



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NUMBER 114 OF 2016

OKIYA OMTATAH OKOITI.....PETITIONER

VERSUS

HEAD OF THE PUBLIC SERVICE.....1ST RESPONDENT

CABINET SECRETARY

MINISTRY OF INTERIOR.....2ND RESPONDENT

PUBLIC SERVICE COMMISSION.....3RD RESPONDENT

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

AND

KENYA PRISON SERVICE.....1ST INTERESTED PARTY

ISAYA M. S. OSUGO.....2ND INTERESTED PARTY

OMAR TAWANE GUDAL.....3RD INTERESTED PARTY

RULING

1. On 10th August, 2015 the Petitioner moved this Court ex parte for orders among others that:-

a. That pending the inter-partes hearing and determination of the Application herein, this Honourable Court be pleased to issue a temporary order suspending the Implementation of the Respondents' decision to extend the tenures of the 2nd and 3rd Interested Parties as officers of the 1st Interested Party.

b. That pending the inter-partes hearing and determination of the Petition herein, this Honourable Court be pleased to issue a temporary order suspending the implementation of the Respondents' decision to extend the tenures of the 2nd and 3rd Interested Parties as officers of the 1st interested party.

c. That pending the inter-partes hearing and determination of the instant Application and/or Petition

this Honourable Court be pleased to issue a temporary order of prohibition prohibiting any of the Respondents, whether by themselves, or any of their employees or agents or any person claiming to act under their authority from proceeding to give effect, in any way whatsoever, to the purported extension of the tenures of the 2nd and 3rd interested parties as officers of the 1st Interested Party.

2. The Court after reviewing the application, the grounds upon which it was brought, the affidavit in support and attached documents, became of the view that ex facie, the application was merited and granted the orders sought to last until 18th August, 2016 when the same would be heard inter partes.

3. On 13th August, 2016, after hearing the parties on their opening remarks, I directed that in order to help me decide whether the interim orders can or cannot remain in force pending the determination of the petition herein, parties do make submissions on the import of section 5 and 6 of the Prison Act. That is to say whether the order granted on 10th August, 2016 had adverse effect on the effective execution of the functions set out in section 5 and 6 of the Act to warrant their discharge and as corollary whether any prejudice would be occasioned to the Petitioner and the constituency he represents if the said orders were set aside, discharged or varied with the consequence that the 2nd and 3rd Interested Parties continue in office pending the determination of the Petition herein.

4. Mr. Kinyanjui for the 2nd Interested Party submitted that it was not contested that his client was the current Commissioner of Prisons having been appointed on a Local Agreement for two years by the 3rd respondent, effective 1st August 2016.

5. Counsel further submitted with regard to maintenance of statute set Prison hierarchy, that the Prison's Act was expressed to be an Act of Parliament to consolidate and amend the law relating to prisons and to provide for the organization, discipline, powers and duties of prison officers and for matters incidental thereto and connected therewith. Further section 3(2) established the hierarchy necessary for the Prison's Force and organizational structure as deemed expedient by Parliament. According to Mr. Kinyanjui, so far as is material section 3(2) of the Act provided as follows:-

“the service shall consist of such ranks of senior and subordinate prison officers as the Minister may by notice in the Gazette specify and prison officers shall have seniority as so specified.”

6. Section 5 creates the Office of the Commissioner of Prisons and provides:-

1. The administration of the service and control of supervision of all prisoners shall be vested in the commissioner subject to directions of the Minister.

2. The Commissioner may subject to this Act from time to time make standing orders and give administrative directions for the observance of all prison officers.

7. According to Counsel therefore, the hierarchy established by the Prison Act places the Commissioner in mandatory terms at the apex of the organization. This according to Counsel cannot be abrogated since the Court cannot override what Parliament has created.

8. Regarding the Petition, Counsel submitted that the same was based on the erroneous supposition that the 2nd Interested Party's tenure was extended. According to Mr. Kinyanjui the 2nd Interested Party was appointed under a Local Agreement at the time the Petition was lodged. The ex parte order was therefore issued in error and amounted to suspension from employment of the 2nd Interested Party under the local agreement.

9. Counsel further submitted that whereas section 6 of the Prisons Act permits the Deputy Commissioner to do such acts as the Commissioner may direct, there is a basic presumption that there is in office a Commissioner of Prisons. Further given the emphasis on ranks in the Force, suspending a serving

Commissioner through a Court order would mean the four deputies will assume the role of the Commissioner under section 5. This according to Counsel would create an unhealthy competition for power and a collapse of the established hierarchy.

