



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA
PETITION NO. 342 OF 2014

WALID KHALIDPETITIONER

VERSUS

THE COUNTY ASSEMBLY OF MOMBASA.....1ST RESPONDENT

THE SPEAKER COUNTY ASSEMBLY OF MOMBASA2ND RESPONDENT

THE GOVERNOR COUNTY GOVERNMENT

OF MOMBASA.....3RD RESPONDENT

RULING

INTRODUCTION

1. The application before me is the petitioner's Notice of Motion dated 10/3/2017. It seeks the following orders:

(a) That the honourable court reviews the order made on 10th October 2014 directing that the file be placed before the chief Justice to appoint a three judge bench to hear and determine this case and replace with an order that this case does proceed before this court for hearing and determination.

(b) That leave be granted to the Petitioner to amend the petition as per the annexed draft and the amended petition to be deemed duly filed upon payment of the requisite court fees.

(c) That cost of this application be in the cause.

2. The Motion is supported by the petitioner's affidavit sworn on 10/3/2017. The gist of the said affidavit being that the substantive legal issue certified by the court vide the impugned ruling has now been settled by several court decisions across the country; and that allowing the Motion as prayed will serve the interest of justice by saving time and enable the court to deal with all the real issues in dispute between the parties herein.

3. The respondent and the interested party have opposed the Motion vide their grounds of opposition filed on 19/5/2017 and 22/5/2017 respectively. The grounds of the opposition can be summarized as follows:

(a) The Motion is incompetent and bad in law.

(b) The Motion is frivolous, superfluous, not well grounded and otherwise devoid of merits.

Background

4. The applicant is a former Finance Executive Committee member in the County Government of Mombasa. He was impeached from his portfolio by the County Assembly of Mombasa on allegation of incompetence, abuse of office and violation of the law by a Motion passed on 24/7/2014. On 25/7/2014, he brought the Petition herein seeking among other orders, the nullification of the said impeachment for being done in breach of Section 40 of the County government Act 2012, Article 47 and 236 of the Constitution and Section 41 of the Employment Act. Simultaneously with the Petition he brought a Notice of Motion and obtained conservatory orders stopping the implementation of the said impeachment.

5. The respondent and the interested party objected the suit on grounds that this court lacks jurisdiction to determine the petition and that it was bad in law and defective for seeking orders of certiorari and prohibition through a wrong procedure.

6. After hearing the submissions by all the parties in respect of the said objection, I made the opinion that this court has the jurisdiction to determine whether a person's right to employment, protection from unfair dismissal and protection from unfair labour practices have been violated. I further made the opinion that this court has jurisdiction to grant the orders of certiorari and prohibition whether sought by a petition under Article 22 and 23 of the constitution or a motion under Section 8 of the Law Reform Act.

7. However in the same ruling, I felt that there was need to have a bench of more than 2 judges constituted to determine whether state officers including County Executive Members were employees under a contract of service. To me, that was a fundamental question of law at that time, which needed to be put to rest, considering similar objections in other suits. I therefore sent the file to the Honourable Chief Justice to constitute the said bench.

8. The Honourable Chief Justice, however, returned the file to me with direction to get consent of the parties to have a mixed bench of judges from this court and the High Court because there was already one constituted to do a similar matter. The parties agreed but the Chief Justice never constituted the intended bench and the matter went into a limbo until the applicant brought the current Notice of Motion on 10/3/2017.

Applicant's case

9. Mr. Wafula, learned counsel for the applicant submitted that Article 47 of the constitution provides for the right to fair administrative process which includes expeditious hearing of litigants who have come to court. He observed that the hearing of the petition herein has been delayed after this court referred the file to the Honourable Chief Justice for empaneling of a 3 judges bench to determine the issue of whether state officers can petition this court for interpretation of their constitutional rights arising from or related to their dismissal from office. The Honourable Chief Justice has not yet empaneled a bench and that delay has occasioned injustice to the petitioner.

10. Mr. Wafula further submitted that the issue which was being referred to the Chief justice for determination has of late been the subject of decision by other courts. He therefore urged this court to review its ruling dated 10/10/2014 and proceed to hear and determine the petition because in the said ruling the court held that it has jurisdiction to determine the suit.

