



**REPUBLIC OF KENYA**

**High Court at Nairobi (Milimani Law Courts)**

**Judicial Review 126 of 2013**

**REPUBLIC..... APPLICANT**

**VERSUS**

**1. CABINET SECRETARY RESPONSIBLE FOR  
LABOUR AND MICRO AND SMALL ENTERPRISES**

**2. PRINCIPAL SECRETARY RESPONSIBLE FOR  
LABOUR AND MICRO AND SMALL ENTERPRISES**

**3. THE ATTORNEY GENERAL OF THE REPUBLIC OF KENYA.....RESPONDENTS**

**EX PARTE**

**1. NELSON NG'ANG'A SUING AS THE SECRETARY  
OF THE NATIONAL ASSOCIATION FOR THE  
FINANCIAL INCLUSION OF THE INFORMAL SECTOR;**

**2. MATHEWS ASHERS OCHIENG SUING AS THE SECRETARY/CHIEF EXECUTIVE  
OFFICER OF PROUDLY**

**KENYAN.....SUBJECTS**

**JUDGEMENT**

1. By a Notice of Motion dated 29<sup>th</sup> April, 2013, the *ex parte* applicants herein seek the following orders:

**1 An order of certiorari do issue removing into remove into this Honourable Court for the purposes of being quashed the decision of the Minister for Labour, as then known, and contained in the gazette Notice No. 2934 dated 27<sup>th</sup> February, 2013 and published in the Kenya Gazette Notice No. 2934 dated 27<sup>th</sup> February, 2013 and published in the Kenya gazette of 8<sup>th</sup> March 2013 to appoint the following persons as members of the Board of the Micro and small Enterprise Authority:**

- **James Bwatuti**

- **John Kihiu**
- **Simon Sangale Nasieku**
- **Ruth Oniang'o**
- **Joan Mwangai**
- **Nahum Okwiya**
- **Joy Limo**
- **David Keli Kiilu**
- **Benjamin Nkungi**
- **Millicent A. Ogola**
- **Richard Nzioka Muteti**
- **Patrick K. Mwangi (Ag CEO);**

**2 That the costs of these proceedings be borne by the Respondents.**

**EX PARTE APPLICANT'S CASE**

2. The application is based on the Statement and Affidavit Verifying the Statement sworn by **Nelson Ng'ang'a**, the Secretary of the National Association for the Financial Inclusion of the Informal Sector, the 1<sup>st</sup> applicant herein.

3. According to the deponent, the 1<sup>st</sup> Applicant is registered under the **Societies Act**, Chapter 108 of the Laws of Kenya and as a society, the applicant has as its objects facilitation of business development of the informal, micro and small enterprises sector, provision of a platform for engagement by the informal, micro and small enterprises associations for effective achievement of their objectives, promotion and advocacy for the formulation and implementation of policies and programs affecting the informal and micro and small enterprises, among others. It is further deposed that the 1<sup>st</sup> applicant is an umbrella national association with membership of county associations throughout the country. Following the engagement and participation of the officials of the 1<sup>st</sup> applicant and other associations and interest groups, parliament enacted the **Micro and Small Enterprises Act, 2012** (hereinafter referred to as the Act) in December, 2012 and the Act came into force on 4<sup>th</sup> January, 2013. Pursuant to the enactment of the said legislation and its commencement, it is deposed that the 1<sup>st</sup> Respondent, then known as the Minister for Labour vide Gazette Notice No. 2240 dated 20<sup>th</sup> February, 2013 and published in the Kenya gazette of 22<sup>nd</sup> February, 2013 appointed the Chairman and Members of the Board and Acting Chief Executive Officer (Ag. CEO) of the Micro and Small Enterprises Authority established under the Act stating to be acting in exercise of the powers conferred upon him by section 30(1) of the said the Act. Subsequently, the 1<sup>st</sup> Respondent vide Gazette Notice No. 2934 dated 27<sup>th</sup> February 2013 and published in the Kenya Gazette of 8<sup>th</sup> March 2013 revoked the Gazette Notice No. 2240 dated 20<sup>th</sup> February, 2013 and published in the Kenya Gazette of 22<sup>nd</sup> February, 2013 appointed again the Members of the Board and Acting Chief Executive Officer (Ag. CEO) of the Micro and Small Enterprises Authority established under the Act leaving out the position of the chairperson of the Authority and again stating to be acting in exercise of the powers conferred upon him by section 30(1) of the said the Act.

