

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS

PETITION NO. _____ OF 2018

- IN THE MATTER OF: ARTICLES 1, 2, 3, 4(2), 10, 12(1)(A), 19, 20, 21, 22, 23, 24, 27, 41(1), 47, 48, 50(1), 73, 75, 156, 159, 162, 165, 232, 234, 236, 258, AND 259 OF THE CONSTITUTION OF KENYA.
- IN THE MATTER OF: THE ALLEGED VIOLATION OF ARTICLES 1, 2, 4(2), 10, 27, 41(1), 47, 73, 232, 234, 249(2)(b) AND 259(1) OF THE CONSTITUTION;
- IN THE MATTER OF: THE CONSTITUTIONAL AND LEGAL VALIDITY OF THE PRESIDENT EXECUTING THE MANDATE OF THE PUBLIC SERVICE COMMISSION
- IN THE MATTER OF: THE CONSTITUTIONAL AND LEGAL VALIDITY OF THE CIRCULAR REF. NO. OP/CAB.39/1A OF 4TH JUNE 2018 ISSUED BY JOSEPH KINYUA PURPORTING TO SEND HEADS OF PROCUREMENT AND ACCOUNTING UNITS IN GOVERNMENT MINISTRIES, DEPARTMENTS AND AGENCIES INCLUDING STATE CORPORATIONS, ON COMPULSORY LEAVE FOR 30 WORKING DAYS.
- IN THE MATTER OF: THE CONSTITUTIONAL VALIDITY OF PRESIDENTIAL FIAT AND THE MASS SACKINGS OF PUBLIC OFFICERS BASED ON ROADSIDE DECLARATIONS ISSUED BY THE PRESIDENT.
- IN THE MATTER OF: THE ABUSE OF DELEGATED LEGISLATION BY THE EXECUTIVE AND THE REGULATORY BURDEN IMPOSED ON THE PEOPLE OF KENYA
- IN THE MATTER OF: THE DOCTRINES OF LEGITIMATE EXPECTATION, AND *VOID AB INITIO*.

BETWEEN

OKIYA OMTATAH OKOITI PETITIONER

~VERSUS~

JOSEPH KINYUA 1ST RESPONDENT
THE PUBLIC SERVICE COMMISSION 2ND RESPONDENT
THE HON. ATTORNEY GENERAL 3RD RESPONDENT

CERTIFICATE OF URGENCY

I, OKIYA OMTATAH OKOITI, the Applicant/Petitioner herein, do hereby certify that this Application is extremely urgent and should be heard forthwith.

DATED at NAIROBI this 6th day of June 2018

OKIYA OMTATAH OKOITI
THE PETITIONER

DRAWN & FILED BY:

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TO BE SERVED UPON:

- 1. JOSEPH KINYUA**
OFFICE OF THE PRESIDENT,
HARAMBEE HOUSE,
HARAMBEE AVENUE,
NAIROBI.

- 2. THE PUBLIC SERVICE COMMISSION**
THE SECRETARY, PUBLIC SERVICE COMMISSION OF KENYA,
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- 3. HON. ATTORNEY GENERAL**
THE HON. ATTORNEY GENERAL'S CHAMBERS,
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THE PUBLIC SERVICE COMMISSION 2ND RESPONDENT
THE HON. ATTORNEY GENERAL 3RD RESPONDENT

NOTICE OF MOTION

(Under articles 20, 22, 50(1), 23(3), 159(2)(d), 165, and 258 of the Constitution of Kenya 2010, Sections 18, 19 and 24 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013, and all other enabling provisions of the Law)

LET ALL PARTIES CONCERNED attend the Honourable Judge in Chambers on the _____ day of _____, 2018, at 9.00 O'clock in the forenoon or as soon thereafter for hearing of an Application by the Applicant for **ORDERS:**

1. **THAT** this Application be certified as urgent and fit to be heard forthwith, and be granted *ex-parte*, and in priority to any other matter herein.
2. **THAT** pending the *inter-partes* hearing and determination of this Application and the Petition herein the Honourable Court be pleased to issue an interim order suspending the Circular Ref. No. OP/CAB.39/1A of 4th June 2018 issued by the 1st respondent.
3. **THAT** pending the *inter-partes* hearing and determination of this Application and the Petition herein the Honourable Court be pleased to issue an interim order of injunction prohibiting the respondents or any of their agents from implementing in any way whatsoever the Circular Ref. No. OP/CAB.39/1A of 4th June 2018 issued by the 1st respondent.
4. **THAT** consequent to the grant of the prayers above the Honourable Court be pleased to issue such further directions and orders as may be necessary to give effect to the foregoing orders, and/or favour the cause of justice.
5. **THAT** the costs of this application be provided for.

