



REPUBLIC OF KENYA

EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

PETITION NO.1 OF 2015

(BEFORE D. K. N. MARETE)

KENYA COUNCIL OF EMPLOYMENT

MIGRATION AGENCIES.....PETITIONER

VERSUS

NYAMIRA COUNTY GOVERNMENT.....1ST RESPONDENT

NYAMIRA COUNTY PUBLIC SERVICE BOARD.....2ND RESPONDENT

H.E. JOHN OBIERO NYAGARAMA.....3RD RESPONDENT

ROBERT MOCHECHE.....4TH RESPONDENT

PETER NYAKUNDI.....5TH RESPONDENT

ERICK AORI ONCHANA.....6TH RESPONDENT

JOASH NYAMOKO.....7TH RESPONDENT

THE CLERK OF THE

COUNTY ASSEMBLY OF NYAMIRA.....8TH RESPONDENT

NOMI IKONGE NYAGARAMA.....9TH RESPONDENT

THE HON. ATTORNEY GENERAL.....10TH RESPONDENT

PUBLIC SERVICE COMMISSION OF KENYA.....INTERESTED PARTY

R U L I N G

This petition is brought to court under a certificate of urgency dated 7th April, 2015 and filed on 14th instant.

The Petition is unclear on intent and brings with it the following documents, presumably in support of the same;

1. *Supporting Affidavit of Certificate of Urgency sworn on 7th April, 2015.*
2. *Ex-parte chamber summons dated 7th April, 2015.*
3. *Supporting Affidavit sworn on 7th April, 2015.*

One would perhaps discern the intent of the petition from the above pleadings.

In a nutshell, the petition intends to question the constitutionality and legal basis of a recruitment expressed through an advertisement in the Standard Newspapers on 7th July, 2014 which the Petitioner avers were skewed in favour of certain candidates and hence the fallibility of the same.

When the matter came up for hearing on 15th April, 2015 this court made the following orders, thus setting the matter to its current position;

- i. *That the Petition be and is hereby declared urgent and be heard ex-parte in the first instance.*
- ii. *That the application for hearing during the court's Easter vacation is spent.*
- iii. *That the petitioners be served with the entire petition and orders of this court forthwith but not later than the close of the day on 17th April, 2015.*
- iv. *That the Respondents be and are hereby awarded fourteen days leave to make, file and serve their responses to this Petition.*
- v. *Hearing on 6th May, 2015 at 900 hours.*

When the matter ultimately came for hearing on 4th June, 2015 counsels for the 7th and 8th Respondents and also the 1st and 3rd Respondents sought to, on a priority basis, pursue their preliminary objections to the petition which are framed and filed as follows;

1. *That this petition has been instituted before this honourable Court in clear disregard of Article 162 (2) (a) of the Constitution of Kenya and Section 12 (1) of the Industrial Court Act (Cap 234 of the Laws of Kenya), which provisions bestow jurisdiction upon this honourable court.*
2. *That in due regard to the foregoing, this petition is premature and defective as this Honourable Court is not seized of the jurisdiction to hear and determine this suit in view of ground (a) above.*
3. *That no employer-employee relationship exists as between the Petitioner and any of the Respondents and further no employment and/or labour relation dispute has been raised in the said petition.*
4. *That the entire petition is thus misconceived, incompetent, bad in law, incurably defective, thus an abuse of the court process and the same should be struck off forthwith with costs.*

The 1st and 3rd Respondents have in their Reply to Petition dated 2nd June, 2015 filed preliminary objections as follows;

7. *The 1st and 3rd Respondents aver that the petitioner has no locus stand to agitate petition as*

presented and the 1st and 3rd respondents shall raise a preliminary objection to that effect.

14. That in reply to the Petition, the 1st and 3rd Respondents aver that the Petitioner misapprehends Article 22(10) and (2) of the Constitution. Whereas an individual can sue to vindicate a constitutional right, either personally or on behalf of other persons or group of persons, the right of an individual to sue in violation of a right under Article 22 (2) has specific constitutional limitations and the Petitioner does not satisfy the special limitation and/or conditions enumerated in Article 22 (2) of the Constitution.

