



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**

**PETITION NO. 33 OF 2014**

**OKIYA OMTATAH OKOITI ..... 1<sup>ST</sup> PETITIONER**

**NYAKINA WYCLIFE GISEBE ..... 2<sup>ND</sup> PETITIONER**

**AND**

**KEMRI BOARD OF MANAGEMENT..... 1<sup>ST</sup> RESPONDENT**

**DIRECTOR, KEMRI ..... 2<sup>ND</sup> RESPONDENT**

**PRICIPAL SECRETARY, HEALTH ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**KIZITO M. LUBANO..... 1<sup>ST</sup> INTERESTED PARTY**

**ETHICS AND ANTI-CORRUPTION COMMISSION.....2<sup>ND</sup> INTERESTED PARTY**

**ELIZABETH BUKUSI..... 3<sup>RD</sup> INTERESTED PARTY**

**ANNE WANG’OMBE ..... 4<sup>TH</sup> INTERESTED PARTY**

**Petitioners in person**

**Munge Advocate for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and 3<sup>rd</sup> and 4<sup>th</sup> Interested Parties**

**Radoli Advocate for 1<sup>st</sup> interested party**

**Jemutai Advocate for the 2<sup>nd</sup> Interested Party**

**RULING**

1. The Petition herein was filed on 5<sup>th</sup> June 2014 by the two Petitioners Okiya Omtatah and Nyakina Wycliffe Gisebe, seeking urgent orders based on the Notice of Motion dated 26<sup>th</sup> May 2014. By Notice dated 2<sup>nd</sup> July 2014, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents together with the 3<sup>rd</sup> and 4<sup>th</sup> Interested Party filed Preliminary Objections on the grounds;

1. *The Petitioners have no locus standi or cause of action known in law or otherwise to file the suit/petition against the respondent or interested parties on the subject matter and the entire Petition is incompetent.*
2. *The cause of action as pleaded in the petition arises from the private and contractual rights of parties, being employment contract between the 1<sup>st</sup> interested party and Kenya medical research institute, which is a research institute with perpetual succession and powers to sue and be sued, but which is not privy to these proceedings, and hence the Petitioners have no locus or cause of action to interfere with contractual or private rights of the parties.*
3. *The petitioners have no interest in the subject matter or rights in law to commence proceedings on the subject matter by virtue of Rule 4 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and hence the entire suit/petition is incompetent, bad in law and fatally defective.*
4. *The 1<sup>st</sup> interested party has not assigned his contractual and private rights to the petitioners and any way or at all and hence the proceedings are incompetent and further there are no known legal provisions to sustain the proceedings as pleaded and framed in the petition.*
5. *The petition as pleaded and framed, seeks to interpret and represent the 1<sup>st</sup> interested Party, who is an employee of Kenya medical Research institute, but there is no compliance with the Provisions of Article 22(2) of the constitution hence rendering the entire petition incompetent and bad in law.*
6. *There are no legal provisions within our jurisdiction giving the petitioners or the Courts rights to micro-manage and determine disciplinary and administrative functions/roles of legal entities as pleaded in the petition.*
7. *The petitioners are, with respect, busy bodies on the subject matter and the entire petition, as pleaded, is founded on speculations and hearsay and a waste of precious judicial time.*
8. *There are no allegation of infringement of rights in law by the 1<sup>st</sup> respondent by virtue of Rule 2 of the Constitution of Kenya (Protection of Rights and Freedoms) Practice and procedure Rules, 2013, or cause of action and hence joinder and claim against the 1<sup>st</sup> Respondent is fatally defective, superfluous and incompetent.*
9. *There are no allegations of infringement of rights under the Constitutional or otherwise by the interested Parties especially the subject matter, to warrant their joinder in the proceedings herein. The Interested Parties are unnecessary in these proceedings and the claims against all of them should be struck out and alternatively the petitioners should deposit sufficient security of costs in Court.*
10. *The 2<sup>nd</sup> interested party, Ethic and Anti-Corruption commission, is created by virtue of Article 79 of the Constitution and its independence is protected by statute. There is no evidence save for speculation, before court to show infringement of rights of the petitioner or any party to warrant its joinder in this suit. Hence the 2<sup>nd</sup> interested Party is an unnecessary party on the subject matter.*
11. *The Petition and pleadings, as framed are incompetent and fatally defective as the Petitioners purport to act for parties before this honourable court without compliance with Article 22(2) of the Constitution while they are not advocates of the High Court of Kenya hence lack locus to practice and represent parties before this court.*

2. To these Preliminary objections, the petitioners filed their submissions on 15<sup>th</sup> July 2014. The 1<sup>st</sup> Interested Party also failed their written submissions on the preliminary objections raised herein.

