



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

MISC. APPLICATION NO. 16 OF 2017

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL

REVIEW ORDERS OF PROHITION AND CERTIORARI

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA

ARTICLE 10,23,27,35,41, 46 & 47

AND

IN THE MATTER OF THE LAW REFORM ACT, CAP 26 LAWS OF KENYA

AND

IN THE MATTER OF THE ORDER 53 OF THE CIVIL PROCEEDURE RULES

AND

IN THE MATTER OF THE WATER ACT NO. 8 OF 2002

BETWEEN

ABDALLA A MIRAJI.....APPLICANT

VERSUS

1. THE COAST WATER SERVICES BOARF

2. THE BOARD OF DIRECTORS OF THE COAST

WATER SERVICES BOARD.....RESPONDENTS

AND

JACOB KIMUTAI TORRUT.....INTERESTED PARTY

EXPARTE.....REPUBLIC

RULING

INTRODUCTION

1. Before me for consideration are two notices of Preliminary objections dated 22/5/2017. The first objection is by the respondents in this suit while the second is by the Necessary Party in the petition No. 5 of 2017. The objection is basically on grounds that this court lacks jurisdiction to entertain the two suits; the petitioner/applicant lacks *locus standi* to sue; the pleadings offend the provisions of the Government Proceedings Act; the petition is brought under repealed Provisions of the law; and petition is founded on an illegally obtained evidence.
2. By consent of the parties to the two suits, the objections were disposed of together by written submissions which were highlighted on 19/6/2017 in this file. The objectors filed their submissions on 6/6/2017 and 8/6/2017 respectively. In response the applicant herein and the petitioners in petition No. 5 of 2017 filed their submissions on 6/6/2017 and 19/6/2017 respectively.

OBJECTORS SUBMISSIONS

3. The objectors urged that this court lacks jurisdiction to entertain both the petition No. 5 of 2017 and this suit. In their view the jurisdiction of this court arises from Article 162(2) of the constitution and Section 12(1) of the Employment and Labour Relations Court Act (ELRCA) which is basically to hear and determine all disputes referred to it in accordance with the Article 162(2) of the constitution and the provisions of the ELRCA and other written law.
4. They urged that under the said Section 12 of the ELRCA, the disputes for determination by this court relates to and arise from employment between employer and employee; dispute between employer and trade union, dispute between employers organization and a trade union, disputes between trade unions, disputes between employers organization and a trade union; disputes between trade union and its members; disputes between employer' organization or federation and its members, disputes concerning registration and election of trade union officials, and disputes relating to the registration and enforcement of collective agreements.
5. Relying on the Supreme Court of Kenya decision in Samuel Kamani Macharia vs Kenya Commercial Bank Ltd and 2 others [2012] eKLR, the objectors submitted that jurisdiction of the court flows from the constitution or stature or both and it cannot be expanded through judicial craft or innovation or by the parliament beyond the scope defined by the constitution.
6. In view of the foregoing analysis, the objectors submitted that the applicant and the petitioner have no *locus standi* to bring the impugned suits because there is lack of employment relationship between them and the objectors. In their opinion, this court can only entertain judicial review applications filed by employees and employers as stated under Section 12(1) of the ELRCA but not applications filed by third parties like in this case.
7. Relying on the Prof. Daniel N. Mugendi vs Kenyatta University & 3 others [2013] e KLR, the objectors contended that a party applying for judicial review before this court must first establish that employer and employee relationship exists to enable this court to exercise its jurisdiction over the matter. That where the said relationship is missing, this court does not have jurisdiction to entertain the matter.
8. As regards the provisions of Article 165(3) (b) and (d) of the constitution, the objectors urged that the jurisdiction to determine the question affecting fundamental rights and or interpretation of the constitution are exclusively conferred to the high court. They relied on the Republic vs Karisa Chengo & 2 others [2017] eKLR, to support their foregoing view. According to the objectors the suit herein is about ethics, integrity and leadership which is for the high court and not this court to determine.
9. In addition to the issue of jurisdiction, the objectors have faulted the suits for lack of *locus standi* on the part of the petitioner in petition No. 5 of 2017 and the applicant herein. According to the objectors,

locus standi means the legal right or capacity of a person to initiate court proceedings and at the heart of the law on administrative relief is the requirement that a complainant has sustained or will sustain direct injury or harm and that this harm is redressable. In their view, the applicant and petitioner have neither proved their employment relationship with the objectors nor have they demonstrated their interest in the respondent's affairs nor any representative capacity as required under Article 22(2) of the constitution of Kenya. The applicant and petitioner are therefore, in the objectors view, not proper parties before this court and they are only busy bodies.

