



IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

PETITION NO. 42 OF 2014

OKIYA OMTATAH OKOITI 1ST PETITIONER

NYAKINA WYCLIFF GISEMBE 2ND PETITIONER

VERSUS

ANN WAIGURU

THE CABINET SECRETARY, DEVOLUTION

& HEAD OF PUBLIC SERVICE 1ST RESPONDENT

JOSEPH KINYUA, THE STATE HOUSE CHIEF

OF STAFF AND HEAD OF PUBLIC SERVICE 2ND RESPONDENT

PETER O. MANGITI

THE PRINCIPAL SECRETARY,

DEVOLUTION & PLANNING 3RD RESPONDENT

MARGARET KOBIA

CHAIRPERSON,

THE PUBLIC SERVICE COMMISSION 4TH RESPONDENT

Mr. Nyakina Wycliff Gisembe in person

Mr. Ngatia for the 1st Respondent

Mr. Mutinda for the 2nd, 3rd and 4th Respondents

RULING

1. The Petition dated 19th June 2014 was filed on 23rd June 2014 alleging in the main;
 - i. Violation of General Provisions relating to the Bill of Rights in **Articles 12(1), 19, 20, 24 and 25**;
 - ii. Violation of Rights and fundamental Freedoms in **Articles 26, 27, 28, 29, 40, 41, 43, 46, 47 and 50**;
 - iii. Violation of Constitutional Values and Principles in **Articles 1, 2, 3, 10, 73, 74** (As read with the **Third Schedule, 75, 20, 232, 233, 234, 236, 249, 252, 253, and 259** of the **Constitution**).
 - iv. The Constitutional Validity of the policy on the decentralization of the Human Resource management in the Civil Service to wrest control over Civil servants from Principal secretaries and to vest it in Cabinet secretaries.
 - v. Violation by Cabinet Secretary Anne Waiguru of The National Government Coordination Act, 2013, The Public Service Commission Act, 2012. The Public Officer Ethics Act 2003, The Leadership and Integrity Act 2012, The National Youth service Act, The State Corporation Act and The Youth Enterprise Development Order 2007;
 - vi. The Alleged Violation by Cabinet Secretary Anne Waiguru of the Schemes of Service in the Public Service, and the Constitutional Validity of the Removals from and appointments into offices in the Public Service made by the Cabinet Secretary.
 - vii. Constitutional Validity of the State House Chief of Staff and Head of Public Service Joseph Kinyua usurping the functions of the Public service Commission; and
 - viii. Alleged Devolution of duty by Margaret Kobia and her incompetence as the Chairperson of the Public Service Commission and the Alleged Devolution of Duty by Peter O. Mangiti and his incompetence as the Principal Secretary State Department of Planning.
2. The Petitioners are Mr. Okiya Omtatah Okoti and Nyakina Wycliff Gisebe who describe themselves as citizens of Kenya, Human rights defenders and members of Kenyans for Justice and Development Trust, a legal Trust incorporated in Kenya.
3. The Respondents are the Cabinet Secretary, Anne Waiguru; The State House Chief of Staff and Head of Public Service Mr. Joseph Kinyua. The Principal Secretary, Devolution and Planning Mr. Petero O. Mangiti and M/S Margaret Kobia, chairperson, The Public service Commission.

A raft of orders a – v are sought in the Petition.
4. Simultaneously with the Petition was filed an application on Certificate of Urgency dated 19th June 2014 and filed on 23rd June 2014 seeking *inter alia*, an order;
5. “2 That the Honourable Court be pleased to certify that the Petition herein raises a substantial question of law and forthwith refer the case to His Lordship the Chief Justice for appointment of a bench of three or five Judges pursuant to **Article 165(4)** of the **Constitution of Kenya 2010**.”
6. “12 That pending hearing inter-partes and determination of the Notice of Motion application herein the Honourable Court be pleased to issue and issues stay orders temporarily suspending the implementation Roadmap set to begin on 30th June 2014, as laid out on pages 6 of the document dated May, 2014, Policy on Decentralization of Human Resource in the Civil service.”
7. I have singled out these orders for the reason that, when the matter came before Hon. Lady Justice

Maureen Onyango on 23rd June 2014, the judge, granted interim orders in terms of prayer 12 pending interpartes hearing of this Application and prayer 2 which necessarily needs to be determined at this stage.

