



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2037 OF 2014

DR. SHEM EVANS OHITO.....CLAIMANT

VERSUS

THE KENYA HOSPITAL ASSOCIATION LTD

T/A THE NAIROBI HOSPITAL.....RESPONDENT

TITLE BY WAY OF COUNTERCLAIM

IN THE MATTER OF ARTICLE 22(1)

IN TH MATTER OF ALLEGED CONTRAVENTION OF RIGHTS OR FUNDAMENTAL FREEDOMS UNDER ARTICLE 27 AND 40 OF THE CONSTITUTION

THE KENYA HOSPITAL ASSOCIATION LTD

T/A THE NAIROBI HOSPITAL.....PETITIONER

VERSUS

DR. SHEM EVANS OHITO.....RESPONDENT

RULING

1. What is before me for determination is the Respondent/Applicant’s Notice of Motion Application dated 19th March 2015 brought under Article 159(2) (a), (d) & (e); and Article 165 (3) (b) (d) (i) (ii) & 4 of the Constitution; and Rules 3, 7, 8 & 17 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013, Rule 23 of the Industrial Court (Procedure) Rules 2010. The Respondent/Applicant in the claim, the Kenya Hospital Association Limited trading as The Nairobi Hospital filed a Petition seeking determination of the alleged contravention of rights or fundamental freedoms under the Constitution. In the notice of motion application the Respondent/Applicant seeks orders that this cause be consolidated with Industrial Causes Nos. 1575 of 2014 John Gichuru Ngunju v the Kenya Hospital Association Limited t/a The Nairobi Hospital; 1804 of 2014 Samuel Kyuma Mutua v the Kenya Hospital Association Limited t/a The Nairobi Hospital; 2140 of 2014 Solomon Mwiyei Kasina v the Kenya Hospital Association Limited t/a The Nairobi Hospital. The Respondent/Applicant sought that Cause 2037 of 2014 be the holding file for the purposes of determining the constitutional issues raised in all the counterclaims. The Respondent/Applicant sought that the Court do refer causes

2037 of 2014, 1575 of 2014, 1804 of 2014 and 2140 of 2014 to the Honourable the Chief Justice to empanel a panel of judges outside those sitting in the Employment and Labour Relations Court to hear and determine the constitutional issues raised in the counter-claims. The Respondent/Applicant sought stay of causes No. 2037 of 2014, 1575 of 2014, 1804 of 2014 and 2140 of 2014 pending the hearing and determination of the constitutional issues raised in the counter-claims. The Respondent/Applicant sought that the Attorney General, Central Organisation of Trade Unions (COTU) and the Federation of Kenya Employers (FKE) be enjoined as interested parties for the purposes of determining the constitutional issues raised in the counterclaims. The Application was premised on grounds on the face of it and the Affidavit of Sarah Oneya the Legal officer of the Respondent/Applicant.

