



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
PETITION NO. 24 OF 2014

FARAH ABDINOR AHMEDPETITIONER

VERSUS

NATIONAL LAND COMMISSION 1ST RESPONDENT

DAUD ABDULLAHI OMAR 2ND RESPONDENT

HON. ATTORNEY GENERAL 3RD RESPONDENT

RULING

1. On 7th May 2014 the Petitioner filed a Notice of Motion under Rule 23 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court (Practice Rules) and Article 22, 23, 35 and 163 of the Constitution. The petitioner is seeking;

a. ...

b. *That a conservatory order of stay be issued to the decision of the 1st respondent's to appoint the 2nd respondent as Secretary to the County Land Management Board contained in its letter dated 14th April, 2014 pending hearing and determination of this Application/Petition.*

c. *That an order of mandatory injunction be issued to compel the 1st respondent to furnish the Petitioners with certified copies of the applications and testimonial submitted by the shortlisted candidates from Wajir County for the position of Secretary to the County Lands Board namely Mohamud Kasai Mohamed, Ahmed Guhad Omar, Mohamed Osman Omar, Abdi Yunis Guliye, Daud Abdullahi Omar, Hassan Amey Ali, Issa Garore Irobe and Abdi Ali Mohamed as published in the Standard newspaper of 21st February 2014 within seven days of grant of the order.*

d. *That as an alternative to prayer 2 above, the Court be pleased to issue directions that the Petition herein be heard and determined on priority basis and at any rate before 2nd June 2014.*

e. *That the costs of this application be provided for.*

2. The application is supported by the annexed affidavit of Abdurrahman Mohamed Abdille for an on behalf of the Petitioner herein and upon the withdrawal from the petition as the 1st petitioner, the petitioner herein filed his affidavit on 3rd June 2014 in support of his application and petition. The application is based on the grounds that the decisions, actions and omissions of the 1st respondent have violated the applicant's constitutional rights and freedoms and the conservatory order sought is necessary in order to conserve the subject matter of this petition and ensure efficacious remedy for the petitioner if they will be successful in the petition. The appointment of the 2nd respondent is vitiated by illegality, fraud and misconduct under chapter 6 of the Constitution; it is only fair and just that the conservatory order sought be granted as pursuant to Article 35 of the Constitution, the petitioner require the documents sought in order to effectively prosecute their application for enforcement of rights and fundamental freedoms. The shortlisting of the candidates for Wajir County is illegal on the grounds that the 2nd respondent did not meet one of the most important qualification of 4 years' experience at a senior management level and that his appointment was being lobbied by the member of Parliament of Eldas Constituency Hon. Adan Keynan. That despite protests from the people of Wajir County to the 1st respondent, they issued the 2nd respondent with an appointment letter for the position of Secretary to the County Land Management Board reserved for applicants from Wajir County. Unless the Petition is heard and determined forthwith the same will be rendered nugatory as the 2nd respondent is scheduled to take up his duties as the secretary to the County Land Management Board. Kwale County on 2nd June 2014 and it is not in the public interest for the 2nd respondent to start serving as the secretary in Kwale County or any other County in Kenya.

3. On 15th May 2014, The 1st and 3rd respondents filed their Grounds of Opposition to the application noting that there was no labour dispute for determination and the court lacks jurisdiction to determine the matter; the claimants are mere allegations with no evidence and no justiciable case against the respondents, the petitioner will not suffer any inconvenience if the orders are not granted and if the testimonial sought as re not given there will be no prejudice as there is no evidence that the 1st respondent has refused to issue these documents and there is no demonstration of what rights have been infringed and the application is brought in bad faith to scuttle the smooth operations to the 1st respondent as the appointment of the 2nd respondent has already taken effect.

