



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT OF KENYA AT NAIROBI
PETITION 19 OF 2016
(Before Hon. Justice Hellen S. Wasilwa on 16th June 2016)

OKIYA OMTATAH OKOITIPETITIONER/APPLICANT

VERSUS

THE PRESIDENT OF KENYA1ST RESPONDENT

CABINET SECRETARY NATIONAL TREASURY.....2ND RESPONDENT

PUBLIC SERVICE COMMISSION3RD RESPONDENT

STATE CORPORATIONS ADVISORY COMMITTEE4TH RESPONDENT

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

AND

R. E. KIBWANA/JOSEPH KIBWANA.....1ST INTERESTED PARTY

WAMBUI NAMU.....2ND INTERESTED PARTY

ESTHER GICHERU.....3RD INTERESTED PARTY

FRANCIS PARSIMEI.....4TH INTERESTED PARTY

KENYA TRADE NETWORK AGENCY5TH INTERESTED PARTY

RULING

1. The Preliminary Objection by the 1st – 5th Respondent is dated 4th April, 2016, raising the following:-

1. **That this Honourable Court lacks Jurisdiction to entertain this matter by virtue of Article 165(3) (d) (i) of the Constitution of Kenya, 2010 which gives the High Court Original an exclusive jurisdiction to hear and determine the instant proceedings.**

2. **That the Petition raises purely constitutional issues that are not within the jurisdiction of this Honourable Court as per Article 162(2) as read together with section 12 of the Employment and Labour Relations Court Act.**
3. **That the issues raised in the instant proceedings are neither within the purview of employment and labour relations as contemplated by Article 162(2)(a) nor do they fall under employer and employee relationship as contemplated under section 12 of the Employment and Labour Relations Court Act by which reason this Honourable Court lacks jurisdiction to entertain this suit.**
4. **That the instant application and entire suit are incompetent as they do not disclose any reasonable cause of action as the appointments sought to be quashed were merely properly made pursuant to the State Corporations Act and other laws in place and the appointments are not in breach of any statutory or constitutional provisions.**
5. **That the entire suit is bad in law and untenable by reason of which it ought to be dismissed with costs.**

2. The Respondents submit that Article 165(3)(d)(i) and (ii) of the Constitution establishes a High Court with the mandate to hear and determine questions touching on interpretation of the Constitution.

3. They submit that the subject matter of this petition doesn't not raise issues of employment and labour relations but questions the appointment of Board Members in State Corporations which is a different realm of law. The matters raised are matters involving the prerogative right of the Executive Arm of Government, under Article 132 of the Constitution and this Court does not have jurisdiction to determine this matter by virtue of Article 165(3) (d) (i) and (ii) of the Constitution.

4. The Respondents' rely on the case of **George Onyango Ochieng vs Chemelil Sugar Company Ltd [2014] eKLR** where this Court stated that:

“Under Section 12 of the Industrial Court Act 2011, the jurisdiction of this Court is well listed as it relates to disputes relating to or arising out of an employment between an employer and an employee and extends to Unions and Federations... it is therefore the finding of this Court that this Court lacks jurisdiction to entertain this claim and order Claimants to pay costs to the Respondent herein”.

5. The Respondent further submits that the Employment and Labour Relations Court determines questions on employment and labour relations, where the nexus of the relationship in a contract of service and payment of wages which is not the situation in this case. Board members are appointment through operation of the law and their appointment does not create employment in terms of the Employment Act, neither does it constitute a contract of service.

6. They rely on the case of **Geoffrey Oriaro v Cabinet Secretary Ministry of Labour Social Security and Services & 4 others [2015] eKLR**. In determining the employment relationship between the Trustees and NSSF, the Court stated that:

“The first and second Respondent are also not employees of the Trustees within the meaning of employer under Section 2 of the Employment Act, that is, employer means any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company;

It follows that there does not exist an employee and employer relationship between the Appointees and the Respondents nor is there an employment relationship between members of the NSSF and the Fund itself or the Cabinet Secretary”.

7. The Respondents submit that Board Members do not receive salaries or wages but sitting allowance and reimbursements of expenses which does not satisfy the requirement in establishing an employer and employee relationship.

8. They rely on the case of **David Randu v Malindi Water & Sewerage Company Ltd [2013] eKLR** where the Court highlighted the effect of Section 2 of the Employment Act 2007, in determining the employer-employee relationship and lack of the Employment Courts jurisdiction in absence of that relationship. The judge in this matter stated:

“The Court’s decision in the Eaton’s case is corroborated by Section 2 of the Employment Act of Kenya which defines an employee as a person who is employed for wages and salary.

