



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 212 OF 2014

(Before D.K.N. Marete)

**KENYA COUNCIL OF EMPLOYMENT AND
MIGRATION AGENCY.....CLAIMANT**

Versus

THE NATIONAL POLICE SERVICE COMMISSION1ST RESPONDENT

JOHNSTON MAFENYI KAVULUDI.....2ND RESPONDENT

PETER KALONZO KAVILA.....3RD RESPONDENT

ALHJI OMAR ABDI SHURIE.....4TH RESPONDENT

THE DEPUTY INSPECTOR-GENERAL

POLICE SERVICE.....5TH RESPONDENT

DEPUTY INSPECTOR-GENERAL

ADMINISTRATION POLICE SERVICE.....6TH RESPONDENT

INSPECTOR-GENERAL NATIONAL

POLICE SERVICE COMMISSION.....7TH RESPONDENT

THE ATTORNEY-GENERAL.....8TH RESPONDENT

PRINCIPAL SECRETARY NATIONAL TREASURY.....9TH RESPONDENT

RULING

This is an application by way of Notice of Motion dated 18th February, 2014 and filed in court on the 19th instant. It is brought up under a certificate of urgency and seeks the following orders;

1. **THAT:-** this Application be certified as urgent and service be dispensed within the first instance.
2. **THAT:-** this Honorable Court pleased to issue a temporary Injunction restraining the 1st 2nd 3rd

*4th 5th, 6th 7th 8th and 9th Respondents by itself its Commissioners, Agents, employees, and whomsoever acting under this authority from recruiting, admitting, employing or pass out of the recruits who were never recruited or passed the initial Period of training that others had undertaken in training or filling of replacements of any individuals that was not on the list of field recruits which was witnessed by the District security Committee the **District** Intelligences committee, **NGOs, Usalama, EACC, Usalama** Forum Officer In-Charge of Police Divisions and County Commanders that indicated in which Location that they had gotten a slice of the National Cake of employment from the **286 District** Headquarters as advertised on or about **29th October 2011 and November 23, 2011** and reported to colleges/Embakasi Administration of Kiganjo Police College, General Services unit training School numbering **7,000 recruits** with a breakdown of 4,000 to Police Service and **3,000** to Administration Police Service pending hearing and determination of this Application.*

3. ***THAT:-**this Honourable Court be pleased to issue a temporary Injunction restraining the **1st 2nd 3rd 4th 5th, 6th 7th 8th and 9th** Respondent by itself its Commissioners, Agents, employees, and whosoever acting under this authority from giving service numbers, to bar to block recruited improperly from performing duties of Police officers under National Police Service pending hearing and determination of this Application.*
4. ***THAT:-** The Respondents be restrained by an order of this honourable Court from replacing the recruits with others who had fake Certificates, who became pregnant while in College and suspended from their position since the action a rose due to non-diligence of the Commandants of this training schools and who are/subjected to the findings of the Court to be unfit to head such sensitive institutions and to issue a declaration for them not to serve as Commandants, to avoid interference of records on such, pending the hearing and determination of this claim.*
5. ***THAT:-** 1st Respondents agents, whosoever is be compelled to table before Court initial list of recruits from the **286 Districts**, initial list of dropouts, initial list of Replacement and their diverse dates for practices and Governance in respect of the Constitution of Kenya.*
6. ***THAT:-** the Respondents to be condemned to pay the costs of this claim.*

When the application came for hearing on 19th February, 2014, it was certified urgent and set for hearing on 24th February, 2014. On this date, hearing was slated for 27th February, 2014.

At the hearing, the applicant sought to rely on his pleadings and submission while Mr. Ngumi, counsel for the respondents submitted that he was ready to proceed and had filed a preliminary objection. He, however, submitted that he had entered appearance for only the 3rd to 8th respondents. He was ready to proceed with the application. The matter was set for hearing at 1100 hours.

When the matter came for hearing at 1100 hours Mr. Nyambega for the applicant submitted that he wished to rely on his record dated 18th February, 2014 and a supplementary affidavit sworn on 26th instant. He further submitted that the dispute lies on the Employment Act, 2007 and supplemented by the Industrial Relations Act, 2007. The upshot of the matter is that around the month of November, 2012 the National Police Service Commission, a constitutional body announced the recruitment of police officers. There were 286 centres countrywide for this recruitment. Another centre was made at Bruce House and called Centre 287 and the commission proceeded to recruit at it. This was illegal – See Annexure AD of the supporting affidavit. He therefore sought orders as prayed in his application.

