REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO 171 OF 2013

BETWEEN

PUBLIC CORRUPTION ETHICS & GOVERNANCE WATCH.....PETITIONER

AND

MINISTER FOR TRANSPORT.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL ……..…….....….....2ND RESPONDENT

HASSAN KULOW.....1ST INTERESTED PARTY

GABRIEL COMBA KIVUTI.....2ND INTERESTED PARTY

KENYA AIRPORTS AUTHORITY.....3RD INTERESTED PARTY

JUDGMENT

Introduction

1. The Petition herein is dated 19th March, 2013 and was filed together with a Supporting Affidavit sworn in Nairobi on 19th March, 2013 by Charles Ndungu Mwangi in his capacity as the Executive Chairman of the Petitioner. Together with the Petition, a Chamber Summons Application accompanied by a Certificate of Urgency was filed together with a Supporting Affidavit seeking diverse interlocutory orders. By consent, the Application was later dispensed with and parties agreed to have the Petition heard expeditiously. The Petition basically challenges the qualifications and suitability of the 1st and 2nd Interested Parties as Board Members of the Kenya Airports Authority.

Case for the Petitioners

2. The Petitioners state that by Gazette Notice No.2935 which was published on 8th March, 2013, the 1st Respondent in exercising the powers conferred upon his office by **Section 5 (1) (f)** of the **Kenya Airports Authority Act, Cap 395 Laws of Kenya**, appointed the 1st and 2nd Interested Parties as members of the Board of Directors of the 3rd Interested Party for a period of 3 years

effective 4th March, 2013.

3. The said Section in the **Kenya Airports Authority Act** empowers the 1st Respondent to appoint two members to the Board of Directors of the 3rd Respondents and the appointees must have knowledge of civil aviation, aerodromes management and of commerce, industry, finance and administration, generally. The Petitioner in that regard contends that the appointees do not meet those qualifications and aver that the Board of Directors of the 3rd Interested Party as currently constituted is unlawful and illegal as it includes members who do not meet the necessary statutory qualifications.

4. They further allege that the 1st Respondent has no legal power to appoint unqualified members to the Board of Directors of the 3rd Interested Party and as such his decision is patently illegal and unconstitutional and add that the impugned appointments are an unlawful administrative action.

5. They conclude by stating that this Court has jurisdiction to intervene and curb blatant excesses of power by a public officer as the aforesaid appointments have been made in complete disregard of an express Court order in Petition No.514 of 2012, Public Corruption Ethics and Governance Watch vs Minister of Trade & 6 Others and are thus illegal, null and void. The following orders and declarations are now sought;

"a) An order of certiorari do issue to bring to this Honourable Court for purposes of being quashed Gazette Notice No.2935 dated the 25th of February, 2013 and published in the Kenya Gazette issue of the 8th March, 2013 notifying the public in general of the appointments of the 1st and 2nd Interested Parties as members of the Board of Directors of the 3rd Interested Party.

b) An order of prohibition do issue to prohibit the 1st Respondent by himself, servants, agents or whomsoever from appointing the 1st and 2nd Interested Parties or any other person as members to the Board of Directors of the 2rd Interested Party contrary to the provisions of Section 5 (1) (f) of the Kenya Airports Authority Act, Cap 395 Laws of Kenya.

c) A declaration that the 1st Respondent's purported appointments of the 1st and 2nd Interested Parties communicated through Gazette Notice No.2935 of the 8th March, 2012 is unconstitutional, null and void.

d) A declaration that the 1st Respondent as a State Officer is bound by Article 47 of the constitution to act fairly, reasonably and lawfully.

e) Damages.

f) Costs of this suit."

Case for the Respondents

6. The Respondents' answer to the Petition is contained in a Replying Affidavit sworn by one, Dr. Karanja Kibicho the Permanent Secretary of the 1st Respondent and in it the qualifications of the 1st and 2nd Interested Parties are set out and it is argued that the same were not disputed by the Petitioners. They add that it would go against the principles of the Constitution, 2010, if the Petitioner succeeds in seeking the disqualification of the 1st and 2nd Interested Parties who are otherwise properly qualified as clearly shown in their curriculum vitaes. That the Petition as framed is therefore frivolous, vexatious and should be dismissed with costs.

Case for the Interested Parties

7. It is the 1st Interested Party's case that he was first appointed to the Board of the 3rd Interested party in April of 2009 and that he has served in this capacity for the last three years. He adds that

his academic background and training is in education and that during his tenure on the Board, he was directly involved in the approval and implementation of various aviation projects in Kenya in line with the 3rd Interested Party's strategic plan and budget. He argues therefore that putting all factors into their proper perspective, his appointment vide Gazette Notice No.2935 of 8th March, 2013 did not in any way contravene the provisions of **Section 5(1) (f)** of the **Kenya Airports Authority Act, Cap 395 Laws of Kenya** or the Constitution of the Republic of Kenya.

8. Further, that the knowledge of the disciplines set out in **Section 5 (1) (f)** of the **Kenya Airports Authority Act** are not co-joined but distinct and as such the requirement is to have knowledge in either one of the three disciplines being; civil aviation, aerodromes management and operations (on the one hand) or of commerce, industry, finance (on the second part) or administration generally (of the third party). He adds that prior to joining the Board in 2009 he possessed such knowledge and experience in commerce and administration as set out in his curriculum vitae which qualifies him to the appointment and concludes by stating that there is no impropriety or shortcoming exhibited against his service during his tenure that begun in 2009 and further states that the Court should not be used to serve the interests of amorphous Petitioners such as the present Petitioner under the guise of enforcing constitutional rights while infringing on the rights of others.

9. The 2nd Interested Party also affirms that he is qualified for the position of member of the Board of Director of the 3rd Interested Party and reiterates the 1st Interested Party's sentiments and further adds that his professional background is in credit and finance as he has served in diverse financial organizations and advised governments, international organizations as well as the private sector for over 27 years. He confirms that as such he has extensive knowledge in commerce, industry and finance and his appointment cannot be improper as he meets the qualifications for the position of Board of Director.

Both pray that the Petition as against them be dismissed with costs.

Determination

10. The first issue that I must dispense with is the allegation raised concerning orders made in **Petition No.514 of 2012 Public Corruption Ethics and Governance Watch vs The Minister of Transport & 6 Others.** From the record, what was in contention in the said Petition was the issue whether the 1st Respondent had power to appoint more than 2 members to the Board of Directors of the Kenya Airports Authority and whether his decision to do so was patently illegal and unconstitutional. Indeed in the introduction to the said Petition No.514 of 2012, the Petitioners listed a number of Gazette Notices that notified the public of the appointment of more than 2 members to the said Board. Before the Petition could be determined on the merits, parties entered into a consent dated 26th February, 2013 in which all the Gazette Notices i.e. 5063 of 20/4/12; 6262 of 11/5/12 and 14712 of 19/10/12 were revoked and so the issues raised in the Petition were compromised in favour of the Petitioner.

11. The question that confronts me and which I must determine at the outset is whether the issue of the appointments of the 1st and 2nd Interested Party vis a vis their qualifications was directly and substantially in issue in Petition No.514 of 2012 and whether they are estopped from contending otherwise by virtue of the application of the doctrine of *res-judicata.*

12. The doctrine of *res judicata* in Kenya is provided for under the Civil Procedure Act, Cap 21 Laws of Kenya and Section 7 thereof provides that;

"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue by such Court."

13. An interpretation of the equivalent of **Section 7** above was made in the Indian case of **Swamy Atmandanda vs Sri Ramakrishna, Tapovanam [(2005) 10 SCC 51]** where the Court stated thus;

> ***"The object and purport of the principle of res judicata as contended in Section 11 of the Code of Civil Procedure is to uphold the rule of conclusiveness of judgment, as to the points decided earlier of fact, or law, or of fact and law, in every subsequent suit between the same parties. Once the matter which was the subject -matter of litigation stood determined by a competent Court, no party thereafter can be permitted to re-open it in a subsequent litigation. Such a rule was brought into the statute-book with a view to bring the litigation to an end so that the other side may not be put to harassment. The principle of res judicata envisages that a judgment of a court of concurrent jurisdiction directly upon a point would create a bar as regards a plea, between the same parties in some other matter in another Court, where the said plea seeks to raise afresh the very point that was determined in the earlier judgment."***

14. The rule was further explained by the Court of Appeal of England and Wales in **Barrow vs Bankside Agency Ltd [1996] 1 WLR 257** where it was stated that;

> ***"The rule in Henderson v Henderson 3 3 Hare 100 is very well known. It requires the parties, when a matter becomes the subject of litigation between them in a Court of competent jurisdiction, to bring their whole case before the court so that all aspects of it may be finally decided (subject, of course, to any appeal) once and for all. In the absence of special circumstances, the parties cannot return to the Court to advance arguments, claims or defences which they could have put forward for decision on the first occasion but failed to raise. The rule is not based on the doctrine of res judicata in a narrow sense, nor even on any strict doctrine of issue or cause of action estoppel. It is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on for ever and that a defendant should not be oppressed by successive suits when one would do. That is the abuse at which the rule is directed."***

15. I am well guided and the question is, was it possible for the Petitioner to have raised the issue of qualifications of the 1st and 2nd Interested Parties in Petition No.514 of 2012? I think so because the issues raised are all covered under Section 5 of the Kenya Airports Authority Act and there must be finality in litigation. There is no justified reason why the Petitioners chose to divorce the twin issues of appointment and qualifications for appointments because the appointment of Board Members was a process that entailed short listing of candidates based on their qualifications all the way to advertisement in the Kenya Gazette. I therefore hold that it was possible for the Petitioners to have ventilated issues pertaining to qualification in the previous Petition and once the same was compromised, all issues should have been settled in a composite consent order.

