



Ndegwa v Attorney General & 3 others; Public Procurement Regulatory Authority (Interested Party) (Constitutional Petition E001 of 2025) [2025] KEHC 4815 (KLR) (Anti-Corruption and Economic Crimes) (23 April 2025) (Ruling)

Neutral citation: [2025] KEHC 4815 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
CONSTITUTIONAL PETITION E001 OF 2025**

BM MUSYOKI, J

APRIL 23, 2025

BETWEEN

KIROKO NDEGWA PETITIONER

AND

THE HONOURABLE ATTORNEY GENERAL 1ST RESPONDENT

ETHICS AND ANTI CORRUPTION COMMISSION 2ND RESPONDENT

**CABINET SECRETARY, NATIONAL TREASURY & ECONOMIC
PLANNING 3RD RESPONDENT**

HON. MWANGI WA IRIA 4TH RESPONDENT

AND

**PUBLIC PROCUREMENT REGULATORY AUTHORITY INTERESTED
PARTY**

RULING

1. This ruling is in respect of the petitioner's application dated 6th January 2025. When the parties appeared before this court on 29-01-2025, I ordered that the court will only deal with prayers 2 and 3 of the application which are in the following terms;
 2. That pending the hearing and determination of this application inter-partes, a conservatory order be issued halting the appointment, assumption, performance of the duties, deriving any salary/benefits for the position of the Chairman of the interested party herein by the 4th respondent herein on and/or any of the respondents herein from implementing the process



of appointment of the 4th respondent as the chairman of the Public Procurement and Assets Disposal Regulatory Board.

3. That upon inter-partes hearing of this application but pending the hearing and determination of the substantive constitutional petition, a conservatory order be issued restraining the respondents from implementing the appointment, assumption, performance of the duties, deriving any salary/benefits for the position of the chairman of the interested party herein by the 4th respondent herein on and/or any of the respondents herein from implementing the process of appointment of the 4th respondent as the chairman of the Public Procurement and Assets Disposal Regulatory Board.

2. The petitioner depones in his supporting affidavit that the 4th respondent who was appointed by the President of the Republic of Kenya as the chairman of the interested party on 20-12-2024 is not fit to hold that office owing to his history of lack of integrity. The 4th respondent was elected as the Governor for Murang'a County on 4th March 2013 for the 2013-2017 term and re-elected to the same office for the 2017-2022 term. The petitioner avers that during the period the 4th respondent served in the gubernatorial office, he perpetuated unprecedented acts of embezzlement of public funds, abuse of office, misuse of public resources and contravened chapter six of the Constitution and breached the epithets of the integrity required of a person holding a public office.
3. The petitioner adds that the 4th respondent was impeached by the County Assembly of Murang'a twice, in October 2016 and on 21-10-2017 which impeachments were presented to the Senate and the House convicted him on account of violation of provision of chapter six of the Constitution, misappropriation of public funds and abuse of office. In support of this position, the petitioner annexed documents he avers are reports of the Senate Select Committee which found the 4th respondent culpable.
4. The petitioner has also claimed that the 4th respondent has been adversely mentioned in court cases and other public forums as having been involved in matters related to abuse of office. One of these is a report prepared by the 2nd respondent on suitability of the gubernatorial candidates for the country's general elections of 2017 which he has exhibited as annexure 3. There is also a claim that the 4th respondent has been charged with various corruption related offences in milimani chief magistrate anti-corruption case number E012 of 2024 and in proof of that fact, the petitioner has exhibited a communication from the 2nd respondent dated 15-04-2024. It is also alleged that the 4th respondent is facing forfeiture proceedings instituted in 2022 for embezzlement of Kshs 542 million.
5. It is the petitioner's case that with the above myriad issues of corruption baggage on the shoulders of the 4th respondent, the 3rd respondent was not justified and in fact violated the Constitution by advising the President to appoint the 4th respondent to the position of the chairman of the interested party. He adds that the 2nd respondent was aware of the aforesaid issues.
6. According to the petitioner, the appointment of the 4th respondent in such a crucial body as the interested party is an insult to the sovereignty of the people and the Constitution of Kenya. The petitioner prays that this court should enforce the tenets of the Constitution and Section 62(1) of the Anti-Corruption and Economic Crimes Act (hereinafter referred to as ACECA) and have the 4th respondent suspended from acting or performing duties of the office in terms of the prayers reproduced above.
7. The 1st and 3rd respondent have filed grounds of opposition dated 20th February 2025 in which they state among others that the report of the Senate's Select Committee the petitioner is seeking to rely on in these proceeding is not authoritative on integrity of the 4th respondent. They also add that the



