



**REPUBLIC OF KENYA**  
**EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**PETITION NO. 55 OF 2015**

(Before Hon. Justice Hellen S. Wasilwa on 20<sup>th</sup> August, 2015)

JOHNSON OTIENO ADERA..... 1<sup>ST</sup> PETITIONER  
 ABDIKADIR MOHAMED.....2<sup>ND</sup> PETITIONER  
 WELDON KIPROTICH SIGEI.....3<sup>RD</sup> PETITIONER  
 SAMMY AREKAI SARICH.....4<sup>TH</sup> PETITIONER

**VERSUS**

THE ANT-COUNTERFEIT AGENCY .....1<sup>ST</sup> RESPONDENT  
 JOHN AKOTEN .....2<sup>ND</sup> RESPONDENT  
 MICHAEL AREMON.....3<sup>RD</sup> RESPONDENT  
 POLICAP IGATHE .....4<sup>TH</sup> RESPONDENT

**RULING**

1. On the 19/6/2015, the Applicants filed their application under Certificate of Urgency brought through a Notice of Motion through the firm of Kwengu & Company Advocate. The Notice of Motion was filed under Rule 3, (3) (4), (5), 4, 13, 23 (1) and (2) of The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, and Articles 10, 22 (1), (3), (4), 23, 27, 28, 35, 47, 50, 73 and 232 of the Constitution of Kenya and all other enabling legal provisions of the law.
2. The Applicants sought orders as follows:
  1. ***THAT this application be certified as extremely urgent and be heard ex-parte at the first instance.***
  2. ***THAT the Honourable Court be pleased to issue temporary conservatory orders by way of an injunction restraining the Respondents by themselves, or anyone of them, agents, servants or otherwise howsoever from further publishing and or causing to be published in print media and***

*broadcast defamatory statements against the petitioners .*

3. *THAT the Honourable Court be pleased to issue temporary conservatory order by way of an injunction restraining the Respondents by themselves, or anyone of them, agents, servants or otherwise howsoever from further publishing and or causing to be published in print media and broadcast defamatory statements against the petitioners.*
4. *THAT the honourable court does order the respondents to provide the Petitioners with information under Article 35 of the constitution of Kenya of the said complainants and the general public and the manufacturers/IPR owners as contained in the letter dated 15<sup>th</sup> June, 2015 which include correspondences, and mails .*
5. *THAT the Honourable Court be pleased to issue a stay of the Respondents letters to the Petitioners all dated 15<sup>th</sup> June, 2015 and referenced 201112058/(37), 201006005/(115),201006022/(64) and 201006027/(47) respectively) respectively pending the hearing and determination of the application herein.*
6. *THAT the Honourable Court be pleased to issue a stay of the Respondents' letters to the Petitioners all dated 15<sup>th</sup> June, 2015 and referenced 201112058/(37), 201006005/(115),201006022/(64) and 201006027/(47) respectively) respectively pending the hearing and determination of the petition herein.*
7. *THAT upon grant of prayers number 5 and 6 above, this Honourable Court does order that the Petitioners be reinstated at the first Respondent pending the hearing and determination of the application herein.*
8. *THAT upon grant of prayers number 5 and 6 above, this Honourable Court does order that the Petitioners be reinstated at the first Respondent pending the hearing and determination of the Petition herein.*
9. *THAT upon grant of prayer number 6 and 7 above , this does order that the Petitioners have full and unimpeded access to their offices together all the tools necessary for the Petitioners to execute their duties as bonafide employees of the 1<sup>st</sup> respondent*
10. *THAT the Honourable Court be pleased to issue any such further orders it may deem fit and convenient in the circumstances of this case.*