In view of the foregoing, that there was never any employment relationship between the parties herein, the Court is ousted of the jurisdiction to determine the dispute involved in the suit. Section 12 of the Industrial Act read together with Article 162 of the Constitution of Kenya limits the jurisdiction of this Court only disputes related to employment and labour relations. On the other hand Section 2 of the Companies Act Cap 486 grants to the High Court the exclusive jurisdiction to determine all disputes related to the business and affairs of companies. The present case is clearly about the removal of a director from office and in my view it is filed in the wrong forum. The Court therefore agrees with the defence that this Court lacks jurisdiction”.

9. The Respondents further submit that this Petition raises purely constitutional issues as it challenges the appointment of board members. The Petitioner is in essence challenging the powers of the President and the relevant Cabinet Secretary in appointing the Board Members. The dispute is gauged in Article 132 of the Constitution and from a reading of the Petition it is obvious that they want provisions of the State Corporation Act declared unconstitutional a decision that can only be made by a High Court Judge sitting in a Constitutional Court.

10. The Petitioners have also challenged infringement on rights falling on Chapter IV of the Bill of Rights, and High Court still has jurisdiction under Article 165 (3) (d) (i) and (ii) to determine constitutional questions touching on Article 22 and other provisions of the Constitution as raised in the instant Petition.

11. It is because of the above reasons, that the Respondents pray that the Application dated 29th February 2016 together with the Petition therein be dismissed for lack of jurisdiction and costs.

12. The Petitioner has filed a Replying Affidavit to the 1st – 5th Respondents’ Preliminary Objection wherein he depones:

“That the Preliminary Objection lacks merit and should be dismissed for the reasons that the Constitution of Kenya 2010 brought significant change on aspects of leadership and transparency and in particular Articles 10 and 73.

That the Court is established pursuant to the provisions of Article 162(2) of the Constitution and its jurisdiction is set out under Article 165 (5) (b) and Section 12(1) of the Employment and Labour Relations Court. These provisions are meant to safeguard against political patronage and the Petitioner contends that the State Corporations Act (Cap 446) fails to meet this requirement and as such appointments made under this Act are not based on personal integrity, competence and suitability”.

13. He further states that failure by the Act to address the question of which criteria shall be applied clearly disqualifies the Act from meeting the constitutional requirement of transparency or public participation as envisaged under Article 10(2) (c) of the Constitution.

14. He also states that the Act did not comply with Article 27(1) (2) & (3) which puts all persons as equal

before the law and Article 47(1).

15. The Petitioner submits that the two grounds do not plead a valid point of law neither is there one which raises by clear implication out of the pleadings and which, if argued as a Preliminary Objection may dispose of the suit. He continues to submit that a valid objection must raise a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. A preliminary Objection cannot be raised if any fact has to be ascertained or on what is the exercise of judicial discretion.

16. The Petitioner submits that the subject matter herein concerns the constitutionality of the appointment of board members under the State Corporations Act and that the issues raised do relate to employment and labour relations and falls squarely under the Jurisdiction of this Court. He goes on to submit that there is no provision in the Constitution express or implied which exempts the appointment of board members under the State Corporations Act.

17. The Petitioner further submits that the Court is vested with the jurisdiction to deal with constitutional issues arising within matters under its jurisdiction, under Article 2(4), 22(1), 23, 41, 162(2)(a), 165(5) (b) and 258(1) of the Constitution as well as Section 12 of the Industrial Court Act 2011. Moreover, he submits that the High Court is stripped of jurisdiction to interpret and enforce the Constitution in matters that fall under the Jurisdiction of this Court.

18. The Petitioner adopts the ruling of this Court in the case of **Okiya Omtatah Okoiti vs. Kenyatta University Council & 4 Others, Nairobi ELRC Petition No 89 of 2015** where the Court correctly and effectively addressed its jurisdiction to entertain such matters. He argues that this Court under the above named Sections has exclusive original and appellate jurisdiction to hear and determine all disputes referred to it relating to employment and labour relations; including the violation of rights and the interpretation of the Constitution, including questions of contradiction between any law and the Constitution.

19. The Petitioner expounds that the jurisdiction of the Court is not just limited to disputes arising out of employment contracts between the employer and an employee or employer - employee relationship and that limiting it to just that amounts to ousting the provisions of Article 22(2)(b)&(c) and 258(2)(b)&(c) in matter concerning Article 41 and related issues. He argues that Article 23(1) of the Constitutions must be read with Article 162(2) (a) with neither provision destroying each other.

