



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NUMBER 35 OF 2016

**KENYA COUNCIL OF EMPLOYMENT AND
MIGRATION AGENCIES.....PETITIONER/APPLICANT**

VERSUS

KENYA LITERATURE BUREAU.....1ST RESPONDENT

CABINET SECRETARY

EDUCATION, SCIENCE AND TECHNOLOGY..... 2ND RESPONDENT

SECRETARY, STATE CORPORATIONS

ADVISORY COMMITTEE.....3RD RESPONDENT

HON. ATTORNEY GENERAL.....4TH RESPONDENT

AND

FRANCIS S. K. BAYA.....1ST INTERESTED PARTY

DR. MR. BELLIO KIPSANG.....2ND INTERESTED PARTY

MRS. EVE AKINYI OBARA.....3RD INTERESTED PARTY

RULING

1. Counsel for the 1st respondent and 1st and 3rd interested party together with the Attorney General for 2nd, 3rd and 4th respondent raised a preliminary objection to the effect that the Petition as filed contravened section 16(2) of the Government Proceeding Act (Cap 40 Laws of Kenya).

2. Section 16 (2) of the Government Proceedings Act provides as follows:-

“16(2) The Court shall not in any civil proceedings grant any injunction or make any order against the Government which could not have been obtained against the Government.”

3. Mr. Ochieng submitted that the import of section 16(2) of the Government Proceedings Act was to avert a crisis that would have been occasioned by issuance of injunctive relief against the Government and its agencies by restraining them from carrying out their statutory functions. According to Counsel, the only available remedy to the Petitioner lies in judicial review to remedy any excesses of the executive. In support of this submission counsel invited the Court to the decision of Okwengu J in the case of **Margaret Mbiyu Vs. Minister of Lands & 2 Others** where the learned Judge struck out a Petition seeking to obtain injunctive reliefs against the Minister of Lands and Chief Lands Registrar.

4. Ms. Chege for the Attorney General submitted that the first prayer in the Petition could not be granted because the Office of the Attorney General can only be directed by the Court if in disobedience of the law. In the current circumstances the Petitioner had not proved that the Office of the Attorney General had breached any of his rights. In support of this submission, Counsel relied on the case of **Hon. Chirau Ali Mwakwere v. Robert Mobera & 4 Others** and **Francis Mbugu v. Commissioner of Police & 2 Others**.

5. The Petition as filed by the Petitioner presents difficulty to the Court to comprehend as it consists of massive reproduction of articles of the Constitution and other statutes without showing any connection with the matter at hand. Sorry to observe that the Petition presents an example of bad drafting. The Petitioner could have done better. That having been said, the Petition is not clear on what reliefs are being sought but if the Court can glean them, they appear to be the following.

(a) That it was in the interest of justice that this application is certified urgent and conservatory orders be granted to preserve public interests and welfare of Kenyans and status of the matters in dispute pending the hearing and determination of this suit.

(b) That pending the hearing and determination of this application the respondents herein or any other body or authority be restrained from interfering with the process of the Kenya position of the managing Director of Kenya Literature Bureau as the process of vacation of the same is complied upon the incumbent person herein Mrs. Eve Akinyi Obara who was currently holding into the position ultra-aversely, depending the outcome of the advertisement, short listing interviews and subsequent appointment and gazettelement.

(c) That pending the hearing and determination of this application the respondents be restrained interfering in any way with the current composition of the board of Kenya Literature Bureau in any way which is pre-judicial to this matter until proper board is appointed as being full Board which includes a person and a character of Managing Director.

6. It can therefore be seen that the Petitioner has not properly crafted his prayers in way that the Court could be in a position to make final orders. The Court however would let the Petitioner get away with it on the premise that he is acting in person but the organization which he represents could in future be of assistance to the Court if they drafted their pleadings more coherently or better still hire the services of an advocate for that purpose.

7. If the Court were to assist and try and understand the import of the orders sought, it would be that the Petitioner seeks mandatory injunction against the respondents compelling them not to allow the 3rd Interested Party to remain in office pending the recruitment of her successor and further that the 1st respondent's Board be restrained from continuing in office until a proper Board is formed.

8. These prayers are informed by what the Court reckons to be the concerns by the Petitioner over what he calls recent happenings in state corporations where the agencies mandate to monitor and evaluate such as respondents have abdicated their mandate and that the infighting according to press reports and article 35 of the Constitution gravitates around the questions of integrity and probity and personal relationships of various public offices occasioning loss and wastage. The Petitioner further contended that the non-compliance in the appointment of the managing director is lack of probity on the part of 1st, 2nd, 3rd and 4th respondents where the Board of the 1st respondent is incomplete hence the 1st interested party cannot by law make a binding decision.