4. According to the 1<sup>st</sup> applicant, and based on legal advice received from legal counsel, the 1<sup>st</sup>

Respondent has no power under section 30(1) of the Act to appoint the chairman of the Micro and small Enterprises Authority as he purported to do vide the earlier gazette Notice No. 2240 this power is reserved for the President of the republic of Kenya as he can only appoint members of the Board of the Micro and Small Enterprises authority duly nominated by specified national sectoral associations and organizations pursuant section 30(1) (g), (h), (i), (j) and (k) of the Act.

5. It is further deposed that the members appointed to the Board of the Micro and Small Enterprises Authority by the 1<sup>st</sup> Respondent vide the said Gazette Notice No. 2934 were not nominated by any association or organization under the Act for purposes of being appointed by the Minister as provided in the Act and that among the persons appointed by the 1<sup>st</sup> respondent as Members of the Authority, **James Bwatuti** is the chairman of Kenya National Federation of Jua kali Association and the Confederation of Informal Sector Organizations (CISO – Kenya) while **John Kihui** and **David Keli Kiilu** are members of CISO – Kenya and **Richard Nzioki Muteti** is the Chief Executive Officer of the Kenya National federation of Jua Kali Association and CISO – Kenya and accordingly the four belong to one organization.

6. To the applicant, the said appointments to the board of the Micro and Small Enterprises Act were done by the 1<sup>st</sup> Respondent unilaterally and without notice and or participation of the associations and organizations representing the micro and small enterprises in the country contrary to the mandatory provisions of the Act.

### **RESPONDENTS' CASE**

7. In opposition to the application the Respondents filed a replying affidavit sworn by **Patrick Keige Mwangi**, the Deputy Secretary in the Ministry of Labour on 7<sup>th</sup> May 2013 in which he deposed that the applicant herein did not participate in the process of the enactment of the said Act as it had not been registered and only participated as a rapporteur and that its registration was meant to secure funds as provided in High Court Petition No. 40 of 2012. According to the deponent the Chairman **Mr. Paul Billy Muhia Ngugi** was appointed by the President vide Gazette Notice No. 2902 published in the Kenya Gazette on 1<sup>ST</sup> March 2013 as provided under the Act and that the appointment of the ,members of the Authority involved participation and the representation by various groups with the Minister having received nominations from various categories as per the law and considering the National values and Principles set out in Chapter 10 of the Constitution. According to the deponent, the appointees were nominated by various stakeholders. It is further deposed that the Chairman of the 2<sup>nd</sup> applicant has disowned the institution of these proceedings claiming that the same have been instituted by the applicants in their own personal capacities hence the CEO of the 2<sup>nd</sup> applicant is acting without the 2<sup>nd</sup> applicant's authority.

8. In the deponent's view, the right procedure was followed to appoint the Members of the Authority and the process was a legal and lawful hence the orders sought are not tenable. It is deposed that as was held in Nairobi High Court Petition No. 40 of 2012, the Minister has no obligation to consider the 1<sup>st</sup> applicant for consultation regarding the appointments since his previous conduct in relation to the Micro and Small Enterprises Sector is questionable. It is further deposed that there is no requirement that the appointment of the Chairman of the Board be subjected to public scrutiny before assuming office since the Act clearly states that the appointment is by the President, hence the application lacks merits and should fail.

9. To the deponent, the Minister acted within his lawful authority and did not misdirect himself in appointing the Members of the said Board. To him public interest must override the private or individual interests of the applicants in judicial review hence the individual interests of the applicants cannot hold the operations of the whole sector. As the applicants have misled the Court, it is the deponent's view that they do not deserve the court's sympathy hence the orders sought should not be granted. It is further deposed that the application is an abuse of the court process and does not warrant judicial review remedies as the applicants have no justiciable case against the Respondents.