The Application is supported by an Affidavit by the 1st Petitioner Okiya Omtata Okoti dated 19th June 2014. The deponent, has also sworn another Affidavit in support of the Petition.

8. All the persons alleged in the Petition as having been aggrieved by various decisions by the Respondents have not filed any supporting or verifying Affidavits on the matters alleged to have happened to them and / or giving authority to the Petitioners to come to Court on their behalf.

9. The 1st Respondent filed a replying Affidavit in response to the Petition and Affidavits filed by the 1st Petitioner on 23rd July 2014.

The 1st Respondent also filed supplementary Affidavit on 30th July 2014.

10. At this stage, the issues for determination simply put are as follows;

Whether the Court should refer the matter to The Hon. the Chief Justice for constitution of a bench of uneven number of Judges upon certification that the matter raises substantial issues of law for determination pursuant to **Article 165(4)** of the **Constitution**; and

Whether the interim orders issued by the Court should be confirmed pending the hearing and determination of the matter.

11. 1st issue

In the matter of **J. Harrison Kinyanjui Vs. The Hon. Attorney General and Judicial Service Commission and 19 others. H.C.C. at Nairobi, Petition No. 74 of 2011**, Hon. D.S. Majanja considered the decision of the **Indian Supreme Court in Chuilal V. Mehla V. Century Spinning and Manufacturing Co. Air 1962 SC 1314** which laid down the following test for determining whether a question of law raised in the case is a substantial question of law or not. It stated

12. *“The proper test for determining whether a question of law raised in the case is substantial would be whether it is of general public importance or whether it directly or substantially affects the rights of the parties and if so, whether it is either an open question in the sense that it is not finally settled by the Supreme Court or by the privy Council or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the Highest Court or the general Principles to be applied in determining the questions are well settled and there is more question of applying these principles or the plea raised is palpably absurd, then the question would not be a substantial question of Law.”*

13. In rejecting this dicta, Hon. D. S. Majanja J. stated;

*“if I were to accept the above dicta, then it would follow, that every question concerning our constitution would be substantial question of Law. Each case that deals with the interpretation of the Constitution or our expanded Bill of Rights would be a substantial question of law as it is a matter of public interest, affects the rights of the parties, is fairly novel and has not been the subject of pronouncement by the highest Court. This would burden judicial resources to the extent that the value of obtaining justice without delay under **Article 159(2)(b)** would be imperiled.”*

14. It must not be lost on the litigants that jurisdiction conferred on the High Court under **Article 165(3)** and to the Courts with the status of the High Court under **Article 162(2)(a) & (b)** which includes jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened or interpretation of the Constitution as a whole is conferred on a single Judge of the respective Courts.

15. Accordingly, the Constitution of a bench of uneven number of Judges assigned by the Chief Justice is an exception not the rule. In this regard, as was stated by Majanja J.;

“there must be something more to the ‘substantial question’ than merely novelty or complexity of the issue before the Court. It may also present unique facts not plainly covered by the controlling precedents. It may also involve important questions concerning the scope and meaning of the decisions of higher Courts or the application of well-settled principles to the facts of a case.”

16. The Court notes further that the applicant has the duty to discharge the burden placed on him / her under **Article 165(4)** to show that the cause of action raises substantial questions of law.

17. I have looked at the matters raised in the body of the Petition and in the supporting Affidavit and have come to the following conclusion:

The Petitioners primarily complain about;

(a) removal and replacement from office of persons employed by the Public Service Commission;

(b) appointment of the State House Chief of Staff and the Head of Public service by the President without vetting by Parliament and his alleged supervision of public officers;

(c) violation of scheme of service by alleged ‘rogue’ administrative decisions of the 1st and 2nd Respondents.

(d) promulgation of ‘rogue’ policy on the decentralization of human resource management in the Civil service and by so doing wresting control of the public human resources in state departments from principle secretaries and vest them in cabinet secretaries contrary to the provisions of the Constitution.