4. On 29th May 2014, the 1st and 3rd respondent also filed their Replying Affidavit sworn by Chavangi Aziz Tom in support of their opposition to the Petition and application stating that the 1st respondent received 669 applications for the post of Secretary and only 270 applicants were shortlisted with 10 applicants from Wajir County including the petitioner. Interviews were carried out on 3rd march 2014 where the petitioner was interviewed and at the close the 2nd respondent was ranked best and appointed having met the prescribed qualifications. The process was open and competitive and being an independent body the 1st respondent is not amenable to any outside influence. The orders sought are after the fact as the 2nd respondent has been appointed and thus the application is actuated by malice to affect the operations of the 1st respondent. The petitioner will not suffer any prejudice and has failed to demonstrate

how his rights have been violated and in any case the court lacks the requisite jurisdiction to grant the orders sought.

5. The 2nd respondent filed his Replying Affidavit on 15th May 2014 and stated that the petitioner's Notice of Motion offends constitutional provisions as alleged violations of the Constitution lie in the High Court and not the Industrial Court, the industrial Court lack jurisdiction herein as the petition raises issues that do not fall under the special jurisdiction of the Industrial Court. The application lacks merit as the 2nd respondent is qualified for the appointed position by the 1st respondent having served in senior positions in the last 5 years and when the 1st respondent advertised for the position of County Management Board, he was shortlisted and interviewed and followed with an appointment. The petitioner cannot invoke the provisions of Article 41 and 47 of the Constitution as there is no employer and employee relationship between the 1st respondent and the petitioner who was an applicant for the position now offered to the 2nd respondent. There is no obligation by the 1st respondent to provide reasons for finding the petitioner unsuccessful or for providing the testimonials of other candidates to him.

6. The petitioner also submitted that he is seeking for orders to compelling the 1st respondent to furnish the Petitioners with certified copies of the applications and testimonial submitted by the shortlisted candidates from Wajir County for the position of Secretary to the County Lands Board namely Mohamud Kasai Mohamed, Ahmed Guhad Omar, Mohamed Osman Omar, Abdi Yunis Guliye, Daud Abdullahi Omar, Hassan Amey Ali, Issa Garore Irobe and Abdi Ali Mohamed as published in the Standard newspaper of 21st February 2014. On the grounds that where a citizen is seeking evidence under Article 35 of the Constitution, there is an entitlement unless the respondent can show a legitimate reason as to why such a document and information cannot be produced. He relied on the case of *Nairobi law Monthly Company Limited versus Kenya Electricity Generating Company & Others [2013] eKLR* where the court held that a party can be furnished with documents by a state agency. The Petitioner herein has filed a petition to enforce fundamental rights and he requires documents in the possession of the respondents to be able to effectively canvass his petition. He needs these documents to support evidence that the 2nd respondent was appointed by the 1st respondent while he did not meet the basic criteria to be the Secretary County Land Management Board. the required documents will demonstrate that the 3rd respondents did not comply with Articles 232 of the Constitution by ensuring that the appointments done by the 1st respondent are fair and competitive and in accordance the set criteria. There is a direct nexus between the rights sought under Article 35 and the petition and the burden is on the respondents to demonstrate that there are legitimate grounds of public security and morality as envisaged under the Constitution so as not to provide the required documents to the petitioner.

7. That the 1st respondent has failed to demonstrate through the affidavit of Tom Aziz that there are legitimate reasons or that it would be oppressive to furnish the petitioner with the required documents and the court should grant the orders compelling the respondents to discharge their constitutional obligations. The 2nd respondent states that the orders sought are against the 1st respondent but notes that they complied with Articles 10 and 36 of the Constitution and being the most qualified candidate was appointed to the position of Secretary

County Land management Board. On this basis, the 1st respondent ought to give the required documents to demonstrate that indeed the 2nd respondent was the most suitable candidate.

8. The court should conserve the subject matter pending the hearing of the petition by granting a stay of the appointment of the 2nd respondent. Once the orders compelling the 1st respondent to produce the required documents is granted, the petitioner will move the court for the hearing of the petition.

9. The petitioner also submitted that the Court has jurisdiction to determine the matters herein as the matters relate to the appointment of the 2nd respondent by the 1st respondent and relied on the case of *Dr. Anne Kinyua versus Nyayo Tea Zone Development Corporation & 3 others [2012] eKLR* where the court held that labour and employment rights are part of the Bill of Rights and are protected under Article 41 within the province of the Industrial Court. That conservatory orders herein are necessary based on the finding in *Martin Nyaga Wambora versus the Speaker, County Assembly of Embu & 5 Others [2014] eKLR* where the court granted conservatory orders as there was real danger that the applicant would suffer prejudice as a result of the alleged violation or threatened violation of the Constitution.