- impeachment of the 4th respondent by the County Assembly of Murang'a was dismissed and where violations of the law were proved, they were found not to have met the threshold of gross violation and that the pendency of investigations by the 2nd respondent cannot be a bar to appointment to public office.
8. The 1st and 3rd respondents add that the jurisdiction of this court has not been properly invoked because the mandate to evaluate suitability of the appointment of person to public offices is on the 2nd respondent and the court should apply the doctrine of avoidance and leave the matter to the 2nd respondent. They further state that the court should refrain from discussing issues which are pending before the chief magistrate's court. The said respondents add that Section 62 of the ACECA is not applicable to the petitioner because he was not a public officer at the time he was appointed to the said position.
 9. The 2nd respondent did not file any documents in opposition or support of the application but when the matter came for directions on 24-02-2025, Miss Kenduiwa for the 2nd respondent indicated to the court that it was not opposing the application.
 10. The 4th respondent filed a replying affidavit sworn on 27th January 2025 in which he averred that he was elected as the governor of Murang'a County on 4-03-2013 and re-elected on 8-08-2017 and during the two terms, he diligently served to the end. He confirms that he has already assumed office after he was appointed and has since chaired meetings of the interested party's board. He has annexed minutes of the board's meeting held on 15th January 2025. He avers that owing to his taking office, the application is moot and has been overtaken by events. He adds that the petitioner has not demonstrated any prejudice or irreparable harm, damage or injury suffered or likely to be suffered if the court does not grant the conservatory orders and to the contrary, he would suffer prejudice if he were to be suspended and the petition finally fails.
 11. The 4th respondent has averred further that reliance on pendency of the criminal case to issue orders prayed by the petitioner would violate his right to be presumed innocent as protected under Article 50 and 25 of the Constitution. He also contends that the application is an abuse of the court process as it seeks to litigate the criminal complaint through this petition and that there is no law that disqualifies him from appointment into a public office on account of pending criminal charges. He adds that his appointment was in accordance with Sections 10 and 11 of the Public Procurement and Assets Disposal Act and that the impeachment proceedings are irrelevant to this petition as he has never been impeached or removed from office through impeachment or in any other way.
 12. It cannot be a matter of debate that the Constitution of Kenya requires that those who serve in public offices must be persons of integrity. Principles of public service as defined in Article 232 of the Constitution call for high standards of professional ethics among other tenets and Sub-Article 2 thereof provides that the values apply to all state organs both in levels of government and all state corporations.
 13. Article 260 of the Constitution defines public officer to mean any state officer or any person, other than a state officer, who holds a public office. This is not the first time this issue is coming up for discussion in our courts. In Katiba Institute & another v Attorney General & another, Julius Waweru Karangi & 128 others (Interested Parties) (2021) KEHC 6781 (KLR) which has been cited by the 4th respondents, a three judges bench had opportunity to interrogate the question whether chairpersons and members of state corporations were public officers under Article 232 and 260 of the Constitution. The judges held for the second time as follows;

‘This issue is not new. It was the subject of this Court’s consideration and determination between the same Petitioners and respondents in *Katiba Institute & Another v Attorney*



General & Another, (Nairobi High Court Petition No. 331 of 2016) [2020] eKLR. The Petitioners in that petition are the same as in the present petition. The Respondents are also the same. Only some of the Interested Parties are different. Just like in that petition, the challenge here is directed at appointments of chairpersons and board members to Parastatals and State Corporations.

This Court considered the above issue, the Constitution and applicable statutes and made a determination that positions of chairpersons and board members in Parastatals and State Corporations are not offices in the public service. The Court applied a two pronged test. First, the definitional test under Article 260 of the *Constitution*, sections 2 of *Public Officer Ethics Act* and The *Public Service Commission Act*, and stated:

On the first test, we are of the considered view, that state corporations and parastatals are not offices in the public service, because they are neither offices in the national government nor county government as defined by the Constitution. The Constitution is also clear that to be a public service, there must be the collectivity of individuals who are performing a function within a commission, office, agency or other body established under the Constitution, except state officers. More importantly, state corporations and parastatals are not offices established under the Constitution.

The second test the court applied was that of remuneration. On this, the Court again considered the Constitution and in particular the requirement that remuneration and benefits of public officers be directly payable from the Consolidated Fund or out of money provided by Parliament. The court determined that the benefits payable to state corporations and parastatals are not drawn from the Consolidated Fund or from money directly provided by Parliament. the Court concluded:

Regarding remuneration and benefits, our reading of the law is that this is not directly drawn from the Consolidated Fund or directly provided by Parliament. Under section 11 of the *State Corporations Act*, state corporations are required to prepare and submit to the line minister and the Treasury for approval, yearly estimates of their revenue and expenditure accompanied by proposals for funding of the projects they are to undertake, or implement during the financial year. This is testimony to the fact that state corporations and parastatals generate their own revenue for expenditure, and their funding is not necessarily wholly provided for by Parliament.