Mr Ngumi, counsel for the applicants submitted that he had filed a preliminary objection the same morning and wished to adopt the same in full in support of his opposition to the application. The preliminary objection is as follows;

1. *The honorable Court does not have jurisdiction to hear this matter.*

2. *That the claimant lacks locus standi to institute this suit.*

3. *That the supporting affidavit as drawn offends the mandatory provisions of Order 19 Rule 3 of the Civil Procedure Rules.*

He wished to adopt his preliminary objection and submitted that the court lacks jurisdiction to entertain this application in that the issues in dispute fall outside the scope of Article 162(2)(a), Constitution of Kenya, 2010 which provision grants and defines the jurisdiction of this court. This is as follows;

162.(1) ...

(2) *Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to –*

a. *employment and labour relations; and*

b. ...

He further submitted that the issues in dispute fall outside the scope of this court as expressed in the constitution and therefore his case and submission for lack of jurisdiction. He further alluded to the authority of **S.K. Macharia Vs Kenya Commercial Bank and 2 Others** which authority he submitted avails and applies to this case and his submissions.

Counsel further submitted that the claimant lacks jurisdiction to institute this suit. He submitted that his search at the society's registry indicates that the claimant is registered to deal with issues of immigrant workers. He argued and submitted that although Article 22 of the constitution espouses powers for pursuance of these matters and expands the horizon for their pursuit, there must be a nexus between the subject matter and the parties.

Counsel further submitted that the supporting affidavit of the applicant offends Order 19, rule 3 of the Civil Procedure rules in that the same is not sworn of the deponent's knowledge and the same is not disclosed as to sources. He in the penultimate submitted that the suit is bad in law and prayed that it be dismissed.

The respondent in his respondent's skeleton submissions emphasizes the importance of jurisdiction as was established in the authority of **Owners of the Motor Vessel "Lilian S" v. Caltex Oil (Kenya) Ltd. [1989] KLR 1** (at p.14):

"Without jurisdiction, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

He therefore submitted that the jurisdiction of the Industrial Court as espoused in the constitution and Section 12(1) of the Industrial Court Act, 2011 is lacking and therefore this court has no power to entertain this suit. S. 12(1) of the Industrial Court Act is 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 Articles 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 an employers' organization and a trade unions organization;*

(d) disputes between trade unions;

(e) disputes between employer organizations;

(f) disputes between an employers' organization and a trade union;

(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.

The respondent sought to rely on the authorities of **S.K. Macharia Vs Kenya Commercial Bank and 2 Others** (unreported) where the Supreme Court observed as follows;

“A court’s jurisdiction flows from either the Constitution or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself Jurisdiction exceeding that which is conferred upon it by law.

Where the Constitution exhaustively provides for Jurisdiction of a court of law, the court must operate within the Constitutional limits. It cannot expand its jurisdiction through judicial craft of innovation. Nor, can parliament confer jurisdiction upon a court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon parliament to set the jurisdiction of the court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such court ... by statute law.”

He therefore submits that on this basis this court lacks jurisdiction to hear and determine the issues in dispute.

The respondent further submits that the claimant/applicant’s constitution and registration under the Society’s Act only empowers her to deal and safeguard the interests of migrant workers and therefore has no *locus standi* to entertain this cause or subject matter. She lacks *locus standi* to do the same. He rubbishes the application of Article 22 of the Constitution of Kenya, 2010 in that there is no nexus between the claimant/applicant and the party(ies) affected by the acts complained of. He cites the authority of **Joshua Karianjahi Waiganjo versus Attorney General, Nairobi High Court Petition 42 of 2013** where Majanja, J. observed as follows;

‘I appreciate that the, Article 22(1) and (2) has expanded the horizon of locus standi in matters or enforcement of fundamental rights and freedoms but even where one purports to enforce the rights of another there must be a nexus between the parties particularly where a case has a direct effect on the person whose rights are affected.’

The respondent further alleges that the application is defective for lack of compliance with the mandatory requirements of order 19 rule 3(1) on affidavits;

‘Affidavits shall be confined to such facts as ten deponent is able of his own knowledge to prove;

Provided that in interlocutory proceedings, or by leave of the Court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.’

The respondent submits that the claimant has made several assertions without providing the sources of such information. He therefore prays that the same should be struck out by the court as provided under Order 19, rule 6 of the Civil Procedure rules as follows;

'The Court may order to be struck out from any affidavit any matter which is scandalous, irrelevant or oppressive.'

He cited the case of **Joseph Gitau & 2 Others Vs Ukay Estate Ltd Nbi H.C.C.C. No. 813 of 2004** where Ojwang, J. (as he then was) held as follows on scandalous pleadings;

“Allegations in a pleading are scandalous if they state matters which are indecent, or offensive or for mere purpose of abusing or prejudicing the opposite party. Moreover, any unnecessary or immaterial allegations will be struck out as being scandalous if they contain any imputation on the opposite party, or make any charge of misconduct or bad faith against him or someone else.”