3. Munge advocate for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and the 4<sup>th</sup> and 3<sup>rd</sup> interested parties submitted that the petitioners have not standing to institute the petition as the cause of action arise between KEMRI and the 1<sup>st</sup> interested party Dr Kizito and as a state corporation, KEMRI has not been made a party to the proceedings despite the allegations made against it. Dr Kizito has admitted that he is an employee of KEMRI who may have action against the corporate but this cannot be for the 4 petitioners to claim. KEMRI has their own code of conduct applicable to its staff and there is a human resource policy that governs all its employees with regard to disciplinary matters. Any complaint that arise from an employer/employee relationship must follow the policy document and the court should allow that process to complete before allowing the petitioners to petition as they have. Even where KEMRI does proceed

and complete the process and make a finding against Dr Kizito section 49 of the Employment Act apply which are the only remedies available to him. Where the petitioners felt aggrieved by any action of KEMRI section 18 and 19 of State Corporations Act and the Integrity Act apply or raise a complaint with the 2<sup>nd</sup> interested party. That the rights alleged to have been violated are personal and there are remedies to the aggrieved employee but not to the petitioners.

4. The reliefs sought under Article 22(1) of the Constitution which article has to be read together with Article 22(1) where one is not acting in his own interest. In this case the petitioners are not employees or the employers so as to approach the court as they have as only a Union representative, employers or their association or the affected employee have the *locus standi* before the court. The 1<sup>st</sup> interested party has sworn an affidavit as the aggrieved party and this has removed the petitioners from acting in the public interest.

5. That there is no cause of action against the 3<sup>rd</sup> and 4<sup>th</sup> interested parties as they are employees of KEMRI and only acted as such. There is no law that require corporation's staff to be held liable for actions undertaken for and on behalf of their employer and the two have therefore been wrongly joined in this petition. Equally that the 3<sup>rd</sup> and 4<sup>th</sup> respondents cannot terminate employment of the employee as only the board of KEMRI has this mandate. That the 2<sup>nd</sup> respondent has also been wrongly enjoined and is an unnecessary party as constituted in law; the 2<sup>nd</sup> respondent can only investigate matters within their legal mandate. In this petition there is nothing the 2<sup>nd</sup> respondent has failed to do and only one remedy is sought against them.

6. The suit is not merited as the petitioners have no capacity so sue and there is no law that bar Dr Kizito from filing his own claim.

7. The 1<sup>st</sup> petitioner in response submitted that Article 3(1) of the Constitution create an obligation on the petitioners to respect, uphold and defend the Constitution and Article 22 vests *locus standi* for the enforcement of the bill of Rights to the petitioners. Article 258 gives the petitioner capacity to institute court proceedings to defend the values and principles of the Constitution where it is contravened, threatened with contravention. The Court has jurisdiction to hear matters where employees rights have been violated or threatened with violation especially under Article 162 the Court has supervisory jurisdiction over subordinate courts and bodies exercising quasi-judicial functions. The Industrial Court Act establishes the Court to settle employment and industrial relations disputes to secure and maintain good employment and labour relations.

8. That the cause of action as pleaded does not arise from private and contractual rights of parties but from gross violation of the 1<sup>st</sup> interested party rights, the rights of the petitioners and the rights of other Kenyans which flow from the Constitution. There is therefore a cause of action based on the Constitution against KEMRI which is a public entity subject to the provisions of the Constitutional and where violated the same can be addressed by any citizen as under Article 10 and 232 where KEMRI is required to uphold the rule of law, good governance, integrity, transparency and accountability with regard to respect for human rights and to accord every person the dignity they deserve. To raise these issue the petitioner have relied on Article 258(1) of the Constitution in the public interest.

9. The petitioners also submitted that the objections raised do not meet the principles addressed in **Mukisa Biscuits Co. versus West End Distributors 91969) EA 696** which sets the rules governing such objection to matters of law only. The issues raised require evidence that only the petitioner can bring to the court. That the objections raised should therefore be dismissed to allow the petitioners a chance to be heard on merit.

