



REPUBLIC OF KENYA



Cabinet Secretary, Ministry for the National Treasury and Economic Planning & another v Mamo & 13 others (Civil Appeal E143 of 2024) [2025] KECA 770 (KLR) (9 May 2025) (Judgment)

Neutral citation: [2025] KECA 770 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL E143 OF 2024
DK MUSINGA, MSA MAKHANDIA & M NGUGI, JJA
MAY 9, 2025**

BETWEEN

**THE CABINET SECRETARY, MINISTRY FOR THE NATIONAL TREASURY
AND ECONOMIC PLANNING 1ST APPELLANT
ATTORNEY GENERAL 2ND APPELLANT**

AND

**MOLU JILLO MAMO 1ST RESPONDENT
HARO GUYO AKOLA 2ND RESPONDENT
KIRIGHA MWANYASI 3RD RESPONDENT
ELYAS SHEIKH ABDINOOR 4TH RESPONDENT
PATRICK MUIRURI 5TH RESPONDENT
PARTICK MUCHOKI 6TH RESPONDENT
RUTH CHARITY WANYONYI 7TH RESPONDENT
BARBARA KAWIRA JAPAN 8TH RESPONDENT
ROBLEY OTIENO NGOJE 9TH RESPONDENT
SAMWEL KARIUKI MAINA 10TH RESPONDENT
CHRISTINE KIBET 11TH RESPONDENT
BEATRICE KONES 12TH RESPONDENT
KENYA NATIONAL HUMAN RIGHTS AND EQUALITY
COMMISSION 13TH RESPONDENT
LAW SOCIETY OF KENYA 14TH RESPONDENT**



(Being an appeal from the judgment and decree of the High Court at Nairobi (L. N. Mugambi, J.) dated 19th January, 2024) in Nairobi High Court Petition No. 2 of 2023)

JUDGMENT

1. The judgment of the High Court impugned in this appeal arose from a petition by the 1st -5th respondents, Molu Jillo Mamo, Haro Guyo Okola, Kirigha Mwanyasi, Elyas Sheikh Abdinoor and Patrick Muiruri, challenging the revocation of their appointment as board members of the Local Authorities Provident Fund Board (hereafter ‘the Board’).
2. The petition was initially filed before the Employment and Labour Relations Court (the ELRC). It was, however, transferred to the Constitutional and Human Rights Division of the High Court pursuant to a ruling of the ELRC dated 17th March 2023, where the court held that it did not have jurisdiction as the petition was in respect of board members of the Local Authorities Provident Fund Board, who are not employees as defined in section 2 of the *Employment Act*.
3. In their petition and the affidavits in support thereof, the 1st -5th respondents averred that they had been appointed members of the Board pursuant to section 5 of the *Local Authorities Provident Fund Act*. With regard to their respective appointments to the Board, the 1st -5th respondents averred that:

the 1st respondent was appointed through Gazette Notice No. 6382 and was given a letter of appointment on 21st June 2022; the 2nd -4th respondents’ appointments were through Gazette Notice No. 10642, and that they received their appointment letters on 14th December 2021. The 5th respondent received his letter of appointment on 25th October 2021. They averred that their appointments to the Board was for a term of three years.
4. It was the 1st -5th respondents’ averment further that in violation of their constitutional rights, the 1st appellant herein, the Cabinet Secretary, Ministry for The National Treasury and Economic Planning, revoked their appointments on 6th February 2023 by Gazette Notice No.1407 Vol. CXXV – No. 30; that by this Gazette Notice, the 2nd respondent was replaced with the 12th respondent, Beatrice Kones, appointed as a new Board member for a term of 3 years; and that through Gazette Notice No.2871 Vol. CXXV – No.57 dated 6th March 2023, the 1st appellant revoked the appointment of the 2nd -5th respondents and appointed in their place the 6th -11th respondents.
5. The 1st -5th respondents averred that they were neither issued with notice of impending revocation of their appointment nor were they given reasons for the revocation; that they were not given a hearing to establish their suitability to hold office, and the revocation of their appointment was contrary to the provisions of the Local Authorities Provident Fund Board Charter on vacation of office, specified under paragraph 4.1.8 which sets out the grounds for removal from the Board; that they had not been convicted of any criminal offence or sentenced to a term of imprisonment exceeding six months or a fine exceeding Kshs. 2000; nor were they found to have engaged in gross misconduct or incapable of performing their duties as Board members.
6. The 1st -5th respondents’ case therefore was that the revocation of their appointment was irregular, unlawful and in violation of their rights; was a departure from, among others, the constitutional tenets of good governance provided for in Articles 10(2) and 73(2)(d) of *the Constitution* which require leaders to be accountable to the public for their actions; and Article 236(b) with regard to the right of a public officer not to be removed from office, demoted in rank or otherwise subjected to a disciplinary



process without the due process of the law. They therefore sought from the court, in their Amended Petition dated 11th April 2023, the following substantive orders:

