



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

PETITION NO. 25 OF 2016

**IN THE MATTER OF ARTICLES 1,2,3,10,19,20,21,22,23,28,41,47,48,50,165,258 OF THE
CONSTITUTION**

AND

**IN THE MATTER OF: CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS
UNDER ARTICLES 27, 28 AND 41(1)(2)(a) AND (b), 47 AND 50 OF THE CONSTITUTION OF
KENYA**

AND

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

AND

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

AND

IN THE MATTER OF: INDUSTRIAL COURT ACT, ACT NO. 20 OF 2011

BETWEEN

SHADRACK KOSGEY CHEROGOE 1ST PETITIONER

ABRAHAM BIRUNDU NYANGOTO 2ND PETITIONER

AND

THE COUNTY ASSEMBLY OF NAKURU 1ST RESPONDENT

THE GOVERNOR, NAKURU COUNTY 2ND RESPONDENT

THE COUNTY PUBLIC SERVICE

BOARD

3RD RESPONDENT

AND

JOSEPH MOTARI

1ST INTERESTED PARTY

RULING NO. 2

1. The 2 Petitioners moved Court on 5 July 2016 alleging violation/(threatened) of various constitutional provisions, and the Interested Parties rights and fundamental freedoms by the Respondents.
2. The Petition was accompanied with a motion under certificate of urgency seeking certain interim orders, but the Court did not grant any of the orders sought because they were similar in substance to the final reliefs in the Petition (except for a conservatory order stopping the 1st Respondent from presenting a report for removal from office of the Interested Parties to the 2nd and 3rd Respondents, which was acceded to by the advocate for the 2nd and 3rd Respondents).
3. The Court therefore directed that the Petition be set down for an accelerated hearing and directions as to filing of appropriate pleadings and submissions were made. Submissions were to be highlighted on 7 September 2016.
4. The 1st Respondent however moved Court on 21 July 2016 to vacate the conservatory order and in a ruling delivered on 29 July 2016, the Court vacated the orders, and issued new directions as to filing of pleadings and submissions.
5. The parties did not comply with timelines as to the filing of appropriate documents and extensions were granted.
6. On 29 September 2016, the 1st Respondent filed a *Notice of Preliminary Objection* and sought that it be determined first, a request which the Court acceded to, and the objection was taken on 2 March 2017 (after several false starts). The objection is the subject of this ruling.
7. The *Notice of Preliminary Objection* was to the effect
 1. The matter herein offends the provisions of section 12 of the Industrial Court Act, as there is no employment relationship between the Petitioners and the 1st Respondent. The court has no jurisdiction as the 1st Respondent has no capacity as an employer.
 2. The Employment and Labour Relations Court has no jurisdiction to determine constitutional matters and issues. However, it can only be invited to determine such issues where they arise in the context of a labour dispute and there is no employment relationship between the Petitioners and the Respondents.
 3. The Petition is brought on behalf of persons who can act on their own behalf and in violation of the provisions of Article 258 of the Constitution as it is intended to protect the interests of individuals thus it is not in the public interest.
 4. The Petition herein does not raise issues of public interest as it seeks to protect the employment status of the Interested Parties on the basis of their occupying public offices whereas such does not equate to a public interest.
 5. The breach or the threatened breach of the Interested parties contract of employment was not a public act or matter of public law but a contractual relationship. Their remedy, lie under private law which covers disputes relating to contractual relationships.
 6. The matter herein relates to the exercise of the oversight authority of the County Assembly under Article 185(3) of the Constitution in respect of County Executive Committee and other County Executive organs.

7. The Petition herein is in breach of the doctrine of separation of powers as the County Assembly has the power to summon any officer including county ministers for purposes of explaining the affairs of the County as per its role under Article 1 of the Constitution.

8. Article 195 of the Constitution provides that a County Assembly Committee has powers similar to the High Court to summon "any person to appear before it for the purpose of giving evidence or providing information" as exercised by the Committee constituted by the 1st Respondent.

9. The court's jurisdiction under Article 162(2) of the Constitution and Section 12 of the Industrial Court Act does not extend to interfering with ongoing processes before the other organs. The court should defer to the other arms and only challenge the constitutionality of their final decisions.

8. The 1st Respondent filed written submissions in respect of the objection on 18 November 2016, while the Petitioners had filed their written submissions on 17 November 2016. The other parties did not file any written submissions.

9. Oral arguments were taken on 2 March 2017 and Mr. Karanja for the 1st Respondent collapsed the 9 grounds of objection into 3 broad grounds.

1st Respondent's arguments

10. The first broad ground urged by the 1st Respondent was that because there was no employer/employee relationship between the Petitioners and the Respondents, this Court did not have jurisdiction.

11. According to the 1st Respondent, the issues raised by the Petitioners fell outside the matters provided for in section 12 of this Court's Constitutive Act, the Employment Act and Labour Relations Act.

12. The second ground of attack advanced by the 1st Respondent was that the Petitioners did not have the *locus* or competence under Article 22 of the Constitution.

13. In the view of Mr. Karanja, there was no public interest in the dispute before Court as the issues revolved around private law (employment) and further the Petitioners were agitating for purported wrongs against the Interested Parties who could have pursued any wrongs against them by the Respondents in their individual capacities.

