



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO 3 OF 2017

**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),73,75,156,159,165, 232,234,258,AND 259 OF THE
 CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF THE ALLEGED VIOLATION OF ARTICLES
 2,10,27,41(1),47,73,232,234 AND 259(1) OF THE CONSTITUTION OF KENYA; THE
 STATUTORY INSTRUMENTS ACT; THE STATE CORPORATIONS ACT; THE CODE OF
 GOVERNANCE FOR STATE CORPORATIONS (POPULARLY KNOWN AS
 MWONGOZO); AND CIRCULAR NO OP/CAB.9/1A**

AND

**IN THE MATTER OF THE CONSTITUTIONAL AND LEGAL VALIDITY OF THE
 FAILURE/REFUSAL BY THE BOARD OF DIRECTORS OF ATHI WATER SERVICES
 BOARD TO APPOINT AN ACTING CEO AND TO SEND ENG. MALAQUEN MILGO ON
 THE MANDATORY SIX-MONTH TERMINAL LEAVE PENDING THE EXPIRY ON 11TH
 JULY 2017 OF HIS SECOND AND FINAL TERM AS THE CEO FOR ATHI WATER
 SERVICES BOARD AND TO COMMENCE THE RECRUITMENT OF HIS
 REPLACEMENT**

OKIYA OMTATAH OKOITI.....PETITIONER

VERSUS

THE BOARD OF DIRECTORS, ATHI WATER SERVICES1ST RESPONDENT

CABINET SECRETARY FOR WATER AND IRRIGATION.....2ND RESPONDENT

STATE CORPORATIONS ADVISORY COMMITTEE.....3RD RESPONDENT

PUBLIC SERVICE COMMISSION.....4TH RESPONDENT

THE HON ATTORNEY GENERAL.....5TH RESPONDENT

ENG. MALAKWEN MILGO.....6TH RESPONDENT

AND

ATHI WATER SERVICES BOARD.....INTERESTED PARTY

RULING

Introduction

1. On 3rd February 2017, the Petitioner, Okiya Omtatah Okoiti filed a Petition together with a Notice of Motion under certificate of urgency seeking orders compelling the 1st Respondent to send the 6th Respondent on terminal leave and to appoint an acting Chief Executive Officer of the Interested Party.
2. The 6th Respondent and the Interested Party filed a cross petition on 16th February 2017 on which date the 1st and 6th Respondents as well as the Interested Party filed a Notice of Preliminary Objection which is the subject of this ruling.

The Preliminary Objection

3. The objection is based on the following grounds:

- a) The Petition has been filed contrary to the express provisions of Section 12 of the Employment and Labour Relations Court Act, Cap 234B of the Laws of Kenya and Article 162(2) of the Constitution;
- b) The Court lacks jurisdiction to take cognizance of, hear and determine the Petition which has been filed contrary to the express provisions of Articles 22,165(3) and 258 of the Constitution;
- c) The Petition is *sub judice* in light of ***Nairobi High Court Petition No 435 of 2016: Okiya Omtatah Okoiti and another v Athi Water Services Board and 18 others***;
- d) The Petition does not meet the threshold for a constitutional petition as stipulated in the *locus classicus* cases of ***Anarita Karimi Njeru v Republic (1976-1980) KLR 1272*** and ***Mumo Matemu v Trusted Society of Human Rights Alliance and 5 others [2013] eKLR***;
- e) The Petition is otherwise an abuse of the court process and it is only fair, just and proper that the Court strikes it out.

Submissions in Support of the Objection

4. The 2nd, 3rd, 4th and 5th Respondents are in support of the objection. In their submissions filed on 25th April 2017, they state that the jurisdiction of this Court is guided and limited by Section 12(2) of the Employment and Labour Relations Court Act. They therefore submit that this Court lacks jurisdiction to entertain a claim brought by any person other than those listed under Section 12(2) of the Act.
5. The 2nd, 3rd, 4th and 5th Respondents further submit that the Petition herein does not meet the threshold reaffirmed by the Court of Appeal in ***Mumo Matemu v Trusted Society of Human Rights Alliance & 5***

others [2013] eKLR.

6. In their written submissions filed on 4th April 2017, the 1st & 6th Respondents and the Interested Party submit that the Petitioner lacks *locus standi* to institute and maintain the Petition in light of Articles 22 and 258 of the Constitution as well as Section 12 of the Employment and Labour Relations Court Act.