- i. A Declaration do issue from this Honourable Court that pursuant to Article 47 of *the Constitution* of Kenya, Section 4 of the *Fair Administrative Action Act* (No. 4 of 2015) the 1st Respondent is mandated to give prior and adequate notice accompanied with written reasons before revocation of any appointment of the Board Members of the Local Authorities Provident Fund.
 - ii. A declaration do issue from the Honourable Court that the 1st Respondent's action of publishing Gazette Notice No. 1407 Vol. CXXV-No. 30 dated 6th February 2023 and Gazette Notice No. 2871 Vol. CXXV-No. 57 dated 6th March 2023 purporting to revoke the petitioners' appointment as Board Members of the Local Authorities Provident Fund violated the Petitioners' constitutional rights and the law as enshrined under Article 28, 47 and 236 of *the Constitution* of Kenya and Section 4 of *Fair Administrative Action Act* (No. 4 of 2015).
 - iii. An order of certiorari do issue to bring into this Court and quash the purported Gazette Notice No. 1407 Vol. C: XXV-No. 30 dated 6th February 2023 and Gazette Notice No. 2871 Vol. C: XXV-No. 57 dated 6th March 2023 purporting to revoke the petitioners' appointment as Board Members of the Local Authorities Provident Fund.
 - iv. A permanent injunction restraining the Respondents, their representatives, employees, servants and/ or agents or anybody working under them from purporting to appoint any other person to replace the Petitioners as Board Members of the Local Authorities Provident Fund at least for the remainder of the petitioners' term.
 - v. General Damages for the violation of the petitioners' constitutional rights.
7. The appellants opposed the Amended Petition through an affidavit sworn on 7th June 2023 by the then Cabinet Secretary for the Treasury, Prof. Njuguna Ndung'u. While still challenging the jurisdiction of the High Court to hear the matter, asserting that it fell within the jurisdiction of the ELRC, the appellants substantially agreed with the factual basis of the Amended Petition as set out in the 1st -5th respondents' affidavits.
 8. Prof. Ndung'u averred that the petitioners (the 1st -5th respondents) were appointed as part of the eight Board members through Gazette Notice No.10642 for a term of three years with effect from 6th October 2021; that on 7th and 8th February 2022, two members of the Board resigned to pursue political interests in line with the directive by the Head of the Civil Service in Circular No.OP.CAB/39/1A dated 28th January 2022, which resulted in vacancies in the Board; that one of these vacancies was filled through the appointment of the 1st respondent by Gazette Notice No.6382 dated 3rd June 2022; and that subsequently, pursuant to Gazette Notice No.1407 issued on 10th February 2023, the 2nd respondent's appointment was revoked and he was replaced by the 12th respondent.
 9. Prof. Ndung'u confirmed that the appointments of the 1st, 3rd, 4th and 5th respondents were revoked through Gazette Notice No.2871 dated 6th March 2023; and that they were replaced by the 6th -12th respondents.
 10. He asserted that in revoking the appointments and making new appointments, he acted within the powers conferred by the relevant Act to appoint the members of the Board; and that the Act allows the President to issue directions for removal of Board members where it appears that the Board has failed to carry out its functions, notwithstanding any provisions in any other law or the Articles of Association establishing the Board. He contended that the appointments were made in good faith, and



that no evidence had been provided to demonstrate that he flouted any law in the manner he made the appointments to the Board.