2. The Court gave directions and called for the files that were to be affected by the prayers of the Respondent/Applicant's motion and the counsel for the Claimants in those cases filed in opposition to the motion Grounds of Opposition and preliminary objections. In cause 2037 of 2014, M/s Aming'a Opiyo Masese & Co. Advocates filed a preliminary objection to the Counter Claim/Petition on 2nd February 2015 and grounds of opposition to the Notice of Motion on 7th April 2015. In the preliminary objection the advocates for the Claimant stated that the fundamental rights and freedoms set out in the bill of rights in the Constitution of Kenya 2010 can be enforced by a private individual by way of a constitutional petition only as against the state and state organs and not by a private individual as against another private individual as sought by the Petitioner. The Claimant in his grounds stated that there are no sound reasons advanced to warrant this matter to be referred to the Chief Justice to empanel a panel of judges to determine the constitutional issues raised as the trial court herein has power and jurisdiction to hear and determine the constitutional issues intended to be referred to a court other than the Employment and Labour Relations Court. The Claimant stated that the application is frivolous, vexatious and an abuse of the process of the court and is aimed at stalling expeditious disposal of the suit and is a mere academic exercise in futility.
3. The Court permitted the Claimant's in the other cases to file responses to the Respondent/Applicant's motion as affected parties and for purposes of determination of the motion consolidated the causes. The Claimant in cause 1575 of 2014 filed a preliminary objection to the constitutional issues raised by the Respondent/Applicant.
4. On 25th May 2015 Mr. Gichuhi appeared for the Respondent/Applicant while Mr. Nyaencha appeared for the Claimant in Cause 1575 of 2014, Miss Omolo appeared for the Claimant in Cause 2037 of 2014 and Mr. Wakla appeared for the Claimant in Cause 1804 of 2014. There was no appearance for the Claimant in Cause 2140 of 2014.
5. Mr. Gichuhi stated that the Respondent/Applicant sought orders as enumerated above in respect of the motion and submitted that the gist of the matter is that the case should be referred to the Chief Justice to empanel a panel of judges to determine the constitutional issues contemplated in the Counter Claim. He relied on the cases on his list of authorities and submitted that on the authority of *Odds and Ends v Attorney General* where the judge had dismissed an application challenging the 12 months compensation. He submitted that the Respondent had in each of the claims before the Court raised substantial matters of law on the 12 months compensation. He submitted that the interpretation is to be *in rem* and not *personam* as it deals with a critical component of the Employment Act. He stated that the Respondent wished to establish clarity and certainty of the law. He submitted that the affidavit of Sarah Onger summarised the position of the Respondent. He submitted that Respondent had addressed the issue of enforcement of private fundamental rights. He referred to the case of **Rose Mambo v Limuru Club** on Article 22 of the Constitution. He stated that there was the issue of consolidation of claims and stay and submitted that the Respondent is common and is sued by former employees. Constitutional court has power to consolidate. He submitted that the intention was not to delay but to ensure clarity. He stated that the court has an obligation in constitutional issues to ensure that the relevant parties are included and in this case FKE, COTU and the Attorney General are critical. He submitted that they have to be heard and their joinder is critical. He submitted that recently, the Court of Appeal had held that

there cannot be a panel of judges from the criminal division and other judges to hear criminal cases. He submitted that in that case the Court of Appeal stated that there was no joinder of critical parties in the matter. He stated that he relied on the case of **Gladys Boss Shollei v JSC** in regards to damages. He submitted that the Court of Appeal did not consider the issues he was raising. He submitted that the preamble in the Employment Act is biased to employees alone and not to employers. He submitted that the issues raised by the Respondent were constitutional and stated that the Courts in some instances had lamented the lack of directions and he thus sought this issue to be determined to protect the right to property.

6. Mr. Nyaencha submitted that the application was most undeserving. He stated the issues in this Court are simple labour issues between an employer and employee which are amply decided within the labour laws of Kenya. He submitted that they should remain that simple without being clouded by lofty issues of the Constitution. Granted, the Constitution touches every aspect of the laws, the requirement of speedy hearing and conclusion of labour issues and other mundane issues and so on, he submitted that if a purely constitutional issue were to arise, that should be dealt with from the beginning before a Constitutional Court. No such issue arises as a simple and careful reading of the prayers by Claimant attest to that fact. He submitted that the simple defences and replies attest to the fact that these are simple issues of labour. He stated that the only issue that arises is the counterclaim which seems to grow from nowhere and is brought in to bring in the constitutional issue. He submitted that the counterclaim sought to delay simple labour issues and that the Claimants are not the ones directly concerned with the Constitution and its interpretation. He submitted the Respondent's position was untenable and it will lead to injustice. He submitted that on the compensation, Courts had held in instances that one is not entitled or at times awards 1 month, a few months and occasionally 12 months. He submitted that is the way it should be.
7. Miss Omolo submitted that in the preliminary objection raised by her client in cause 2037 of 2014 was to the effect that fundamental rights and freedoms can be expressed by an individual against the state and not an individual against another individual. She submitted that there is no order sought touching on the Claimant. She stated that Article 21 has a gamut of protections that the Claimant cannot satisfy. She relied on the case of **Uhuru Kenyatta v The Star Publications** for the proposition that it is the state and state organs that are bound to promote the rights in Article 21. Reliance was also placed on the case of **Chelimo v Officer Commanding GSU Camp** and she submitted that it is the duty of the state to enforce the bill of rights. She sought that the preliminary objection be upheld and the counterclaim be struck off. She distinguished the case of **Rose Wangui Mangu & 2 Others v Limuru County Club** in that the circumstances in that case were different and the State participated in the proceedings. She submitted that in this case the Attorney General has not been joined and the orders sought are directed against private persons and it is only the state that can enforce the provisions of Article 21. She submitted that the law allows the compensation up to 12 months. She submitted that the Court is capable and has sufficient expertise to determine the issues in contention. She also relied on the case of **Odds and Ends v Attorney General**.
8. Mr. Wakla made submissions on behalf of the Claimant in cause 1804 of 2014. He submitted that the application by the Respondent is unmerited. He submitted that that order for consolidation of these various suits which had various parties who have different contracts of employment and different causes of action. He submitted that the threshold for consolidation had not been met by the Respondent and that at the trial of each of these cases there is no way that all the 4 claims can be heard concurrently. He submitted that would pose very difficult challenges if the suits were consolidated. He submitted that the suits cannot be consolidated on the basis of the counterclaim. He submitted that the declarations sought were not directed to the Claimants but were directed elsewhere and the parties to whom they were directed are not parties to this suit. He submitted that the application for joinder of other parties to the claim, namely COTU, Attorney General, FKE as interested parties reinforced his position that this is not the correct forum for the orders sought. He submitted that if the Respondent felt that certain sections of the Employment Act infringe on their liberties the Respondent was entitled to institute a constitutional petition at the appropriate forum. He submitted the request to refer the matter to the Chief Justice to empanel 3 judges outside this