15. The 1st and 3rd Respondents in further reply aver that the Petitioner lacks the constitutional locus standi and fails to meet the constitutional threshold to institute a suit on behalf of the parties he purports to be acting on their behalf.

16. In reply to Petition whereas Article 22 (2) provides that a person acting as a member of, or in the interest of a group or class of persons or in the public interest can sue in violation of constitutional human rights, the Petitioner does not show or satisfy that constitutional requirement of another person who labours under certain limitations or why the person whose right is in play cannot sue in the instant case. The Petitioner also does not plead neither does he sufficiently specify or name the parties or the section or segment of the public on whose behalf he purports to bring the cause of action. And most importantly, the Petitioner does not plead the rights of these persons that are allegedly breached or threatened to be breached by the 1st and 3rd Respondents, and even more so the Petitioner fails to plead specifically the factual set of matrix that cause him to be aggrieved against the 1st and 3rd Respondents.

21. The 1st and 3rd Respondents in reply to the issues raised in the Petition aver as follows.

- a. The Petitioner lacks the locus standi to bring the suit herein as framed.*
- b. He pleads grievances that are his sole creation and purports to act for entities that are uncertain, undefined and even unknown.*
- c. The Petition herein is an abuse of the court process. The court process is being used for extraneous, mala fide and illegitimate purpose.*
- d. The conditions set out under Articles 22 and 258 of the Constitution have not been satisfied or met by the Petitioner and on the premise he can only sue on his own behalf.*
- e. The Petitioner does not with any degree of clarity and specificity particularize how or in what capacity he is suing. He fails to build a bridge or a nexus between himself and any or other people he allegedly litigates on their behalf.*
- f. The functions and responsibilities of a County Governor under the County Governments Act No.17 of 2012 are statutorily defined. Suing on behalf of a stranger and nebulous entities is not a function of a County Governor.*

At the hearing, Mr. Walukhwe, counsel for the 7th and 8th respondents submitted that it is the objectors submission that jurisdiction in the circumstances is a derivation of Article 162 (2) (a) of the constitution as read with Section 12 of the Industrial Court Act. That the petitioner is not an employee or an employer organisation and further that there is no employer/employee relationship between the petitioner and the respondents therefore disabling the petitioner from bringing this matter to court. He further argued and submitted that the petitioner avers that he brings out this petition on behalf of the public interest of persons with disabilities, disadvantages, insufficient and sufficient persons and bankrupt and insolvent minorities, unrepresented, uninformed, illiterate and poor Kenyans whose fundamental rights have been contravened.

The respondents herein submit that this is a specialised court with a totally different jurisdiction from the High Court where this suit should have been filed. They seek to rely on the authority of **Kalema**

Kengaha & 2 Others v. Republic, Malindi Criminal Appeal No. 44, 45 and 76 of 2014, where the issue of jurisdiction of the high court and the specialized courts that are constitutionally of the status of the high court is ably restated.

Further, paragraph 4 (d) and (e) of the Supporting Affidavit and also paragraph 6,8,11 and 13 of this affidavit are an indication that the issues intended for determination are not within the province of this courts determination. Again, the orders sought, certiorari and declarations are totally misconceived and bad in law and not awardable.

Mr. Nyanchiro, counsel for the 1st and 3rd respondents in his submissions opined that judicial review reliefs are brought to court in a special manner. It is required that a party seeking these reliefs, certiorari, mandamus and prohibition foremost seeks leave before applying for the same. He further submitted that these are only allowed within a six (6) month time frame. The acts complained of in the instant case occurred on 7th July, 2014 and are therefore time barred.

Counsel further argued and submitted that the petitioner is registered under the Societies Act, Chapter 108, Laws of Kenya and therefore a suit under this Act must be brought out in the name of the trustee (s) and not the firm. The power of Attorney by Millicent Kerubo Obae and Morgan Mainye Omwenga to Evans Nyambega Akuma is specifically to bring out suit on behalf of the donors. Mr. Akuma is therefore not properly before court as he is not an official or owner of the firm.