11. Prof. Ndungu contended that issuing the orders sought in the petition would be prejudicial to the public as they would lead to halting the operations of the Board and, as a consequence, of the Fund. Further, that issuing the orders would be in vain as the 6th -12th respondents had been sworn in and were already in office.
12. On their part, the 6th -12th respondents, the interested parties before the trial court, each filed an affidavit, similar in content, in opposition to the Amended Petition. They also filed joint grounds of opposition dated 20th April 2023 in which they asserted, among other things, that the 1st- 5th respondents had not demonstrated with precision how their fundamental rights and freedom under *the Constitution* had been violated or threatened as required under Article 22(1) of *the Constitution*; and that the Amended Petition did not disclose any constitutional violation by the appellants or the 6th -12th respondents.
13. The 6th- 12th respondents' averments in opposition to the Amended Petition as set out in their affidavits sworn on 31st May and 2nd and 5th June 2023, respectively, were that they were members of the Local Authorities Provident Fund Board established under section 5 of the *Local Authorities Provident Fund Act*; that neither the Act nor the *State Corporations Act* provide procedures for appointment and the government had therefore established the Code of Governance for State Corporations (MWONGOZO) to ensure compliance with Article 10 and 27 of *the Constitution*; that clause 1.1 (10) and (11) of the Code provides that Board members of state corporations are to be appointed by the Cabinet Secretary of the parent ministry through a Gazette Notice; and that the 6th -12th respondents had been appointed through Gazette Notices numbers 1407 dated 6th February 2023, Volume CXXV - No. 30 and No. 2871 dated 6th March 2023, Volume CXXV- No. 57.
14. According to these respondents, section 51 of the *Interpretation and General Provisions Act* provides that the power to appoint includes the power to suspend, dismiss and to reappoint; and that, accordingly, the 1st appellant was within his power when he issued the Gazette Notices revoking the appointment of the 1st -5th respondents. They contended therefore that the Amended Petition had no merit, and urged the trial court to dismiss it.
15. Upon considering the respective cases of the parties, the trial court found that, contrary to the appellants' contentions, it had jurisdiction to hear and determine the Amended Petition in accordance with Articles 22 and 165 of *the Constitution*. It further found that the Amended Petition was properly before it as a constitutional petition, and that the petitioners did not need to approach the court by way of judicial review. The court further held that the Amended Petition met the requirements of a constitutional petition, and that it disclosed and demonstrated the constitutional violations by the 1st appellant alleged by the 1st -5th respondents. The court concluded that the 1st appellant was bound by constitutional provisions in exercising powers under the *Local Authorities Provident Fund Act*, and his actions were in violation of Articles 10, 47, 73 and 236 of *the Constitution*.
16. It was the Court's finding further that both the provisions of *the Constitution* and the Fair Administrative Actions Act incorporate the principle of reasonableness and procedural fairness in administrative actions; and that the requirement of prior notice, reasons for the decision and providing an opportunity to be heard are key defining standards of a reasonable and procedurally fair administrative action. It further held that the expectation of the 1st - 5th respondents to serve their 3 -year term was cut short abruptly, which was a breach of the legitimate expectation that they had, and that premature revocation of their appointments without notice contravened section 4 of the Fair



Administrative Actions Act. The trial court therefore allowed the Amended Petition and issued the orders impugned in this appeal.

17. In their memorandum of appeal dated 23rd February 2024, the appellants raise eleven grounds of appeal against the decision of the trial court. They contend that the trial judge misdirected himself on the law and facts pleaded, drew issues not canvassed in the petition, and failed to analyse relevant issues, thus arriving at a wrong decision; erred in issuing a conservatory order by way of a permanent injunction against the appellants for the remainder of the term; failed to appreciate that where, by law, a power or duty is conferred upon a person to make appointments, constitute a board, commission or committee, then, unless a contrary intention appears, such person shall have the power to remove, suspend, dismiss or revoke the appointment; erred by acting in a matter not properly filed before the court; lacked jurisdiction to act in the matter; purported to remodel a statutory instrument on purported grounds of giving greater efficacy to the instrument, thereby going against the doctrine of separation of powers; erred in allowing a petition on the basis of untested and inadmissible evidence; and erred in shifting the burden of proof to the appellants. They ask this Court to allow the appeal and set aside the judgment of the trial court.
18. At the hearing of the appeal, learned counsel, Mr. Thande Kuria, appeared with Mr. Paul Nyamodi for the appellants; Mr. Kinaro for the 1st to 5th respondents; Mr. Mumia for the 6th to 12th respondents; while Mr. Mulandi Ambrose appeared for the 14th respondent.
19. In the submissions dated 12th March 2024 highlighted by learned counsel, Mr. Kuria and Mr. Nyamodi, the appellants submitted that the High Court failed to appreciate that appointment to the Board was regulated by statute and that the 1st appellant had the absolute discretion under section 7(3) of the *State Corporations Act* to appoint the respondents to the positions that they held. Further, that under section 51 of the *Interpretation and General Provisions Act*, the person bestowed with the statutory power to appoint also has the power to revoke such appointment.
20. The appellants further relied on Article 132(3) of *the Constitution* and the decisions in *Pharmaceutical Manufacturing (K) Co Ltd & 3 others v Commissioner General of Kenya Revenue Authority & 2 others* [2017] eKLR and *Kenya Revenue Authority & another v Republic (ex parte) Kenya Nut Company Limited* [2020] eKLR to support their contention that contrary to the finding of the trial court that the 1st-5th respondents' legitimate expectation to remain on the Board for the period of three years had been violated by the revocation of their appointment, the doctrine of legitimate expectation has to be founded on certain legal foundations. The appellants further relied on the decision of the Supreme Court of India in *B.P. Singhal v. Union of India and Another* (2010) 6 SCC 331 at 352] *State of U.P. v U.P. State Law Officers Association* [(1994) 2 sec 204] for the proposition that as the appointments of the respondents were made on considerations other than merit and there exists no provision to prevent such appointments, and in the absence of guidelines regarding appointments, the appointments may be made purely on personal or political considerations, and revocation could therefore be done without due process.
21. Counsel further cited Article 133 of *the Constitution* and section 7(3) of the *State Corporations Act* to submit that power under the said section belongs to the President and may be exercised by the Cabinet Secretary. Further, that as the appointing authority, the 1st appellant has the sole discretion to remove the appointees from office.
22. With respect to the question of jurisdiction, it was submitted for the appellants that the High Court wrongly assumed jurisdiction in a matter that was not filed before it; that the ELRC, a court of concurrent jurisdiction, had no power to transfer the matter to the High Court; and that if a court makes the decision that it has no jurisdiction, then the only order that it can make is an order for