Court to determine the issue raised around Section 49 of the Employment Act is a matter that can be capably dealt with in this Court. He submitted that this Court is a special court established by Constitution and has a special and unique expertise to deal with labour issues. He stated that the interpreting the section so the law that are in conflict with the Constitution cannot be outside the ability of the Court. He submitted that a casual look at Section 49 of the Employment Act is that it is a merely permissive section and the Court may award damages if the Court holds so. The Section only gives a maximum. He posed the question – what is unconstitutional about a merely persuasive section? He submitted that the application by the Respondent is not merited and there was no basis for further stay of the cases before the Court. He thus urged the Court to dismiss the application.

9. Mr. Gichuhi submitted in his brief reprise that Article 22 of the Constitution allowed any breach of fundamental rights to be raised by institution of proceedings as had been done. He submitted that on the basis of Article 22(2)(c) he had brought in the joinder of FKE, Attorney General and COTU. He submitted that the joinder had been sought under the Mutunga Rules on constitutional petitions. He submitted that the empaneling of judges from outside the division was sought as all decisions of the Court have been biased towards employees. He submitted that he had brought out the biases in decisions alluded to. He submitted that the consolidation was limited only for the determination of the constitutional issue. He submitted that the issues raised dealt with the award of compensation without distinguishing between unfair and unlawful. He submitted that this was an issue that needs to be determined for the sake of posterity.
10. I have considered the submissions of parties and even where I do not expressly refer to portions or authorities cited they have been considered in coming to this decision. The application is one which is premised on the provisions of Articles 159(2)(a),(d) & (e); 165(3)(b), (d)(i),(ii) & 4 of the Constitution of Kenya 2010 as well as Rules 3, 7, 8 & 17 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 and Rule 23 of the Industrial Court (Procedure) Rules 2010. The long and short of the application is that the Respondent/Applicant seeks to stay 4 suits before this Court and a reference of the file to the Chief Justice to constitute a panel of judges from the High Court to hear a petition on the constitutional issues raised by way of counterclaim in the 4 suits. The Claimants/Respondents are opposed and raised preliminary objections to the application. The Court heard the application and the preliminary objections were taken as a response thereto. The objections nevertheless were proper objections in terms of the famed case of **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd** reported in the 1969 volume of East Africa law reports at pages 696 onwards.
11. Article **159 makes provision that** judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution. In exercising judicial authority, the courts and tribunals shall be guided by the following principles (a) justice shall be done to all, irrespective of status; (b) justice shall not be delayed; (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, (d) justice shall be administered without undue regard to procedural technicalities; and (e) the purpose and principles of this Constitution shall be protected and promoted. Article 165(3)(b) makes provision that the jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened shall rest on the High Court.
12. The Respondent/Applicant submitted that the compensation awarded by various courts in the Employment & Labour Relations Court are unconstitutional as the compensation is lopsided. The Respondent/Applicant was of the view that a hearing of the petition by any judge in this Court would not be proper as all the judges of this award 12 months compensation. The Respondent/Applicant submitted that serious constitutional issues arise and these require the interpretation of the same by the High Court. Compensation is provided for under section 49(1)(c) of the Employment Act. The Court or Labour officer may award the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal. The key word is may. It need not be awarded and it must

not exceed 12 months gross salary at the time of dismissal. It is not a mandatory award.