He prays that the supporting affidavit be struck out of the record of court. This would in effect render the suit unsustainable and defective. It would settle the matter altogether.

In the penultimate the respondent submits that this suit is bad in law, frivolous, vexatious and should be dismissed with costs to the respondent.

This court finds itself tied up in a situation of determining the respondent's submissions and case against this application and suit. The issues for determination are three-fold;

1. Does this court have jurisdiction to entertain, hear and determine this application and suit?
2. Does the claimant/applicant have *locus standi* to bring this action, and lastly,
3. What is the fate of the supporting affidavit of the claimant/applicant in view of Order 19, rule 3(1) and rule 6 of the Civil Procedure Rules?

The 1st issue for determination is one of jurisdiction of this court in the hearing and determination of the issues before court.

Article 22 of the Constitution of Kenya, 2010 provides for the enforcement of the Bill of Rights. It is as follows;

22. (1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

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

- (a) a person acting on behalf of another person who cannot 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 the public interest; or*
- (d) an association acting in the interest of one or more of its members.*

(3) the Chief Justice shall make rules providing for the court proceedings referred to in this Article, which shall satisfy the criteria that –

(a) the rights of standing provided for in clause (2) are fully facilitated;

(b) formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation;

(c) no fee may be charged for commencing the proceedings;

- d. *The court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities; and*
- e. *An organization or individual with particular expertise may, with the leave of the court, appear as a friend of the court.*

(4) *The absence of rules contemplated in clause (3) does not limit the right or any person to commence court proceedings under this Article, and to have the matter heard and determined by a court.*

Article 22(3) has been effected by the gazettelement of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 in which the Chief Justice has formulated and gazetted rules to this extent.

Article 22 is broad and bold on the issue of enforcement of the Bill of Rights as enshrined in the Constitution of Kenya, 2010. It empowers every person the right to institute proceedings on the subject besides authorizing other categories of persons and associations that may bring out suits relating to the subject under sub-article (2) as above. Action in the public interest is emphasized under Article 22 (2)(c.) The Constitution and the rules made on the issue of enforcement on the protection of rights and fundamental Freedoms are intended to loosen the process of realization of these rights so as to facilitate an easy and available procedure and methodology of accessing the same. The constitution and rules aforesaid also introduce a situation of informality and non-orthodoxy in the filing, acceptance, hearing and determination of these issues and therefore my finding that this application and suit fall well within the confines of Article 22 of the constitution and should be treated as such.

Article 22(3)(b) is as follows;

“Formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation.”

The subject matter of this application is one on recruitment, training, employment and deployment of police officers. Police officers are no doubt recruited and employed in the public sector and domain. It however remains a matter of employment and labour relations and therefore well fitted within the provisions of Article 162(2) of the constitution.

The narrow and limited provisions of S.12(1) of the Industrial Court Act, 2011 cannot be seen to limit the broad and encompassing provisions of Articles 162(2)(a), 22 and 258 of the constitution of Kenya, 2010 on employment and labour relations, enforcement of the Bill of rights and the constitution. The respondents’ submission on lack of jurisdiction stumbles and I so find.

The 2nd issue for determination is whether the claimant/applicant was *locus standi* to bring out this suit. *Locus standi* has in the past been used as an excuse and a stumbler to the realization of fundamental freedoms under the Bill of Rights. It enabled litigants and courts to short circuit the realization of these rights by delimiting the power of persons and parties from pursuing these rights. It even served as a disabler to public interest litigation. The Constitution of Kenya, 2010 under Articles 22 and 258 *inter alia* came in to pre-empt this ugly practice by enabling persons and organizations to come out and pursue issues of infringement of the constitution and fundamental freedoms under the Bill of Rights without fetter.

Article 258

258. (1) *Every person has the right to institute court proceedings claiming that this Constitution has been contravened or is threatened with contravention.*

(2) *In addition to a person acting in their own interest, court proceedings under clause (1) may be*

instituted by –

- (a) a person acting on behalf of another person who cannot 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 the public interest; or*
- (d) an association acting in the interest of one or more of its members.*

The issue of lack of jurisdiction in the circumstances is, with due respect, farfetched, sloppy and wanting. It is an attempt to take us to the days of yonder. It has a no room under the current libertarian constitutional dispensation. I therefore find that the claimant/applicant is well within the law in bringing out this action.