20. They refer to the case of **Karisa Chengo, Jefferson Kalama, Kengha & Kitiso CHaro Ngati v Republic (2015) eKLR** where the Court of Appeal held that:

“The Jurisdiction of the High Court is limited, it cannot exercise jurisdiction on matters falling within the jurisdiction of the two Courts contemplated in Article 162(2). Therefore the High Court no longer has original and unlimited jurisdiction in all matters as it used to have under the repealed constitution. It cannot deal with matters set out under Section 12 of the ELRC and Section 14 of the ELC Act. Conversely, the ELRC and ELC cannot deal with matters reserved for the High Court”.

21. The Petitioner goes on to submit that this Court has a duty to look into the lawfulness both constitutionality and legality and the procedural integrity of the process of recruiting and appointing chairpersons and members of boards of State Corporations, especially if recruitment process was in harmony with Articles 10, 27, 41, 47, 232, and 259(1) of the Constitution.

22. He submits that all state authorities are ultimately subject to judicial accountability vide the sovereign people’s authority vested in the Judiciary as the final arbiter of disputes, and as the institution with exclusive authority and power to make binding interpretations of the Constitution and the Law.

23. They further submit that they have a reasonable and legitimate expectation by virtue of Article 2 (3) and 2 (4) that individuals can only legitimately occupy public office if they are appointed through

recruitment process that is in compliance with the Constitution and does not contravene the law in any way.

24. The Petitioner submits that they are not subject to the approval of the National Assembly, appointments of chairpersons of Board of State Corporations are not part of presidential appointments anticipated under Article 132(2), and are subject to the values and principles of public service that apply to all in public service in all state corporations. Moreover, state corporations are not among those state organs or bodies exempt by virtue of Article 234(3) and (4) of the constitution from supervision of the Public Service Commission.

25. In conclusion the Petitioner submits that the Preliminary Objection should be dismissed with costs as it is the Courts duty to promote and safeguard constitutionalism and rule of law.

26. Having considered the submissions on this Preliminary Objection, I will revert back to the prayers being sought in this Petition. The Petition concerns the constitutionality of the appointment of board members under the State Corporations Act.

27. The Petition was filed against the 5 Respondents herein plus 5 other Interested Parties. The Petitioner has filed his Petition faulting the 1st and 2nd Respondents for appointing the Chairman and 3 members of the board of the Kenya Trade Network Agency without adhering to laid down constitutional values and principles and procedures of the rule of law, fairness, inclusiveness, competitiveness, merit and openness in public appointments.

28. The Petitioner is therefore inviting this Court to intervene and determine the constitutional validity of paragraphs 6 (1) (a), 6 (1) (g) and 9 (1) of the Kenya Trade Network Agency Order 2010 (Legal Notice No. 6 of 28th January 2011) issued under 53 (1) of the State Corporations Act, (hereinafter the order) and appointments made thereunder.

29. The Petitioner has approached these issues in light of Article 41(1) which deals with fair labour practices. Article 232(1) (g) which deals with appointments in public service being based on fair competition and merit etc.

30. The Respondents have raised the Preliminary Objection to the effect that this Court lacks jurisdiction to handle these issues and that the High Court has exclusive jurisdiction to determine them.

31. The Respondent has submitted that under Article 165(3) and (i) and (ii) of the Constitution, the High Court has jurisdiction to hear and determine questions touching on interpretation of the Constitution.

32. They also submit that the subject matter of the Petition does not raise issues of employment and labour relations.

33. The jurisdiction of the Employment and Labour Relations Court is derived from Article 162 (2) (a) of the Constitution of Kenya which provides as follows:

“(2) Parliament shall establish Courts with the status of the High Court to hear and determine disputes relating to:

(a) Employment and labour relations.

And Section 12 of Employment and Labour Relations Court Act which states as follows:

“(1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including:-

- a. disputes relating to or arising out of employment between an employer and an employee;
- b. disputes between an employer and a trade union;
- c. disputes between an employers' organisation and a trade unions organisation;
- d. disputes between trade unions;
- e. disputes between employer organizations;
- f. disputes between an employers' organisation and a trade union;
- g. disputes between a trade union and a member thereof;
- h. disputes between an employer's organisation or a federation and a member thereof;
- j. disputes concerning the registration and election of trade union officials; and
- i. disputes relating to the registration and enforcement of collective agreements.

(2) An application, claim or complaint may be lodged with the Court by or against an employee, an employer, a trade union, an employer's organisation, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose.

(3) In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders:

1. interim preservation orders including injunctions in cases of urgency;
2. a prohibitory order;
3. an order for specific performance;
4. a declaratory order;
5. an award of compensation in any circumstances contemplated under this Act or any written law;
6. an award of damages in any circumstances;
7. contemplated under this Act or any written law;
8. an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law; or
9. any other appropriate relief as the Court may deem fit to grant.

