



**IN THE HIGH COURT AT NAIROBI**

**MILIMANI LAW COURTS**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 162 OF 2014**

**BETWEEN**

**LUCIA WANGARI .....PETITIONER**

**AND**

**UNCLAIMED**

**FINANCIAL ASSETS AUTHORITY.....RESPONDENT**

**RULING**

1. The petition in this matter is dated 8<sup>th</sup> April 2014 and it seeks several prayers as follows;
1. *?A declaration that the failure by the Respondent to commence its business and operations more than a year after the appointment of the Board of Directors took effect on 25th October 2012 is a violation of the fundamental rights of the petitioner as provided in Article 47 of the Constitution.*
2. *A declaration that the failure by the Respondent to establish the Unclaimed Assets Trust Fund and to publish the audited accounts of the Fund in the Kenya Gazette as required by Section 46 of the Unclaimed Financial Assets Act 2011 more than a year after the appointment of the Board of Directors took effect on 25th October 2012, is a violation of the fundamental rights of the petitioner as provided in Article 47 of the Constitution*
3. *An order requiring the Board of Directors of the Respondent to forthwith commence the business and operations of the Unclaimed Financial Assets Authority by proceeding to competitively appoint a Chief Executive Officer, top management officers and other necessary and required support staff, in accordance with Section 42 of the Unclaimed Financial Assets Act and open its operational offices and in any case, not more than twenty one (21) days from the date of service of the order.*
4. *An order requiring the Board of Directors of the Respondent to forthwith establish the Unclaimed Assets Trust Fund and to publish the audited accounts of the Fund in the Kenya Gazette as required by Section 46 of the Unclaimed Financial Assets Act 2011, and in any case, not more than sixty (60) days from the date of service of the order.*
5. *An order requiring the Cabinet Secretary for the National Treasury to revoke the appointments of the current members of the Board Directors of the Respondent and to surcharge them for any allowances earned since their respective appointments should they fail to proceed to competitively appoint a Chief Executive Officer, top management officers and other necessary and required support staff, in accordance with Section 42 of the Unclaimed Financial Assets Act and open its*

operational offices and in any case, not more than twenty one (21) days from the date of service of the order.

6. An order prohibiting persons, banks, companies and other financial institutions holding assets presumed abandoned and subject to the custody of the Unclaimed Financial Assets Authority from surrendering the said assets to the Respondent until the Unclaimed Assets Trust Fund is established in accordance with section 44 of the Unclaimed Financial Assets Act, 2011.
7. Leave be and is hereby granted to the Petitioner to advertise this Honourable Court's order in at least two newspapers of national circulation.
8. Costs of this Petition be granted to the Petitioner.
9. Any other order that the court may deem fit to grant.

2. The matter was filed under certificate of urgency and I certified it as urgent on 8<sup>th</sup> April 2014. I thereafter directed that it be served on the respondent and fixed for directions on 14<sup>th</sup> April 2014. When the advocates appeared before me they indicated that they wished to record a consent allowing the petitioner in its entirety as prayed.

3. **Rule 29 of the Constitution of Kenya (Protection of Rights and fundamental Freedoms) Practice and Procedure Rules, 2013** provides that, “The parties may, with leave of the court, record an amicable settlement reached by the parties in partial or final determination of the case”. In light of the requirement for leave, I had to satisfy myself that the prayers in the petition were warranted in the circumstances.

4. This matter concerns the **Unclaimed Financial Assets Act, 2011** and a perusal of the prayers shows that granting the petition would have far reaching results in directing the respondent to perform its statutory mandate. Prayer (3) of the petition is directed at the Cabinet Secretary for the National Treasury to revoke appointments of members of the Board even though the Cabinet Secretary and the Board members directly affected are not party to the petition. It is inconceivable that the respondent's board members would accede to dissolution of the Board by a consent order in a petition. Prayer (6) is directed as other persons, bodies and institutions directing them to comply with the provisions of the **Act**.

5. In these circumstances, I adjourned the matter to the afternoon with directions that counsel for the respondent do file a replying affidavit from the Chairman of the Board to show the steps being undertaken to comply with the provisions of the **Unclaimed Financial Assets Act**.

6. In afternoon, an affidavit was filed not by the Chairman but by one of the directors, ERIC BARARE ORINA who states that, “a reading of the entire petition discloses an oversight on the part of the respondent largely due to the fact that, Board Members are independent and engaged elsewhere and are not in full time employees of the respondent”. He avers that the respondent will not suffer prejudice if the terms of the petition are allowed in terms of prayer 3, 4, 7 and 8 of the petition. The respondent however objects to prayers 1, 2, 5 and 6 of the petition for the following reasons;

- a. The respondent does not agree that it failed to start its business for a period of over one year because it has merely not appointed a Chief Executive Officer.
- b. The respondent has an operational Board of Directors, despite the fact that they have not appointed a chief executive officer to date.
- c. Though the respondent has not established an Unclaimed Assets Trust Fund, the respondent avers that this is so because, it has not appointed a chief executive officer and hence not a failure on its part.
- d. The grant of prayer 5 is opposed, as the Cabinet Secretary of the National Treasury is not a party to these proceedings as such the order cannot be granted.
- e. It contends that prayer 6 of the petition will be difficult to enforce.
- f. It leaves prayer 9 of the petition to the discretion of the Court.

7. I have considered the request to record the consent in light of the petitioner's case. The

petitioner's case is simple. It is that she is the administrator of her deceased's husband estate and the course of administering her husband's assets has been made difficult because the respondent has yet to operationalise the Fund to be established under the **Act**. There is no evidence that she has made a demand to the respondent who has filed/refused and or neglected to assist her in any way to locate her husband's assets.

8. The petitioner's case is a far cry from the prayers which are sought and I dare say that the prayers do not affect her in any manner. Granting the prayers sought in the petition by consent would amount to directing the respondent's Board of Directors to carry out its ordinary duties without a basis for doing so.
9. Taking into account the sentiments I have expressed in the matter, I refuse to grant leave to record a consent, either partially or finally determining the matter, as proposed by the parties.
10. In order to finalise the matter, I direct that a replying affidavits be sworn by the **Chairman** of the respondent's Board of Directors and its acting **Chief Executive** within the next 15 days. The matter shall be mentioned on 5<sup>th</sup> May 2014 for further orders/direction.

**DATED and DELIVERED at NAIROBI this 14<sup>th</sup> day of April 2014.**

**D.S. MAJANJA**

**JUDGE**

Mr Mariaria instructed by Mariaria and Company Advocates for the petitioner.

Mr Ondieki instructed by Mokono Ondieki and Company Advocates for the respondent.