*11.Costs be provided for.*

3. The Petition is supported by the supporting affidavit of Johnson Otieno Adera 1<sup>st</sup> Petitioner herein sworn on 19/6/2015 and is premised based on the following grounds:
  1. *That the purported decisions contained in the letters more particularly described in prayers 5 and 6 above have violated the rights of all the Petitioners as set out under the Constitution, the Employment Act and the Human Resource Manual of the 1<sup>st</sup> Respondent.*
  2. *That the Respondents have collectively acted in an opaque manner by denying the Petitioners, an opportunity to know who their accusers are, the nature of the accusations, when the accusations were made and the reasons why the alleged accusations or complaints were not brought to our attention immediately.*
  3. *That the decision to send the Petitioners on compulsory leave was made without jurisdiction and is wrong in every respect as none of the Petitioners was ever notified of any complaints or allegations against him that could trigger such drastic action.*
  4. *That the Respondents have acted and conducted themselves in a manner actuated by acute*

*malice and personal vendetta that is inimical to the proper conduct of a public office.*

5. *That the 1<sup>st</sup> & 2<sup>nd</sup> Respondents have already expressed in the letters of 15<sup>th</sup> June 2015 aforesaid that they do not intend to subject the Petitioners to due process but to contradictory and alien process.*
6. *That the Respondents have acted as accuser, prosecutor, judge and persecutor of all the Petitioners and therefore cannot afford the Petitioners a fair hearing or guarantee their fair hearing rights.*
7. *That the Respondents have collectively acted maliciously and capriciously in making the impugned decision and have therefore violated the Petitioner's inalienable rights by condemning them unheard and based on allegations that are unknown and could as well be a figment of the imagination of the Respondents based on personal vendetta.*
8. *That the 1<sup>st</sup> Respondent has already judged the Petitioners and therefore automatically denied them an opportunity to be subjected to a fair, impartial and justified process where any proper and legitimate allegations against them can be decided in a manner that does not violate their rights.*
9. *That the Respondents have collectively acted towards the petitioners in a manner that is manifestly irresponsible and inimical to good leadership and governance by not only being opaque but creating an impression that there are some clear and documented complaints against the Petitioners when in reality there is none but mere vendetta, mala fides, rumors, gossip and cheap falsehoods peddled by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.*
10. *It is fair and just that the Orders sought herein are granted.*

4. When this application came before me *ex parte* on 19/6/2015 I granted interim orders in terms of prayer 1, 2, and 3.

5. When the application came up for hearing *inter partes* on 20/7/2015, the Respondents raised a Preliminary Objection dated 17/7/2015 and filed in Court on 20/7/2015. The Preliminary Objection raised is to the following extent:-

1. **The proceedings before the Hon. Court are fatally defective having been commenced *per incurriam* in violation of Section 7, the Anti-Counterfeit Act, 2008, as read with Sections 13, 14 and 15 thereof;**
2. **The proceedings before the Hon. Court are fatally defective having been commenced *per incurriam* in violation of Article 162 2) (a) and (3) of the Constitution as read with the Section 12 and 20 of the Employment and Labour Relations Court Act, Cap 234B;**
3. **The proceedings are fatally defective having been commenced in violation of the Civil Procedure Act and Order 2 Rule 7 of the Civil Procedure Rules, 2010; and,**
4. **The Application therefore is an abuse of the process of Court and should be dismissed with costs.**

6. The contention by the Applicants is that on 15<sup>th</sup> June 2015 they were all sent on compulsory leave for 3 months after they each received a letter to that effect. The letters were annexed as **Appendix A1, A2, A3 and A4**. The letters read as follows:

“

*Dear Sir,*

**RE: COMPULSORY LEAVE**

*The above refers;*

*The Agency has received numerous complaints from the general public and the manufacturers/IPR owners on your misconduct.*

*In their 46<sup>th</sup> Full Board meeting held on Friday, 12<sup>th</sup> June 2015, given the serious nature of the matter the Board approved the HR, Finance and General Purposes Committee recommendation to send you on compulsory leave with pay to allow investigations into the complaints laid against you with effect from today 15<sup>th</sup> June, 2015.*

*Consequently, you are not to report for work effective immediately, until 15<sup>th</sup> September 2015. This is not disciplinary, but is intended to allow the Agency to examine the issues thoroughly and to determine appropriate action. Should the investigation not be completed during this time, the Management reserves the right to extend the leave, as deemed necessary.*

