



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NUMBER 14 OF 2016

WILBERT KIPSANG CHOGE.....1ST
PETITIONER

KENNEDY MONCHERE NYAUNDI.....2ND
PETITIONER

GRACE MWENDWA MUNJIRI.....3RD
PETITIONER

PROFESSOR LEVI OBONYO.....4TH
PETITIONER

HELLEN KINOTI.....5TH
PETITIONER

BEATRICE OPEE.....6TH
PETITIONER

PETER MUNYWOKI OPEE.....7TH
PETITIONER

VERSUS

COMMUNICATIONS AUTHORITY OF KENYA.....1ST
RESPONDENT

**CABINET SECRETARY, MINISTRY OF INFORMATION AND
TELECOMMUNICATION.....2ND RESPONDENT**

RULING

1. By a Notice of Preliminary Objection dated 18th February, 2016 the 2nd respondent raised the following objections which it required determined in limine.
 - a. **The Petitioners herein are essentially seeking a review, variation or setting aside the decision of Honourable Justice Odunga in High Court JR 401 of 2014 which quashed their appointments as members of the board of the Communications Authority; this**

Honourable Court lacks the requisite jurisdiction to review, vary, set aside or sit on an appeal of the said decision.

- b. There being no pending appeal to Justice Odunga's decision in High Court JR 401 of 2014, the stay being sought herein would be stopping the execution of a judgment which is neither subject to appeal, review or setting aside proceedings therefore in vain and contrary to public policy; litigation must come to an end.**
- c. The matter is res judicata as the High Court in JR 401 of 2014 already delivered a judgment finding the petitioners' appointment to the board was done contrary to the law.**
- d. The matter substantially in issue is being litigated on in public interest litigation at the High Court, Petition 45 of 2016 where parties herein are substantive parties.**
- e. The Court lacks the requisite jurisdiction to hear and determine the matter in light of the provisions of Article 162 of the Constitution as read with Section 12 of the Industrial Court Act: the matter concerns appointments of board members by the 2nd Respondent under Kenya Information and Communications (Amendment) Act 2013 and there is no employer-employee relationship between the parties.**

2. Mr. Adrian Njenga who joined these proceedings as an interested party further raised a preliminary objection to the effect that, the pleadings filed by Mr. Isaac Onyango Aloo Advocate were in contravention of section 31(1) of the Advocates Act hence a nullity in law. That is to say Aloo did not hold a valid practicing certificate by the time he filed the Petition and the Motion herein.

3. On 14th March, 2016 when the parties appeared before me, I gave directions that the matter be set for oral arguments on the issue of the jurisdiction of the Court to entertain the Petition and the competence of Counsel for the Petitioners to bring the Petition only.

4. Mr. Biita for the 2nd respondent submitted before me that when the Petitioners were appointed to the 1st respondent's Board, the Interested Party moved the Court through HC. Misc. Application No. 401 of 2014 and the High Court (Odunga J) delivered his judgment on 28th May, 2015 quashing the Gazette Notice appointing the Petitioners as members of the 1st respondent's Board. This decision according to counsel has not been overturned hence the petitioners are not members of the 1st respondent's Board nor are they employees of the respondent.

5. Mr. Biita further submitted that the case before the High Court was brought under Law Reforms Act. Section 8(3) of the said Act provided that no return should be made. The order made under the section therefore can only be subject to Appeal. According to counsel, the Petition seeks relief from orders made by Justice Odunga. The petitioners claim certain rights have been infringed. They are therefore seeking before this Court a return. This is not permitted by the Law Reform Act; Mr. Biita argued. This Court could not therefore sit on Appeal over a decision of a Court of equal status. Concerning allegation over breach of fundamental rights, Counsel submitted that a Court cannot breach anybody's fundamental right. The Court is the ultimate interpreter of rights hence a decision affecting person's right cannot be a breach of that right. A person affected can only appeal to a superior Court.

6. On the issue of res judicata, Mr. Biita submitted that the petitioners were parties to the petition before Justice Odunga and had ample opportunity to raise all issues before that Judge. The matters before this Court are therefore to that extent, res judicata. Counsel further argued that the matters before this Court are on all fours with Petition No. 45 of 2016 brought by Okiya Omtatah hence the present petition was res judicata.