16. I also say so because in **Manson vs Vooght [1999] BPIR 376, 387 May LJ** stated as follows in that regard;

> ***"It may in a particular case be sensible to advance claims separately. Insofar as the so-called rule in Henderson vs Henderson suggests that there is a presumption against the bringing of successive actions, I consider that it is a distortion of the position. The burden should always rest upon the defendant to establish that it is oppressive or an abuse of process for him to be subjected to the second action."***

In the instant case, successive litigation has the untidy burden of piecemeal decisions of the Court on related issues and I am certain that the Respondents have genuine reasons to protest. But suppose I am wrong and must allow the Petitioners the opportunity to demonstrate the singular issue whether the 1st and 2nd Interested Parties have met the qualifications necessary for appointment as Board Members of the 3rd Interested Party. In doing so, I must begin by addressing the issue of jurisdiction i.e. whether this Court has the jurisdiction to determine that question.

17. This Court will not tire in reminding parties that the Court of Appeal (Nyarangi, JA) stated as follows in the case of T**he Owners of Motor Vessel "Lillian S" vs Caltex Oil Kenya Limited (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 a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."***

18. In that regard, **Section 5 (1) (f)** of the **Kenya Airports Authority Act** donates power to the 1st Respondent to appoint two people to the Board of the 2nd Interested Party. But if the Minister's actions under that Section are ultra vires or unconstitutional, the same can be remedied by the issuance of judicial review orders as envisaged in **Article 22 (3) (f)** of the **Constitution** of Kenya but it must be understood that such orders must be predicated upon a constitutional duty under the Bill of Rights as opposed to a mere statutory or administrative duty.

I say so deliberately because **Article 23 (3) (f)** of the **Constitution** provides that;

"(1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation uphold and enforce or infringement of, or threat to, a right or fundamental freedom in the the Bill of Rights.

(2) ...

(3) In any proceedings brought under Article 22, a court may

grant appropriate relief, including—

(a) ...

(b) ...

(c) ...

(d) ...

(e) ...

(f) an order of judicial review."

Article 22 (1) then provides as follows;

"Every person has the 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. "

19. It is obvious that the judicial review orders to be issued under the Constitution are limited to situations where denial, violation, infringement or threatened violation and infringements of a right or fundamental freedom in the Bill of Rights has been successfully pleaded. This would not be the case if the Court had been invited to invoke its civil jurisdiction under **Order 53** of the **Civil Procedure Rules.** In the latter case, all statutory and administrative actions in the traditional sense would be amenable to the civil jurisdiction of the Court under **Article 165 (3) (a)** and not under **Article 23(3) (f)** as read with **Article 22 (1)** reproduced above.

20. Applying the above holding to the present case, neither in the body of the Petition nor in the prayers sought nor in submissions has the Petitioner stated what part of the Bill of Rights has been violated or infringed by the actions of the 1st Respondent in appointing the 1st and 2nd

Respondents as he did.

21. In prayer (c) of the Petition, it has been stated that the Court should declare the appointments "unconstitutional" but not one article of the Constitution has been cited to warrant such a finding . **Article 47** on fair administrative action has been cited loosely but its applicability to the present case has not been explained and a casual reading of the said Article would show that it cannot come to the Petitioner's aid in any way. In addition to the above, even if the Court's jurisdiction had been properly invoked, the Petitioner has therefore completely failed to particularise any breaches of the Bill of Rights in any way and the Court is unable to discern what constitutional complaint he has in that regard. In his book, **Remedies in International Human Rights Law, Oxford University Press, 1999**, Shelton stated that in pressing claims of abuse of fundamental rights, pleas must be specific and certain, for purposes of facilitating proceedings. The Constitutional Court of South Africa in the case of **Prince vs Law Society of the Cape of Good Hope and Others (Prince 1) (1989) ZASCA 90; 1989 (4) SA 731** was also emphatic on that point when it stated as follows;

> ***"... It is not sufficient for a party to raise the constitutionality of a statute only in the heads of argument without laying a proper foundation for such challenge in the papers or pleadings. The other party must be left in no doubt as to the nature of the case it has to meet and the relief that is sought."***

I am duly guided and I have shown that the Petition before me has not met that test.

22. Having stated as I have above, I would still say the following about the Petition before me and in very few words; the complaint made in the Petition was one of the qualifications or otherwise of the 1st and 2nd Respondents to sit as Board Members of the 3rd Respondent. They answered the complaint by exhibiting their curriculum vitae. The Petitioner failed to bring evidence, of any kind, that **Section 5 (1) (f)** of the relevant Act had not been met by those qualifications. He who alleges must prove and the Petitioner has once again failed in that regard. ***The Petitioner merely raised a complaint of lack of qualification but completely failed to support that complaint which in any event has no justification whatsoever.***

23. I have above shown that on the law, the procedure and merit, the Petition is lacking in substance and the only fate it must now meet is that of a quick dismissal and it is therefore ordered to be dismissed.

24. As to costs, I see no benefit that the Petitioner would have obtained had the Petition succeed save a more transparent public appointment process. Let each party therefore bear its owns costs.

25. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 18TH DAY OF DECEMBER, 2013

ISAAC LENAOLA

JUDGE

In the presence of:

Irene – Court clerk

Mr. Ng'ang'a for petitioner\Mr. Munyu for 1st, 2nd and 3rd Interested Parte

Mr. Ojwang holding breif for Mr. Bitta for Respondents

Order

Judgment duly delivered.

ISAAC LENAOLA

JUDGE