



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**MISC APPLICATION NUMBER 20 OF 2014**

**KENYA COUNCIL OF EMPLOYMENT AND**

**MIGRATION AGENCIES.....1<sup>ST</sup> APPLIANT**

**EVANS NYABEGA AKUMA.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**SAMUEL MWONGERA ARACHI.....1<sup>ST</sup> RESPONDENT**

**ALHAJI OMAR SHURIE.....2<sup>ND</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. The applicant in this suit seeks leave of the Court to apply for what he describes as judicial review orders for restraining and quashing the decision of the respondent dated 20<sup>th</sup> November, 2012 contained in Kenya Gazette CX.IV No. 114 dated 21<sup>st</sup> November, 2012. The applicant further seeks that such leave if granted do operate as a stay of the said decision pending the hearing and determination of the proceedings.

2. The application was supported by the affidavit of Evans Nyambega Akuma who described himself as the chairman of the respondent. He depones in the main as follows:-

“12 (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 and employers’ organization and a trade union’s organization;
- (d) disputes between trade unions;
- (e) disputes between employer organizations;

- (f) disputes between a trade union and a member thereof;
  - (g) disputes between a trade union and a member thereof;
  - (h) disputes between an employer's organization or a federation and a member thereof;
  - (i) disputes concerning the registration and election of trade union officials; and
  - (j) disputes relating to the registration and enforcement of collective agreements.
- (a) The 1<sup>st</sup> respondent took office at the National Police Service on falsification of his curriculum vitae.
- (b) That on 20<sup>th</sup> November, 2012 he gave false information that he became a District Commissioner in 1983 backwards and yet he was employed as an Assistant Secretary Office of the President in 1989.
- (c) The 2<sup>nd</sup> respondent continued to witch-hunt the Kenyans who want to be promoted to head Administration Police College Embakasi by making unfounded report to National Police Service Commission for extension of his age from 60 years old to 65 years old under disability law yet commanders who were incapacitated or disabled could not head National Police Service when other qualified young competent officers were available.

3. When the application came before Justice Rika on 5<sup>th</sup> September 2014, he ordered that the same be served on the respondents and that the respondent do file a response to the application within 14 days of service. After compliances, on 4<sup>th</sup> December 2014, I directed that the parties address the issue of leave by way of written submissions.

4. This being leave stage, the Court expected very lean submissions and documentation. I have however been treated to voluminous submissions and authorities which in my view ought to have been reserved for the main suit if the leave sought was granted. I was unable to make sense out of the applicants' submissions which with due respect but honesty to him were convoluted and difficult to comprehend in terms of logical flow of issues in contest. I would therefore assume that the sum total of the hazy and intertwined argumentation is that the applicant seeks leave to apply for judicial review orders to challenge and eventually nullify the appointment of 1<sup>st</sup> respondent as Deputy Inspector General – Administration Police.

5. The 1<sup>st</sup> and 2<sup>nd</sup> respondent raised two fundamental points of law which require to be resolved before the question of whether leave should be granted or not is delved into. First is the issue of whether the present application meets the requirements of order 53 rule 2 and second; whether the applicant has the locus standi to bring the present application.

6. Order 53 Rule 2 of the Civil Procedure Rules states

**“leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purposes of its being quashed, unless the application for leave is made not later than six months after the date of proceeding or such shorter period as may be prescribed by any Act; and where proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the Judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.**

**(underlining mine)**

7. The Gazette notice sought to be impugned by the applicant is dated 15<sup>th</sup> October 2012, the present application was filed on 5<sup>th</sup> September, 2014. This was almost two years after the Gazette Notice. No reason has been put forward by the applicant for this inordinate delay but even if one was to be proffered, it would be of no help since the wording of order 53 uses the mandatory “**shall**” hence the application

must be brought within six months or a shorter period prescribed by any other Act. There is no provision for extension of time. On this ground alone the application is incompetent.

8. On the issue of locus standi, the applicant states that it is a registered civil society organization under Societies Act which deal with interests of workers and particularly workers who are not of Kenyan nationality.

9. The 1<sup>st</sup> applicant is stated to be conducting proceedings where the Constitution and subject matters of Employment and recruitment are threatened with violation, breach of law and contravention of the Constitution. The present application is allegedly brought on behalf of unspecified persons whom the applicant felt qualified to be appointed to the posts held by 1<sup>st</sup> and 2<sup>nd</sup> respondent but were excluded due to what the applicant feels was misrepresentation and dishonesty by the 1<sup>st</sup> and 2<sup>nd</sup> respondent.

10. Labour relations are part of the Bill of Rights under Chapter 4 of the Constitution.

11. Under article 22 of the Constitution every person has the right to institute Court proceedings claiming that a right has been denied, violated or infringed or is threatened. The action may be commenced by such person directly or through a recognized agent or any other person acting in the public interest.

12. Article 22 (3) of the Constitution empowers the Chief Justice to make rules for enforcement of the Bill of Rights. We have in place Mutunga Rules which requires that such an application be brought preferably by petition or in special cases, informally.

13. The application before me is a judicial review application brought under section 8 and 9 of the Law Reform Act and Order 53 rules 1, 2, 3, and 4 of the Civil Procedure Act. It is therefore not a Constitutional petition which can be brought by any person acting in public interest.

14. Whereas this Court is a superior Court of the same rank as the High Court, its jurisdiction is specialized as spelt out under section 12 of the Industrial Court Act which provides as follows:-

“12 (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 and employers’ organization and a trade union’s organization;
- (d) disputes between trade unions;
- (e) disputes between employer organizations;
- (f) disputes between a trade union and a member thereof;
- (g) disputes between a trade union and a member thereof;
- (h) disputes between an employer’s organization or a federation and a member thereof;
- (i) disputes concerning the registration and election of trade union officials; and
- (j) disputes relating to the registration and enforcement of collective agreements.

15. Section 12 (2) of the Act further provides that an application, claim or complaint may be lodged with the Court by or against an employee, an employer, a trade union, an employer's organization, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose. These class of people may be represented before the Court either in person, an advocate duly authorized to practice law under the Advocates Act or duly appointed and authorized Trade Union Official. There is no provision for any other representation.

16. Whereas and from the foregoing provisions of the law, the Court has jurisdiction to adjudicate constitutional questions, these questions must arise within the broad relationship parameters set out under section 12 of the Act and further they can only be agitated by persons identified under section 12(2) of the Act acting in person or through authorized representative as stated earlier. The Act makes no provision for representation by civil society which the applicant is.

17. Even assuming the applicant could have a right of audience before the Court, it is not clear on whose behalf the application has been brought. Judicial review orders are issued for the benefit of a person or class of persons aggrieved by a decision of a public body or a quasi-judicial body. They do not issue in the air. There has to be a person or persons aggrieved by such a decision.

18. In conclusion therefore the Court rules that the application is incompetent for two reasons, first, it was brought outside the time presented under order 53 rule 2 and second, the applicant lacks the locus standi to bring the same. The application is therefore struck out with costs.

19. It is so ordered.

Dated at Nairobi this 7<sup>th</sup> day of May 2015

Abuodha J. N.

Judge

Delivered this 7<sup>th</sup> day of May 2015

**In the presence of:-**

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge