



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
PETITION NO. 2 OF 2015

SAMUEL K. TONUI

PETITIONER

v

THE SPEAKER, NAKURU COUNTY ASSEMBLY

1st RESPONDENT

THE CLERK, NAKURU COUNTY ASSEMBLY

2nd RESPONDENT

JAMES KIPKOROS TUEI

3rd RESPONDENT

RULING

1. Samuel K. Tonui (Petitioner) filed a Petition against the Speaker, County Assembly of Nakuru (1st Respondent), the Clerk, County Assembly of Nakuru (2nd Respondent) and James Kipkoros Tuei (3rd Respondent) on 20 March 2015 alleging violation of his rights to a fair hearing, dignity and protection from discrimination and security of the person.
2. Together with the Petition was a motion under certificate of urgency seeking conservatory orders.
3. The Court certified the motion urgent on 20 March 2015 and directed that it be served for *inter partes* hearing on 10 April 2015.
4. When the Respondents were served, they filed a Preliminary Objection contending that the Court did not have jurisdiction to adjudicate over the Petition on the ground that the Petitioner was not an employee of the Respondents as envisaged by section 12 of the Employment and Labour Relations Court Act and the Employment Act.
5. The Court directed the parties to file skeleton arguments and authorities which the parties did and the preliminary objection was taken on 29 April 2015.

Respondents' submissions on the objection

6. Mr. Karanja urged the Respondents case.
7. He submitted that this Court gets its jurisdiction from Article 162(2)(a) and (3) of the Constitution and section 12 of the Employment and Labour Relations Court Act.
8. In this respect, he submitted that the Court has jurisdiction over disputes arising out of the employment

relationship between an employer and an employee and a contract of service was a necessity for the Court to assume jurisdiction.

9. And as to what amounts to a contract of service, Mr. Karanja made reference to the case of *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* (1968) 2QB 497.

10. Relying on the said decision, Mr. Karanja urged that there must be a wage and control for there to be an employer/employee relationship. And the control would include a power upon the employer to dismiss the employee.

11. According to the Respondents, they were not paying the Petitioner his wages nor did they possess the power to dismiss him from his office.

12. And to demonstrate that there was no employer/employee relationship, Mr. Karanja submitted that the Petitioner had not pleaded in the Petition that he was an employee of the Respondents or specified his rights allegedly violated as an employee.

13. The Respondents took the submission further by urging that the Petitioner's employer would be the County Assembly of Nakuru by dint of Article 178(2)(b) of the Constitution because the Deputy Speaker was elected by members of the County Assembly and not the Speaker.

14. The proper party, according to the Respondents was the County Assembly of Nakuru.

15. Further, the Respondents submitted that the office of a Deputy Speaker was a political office pursuant to Article 178 of the Constitution as read with the County Government Act and the Standing Orders of the Assembly, and was therefore held at the whims of the electors.

16. And in so far as the Standing Orders were amended to remove the Petitioner, that was outside the remit of this Court because the Employment Act, 2007 was not applicable and the cases of *County Government of Nyeri v Cecilia Wangeci Ndungu* (2015) eKLR and *Martin Nyaga Wambora & 4 Ors v Speaker of the Senate & 6 Ors* (2014) eKLR were cited. The Petitioner's remedy, it was contended lay with the High Court.

17. The Respondents also submitted that the orders sought by the Petitioner could only be available at the High Court. There was no prayer for reinstatement or compensation for unfair labour practices.

18. And because, according to the Respondents, the Petitioner had moved the wrong forum, the Petition ought to be struck out and not transferred to the appropriate forum. For this contention, the Respondents cited *Samson Gwer & 5 Ors v Kenya Medical Research Institute & 2 Ors* (2013) eKLR.

19. The Respondents also urged that the Court of Appeal decision in *Prof. Daniel Mugendi v Kenyatta University* (2014) eKLR was not applicable as the ground had since shifted on transfer of suits to appropriate Courts.

Petitioner's response on the objection

20. The Petitioner started off by submitting that although the jurisdiction of this Court is not yet settled, it had become almost clear and that Article 162 and Section 12 of the Employment and Labour Relations Court Act provided for the jurisdiction of this Court.

21. According to Mr. Kipkoech for the Petitioner, these were the applicable provisions and the Court should give them a purposive interpretation so as to give effect to the objectives, aspirations, intentions and values of the people of Kenya.

22. And in giving a purposive interpretation, Mr. Kipkoech submitted that the word used in section 12 of the Employment and Labour Relations Court Act, was 'includes' and therefore the jurisdiction of the

Court was not restricted to the disputes enumerated in the section.

23. In the view of the Petitioner, the real employer were the people of Kenya, and in this regard he sought to get umbrage from Article 1 of the Constitution and he made reference to the case of *Nick Githinji Ndichu v Clerk, Kiambu County Assembly & Ar* (2014) eKLR.

24. As to whether the Petitioner was strictly an employee, Mr. Kipkoech submitted that although he was not strictly an employee for purposes of the common law, he was the peoples' employee by dint of Article 1 of the Constitution and also an employee of the County Assembly of Nakuru.

25. On the issue of the proper party to sue, the Petitioner urged that the County Assembly was not created as a body corporate and therefore the County Public Service Board and the Speaker and Clerk of the County Assembly were the correct parties as they were the embodiment of the Assembly.

26. On the failure to include the County Assembly, the Petitioner asserted that it was not fatal because the Speaker and the Clerk were already parties.

27. On the authorities cited by the Respondents, Mr. Kipkoech submitted that the Court in *County Government of Nyeri v Cecilia Wangeci Ndungu* properly interpreted who is an employee in terms of state offices, and that it is not only employees as defined in the Employment Act, 2007 who have recourse to this Court, but even state officers.

28. On the question of the proper forum, the Petitioner urged that pursuant to Article 165(5)(b) of the Constitution, the High Court had no jurisdiction on matters reserved for the superior courts with the status of the High Court and he cited the decision of *USIU v Attorney General* (2012) eKLR and went on to submit that Parliament could not legislate to take away the jurisdiction contemplated for this Court in Article 162(2) of the Constitution.

29. According to the Petitioner, this Court has the jurisdiction to deal with removal of an employee of the people and no person is immune from the reach of the Court when it acts against the law.

Respondents' rejoinder

30. In a brief rejoinder, the Respondents asserted that the County Assembly is a constitutional body and it is the employer and that the offices of Speaker and Clerk were not bodies corporate and that the powers to quash decisions of the County Assembly lay with the High Court.

31. The parties filed other authorities which they did not refer to in submissions but the Court will allude to them as may be necessary.

Evaluation

32. The Respondents preliminary objection was mainly anchored on the ground that there was no employer/employee relationship between the parties herein and therefore this Court has no jurisdiction.

33. In my view, it is not necessary for the Court to make a determination as to whether there was or is an employer/employee relationship between the parties here at this early stage as it would still be open to the Petitioner to amend his pleadings and enjoin other necessary parties. Striking out pleadings should not be made lightly.

34. It is not equally appropriate for the Court to determine in this proceeding whether a Deputy Speaker is an employee for purposes of the Employment Act, 2007 or Employment and Labour Relations Court Act.

35. In the motion filed with the Petition, the Petitioner sought some 2 substantive orders to wit:

1.

2. THAT a conservatory order does issue staying the motion and/or decision of the County Assembly of Nakuru to amend the Standing Order number 64 and 237(6), the removal of the Petitioner on the 11th March 2015 and the election of the 3rd respondent as the Deputy Speaker on the 12th of March 2015 and that consequently the Petitioner continues serving as the Deputy Speaker pending the hearing and determination of the application herein.

3. THAT a conservatory order does issue staying the motion and/or decision of the County Assembly of Nakuru to amend the Standing Order number 64 and 237(6), the removal of the Petitioner on the 11th March 2015 and the election of the 3rd respondent as the Deputy Speaker on the 12th of March 2015 and that consequently the Petitioner continues serving as the Deputy Speaker pending the hearing and determination of the Petition herein.

36. In the Petition, the Petitioner sought the following prayers

(a) A declaration that the respondents actions of manipulating the house as against the petitioner and vote to remove him not by way of secret ballot as the speaker were illegal and unconstitutional.

(b) A declaration that Kenya is a democratic republic under the rule of law and constitutionalism and free from discrimination and everybody has a right to be heard.

(c) A declaration that the amended standing orders number 64 and 237(6) used to remove the petitioner are unconstitutional and the same be quashed.

(d) A declaration that the election of the 3rd respondent was not only unprocedural, egregious and illegal but also unconstitutional and the same be quashed and the Petitioner be reinstated as the Deputy Speaker of the County Assembly Nakuru unconditionally with full salary, benefits and allowances from the 11th March 2015.

(e) A declaration that the conduct of the 1st and 2nd respondents does not meet the provisions of Article 10 and chapter 6 of the Constitution of Kenya hence unfit to hold public office.

(f) An order of certiorari be issued to bring into the court the motion and decision to amend standing order number 64 and 237(6) and the same be quashed.

(g) THAT the Petitioner be paid general damages for violation of his rights under Article 27,28,29,41,47,48 and 50 of the Constitution of Kenya.

(h) That the petitioner be paid costs of this Petition.

37. It is clear from the orders and remedies sought by the Petitioner in the motion and the Petition that the substratum of his cause of action relates primarily to the amendment of the Standing Orders in order to facilitate his removal from office of Deputy Speaker.

38. In Constitutional Petitions No. 373,426 of 2012, *Stephen Waweru Wanjohi & Others v Attorney General & Others and Kipngetich Maiyo & Others v the Kenya National Land Commission Selection Panel & Others*, Majanja J observed that *the key purpose of pleadings is to set out facts which constitute a cause of action.*

39. The facts as set out in the Petition and the Motion (nature of pleaded case), in the view of the Court lead to the conclusion that the Petitioner approached the wrong forum.

40. It is not open to dispute that in the orders sought in the motion, the Petitioner is seeking to impugn the process or amendment of a County Assembly's Standing Orders. The determination of whether that process was constitutional or unlawful is a jurisdiction that lies elsewhere.

41. In the Petition, the Petitioner is more or less seeking declarations that the amendment of the Standing Orders and his subsequent removal were unconstitutional or violated his rights.

42. Again, these are remedies which in the view of the Court lie with the High Court.

43. The Petitioner's cause of action as pleaded cannot be resolved in this forum and in any case it was not suggested that the Standing Orders comprise the terms and conditions of employment of the Petitioner.

44. It is also not necessary, due to the state of the pleadings, to determine in this Petition whether the jurisdiction of this Court extends beyond the confines of the Employment Act, 2007 and the Employment and Labour Relations Court Act.

Disposition

45. That leaves the issue of whether the Petition should be struck out or be transferred to the appropriate forum.

46. According to the Respondents, the law has since the establishment of the Courts with the status of the High Court settled such that litigants know the correct forum.

47. It is doubtful whether this question has been settled and the authorities cited by the parties are a testimony of that. Many parties are still approaching either this Court or the High Court and both Courts have assumed jurisdiction. The parties did not direct my attention to any decision from the Court of Appeal on the issue, and I would therefore order that the Petition herein be transferred to the High Court sitting at Nakuru for hearing and determination.

48. Each party to bear own costs.

Delivered, dated and signed in Nakuru on this 19th day of June 2015.

Radido Stephen

Judge

Appearances

For Petitioner Mr. Kipkoech instructed by Gordon Ogola, Kipkoech & Co. Advocates

For Respondents Mr. Karanja instructed by Mirugi Kariuki & Co. Advocates

Court Assistant Nixon