10. On 3<sup>rd</sup> May 2013, with a view to expediting the hearing of the matter, I directed the applicants to

file and serve submissions on or before 10<sup>th</sup> May 2013 while the Respondents were to file and serve submissions on or before 14<sup>th</sup> May 2013. However, by the time of writing this judgement, none of the parties had filed their submissions.

## **DETERMINATIONS**

11. I have considered the foregoing. Although the applicants allege that the Chairman of the Board was appointed by the Minister and not the President, the alleged Gazette Notice appointing the Chairman is not part of the record. Accordingly the Court is unable to find who between the Minister and the President appointed the Chairman in light of the contention by the Respondents that the appointment was done by the President.

12. On the issue of lack of consultation by the Minister, in **Republic vs. The Attorney General & Another ex parte Hon. Francis Chachu Ganya, Nairobi High Court (Judicial Review Division) Miscellaneous Application No. 374 of 2012**, I expressed myself as follows:

**“One of the issues raised in these proceedings is that the ex parte applicants were not consulted before the decision affecting them was made. It is not in dispute that under Article 10 of the Constitution the national values and principles of governance bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets this Constitution, enacts, applies or interprets any law or makes or implements public policy decisions. It is also true that under Article 10(2) of the Constitution, national values include participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised and good governance, integrity, transparency and accountability. Participation of the people necessarily requires that the information be availed to the members of the public whenever public policy decisions are intended and the public be afforded a forum in which they can adequately ventilate their views. This requirement is also to be found in section 13(2)(b) of the *Trust Land Act* which provides that “the Council shall bring the proposal to set apart the land to the notice of the people concerned, and shall inform them of the day and time of the meeting of the Divisional Board at which the proposal is to be considered”. In *Republic vs. Ministry of Finance & Another Ex Parte Nyong’o Nairobi HCMCA No. 1078 of 2007 (HCK) [2007] KLR 299*, the Court held:**

**“Good public administration requires a proper consideration of the public interest. There is considerable public interest in empowering the public to participate in the issue. It ought to be the core business of any responsible Government to empower the people because the government holds power in trust for the people. People’s participation will result in the advancement of the public interest. Good public administration requires a proper consideration of legitimate interests.”**

**Once public participation is attained and the decision making authority after considering the views expressed makes a decision, the issue whether or not such decision ought to have been made, can no longer be a subject of judicial review since the decision is no longer questionable on the process of arriving thereat but can only be questioned on the merits and that is not within the realm of judicial review. In the replying affidavit filed by the interested party there are minutes of meetings involving the local administrative authorities, members of the community, councillors and the interested party. Whereas the adequacy and extent of the participation of the community in the said meetings and in the decision making process may be challenged, that challenge, in my view would go to the merits rather than to the process that was followed.”**

13. In this case the Respondents have annexed copies of the letters indicating that there were nominations carried out by certain bodies and it is not contended by the applicants that the said bodies were not entitled to make recommendations for appointment of the persons appointed. The mere fact that the applicant’s views did not carry the day in the said appointment is not a ground for quashing the said appointments since having received the nominations the discretion was left to the appointing authority to make the final determination and that discretion cannot be interfered with unless it is shown that the same was abused.

14. Apart from that it is clear that the appointees were not made parties to these proceedings. That the orders sought herein are likely to adversely affect them if granted is not in doubt. Accordingly, by granting the orders sought herein the Court would be contravening the provisions of Article 50(1) of the Constitution which provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

**ORDER**

15. In the result the Notice of Motion dated 29<sup>th</sup> April 2013 lacks merits and the same is dismissed with costs to the respondents.

**Dated at Nairobi this 3<sup>rd</sup> day of June 2013**

**G V ODUNGA**

**JUDGE**

Delivered in the presence of **Mr Oluoch** for the ex parte applicants and **Ms Sirai** for the Respondent