

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. E492 OF 2024

**ERIC KITHINJI
MWITI.....PETITIONER**

VERSUS

**PHILIP MAINGA.....
RESPONDENT**

AND

**ETHICS AND ANTI-CORRUPTION COMMISSION....1ST
INTERESTED PARTY**

**KENYA RAILWAYS AUTHORITY BOARD OF
DIRECTORS.....2ND
INTERESTED PARTY**

R U L I N G

Introduction

1. The Petitioner a human rights defender, in the Petition dated 20th September 2024, asserts that the Respondent herein has been engaging in illegal and irregular activities in his tenure as the Chief Executive Officer (CEO) of Kenya Railways Authority.

2. Particularly, he alleges that the Respondent has engaged in irregular procurement procedures and making fictitious

payments for land compensation in the Datuto/Dafur Settlement Scheme.

3. In addition, the Petitioner claims that the Respondent is also involved in embezzlement of public funds and corruption in violation of Chapter six of the Constitution. For this reason, the Petitioner seeks the following reliefs against the Respondent:

- a) A declaration that the Respondent has violated the principles enshrined in Articles 10, 73 and 232 of the Constitution.**
- b) A declaration that the continued stay in office of the Respondent as the Chief Executive Officer of Kenya Railways Authority is against the public interest.**
- c) An order of mandamus, directed to the Public Service Commission to declare the position vacant and to conduct a fresh interview and appointment of the CEO of the Kenya Railways Authority.**
- d) An order of mandamus, compelling the Interested Party to criminally investigate and, if culpable, instruct the Director of Public Prosecutions, to criminally prosecute the Respondent for his flagrant breach of the law.**
- e) A declaration be issued that the Respondent is unfit to hold any other public office because he has grossly violated the**

Constitution and other laws, and is guilty of gross misconduct.

- f) An order of injunction be issued restraining the Kenya Railways Authority from paying any compensation for land registered as LEASE NO. NAIROBI/BLOCK125/2157.**
- g) The Court be pleased to exercise its powers under Article 23(3) of the Constitution, to issue any other appropriate relief.**
- h) An order that the Respondent do pay the costs of this Petition.**

4. The Respondent in rejoinder filed his Notice of Preliminary Objection dated 26th January 2025 on the ground that:

- i. The Court lacks jurisdiction to remove or interfere with the tenure of the Managing Director of Kenya Railways Corporation, as such powers are vested exclusively in the Cabinet Secretary in consultation with the Board under Section 5 and Schedule 1 of the Kenya Railways Corporation Act and the Employment Act.**
- ii. The Petition improperly seeks to compel the 1st Interested Party herein to criminally investigate the Applicant contrary to Article 249 which vests the EACC with the requisite powers and autonomy to conduct its functions and it's not subject to direct control by any authority.**
- iii. The Petition improperly seeks to compel the Director of Public Prosecutions (DPP) to institute criminal proceedings, contrary to Article 157 of the Constitution, which**

guarantees the independence and discretion of the DPP.

- iv. The Petition seeks to restrain Kenya Railways from paying compensation for land registered as Lease No. NAIROBI/BLOCK 125/215 despite matters concerning land acquisition/ compensation falling under the jurisdiction of the Land Acquisition Tribunal and the Environment and Land Court as provided under the Land Act. This Court is therefore not the appropriate forum for disputes relating to land.***
- v. The Application improperly seeks to circumvent statutory processes and invites the Court to assume functions expressly reserved for other entities, contrary to the principle of separation of powers.***

Interested Parties

- 5. There were no responses or submissions to the Respondent's Notice of Preliminary Objection by the Interested Parties in the Court file or Court Online Platform (CTS).

Respondent's Submissions

- 6. The Respondent through his Counsel, G.K. Muturi and Company Advocates filed submissions dated 4th June 2025 in support of his Preliminary Objection. Counsel set out the issues for discussion as: *whether this Court has jurisdiction to remove or interfere with the tenure of the Respondent; whether this Court has jurisdiction to deal with matters concerning land acquisition or compensation; whether this*

Court has jurisdiction to compel the 1st Interested Party to criminally investigate the Respondent as prayed and whether this Court has jurisdiction to compel the Director of Public Prosecutions to institute criminal proceedings.

7. Counsel stated that the Respondent's Preliminary Objection challenges this Court's jurisdiction, as the Petition raises matters that are outside its constitutional and statutory jurisdiction. Reliance was placed in **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696** where it was held that:

"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit."