THIS APPLICATION is based on the following grounds:

1. **THAT** that this matter is extremely urgent because the Circular Ref. No. OP/CAB.39/1A of 4th June 2018 issued by the 1st respondent has created extreme anxiety in the Public Service as it purports to terminate the services of heads of procurement and accounting units in Government ministries, departments and agencies including State corporations and independent offices and commissions by sending them on compulsory leave for 30 working days, effective today, the 6th day of June 2018,.
2. **THAT** the petitioner has moved the Court in record time.
3. **THAT** the impugned circular was subjectively created through an irregular, hurried, arbitrary and opaque process that did not involve public participation, and violated express provisions of the Constitution and legislation.

4. **THAT** 1st respondent is a busybody with no capacity to oust the mandate of the 2nd respondent.
5. **THAT** that the **Circular Ref. No. OP/CAB.39/1A of 4th June 2018** was issued by the 1st respondent to achieve the collateral purpose of hyping the on-going staged war on corruption, and looking for scapegoats.
6. **THAT** none of the affected officers has been formally accused of any wrongdoing, to be so subjected to collective punishment.
7. **THAT** the biblical doctrine of collective punishment is anathema to Kenya's constitutional dispensation. Even in the Bible, collective responsibility belongs to the Old Testament.
8. **THAT** the doctrine of personal culpability or liability is expressly enshrined in law at **Articles 19(3)(a) and 226(5) of the Constitution** and legislation, including Leadership and Integrity Act 2012 (which throughout its body addresses public officers in the singular), and **Sections 15(2), 30(2), and 32 of the Public Officer Ethic Act (Cap 183)**.
9. **THAT** the **Circular Ref. No. OP/CAB.39/1A of 4th June 2018** issued by the 1st respondent does not invoke any powers he has under the law as a regulation making authority.
10. **THAT** the 1st respondent is not the Head of the Public Service as such a position does not exist in law.
11. **THAT** 1st respondent is not a regulation making authority.
12. **THAT** the public service is not run on the basis of presidential fiat and roadside declarations, but it is well organised and managed by an independent commission, the 2nd respondent.
13. **THAT** the petitioner posits that the 1st respondent acted *ultra vires* and violated **articles 10(2) and 47 of the Constitution** on the rule of law.
14. **THAT** the petitioner submits that under the law the respondents have power to do only those things which are authorized by the law, and anything not so authorized is both

ultra vires and unconstitutional and, therefore, invalid, null and void and of no consequence.

15. **THAT** under the doctrine of *ultra vires*, an act of a public body or official must not be beyond or exceed the powers delegated to the body or official, or what the law allows, otherwise it will be *ultra vires* and, therefore, invalid, null and void and of no consequence.
16. **THAT** the doctrine of *ultra vires* and articles 10(2) and 47 of the Constitution protect the public interest by ensuring that public bodies and officers act strictly within and according to the law to prevent the abuse of power. Thus, it puts a check over the activities of public bodies and officials by setting the four corners of the law within which they are authorized to and must act.
17. **THAT** the petitioner posits that an *ultra vires* act or an unconstitutional act is void *in toto* from its inception and it is because the public body or officer has not the capacity to make it in the first place.
18. **THAT** a key plunk of the Constitution of Kenya 2010, and which is a major departure from the **Repealed Constitution**, is the autonomy of the public service from political control.
19. **THAT** whereas Section 25 (1) of the repealed Constitution provided that: “*Save in so far as may be otherwise provided by this Constitution or by any other law, every person who holds office in the service of the Republic of Kenya shall hold that office during the pleasure of the President,*” the Constitution of Kenya 2010 establishes the 2nd respondent at Article 233 and provides at Article 234, for the functions and powers of the Public Service Commission to superintend the public service.
20. **THAT** vetting does not require dismissal from office, unless it is a witch-hunt. In fact, dismissal from office is pre-emptive of any vetting. Dismissal from office can only come after vetting and the establishment that an officer is not suitable to hold a specific office.
21. **THAT** vetting is not a basis for dismissal from office.