- dismissal. Counsel asserted that the High Court should not have assumed jurisdiction, and the ELRC, instead of transferring the matter to the High Court, should have dismissed it for want of jurisdiction.
23. In further submissions for the appellants, Mr. Nyamodi argued that the lynchpin of the appellants' appeal was ground 9, in which they challenged the finding of the trial court that the 1st - 5th respondents' constitutional right to fair administrative action was violated. The appellants submitted that this finding was made without any evidentiary basis; and that the court erred by enforcing the right as though the right was an absolute right. Mr. Nyamodi submitted that the court erred in finding that neither section 5 of the Local Government *Provident Fund Act* nor the provisions of the *State Corporations Act* limit in any way the application of Article 47 of *the Constitution*; and that in making this finding, the trial court was incorrect.
 24. The reasons advanced for this argument were, first, that the Local Government *Provident Fund Act*, promulgated on 6th July 1960, and the *State Corporations Act*, promulgated on 1st of November 1986, are statutes or legislation in effect within the meaning of section 7 of the Sixth Schedule to *the Constitution*. Mr. Nyamodi submitted therefore that section 5 of the *State Corporations Act* and the provisions of the Local Government *Provident Fund Act* are limitations to the 1st - 5th respondents' right under Article 47; and that section 7 of the Sixth Schedule to *the Constitution* creates not just the ability but places an obligation on a court interpreting existing legislation to interpret it in a manner that renders it consistent with *the Constitution*.
 25. It was submitted further that the drafters of *the Constitution* were clear that not all legislation in existence at its promulgation will conform with *the Constitution*; that had the trial court applied or construed those provisions in light of section 7 of the Sixth Schedule, it would have found that the provisions identified in the Local Government *Provident Fund Act* and the *State Corporations Act* were limitations to the right guaranteed under Article 47 as it is not absolute.
 26. According to Mr. Nyamodi, there are practical reasons for this argument: that the 1st to the 5th respondents are appointees, not employees, and the relationship between them and the appointing authority is one of an owner and a steward; that they are merely appointees to look after the interests of the public through the appointments that they are given; and that it would be impractical if, with the thousands of appointments that the government makes, it would have to give notice and reasons upon termination, and therefore it would be impractical and impossible to make those public appointments. Learned counsel cited the case of Republic v The Attorney General ex parte Steven Roqui Wanye [2016] eKLR and Kenya Magistrates and Judges Association v The Judges and Magistrates Vetting Board [2014] eKLR with respect to the ability of the court to 'read in' words into legislation. He submitted that the trial court should have 'read in' the words necessary to render those two provisions as exceptions or limitations to the right in Article 47 on appointments, and dismissed the petition.
 27. Mr. Mumia, for the 6th - 12th respondents, highlighted their submissions dated 28th March 2024, which echo the appellants' submissions. Mr. Mumia submitted that once the ELRC found that it had no jurisdiction to hear the Amended Petition, it could not take any other step, and the petition before the High Court was nullity ab initio. Counsel cited the case of Equity Bank Ltd. v Bruce Mutie Mutuku [2016] eKLR to submit that this Court had determined that a transfer of matters between courts was not possible.
 28. Regarding the revocation of the appointment of the 1st - 5th respondent, learned counsel echoed the submissions of the appellants with respect to the power of the 1st appellant to appoint and revoke such appointments. He submitted that by its decision, the trial court had revoked the appointments of the 6th - 12th respondents and reinstated the 1st - 5th respondents; that it would have been better if the court



had reverted the duty back to the appointing authority, the 1st appellant, who, under the law, has the power to make those appointments.