The Court concluded, a view we still hold, that positions of chairpersons and members of boards of State Corporations and Parastatals are not offices in the public service. In arriving at this conclusion we are further guided by the decision of the Supreme Court in *Fredrick Otieno Outa v Jared Odoyo Okello & 4 others* [2014] eKLR, where the Court stated that the proper meaning of public officer is that the person concerned is either a State officer or any other person who holds public office within the national government, county government, or public service or, a person holding such an office is sustained in terms of remuneration and benefits, from the public exchequer.’

14. I have no reasons to depart from the above decision and I therefore agree with the 4th respondent that Section 62(1) of the *ACECA* is not applicable at this stage of the petition. This however does not mean that the court cannot consider the merits of the application in respect of the 4th respondent’s suitability to continue serving in the office in question pending the hearing and determination of the petition.



15. The respondent has submitted that the petitioner has not shown that he is likely to suffer any damage or injury if the application is not granted. This is a public interest litigation and as such the petitioner is not expected to show any personal interest in it or personal injury or damage. Article 3(1) of the Constitution dictates that every person has an obligation to respect, uphold and defend the Constitution and therefore the petitioner is within his rights and duties and has locus to bring and prosecute the petition. Article 258 of the Constitution also gives every person a locus to institute court proceedings claiming that the Constitution has been contravened or is threatened with contravention. The obvious interpretation of this is that in a constitutional petition on matters of public interest, the petitioner need not show that they have suffered person injury, damage or lose. In Bia Tosha Distributors Limited v Kenya Breweries Limited & 6 Others (2023) KESC 14 (KLR) the Supreme Court of Kenya held that;

‘Conservatory orders bore a more decided public law connotation: for those were orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, were not, unlike interlocutory injunctions, linked to such private-party issues as the prospects of irreparable harm occurring during the pendency of a case; or high probability of success’ in the applicant’s case for orders of stay.’

16. The petition seeks several declarations touching on the constitutional and statutory suitability of the 4th respondent in particular or any other person in general to hold a public office. Having gone through the petition, the supporting affidavit together with annexures thereto, I have come to a conclusion that the petition is not frivolous and raises substantial constitutional issues which needs to be interrogated in a full hearing.

17. That said, this court has to weigh the issue raised in the petition against the right of the 4th respondent. The Constitution sets standards for integrity of public officers and at the same time provides for rights of individuals which also need to be considered and to that end, a court of law cannot interpret or apply some Articles of the Constitution in isolation or exclusion of others. There is no Article or part of the Constitution that is more important than the others. The law is a cocktail of many desires and aspirations of the people touching on development, governance, delivery of services, socio-economic needs, security, social relations, justice, politics and many other aspects. It must therefore be seen to balance between all these areas while respecting the rights of the private citizens and the public interest. This is what the court will strive to do in this ruling

18. Whereas public interest is expected to take priority over private or individual interest, there are instances where the court should be careful that it does not sacrifice the fundamental rights of a person at the altar of public interest. In an application like this one, the court should look at what public interest may be compromised if the individual sought to be suspended were to remain in office in question pending the hearing and disposal of the petition. The keywords here is pending the hearing and determination of the petition and not pending the hearing and determination of the corruption case he is said to have been charged with. The latter should be a point of consideration in the main petition which I am not dealing with now. I am mindful that this is a ruling on an interlocutory application and I should not go into discussing the merits of the petition.

19. The petitioner has based his application on the alleged lack of integrity and unsuitability of the 4th respondent on four grounds. That is; he was impeached by the County Assembly of Murang’a, he was found by the Senate guilty of violation of the law and gross misconduct, he has been charged in corruption case number E012 of 2024, the 2nd respondent has an adverse report against him and that



he is facing forfeiture proceedings for Kshs 542 million in respect of embezzlement of public funds while he was serving as the Governor for Murang'a County.

