



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE NO.1549 OF 2015**

**KENYA NATIONAL PARENTS ASSOCIATION .....CLAIMANT**

**VERSUS**

**CABINET SECRETARY, MINISTRY OF EDUCATION**

**SCIENCE & TECHNOLOGY.....1<sup>ST</sup> RESPONDENT**

**THE PUBLIC SERVICE COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. On 29<sup>th</sup> October 2015, the Respondents filed notice of preliminary objections on the following grounds;

- a. *That the Court has no jurisdiction to entertain the suit herein;*
- b. *That the Claimant herein Kenya national Parents Association lacks locus of instituting this suit;*
- c. *That the applicant's application is bad in law and an abuse of the Court process and should be dismissed with costs.*

2. Both parties filed their written submissions.

3. The Respondents submitted that the Claimant filed Notice of Motion application dated 2<sup>nd</sup> September 2015 seeking for orders prohibiting the Respondents from collective termination of employment of holders of offices county directors of education and from conducting recruitment, employing or deploying applicants for appointment to the 53 advertised positions of Deputy Directors of Education in the Ministry of Education Science and Technology. That section 12 of the Industrial Court Act [Employment and Labour Relations Court Act] establish this Court to entertain matters on employment and labour relations but the suit herein is with regard to the recruitment of county directors of education by the 2<sup>nd</sup> Respondent which is an administrative act. Under the constitution, Counties replaced the administrative 8 provinces and the 1<sup>st</sup> Respondent thus in an effort to level the ground in matters education identified a number of officers to coordinate education functions in the counties. The Basic Education act, 2013 recommend creation of the posts of County Directors of Education.

4. That the Respondent has not demonstrated how they are affected by the actions of the Respondents by recruiting the county directors of education. The Claimant does not state that they are acting in the public interest. Such suit should have been filed in the name of the party seeking the public interest and such a claim should be by a constitutional defence in the constitutional court. This therefore removes this Court

from such a matter that has jurisdiction only in employment and labour relations matters. A suit filed in a Court without jurisdiction is a nullity in law as held in **Boniface Waweru Mbivu versus Mary Njeri & Another**.

5. The Respondents also submit that the Claimant does not have locus to institute this suit. In the Basic Education Act, 2013 at section 55 and the schedule thereto sets down the process of forming a Parent Association whose primary mandate is to champion pertinent issues regarding parents and institutions of learning. Such an association is an umbrella body of all parent associations in schools. The Claimant is however not a registered statutory body under the Act. There is no evidence that the Claimant is a registered association but registered under the Societies Act and as such cannot be registered under any other law such as under the Basic Education Act. The failure by the Claimant to be registered under the Basic Education Act makes them non-existent and cannot pursue the reliefs sought. Mr Musau Ndunda has not demonstrated how the administrative acts exercised by the Respondents shall aggrieve him. He can only file the case as herein in his own names under the provisions of article 23 of the constitution as held in **Okiya Omtatah versus The Attorney General, Petition No.354 of 2014**.

6. That the Claimant has instituted this suit as a public interest case which per the Employment and Labour Relations Court act this Court has no jurisdiction to entertain. The Claimant has not demonstrated how he has been aggrieved by the actions of the Respondent and lacks locus to file the suit as it is a body not registered under the law relied upon. The Claimant is amorphous and cannot pursue the reliefs sought and thus in abuse of Court process and the suit should be dismissed with costs to the respondent.

7. In reply and submissions, the Claimant submitted that section 12 of the Employment and Labour Relations Court Act gives the Court exclusive jurisdiction over employment and labour relations matters as conferred under article 162 (2) of the constitution. The matters set out by the Respondents with regard to jurisdiction only relate to semantics which are technicalities ousted by the application of article 159 of the constitution. The constitutive Act for the Court give power for the arbitration of disputes between all parties that relate to employment and labour relations. The classification of the suit as a constitutional matter does not arise. To do so would only blur the issues. This Court should not cede its jurisdiction to any other forum or court.

8. The Claimant also submits that under paragraphs 1 and 2 of the claim herein, the complaint is filed in public interest which is allowed under article 22 of the constitution. A party other than the one directly affected can lodge the claim. Their complaint herein relate to the possible loss of employment to the current 47 county directors of education, a matter that this Court has jurisdiction to resolve.