8. Like dependence was placed in **Owners of Motor Vessel "Lillian S" -Versus- Caltex Oil Kenya Limited (1989) KLR 1.**
9. On the first issue, Counsel submitted that this Court cannot interfere with the tenure of the Respondent as his ouster can only be done by the Cabinet Secretary as is provided under Section 5(1) of the Kenya Railways Corporation Act. Further Counsel notes that the Act in its First Schedule at Paragraph 2 sets out clear grounds on which one can be removed from office by the Cabinet Secretary. Counsel noted that

additional provisions on such a removal are also set out in State Corporations Act and the Mwongozo Code of Governance for State Corporations.

10. Counsel submitted that while the Petition does not particularly challenge the Respondent's appointment, it seeks to impugn acts allegedly committed by the Respondent during his tenure and thus on that basis, invites this Court to grant orders that would culminate in his removal. In this regard, Counsel stressed that the proper statutory provisions should be adhered to.
11. Consequently, Counsel argued that the Petition through this Court seeks to improperly bypass the established mechanisms under the Kenya Railways Corporation Act and the State Corporations Act. Counsel argued as such that it was not feasible for this Court to arrogate itself the power to remove a public officer from office in absence of the statutory provided due process.
12. Reliance was placed in **Okoti v Cabinet Secretary, Industry, Trade and Co-operatives & 13 others; Kenya Bureau of Standards [2022] KEELRC 1416 (KLR)** where it was held that:

"It is trite that the jurisdiction of a court or tribunal is derived from the Constitution, statute, or by principle laid out in judicial precedent."

13. Like dependence was placed in **Samuel Kamau Macharia vs Kenya Commercial Bank & 2 Others [2012] eKLR, Mary Munyuli Luseka v Brand Kenya Board; Cabinet Secretary, Ministry of Industry, Trade and Cooperatives (Interested Party) [2021] eKLR, Fred A. Odhiambo v Attorney-General & Another [2013] eKLR** and **Judicial Service Commission v Speaker of the National Assembly & Another [2013] eKLR**.
14. On the second issue, Counsel submitted that this Court lacks jurisdiction to adjudicate on the Petitioner's claim on the irregular compensation payments for L.R. No. Nairobi/Block 125/2157 within the Datuto/Dafur Settlement Scheme. This is since the dispute involves compulsory land acquisition and compensation which is vested in the Land Acquisition Tribunal under Section 133A of the Land Act. Counsel additionally noted that the Act provides that where a party is grieved by the Tribunal's finding they can appeal to the Environment and Land Court.
15. Reliance was placed in **Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 Others [2015] eKLR** where it was held that:

"The Constitution is not meant to short-circuit the normal procedures for dispute resolution. It ought not to be used as a general substitute for all causes of action when suitable remedies exist elsewhere in law."

16. Like dependence was placed in **Gabriel Mutava & 2 Others v Managing Director Kenya Ports Authority & Another [2016] eKLR.**
17. Moving to the third issue, Counsel submitted equally that this Court cannot compel the 1st Interested Party, an independent constitutional Commission to execute its mandate. To buttress this point reliance was placed in **Agoro & 2 others v Ethics & Anti-Corruption Commission & 4 others [2024] KEHC 7955 (KLR)** where it was held that:

“EACC being an independent commission is not under the control of any person and or organ in the exercise or performance of its mandate. The court will also not compel the Commission to act except where it is demonstrated that, actions or omissions by the Commission amount to violation of the Constitution or law... It bears repeating that the real purpose of the “independence clause”, with regard to Commissions and independent offices established under the Constitution, was to provide a safeguard against undue interference with such Commissions or offices, by other persons, or other institutions of government’ (SC, in Re The matter of Interim Independent Electoral Commission [2011] eKLR). The independence proclaimed of Commissions, is a shield from influence or interference with the Commission in any form or shape not authorized by law...”

18. Comparable dependence was placed in **Musyoka v Ethics & Anti-Corruption Commission & 2 Others [2021]**

KEHC 534 (KLR) and Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR.

19. Comparatively, Counsel submitted that this Court is barred by the Constitution from directing the DPP as envisaged under Article 157 of the Constitution. Reliance was placed in **MN (suing as the mother and the next friend of CW) v Director of Public Prosecutions; Geoffrey Werumbe (Interested Party) [2019] eKLR** where it was observed that:

“The court cannot compel the office of the Director of Public Prosecutions to carry out its functions which have been conferred upon it by the Constitution unless it is shown that the office violated the Constitution.”