11. In conclusion the applicant prayed for leave to amend the petition to conform to the new developments which occurred after the filing of the petition, namely, to indicate that the petitioner has since been dismissed from work. In his view there is need to amend the petition to enable the court to deal with all the real issues between the parties. He has annexed a draft amended petition for consideration by the court.

1st and 2nd Respondent's Case

12. Mr. Mutiso learned counsel for the 1st and 2nd respondent opposed the Motion. He submitted that his clients objected generally to the suit herein on ground that the court lacks jurisdiction and the file was referred to the Hon. Chief Justice for empaneling of a bench to determine the issue of jurisdiction. That the respondents even consented to the directions by the Chief Justice for a mixed bench of judges drawn from this courts and the High Court but the matter was never determined.

13. The counsel observed that the applicant has not annexed copies of the decisions by other courts which he alleged that they dealt with the issues which this court referred to the Chief Justice. The counsel, therefore, submitted that the Motion before the court is bad in law because it is asking the court to sit on appeal over its own decision. In addition, the counsel submits that the Motion lacks merits because it is not grounded on a mistake on the face of the record, or discovering of new evidence.

14. As regards the request for leave to amend the petition, the counsel submitted that such leave would allow introduction of a new cause of action which in his view is not allowed after filing of defence.

3rd Respondent's case

15. Mr. Mohammed, learned counsel for the 3rd respondent associated himself with the submissions by Mr. Mutiso advocate. He however, submitted that once the court certified that there was a substantial question of law in its ruling dated 10/10/2014, the matter was brought under the mandatory provisions of Section 21(2) of the Employment and Labour Relations Court Act, [ELRC Act]. The said Section require that such a matter shall be referred to the Hon. Chief Justice for empaneling of a bench of uneven number of judges to determine it.

Interested party's case

16. M/s. Wafula learned counsel for the interested party associated herself with the submissions by Mr. Mutiso and Mr. Mohammed above and further adopted her clients ground of opposition in urging the court to dismiss the Motion herein.

Applicant's rejoinder

17. M/s Wafula observed that the referral of the petition to the Chief Justice was not prompted by the parties but the court on its own motion. He denied that the Motion before the court was an appeal to the same court. Regarding the Preliminary Objection by the defence that the court lacks jurisdiction, the applicant maintained that the court made a determination that it indeed had the jurisdiction over the suit. He therefore submitted that empaneling of 3 judges bench by the Honourable Chief Justice was purely administrative decision which does not take away the power of this court to deal with the dispute before it.

ANALYSIS AND DETERMINATION

18. There is no dispute that on 10/10/2014, I made a ruling whereby I held that this court has jurisdiction to interpret the constitution and grant order of certiorari and prohibition whether sought under Article 22 and 23 of the constitution or Section 8 of the law Reform Act. It is also common knowledge that this court in its own motion referred the petition herein to the Honourable Chief Justice for empaneling of a bench of at least three judges to determine whether state officers including County Executive Members were employees and whether this court has jurisdiction to determine any disputes related to their appointments and their termination.

19. The Honourable Chief Justice, then in office, never empaneled the requested bench even after the parties agreed to his directions for appointment of mixed bench of judges from this court and the High court. The applicant has now moved the court for review of its own decision to refer the petitioner to the Hon Chief Justice and proceed to deal with the petition.

20. The issues for determination are:

- (a) Whether the Motion is incompetent and bad in law
- (b) Whether the applicant has met the threshold for granting review of the ruling dated 10/10/2014.
- (c) Whether leave to amend the petition should be granted as prayed.

Incompetent Motion/ bad in law

21. The defence contends that the Motion is in competent and bad in law because: it is not grounded on the discovery of any new and important matter or evidence or any mistake apparent on the face of the record; the court lost the mandate over the suit to the Honourable Chief Justice under section 21 of the ELRC Act after certifying that there was a substantial question of law; and it is asking the court to sit on appeal of its own decision.