29. Counsel further relied on the case of Independent Policing Oversight Authority & another v the Attorney General G & 660 others [2014] eKLR in which the court held that a power to recruit included a power to cancel the recruitment, in accordance with section 51 of the *Interpretation and General Provisions Act*. Counsel cited section 24(1) of the Interpretation Act of Canada to submit that words authorizing appointment of public officers to hold office during pleasure include the authority to terminate an appointment. The 6th -12th respondents urged this Court to allow the appeal and set aside the decision of the trial court.
30. The 1st to 5th respondents filed submissions dated 19th April 2024 in opposition to the appeal. In highlighting these submissions, Mr. Kinaro contended that the 1st appellant's power to hire and fire contained in section 51 of the *Interpretation and General Provisions Act* does not reflect the new dispensation under Article 236 (b) of the 2010 Constitution. Further, that Article 236 (b), coupled with Article 47 of *the Constitution*, are very clear on what due process entails; that contrary to the argument by the appellants that the 1st appellant can remove non-performing officers, the 1st -5th respondents had, in their pleadings before the trial court, indicated that they were removed without any reason; that they were, as a result, subjected to public humiliation, with the public left to speculate on why they were removed, which was contrary to *the Constitution* that demands dignity, protected by *the Constitution*, for an individual.
31. Mr. Kinaro conceded that the 1st -5th respondent were appointed to the Board without any reasons for their appointment thereto being assigned. To the question, then, why the 1st appellant should assign reasons for their removal from the Board, learned counsel submitted that Article 10 of *the Constitution* demands accountability; that while there was no accountability in their appointment, under Article 236, they acquired certain rights once they were appointed as Board members; that they became public officers by dint of their appointment under Article 236. Counsel cited the decision in Abel Odhiambo Onyango & another v Cabinet Secretary Ministry of Health & 2 other [2014] eKLR in which the court held that the power to appoint and remove must be exercised in accordance with the provisions of *the Constitution* and must not be exercised in a manner that violates a person's rights. It was the 1st -5th respondents' submission that having been appointed and acquired rights under Article 236, they were entitled to a fair process.
32. To the question whether the 1st -5th respondent could claim legitimate expectations given the manner of their appointment, counsel maintained that Article 10 of *the Constitution* breathes life to the issue of accountability; that large amounts of public resources are used to train board members, and the State cannot be allowed to remove Board members and replace them as it wishes at the expense of public resources. Counsel relied for this submission on Speaker of the Senate & Another vs Hon. Attorney General & 3 Others Advisory Opinion Reference No. 2 of 2013 [2013] in which the Supreme Court described the 2010 Constitution as a 'progressive charter' and, accordingly, the 1st appellant could not be allowed to appoint and revoke the appointment of Board members at will, without being accountable to anyone.
33. With regard to jurisdiction and whether the ELRC could properly transfer the petition to the High Court, Mr. Kinaro submitted that the appellants did not challenge the decision to transfer; that they were now attempting to appeal against the decision through the back door, which this Court should not allow. The 1st -5th respondents noted that under rule 8(1) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013, a court may order a petition



to be transferred to another court of competent jurisdiction. It was their submission therefore that the trial court properly exercised jurisdiction over the matter.

34. In submissions dated 19th April 2024 highlighted by Mr. Mulandi, the 14th respondent also opposed the appeal. While associating himself with the submissions made on behalf of the 1st -5th respondents, Mr. Mulandi referred to the decision of this Court in *Daniel N. Mugendi v Kenyatta University & 3 others* [2013] eKLR with respect to the question of jurisdiction to transfer the petition. Learned counsel urged the Court to dismiss the appeal, contending that there are no sufficient grounds to deviate from the decision of the trial court.
35. In submissions in reply, Mr. Nyamodi contended that contrary to the submissions by the 1st – 5th respondents, Article 236 of *the Constitution* does not apply to them as they are not public officers within the meaning of Article 236 of *the Constitution*. He submitted that the 1st – 5th respondents were appointees; that there was no competitive process of recruitment for their appointment, and the provisions of Article 236 only apply to those members of the public service who are under the purview of the Public Service Commission established by this Constitution.
36. We have considered the record of appeal and the respective submissions of the parties. As this is a first appeal, we are under a duty to re-evaluate the evidence presented before the trial court and to reach our own conclusion- see *Selle & Another v. Associated Motor Boat Co. Ltd & Others* [1968] EA 123 and *John Teleylo Ole Sawoyo v David Omwenga Maobe* [2013] eKLR.
37. As we observed earlier in this judgment, the factual basis of the 1st- 5th respondents' case before the trial court is not disputed. They had been appointed as members of the Board on diverse dates and their appointments placed in the Kenya Gazette. They had also been given letters indicating their appointments to the Board, their respective terms to run for a period of 3 years from the date of appointment. They were, however, removed from the Board by Gazette Notices revoking their appointments and appointing the 6th -12th respondents in their place. Their contention is that the revocation of their appointments was unlawful and unprocedural; that it was carried out in violation of *the Constitution* and the Fair Administrative Actions Act; that it violated their rights under Article 47 and 236 of *the Constitution*; and that it was in violation of their legitimate expectation that they would serve in the Board for a period of 3 years.
38. The appellants did not dispute that the 1st -5th respondents were indeed members of the Board, and that they were removed as they contended, without notice or reasons for their removal given. The appellants' case, however, is that the 1st appellant had the power, under section 5 of the Local Government *Provident Fund Act* and section 51 of the *Interpretation and General Provisions Act*, to appoint and revoke the appointments; and that he did not need to give the 1st -5th respondents a hearing before revoking their appointment as their appointment to the Board was not merit based. Additionally, that the 1st-5th respondents were not public officers as defined in *the Constitution*, and Article 236 of *the Constitution* did not therefore apply to them. Consequently, according to the appellants, a position supported by the 6th -12th respondents, the actions of the 1st appellant were not in violation of *the Constitution*.
39. In light of these conflicting positions, we take the view that this appeal turns on the determination of three issues, two of which are closely interlinked. The first is whether the trial court had jurisdiction to hear and determine the Amended Petition. The second issue, which goes to the substance of the appeal, is whether the trial court erred in finding that the 1st -5th respondents established violation of their rights under Article 47 and 236 of *the Constitution*, and of their legitimate expectation to serve on the Board for the full term of three years. The final issue, which is, in a sense, the converse of the second issue, is whether the trial court erred in finding that the 1st appellant acted in violation of *the Constitution*