10. The 1st and 3rd respondents also submitted that the orders sought affect the rights of third parties who will be prejudiced as they are not aware of the proceedings. Article 35 provisions to be granted, a party must demonstrate that they sought the information and the respondent refused to issue such information. Coercive orders can be granted where it is demonstrated that there was a request and the same was denied or violated by the state. The petitioner has not demonstrated why he is seeking the information sought and why he came to court before being prepared with his case only to work backwards looking for information to support his petition.

11. The 2nd respondent on their part submitted that the 1st respondent advertised for positions last year, parties applied and interviews conducted where the 2nd respondent was appointment. Everything was published in the newspaper. Only in May 2014 when the process was complete and the petitioner failed to get the appointment, he moved the court without seeking to have information from the 1st respondent. The petitioner cannot come to court to seek information to prepare for his case in a speculative manner by stopping the appointment of the 2nd respondent without any justification. The petitioner has not attached his testimonials to his application or petition and cannot compel others to give him their testimonials. In a case where the Court finds that the process applied by the 1st respondent was not fair, the court can only order that there be a repeat of the interview in a new process but cannot appoint the petitioner as the 1st respondent has the constitutional mandate to make such appointment. The application therefore lacks merit.

12. The 2nd respondent also submitted that under Article 35 of the Constitution, the right to access information is not absolute as there are limitations under Article 24. In the case of *National Association for financial inclusion of the informal Sector versus the minister for Finance & Another* the court held that a party seeking information must demonstrate that information requested for from the state or a state agency was rejected. That the rights and freedoms sought to be enforced are threatened or violated as held in the case of *Charles Omanga & 8 others versus Attorney General [2014] eKLR*.

Determination

13. The 1st and 3rd respondents in their Grounds of opposition to the petitioner's application raise the grounds that the Court has no jurisdiction to determinate the matters herein as there is no labour dispute. The 2nd respondent as well noted that the court lacks jurisdiction as this is a case seeking to enforce fundamental human rights under the Constitution and the Industrial Court being a court with special mandate is not the court to hear a petition and application as filed by the petitioner. It will be useful to address this aspect before dealing with the other substantive issues raised in the application by the petitioner as The seriousness of the issue of jurisdiction is founded on the fact that as a High Court, the Court has Original and unlimited jurisdiction to determine any question properly brought before it and any challenge on its authority to do so must be thoroughly inquired into and resolved and as held in the case of **The Owners of the Motor Vessel "Lillian S" v. Caltex Oil (Kenya)Ltd [1989 KLR 1;**

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

14. Article 162 of the Constitution establishes the Industrial Court as a Superior Court of record with the same status as the High Court and further at Article 162(3) require Parliament to enact further legislation to determine the jurisdiction and the functions of the Court which has now been done through the enactment of the industrial Court Act, 2011. Therefore, the Industrial Court being a Superior court of Record with the same status as the High Court is further regulated by the provisions of Article 165(5) of the Constitution by removing the powers to hear labour relations matters from the High Court general division to the Labour Relations Court as contemplated under Article 162(2). Therefore under section 12 of the Industrial Court Act, the jurisdiction of the industrial Court is outlined as;

12. (1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 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' organisation and a trade unions organisation;*
- (d) disputes between trade unions;*
- (e) disputes between employer organizations;*
- (f) disputes between an employers' organisation and a trade union;*
- (g) disputes between a trade union and a member thereof;*

(h) disputes between an employer's organisation 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.

15. The constitution and the industrial Court Act are therefore not in conflict, rather they complement each other with regard to the jurisdiction of the Industrial Court also stated as the Labour Relations Court. This is the Court that is conferred with original and exclusive jurisdiction to hear and determine disputes relating to labour relations. Any dispute that relate to employment, industrial action or matters touching on employer and employee, matters between employees and trade union or trade unions and employer or as between employers and their associations, all fall within the ambit of the Industrial Court.