10. Section 6 of the Prisons Act provides:-

1. The Deputy Commissioner may exercise any of the powers or perform any of the duties vested in or assigned to the commissioner by or under this Act or any rules made thereunder or by or under any other written law.

2. The Commissioner may delegate any of the powers vested in him by this Act or any rules made thereunder or save where contrary intention appears therein, by any other written law, to an assistant Commissioner.

11. According to Mr. Kinyanjui, to read into this section an express succession of the Commissioner by the four Deputy Commissioners during the subsisting tenure of a current commissioner is an interpretation of statute that stretches to a brittle point the intent of the legislature on the establishment of a hierarchy of authority in the Prison Force. To support this submissions, counsel sought reliance on the case of **NSSF Board of Trustees & 2 Others v. COTU (K) 2015 eKLR.**

12. Mr. Kinyanjui further submitted that the letter dated 8th June, 2016 by the Public Service Commission expressly stated that the decision to employ the 2nd Interested Party as a Commissioner of Prison was not an extension but that it was on Local Agreement Terms for a space of two years effective 1st August, 2016. According to counsel, the Court was not furnished with this letter at the time the Petitioner sought the interim orders.

13. Concerning the Local Agreement, Counsel submitted that the Petitioner did not demonstrate that the Local Agreement offered to the 2nd Interested Party was unlawful. According to Counsel, the Local Agreement was a feature of Public Service Code of Regulations which the Petitioner relied on and which provided at paragraph E.19 (1) that:-

“where vacancies cannot be filled on pensionable terms because of non-availability of suitable persons or where vacancies exist in the non-pensionable establishment such as in development projects, candidate recruited to fill such vacancy should be appointed on Agreement Terms if the period is justified.”

14. According to Mr. Kinyanjui, it had not been proven by the Petitioner that any of the terms of engagement of the 2nd respondent was injurious to him or that he would suffer any prejudice if the orders were vacated. Counsel further submitted that the purpose of granting ex parte orders on 10th August, 2016 were distorted by the Petitioner. He misled the Court that the interested party's employment was an extension beyond 60 years which was not the case.

15. In conclusion counsel, submitted that Kenya Prison Force is a critical cog in not only the administration of justice but also the intention of section 5 of the Prison Act was that the authority is exercised nationally over the prisons in manner that gives confidence that the justice system and rule of law is upheld. To leave this position in vacuum solely based on the Petitioner's apprehension that the 2nd interested party's tenure was allegedly extended beyond retirement age of sixty years would be injurious to the hierarchy espoused in section 3 of the Prisons Act. It was therefore in the public interest to have the interim orders vacated and the 2nd interested party continues to serve in office pending the determination of the petition.

16. Mr. Omari in support of submissions by Kinyanjui added that the 2nd Interested Party was sourced from Police Service on recommendation of the Madoka Task Force. He was brought to initiate reforms. These reforms are incomplete hence the need for his re-engagement on local agreement.

16. Ms. Mbilo for the Attorney General submitted that sections 5 and 6 of the Prisons Act were couched in mandatory terms hence the deputies could only exercise the functions of a substantive holder. To understand the import of these sections, Counsel drew the Court's attention to section 43 of Interpretation and General Provisions Act. According to Counsel, there is in office a lawfully appointed Commissioner and that the orders were issued after appointment and no evidence has been shown of the irregularity of the appointments. The orders should therefore be lifted in the public interest. Mr. Cheloti for the 3rd Interested Party submitted that the Motion lacked necessary documents. The 3rd Interested party was appointed on Local Agreement which is permitted by Government Policy. According to Counsel, the Petitioner had not shown what damages the public would suffer if the orders are vacated.

17. Mr. Okoiti the Petitioner on his part submitted that Free Dictionary defines a Deputy as a person appointed or empowered to act for another or an assistant exercising full authority in the absence of his or her superior and equal authority in emergencies. According to the Petitioner therefore, a Deputy is not decorative ornamental or ceremonial designation. Deputies are important assistants who serve the pivotal purposes of being persons empowered to act for the CEO as substitute whenever necessary. According to Mr. Okoiti therefore, there could not be any leadership crisis created by the exit of the 2nd Interested Party. Further the Kenya Prison Service is a large institution with very sound organizational, administrative and command structures that cannot be compromised by the absence of any individual.

18. Mr. Okoiti further submitted that the parties urging that there is a crisis in the Prisons are simply telling a lie for there is none. According to him, the assumption in section 5 of the Prisons Act is that whoever is the Commissioner is properly appointed to that office. The case before the Court was different in that the 2nd Interested Party has been improperly re-appointed after he retired. The 2nd Interested Party cannot therefore legitimately exercise the powers in section 5 of the Prisons Act.