20. To this end, Counsel submitted that the Petition offends the doctrine of constitutional avoidance as guided in **Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others [2014] eKLR** as the dispute can be resolved under ordinary legislation or specialized statutory mechanisms.

Petitioner’s Submissions

21. The Petitioner through Gikunda and Miriti and Company Advocates filed submissions dated 26th May 2025. Counsel highlighted the issues for discussion as: *whether this Court has jurisdiction to remove/interfere with the tenure of the Managing Director of Kenya Railways Corporation, whether*

the Petition improperly seeks to compel the 1st Interested Party herein to criminally investigate the Applicant contrary to Article 249 of the Constitution, whether the Petition improperly seeks to compel the DPP to institute criminal proceedings and whether a Petitioner can seek to restrain Kenya Railways from paying compensation for land registered as a leasehold through a Court Petition.

22. On the first issue, Counsel submitted that the Constitution under Article 165(3)(d) of the Constitution grants this Court the power to hear and determine questions touching on the interpretation of the Constitution and the legality of the actions of public officials and bodies. Further, Article 47 of the Constitution as read with the Fair Administrative Actions Act allows individuals to challenge administrative decisions that are unreasonable, unfair or not procedurally fair. For this reason, Courts are granted power to review such decisions under judicial review.

23. In this regard, Counsel submitted that the Respondent's argument was misguided as the Kenya Railways Authority being a public body and Managing Director office being held in public trust, they are expected to perform their duties in accordance with the Constitution, otherwise their actions are amenable to challenge before this Court under Article 165(3) (d) of the Constitution.

24. On the second issue, Counsel submitted that while it is accurate that this Court cannot compel independent bodies like the 1st Interested Party to perform their mandate, the Court can intervene to compel it to discharge its duty, where it is evident that it has abdicated its responsibilities, acted in bad faith or made decisions that are irrational, arbitrary or contrary to public interest. Counsel noted that Article 35 and 47 of the Constitution and the Anti-Corruption and Economic Crimes Act provide a statutory framework for holding administrative bodies accountable.
25. Moreover, Counsel submitted that the Courts have affirmed their authority to intervene when a public institution fails to fulfill a statutory obligation as held in **Trusted Society of Human Rights Alliance v Attorney General & Others (2012) eKLR.**
26. Comparable dependence was placed in **Mohamed Ali Baadi & Others v Attorney General & 11 Others (2018) eKLR, R v Commissioner of Police ox parte Nicholas Gitutu (2004) eKLR** and **Kenya Human Rights Commission v NonGovernmental Organizations Co-ordination Board (2016) eKLR.**
27. A similar argument was made in the next issue. Counsel reiterated that the Petitioner cannot also compel the DPP to

perform his mandate unless it can be shown that he abdicated his constitutional mandate or acted contrary to the Constitution. Counsel pointed out that while discretion to prosecute lies with the DPP, judicial review can be invoked in the face of manifest injustice or abuse of power as held in **Mohamed Gulam Hussein Fazal Karmali & Another v Chief Magistrate's Court Nairobi & Another [2006]eKLR.**

28. In the final issue, Counsel submitted that it is thus plausible for the Petitioner to seek a Court Order restraining Kenya Railways Corporation where it is made manifest that there are constitutional violations and where statutory mechanisms are inadequate or unavailable as it is the case in this Petition.

Analysis and Determination

29. It is my considered opinion that the issues that arise for determination herein are:

*i. **Whether the Respondent's Preliminary Objection is merited.***

30. The essential characteristics of a Preliminary Objection were laid down in the celebrated case of **Mukisa Biscuit**

Manufacturers Ltd -vs- Westend Distributors Ltd, (1969) EA 696 page 700 where the Court stated thus:

'So far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit, to refer the dispute to arbitration.

A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop.'

31. Likewise, the Court in **Dismas Wambola v Cabinet Secretary, Treasury & 5 others [2017] KEHC 8777 (KLR)** observed as follows:

"...a preliminary objection may only be raised on a "pure question of law." To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.

In law, a question of law, also known as a point of law, is a question that must be answered by applying relevant legal principles to

interpretation of the law. Such a question is distinct from a question of fact, which must be answered by reference to facts and evidence as well as inferences arising from those facts.”