22. **THAT** pursuant to Section 42 (7) of the Leadership and Integrity Act, it is only investigations can occasion the sending of an officer on compulsory leave.
23. **THAT** none of the affected officers is under investigation and so there is no basis for sending any one of them on compulsory leave.
24. **THAT** the demand that they provide information about themselves is tantamount to the State going on a fishing expedition to incriminate people.
25. **THAT** public officers are protected by the Constitution and legislation, and due process must be followed when taking disciplinary action.
26. **THAT** Kenyans have elected due process over dictatorship.
27. **THAT** in the case of *Dr. Christopher Ndarathi Murungaru vs. AG and another, Civil Application No. Nai. 43 of 2006 (24/2006)*, the Court of Appeal, on page 12, ruled that:
- “... the Constitution of the Republic is a reflection of the supreme public interest and its provisions must be upheld by the courts, sometimes even to the annoyance of the public. The only institution charged with the duty to interpret the provisions of the Constitution and to enforce those provisions is the High Court and where it is permissible, with an appeal to the Court of Appeal. We have said before and we will repeat it. The Kenyan nation has chosen the path of democracy: our Constitution itself talks of what is justifiable in a democratic society. Democracy is often an inefficient and at times messy system. A dictatorship, on the other hand, might be quite efficient and less messy. In dictatorship, we could simply round up all these persons we suspect to be involved in corruption and economic crimes and simply lock them up without much ado. That is not the path Kenya has taken. It has opted for the rule of law and the rule of law implies due process. The courts must stick to that path even if the public may in any particular case want a contrary thing and even if those who are mighty and powerful might ignore the court’s decision.”*
28. **THAT** it is totally unreasonable and procedurally unfair for the public officers who have personally not been accused of any wrongdoing to be punished.

29. **THAT** impugned circular is voided by the arbitrariness with which the decision to dismiss the affected officers was taken, and which decision was unlawfully taken with no adherence to the express provisions of the Statutory Instruments Act 2013.
30. **THAT** the forgoing constitutes a gross violation of the rights of the affected officers and the petitioner's legitimate expectations.
31. **THAT** the petitioner has established a prima facie case with high chances of success.
32. **THAT** the orders sought herein will advance the cause of justice.
33. **THAT** granting the orders will not prejudice the respondents in any way under the law.
34. **THAT** the orders sought herein are not determinative of the main motion.
35. **THAT** the balance of convenience favours the granting of the orders sought in this application.
36. **THAT** it is meet and just, for purposes of justice and equity and the overarching purpose of constitutional integrity and rule of law, to make the orders sought.
37. **THAT** this Honourable Court has unfettered powers and jurisdiction to make the orders sought.

AND FURTHER SUPPORTED by the affidavit of **Okiya Omtatah Okoiti** annexed herewith, the nature of the case, and other grounds and reasons to be adduced at the hearing hereof.

DATED at **NAIROBI** this **6th** day of **June 2018**

OKIYA OMTATAH OKOITI
THE PETITIONER

DRAWN & FILED BY:

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THE HON. ATTORNEY GENERAL'S CHAMBERS,
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NAIROBI.

Note: If any party served does not appear at the time and place above mentioned such orders will be made and such proceedings taken as the Court may deem just and expedient.

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THE PUBLIC SERVICE COMMISSION 2ND RESPONDENT
THE HON. ATTORNEY GENERAL 3RD RESPONDENT

SUPPORTING AFFIDAVIT

I, OKIYA OMTATAH OKOITI, a resident of Kenya and of care of Room 4, Floor B1, Western Wing, Block A, Social Security House, P.O Box 60286-00200, Nairobi, do hereby solemnly make oath and state as follows:

1. **THAT** I am the Applicant/Petitioner herein, aware of the matters in issue and hence competent to swear this affidavit on my own behalf.
2. **THAT** I swear this affidavit in good faith in support of the Application herein.
3. **THAT** I have perused the Application herein and confirm that the facts stated therein are true and correct.

4. **THAT** I hereby reaffirm and solemnly repeat the facts and averments stated and included in the Application, including each of the paragraphs (each individually as well as cumulatively), and solemnly state that the facts therein are true and to my own knowledge, information and belief.
5. **THAT** if the instant application is not immediately ventilated and necessary orders made, the damage or harm would be of an immediate, incalculable and irreversible nature.
6. **THAT** in view of the above, and pursuant to this Court’s duty to promote and safeguard constitutionalism and the rule of law, I verily believe that it is now incumbent for this Honourable Court to determine the issues I have raised in this application to ensure that the Constitution, statutes, and statutory instruments are protected and enforced.
7. **THAT** what is deponed to herein is true and to my own knowledge save as to facts deponed to on information and belief the sources and grounds whereof have been respectively specified.

SWORN by the said OKIYA OMTATAH OKOITI
 at Nairobi this 23rd day of March, 2018
 BEFORE ME

.....
DEPONENT

COMMISSIONER OF OATHS / MAGISTRATE

DRAWN & FILED BY:

DATED at NAIROBI this 6th day of June 2018

 OKIYA OMTATAH OKOITI
 THE PETITIONER

DRAWN & FILED BY:

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