10. The 1<sup>st</sup> interested party on his part through his advocate submitted that the petitioners have the *locus standi*. The petition is filed by the two petitions against the respondents seeking conservatory orders of stay of proceedings of the ad hoc committee investigating the 1<sup>st</sup> interested party and also restraining orders against the respondent from dismissing the 1<sup>st</sup> interested party from his employment. Article 22

and 258 grant the petitions the capacity to institute the suit as held in the **Petition no. 19 of 2014 Benson Riitho Mureithi (suing on his behalf and on behalf of the general public as Petitioner versus J W Wakhungu, Cabinet Secretary Ministry of Environment, Water and natural resources and the Attorney General (as 1<sup>st</sup> and 2<sup>nd</sup> Respondents).**

11. Several issues stand out for determination in the preliminary objections raised by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents as well as by the 3<sup>rd</sup> and 4<sup>th</sup> interested parties. These can be outlined as;

**Whether the petitioners have the *locus standi* to appear before the Court and if so, whether they have the requisite capacity to lodge the Petition was filed;**

**Whether the Court has jurisdiction to entertain this matter;**

**Whether there is a cause of action in a matter where the core dispute relate to employer and employee relationship on matters contractual;**

**Whether there is misjoinder of parties; and**

**Whether the 1<sup>st</sup> respondent is properly sued.**

12. The question of standing is paramount in this Petition. The respondents disputed the petitioners' standing as persons whose legal capacity to initiate any legal proceedings as such is in question noting that there is no cause of action against the party outside the employer/employee relationship other than the employer or the employer, the Union or the employer organization. The petitioners' response was that under **article 22** of the Constitution and **Rule 4** of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** any person can file proceedings alleging a threat to violation of fundamental rights and freedoms and this right is not limited to a specific group.

13. **Article 22 (1)** of the **Constitution** which is the law in focus on this issue states:

*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.*

14. As far as capacity to institute court proceedings alleging infringement of rights or fundamental freedoms in the Bill of Rights is concerned there is no doubt that under this Article "every person" is entitled to that recourse. While it is true that "every person" has access to court under this provision of the Constitution, the petitioners did not approach the court as "every person". The Affidavit in support of the petition has the annexed affidavit of Okiya Omtatah Okoiti who describes himself as;

*I am an adult male of sound mind and a citizen of Kenya, aware of the matters in issue and hence competent to swear this affidavit on my own behalf and on the behalf of the 1<sup>st</sup> petitioner.*

*I am also the Executive Director of Kenyans for Justice and Development (KEJUDE) Trust, which is a legal entity, founded on republican principles and set up with the purpose of promoting democratic governance, economic development and prosperity.*

15. It is apparent from the petition that the description the petitioners adopted for themselves was not in vain; if indeed they are persons they claim to be, the actions of the respondents would impact them, one way or the other. Logically, if they were not going to be affected they would not have had any reason to bring this petition; in other words, the petitioners' as members of KEJUDE is the cornerstone of their petition. Without stretching this argument any further it suffices to say, as correctly stated in **Anarita Karimi versus Attorney General (1979) KLR 154**, it would not have been difficult for the petitioners to question the actions of the respondent and how such actions affected them as individuals without disclosing their interests. The burden that came along with the petitioners' description was the need to demonstrate that they are indeed acting in the public interest or have an interest justifying their filing the

Petition herein.

15. That said, the petition is premised on some facts that;

*On 5<sup>th</sup> May 2014, During KEJUDE Trust's bi-monthly legal Café, a member raised the issue of the victimization of the 1<sup>st</sup> interested party at his place of work for being a whistle-blower. After reviewing the documentary evidence, KEJUDE members authorized the petitioner to file the Petition herein to protect the rule of law, and the important role conscientious citizen's play in the advancement of good conduct...*

*On 20<sup>th</sup> September, 2013, the 1<sup>st</sup> interested party wrote to the Commission on the Administrative Justice alleging there was abuse of power, unfair treatment, and maladministration at KEMRI. The specifics of the complaints were that;*

*He [1<sup>st</sup> Interested Party and Dr Kizito] was being mistreated by the 2<sup>nd</sup> respondent, the 3<sup>rd</sup> interested party and the 4<sup>th</sup> interested party.*

*He had received 3 adverse letters in less than three months, yet throughout his 20 years he had never received such letter. The adverse letters included one dated 13<sup>th</sup> January 2014, which demoted and transferred the 1<sup>st</sup> interested party from the headquarters to a research Centre*

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16. 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

17. Article 22(3)(a) further provide for Rules providing for the court proceedings referred to under article 22 which would among other things facilitate the standing provided under clause 2. These Rules are now in force and must be read together with the Industrial Court Act and the Industrial Court Procedure Rules 2010 that provide for a clear procedure on standing.