16. The Constitution has further created employment rights as part under the Bill of Rights under Article 41 of the Constitution. Where the provisions of section 12 of the Industrial Court Act interact with Article 41 of the Constitution, then as of necessity, such a claim must lie at the Industrial Court. See *United States international University versus Attorney General and 2 others, Petition 170 of 2012*.

17. The Petition and application herein relate to the appointment of the 2nd respondent by the 1st respondent and the conservatory orders sought are to stay the appointment pending the hearing of the Petition. These are matters within the realm of the jurisdiction of the Industrial Court under the Powers granted to the Court under Article 162 and 165 of the Constitution. I therefore find the court has the right jurisdiction to hear and determine the matters as hand.

18. The orders sought by the Petitioner in the main are;

That an order of mandatory injunction be issued to compel the 1st respondent to furnish the Petitioners with certified copies of the applications and testimonial submitted by the shortlisted candidates from Wajir County for the position of Secretary to the County Lands Board namely Mohamud Kasai Mohamed, Ahmed Guhad Omar, Mohamed Osman Omar, Abdi Yunis Guliye, Daud Abdullahi Omar, Hassan Amey Ali, Issa Garore Irobe and Abdi Ali Mohamed as published in the Standard newspaper of 21st February 2014 within seven days of grant of the order.

19. The petitioner has relied on the provisions of Article 22, 23, 35 and 163 of the Constitution that concern the enforcement of fundamental rights and freedoms protected under the Bill of Rights. With regard to the enforcement of Article 35 of the Constitution, the right is outlined as;

35. (1) every citizen has the right of access to—

(a) Information held by the State; and

(b) Information held by another person and required for the exercise or protection of any right or fundamental freedom.

(2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.

(3) The State shall publish and publicise any important information affecting the nation.

20. This constitutional right to information is based on the idea that people should have access to the information in the possession of the state that has an impact on them. This includes information that is specifically about someone and more generally, the information the state uses to make decisions affecting someone. At this level, freedom of information is closely connected to freedom of expression and the right to privacy. The second level on which freedom of information operates is political. In an authoritarian society, power is exercised arbitrarily, without reason or explanation. In an open and democratic society, by contrast, government should be accountable for its actions and decisions, which should be informed by rational considerations that are explainable to those affected by them: democracy is government by explanation. Accountable government is impossible if government has a monopoly over the information that informs its actions and decisions.

21. In the application of the right to access to information held by the state or held by another person so as to protect a fundamental right there are procedural requirements by a party so seeking. Article 35 of the Constitution now creates a right to request information and a concomitant duty to provide the information requested, unless there is a ground for refusing access to the information. The other way in which freedom of information provides access is by requiring own-initiative disclosure – the mandatory publication of certain information, without the need for prior request. This means that entities exercising public function in terms of legislation may request access to records of a public body or a private body. Request for access must not be refused unless there are relevant reasons for such refusal.

22. Therefore Article 35 creates an entitlement to information from the state or to information held by another person's required for the exercise or protection of a fundamental right and freedom. A person therefore seeking to enforce fundamental rights and freedoms must also demonstrate that the rights sought to be enforced are threatened or violated and more fundamentally, a party so seeking must set out what information is required or what information is sought and not given. The Petitioner herein moved the court with his application seeking for orders to compel the respondents to furnish him with certified copies of the applications and testimonial submitted by the shortlisted candidates from Wajir County for the position of Secretary to the County Lands Board. Though the testimonials required as stated, the petitioner has not demonstrated that there was a request or application filed with the respondents and that the information or record refused upon such request or application. As cited by the respondents in the case of ***Kenya Society for the mentally Handicapped (KSMH) versus the Attorney General and others, Petition 155A of 2011;***

... coercive orders of the court should only be used to enforce Article 35 where a request has been made to the state or its agency and such request denied. Where the request is denied, the court will interrogate the reasons and evaluate whether the reasons accord with the

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Constitution. Where a request has been neglected, then the state organ or agency must be given an opportunity to respond and a peremptory order made should the circumstances justify such an order.