in revoking the appointment of the 1st – 5th respondents and appointing the 6th -12th respondents to the Board.

40. We begin by considering the question of jurisdiction. It is settled law that a court can only determine a matter in which it has the requisite jurisdiction. In the famous words of Nyarangi, JA. in the case of *Owners of The Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] KECA 48 (KLR):

“Jurisdiction is everything. Without it, a court has no power to make one more step. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

41. The appellants argue that the trial court did not have the requisite jurisdiction to hear and determine the Amended Petition as it had not been filed before it. They make the argument, which is supported by the 6th - 12th respondents, that the ELRC did not have jurisdiction to transfer the petition to the High Court; that once the ELRC determined that it did not have jurisdiction, it should have downed its tools and struck out the petition. The response from the 1st - 5th respondents, supported by the 14th respondent, is that the ELRC properly transferred the petition to the High Court in accordance with the provisions of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 (the ‘Mutunga Rules’), which allow the transfer of constitutional petitions from one court to another.

42. We have considered the respective positions of the parties on this issue. The appellants and the 6th- 12th respondents have referred us to several decisions which they argue represent the correct position with regard to the power of the ELRC to transfer the Amended Petition, which had been filed before it, to the High Court. They cite the decision in *Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour & Travel* (supra) where the appeal before this Court emanated from a decision of the High Court ordering the transfer to itself of a suit filed before the Kwale Principal Magistrates’ Court. In allowing the appeal in which the appellant argued that the High Court had no jurisdiction to order the transfer, this Court stated as follows:

“In numerous decided cases, courts, including this Court have held that it would be illegal for the High Court in exercise of its powers under Section 18 of the *Civil Procedure Act* to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow a court to transfer an incompetent suit for want of jurisdiction to a competent court would be to muddle up the waters and allow confusion to reign. It is settled that parties cannot, even by their consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where it lacks, parties cannot even seek refuge under the “O2” principle or the overriding objective under the *Civil Procedure Act*, the *Appellate Jurisdiction Act* or even Article 159 of *the Constitution* to remedy the situation. In the same way, a court of law should not through what can be termed as judicial craftsmanship, sanctify an otherwise incompetent suit through a transfer.”

43. The appellants also referred us to the decisions in *Phoenix of E.A Assurance Company Limited vs. S. M. Thiga t/a Newspaper Service* [2019] eKLR; *Joseph Muthee Kamau & Another v. David Mwangi Gichure & Another* (2013) eKLR and the Supreme Court decision in *Mumba & 7 others (Sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Munyao & 148 others (Suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya*



Ports Authority Pensions Scheme) (Petition 3 of 2016) [2019] KESC 83 (KLR) (8 November 2019) (Judgment).