The constitution of the organisation again does not empower it to institute suits on its behalf and the petitioner does not have the *locus standi* in this matter. The power of attorney as drawn and executed is null and void *ab initio*.

The 1st and 3rd Respondents further submit that Article 22 of the constitution provides that an action in public interest must declare the names of persons affected by the breach of fundamental right. In as much as the constitution has opened room for public interest litigation, this court must be warned of a possible abuse of the same. The petition is a citation of the constitution but a nexus of this to the petition is not demonstrated and therefore the urge that it be struck out. Further, there is no cause of action arising inter-parties to warrant action in this manner and the respondents pray that it be struck out with costs.

The petitioner in opposition to the preliminary objections submitted that he relied on his record. He further submitted that in this kind of suits, the Attorney General is supposed to lead the process and this was provided for vide the orders of court dated 7th May, 2015. Now that the state was silent on the matter, he prayed that the objections be dismissed.

The 1st and 3rd respondents vehemently opposed the petitioner's submissions in response thereof and deemed the same as of no effect. They were of the opinion and submitted that the petitioner had not in any manner responded to the preliminary objections as filed and presented.

Two issues came out for determination by this court;

1. *Does this court have jurisdiction to entertain this petition as presented"*
2. *Is the petition as filed rightly before this court"*

It is this courts observation that as early as the certificate of urgency which is a prelude to this petition, the petitioner enjoins herself to the subject matter of employment and recruitment of officers to the

office(s) of the 1st Respondent at paragraph 6 of the Certificate of Urgency as follows;

6. That the actual allegations precisely are that the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th and the interested party with the leave of this court to enjoin them as such in between the year 2014 and 2015, the respondents knowingly, willfully, with proxy, or by emissary, ethnic or clan whipping, canvassed directly or indirectly by either way of briberies, corruption, political intimidations, illegally, unconstitutionally or by pressure groups or by other associations or in any other way to achieve the illegal positions without shortlisting, interviews, and subsequent appointments, offending Article 10,27,35,41,73,74 and 232 of the constitution of Kenya, on the following positions yet they were advertised calling for public applications which was never honoured. This positions precisely are as hereunder;

(a) COUNTY SECRETARY AND HEAD OF COUNTY PUBLIC SERVICE, (1) POSTION

(b) SENIOR ASSISTANT DIRECTOR LIASON, DIASPORA OFFICER, (1) POSITION

(c) ASSISTANT DIRECTORS ADMINISTRATION, (3) POSITIONS

(d) COUNTY DIRECTOR AND ADMINISTRATION

(e) RECRUITMENT OF ENFORCEMENT OFFICES AND SUPPORT STAFF

(f) SENIOR SUPPORT STAFF JOB GROUPS D,E,F,(12) POSITIONS

(g) CLEANING SUPERVISIONS STAFFS JOB GROUPS D,E,F, (5) POSITIONS

(h) SUPPORT STAFF JOB GROUPS A,B,C (12) POSITIONS

(I) ENFORCEMENT OFFICERS JOB GROUPS E,F,G (65) POSITIONS

This is echoed throughout the body and frame of the petition.

Article 162 (2) (a) of the Constitution of Kenya, 2010 creates this court as opposed to the High Court as follows;

(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.*

Article 165 (5) (b) of the same constitution ousts jurisdiction of the High Court on matters within the province of this court.

The court, which is constitutionally equivalent in status to the High Court has exclusive jurisdiction to deal with matters on employment and labour relations and other matters antecedent thereto. I therefore do not agree on the 1st and 3rd respondent's submission that this court lacks jurisdiction to in any manner entertain the issues in this petition. Prerogative writs touching on and in pursuance of matters constitutionally bestowed upon this court for hearing and determination can rightly be brought before this court. This to me, is the position in the instant case.