7. On the issue of jurisdiction as contemplated under the Constitution and the Court's constitutive Act, Counsel submitted that the dispute did not touch on labour relations since the petitioners were not employees of the 1st respondent hence outside the jurisdiction of the Court.
8. Mr. Ahmednasir for the 1st respondent supported submission by Mr. Biita for the 2nd respondent. He submitted that this was a constitutional petition premised on article 25 and 27 and that the only article of relevance to the Court cited on the petition was article 41. According to counsel, the Court lacked power to reinstate Board members since they are not employees of the 1st respondent. He argued that for the Court to have jurisdiction, the matter must relate to employment and labour relations. The dispute according to counsel was a Board issue hence the Court lacked jurisdiction.
9. Mr. Okoth for the 4th Petitioner in a strange turn of events, supported the preliminary objections and submitted that the petitioners were not employees of the 1st respondent therefore they lacked the locus to move the Court. According to counsel, the Courts jurisdiction derived from article 162(2) (a) of the Constitution. He further submitted that the Employment and Labour Relations Court Act had offered a description of the jurisdiction of the Court. According to him, membership to the 1st respondent's Board was not an employment relations issue.
10. Mr. Njenga, the Interested Party on his part submitted that the petitioner's counsel Mr. Isaac Onyango Aloo had no valid Practicing Certificate when he filed the petition. In a letter annexed to his Replying Affidavit to the Petition he stated that the Chief Registrar Judiciary informed him that Mr. Aloo had not been issued with the current practicing certificate. He further stated that a search from the Law Society of Kenya's Website indicated Mr. Aloo's practice status was inactive. According to him therefore section 9 and 31 of the Advocate's Act had been breached.
11. Mr. Ndumbi for the petitioners submitted that the petitioners were appointed as Board members pursuant to article 34(5) of the Constitution. The 1st respondent's constitutive Act was enacted pursuant to this article. Appointments to 1st respondent's Board therefore had to align to the Constitution that is to say, it had to be independent, devoid of any political or commercial control.
12. On the issue of the status of Judge Odunga's decision, Mr. Ndumbi submitted that both the 1st respondent and the petitioners appealed to the Court of Appeal and a stay order of the Learned Judge's Order was given by the Court of Appeal. According to Counsel, the Petitioners have a labour relationship with the 1st respondent hence the place of redress is this Court and not the High Court. He further submitted that the Court can entertain rights incidental to labour relations.
13. Concerning the withdrawal of the Appeal, Mr. Ndumbi submitted that Counsel for the 1st respondent filed a notice of withdrawal of the Appeal under rule 68(1) of the Court of Appeal Rules 2010. This rule according to counsel, relates to Criminal Appeals. The relevant rule should have been rule 98. Counsel further submitted that the petitioners filed an application for contempt and that the same is due for hearing on 25th April, 2016. According to Counsel, the notice could not have issued if the Appeal had been withdrawn. He further contended that the parties to the appeal were never served with the withdrawal notice.
14. On the issue of res judicata Mr. Ndumbi, submitted that the matter was not res judicata since the stay orders issued by the Court of Appeal were still valid. Counsel further contended that a new cause of action arose when the respondent's refused the petitioners entry into their offices.
15. On the issue of jurisdiction of this Court to entertain the petition, Counsel submitted that the Constitution grants every state organ or tribunal power to promote values of the Constitution hence it would be narrow to restrict the jurisdiction of the Court.

16. Regarding the competence of Mr. Aloo to file the petition, Counsel relied on the Supreme Court's case of **National Bank of Kenya v. Anaj Warehouse** and submitted that an advocate without a practicing certificate is still competent to draw documents.

17. Mr. Aloo for his part submitted that exhibits 1 to 7 in his Replying Affidavit clearly showed he was qualified and active in his practice of law. According to counsel annexure 3 was a demand from LSK for further sums beyond what was required for practicing certificate. The further demands according to counsel were for the LSK Arbitration Centre Project. According to Mr. Aloo payment for the practicing certificate was made in full on 29th January, 2016 and the receipt attached as annexure 6 showed he was in active practice for the current year. Counsel further submitted that payments for practicing certificate are made to Law Society of Kenya and not the Chief Registrar of Judiciary. It was therefore the duty of the Law Society of Kenya to inform the Chief Registrar of Judiciary of the payments received.

