



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT KISUMU
CAUSE NO. 271 OF 2014

(Before Hon. Justice Hellen S. Wasilwa on 5th November, 2014)

HON. SAMUEL ANGASA ONUKOCLAIMANT

-VERSUS-

1. THE SPEAKER COUNTY ASSEMBLY KISII COUNTY
2. THE CLERK, KISII COUNTY ASSEMBLY
3. THE COUNTY ASSEMBLY SERVICE BOARD KISII COUNTY
4. KISII COUNTY GOVERNMENT
5. DANIEL MBAKA OMWOYO RESPONDENTS

RULING

The respondents herein have raised a preliminary objection dated 15.10.2014 raising the following points of law.

1. That the suit as filed in court offends the mandatory provisions of Section 6 of the Civil Procedure Act. Cap 21 Laws of Kenya since there is a similar suit pending, being Kisumu Industrial Court Petition No. 243 of 2014 filed earlier than this suit.
2. That the issues raised in this suit were debated and determined by the Kisii County Assembly in its plenary through the impeachment proceedings against the 1st respondent on 17th September, 2014 and therefore contrary to the provisions of the Constitution of Kenya, 2010 in terms of double jeopardy.
3. That the petitioner in this suit lacks *locus standi* to commence the instant proceedings before this court contrary to the provisions of Section 12 of the Industrial Court Act.
4. That the proceedings as commenced by the petitioner are irregular, null and void and an abuse of the due process of court owing to the fact that no leave of court was sought to commence Judicial Review proceedings in the nature of certiorari contrary to the provisions of order 53 of the Civil Procedure Rules, 2010.
5. That based on the above points of law, this honorable court be pleased to strike out the entire proceedings with costs to the respondent.

The petitioner opposed the preliminary objection. The petitioner submitted that what is being canvassed as a preliminary objection is in itself a misconception and a misinterpretation of the law. It is the petitioner's submission that the issues being raised are factual and that these issues were raised in **Mukisa Biscuits VS Westend Distributors Ltd (1969) E.A 696 at pg 701 – para 2.**

On issue of *subjudice*, it is the petitioner's submission that this is defined by **S. 6 of CPA** and it only falls into play where issues in dispute are the same as those in a previous suit and between same petitioner. It is the petitioner's submission that Petition No. 243 of 2014 pg 14 to 21 was referred to by the respondents

but that this petition is different from the current petition. The petitioner also aver that the petitioner in 243/2014 is not an Member of County Assembly as in this current petition and therefore represents different constituents. That the petitioner in 243/2014 is a private person acting in his private capacity and does not therefore represent a group or a cluster of persons. Further the petitioner argues that Petition No. 243/2014 does not represent the interest of current petitioner and therefore the rule of subjudice cannot affect the current petition. The petitioner further contends that prayers to Petition No. 243/2014 are so separate and distinct from those in the instant petition.

On issue of impeachment proceedings the petitioner has submitted that impeachment proceedings are not proceedings before a court of law and cannot be equated to this court's proceeding and the senate cannot have jurisdiction of this court. The petitioner also submits that the end result of the impeachment proceedings are different from those of a petitioner and did not relate to employment.

On *locus standi*, the petitioner referred court to Article 22(1) and 258 of the Constitution which they submitted confer capacity on every person without qualification or discrimination where the Constitution is contravened or threatened with contraventions. It is their submission that Article 10 of the Constitution stands to be contravened herein hence the petition. They also submitted that S. 12 of Industrial Court Act does not limit the mandate of this court to an employee – employer relationship dispute but that S. 12 touches on other issues of labour and employment. It is therefore the petitioner's submission that this is the right court to ventilate his case. The petitioner cited **Benson Riitho Mureithi VS Water & Natural Resources** which addresses issue of *locus*. They also cited Petition No. 4 of 2013 **Northern Nomadic Disabled Persons Organization VS County Government of Garissa & Another** addressing the same issue of *locus* and Article 22 and 258 of the Constitution.

On issue of leave to file Judicial Review proceedings, the petitioner avers that this is not a matter of Judicial Review *per se* and that the petition has not been brought under O.53 of Civil Procedure Rules. They aver that the petition is brought under Article 23(3) of the Constitution. They also submit that this provision of leave cannot fetter the judicial mandate. The petitioner asked court to dismiss the preliminary objection.

The respondents reiterated that the preliminary objection has merit and want the case determined at this point.

Upon considering the submissions of the parties, the issues for determination are whether the preliminary objection is merited as per the issues raised.

