



Mboya v Mbithi & another; Chief of Staff & Head of Public service & 4 others (Interested Parties) (Petition E032 of 2025) [2025] KEELRC 1338 (KLR) (9 May 2025) (Ruling)

Neutral citation: [2025] KEELRC 1338 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION E032 OF 2025

B ONGAYA, J

MAY 9, 2025

IN THE MATTER OF ARTICLES 2, 19, 20(1-4), 21(1) & (3), 22(1) & (2)(B) & (C), 23(1) & (3), 27, 28, 41(1) & (2)(B), 47, 48, 50(1), 73, 75, 159, 162(2)(A), 165(3)(B), 232, 258(1) & (2)(B) & (C) AND 259(1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTION 5(3) OF THE STATE CORPORATIONS ACT, CAP 446

AND

IN THE MATTER OF THE EMPLOYMENT ACT, 2007.

AND

IN THE MATTER OF EAST AFRICAN PORTLAND CEMENT COMPANY

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES

AND

IN THE MATTER OF CONTRAVENTION OF NATIONAL VALUES AND PRINCIPLES OF GOVERNANCE UNDER ARTICLE 10, THE PRINCIPLE OF LEADERSHIP AND INTEGRITY UNDER ARTICLE 73, AND THE VALUES AND PRINCIPLES OF PUBLIC SERVICE UNDER ARTICLE 232 OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

APOLLO MBOYA PETITIONER

AND

BRIGADIER (RTD) RICHARD MBITHI 1ST RESPONDENT

EAST AFRICA PORTLAND CEMENT COMPANY PLC 2ND RESPONDENT



AND

CHIEF OF STAFF & HEAD OF PUBLIC SERVICE INTERESTED PARTY
**CABINET SECRETARY, MINISTRY OF INDUSTRY, TRADE &
INVESTMENTS INTERESTED PARTY**
THE ATTORNEY GENERAL INTERESTED PARTY
BRUNO OGUDA OBODHA INTERESTED PARTY
MOHAMED OSMAN ADAN INTERESTED PARTY

(Before Hon. Justice Byram Ongaya on Friday, 9th May 2025)

RULING

1. The petitioner filed the notice of motion application dated 03.04.2025 through Apollo & Company Advocates. He seeks the following orders:
 - i. (...Spent.)
 - ii. That pending the hearing and determination of the application inter partes and determination of the suit, the Honourable Court be pleased to issue temporary injunction restraining the 1st, 2nd respondents and 5th interested party, their agents, servants and employees or proxies from disposing off any assets of East Africa Portland Cement Company PLC.
 - iii. That costs of the application be in the cause.
2. The application was made upon the grounds set out therein and supported by the affidavit of the petitioner, who urged as follows:
 - a. That the 1st, 2nd respondents and 5th interested party are in the process of disposing the land assets of East Africa Portland Cement Company PLC and obtained rates clearance certificates for the Land Reference No. 10424 for plots numbers 5/8/9/10/11/12/1314/1516/17/18/19/20/21.
 - b. That the 1st, 2nd respondents and 5th interested party have published Annual Report and Financial Statements for the year ended 30.06.2024, confirming the intention to dispose the land assets of East Africa Portland Cement Company PLC.
 - c. That in the said Annual Report and Financial Statements for the year ended 30.06.2024, the 5th interested party refers to himself as Acting Managing Director of East Africa Portland Cement Company PLC.
 - d. That the assets of East Africa Portland Cement Company PLC are in danger of being irregularly alienated by an imposter masquerading as the acting managing director unless the orders are granted.
3. The 2nd respondent filed their replying affidavit sworn by Roselyne Ominde on 16.04.2025 through Adrian Kamotho Njenga & Company Advocates. They stated as follows:
 - i. Disposal of assets, specifically land, by a public body such as the 2nd respondent herein is governed by the provisions of the Public Procurement and Asset Disposal Act, the Land Act



and the Rules and Regulations therein. Equally, any dispute, grievances, right or breach arising from such a disposal is to be governed by the *Land Act, Environment and Land Court Act* (ELC Act) as read together with the *Public Procurement and Asset Disposal Act* (PPAD Act) and the Rules and Regulations therein.