18. On the issue of jurisdiction he submitted that article 162 (2) (a) of the Constitution and section 12 of the Employment & Labour Relations Court Act gives the Court jurisdiction.

19. According to him the Employment & Labour Relations Court Act defines who an employee and an employer is. According to counsel, the petitioner did not give themselves these jobs. Stringent procedures were followed prior to their recruitment. Counsel further submitted that the purpose of article 41 in talking about labour relations was meant to widen the jurisdiction of the Court. He further submitted that the Board members have letters of appointment.

20. Having summarized arguments by all parties in this matter in favour of or in opposition to the preliminary objection, I intent to address the objections in three broad heads which I believe will substantially resolve the matter leaving other submissions as corollary.

21. First and most important the Court will decide whether its jurisdiction as contemplated under article 162(2) (a) of the Constitution and section 12 of the Employment & Labour Relations Court Act include Board members of corporations or organizations?

22. Second, is the petition as filed competent if the Court were to find that Mr. Aloo who filed it did not hold a valid practicing certificate at the time he did?

23. Third and finally, was the appeal filed by the 1st respondent against the decision of Honourable Justice Odunga withdrawn? In other words is there an appeal against Justice Odunga' orders on which a stay order can be sustained by the Court of Appeal?

a. **Jurisdiction of the Court as contemplated under article 162(2) (a) of the Constitution and Section 12 of the Employment and labour Relations Court Act.**

Article 162 (a) of the Constitution provides:

“...Parliament shall establish Courts with the status of the High Court to hear and **determine disputes relating to –**

- a. employment and labour relations. (emphasis mine).

24. Article 165(5) further provides that the High Court shall not have jurisdiction in respect of matters falling within the jurisdiction of the Courts contemplated in article 162(2).

25. The preamble to the Employment and Labour Relations Court Act (ELRC Act) provides as follows:-

“An Act of Parliament to establish the employment and Labour Relations Court to hear and determine disputes relating to **employment and labour relations and for connected**

purposes (underlining nine)

26. In order to unbundle for purposes of simplifying the scope of jurisdiction of the Court an inquiry ought to be made into the actual and consequential meaning of the phrase **“dispute relating to employment and labour relations and connected purposes”** as provided both in the Constitution and the Employment & Labour Relations Court Act. Whereas the Employment Act defines what employment is, neither itself nor Labour Relations Act define labour relations. However, labour relations can be described as the interaction between employers and employees aimed at creating a fair working environment. It concerns laws, conventions, practices and institutions that regulate the working environment. To a worker or his representative, good labour relations mean conducive working environment, fair remuneration, staff welfare and freedom of association. To the employer good labour relations entails uninterrupted supply of contracted labour in order to achieve the organization’s targets and objectives. To the employer staff must show dedication to work and commitment towards organizations goals and strategies.

27. Where the organization is profit driven the employer’s major concern is to keep the running operations of the organization profitable for the ultimate benefit of the shareholders.

28. It is in the foregoing context that Boards of directors are appointed. The key purpose of the Board is to ensure the company’s prosperity by collectively directing its affairs whilst meeting the appropriate interests of its shareholders. In addition to business and financial issues, Boards of directors must deal with challenges and issues relating to corporate governance, corporate social responsibility and corporate ethics.

29. Activities and decisions of the Board are in this context closely interconnected with the day to day operations of organizations. Boards pass resolutions which often times have impact on employees contractual relationship with the employer. They formulate policies which are eventually implemented by the employer using the employees. This interplay among the Board, employer and employees constitute the complete gourmet of labour relations.

30. Whereas it is true that there is no contract of service between the Board and the company, the jurisdiction of this Court is not confined by the narrow path that employer-employee relationship must exist for it to have jurisdiction. The Court is granted jurisdiction by the Constitution and the Employment & Labour Relations Court Act, over employment and labour relations and connected purposes and not employer-employee dispute only.