*During the course of the investigations, you will be provided with the details of the allegations and given an opportunity to respond to them. You must ensure you are available for interviews during this period. If you do not make yourself available we will proceed with the investigations and make a determination based on the information we have available to us.*

*Upon receipt of this letter, you will be required to temporarily return your office keys, Staff Identification Card and Certificate of Authority.*

*You may contact the Ag. DD F & A should you wish to remove any personal items and arrange for a time to do this; however, all items, which are the property of the Agency, must be left at the work station.*

*If you have any files or equipment at your residence, which are the property of the Agency, we will arrange to have these items collected.*

*Upon completion of the investigation, you will be required to attend a meeting where the results of the investigation and any possible disciplinary sanctions will be discussed with you.*

*Yours faithfully*

*Signed*

*Dr. John Akoteri, PhD*

**Ag. EXECUTIVE DIRECTOR**

***Cc. Ag. Deputy Director – Finance & Administration***

7. The Applicants contend that the decision to send them on compulsory leave violated their rights under the Constitution, the Employment Act and the Human Resource Manual of the 1<sup>st</sup> Respondent.
8. The Applicants also aver that the Respondents acted in an opaque manner by denying them an

- opportunity to know who their accusers were, the nature of their accusations, when the accusations were made and the reasons why the alleged accusations or complaints were not brought to their attention immediately.
9. The Applicants contend that the reasons given by the Respondents to send them on compulsory leave is an escapist and fabricated attempt by the Respondents to use baseless excuses to harass and intimidate them out of employment. They contend that the decision was made without jurisdiction and is wrong in every respect as none of them was ever notified of any complaints or allegations against them that could trigger such drastic action.
  10. The Applicants aver that the 1<sup>st</sup> Respondents HR Manual at paragraph 3.9 makes provision for compulsory leave and provides 3 clear and distinct reasons that may necessitate compulsory leave. They contend that none of the reasons have been advanced by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent in the letter aforesaid hence 1<sup>st</sup> and 2<sup>nd</sup> Respondents have abused the process to the Applicants detriment.
  11. The Applicants aver that the 1<sup>st</sup> Respondents disciplinary process is explained in their HR Manual and nowhere does it provide for the full board of the 1<sup>st</sup> Respondent to make such a decision as it did. That compulsory leave can only be effected after a recommendation by the Head of Division which recommendations were never made.
  12. The Applicants have also submitted that the Respondents contention that there was a full board meeting of 1<sup>st</sup> Respondent is a lie as the quorum of such meeting is 7 but the members who sat were 5 and therefore the meeting was marred by illegality as even a stranger attended the said meeting i.e. *"a person in attendance"*.
  13. On the Preliminary Objection raised, the Applicants aver that the defamatory action is auxiliary before this court and all they seek is an Injunction not to publish any defamatory statements against the Applicants.
  14. The Respondents filed their replying affidavit before Court on 20/7/2015 and also the Preliminary Objection on the same day. The affidavit was sworn by one Dr. John Akoten the Executive Director of the 1<sup>st</sup> Respondent herein and also named as 2<sup>nd</sup> Respondent herein.

In the affidavit, the Respondent depones that the Petitioners' Interlocutory and substantive application is ill conceived, fatally and incurably flawed as it purports to pursue legal action against 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents who are Ag. Executive Director, Ag. Deputy Director Finance and Administration and Chairman of the Board of Directors of 1<sup>st</sup> Respondent in respect of execution of functions of their office contrary to anti-Counterfeit Act 2008 at Section 14 as read with Section 7, 11 and 13 thereof. This contention is what the Respondents raised as their Preliminary Objection.

15. The Respondents also aver that proper procedure and lawful grounds were invoked in sending the Respondents on compulsory leave and that they never acted ultra vires in any way including in the alleged publishing or causing to be published in print media and broadcast defamatory statements against the Petitioners.
16. The Respondents further aver that the Agency received numerous complaints written and otherwise alleging various improprieties against the Applicants. The substance of which was that the Applicants had allegedly been variously involved in obfuscating the enforcement of Intellectual Property Rights (IPRs) against various suspected counterfeiters.