44. In these decisions, the respective courts were unanimous in their conclusion that courts have no jurisdiction to transfer suits filed before courts without jurisdiction to courts of competent jurisdiction. These decisions, in our view, represent the correct position in law, on their respective facts. The suits at issue had been filed before courts without jurisdiction: in the first two, before Principal Magistrates' Courts. In the matter before the Supreme Court, as the Supreme Court found, the matter had been filed in the High Court and transferred to the ELRC, both of which had no jurisdiction in the matter in light of the provisions of the *Retirement Benefits Act*.
45. The above decisions are all distinguishable from the facts in the present matter, which was a constitutional petition filed before the ELRC and transferred to the High Court. Rule 3 of the Mutunga Rules provides that the Rules shall apply to all proceedings brought under Article 22 of *the Constitution*. The 1st -5th respondents' petition before the ELRC was brought under, inter alia, Article 22 of *the Constitution*, which provides that '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.' Rule 8 of the Mutunga Rules provides that:
1. Every case shall be instituted in the High Court within whose jurisdiction the alleged violation took place.
 2. Despite sub rule (1), the High Court may order that a petition be transferred to another court of competent jurisdiction either on its own motion or on the application of a party." (Emphasis added)
46. These provisions of the Mutunga Rules, contained in *Legal Notice No. 117 of 2013*, were enacted on 28th June 2013, soon after the decision of this Court in *Daniel N. Mugendi v Kenyatta University & 3 others* (supra) in which this Court stated as follows:
- "Believing as we do that the approach taken by Majanja, J. is the correct one, and in endeavouring to meet the ends of justice untrammelled by procedural technicalities, we set aside the order striking out the appellant's petition and direct that the High Court do transfer it to the Industrial Court which also has jurisdiction and authority to consider the claims of breach of fundamental rights as pertain to industrial and labour relations matters. It is only meet and proper that the Industrial Court do exclusively entertain those matters in that context and with regard to Article 165(5)(b). And in order to do justice, in the event where the High Court, the Industrial Court or the Environment & Land Court comes across a matter that ought to be litigated in any of the other courts, it should be prudent to have the matter transferred to that court for hearing and determination. These three courts with similar/equal status should in the spirit of harmonization, effect the necessary transfers among themselves until such time as the citizenry is well-acquainted with the claim. (Emphasis added).
47. There is thus binding jurisprudence from this Court and Rules made by the Chief Justice in compliance with the constitutional directions under Article 22(3) that expressly grant the High Court and, by extension, courts of equal status, jurisdiction to transfer petitions filed under Article 22 to courts of competent jurisdiction. We thus determine the first issue in the affirmative: the trial court had the jurisdiction to hear and determine the Amended Petition even though it had not, initially, been filed before it.



48. We consider, next, the second and third intertwined issues. The appellants have contended that the trial court erred in finding that the 1st -5th respondents had established violation of their rights under Article 47 and 236 of *the Constitution*, and of their legitimate expectation to remain on the Board for the full term of three years indicated in their letters of appointment. Tied to this is the question whether the trial court erred in finding that the act of the 1st appellant in revoking the appointment of the 1st – 5th respondents and appointing the 6th -12th respondents to the Board was in violation of *the Constitution*.
49. In reaching these conclusions, the court held that both *the Constitution* and the Fair Administrative Actions Act incorporate the principle of reasonableness and procedural fairness in administrative actions; that key defining standards of a reasonable and procedurally fair administrative action include prior notice and reasons for the decision, as well as providing an opportunity to be heard. The court found that all administrative action is required to conform to these constitutional and statutory benchmarks unless there are specific limitations in accordance with Article 24. The court further found that neither section 5 of the Local Government *Provident Fund Act* nor the *State Corporations Act* limit in any way the application of Article 47 of *the Constitution*. Accordingly, any public officer making an administrative decision under the said Acts was fully bound by the provisions of Article 47, in line with the requirement of Article 3 (1) of *the Constitution*. Further, that such officer was bound to act in accordance with the national values and principles of governance set out in Article 10 of *the Constitution*, which include human dignity, rule of law, good governance, transparency and accountability.
50. In challenging these findings, the appellants contended before us that the appointments of the 1st -5th respondents were not based on merit; that the President and the 1st appellant have power, in accordance with section 51 of the *Interpretation and General Provisions Act*, to appoint and revoke the appointment of any person. They referred to a decision of the Supreme Court of India in *In the matter of B.P. Singhal v. Union of India and Another* (2010) 6 SCC 331 at 352] *State of U.P. v U.P. State Law Officers Association* [(1994) 2 sec 204] in which the Court held that:
- “The appointments may, therefore, be made on considerations other than merit and there exists no provision to prevent such appointments. The method of appointment is indeed not calculated to ensure that the meritorious alone will always be appointed or that the appointments made will not be on considerations other than merit. In the absence of guidelines, the appointments may be made purely on personal or political considerations, and be arbitrary. This being so those who come to be appointed by such arbitrary procedure can hardly complain if the termination of their appointment is equally arbitrary. Those who come by the back door have to go by the same door... Such appointments are made, accepted and understood by both sides to be purely professional engagements till they last ... ”
51. In an argument premised on the above holding, learned counsel, Mr. Nyamodi, submitted that section 5 of the Local Government Fund Act and section 7 of the State Corporation Act, enacted several decades prior to the promulgation of the 2010 Constitution, must be read as constituting limitations on the constitutional right to fair administrative actions guaranteed under Article 47. This argument, we find, would upend the constitutional intent in section 7 of the Sixth Schedule to *the Constitution*, and flies in the face of express constitutional provisions. The section provides that ‘All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.
52. To state the obvious, it is legislation predating *the Constitution* that must be construed with the ‘alterations, adaptations, qualifications and exceptions’ required to make it conform with the



constitutional imperatives under the 2010 Constitution. As the trial court found, appointments to public office in Kenya, and removal therefrom, must accord with constitutional values and principles contained in Articles 10 and 47 of *the Constitution*.