31. As stated above, the interaction among the Board, the company and employees constitute the complete context of labour relations over which the Court has jurisdiction. Further the close connectivity of the Board to work environment bring them under the rubric of **“related to”** or **“connected purposes”** contemplated by the Constitution and the Employment & Labour Relations Act respectively.

32. Cases where employees or their unions have found themselves in dispute with the Board of Directors of an organization over labour relations are not rare. Would it therefore be a sustainable legal argument that in absence of a contract of employment between the Board and the disputing employees the Court lacks jurisdiction? I refuse to be so persuaded.

33. The Court has relied severally in other decisions where arguments over its jurisdiction have been raised on the Australian case of **Dean Patty v. Commonwealth Bank of Australia (2000) FCA 1072** where Justice Paul L. G. Brereton stated as follows:-

“When a Federal Law confers jurisdiction on a court in respect of a “matter” arising under the Constitution or a Federal statute, the jurisdiction so conferred extends to authorize determination of the whole “matter”. It has long been established that a matter is a “justiciable controversy”, the determination of which may involve both Federal and State law. The accrual of State jurisdiction to the

High Court, so that it could determine non-federal parts of a “matter” arising under the Constitution or a federal law has been recognized for many years. This means that once the jurisdiction of the High Court is attracted by reason of the matter arising under Federal law, the Court is clothed with full authority essential for the complete adjudication of the “matter”, and not merely the federal aspect of it. Subsequently, it was recognized that other courts exercising federal jurisdiction also had accrued jurisdiction.

In an earlier Australian case of Philip Morris Inc v. Adam P. Brown Male Fashions Ltd (1981) 148 CLR at p. 535 Aickin J stated that:-

“The vesting of Judicial power in the specific matter permitted by the Constitution carries with it such implied power as is necessarily inherent in the nature of the judicial power itself”.

34. The dispute before me is between the appointing authority (Cabinet Secretary), the Communication Authority of Kenya on one hand and the petitioners on the other, over their membership to the 1st respondent’s Board. Whilst the act of appointment to the Board does not create an employer-employee relationship between the petitioners and either the 1st respondent or Cabinet Secretary or both, its mere absence does not oust the jurisdiction of the Court as observed earlier. The vesting of power by the Constitution and the Employment & Labour Relations Act on the Court to deal with disputes relating to employment and labour relations and connected purposes carries with it the implied power as is necessarily inherent in the nature of the exercise of that jurisdiction. The Court therefore finds that it has jurisdiction.

(b) Is the petition as filed competent should the Court find that Mr. Onyango did not hold a valid practicing certificate?

35. Mr. Aloo attached to his replying affidavit his previous practicing certificates dating from 1999 to 2015. He further attached a receipt dated 29th January 2016 (annexture 6) which is acknowledged by Law Society of Kenya as payment for P.C 2016 (presumably Practising Certificate) 2016. This petition was filed on 11th February, 2016. The Court takes judicial notice that payments for Practising Certificates are made to Law Society of Kenya who then forwards the same to the Chief Registrar of the Judiciary who then issues a practising certificate to the advocate concerned.

36. It would therefore seem to be that breach of section 9 and 31 of the Advocates Act can only occur where such advocate has not made payment to Law Society of Kenya for his current Practising Certificate. The act of the Chief Registrar of the Judiciary issuing a paper signification of the renewal does not itself constitute a renewal since renewal is in the payment. The Court is alive to the fact that the number of advocates in practice have significantly increased lately hence delay by the Chief Registrar of the Judiciary’s office to issue the physical certificates to advocates may be understood in that context. To this extent the Court does not find the petition incompetent as urged by Mr. Njenga. The objection is therefore overruled.

(c) Is the appeal in the Court of Appeal still alive?