14. Mr. Karanja also contended that judicial review was not available in respect of private law disputes and that employment by a public authority could not inject public law/interest in contractual disputes.

15. To dramatise his contentions, Mr. Karanja urged that the Petition had been initiated by strangers to a contractual relationship.

16. The third line of attack was on separation of powers concerns.

17. According to the 1st Respondent, it (County Assembly) had a constitutional mandate under Article 185(3) of the Constitution and the Court should in that respect defer to it while carrying its oversight role.

18. The 1st Respondent relied on 2 authorities, *Owen Baya v County Assembly of Kilifi* (2015) eKLR and *R v Teachers Service Commission & 3 Ors ex parte Titus Mutua Mulinge* (2013) eKLR.

Petitioners' response

19. In a 395 page submissions inclusive of authorities, the Petitioners' put up a stiff legal counter attack.

20. While admitting that there was no employer/employee relationship between the Petitioners and

Respondents, Mr. Konosi referred to the case of *Trusted Society of Human Rights Alliance v Nakuru Water & Sanitation Services Co. & Ar* (2013) eKLR to advance the position that parties to proceedings before this Court were not limited to those in an employer/employee relationship and that it is the subject matter which is material and relevant.

21. Mr. Konosi also urged that this Court, having the status of the High Court could interpret and enforce the fundamental rights and freedoms where allegations of violation arose within the context of labour rights in terms of Article 41 of the Constitution. The case of *United States International University (USIU) v Attorney General* (2012) eKLR was cited.

22. On the ground of locus, Mr. Konosi contended that Article 3(1) of the Constitution as read together with Articles 22(1) and 258 gave competency and/or locus to *every person* to institute legal proceedings asserting that a constitutional right, a right or fundamental freedom had been denied, violated or under threat.

23. In the view of Mr. Konosi, the Respondents had not only violated the Interested Parties bill of rights but the Constitution, and therefore in terms of Article 3(1), the Petitioners were on solid legal grounding to initiate the instant proceedings on their own right.

24. On the separation of powers concerns, the Petitioners submitted that the 1st Respondent was bound by the national values and principles as enshrined in Articles 10 and 20(1) of the Constitution and that whenever such an organ overstepped its constitutional and/or statutory mandate, a Court had the power to intervene despite the doctrine of separation of powers.

Evaluation

25. The Court wishes to caution itself that some of the arguments presented during the hearing of the preliminary objection are so closely intertwined with the substantive issues raised in the Petition and therefore it must examine them with some circumspection in order not to tie the pen of the ultimate trial Court.

Employer/Employee relationship

26. In the view of the Court, this issue was a red herring for the 1st Respondent in grounds 1, 4 and 5 of the Preliminary Objection acknowledge the existence of an *employment relationship* between the Interested Parties and the other Respondents.

27. The decision challenged by the Petitioners essentially relates to a decision and/or recommendation to terminate that employment relationship and therefore this Court has jurisdiction.

Locus/competency of Petitioners

28. **In my view**, although Article 22(1) and (2) of the Constitution has expanded locus standi as to litigation of fundamental rights and freedoms, at the same time, the proviso have circumscribed persons who can institute Court proceedings alleging denial, violation, infringement or threats of rights and freedoms protected in the bill of rights.

29. Where a person is acting on behalf of another, the person should demonstrate that the person on whose behalf they are acting cannot act in their own name, or that (s)/he is acting as a member of or in the interest of a group or class of persons, or that (s)/he is acting in the public interest and that the person is an association acting in the interest of its members.

30. In the present case, the Petitioners have sought to rely not only on Article 22 but on Article 3 of the Constitution. The Petitioners have alleged violations of other provisions of the Constitution by the 1st Respondent, which are not limited allegations to violations of the bill of rights.

31. Among the allegations brought against the 1st Respondent are acting ultra vires the powers of a County Assembly and attempting to bypass the protections guaranteed public officers by Article 236 of the Constitution.

32. In so far as the Petitioners have alleged that the 1st Respondent has overstepped its constitutional and statutory mandate, the Court finds that at this stage that the Petition is in the public interest, is competent and the Petitioners have locus.

Separation of powers

33. In making the decision and recommending that the Interested Parties be removed from office, the 1st Respondent was exercising a quasi-judicial function and such decision is susceptible to judicial control.

34. I would also endorse the holding by Lenaola J (as he was then) in *National and Gender Equality Commission v Cabinet Secretary, Ministry of Labour and Social Security & Ar* (2016) eKLR that the doctrine of separation of powers is not an absolute bar to Court intervention when properly required.

Conclusion

35. In light of the above, the Court finds no merit in the 1st Respondent's preliminary objection and orders that it be dismissed.

36. Costs to abide outcome of Petition.

Delivered, dated and signed in Nakuru on this 28th day of April 2017.

Radido Stephen

Judge

Appearances

For Petitioners Mr. Konosi instructed by Konosi & Co. Advocates

For 1st Respondent Mr. Karanja instructed by Mirugi Kariuki & Co. Advocates

For 2nd and 3rd Respondents Hari Gakinya & Co. Advocates

For Interested Parties Mr. Magatta instructed by Magatta & Associates. Advocates

Court Assistant Nixon