9. The 1st respondent through its Legal Services Manager has refuted these allegations and stated in the main that:-

(a) That he knew by his own knowledge that the 3rd Interested Party's contract with the 1st Respondent was due to expire on 31st March 2016 but the same was duly extended for a period of six (6) months by the Minister for Education, Science & Technology and Kenya Literature Bureau's Board of Management to allow for transition but which extension will expire upon recruitment of a new Managing Director.

(b) That he knew by his own knowledge that the 1st and 3rd Interested Party had conducted the activities of the 1st Respondent within the law following their appointment by the competent authorities as stipulated under KLB's Act Cap 209.

(c) That he knew by his own knowledge that the Mwongozo Code of Governance is a policy document that works hand in hand as supplement with other Kenya Literature Bureau's Policies and Kenya Literature Bureau Act.

(d) That he knew by his own knowledge that the 3rd Interested Party has not applied for a new term and extension of her contract was done by the appointing authority in line with Kenya Literature Bureau Act Cap 209 and the same was not in contravention with Kenya Literature Bureau's Act and does not contravene Mwongozo Code of Governance which is a guideline.

(e) That he knew by his own knowledge that the 1st Respondent had advertised for the position of Managing Director and the recruitment process was underway which would have been completed within (6) months as per the Agreement with Delloite and Touche.

(f) That the Petitioner continues to exhibit malice in the way that matter was being handled by having proceedings with malicious allegations and withdrawing the same knowing very well that the petition was intended to cause disrepute to the Respondents and Interested Parties.

10. The issues raised by the Petitioner and the responses by the respondent and interested parties are matters reserved for the trial of the main petition. The Court cannot delve much into them.

11. The Court at this stage is called upon to decide whether the injunction currently in force was properly issued in view of section 16 of the Government Proceedings Act.

12. The purport of section 16 of the Government Proceedings Act is that an order of injunction cannot issue against the Government. This section appear to have been informed by the principle stated by Visram J as he then was in the case of **Royal Media v. Telkom Kenya** where the learned Judge stated that:-

“...in my view rightly, so that there can be no injunction against the Government. Where there is a cause of action directly against the Government, there can be no injunction. The appropriate remedy in that case would be to seek declaratory relief against the Government. This is founded on the principle that the King cannot do wrong and that he cannot be sued in his Court.

13. This position was re-asserted by Kasango J in the case of **Chogis Garage Limited v. Attorney General** where the learned Judge stated:-

“clearly section 16 of the Government Proceedings Act prohibits the issuing of injunction against the Government... the Courts finding being that the Court is not empowered to issue an injunction against the Government, the plaintiffs application must fail.”

14. It is noteworthy that both the decisions cited above were made prior to the promulgation of the Kenya Constitution 2010. Under article 23(3), in proceedings brought under article 22, a Court may grant

appropriate relief including an injunction. The Constitution binds the Government and any party approaching the Courts on complaints of violation of his or her rights under article 22 and indeed under the entire Constitution, is entitled where appropriate to any of the remedies stipulated under article 23(3) which include injunction. This implies that the interdiction presented by section 16 of the Government Proceedings Act against issuing of injunctions upon government in essence deprives a person meriting such an order from a remedy provided for in the Constitution. To this extent, section 16 of the Government Proceedings Act conflicts with the Constitution and to that extent null and void. The preliminary objection consequently fails.

15. The Court however on its own motion and considering the nature and purport of the remedies sought in the Petition, of the view that no prejudice would be occasioned to the Petitioner if the interim injunction issued 5th April, 2016 is vacated.

16. The 1st respondent as an organization must be allowed to carry out its operation and if there be issues of integrity or malpractice these can be submitted to competent authorities for investigation and appropriate action. The Court cannot issue an injunction or indeed any order the effect of which would grind to a halt an organization especially of the kind of the 1st respondent which plays a pivotal role in the country's education sector.

17. The concerns by the Petitioner if proved are remediable by any of the raft of remedies provided for under article 23(3) of the Constitution. At this stage however, the balance of convenience is tilted in favour of allowing the 1st respondent's operations to continue normally, pending the hearing and determination of the Petition.

18. The Court therefore vacates the injunction orders made on 5th April, 2016 and hereby orders that the Petition proceeds to trial on merit on a date to be fixed at the Registry.

19. It is so ordered.

Dated at Nairobi this 9th day of September 2016

Abuodha Jorum Nelson

Judge

Delivered this 23rd day of September 2016

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha Jorum Nelson

Judge