32. Furthermore, the Court in **Nthia v Kenyatta University** [2025] KEHC 13220 (KLR) summarized as follows:

“24. Going by the case law on what a Preliminary Objection entails, one deduces that a proper Preliminary Objection is identifiable by depiction of the following four major characteristics:

- i. Must be on a pure point of law and not a contest of facts;***
- ii. it is argued on assumption that what is pleaded by the opposite side is correct;***
- iii. cannot be raised if any fact has to be ascertained by evidence or if what is sought is an exercise of judicial discretion;***
- iv. If successful, it must be capable of disposing of the entire suit.”***

33. The instant Preliminary Objection is primarily based on the ground that the Court is being invited to assume jurisdiction in matters that it ought to exercise restraint as intervention would amount to interference in matters within the competence of other public bodies or such as the power to *remove the Managing Director of Kenya Railways Corporation, compelling EACC to criminally investigate the Respondent, compelling the DPP to institute criminal proceedings and/or stopping Kenya Railways from paying*

compensation for land registered as Lease No. NAIROBI/BLOCK 125/215.

34. The Respondent contends that *the Petition is aimed at circumventing laid down statutory processes and procedures by inviting the Court to assume the specific primary mandate expressly reserved for other public entities.*
35. In opposing the Preliminary objection, the Petitioner countered that Article 165(3)(d) of the Constitution gives this Court the jurisdiction to intervene when a public body and public office holder acts contrary to the dictates of the Constitution or when constitutional bodies such as the 1st Interested Party and DPP abdicate their constitutional responsibilities.
36. In my considered view, the Respondent's Preliminary Objection primarily raises issues directed at the Court's assumption of jurisdiction, that is whether the Court has the requisite capacity to consider the grant the reliefs sought in this Petition.
37. In raising the issues, the Respondent does not provide any contrary factual position but only that he argues that given the facts as they are, this Court is legally incapable of assuming jurisdiction on the matter without transgressing on the established principles in Constitutional litigation. Being a

jurisdictional issue, I thus find that the issues raised are pure points of law as if successful, they may dispose of the petition.

38. The Supreme Court in **Benson Ambuti Ambega & 2 Others v Kibos Distillers Limited (2020) eKLR** emphasizing on the need for the Court to respect the Constitutional mandates of Public bodies or organs explained thus:

“[51] Judicial abstention, as with judicial restraint, is a doctrine not founded in constitutional or statutory provisions, but one that has been established through common law practice. It provides that a Court, though it may be vested with the requisite and sweeping jurisdiction to hear and determine certain issues as may be presented before it for adjudication, should nonetheless exercise restraint or refrain itself from making such determination, if there would be other appropriate legislatively mandated institutions and mechanism...”

39. Applying the same principle, the High Court in the case of **Law Society of Kenya v Attorney General & Another; National Commission for Human Rights & Another (Interested Parties) (2020) eKLR** held as follows:

“...Where the Constitution has reposed specific functions in an institution or organ of the State, the Court must give those organs sufficient time or leeway to discharge their constitutional mandate and only accept an invitation to

intervene when those organs or bodies have demonstrably been shown to have acted contrary to their constitutional mandate or in contravention of the constitution...”

40. The substratum of the present Petition are allegations that the Respondent has violated the principles under Article 10, 73 and 232 of the Constitution of Kenya by adopting unlawful and irregular procurement procedures as the Chief Executive Officer of Kenya Railways Authority, has conspired to make fictitious land payments in compensation claims, and is generally involved in embezzlement of public funds and corruption in violation of Chapter Six of the Constitution.
41. Article 79 provides for enactment of legislation for the establishment of the Ethics and Anti-Corruption Commission which shall have the powers and status of a Commission under Chapter 15 for purposes of ensuring compliance with, and enforcement of, provisions of Chapter Six of the Constitution. The Ethics and Anti-Corruption Act states as follows in its preamble:

“An Act of Parliament to establish the Ethics and Anti-Corruption Commission pursuant to Article 79 of the Constitution, to provide for the functions and powers of the Commission, to provide for the qualifications and procedures for the appointment of the chairperson and members of the Commission, and for connected purposes.”