18. These allegations of fact have been contested by the 1st Respondent and are therefore the subject of trial at the hearing of the Petition.

The court notes that matters of appointments, transfers and removals are routine at the Industrial Court of Kenya.

19. The principles involved in the determination of these employment matters are well articulated in the statutes of Kenya and the provisions of the Constitution of Kenya 2010.

The matters raised in this Petition cannot be said to be novel nor are they extremely complex as to amount to ‘*substantial questions*’ of law.

20. Furthermore, a determination by one Judge of a superior Court has same judicial value as that by a bench of uneven number of Judges.

Even though, it is generally accepted that two heads are better than one, this must be weighed against the need to utilize the very lean judicial resources in the best interest of the majority of Court users and the Public at large.

21. The Court therefore declines the invitation to refer this matter to The Hon. the Chief Justice in terms of **Article 165(4)** of the **Constitution**.

The matter will be heard and determined by a single Judge of the Industrial Court.

22. 2nd Issue

The granting of an interdict as the one sought under prayer 12 of the Notice of Motion to suspend the Implementation Road Map set to begin on 30th June 2014 namely “policy on Decentralization of Human Resource in the Civil Service” which is an interlocutory order is an exercise of judicial discretion which must be exercised judiciously.

See **Sargent v. Patel (1949) 16 E.A.C.A. 63.**

23. The purpose of a temporary injunction is to preserve the *status quo* and as was stated in **Mary Ariviza & Okoth Mondol V.AG** of Kenya and **Anor E.A.L.S. Law Digest 2005 – 2011 3.** “*The conditions for the grant of an interlocutory injunction are well settled in East Africa:-*

- a. *An Applicant must show a prima facie case with a probability of success.*
- b. *An Interlocutory Injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages.*
- c. *If the Court is in doubt, it will decide an application on the balance of convenience.”*

24. The Applicants allege that the administrative decisions by the 1st Respondent constitute an abuse of power and are tainted with unreasonableness and procedural impropriety. The Court notes that the alleged Grievants, **Mr. Semelang’o** and **Mr. Japter Kiplimo Rugut** who were allegedly removed from their position and replaced with **Mr. Bruce Odhiambo** and **Dr. Nelso Githinji** respectively have not placed any verifying Affidavit on record and there is no documentation on record to signify their discontent with the impugned changes.

25. To this extent, the Applicants have not made out a *prima facie* case warranting any interim intervention with respect to the two removed officers.

Those who have replaced them have not been enjoined in this matter so as to assert their rights in the dispute.

26. With regard to the impugned policy document titled “*implementation of the policy on Decentralization of Human Resource in Civil Service*” dated 3rd June 2014, there is no evidence placed on record by the Applicants to show any discontent from any stakeholder with the proposed policy document.

27. At this stage the Court is interested in facts that establish on a *prima facie* basis the need to injunct the implementation of the intended policy.

The 1st Respondent, Cabinet Secretary Anne Waiguru has extensively dealt in the replying Affidavit and the supplementary Affidavit referred to earlier with the alleged infractions of the law.

28. The Court having considered the competing arguments has come to *the* conclusion that the Applicants have failed to show a *prima facie* case with a probability of success.

29. The Applicants have also not shown that failure to grant the interim relief sought would occasion the Applicants irreparable injury, which would not adequately be compensated by an award of damages.

30. The persons allegedly removed from office irregularly, would no doubt be entitled to private reliefs if they chose to approach the Court, which they have not done.

31. Government policy development and implementation is a continuous process and no policy is cast in stone. If the Petitioners succeed upon the hearing and determination of the Petition, the impugned policy would be declared null and void as per the prayers in the Petition.

After all, there is no evident outrage expressed by the Kenyan Public regarding the policy.

The Applicants equally fail in this regard.

32. The Application is accordingly dismissed with costs and the Petition will take its normal course.

Dated and Delivered at Nairobi this 15th day of October, 2014.

MATHEWS N. NDUMA

PRINCIPAL JUDGE