53. We are therefore satisfied that the trial court properly found that the 1st appellant exercised power arbitrarily in revoking the appointment of the 1st to 5th respondents from the Board. The manner of their removal, we find, was not in accord with the provisions of Article 47 or 236 of *the Constitution*. We make this finding because, in our view, once an appointment is made under the Local Government *Provident Fund Act* or the *State Corporations Act*, the holders of such offices, who have a duty to act on behalf of the public, administer public resources and are remunerated from public funds, become public officers as defined in Article 260 of *the Constitution*.
54. While the 1st appellant, and the President, do have power to appoint and revoke such appointments, they have to do so in accordance with the constitutional principles set out in Article 10, 47, 236 and Chapter 6 of *the Constitution*. We therefore find that the High Court properly reached the conclusion that the 1st appellant, in the manner of revoking the appointment of the 1st – 5th respondents without notice and without giving reasons for the revocation, violated their rights under Article 47 and 236 of *the Constitution*.
55. Having so found, we next deal with the question whether, in revoking the appointments, the 1st appellant violated the 1st – 5th respondents' legitimate expectation that they would remain on the board for the three-year period set out in their letters of appointment. The appellants made the argument, which was not challenged by the 1st -5th respondents and we are satisfied that it is a valid argument, that the appointment of the 1st -5th respondent to the Board was not based on merit. They were appointed to the Board for no discernible reason. In other words, as the appellants suggest, their appointment was at the pleasure of the appointing authority.
56. In those circumstances, can they argue that the appointment created a legitimate expectation that they would remain on the Board for the duration of their term? The appellants have referred us to, among others, the decision in *Pharmaceutical Manufacturing (K) Co Ltd & 3 others v Commissioner General of Kenya Revenue Authority & 2 others (supra)*. In this decision, this Court considered various judicial pronouncements with respect to the doctrine of legitimate expectations and concluded as follows:

“The combined effect of the decisions...is that before a person can rely on the doctrine of legitimate expectation, that person must demonstrate that there was an express, clear and unambiguous promise; that the promise was not kept; that as a result, the decision made in breach of that promise affected him by depriving him of some benefit or advantage which either;

- i. he had in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do and until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or
- ii. he has received assurance from the decision maker that they will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn.
- iii) The expectation must itself be legitimate, reasonable and not contrary to the express provisions of the law.”



57. This Court went on to quote HWR Wade & C. F. Forsyth in Administrative Law, 10th Edn (2009) p. 449 that:

“It is not enough that an expectation should exist; it must in addition be legitimate. But how is it to be determined whether a particular expectation is worthy of protection” This is a difficult area since an expectation reasonably entertained by a person may not be found to be legitimate because of some countervailing consideration of policy or law.”

58. In the present case, it seems to us that the only legitimate expectation that the 1st -5th respondent could have had, which is grounded in law and *the Constitution*, is that their removal from the Board, should it occur before the expiry of the three year term indicated in their letters of appointment, would be done in accordance with the provisions of Article 47 and 236 of *the Constitution*, as well as the Fair Administrative Actions Act, including their being given notice and reasons for the removal. Once this is done, they cannot expect more: their appointment was on the basis of opaque political or other considerations; they acquire some rights as public officers under Article 47 and 236 upon assuming their roles on the Board; but they cannot, given the manner of their appointments, expect more.

59. We have found that the 1st -5th respondents were not given notice or reasons for the revocation of their appointment, which was in violation of their rights under Article 47 and 236(b) of *the Constitution*. However, given the manner of their appointment, they did not have a legitimate expectation to remain on the Board for the term indicated in their letters of appointment. We are persuaded, therefore, that the trial court erred in finding that the 1st -5th respondents’ legitimate expectation to serve for the 3-year term indicated in their letters of appointment was violated.

60. As we have found in response to the issues identified above, the trial court properly found that: it had jurisdiction to hear the 1st - 5th respondents’ Amended Petition; the 1st -5th respondents had established breach of their rights under Articles 47 and 236 of *the Constitution*; in revoking the appointment of the 1st -5th respondents’ appointment to the board, the 1st appellant acted in violation of Articles 10, 47 and 236 of *the Constitution*.

61. It is our finding however, that the trial court erred in finding that the 1st appellant breached the 1st -5th respondents’ legitimate expectation that they would remain on the Board for the term of three years set out in their letters of appointment. To this limited extent the appeal succeeds.

62. In light of our findings above, we direct that each party bear its own costs of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF MAY, 2025.

D.K MUSINGA (PRESIDENT)

.....
JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....
JUDGE OF APPEAL

MUMBI NGUGI

.....
JUDGE OF APPEAL



I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.

