



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

PETITION NO. 164 OF 2018

IN THE MATTER OF: CHAPTER FOUR OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: ARTICLES 10, 19(3), 20(1), 22, 23, 27(6), 28, 41(1), 50, 258, 259 OF THE CONSTITUTION 2010

AND

IN THE MATTER OF: PETITION CHALLENGING INFRINGEMENT OF THE CONSTITUTIONAL RIGHTS BY THE BOARD OF DIRECTORS OF THE KENYA PORTS AUTHORITY BY THE SENDING OF CATHERINE MTURI-WAIRI – THE MANAGING DIRECTOR OF KENYA PORTS AUTHORITY ON COMPULSORY LEAVE AND SUBSEQUENT APPOINTMENT OF DR. DANIEL MANDUKU AS THE ACTING MANAGING DIRECTOR OF KENYA PORTS AUTHORITY

BETWEEN

EMMANUEL CHENGO KENGA.....PETITIONER

VERSUS

- 1. KENYA PORTS AUTHORITY**
- 2. CABINET SECRETARY, MINISTRY OF TRANSPORT, INFRASTRUCTURE, HOUSING AND URBANDEVELOPMENT**
- 3. HON. ATTORNEY-GENERAL.....RESPONDENTS**

AND

- 1. CATHERINE MTURI-WAIRI**
- 2. DR. DANIEL MANDUKU.....INTERESTED PARTIES**

RULING

The Application

- 1. The Notice of Motion application before the court is dated 8th July, 2018 filed herein by the 1st Respondent. The application prays that the court be pleased to strike out the Petition herein with costs to the Respondents.
- 2. The application is premised on the grounds:
 - (a) That on the 12th day of June, 2018, the Petitioner informed the court that the substratum in question herein had been overtaken by

events.

(b) This followed the fact that the 1st Interested Party had since written a voluntary vacation of office letter dated 8th June, 2018 addressed to the Cabinet Secretary, to enable her pursue other personal interests.

(c) To that extent, the application dated 5th June, 2018 filed by the Petitioner was withdrawn with no orders as to costs and interim order herein issued on 5th June, 2018 lifted.

(d) That from the foregoing, the substratum of the petition herein is wholly overtaken by events as all the orders sought in the petition related to the office as held by the 1st Interested Party; who has since vacated office on her own volition.

(e) That there is no just cause of having this petition adjudicated to full trial as the same would be abuse of court process and mere waste of this court's time.

(f) No prejudice will be occasion to the Petitioner if the application herein is allowed.

3. The application is supported by affidavit of Turasha J. Kinyanjui sworn on 5th July, 2018. The affidavit restates the grounds upon which the motion is premised.

Support for the motion

4. The 2nd and 3rd Respondents support the motion through grounds in support of the application filed here on 8th July, 2018.

5. The 2nd Interested Part also supports the motion.

6. Parties in support of the motion do so on grounds:

(a) That the 1st Interested Party resigned from the position of the Chief Executive Officer voluntarily and therefore this petition has been overtaken by events.

(b) That the Employment and Labour Relations Court between **Okiya Omtata Okiiti vs. the Kenya Ports Authority Board of Directors and the Attorney General** filed on the 5th of June, 2018, the same having been instituted ostensibly in the public interest, has been dismissed.

(c) That in view of the 1st Interested Party resignation some of the orders sought in the petition cannot be granted.

(d) The petition and motion are premised on Employment and Labour Relations within the public sector, matters over which this Court's jurisdiction is expressly ousted by dint of the provisions of Article 165 (5) (b) of the Constitution.

(e) The matters is issue herein are substantially in issue before a court of competent jurisdiction; **Mombasa Petition No. 4 of 2018 before the Employment and Labour Relations Court between Okiya Omtata Okiiti vs. The Kenya Ports Authority Board of Directors and the Attorney General** filed on the 5th of June, 2018, the same having been instituted ostensibly in the public interest as the present suit where the Employment and Labour Relations Court has assumed jurisdiction.

(f) That the 1st Interested Party resignation was accepted by the 2nd Respondent. Therefore the substratum upon which this suit is founded on no longer exists and the suit has been overtaken by events and is thus not justiciable.

(g) That in view of these facts the Petitioner's rights and interest (if any) are extinguished and settled in law. Any further hearing is moot and shall be a waste of the court's time.