The correspondence in question was produced by Respondent and marked as ACA- 1. The Respondents therefore aver that the Applicants allegation that the compulsory leave was actuated by malice is devoid of any veracity as per their correspondence Appendix ACA 1.

17. The Respondents aver that the complaints were to the effect that the Agency's core function of combating counterfeiting, trade and other dealings in counterfeit goods was supposedly been undersized by the very department to which the Applicants are domiciled within the Agency and which was tasked to execute and discharge this mandate apparently negating the implementation of the objects.
18. That this state of affairs was brought before the board of the 1<sup>st</sup> Respondent which institution is tasked under Section 7 of the Anti-counterfeit Act, 2008 with the responsibility of ensuring that the Agency and the officers retained thereunder conscientiously aid in the execution of the Agency's mandate without drawing the Agency into disrepute.
19. That the Board acting within its jurisdiction sat on Friday the 12<sup>th</sup> June 2015 and deliberated amongst other items the substance of the alleged complaints leveled as against the Agency's Legal Services and Enforcement Department. The Minutes of the said meeting were annexed as Annex ACA.2. The Board at its sitting invoked its powers and decided to send the Applicants on compulsory leave.
20. The Respondents aver that they adhered to its Human Resource Manual at Clause 3.9 in sending the Applicants on compulsory leave. The Respondents also aver that whilst considering the severity of the accusations they have also referred the matter to the Directorate of Criminal Investigations inviting their technical expertise to get to the root of the alleged misconduct and/or impersonation of various Anti-Counterfeit Inspectors.
21. The Respondents also contend that the Petition and Interlocutory Application is ill-advised, premature and unwarranted as the investigations may actually establish that there is no ground for further pursuit by the Board and the Management of the Agency. That the same investigations may lead to the Applicants being called upon to defend themselves and that there is no evidence that they will be condemned unheard.
22. In relation to defamatory publications allegedly tendered by the Applicants and marked A6, the Respondents aver that the same was done by an independent newspaper of national repute known to the Applicants and that the Respondents had no part in it.  
  
The Respondents further aver that the claim for defamation is incurably defective in violation of Order 2 Rule 7, Civil Procedure Rules 2010 and Articles 162 (2) (a) and (3) of the Constitution as read with Section 12 and 20 of the Employment and Labour Relations Court Act Cap 234 B.
23. The Respondents further aver that the publication is not defamatory to the Applicants but is clearly informative and factual regarding the status of the Applicants employment with the 1<sup>st</sup> Respondent. The Respondents want the application dismissed.
24. On quorum of the Board meeting, the Respondents have submitted that, this was a special board meeting under Section 3(2) of the Act and it was properly constituted. The Respondents cited **Supreme Court case Application No. 2 of 2011 Samuel K. Macharia & Another vs Kenya Commercial Bank Limited & 2 Others.**
25. On the issue of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents being sued in their individual capacity, the Respondents have submitted that Section 7, 13 and 14 of the Act prescribes institution of proceedings against officers of the Agency in their official capacity.
26. In a rejoinder, the Applicants have submitted that the HR Manual referred to by Respondent has been selectively been referred to and that Clause 3.9 should be read together with Clause 5 of the Manual which provides for the procedure to be followed. They also submitted that 5 members can constitute a special meeting of the board but in this case, the meeting was not a special meeting.
27. Having considered all submissions from both parties, issues for determination are as follows:

- a. ***Whether the application is properly before court as against the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents being sued in their official capacity for executing their official duties.***
- b. ***Whether the Respondents acted properly and within the law and provisions of their HR Manual in sending the Applicants on compulsory leave.***
- c. ***Whether the Respondents have acted maliciously and defamatory as against the Applicants in any way.***
- d. ***Whether the Applicants are entitled to the orders sought.***

28. On the 1<sup>st</sup> issue of Section 14 of the Ant-Counterfeit Act – Cap No. 130A states as follows:

***“Protection from personal liability 14 (1) No matter or thing done by a member of the Board or by any officer, member of staff or agent of the Agency shall, if the matter or thing is done bona fide for executing the functions, powers and duties of the Agency, render the member, officer, employee or agent or any person acting on his directions personally liable to any action, claim or demand whatsoever.***