The other limb of preliminary objection brought in by Mr. Nyanchiro for the 1st and 3rd respondents is that the petitioner lacks jurisdiction to bring the matter to court as this ought to have been filed under the name of trustee (s) of the firm. It is counsel's submission that the constitution of the petitioner provides that suits by the firm shall be brought to court by her trustee (s). The petitioner he submits does not have power or authority or even *locus standi* to institute proceedings in this manner and any power of attorney as presented to the petitioner is therefore effectless, null and void.

Again, the power of attorney was intended to empower the donee to file suits on behalf of the donors which is not the case here. In essence, the objector posits and submits that Mr. Akuma has no authority to file suit as done.

The 1st and 3rd respondents further raise an objection based on the misapplication of Article 22 of the Constitution of Kenya and the rules made thereof in that the names of persons sought to be represented in this petition are not named or declared and further that their violated rights are neither disclosed nor pleaded. The petitioner is further accused of failure to plead specifically to the facts that cause her aggression by the 1st and 3rd respondents.

The ingredients of a preliminary objection are well established in the celebrated authority of **Mukhisa Biscuit Manufacturing Co. Ltd Vs. West End Distributors Company Limited, (1969) E.A. 696** as follows;

“So far as I am aware, 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. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

Further,

“A preliminary objection 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 the 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 the judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.”

The 1st and 3rd Respondents submission on lack of jurisdiction on grounds of filing suit in the name of the petitioner instead of her trustee (s) falls short of the threshold of the authority of **Mukhisa Biscuits** aforecited.

“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.”

Again,

“It 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 has to be ascertained or if what is sought is the exercise of the judicial discretion.”

It is my finding that the issues of law raised by counsel do not come out clearly to support a preliminary objection. Further, these would require further investigation of facts and therefore do not stand out as

adoptable points of preliminary objection.

I have dutifully followed the issues raised by the objectors in support of their preliminary objections and do not find any feasible ground in support of the objections. This matter delves onto issues expressed under Article 162 (2) (a) of the constitution and therefore passes the test on the issue of jurisdiction.

The argument and submission on limitation of time on the subject of prerogative orders does not touch ground in that this is a petition as opposed to a judicial review application. The alleged six (6) months limitation period for application for certiorari, mandamus and prohibition together with an application for leave in such circumstances would not arise. This would also require scrutiny at trial level.

A close look at the authority of **Mukhisa Biscuits** above establishes the essence of a preliminary objection. It is a point of law apparent out of the pleadings and must meet certain criteria to pass as such. It would, if appropriate and well presented come in to dispose of the suit at a preliminary stage of the proceedings. This is the more reason why its application must be rigorously thrashed to obviate situations whereby litigants would be estopped from pursuing their matters in unclear and uncertain circumstances.

If inappropriately applied, it can be a dangerous tool of operation. It would lock out deserving litigants out of their causes. On the other hand, it could condemn deserving respondents to undue pressure and costs in pursuing undue litigation. This is a delicate balancing act under all circumstances.

Following the authority of **Mukhisa Biscuits** (*supra*) it would appear that the preliminary objections though raising pertinent issues of law do not in the circumstances pass the test of sustainable preliminary objections against the petition. In as much as I agree that the petitioner did not substantially answer or address the issues raised by the objectors, these in themselves are unsustainable and must fail.

I am, in the penultimate, inclined to dismiss the preliminary objection with costs to the petitioner.

Delivered, dated and signed this 30th day of June, 2015.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Nyanchiro instructed by Nyanchiro Nyagaka and Company Advocates for the 1st and 3rd Respondents.
2. Miss. Miimo for the 2nd, 4th and 5th Respondents.
3. Mr. Musyoki instructed by Musyoki Mogaka and Company Advocates for the 6th and 9th Respondents.
4. Miss Langat for the Interested Party and 10th Respondent.
5. Mr. Walukhwe instructed by Okongo Omogeni and Company Advocates for the 7th and 8th Respondents
6. Mrs. Opiyo instructed by Kaplan & Stratton Advocates for the Respondent/ Applicant.



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