7. In this regard, it is urged that the Petitioner does not fit into any of the categories of persons listed under Section 12 of the Act but brings the Petition in his capacity as a member of the public. The 1st & 6th Respondents and the Interested Party maintain that the Petition herein does not fall within the remit of the kind of constitutional petition over which the Employment and Labour Relations Court has jurisdiction.

8. The 1st & 6th Respondents and the Interested Party acknowledge the right of every person to institute court proceedings claiming violation of a right or fundamental freedom under Article 22(1) or violation of the Constitution under Article 258(1) of the Constitution. Making reference to the decision in

United States International University (USIU) v Attorney General & 2 others [2012] eKLR, they agree that this Court has jurisdiction to deal with questions of interpretation of the Constitution and enforcement of fundamental rights and freedoms.

9. They however put the caveat that such jurisdiction is limited to situations where the need to interpret the Constitution or enforce fundamental rights arises within the context of a dispute between persons listed under Section 12 of the Employment and Labour Relations Act.

10. Additionally, they submit that the *locus standi* conferred under Articles 22 and 258 of the Constitution is restricted to instituting court proceedings for enforcement of the Constitution or the Bill of Rights and fundamental freedoms under the Constitution. The instant Petition which seeks interpretation and enforcement of the Code of Governance for State Corporations (*Mwongozo*) is therefore not covered under the aforesaid Articles of the Constitution.

11. The 1st & 6th Respondents and the Interested Party go further to submit that the current Petition does not satisfy the threshold set under Regulation 10(2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution) Practice Rules, 2013 as well as in ***Anarita Karimi Njeru v Republic [1979] KLR 154*** and ***Mumo Matemu v Trusted Society of Human Rights Alliance [2013] eKLR***. In particular, they state that the Petitioner has failed to set out with precision, the nature of injury to be suffered by himself or the public.

12. It is the 1st & 6th Respondents' and the Interested Party's case that the subject of this Petition being the renewal of the 6th Respondent's term of office cannot be said to be an affront to the Constitution since the term of office is not specifically entrenched in the Constitution.

13. The other ground of objection is that the petition herein is *sub judice* as the substantial issue of removal of the 6th Respondent from office is actively being litigated before the High Court in ***Nairobi High Court Petition No 435 of 2016: Okiya Omtatah Okoiti & another v Athi Water Services Board and 18 others***.

14. It is therefore further submitted that the instant petition is a facelift of the matter pending in the High Court and is an affront to the overriding objective of efficient use of available judicial and administrative resources as expressed in Regulation 3(5)(b) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution) Practice and Procedure Rules, 2013.

The Petitioner's Response

15. In opposition to the Preliminary Objection, the Petitioner states that the objection is incompetent and an abuse of the court process. In his submissions filed on 25th April 2017, he submits that Articles 165 and 259 of the Constitution as read with Section 12 of the Employment and Labour Relations Court Act

cloth the Court with broad and expansive jurisdiction to entertain a petition by a private citizen seeking to enforce the constitutionally entrenched national values and principles of governance under Article 10 of the Constitution, as far they relate to employment practices and policies in public institutions.

16. The Petitioner adds that by virtue of Article 162 of the Constitution, this Court has the status of the High Court and therefore has jurisdiction to hear and determine constitutional matters arising from employment relations, practices and policies such as those raised in this Petition. Further, by virtue of Articles 22 and 258 of the Constitution, the Petitioner has the *locus standi* to institute the Petition

17. Regarding the submission that the issues raised in the Petition are *sub judice*, the Petitioner states that ***High Court Petition No 435 of 2016: Okiya Omtatah Okiiti & another v Athi Water Services Board & 18 others*** does not relate to or touch on the employment contract or the status of the 6th Respondent but rather seeks the removal, in the public interest, of the 6th Respondent and members of the 1st Respondent for incompetence and general misconduct, including corruption in the procurement and award of tenders.

18. The Petitioner submits that the Preliminary Objection does not raise pure points of law as defined in ***Mukisa Biscuit Manufacturing Co Ltd v West End Distributors (1969) EA 696-701***.

19. On the question whether the Petition meets the threshold for constitutional pleadings, the Petitioner makes reference to the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (*Mutunga Rules*). He states that the *Mutunga Rules* confer epistolary jurisdiction over matters of public interest litigation. The Petitioner urges the Court to pursue the line of substantive justice rather than technicalities.