23. Article 35 also creates an obligation on the State to publish important information. This would comprise information that is a public nature, information that is of public interest and information that does not compromise the rights privacy of third parties like personal details or information, commercial information of third parties, confidential information of third parties of information with regard to safety of individuals and protection of property or information that is privileged. All this assessment is commenced and decided upon from the request or application by a party seeking such information. I note that the 1st respondent published the list of candidates who applied to the position of Secretary County Land Management Board, the shortlisted candidates and the petitioner has information as to the applicant who was picked for the position. Even in a case where the petitioner has good and valid reasons as to the need for r the information sought from the respondents, Article 35 of the Constitution in creating the right to access that information equally create a duty on the petitioner to first request and or apply to have the required information. Where this requested information is refused or declined without any justification or reason, then the petitioner has a right to move the court to enforce the right to access that information. To move the court as the petitioner has done is to be speculative as held in the case of *Ottawa Football Club versus Canada (Minister of Fitness and Amateur Sports) [1989] 2 FC 480;*

...where a request is made to a government institution for access to a record that the head of the institution is authorised to refuse to disclose by reason of information or other material contained in the record, the head of the institution shall disclose any part of the record that does not contain, and can reasonably ne severed from any part that contains, any such information or material.

24. The fundamental condition to the right to access information under Article 35 of the Constitution is to request for the provision of the required information. Where this request is rejected, then the court is invited to *interrogate* the reasons and evaluate whether the reasons accord with the Constitution.

25. Where the records or documents required relate to employment records, the same standards as under Article 35 of the Constitution apply. This is affirmed under the provisions of section 73(2), (3), (4) and (5) of the Employment Act;

(2) A request for information, records or a document under subsection (1)—

(a) shall be made by notice in writing to the person required to furnish the information, or produce the records or document; and

(b) may be varied or revoked by a subsequent notice so given.

(3) A person who refuses or wilfully neglects to furnish any information or produce any record or he has been required to furnish or produce by a notice under this section commits an offence and shall on conviction be liable to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding six months or to both.

(4) A person who in purporting to comply with a requirement of a notice under this section, knowingly or recklessly makes any false statement commits an offence.

(5) Where an offence under this section is committed by a body corporate and is proved—

(a) to have been committed with the consent or connivance of; or

(b) to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in any such capacity, that person and the body corporate commits an offence.

26. Even in a case where an employer owes or is in debt, the Minister or state agency may require the employer to provide such information as may reasonably be required upon notice in writing to the person required to furnish such information or produce the records.^[1] Of specific reference to an employee's records section 74(2) apply thus;

(2) An employer shall permit an authorised officer who may require an employer to produce for inspection the record for any period relating to the preceding thirty six months to examine the record.

27. Even where the case relates to records of insolvency, the standards that apply are best replicated in any case where records in the possession of a state body or a private entity or person is required. There must be a written notice of request and where this request is declined or the person to furnish wilfully neglects to so furnish or knowingly makes any false statement, under the law, such a person commits an offence and has a sanction. These provisions affirm the provisions of Article 35 of the Constitution.

I therefore find the petitioner failed to request or apply to have the information sought before filing his application. the information is now sought through coercive orders of the court as set out in the application herein. There is no proof that the respondents have refused, rejected or neglected to offer the information or record required by the Petitioner. The application for the provision of such records and information through the court is premature and must fail and the application dated 7th May 2014 is hereby declined and dismissed.

Each party will bear their own costs.

Delivered in open Court at Nairobi and dated this 18th Day of June 2014

Mbaru

JUDGE

In the presence of

Court Assistant: Lilian Njenga

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.....

[1] Section 73 of the Employment Act

...the Minister may require—

(a) the employer to provide him with such information as he may reasonably require for the purpose of determining whether the application is well founded; and

(b) any person having the custody or control of any relevant records or other documents the Minister may require to produce for examination on behalf of the Minister any such records or document.

(2) A request for information, records or a document under subsection (1)—

(a) shall be made by notice in writing to the person required to furnish the information, or produce the records or document; and

(b) may be varied or revoked by a subsequent notice so given



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