22. The applicant has denied that the Motion is an appeal to the same court but an application for review to stop further delay in administration of justice. In addition the applicant contends that the amendment sought is warranted in order to enable the court to deal with all the real issues including the developments after filing of the suit.

23. I have no doubt that this court has jurisdiction to review its own decisions under section 16 of the ELRC Act and Rule 33 of ELRC rules. The said provisions also allows a party to a suit to apply for review of the decisions of the court. Likewise rule 14 (6) of ELRCRs and Rule 18 and 19 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 allows a party to apply for leave to amend his pleadings. Consequently, I do not agree with the defence that the Motion herein is incompetent and bad in law. It is brought under the provisions of the law and it is well intended.

24. I also do not think the Motion is an appeal to the same court because, it is not asking the court to correct an error in judgment but to set aside the order referring the petition to the Chief Justice and proceed with the petition because the jurisdiction of this court over disputes related to appointment and termination of state officers is now settled.

Threshold for Review

25. As noted above, the court can review its decisions under rule 33 (1) ELRCRs on grounds of discovery of a new and important matter or evidence; on account of a mistake apparent on the face of the record; if the decision requires clarification; or for any other sufficient reason. As correctly submitted by the defence, the Motion herein is not grounded on discovery of a new matter or a mistake on the face of the record. The applicant has however contended that it grounded on the constitutional duty of the court to administer justice expeditiously. In my view such ground is a sufficient reason to warrant review under section 16 of ELRC Act and rule 33 of the ELRC Rules.

26. Article 159 of the constitution requires that justice shall not be delayed. For that matter I agree with the applicant that delaying finalization of the suit herein is occasioning injustice to the petitioner and especially when I had already held my ruling dated 10/10/2014 that the court has jurisdiction to grant the orders sought herein. The only issue I referred to the Chief Justice for determination was whether a state officer is an employee for purposes of this court's jurisdiction.

27. The applicant alleged that other courts had dealt with the said issue but no precedent was produced. The Chief Justice in his directions to me under Section 165 (4) of the Constitution indicated that there was a bench dealing with a similar matter but he did not give any details.

28. I have however come across some relevant authorities including C.A No. 2 of 2015 the **County Government of Nyeri and another vs Cecilia Wangechi Ndungu [2015] eKLR** where the Court of Appeal upheld the decision of this court in a similar matter. The appellate court held that:

“We are of the considered view that the Employment Act does not apply to state officers. A state officer's terms and conditions of service are regulated by the constitution and the relevant statute, principles of fair administrative action and rules of natural justice. It follows therefore that a member of the county executive committee is not subject to the Employment Act.”

29. In my view, the court in the foregoing decision appreciated that there are other sources of labour law in Kenya including the Constitutions and the County Governments Act which regulate the terms and conditions of service for state officers. The decision also made a mockery of the simplistic interpretation of article 162 (2) (a) and 165(5)(d) of the constitution and section 12 of the ELRC Act which limit the jurisdiction of this court to private disputes between employers and employees under the Employment Act.

30. The court then went on to dismiss the appeal after holding that this court was correct in granting judicial review orders in a petition brought under Article 22 of the Constitution because that power is expressly provided under the said article.

31. A more recent and relevant authority is the Supreme Court of Kenya decision in ***Pet. No.5 of 2015 Republic V Karisa Chengo & 2 others*** where the court upheld the decision of the Court of Appeal which nullified the decision of a bench of mixed judges from High Court and Environment & Land Court (ELC) on ground that the court was wrongfully constituted. The Supreme Court was categorical that the High Court, ELRC and the ELC are independent courts but with equal status and their judges cannot be empanelled together to exercise the jurisdiction reserved for either of the courts. It is therefore obvious that the directions by the Chief Justice to empanel a bench of mixed judges from this court and the High court is now impossible in this matter in view of the said decision of the Supreme Court.

Disposition

32. For the reasons that the question of law that I referred to the Honourable Chief Justice is now overtaken by events, and that the rules of procedure allows a petitioner to amend his petition with the leave of the court, I allow the Petitioner's Notice of Motion dated 10th March 2017.

Costs shall abide the outcome of the petition.

Dated, signed and delivered this 30th June 2017

O. N. Makau

Judge