10. Further still the objectors have faulted the suits on ground that no notice of intention to sue of 30 days was served on the government before instituting the suits as required under Section 13 A(1) of the Government Proceedings Act. Finally the objectors have faulted the suits because they are founded on Water Act 2007 which has since been repealed by Section 156 of the Water Act No. 43 of 2016. In that regard the objectors have urged that the suits and the application dated 18/5/2017 are nullity *abinitia*, incurably defective, bad in law and ought to be struck out with costs.

SUBMISSION BY APPLICANT IN THIS SUIT

11. The applicant herein has opposed the preliminary Objection to this suit urging that under Article 162(2) of the constitution, this court has jurisdiction to determine disputes relating to employment and labour relations. That under article 41, 47 and 33 of the constitution every person has right to fair labour practices, fair administrative action, and access to information respectively.

12. In addition the applicant has urged that under Article 3 of the constitution every person has an obligation to defend the constitution and the applicant relies on that provision to contend that he has the *locus standi* under Section 2 Article 22(3) of the constitution to sue in this matter. He therefore submits that he has brought this suit to defend the constitution and against a violation that relates to fair labour practices under Article 41 of the constitution and non compliance, infringement and violation of the national values and principles of governance in the process of appointment of the interested party by the respondents to the position of Chief Executive Officer. In the applicant's view, this is the best court under Article 23 of the constitution to adjudicate over the disputes herein which relate to fair labour practices and failure to comply with the national values and principles of governance and fair administrative action in recruitment of a civil servant. He has interpreted Section 12(1) of the ELRCA to mean that the jurisdiction of the court covers the disputes listed thereunder and more. According to him that list of disputes under Section 12 of the Act is not limited. The applicant has maintained that this suit relates to employment and fair labour practice and observed that the objectors have not denied the fact that the interested party is now employed by the respondent.

13. The applicant has cited Abdikadir Suleiman vs County Government of Isiolo and another, and also Seven Seas Technologies Ltd vs Eric Chege where this court dismissed similar objection and ruled that it has powers to determine the question of employment rights under Article 41 of the constitution. He has also relied on Court of Appeal decision in Prof Daniel N. Mugendi VS Kenyatta University and Others where it was held that this court has jurisdiction to deal with constitutional issues related to employment and labour relations alongside claims of fundamental rights ancillary and incidental to those matters exclusively as per Article 165(5) (b) of the constitution.

14. The applicant has denied that his suit is founded on a repealed law and further submitted that the provisions of Government Proceedings Act do not apply to these proceedings. The applicant has however urged the court to transfer the suit to the High Court should it find that it lacks jurisdiction over the matter.

SUBMISSIONS BY PETITIONER IN PETITION 5 OF 2017

15. The petitioner has also opposed the objection by the interested party and the respondent by submitting that she is a human rights organization created under Article 59 of the constitution of Kenya with the right to receive and investigate complaints about alleged human rights violation and seek redress in addition to promotion of protection and observance of human rights in public and private institutions; investigate any

conduct in state officers; or any act or omission in public administration in any sphere of government. In her view therefore, as a creature of the law, she has every right to ensure that there are checks and balances in the public sector.

16. Against the foregoing backdrop, the petitioner has contended that she investigated the process followed in recruiting and employing the interested party as the CEO for the respondent and found that the constitution of Kenya was violated and petitioned this court for orders sought. According to her, Article 41(1) of the constitution guarantees to every person fair labour practices and this court is the right court to determine whether that labour related right has been violated. She also relied on the Court of Appeal decision in Prof Daniel N. Mugandi vs Kenyatta University & Others to maintain that this court is the only court mandated to determine industrial and labour relations matters alongside claim of fundamental rights ancillary and incidental to those matters. She therefore prayed for the preliminary objection to be dismissed with costs.

ANALYSIS AND DETERMINATION

17. The issues for determination are:

- (a) Whether the court lacks jurisdiction to determinate the dispute herein.
- (b) Whether the applicant herein lacks *locus standi* to bring the suits herein.
- (c) Whether the suits violate Section 13A (1) of the Government Proceedings Act.
- (d) Whether the suit is founded on a repealed law; and
- (e) Whether the suits are founded on illegally obtained evidence.