***14(2)-----“***

29. Under Section 13 of the said Act:

***“the Board may, by resolution either generally or in any particular case, delegate to any Committee of the Board or to any member, officer, employee or agent of the board, the exercise of any of the powers of the performance of any of the functions or duties of the Board under this Act or under any other written law”.***

30. From the above provisions of law, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents if at all they acted in any manner which aggrieves the Applicants, they acted on delegation of the board unless contrary proved. The action cannot be subject to civil or any action against them for work done in their official capacity. That being the position of the law, it is the finding of this court that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents are wrongly enjoined in this application and petition and I therefore strike out any action against them with costs to be borne by the Applicants.

31. On the 2<sup>nd</sup> issue, the Respondents HR Manual Clause 3.9 provides as follows:

***“Compulsory leave***

***If in the interest of the service it is considered necessary to keep an employee away from his duties for some time, the Executive Director may approve that an employee be sent on compulsory leave under the recommendation of the Head of Division. The period of such compulsory leave shall as far as possible be kept to the very minimum and shall not exceed three (3) months.***

**3.9.1: Reasons necessitating compulsory leave**

- a. ***When there is need to carry out investigations involving an employee and calling for his absence from office to prevent any possible interference by the same employee.***
- b. ***When the Agency needs some time to sort out such matters as unforeseen accommodation requirements, or to resolve problems brought about by a big re-organization exercise.***
- c. ***When it is desirable to have the employee kept away from office premises to resolve or avoid conflict or disturbance occasioned by the employees conduct”.***

32. The Applicants submitted that the above provisions should be read jointly with Clause 5 of the Manual which deals with disciplinary procedures.

Under Chapter 5:

***“Whenever an allegation of breach of any of the rules and regulations or provisions of the Employment Act is made against an officer, the officer shall be offered an opportunity to respond to these allegations in writing within forty eight hours in order to determine whether any further action should be taken”.***

33.The Respondent submitted that the procedure anticipated above would still have been adhered to after their minimum investigations to confirm the allegations leveled against the Applicants. That as it may be, the step taken to send the Applicants on compulsory leave was expected to be preceded by some form of hearing as envisaged under Clause 5 of the Respondent’s HR Manual.

The letters sending Applicants on compulsory leave did not also explain what allegations were leveled against them from the undisclosed sources. This is in clear breach of the HR Manual and the Employment Act which establishes principles of fair hearing. Article 50 (1) of the Constitution also provides as follows:

***“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.***

34.It is apparent that his crucial step was skept in a haste, to send the Applicants on compulsory leave and thus breaching their right to a fair hearing.

35.Even assuming that the hearing envisaged would have followed, was the decision by the Board reached by a board properly constituted?. The Applicants submitted that the board did not have quorum to meet as they did.

Section 3 (4) of the Anti-Counterfeit Act states:

***“The quorum for the conduct of the business of the Board shall be seven members including the chairman or the person presiding”.***

36.In the case of this meeting however the minutes are attached as Appendix ACA 2 and there is evidence that only 5 members met and this means that there was no quorum to transact the business of the day.

It therefore follows that any decision reached with the improperly constituted board is null and void given that the resolution to send the Applicants on compulsory leave was reached at this meeting, this court finds the resolution null and void for lack of quorum and is therefore set aside.

37.On the issue of defamation raised by the Applicants, there is no indication given as to the defamatory words or conduct said or uttered by the Respondents. The issue of defamation is therefore neither here nor there.

38.Having found as above, I find for Applicants in terms of prayer 4. The compulsory leave letters are hereby declared null and void. This order does not in any way impede the Respondents from carrying out their investigations and subjecting the Applicants to proper disciplinary procedures if need be. The order will remain in force pending the hearing and determination of this Petition.

Read in open Court this 20<sup>th</sup> day of August, 2015

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Okoth for Petitioners

Luci for Respondents