(4) In proceedings under this Act, the Court may, subject to the rules, make such orders as to costs as the Court considers just.

34. In determining whether this Court has jurisdiction to handle this matter or not, I relent back to similar cases which have been dealt by this Court in similar circumstances. The list under Section 12 of Employment and Labour Relations Act states that this Court can deal with any matter arising out of an employment relationship. In the instant case issues being raised in this Petition emanate from an employment relationship and the Hon. Judge Nduma addressed this issue in **Nick Githinji Ndichu vs. Clerk Kiambu County Assembly and Another (2014) eKLR** where he held as follows:

“it is clear from the foregoing that the law is not concerned with the method of acquiring an employment. The law does not concern itself with whether the person was appointed or elected.

Rather the person must:

Be having an oral or written contract of service,

Be receiving a wage/salary for the services rendered.....”

35. In this case then under Section 12(1) of Employment and Labour Relations Court, where such conditions exist then we can say there is an employment relationship and in this case then this Court has jurisdiction to entertain it. I addressed this issue in the case of **Okoyo Omtatah Okoiti vs. Kenyatta University Council and 4 others Nairobi ELRC Pet No. 89 of 2015** as follows:

“Numerous case law has also addressed this issue. In the Industrial Court of Kisumu Cause No. 81/2014 Evans Kaiga Inyangala & 2 Others vs. County Government of Vihiga & 2 Others, this issue was also raised and I held that this Court has jurisdiction to handle any employment related issue.

In the case of United States International University & Eric Rading (2012) eKLR Hon. J. Majanja also addressed this Court’s jurisdiction and stated as follows:

“43. The intention to provide for a specialist court is further underpinned by the provisions of Article 165(6) which specifically prohibits the High Court from exercising supervisory jurisdiction over superior courts. To accept a position where the Industrial Court lacks jurisdiction to deal with constitutional matters arising within matters its competence would undermine the status of the court. Reference of a constitutional matter to the High Court for determination or permitting the filing of constitutional matters incidental to labour matters would lead to the High Court supervising a superior court. Ordinarily where the High Court exercises jurisdiction to interpret the Constitution or enforce fundamental rights, its decision even where declaratory in nature will require the court to follow or observe the direction. This would mean that the High Court would be supervising the Industrial Court which is prohibited by Article 165(6).

44. In the final analysis, I would adopt the position of the Constitutional Court of South Africa in Gcaba v. Minister of Safety and Security (Supra). The Industrial Court is a specialist Court to deal with employment and labour relations matters. By virtue of Article 162(3), Section 12 of the Industrial Court Act, 2011 has set out matters within the exclusive domain of that Court. Since the Court is of the status of the High Court, it must have the jurisdiction to enforce labour rights in Article 41 and the jurisdiction to interpret the constitution and fundamental rights and freedoms is incidental to the exercise of jurisdiction over matters within its exclusive domain. In any matter falling within the provisions of Section 12 of the Industrial Court Act, then the Industrial Court has jurisdiction to enforce not only Article 41 rights but also all fundamental rights ancillary and incidental to the employment and labour relations including interpretation of the Constitution within a matter before it.

45. In light of what I have stated, I find and hold that the Industrial Court as constituted under the Industrial Court Act, 2011 as a Court with the status of the High Court is competent to interpret the Constitution and enforce matters relating to breach of fundamental rights and freedoms in matters arising from disputes falling within the provisions of Section 12 of the Industrial Court Act, 2011.”

36. J. Majanja’s approach was also upheld by the Court of Appeal in

Civil Appeal No. 6 of 2012 Prof. Daniel N. Mugendi vs. Kenyatta University & Others where they rendered themselves thus:-

“in the same token we venture to put forth the position that as we have concluded that the Industrial Court can determine industrial & labour relations matters alongside claims of fundamental rights ancillary and incident to these matters, the same should go for the

Environment & Land Court, when dealing with disputes involving environment & land with any claims of breaches of fundamental rights associated with the two subjects”.

37. It is my view that the issues raised herein arise out of an employment relationship and also concern Article 41 of Constitution dealing with fair labour practices for which this Court has jurisdiction.

38. The case of **George Onyango Ochieng vs Chemilil Sugara Company Limited Kisumu ELRC case No. 54/2013** was cited by the Respondents who submitted that I declined jurisdiction in this case – yes – I did decline jurisdiction in that case because the wrong Respondent had been sued – who had no relationship with the Claimant. The facts were also substantially different from issues raised in this Petition.

39. I find the Preliminary Objection has no merit and I dismiss it accordingly.

40. I order that the Application pending hearing be set down for hearing forthwith.

Dated and delivered in open Court this 16th day of June, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No Appearance