Determination by the Court

20. Having perused the pleadings and submissions filed by the parties on account of the Preliminary Objection before the Court, I have distilled the following issues for determination:

- a) Whether this Court has jurisdiction to entertain the Petition herein;
- b) Whether the Petition as framed meets the threshold for a constitutional petition;
- c) Whether the Petitioner has the *locus standi* to bring the Petition;
- f) Whether the issues raised in the Petition are *sub judice* in light of

Nairobi High Court Petition No 435 of 2016: Okiya Omtatah Okiiti and another v Athi Water Services Board and 18 others.

Jurisdiction

21. While acknowledging the jurisdiction of this Court to interpret the Constitution in employment matters as held by the High Court (**Majanja J**) in ***United States International University (USIU) v Attorney General & 2 others [2012] eKLR*** and affirmed by the Court of Appeal in ***Prof. Daniel Mugendi v Kenyatta University and 3 others [2013] eKLR***, the Respondents and the Interested Party maintain that this jurisdiction is limited to situations where the dispute is between persons listed under Section 12 of the Employment and Labour Relations Act.

22. Learned Counsel for the 1st & 6th Respondents and the Interested Party, Prof. Albert Mumma submitted that for the jurisdiction of this Court to be properly exercised in a constitutional petition, there must be a nexus of employment between the parties involved in the dispute.

23. With much respect, I think this is a very narrow interpretation of the jurisdiction of the Employment and Labour Relations Court to deal with constitutional questions arising from employment. In my view, what the Court ought to ask itself is whether the dominant cause of action arises out of an employment

relationship. In my understanding, the Petition herein arises out of the term of office of the 6th Respondent who is admittedly an employee of the Interested Party, the Water Services Board. That is squarely an employment matter within the jurisdiction of this Court.

24. A related issue raised by the Respondents and the Interested Party is that the Petition deals with interpretation and enforcement of *Mwongozo* which is a government policy and not a constitutional provision. They submit that this places the Petition beyond the purview of Articles 22 and 258 of the Constitution.

25. I have had occasion to peruse *Mwongozo* and have formed the opinion that it is a government policy aimed at enforcing the national values and principles of governance set out under Article 10 of the Constitution. I therefore agree with the Petitioner that failure to enforce *Mwongozo* would be an affront to the Constitution.

Constitutional Threshold

26. This leads to the next question as to whether the Petition meets the threshold for a constitutional Petition as defined in *Anarita Karimi Njeru v Republic (supra)* and *Mumo Matemu v Trusted Society of Human Rights Alliance (supra)*. My understanding of the principle laid down in these decisions is that a party who brings a petition alleging violation of the Constitution must set out with reasonable precision the actual violations to enable the other party to respond.

27. As stated by the Court of Appeal in the *Mumo Matemu Case (supra)*, there is no requirement for mathematical precision in drawing constitutional petitions. The test is a substantive not a procedural one. Applying this test, the Court finds that the Petition as drawn discloses the violations complained of with reasonable precision.

Locus Standi

28. The Respondents and the Interested Party also question the Petitioner's *locus standi* to bring the Petition. They argue that the window granted to members of the public to bring constitutional petitions under Articles 22 and 258 cannot be utilized to enforce a government policy. In light of my finding that *Mwongozo* is in fact an enforcement mechanism of the national values and principles of governance set out under Article 10 of the Constitution, I must find that the Petitioner, who is a member of the public is well within his right to bring this Petition in the public interest.

Sub Judice

29. The final point raised by the Respondents and the Interested Party is that the issues raised in this Petition are *sub judice* in light of *Nairobi High Court Petition No 435 of 2016: Okiya Omtatah Okiiti and another v Athi Water Services Board and 18 others*. My reading of the pleadings in the two petitions reveals that the parties and the subject matters are different. While the High Court Petition seeks removal of the entire Board of Athi Water Services, including the 6th Respondent, the Petition before this Court deals with the term of office of the 6th Respondent. To my mind, these are distinct matters filed in the right fora and each ought to be ventilated fully on its own merit.

30. For the foregoing reasons, the Court finds the preliminary objection not well taken and proceeds to overrule it with costs in the Petition.

31. It is so ordered.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI

THIS 16TH DAY OF JUNE 2017

LINNET NDOLO

JUDGE

Appearance:

Okiya Omtatah Okoiti (the Petitioner in Person)

Prof. Albert Mumma for 1st & 6th Respondents and Interested Party

Mr. Kioko for the 2nd-5th Respondents