20. I have gone through the documents said to have been the recorded proceedings of the Senate's Select Committee on the impeachment of the 4th respondent by County Assembly of Murang'a. The 4th respondent does not deny these proceedings or the results thereof. The position of law on impeachment is that the resolution of a County Assembly impeaching a Governor should be forwarded to the Senate and on adoption of the Assembly's resolution, the governor stands impeached. This means that unless the resolution of the County Assembly is adopted by the Senate, the impeachment would not have grounds to stand on and becomes null. It is effectively an acquittal. At page 115, the report of the Select Committee of the Senate which is the petitioner's annexure 1 shows that the committee did not recommend the 4th respondent's impeachment. The petitioner has said as much in paragraph 8 of his supporting affidavit.
21. The petitioner has also argued that the 4th respondent was found guilty of having violated the law and has quoted several pages of the report of the committee of the Senate which indicts the 4th respondent. It should be noted that for one to be declared unfit to hold public office, the acts said to constitute violation of the law must meet a threshold of gross violation or must have led to a conviction by the court or any other statutory or constitutionally mandated body. Without such a return, it would be unfair to hold that the 4th respondent is unsuitable to hold a public office at the interlocutory stage.
22. The petitioner has not exhibited the charge sheet in the corruption case number E012 of 2024 although the 4th respondent does not deny that he has been charged in the same. It was important that this court be supplied with at least particulars and details of the case especially that the same is said to have been originated by the 2nd respondent. It is not enough for the 2nd respondent to tell the court that it is supporting the application without giving details especially where the information and evidence supplied by the petitioner is not sufficient.
23. It is true that Section 62(1) of ACECA provides that a person who has been charged with a corruption related offence shall be suspended on half pay until the case is concluded. Even if I were to assume that the said Section applies to the 4th respondent, the position in this matter is that the 4th respondent was not in office when he was allegedly charged with the stated offences so the issue of suspension did not arise. The prayers sought in the application are not for suspension of the 4th respondent at half pay but halting of his appointment and in effect having the 4th respondent receive no pay or benefit at all. In that case the application cannot be said to be brought pursuant to the said Section as the prayers go beyond the parameters set by the Section.
24. It has not been shown that the 4th respondent as the chairman of the interested party draws a salary or allowances or both from the interested party. Section 62(2) of the ACECA provides that the public officer who is suspended under Section 62(1) shall continue to receive his allowances in full. For the petitioner to ask this court to stop all his benefits which to me includes allowances amounts to asking the court to oversee breach of the said subsection 62(2).
25. It has also been sated that the 4th respondent is facing forfeiture proceedings in respect of Kshs 542 million. The forfeiture proceedings are in law conducted in the name of the 2nd respondent meaning that if indeed the proceedings exist, the 2nd respondent should be having the details. Neither the petitioner nor the second respondent has favoured this court with pleadings of the same. The case number has not been disclosed either. In any event, I do not think that existence of forfeiture proceedings alone meets the threshold for suspending a public officer as a matter of integrity. If the Legislature intended so, nothing would have been easier than inserting a provision to that effect.



26. The 4th respondent may have integrity issues which needs to be considered but it is my opinion that suspending him in such circumstances would be tantamount to violating his rights to be presumed innocent until proven guilty. This is a court of law and should not be seen to be descending into the arena or mandate of the appointing authorities or the statutory vetting bodies. The court can only intervene where there is conclusive evidence of indictments on leadership and integrity values or clear violation of the law.
27. Having said the above, it is my finding and holding that whereas the petition discloses a prima facie case, there is no sufficient grounds for this court to grant the application. It is not enough for a petitioner to establish a prima facie case. He must go further and demonstrate that there will be further detrimental violation or threat to violation of constitutional rights or there is need to preserve the subject matter. In *Centre for Rights Education & Awareness (CREAW) & another v Speaker of the National Assembly & 2 others* (2017) KEHC 9419 (KLR) Justice Chacha Mwita held as follows;
- ‘A party who moves the Court seeking conservatory orders must show to the satisfaction of the Court that his or her rights are under threat of violation, are being violated or will be violated and that such violation, or threatened violation is likely to continue unless a conservatory order is granted. This is so because the purpose of granting a conservatory order is to prevent violation of rights and fundamental freedom and preserve the subject matter pending the hearing and determination of a pending cause or petition.’
28. I am alive to the fact that the petitioner in this matter is not claiming violation of his individual rights but violation of the constitutional duty of the appointing authority to ensure that the person appointed to the office in question meets the threshold of integrity. The petitioner and the 2nd respondent have given this court very scanty information and material which in my opinion are not sufficient to warrant giving conservatory orders sought by the petitioner. However, it is my considered opinion that in such circumstances, the petitioner must establish, identify and demonstrate the subject matter he desires to be preserved short of which the prayers should await the hearing of the main petition.
29. In view of the above analysis, I proceed to dismiss the application dated January 6, 2025 with no orders as to costs.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF APRIL 2025.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