19. On prejudice, the Petitioner submitted that he will be prejudiced if the orders are lifted since his purpose for seeking interim orders was to prevent and not just to cure violations and threats to the Constitution. Further article 22 and 258 of the Constitution introduce the doctrine of public interest litigation for the protection of public interest. It means litigation is brought in the interest of the public as a whole in seeing the law upheld.

20. Mr. Okoiti further submitted that the preparedness of the Court to consider whether the state has abused its powers is one of the cornerstones of the rule of law under the Constitution. Further when considering the prejudice likely to be suffered by the Petitioner, sight must not be lost of the fact that this was public interest litigation and the public would suffer prejudice when the Constitution and other laws are violated.

21. Public interest litigation is a new and developing concept especially under the Kenya Constitution 2010. It is a very useful concept since it allows any person to petition the Court whenever there is a violation or a threat of violation of any right or fundamental freedom enshrined in the Constitution. It is no longer necessary for a person to show any personal harm or violation before an action can be commenced.

22. The question presented before me to determine is whether the continuance of the 2nd and 3rd Interested Party in Office would be a violation of the Constitution and the Prisons Act.

23. The Petitioner contends it would be a violation of the Constitution while the respondents and the interested parties contend it is not. According to the respondents and the Interested Parties, the 2nd and 3rd Interested Parties have been appointed under clause E 19(1) of the Public Service Code of Regulations which permits appointment on agreement terms in cases where vacancies cannot be filled on pensionable terms because of non-availability of suitable persons or where vacancies exist in the non-pensionable establishments such as development projects.

24. Confronted with this provision in the Public Service Code of Regulations, the Court is left with very little room to maneuver because it would seem the law permits appointments on agreement terms. The

application of this stipulation in the Public Service Commission Code of Regulation however is not absolute. The appointment must be made only where it has been demonstrated that there is non-availability of a suitable person to take up the position on pensionable terms. In the case before me, the determination of whether there is no suitable person to take up the position erstwhile occupied by the 2nd and 3rd Interested Party on pensionable terms forms the substance of the Petition herein and can only be decided after a full hearing of the Petition. The concern at this point is whether pending the determination of this question among others, the 2nd and 3rd Interested Party should be allowed to serve under the local agreement terms already issued to them.

25. No question has been raised and no evidence has been tabled challenging the competence or integrity of the 2nd and 3rd Interested Party to warrant their interdiction from continuing to discharge their duties and functions albeit under the local agreement terms already issued to them. The Court therefore varies its earlier order to the extent that the 2nd and 3rd Interested Party shall continue to serve in their respective capacities as so appointed by the local agreement pending the hearing and determination of the Petition herein.

26. Regarding the remedies that the Court may ultimately provide after the full hearing of the Petition, the Court is alive to the provisions of article 23(3) of the Constitution which provides that:-

23(3) in any proceedings brought under article 22, a Court may grant appropriate relief, including

a. a declaration of rights

b. an injunction

c. a conservatory order

d. a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or a fundamental freedom in the Bill of Rights and is not justified under article 24

e. an order for compensation

f. an order for judicial review.

27. Taking into account these constitutional provisions, if the Court ultimately makes a finding that the appointment of the 2nd and 3rd Interested Party was a violation of the Petitioner's and the constituency he represents rights, the Court will so declare and invalidate the law which permits the appointment of persons who have attained the mandatory retirement age on local agreements to continue discharging their duties and functions past retirement age.

28. The Court cannot feign ignorance to the political and power dynamics which usually run behind the scenes of prominent public appointments. On occasion, the appointments have been used for political gerrymandering or reward for loyalty. This is obviously unconstitutional and the Court must where it is proved that a person has been prejudiced and excluded from appointment on such considerations assert itself and invalidate such appointment. Article 27 of the Constitution binds state organs, officers and public officers to observe national values when making decisions. These national values and of relevance to this case are equity, equality and good governance. Further article 232 provides that the values and principles of public service include fair competition and merit as the basis of appointment and promotions.

29. In conclusion, the Court will have time to consider the complaints and concerns of the Petitioner on merit when the Petition is ultimately heard however at this interlocutory stage, the balance of convenience lies in varying the orders made on the 10th August, 2016 to the extent that the 2nd and 3rd Interested Party shall continue to serve in their respective capacities pending the hearing and determination of this petition.

30. The Court further directs that the parties liaise with the Deputy Registrar of this Court for purposes of listing the Petition for hearing on priority basis.

31. Costs in the cause.

32. It is so ordered.

Dated at Nairobi this 2nd day of September 2016

Abuodha Jorum Nelson

Judge

Delivered this 2nd day of September 2016

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha Jorum Nelson

Judge