13. The preamble to the Employment Act 2007 is somewhat misleading. It reads as follows:

An Act of Parliament to repeal the Employment Act, declare and define the fundamental rights of employees, to provide basic conditions of employment of employees, to regulate employment of children, and to provide for matters connected with the foregoing.

14. The Act has 93 sections and myriad subsections which make provision for a variety of legal issues. It provides for the following in its various parts: Part II general principles, Part III deals with employment relationship and makes reference to contracts of service - oral and written, employment particulars and the like. Part IV is on protection of wages and makes provision on payment, disposal and recovery of wages, allowances, etc., itemised pay statement and statement of statutory deductions. Of note, Part V deals with rights and duties in employment, Part VI deals with termination and dismissal while Part VII deals with protection of children. Part VIII deals with insolvency of an employer while Part IX deals with employment records to be kept by employer while Part X makes provision for employment management. Part XI deals with foreign contracts of service and Part XII deals with the disputes settlement procedure and makes provision on complaints and jurisdiction in cases of dispute between employers and employees. Part XIII deals with the miscellaneous provisions relating to rules of the Court and repeal of Cap. 226 as well as savings and transitional provisions. All these sections are clearly not for employees alone.

15. The Employment & Labour Relations Court was established by Article 162(2) of the Constitution of Kenya and judges appointed to the Court in July 2012. Prior to the appointment of the 12 judges to sit in this Court, the former Industrial Court Tribunal was amenable to supervision by the High Court. The Court as presently constituted is not amenable to such supervision. In the case of **United States International University (USIU) v Attorney General [2012] eKLR** decided on 3rd August 2012, Majanja J. held that:-

Since the Industrial Court as presently constituted has the status of the High Court, it is the proper forum for dealing with this matter as it arises from an employer-employee relationship notwithstanding that the matter concerns the interpretation of the Constitution. The interpretation of the Constitution is incidental to its core jurisdiction of determining labour and employment matters.

16. I am in agreement with Majanja J. that this Court can handle the constitutional issues that may attach to a dispute between employees and employers or between a federation of employers and federation of employees or between trade unions and employers. There is no basis to refer to the High Court any constitutional issue that arises during the determination of a matter before this Court. The issue of compensation is not a matter that can be elevated to the status of breach of fundamental rights.

17. Rule 4 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 provides as follows:-

4. (1) Where any right or fundamental freedom provided for in the Constitution is allegedly denied, violated or infringed or threatened, a person so affected or likely to be affected, may make an application to the High Court in accordance to these rules.

(2) In addition to a person acting in their own interest, court proceedings under sub rule (1) may be instituted by—

(i) a person acting on behalf of another person who cannot act in their own name;

(ii) a person acting as a member of, or in the interest of, a group or class of persons;

(iii) a person acting in the public interest; or

(iv) an association acting in the interest of one or more of its members.

18. The reading of this Rule demonstrates that there must be a breach of fundamental rights where there is a denial, violation, infringement or denial of the fundamental right. In my considered view, the payment of damages by any unsuccessful litigant cannot be said to be a breach of fundamental rights. It would be a legal absurdity to hold that the discretion of a judge to award damages which place a burden or obligation on a party is a breach of fundamental rights. The argument is flawed on so many levels and is incapable of fomenting a reference to the Chief Justice to empanel a bench to determine the constitutionality of an award of compensation under Section 49.

19. The upshot of the foregoing is that I decline the invitation to refer the dispute to the Chief Justice to empanel a bench to hear the issues raised by the Respondent in its counterclaim. These issues can be dealt with competently by any of the 12 judges of the Employment & Labour Relations Court. I dismiss the Application by the Respondent/Applicant with costs to the Claimants in causes 1575 of 2014, 2037 of 2014 and 1804 of 2014.

Orders accordingly.

Dated and delivered at Nairobi this 15th day of June 2015

Nzioki wa Makau

JUDGE