42. **Article 80 of the Constitution** empowers Parliament to enact the Leadership and Integrity Act which it did. **Article 80 (b)** provides that the said legislation shall prescribe the penalties, in addition to penalties referred to in Article 75, that may be imposed for contravention of this Chapter. **Article 80 (c)** provides that the Act will also apply to public officers with necessary modification, hence it is not restricted to state officers as public officers such as the Respondent are included. The preamble to the **Leadership and Integrity Cap 185A** provides that it is ***'An Act of Parliament to give effect to, and establish procedures and mechanisms for the effective administration of Chapter Six of the Constitution and for connected purposes.***
43. The definition of "**Commission**" under Section 2 of the Act is that it means the ***Ethics and Anti-Corruption Commission established under the Ethics and Anti-Corruption Commission Act.***
44. The guiding principles are specified under Section 3 of the Act. Section 3 (1) provides that the primary purpose of the Act is to ensure that State officers respect the values, principles and requirements of the Constitution and at subsection 2 outlines them as follows:

(2)A State officer shall respect the values, principles and the requirements of the Constitution, including—

- (a) the national values and principles provided for under Article 10 of the Constitution;
- (b) the rights and fundamental freedoms provided for under Chapter Four of the Constitution;
- (c) the responsibilities of leadership provided for under Article 73 of the Constitution;
- (d) the principles governing the conduct of State officers provided for under Article 75 of the Constitution;
- (e) the educational, ethical and moral requirements in accordance with Articles 99(1)(b) and 193(1)(b) of the Constitution;
- (f) in the case of county governments, the objectives of devolution provided for under Article 174 of the Constitution; and
- (g) in so far as is relevant, the values and principles of Public Service as provided for under Article 232 of the Constitution.

45. In Section 4 (1) the Act states:

'Every person has the responsibility of implementing the provisions of this Act to the extent required by this Act' but the body that has been specifically designated to oversight the implementation is the Ethics and Anti-Corruption Commission. This is pursuant to Section 4 (2).

46. Under Section 4 (3) and 4 (4) in the performance of that mandate, the Ethics and Anti-Corruption Commission may; require any public body to carry out such functions and exercise such powers as may be necessary under the Act and where the public entity fails to comply, then the Commission may make an application to the High Court Judge for appropriate orders requiring the public entity to comply.
47. This Petition alleges that the Respondent actions violated the values and principles required of public officers by the Constitution. It means that going by the provisions of Leadership and Integrity Act as read with Article 80 of the Constitution, the body that the Petitioner ought to have raised this complaint with in the first instance ought to have been the Ethics and Anti-Corruption Commission as it is the one with the primary mandate to oversight public officers on matters of values and principles of governance under Chapter 6 of the Constitution.
48. The Petitioner argues that under the Constitutional framework, he can seek to have the court compel Ethics and Anti-Corruption Commission (EACC) to investigate a public official where the Commission has abdicated this responsibility. In the instant case, the Petitioner has not pleaded that he lodged any complaint with EACC against the Respondent prior to filing this Petition or even pleaded that

EACC has neglected to investigate after filing the complaint with it.

49. It was therefore premature for the Petitioner institute this Petition before giving the Ethics and Anti-Corruption Commission an opportunity to carry out an exhaustive inquiry into the allegations of breach of Chapter Six of the Constitution by the Respondent. He wants this Court issue an order of mandamus compelling EACC to criminally investigate and instruct the Director of Public Prosecution to prosecute the Respondent for the flagrant breach of the law yet he has not presented any incriminating information against the Respondent to the EACC for preliminary assessment in the first place.
50. This Court is constitutionally bound to accord deference to coordinate branches of government or public bodies charged with responsibility to execute specific legal mandates and its jurisdiction can only be properly invoked where there is demonstration that the public body has failed or neglected to carry out the legal obligation thereby causing prejudice to any person or the public.
51. It is clear the intervention of this Court is being sought in a matter which specifically falls under the mandate of the Ethics and Anti-Corruption Commission yet the petitioner has not given EACC that opportunity to deal with the matter in

the first instance but wants this Court to intrude and direct EACC on the matter. This a perfect case to invoke the doctrine of judicial abstention which allows this Court to refrain from overstepping its judicial authority so to allow the proper functioning of other government organs or bodies. The Petition is therefore struck out.

52. Considering it is public interest litigation, I make no orders as to costs.

Dated, signed and delivered virtually at Nairobi this 31st day of October, 2025.

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L N MUGAMBI
JUDGE