7. The 1st Interested Party did not participate in these proceedings.

Opposition to the motion

8. The Petitioner oppose the motion through a Replying Affidavit sworn by the Petitioner on 20th July, 2018.

9. The Petitioner's case is that the Petition is purely on the basis of public interest and in his capacity as a citizen interested in the going-on at the State Corporation known as Kenya Ports Authority. The Petitioner states that under Article 22(1) and (2)(c) of the Kenyan Constitution 2010 on Enforcement of the Bill of Rights, and Article 258(c) of the Kenyan Constitution 2010, he has a right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened and the same may be instituted by a person acting in the public interest. The Petitioner's case is that it is in the public domain, that the Board of Directors of the Kenya Ports Authority sent one Catherine Mturi-Wairi- the then Managing Director of Kenya Ports Authority - on compulsory leave and subsequently appointed Dr. Daniel Manduku as the New Managing Director of Kenya Ports Authority in an acting capacity. As a citizen the Petitioner was aggrieved by these actions of the Board of Directors of Kenya Ports Authority and presented this Petition before Court.

10. The Petitioner states that under Article 50(2) every accused person has a right to a fair trial which includes the right to be presumed innocent until the contrary is proved. In addition to the Kenyan Constitution 2010, the procedure for appointment and management of meetings of the Board are specifically set out under Cap 391 Kenya Ports Authority Act and the First Schedule thereto. Under Section 5 of Cap 391 Kenya Ports Authority Act a Managing Director shall be appointed by the Minister after consultation with the Board and whose terms and conditions of service shall be determined by the Minister in the instrument of appointment or otherwise in writing from time to time. Section 10 of Cap 391 Kenya Ports Authority Act gives the powers to the Board of Directors. However no power is given to determine the terms and conditions of service of the Managing Director. Further, the Petitioner states that under the laws of natural justice, every person has a right to have any dispute resolved by the Application of law in a fair hearing. The Petitioner states that he is aware that majority of the Board Members terms of office had lapsed by the time the board took a decision yet the remaining members could not constitute quorum to call for a special or general meeting. Hence the actions by the 1st Respondent Board of Directors were as a result of a legally-flawed process. The Petitioner states that there was use of a non-transparent criteria by the Board of Directors in sourcing and appointing one Dr. Daniel Manduku the Second Interested Party as the New Managing Director of Kenya Ports Authority and that the said Second Interested party had never worked at the First Respondent at all.

11. The Petitioner states that this is a matter of public interest and the final determination therein shall inform the 1st Respondent and the other State Corporations in the manner of handling public matters. It was submitted that the Petition raises weighty fundamental issues in law, and should proceed to full trial.

Submissions

12. With the leave of the court parties filed submissions which were orally highlighted in court on 13th November, 2018.

13. I have carefully considered the motion and the submissions of counsel. In my view the following are the issues for determination:

- (i) Whether the substratum of the petition is spent;
- (ii) Whether the public interest in the petition subsists.

The Determination

12. The background to the motion herein is as follows:

Pursuant to the 1st Respondent's Board of Directors sending the 1st Interested Party in compulsory leave on or about 10th May 2018, the Petitioner herein filed the current petition, and a Notice of Motion, seeking conservative orders on the basis that the Board of Directors of the First Respondent had acted ultra-vires Cap 391 Kenya Ports Authority Act by appointing the Second Interested Party an Acting Managing Director and further sending the First Interested Party on compulsory leave. The Petitioner alleged that the actions and process by the 1st Respondent Board of Directors had led to transgressions in terms of Articles 10, 19(3), 20(1), 22, 23, 27(6), 28, 41(1), 50, 258, 259 of The Constitution of Kenya 2010. The Petitioner further alleges that there was use of non-transparent criteria by the Board of Directors in sourcing and appointing one Dr. Daniel Manduku the Second Interested Party as the New Managing Director of Kenya Ports Authority and that the said Second Interested party has never worked at the First Respondent at all.

13. The Petitioner moved this court on 5th June, 2018 and conservatory orders were issued with the result that the employment of the 1st Interested Party was temporarily secured pursuant to application dated 5th June, 2018.

