and for how long. These are basic tenets of fairness and they are necessary because the rights of employees at work place have a bearing on human dignity and they cannot be swept under the carpet in a democratic society which upholds international labour standards.

Conclusion and disposition

36. In consideration of all the matters analyzed herein above, I allow the Notice of Motion dated 8.6.2018 by recalling the ex parte orders granted on 6.6.2018 subject to the following terms:

a) Order number 2 which suspended the circular No. OP/CAB.39/1A of 4.6.2018 issued by the 1st respondent is hereby set aside.

b) Order number 3 which prohibited the implementation of the said circular is varied to only prohibit implementation of the default clause against the concerned employees who, for a just cause, will not be able to present the required information within ten (10) from the date hereof, that is to say, 22nd June 2018 .

c) Costs shall be in the cause.

Dated, Signed and Delivered at Nairobi this 13th day of June, 2018

ONESMUS N. MAKAU

JUDGE