9. The question as to whether the Claimant is registered under the Basic Education Act or under the Societies Act is a matter of evidence and cannot be determined at this stage. The Claimant has relied on the case of **Mukisa Biscuit Co. versus West End Distributors (1969) EA**. In this case, the Claimant is a statutory body by virtue of the Basic Education Act and the matters of facts raised by the Respondent should not be allowed at this point to derail the suit. Objections should be dismissed with costs to the claimant.

## **Determination**

Whether the Court has jurisdiction

Whether the Claimant has locus to institute these proceedings

10. The principles governing preliminary objections are set out in the old case of **Mukisa Biscuit Manufacturing Co. Ltd versus West End Distributors** and not much has changed since 1969 when the Court held;

*... a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit ... A Preliminary Objection ... raises a pure point of law which is argued*

*on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop*

11. Therefore preliminary objections should only address matters of law and not matters that require the Court to address matters of fact, evidence or application of discretion. A preliminary objection once raised, the Court must first address it as where an issue or law arise especially on the question of Court jurisdiction, the determination of such a matter is imperative to commence first as the determination of such a question is likely to terminate further proceedings and if not, parties are able to proceed with certainty that a Court with the requisite jurisdiction will determine the matters at hand.

12. **On the question as to whether this Court has jurisdiction**, Article 165 (5) (b) and 162 of the Constitution sets out the conceptual framework for the establishment of this Court to hear and determine employment and labour relations disputes. Questions relating to legality and other disputes of administrative disciplinary proceedings or actions pending before employers properly fall within the boundaries of this Court as established in accordance with the provisions of the Constitution. Such jurisdiction is further given meaning by the provisions of section 12 of the Employment and Labour Relations Court Act. The Act under subsection 12(3) (i) empower the Court to make interim preservation orders including injunctions in cases of urgency. The possible interim orders would include the preservation of a status quo or rights and obligations in the employment relationship. The proceedings resulting in such orders can commence through memoranda of claim, applications, petitioners or by any party stating their case without undue regard to technicalities in due cognisance of the Chief justice Practice Rules as under Article 22 of the Constitution.

13. As held in **Okiya Omtatah & Another versus KEMRI Board of Management & Others, Petition No.33 of 2014;**

*Where the Court decides to make preservative orders, the Court does not thereby usurp or participate in the right of the employer to discipline the concerned employee nor does the Court thereby become part of the administrative disciplinary process. The Court in such an instance would be exercising its constitutional and statutory judicial powers moved by a party through plaint, notice of motion or petition, and it is not thereby incompetent to entertain the matter in view of the interim orders if a party dissatisfied at the end of the administrative disciplinary process decided to move the Court in that regard.*

14. In many instances where the dispute arise out of employment and labour relations, the Court has jurisdiction to address such a matter as the High Court has specifically been removed from addressing such matters under Chapter 10 of the constitution.

15. **In this case the issue in dispute is the collective constructive termination of current Directors of County Education. The orders sought relate to the Claimant seeking to stop the recruitment of 53 county education to replace the current Directors of County Education. Thus, the issues in dispute and the orders sought relate to employment and labour relations, matters directly under the jurisdiction of this court. Matters of recruitment of employees, termination of employment through whatever means – constructive dismissal/termination as well – fall under the purview of this Court jurisdiction.**

16. The question of *locus* is also in issue. The Respondent submitted that the Claimant lacks standing before this Court noting that the Claimant has filed the suit in the public interest; they are a registered society and not registered under the law under which they seek to enforce the Basic Education Act. As noted above with regard to the Court jurisdiction, a party is allowed to commence proceedings by way of Memorandum of Claim; Petition; Judicial Review; or s a party may require appropriate proceedings can be commenced. Such proceedings and how to file the

necessary pleadings is regulated by the Court Rules and where no Rule is directly appropriate, a party can rely on any other written law applicable in Kenya, especially the Civil Procedure Act and the Rules thereto. Where a party files a Memorandum of Claim, Rule 4 of the Industrial Court (Procedure) Rules set out what a Claimant ought to set out thus;