37. By a supplementary affidavit filed on 8th March, 2016, Mr. Onyango Aloo deponed that the petitioners filed a Record of Appeal and attached an extract of the record. This is Civil Appeal No. 35 of 2015. There is no order of stay in respect of this Appeal or if there is none was exhibited. However in Civil Application NAI 157 of 2015 (UR 28/2015), the Court of Appeal granted an order of stay of execution of the order of the High Court dated 29th May, 2015 pending appeal. The order of Justice Odunga which was stayed by the Court of Appeal was made in Misc. Application No. 401 of 2014 which was a judicial Review application. The effect of the Court of Appeal’s stay order was that the decision of Justice Odunga quashing the gazette notices

appointing the petitioner as 1st respondent's Board members was stayed pending appeal implying that the petitioners would remain in office pending the hearing and determination of the appeal.

38. By a Notice dated 3rd February, 2016 and filed in the Court of Appeal on the same day the 1st respondent (intended appellants) notified the Court of Appeal that it has wholly discontinued or withdrawn all the application dated 15th June, 2015 and the intended appeal against the respondents with no order as to costs.

39. Rule 68 (1) and (2) of the Court of Appeal Rules 2010 relied on by the 1st respondent concern abatement of Criminal appeals. The proper rule ought to have been rule 96. The rule provides as follows:-

96(1) An appellant may at anytime after instituting his appeal and before his appeal is called on for hearing lodge in the appropriate registry notice in writing that he intends to withdraw the appeal.

(2) The appellant shall within seven days after lodging the notice of withdrawal, serve copies thereof on each respondent who has complied with requirements of rule 79.

(3) If all parties to the appeal consent to the withdrawal of the appeal, the appellant shall file in the appropriate registry, a consent letter signed by the parties or their advocates and thereupon the appeal shall be struck out of the list of pending appeals.

(4) If all the parties to the appeal do not consent to the withdrawal of the appeal, the appellant may before the conclusion of its hearing apply for leave to withdraw the appeal.

40. The petitioners who were interested parties in the appeal through their Counsels stated that they had neither been served with the notice of withdrawal notice nor had they consented to it. This therefore means the withdrawal can only be effected with leave to Court as provided under sub-rule 4 above.

41. But there is one curious issue with the notice of withdrawal as filed. First the notice purports to withdraw the application dated 15th June, 2015. This application was heard and an order made thereon by the Court of Appeal on 31st July, 2015 granting a stay of execution of Justice Odunga's orders made on 29th May, 2015. To this extent this application had been disposed of and ceased to exist. There was therefore nothing to withdraw in so far as the application was concerned. Second the notice talks of withdrawing an intended appeal. The rules of the Court of Appeal only provides for withdrawal of an appeal or notice of appeal. There is no provision for intended appeal.

42. The fact that the petitioners have not consented to the withdrawal of the appeal or notice of intended appeal, coupled with the defects in the notice itself pointed out above, the Court finds that there is no effective withdrawal of the appeal and the orders issued by the Court of Appeal on 31st July, 2015 staying Justice Odunga's orders are still in force.

43. The Court having so found, as above it inevitably follows that as a Court of concurrent jurisdiction as the High Court, this Court cannot relitigate afresh a matter substantially decided by a Judge of concurrent jurisdiction. Whichever way one looks at it the dispute here is over the continuance in or removal of the petitioners from office. The declaration by Judge Odunga that the process of the petitioner's appointment of the 1st respondent Board contravened Kenya Information and Communication Act is the flipside of the petition before me seeking to block the recruitment of a new Board to replace the petitioners. This in essence is the matter subject of the

appeal.

44. In conclusion, the Court finds and holds on the preliminary objection as follows:-

- a. **The process of recruitment and the functions of the respondent's Board members constitute the broader picture of labour relations over which the Court has jurisdiction.**
- b. **The lag in issuing Counsel for the Petitioners with current practicing certificate does not make the petition as filed incompetent since Counsel had duly paid the requisite fees and the delay in issuance of the certificate is purely administrative.**
- c. **The Court declines jurisdiction to entertain the present petition for the reason that the dispute is essentially and substantially the same as the issue decided by the High Court (Odunga J) and which is subject of an appeal pending in the Court of Appeal.**

45. It is so ordered.

DATED AT NAIROBI THIS 15TH DAY OF APRIL 2016

Abuodha Jorum Nelson

Judge

Delivered this 15th day of April 2016

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha Jorum Nelson

Judge