On the 1st issue is whether this petition is subjudice? The respondents submitted that there is Petition No. 244/2014 filed in court which is similar to the current petition. The pleadings in Petition No. 243/2014 were annexed to the reply to this petition. Petition No. 243/2014 was filed by James M. Omwambia against the County Assembly Service Board, Kisii County Assembly and the County Assembly of Kisii. The petitioner brought the petition and in his affidavit deponed that he brought the petition under Article 22 of Constitution on his own behalf and other persons with disability who are the subject of Kisii County and who have been prejudiced by the unconstitutional conduct of the respondents.

He sought orders to compel the respondents to adhere to principles of affirmative action and have some posts reserved to persons with disability.

In the current petition, the petitioner in his affidavit states that he is a duly elected member of the County Assembly and representing Boochi Borabu Ward and also a resident of Kisii County. In para 4 of the supporting affidavit, he states why he brings this petition and it is by virtue of his position as a Member of County Assembly and the need to perform oversight responsibilities of the County Assembly. He does not come in his own individual capacity but as a Member of County Assembly. The prayers sought are different from those sought in Petition No. 243/2014. His contention is basically that Article 10 of the Constitution is being flouted.

As submitted by the petitioner, S. 6 of Civil Procedure Act states that:-

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially an issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

If indeed the issues in Petition No. 243/2014 were similar and between the same parties, this matter would be subjudice but I do not find this petition being subjudice in relation to Petition No. 243/2014 as submitted.

On 2nd issue on double jeopardy, the respondents submitted that the matter raised in this suit were debated in Kisii County Assembly and determined through impeachment proceedings and so should not be revisited. The impeachment proceedings were attached to the reply to the petition as proof of the same having been held.

Article 159(1) of the Constitution deals with judicial authority and states that this shall be exercised by courts and tribunals established by or under this Constitution. Courts therefore exercise judicial authority.

Article 196 of the Constitution details how the County Assembly shall conduct its affairs. Under Article 195 of the Constitution, the County Assembly has powers as the High Court to enforce attendance of witnesses and compel production of documents etc, but they do not exercise this power as judicial authority. The principle of separation of power is clear and the County Assembly cannot be the High Court and *vice versa*. The submission that the court should not handle this matter as the County Assembly did so is fallacious and I reject that submission. It cannot be termed as double jeopardy if the court delves into this petition.

On 3rd issue on *locus*, Article 22(1) of the Constitution states that:-

“Every person has a right to institute court proceedings claiming that a right on fundamental freedom in the Bill of Rights has been denied, violated or is threatened”

Article 258 of the Constitution is also couched in similar terms and states that:-

“(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.”

In the current petition, the petitioner seeks to act in his own interest and as a Member of County Assembly representing his constituents. It is therefore the finding of this court that he has an interest in this case personally and as a Member of County Assembly and has *locus* as provided in the Constitution.

On the last issue, is whether leave of court must be obtained before the petitioner files his petition. The petition is brought under various provisions of law including Articles 22(1) and 165 of the Constitution of Kenya 2010. Article 22(1) provides that every person has a right to institute proceedings claiming that right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened. Article 165 deals with the establishment and jurisdiction of the High Court.

Pursuant to the powers conferred by Article 22(3), 23 and 165 of the Constitution, the Hon. The Chief Justice vide **Legal Notice No. 117 of 28th June 2013**, gazetted the rules to guide the court in deciding matters for the protection of Rights and Fundamental Freedoms. Under the said rules, there is no express provision that leave of the court must be sought by any party before instituting a Constitutional petition. The respondents submitted that it is mandatory for leave of court to be sought as provided for under Order 53 of the Civil Procedure Rules before such a petition is instituted.

Order 53 of Civil Procedure Rules deals with Judicial Review matters and provides that leave of court must be sought before Judicial Review matters are instituted. Judicial Review is defined by Blacks Law Dictionary, Ninth Edition at pg 924 as:-

“A courts power to review the actions of other branches or levels of government especially the courts power to invalidate legislature and executive actions as being unconstitutional.”

A Constitutional petition on the other hand deals with the interpretation of the Constitution with resultant orders being varied and may or may not include a review of the orders.

In this petition therefore, this court is dealing with wider Constitutional interpretation and will not necessarily be bound by Order 53. The issue of leave to file such a petition is also not covered by the Constitution of Kenya (Protection of Rights and Fundamental Freedom) Practice and Procedure Rules, 2013.

This court in determining any Constitutional matter is bound to ensure that:-

“Justice shall be administered without undue regard to procedural technicalities” as provided for under Article 159(d) of the Constitution.

It is therefore this court's position that the preliminary objection as raised on all the 4 issues lack merit. I find the preliminary objection unsustainable and I dismiss it accordingly. This petition will now proceed on merit.

HELLEN S. WASILWA

JUDGE

5/11/2014

Appearances:-

Oguttu for petitioner present

G. M. Nyambati for 1st, 2nd, 3rd and 5th respondents present

Onsembe for 4th respondent present

CC. Wamache