14. On 12th June, 2018 when the application was scheduled for inter-partes hearing, the counsel for the Petitioner, Mr. Gunga, informed the court that the 1st Interested Party had voluntarily resigned from her position as the Managing Director of the 1st Respondent Authority, and that therefore he was withdrawing the Notice of Motion application dated 5th June, 2018. All parties, including Mr. Nyongesa for the 1st Interested Party, consented to the said withdrawal. Accordingly, pursuant to that withdrawal, the court lifted the interim conservatory orders issued on 5th June, 2018 and directed the parties, if they so wished, to fix the petition for hearing. However, before the petition could be fixed for hearing, the 1st Respondent filed the instant application seeking to strike out the petition on the grounds that the same is spent.

15. So, the first issue is whether the petition is spent. It is true that although the petition is filed by a 3rd party ostensibly on public interest, the foremost interest in this petition remains that of the 1st Interested Party. This fact comes out quite clearly if one looks at the prayers in the petition. Prayers (a) to (g) of the petition seek declaratory orders based on breach of specified Articles of the Constitution. However, those prayers are not in vacuum, neither are they left hanging. They are consciously attached to the person of the 1st Interested Party Catherine Mturi-Wairi. The prayers specifically alleged that the 1st Interested Party's constitutional rights have been violated when she was sent on compulsory leave and the 2nd Interested Party appointed to take over. Among the prayers none specifically address public interest issue. The Petitioner avers that the public interest issue comes in if we consider the alleged discriminatory way the 2nd Interested Party was appointed. Further, the Petitioner avers that public interest comes into play when the court considers that high level appointment should be done above board and within the law.

16. It is not in doubt that indeed the 1st Interested Party voluntarily resigned from her position to follow her heart. A copy of her letter of resignation is attached to affidavit of Turasha Kinyanjui and marked T.J.K'1'. The said letter is dated 8th June, 2018. The letter reads in part as follows:

“I hereby wish to inform you of my decision to voluntarily vacate from the office of Managing Director of the Kenya Ports Authority with immediate effect, to enable me pursue other personal interests.”

17. The tone of that letter does not suggest a person unhappy with her status, or one whose fundamental constitutional rights have been violated as alleged in the petition. A look at the petition reveals that the claims in the petition are personal claims appurtenant to one Catherine Mturi-Wairi. With her voluntary exit as a result of her aforesaid resignation, it is the finding of this court that the substratum of the current petition has been taken away with the said resignation, and that there is nothing more to gain in the petition.

18. Mr. Gunga Counsel for the Petitioner, citing the case of **Trusted Society for Human Rights Alliance vs. Attorney General & 2 others** Petition No. 229 of 2012, submitted that the jurisdiction of this court to do justice will not allow this court to strike out this constitutional petition, especially where the petition has a modicum of comprehension even if it is inelegantly drafted. I agree. The difference here is that the petition herein is indeed very ably and elegantly drafted. The issue I have with it are the prayers sought, without the participation of the 1st Interested Party pursuant to her aforesaid resignation. Further, Mr. Gunga submitted that the manner in which the 1st Interested Party was sacked was against the law and discriminatory, an issue which should be addressed in this petition.

19. In answer to this Mr. Wachira for the Attorney General submitted that a similar matter being Petition No. 4 of 2018 was filled in the Employment and Labour Relations Court ostensibly on the same issue of the employment of the 1st Interested Party. The petition was dismissed when it became evident that the 1st Interested Party had voluntarily resigned from her position.

20. It is true. A constitutional petition will not easily be struck out even when poorly drafted or even when parties are not clear. A court will allow amendments in the cause of proceedings to save a petition which otherwise prima facie looks arguability. An arguability of a petition will also depend on the prayers sought. Where the prayers sought do not make legal sense, or where the prayers sought, even if granted, will not achieve anything, the court cannot proceed with the petition for its own sake. If the petition cannot be amended, or if the Petitioner, like in the instant case, has not sought the leave to amend the prayers, the court has no business carrying along a hopeless petition which in the end will be thrown away. The court has equal duty to strike out such a petition as soon as possible.

21. For the foregoing reasons, the Notice of Motion before the court dated 8th July, 2018 is allowed. The result is that the petition herein is struck out. Costs of the petition and of the motion shall be paid by the Petitioner to all the Respondents and to the 2nd Interested Party.

Orders accordingly.

Dated, Signed and Delivered at Mombasa this 19th day of December, 2018.

E. K. OGOLA

JUDGE

In the presence of:

M/S Kaguri for Applicant

Mr. Makutoi for 1st & 2nd Respondents

Mr. Otwere holding brief Gunga for Petitioner

Court Assistant Kaunda