



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT NYERI**

**PETITION NO. 5 OF 2018**

**IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER SECTIONS 70(A), 72(3), 74(1) AND SECTIONS 77 OF THE CONSTITUTION OF KENYA, 1969**

**AND**

**IN THE MATTER OF ARMED FORCES ACT (CHAPTER 199 OF THE LAWS OF KENYA)**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION)**

**AND**

**IN THE MATTER OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL HIGH COURT PRACTICE & PROCEDURE RULES 2013**

**BETWEEN**

**PETER NDIRITU GITAHU & 60 OTHERS.....PETITIONERS**

**AND**

**THE HON. ATTORNEY GENERAL.....RESPONDENT**

**RULING**

1. The Petitioners herein filed the petition seeking relief against the Respondent for the acts allegedly perpetrated against them by state agencies. The 61 Petitioners were servicemen in the Armed Forces. The Respondent has filed a motion seeking that the affidavits in support of the Petition be struck out or expunged and as a consequence the Petition be struck out for want of evidence. The motion is supported by the supporting affidavit of Alice Muringo Mate a State Counsel I in the Kenya Defence Headquarters. She deposes that the affidavits by the Petitioners are attested by the advocate who drew the Petition contrary to the provisions of Section 4(1) of the Oaths and Statutory Declarations Act and that the Petition is thus fatally defective as it also is brought contrary to the provisions of Section 12 of the Government Proceedings Act and Order 1 Rule 11 of the Civil Procedure Rules. She asserts that the court should not permit the Petition to advance further as to do so would erode the foundational values of the judicial system and that the Petition should be struck out in the interests of justice. The motion is opposed and the Petitioners filed a notice of preliminary objection stating that the motion discloses no reasonable opposition in law to the Petitioner's pleadings, is frivolous and/or vexatious and is otherwise an abuse of the court process. The Petitioners assert that the notice is fatally flawed and must be struck out *in limine* as the deponent a State Officer I of the Kenya Defence Forces is not competent to swear an affidavit on behalf of the Kenya Defence Forces, the Cabinet Secretary of Defence and the Chief of Defence Forces. The Petitioners assert that the counsel on record has not been authorized in writing by the Principal Secretary Department of Defence to appear, plead and sign for him and that the entire motion is incompetent, misconceived and bad in law. The Petitioners aver that the complaints raised by the Respondent shall be addressed at the pre-trial stage and are thus not fatal to the pleadings as they are amenable. They argue that the motion as presented is oblivious to the provisions of the Employment & Labour Relations Court (Procedure) Rules 2016 and the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practices & Procedure Rules 2013 and that the same should be therefore dismissed with costs.

2. The attack on the Petition is that it offends the provisions of Section 4(1) of the Oaths and Statutory Declarations Act. The Respondents assert that the affidavits filed in support of the Petition are fatally defective in light of the law and that further the Petition offends the provisions of Section 12 of the Government Proceedings Act and Order 1 Rule 11 of the Civil Procedure Rules. The provisions of Section 4(1) of the Oaths and Statutory Declarations Act makes provision as follows:-

4.(1) A commissioner for oaths may, by virtue of his commission, in any part of Kenya, administer any oath or take any affidavit for the purpose of any court or matter in Kenya, including matters ecclesiastical and matters relating to the registration of any instrument, whether under an Act or otherwise, and take any bail or recognizance in or for the purpose of any civil proceeding in the High Court or any subordinate court:

Provided that a commissioner for oaths shall not exercise any of the powers given by this section in any proceeding or matter in which he is the advocate for any of the parties to the proceeding or concerned in the matter, or clerk to any such advocate, or in which he is interested. (Underline supplied)

3. The Government Proceedings Act requires under Section 12 that proceedings against the Government be commenced against the Attorney General. The attack on the Petition on this ground is misplaced as the Petitioners have sued the Attorney General who is the correct party. They did not sue the Department of Defence or the Cabinet Secretary for Defence or even the Armed Forces. In my view, the Petition is not therefore defective in this respect. Similarly, the attack on the Petition in terms of Order 1 Rule 11 is misplaced and there is no merit on this ground. The final attack is on the veracity and legal position of the affidavits in the Petition. The Petitioners' advocate has commissioned the affidavits in the Petition. The stamp affixed to the jurat is that of the advocate for the Petitioners Mr. Ojwang' Agina, Commissioner for Oaths while the firm representing the Petitioners is Agina & Associates Advocates. This is untenable in law. In the case of *Caltex Oil (Kenya) Ltd v New Stadium Station Ltd & Another [2002] eKLR Onyango Otieno J. (as he then was) eloquently stated the law as follows:-*

...With profound respect, I disagree. These affidavits were clearly in breach of the provisions of an Act of Parliament namely The Oaths and Statutory Declarations Act, Chapter 15 of the Laws of Kenya. They were not irregularity as to form only as the Applicant would have me believe. Section 4(1) of the Oaths & Statutory Declaration Act is clear. It states:

“4.(1) A Commissioner for Oaths may, by virtue of his commissioning, in any part of Kenya, administer any oath or take any affidavit for the purpose of any court or matter in Kenya, including matters ecclesiastical and matters relating to the registration of any instrument; whether under an act or otherwise, and take any bail, or recognizance in or for the purpose of any civil proceeding in the court or any subordinate court;

Provided that a Commissioner for Oaths shall not exercise any of the powers given by this Section in any proceeding or matters in which he is the advocate for any of the parties to the proceeding or concerned in the matters, or clerk to any such advocate, or in which he is interested”.

In my humble opinion any attempt to reduce such an Act of Parliament to a mere irregularity is an affront to our laws. Indeed a look at this provision will clearly show that the provisions in Order 18 Rule 7 being provision for taking Oaths for civil proceedings emanates partly from this Section of an Act of Parliament. Breach of this section as happened here cannot be treated as a mere irregularity or as an irregularity as to form only. I do think that the courts have a duty to rightly interpret the laws and to ensure that they do not condone any breaches of the same laws under any pretences whatsoever. I still stand by what I did say in the case of *James Francis Kariuki & Another vs. United Insurance Co Ltd HCCC No. 1450 of 2000* that such an Affidavit sworn in violation of section 4(1) of the Oaths and Statutory Declarations Act is for all intents and purposes not an affidavit as envisaged in law and is not capable of being received under Order 18 Rule 7 as it offends a provision of an Act of Parliament and does not represent a mere irregularity either in defect as to form or by misdirection of the parties, or in the title.

4. The court is of the view that the Respondent need not file a response to the Petition in light of the finding of this court that the commissioning of the affidavit by the advocate for the party before me is tantamount to the Petition being filed without any evidence. The same is not a mere irregularity that can be cured by the filing of another affidavit. The Petition was dead when it arrived at the Court Registry in Nyeri and it is therefore invalid, void and of no effect. The Petition is struck out but I will make no order as to costs.

It is so ordered.

**Dated and delivered at Nyeri this 31<sup>st</sup> day of October 2018**

**Nzioki wa Makau**

**JUDGE**