- ii. The ELC Act and the PPAD Act provide for the Environment and Land Court (ELC) and the Public Procurement Administrative Review Board (PPARB), respectively, to hear and determine any dispute, grievance, right or breach that arises from land disposal by a public body. Consequently, any dispute or grievance arising from the sale of the land parcel reference numbers 10424 for plots 5/8/9/10/11/12/1314/1516/17/18/19/20/21 should be referred to the ELC and the PPARB.
 - iii. The Honourable Court has jurisdiction under Article 162(2) (a) of *the Constitution* of Kenya, as read together with Section 12 of the *Employment and Labour Relations Court Act* (ELRC Act), to hear and determine disputes relating to employment and labour relations. Given that the dispute in the notice of motion dated 03.04.2025 revolves around the disposal of land, the Honourable Court lacks jurisdiction to hear and determine the said application.
 - iv. Without prejudice to the aforementioned, the 2nd respondent further urged that the disposal of the impugned land was proposed by the Board of Directors of the 2nd respondent and approved by the 2nd respondent's members during the general meeting. That the 1st and 2nd respondents and the 5th interested party have continuously ensured compliance with the provisions of the PPAD Act, *Land Act* and Rules and Regulations therein during the process of disposal. The 5th interested party was appointed the 2nd respondent's Managing Director (MD) vide a letter of appointment dated 12.02.2025, from when he has held and performed the duties of the said position. Since the aforementioned appointment he has neither been terminated as per the terms of the Contract dated 12.02.2025, nor revoked, annulled or terminated by a court of law, the 5th interested party is the duly appointed MD of the 2nd respondent. The 5th interested party, therefore, has the capacity and authority to perform the duties of the said office and is not a masquerader as alleged by the applicant herein.
 - v. The applicant has not in any way outlined any breach, violation and contravention occasioned by the 1st and 2nd respondents and the 5th interested party during the disposal of the impugned land. The application dated 03.04.2025 is frivolous, fictitious, scandalous, and an abuse of the court process and should be dismissed.
4. The 5th interested party filed a preliminary objection dated 23.04.2025 through Hashim & Lesaigor Associates. He objected on the ground that the Honourable Court lacks jurisdiction to hear and determine the notice of motion application dated 03.04.2025, in the light of the provisions of Article 162(2)(b) of *the Constitution* of Kenya, 2010 as read together with the provisions of Section 13(1) and (2) of the ELC *Act, No. 19 of 2011*, as the subject matter relate to alleged sale of land registered in the name of 2nd respondent. He thus prayed that the instant application dated 03.04.2025 be struck out with costs in favour of the 5th interested party.
5. Parties relied upon matters on record to urge their cases for and against the application. The Court has considered the respective positions and returns as follows:
- a. The applicant has urged no material basis to defeat the preliminary objection that the subject matter of the application being sale of land, the Court lacks jurisdiction as urged and upon the grounds stated for the respondents and the 5th interested party.



- b. The applicant has substantively prayed for an order pending the hearing and determination of the application with the effect that after the hearing of the application, the order would effectively lapse. Thus, while parties attended an inter-partes hearing, there appears to be no prayer sought beyond such hearing. The misconception of the prayer operates to render the application liable to dismissal.
- c. The application is found to revolve around a new cause of action about sale of land outside the jurisdiction of the Court and after the full hearing of the case, there is no correlated final prayer in the petition.
- d. Accordingly, the application is liable to dismissal as the preliminary objection is upheld.

In conclusion the preliminary objection is upheld and the application is hereby dismissed with costs in the cause.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS
FRIDAY 9TH MAY, 2025**

BYRAM ONGAYA

PRINCIPAL JUDGE