4. A party who wishes to refer a dispute to the Court under any written law shall file a statement of claim setting out—

(a) *The name, the physical and the mailing address and full particulars of the claimant;*

(b) *The name, the physical and mailing address and the description of the respondent;*

(c) *The name, the physical and mailing address of any other party involved in the dispute;*

(d) *the facts and grounds for the claim specifying issues which are alleged to have been violated, infringed, breached or not observed and in the case of trade dispute the rights of the employees not granted or to be granted, any other employment benefits sought and the terms of collective bargaining agreement on which the jurisdiction of the Court is being invoked;*

(e) *any principle or policy, convention, law or industrial relations issue or management practice to be relied upon; and*

(f) *The relief sought.*

[Emphasis added].

17. In this regard the Claimant at the description paragraph 1 and 2 of the Claim states;

1. *The Claimant is an individual adult and the Secretary General of the Kenya National Parents Association a creature established by the Basic Education Act 2013 as apex society of affiliated School Parents Associations throughout the 47 Counties of the Republic of Kenya and their address is care of ...*
2. *The Claimant is a statutory body created by provisions of Schedule 3 of the Basic Education Act 2013 and has vested interests and a stake in the good governance and management of public schools and colleges providing basics education and brings this action in the public interest to redress concerns about dire consequences of arbitrary employment and dismissal of county directors of education may have on the management of education in public school and colleges and according's [accordingly] seeks a waiver of costs of this action.*

18. The Claimant herein is set out as KENYA NATIONAL PARENTS ASSOCIATION. The application filed together with the Claim is supported by the annexed affidavit of Mr Musau Ndunda the Claimant Secretary General. The suit is not filed by the secretary general, rather, the claim is by the association as set out. Paragraph one (1) of the Claim is therefore neither here nor there where the secretary general is set out as the claimant. But at paragraph two (2) the Claimant is further described as acting in the *public interest*. To thus File a Claim and as a Claimant in the *public interest* section 22 of the Employment and Labour Relations Court Act requires that such a Claimant ought to be in person, by their advocate, through their trade union or employer association as the issues that go into a Memorandum of Claim should relate to the breach of an employment relationship. For the Claimant herein to file suit through a Claim and acting in the *public interest* as set out, such a procedure is set out under article 22 of the constitution and in a procedure as under the Procedure Rules issued by the Chief justice for this purpose. A petition would suffice in such a regard where the Claimant is keen to ventilate their issues under the banner of *public interest*.

19. Therefore, According to Article 22(2) of the Constitution, In addition to a person acting in their own interest, Court proceedings under Article 22(1) may be instituted by:

- a) person acting on behalf of another person who could not act in their own name
- b) a person acting as a member of or in the interest of a group or class of persons
- c) a person acting in public interest
- d) an association acting in the interest of one or more of its members

**20. The Claimant in moving the Court as herein has set in motion a process through Memorandum of Claim under which, the orders sought will essentially be frustrated as to seek to act in the *public interest* by filing a Claim is specifically set out for parties seeking under an employment contract. Such is not the nature of the relationship the Claimant has described in the pleadings. However, to fail to apply the correct pleadings is not fatal to the entire suit. Such are matters that can be corrected without the substantive issues raised herein being affected. Such an error is not sufficient to have the entire suit dismissed.**

**21. The contest that the Claimant is an entity registered under the Societies Act and not under the Basic Education Act and hence has no standing are matter that require the Court to call for evidence in that regard. These are not matters that the Court can make a finding based on the admitted facts and the pleadings as filed. To dismissed the suit on this basis and without the Court having the benefit of the registration details and making an enquiry as to whether the Claimant has complied with what is set out under the Basic Education Act under Schedule 3 is to prejudice one party against the other. The call of evidence would be necessary which should be addressed on merit.**

**On the above analysis, the objection raised fail. The Claimant is at liberty to amend their pleadings as appropriate. Interim orders herein are extended.**

Orders accordingly.

**Delivered in open court at Nairobi this 16<sup>th</sup> day of December 2015.**

**M. MBARU**

**JUDGE**

In the presence of

Lilian Njenga: Court Assistant

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