18. I find the petitioners have *locus standi* to institute the motion before court because: they are acting on their own behalf and on behalf of others especially the whistle-blower and through the whistle-blower the petitioners saw a public interest that they could address arising from the respondent's action. Article 22(3) (b), (d) and (4) has provided that formalities relating to commencement of proceedings under Article 22 would be kept to the minimum and that the court to entertain proceedings on the basis of the informal documentation. It further provides that the Chief Justice Practice Rules would ensure that the court is not unreasonably restricted by procedural technicalities and would not limit the right of any person to commence court proceedings under article 22 of the Constitution.

19. However, the Petitioners have blown the cover off the whistle-blower. The link between the petitioner and the 'public interest' as envisaged under Article 22 of the Constitution is premised on the public good that they can act for one who cannot act in their own name or for a class of persons whose fundamental rights under the Bill of Rights is/are violated. there is no rationale now why the whistle-blower named as the 1<sup>st</sup> interested party should not conduct proceedings herein on his own behalf. Even where rights under Article 41 of the Constitution are violated, the Petitioners clearly outline that indeed it is the 1<sup>st</sup> interested party who has been demoted and transferred to a centre and that in the recent past he

has received warning letters that he has never had before in his 20 years of service. These disciplinary proceedings have commenced against the 1<sup>st</sup> interested party following his whistleblowing on various malpractices at KEMRI and that this has resulted in his victimisation. That having thus been outlined by the petitioners, and looking at Article 41 of the Constitution and the fact of the petitioners having filed their Petition and Notice of Motion before this Court as under Article 162 of the Constitution, the mandate of the Court goes beyond ordinary courts as under Article 165 of the Constitution as this is the Court that must look at the Bill of Rights with the objective of ensuring fair labour relations. In that case, the Industrial Court Act, the Employment Act and the Labour Relations Act come into perspective. An employer like KEMRI where the 1<sup>st</sup> interested party is serving as an employee is required under section 8 of the Employment Act to establish internal policy to address workplace disciplinary mechanisms to address workplace misconduct and where an employee is subjected to unfair proceedings, such an employee has recourse before the Court. The duty is on the employee to outline the unfair procedure or the unfair reason/s being alleged as set out under section 43 of the Employment Act and the Court have jurisdiction under section 12 of the Industrial Court Act to order as appropriate where there is good basis that indeed there are unfair labour practices.

20. Even where the petitioners are properly before this court, the jurisdiction of the court to entertain this matter was raised and the Petitioners were also challenged as not having a cause of action to warrant the court hearing the petition. These are to be addressed together. 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. The disputes relating to pending administrative disciplinary actions by employers fall within the jurisdiction of the court as provided for under **section 12 of the Employment Act, 2007**. 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 as may emerge in an administrative disciplinary procedure. 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.

21. 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.

22. However, the court in exercising the jurisdiction to intervene in an administrative disciplinary procedure must proceed with caution so as to protect the employer's right to fairly terminate the employment relationship as held by Wasilwa, J. In **Miguna Miguna versus Permanent Secretary, Office of the Prime Minister and the Attorney General (2011) eKLR** that the employer was entitled to commence disciplinary proceedings against the employee and it was the duty of the employee to justify in the administrative disciplinary process the continuation of his employment. The court further stated that its duty would be to stop a process started with ulterior motive or one based on outright illegality or one which is defective *ab initio*. Equally in the case of **Muthusi and 2 others versus Gathogo and 2 others (1990) KLR 90** the High Court held that it would be futile for the court to involve itself in the day to day running of a union which had its own governing rules. Thus, similarly this court would be reluctant to involve itself in a disciplinary process commenced by the employer unless in an appropriate case it is established that the disciplinary process has been commenced or is continuing unfairly. The intervention in disciplinary process by third parties will be entertained by the court rarely and in clear cases where the process is likely to result into unfair imposition of a punishment against the employee. The court will intervene in an administrative disciplinary procedure if it is established that the procedure relied on by the employer offends fairness or due process by not upholding the rules of natural justice, or, if the procedure is in clear breach of the agreed or legislated or employer's prescribed applicable policy or standards, or, if

the disciplinary procedure were to continue, it would result into manifest injustice in view of the circumstances of the case. The court will normally not intervene if it is established that there exist mechanisms between the employer and the employee such as appeal or revision or review that the employee could invoke internally to remedy the dissatisfaction that would otherwise justify the court's intervention and, the employee has not exhausted such internal mechanisms.