The 3rd issue for determination is the fate of the supporting affidavit to this application in view of Order 19 rule (3)(1) and (6) of the Civil Procedure Rules. The constitutional provisions cited above oust on the issue of technicalities and formalities in the pursuance and realization of violations of the constitution and Bill of Rights. These can also be employed to oust the argument and submission on lack of efficacy of the supporting affidavit. A case of undue disregard to technicalities and formality is a constitutional practice and should be sustained at all times.

Again, Counsel for the respondent strictly sought to rely on a preliminary objection in support of his opposition to this application and suit. He cited several authorities in support of his case but I must admit that this was a selective application of the authorities. In the case of **Mukhisa Biscuits**, supra, it was observed that a preliminary objection is in the nature of a demure which raises a pure point of law and which is argued on the assumption and premise that all facts pleaded by the other side are correct. It cannot be raised if any facts have to be ascertained or what is sought is exercise of judicial discretion;

“...is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

Further,

“... for a Preliminary Objection to succeed it has to be based on agreed facts. A Preliminary Objection should not require the Court to ascertain such facts, or to do a fact finding exercise.”

The preliminary objection by the respondent raises three issues which issues are not outstandingly issues of law. These are not ascertainable on their face and therefore cannot stand as grounds for a preliminary objection on their own motion. They would require further indulgence into issues of evidence and ascertainment of facts by the court. Secondly, the authorities cited by the respondent are calculated to support his position and lack openness in expressing the subject of the law. I would in the circumstances dismiss the preliminary objection thereby rendering the defence amputated.

Article 22 of the constitution must have anticipated situations like in the present case. These are situations where lay persons would approach the court with a view to establishment of their rights or the rights of others, or even public interest in the realization of fundamental freedom under the Bill of Rights and enforcement of the constitutional rights of the Kenyan people. We are not going to be stumblers or fetters to the realization of these rights by any parties. This court and any other court should always be warned of the fluid but important nature of these rights and safeguard the same religiously. I apply this theory in the instant case and find in favour of the application.

I therefore order as follows;

1. **THAT** this Honorable Court be and is hereby pleased to issue a temporary Injunction restraining

the 1st, 2nd, 3rd, 4th 5th, 6th, 7th, 8th, and 9th respondents by themselves, their commissioners, agents, employees or whomsoever acting under their authority from recruiting, admitting, employing or passing out of the recruits who were never recruited or passed the initial period of training that other recruits had or have undertaken in training or filling of replacements of any individuals who were not on the list of field recruits which was witnessed by the District Security Committee, the District Intelligence committee, NGOs, Usalama, EACC, Usalama Forum Officer In-Charge of Police Divisions and County Commanders which organizations supervised and were party to the initial police recruitment exercise as advertised and gazetted.

2. **THAT** the offices and organizations enlisted in Order No. 1 above confirm the actual recruitment undertaken in the 286 districts as per the recruitment advertisement of 29th October, 2011 and 23rd November, 2013 and the reporting of the 7,000 recruits to the various police colleges namely, Embakasi Administration Police School, Kiganjo Police College, General Services Unit Training School.
3. **THAT** the 1st, 2nd, 3rd, 4th 5th, 6th, 7th, 8th, and 9th respondents be and are hereby by themselves, their commissioners, agents, employees, or whomsoever acting under their authority from giving service numbers and are barred from employing improperly recruited and trained recruits from performing duties of Police officers under National Police Service pending hearing and determination of this suit.
4. **THAT** The respondents be and are hereby restrained from replacing the recruits with others who had fake certificates, who became pregnant while in College and or were suspended from their positions since the action arose due to non-diligence of the commandants of these training schools.
5. **THAT** the commandants of the Embakasi Administration Police School, Kiganjo Police College, General Services Unit Training School by themselves, their agents, employees or whomsoever acting under their authority be and are hereby restrained from interfering with the records of the recruitment and training of this lot of police recruits pending the hearing and determination of this claim.
6. **THAT** the 1st Respondent, or their agents whomsoever be and are hereby compelled to table before this court initial list of recruits from the 286 Districts, the initial list of dropouts, the initial list of replacements and their diverse dates for scrutiny and ascertainment of the veracity of the list within fifteen (15) days of these orders of court.
7. **THAT** this matter be mentioned on 14th April, 2014 to confirm compliance and other directions of court.
8. **THAT** the costs of this application shall be borne by the respondents.

Dated, delivered and signed the 17th day of March, 2014.

D.K. Njagi Marete

JUDGE

Appearances

1. Mr. Evans Nyambega Akuma instructed by the Kenya Council of Employment and Migration Agency for the claimant/applicant.
2. Mr. Ngumi instructed by the office of the Attorney General of Kenya for the respondents.