Jurisdiction

18. The objectors contend that the court lacks jurisdiction because there is no employment relationship between the applicants and the objectors; the applicants have not proved any violation of their constitutional rights; and they have also not proved any representative capacity upon which they are suing. According to the objectors the key to opening this courts' jurisdiction is proof that the parties to the dispute are related as employer and employee under Section 12 of the Employment Act. According to the applicants, however, the dispute herein relates to employment and labour relations because it is challenging recruitment process and employment of the interested party by the respondent.

19. After careful considerations of the pleadings and the submission made by the counsel for all the parties herein, I have formed the opinion that the dispute herein relate to employment and labour relation within the meaning of Article 162(2) (a) of the constitution. The interested party has been recruited to work as the CEO of the respondent.

20. The respondent being a state corporation is bound to uphold the national values and principles of governance under Article 10 of the constitution as well as the principles and values of the public service as provided by Article 232 of the constitution. Any violation of the said values and principles amounts to say the least, unfair labour practices and brings that violation under the jurisdiction of this court by dint of Article 3, 22, 23 and Article 165 (5) (b) of the constitution.

21. Article 165(5) provides that:

“the high court shall have no jurisdiction in respect of matters

(a) Falling within the jurisdiction of the courts contemplated in article 162(2)”

22. Article 162(2) of the Constitution provides that

“Parliament shall establish courts with the status of the high court to hear and determine disputes relating to:-

(a) Employment and labour relations”.

23. The high court is therefore barred from exercising jurisdictions in disputes related to employment and labour relations by dint of Article 165 (5) (b) of the constitution. The said position has been upheld by the High Court and the Court of Appeal in their various decisions. In Prof Daniel N. Mugendi Vs Kenyatta University and 3 others [2013] eKLR, the Court of Appeal held that:

“...the industrial court can determine industrial and labour relations matters alongside claims of fundamental rights ancillary and incident to those matters, the same should go for the environment and land court, when dealing with disputes involving environment and land with any claims of breaches of fundamental rights associated with the two subjects...”

24. This court therefore rejects the objection on ground of jurisdiction and holds that it has jurisdiction to determine the dispute before it under Article 162(2), 165(5) of the constitution and Section 21 of the Employment and Labour Relations Court Act. It is therefore dismissed as erroneous the submissions by the objectors that the jurisdiction of this court is limited to the list of disputes listed under Section 12 of the ELRCA. The correct position is that the jurisdiction of the court is much wider and must be viewed to include disputes contemplated under Article 162(2) and 165 (5) (b) of the constitution, Section 21 of the ELRC Act and other statutes that donate jurisdiction to the court.

Locus standi

25. The objector contends that the applicants lack *locus standi* to bring the suits herein because they are not related to the objectors as employer and employee; none of their constitutional rights have been violated and no representative capacity has been proved to warrant them to bring the suits. The applicants have however cited their obligation to defend the constitution under Article 3 of the constitution and their rights to institute proceedings on ground that a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed, or is threatened.

26. After careful consideration of the submissions made by the two sides, I agree with the applicants that under Article 3 of the constitution every person has an obligation to defend the constitution. Likewise, I agree with the applicants that under Article 22(1) of the constitution, every person has a right to institute proceedings in court claiming that a right or fundamental freedom under the Bill of Rights has been denied, infringed, violated or is threatened.

27. The said constitutional provisions are very clear and speaks for themselves.

Article 3 provides that:

“(1) every person has an obligation to respect, uphold and defend this constitution”.

On the other hand Article 22(1) provides that:

“Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the bill of rights has been denied, violated or infringed, or is threatened.”

The objection on ground of *locus standi* is therefore dismissed.

Violation of Section 13 A (1) of the Government Proceedings Act

28. Constitutional petitions and judicial review proceedings are special proceedings brought under the constitution and the Law Reform Act which do not require the suing party to comply with Section 13A(1)

of the Government Proceedings Act (GPA). The objection on ground of violation of Section 13 A (1) of the GPA is likewise dismissed.

Illegally obtained evidence

29. The objector has alleged that some documentary evidence used to found the proceedings herein was illegally obtained and as such the proceedings must fail on account of that illegality. In my view that is a matter which requires proof by way evidence. It is therefore not a good ground for preliminary objection. The objection will therefore also fail on that ground.

DISPOSTION

30. The Preliminary Objection filed both in this suit and Petition No. 5 of 2017 is dismissed with no order as to costs.

Dated, signed and delivered this 29th September 2017

O. N. Makau

Judge