23. To allow the petitioners as herein to proceed with the petition, even at this preliminary stage the court must therefore address its mind as to whether in the present case the petitioners meet the threshold set out above to justify the court's intervention through issuance of orders being sought stopping disciplinary process by the respondents against the 1<sup>st</sup> interested party pending the hearing and determination of this Petition. The Petitioner's case is that the procedure invoked by the respondent is unfair because it involves a disciplinary panel that is biased comprising the 3<sup>rd</sup> and 4<sup>th</sup> interested parties. That matters preceding the disciplinary hearings of the 1<sup>st</sup> interested party are of the nature that he is being victimised for being a whistle-blower in addressing malpractices within KEMRI.

24. The court finds that with the disclosure of the whistle-blower as the 1<sup>st</sup> interested party, the petitioners as applicants herein seeking to stop the disciplinary process in the interim on account of disputed nature of misconduct subject of the proceedings against the 1<sup>st</sup> interested party is a ground that does not meet the threshold set out earlier in this ruling. There are established mechanisms within the 1<sup>st</sup> respondent entity, mechanisms as allowed under fair labour relations looking at Article 41 of the Constitution as read together with section 41(1) of the Employment Act that allow and employer to institute such proceedings subject to adherence to the tenets of natural justice.

25. The other ground advanced by the petitioners for intervention by the court is that the process has been commenced such that it is unfair for want of bias and victimisation of the 1<sup>st</sup> interested party. The court finds that such, and other arguments for exculpation advanced in this petition can be properly advanced and decided in the disciplinary process. The disciplinary panel in which the claimant is allowed representation by his union or the presence of a fellow employee of his own choice if not unionised will be in a good capacity to hear and make a proper determination. The petitioners as applicants for conservatory orders have therefore failed to establish the necessary threshold for the court to order the temporary orders as prayed for. Moreover, where a statute or the Constitution, for that matter, has expressly delegated specific functions, duties or responsibilities to particular organs, like KEMRI that employ persons of the 1<sup>st</sup> interested party qualifications and skill or otherwise, this court will be hesitant to intervene and curtail these organs' efforts to execute their statutory or constitutional mandates; it is the duty of this court to interpret the constitution in a purposive rather than a restrictive manner.

26. Based on the above findings to go into the issue of joinder or non-joinder of parties will be mute. Having found there was good basis for the petitioners to file this petition before this court save that they fail to establish the required threshold to obtain the orders sought to vent out the other issues to proceed further will be a misnomer. This is why there Industrial Court exists as a distinct Court for employment and labour relations to ensure that employers and employees regulate their relations with application of internal procedures that allow formulation human resource management and policies so as to address workplace practices. Upon exhaustion of these internal mechanisms, an aggrieved party has the right to move the court as appropriate. Where these internal procedures are undertaken in disregard to due process, an aggrieved party can move the court for appropriate orders.

27. I however hasten to add and draw the respondent's attention to the provisions of section 46(h) of the Employment Act, 2007 that an employee's initiation or proposed initiation of a responsible and founded complaint or other legal proceedings against his employer shall not constitute a fair reason for dismissal or for imposition of a penalty or adverse decision. During the pendency of this petition, the 1<sup>st</sup> interested party has remained an employee of the KEMRI and should remain as such unless there is a valid and fair reason to have him terminated or dismissed. The court finds that in view of the complex legal issues raised in this cause, the complaint leading to this cause was responsible and with good foundation.

**Accordingly, the court makes the following orders:**

**1. The 1<sup>st</sup> Interested Party shall remain in the employment and duty of the respondent until the conclusion of the disciplinary process occasioning the commencement of this Petition unless otherwise lawfully disciplined on account of substantially different and proven misconduct.**

**2. The Notice of Motion and Petition herein stands frustrated as a result and will be dismissed.**

**3. Parties will bear their own costs.**

Read in open Court at Nairobi this 30<sup>th</sup> Day of July 2014.

**M. Mbaru**

**JUDGE**

In the presence of:

Court Assistant: .....

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