



**Awino v Kandie; Kenya Rural Roads Authority & 6 others (Interested Parties)
(Petition E070 of 2025) [2025] KEELRC 2123 (KLR) (17 July 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2123 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E070 OF 2025**

**B ONGAYA, J
JULY 17, 2025**

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

PETITION NO. E070 OF 2025

**IN THE MATTER OF ARTICLES 1, 2, 3,10,27,41, 73,
75, 259 & 259 OF THE CONSTITUTION OF KENYA**

**IN THE MATTER OF ARTICLES 22, 23, 27(8), 47
AND 232 OF THE CONSTITUTION OF KENYA, 2010**

**IN THE MATTER OF SECTIONS 36 AND 37 OF THE
PUBLIC COMMISSION SERVICE ACT NO. 10 OF 2017**

**IN THE MATTER OF SECTION 10(2) OF THE PUBLIC
SERVICE (VALUES AND PRINCIPLES) ACT NO. 1A OF 2015**

**IN THE MATTER OF THE PUBLIC SERVICE COMMISSION
HUMAN RESOURCE AND POLICIES PROCEDURE MANUAL**

BETWEEN

FRANCIS AWINO PETITIONER

AND

PHILEMON KIPROP KANDIE RESPONDENT

AND

KENYA RURAL ROADS AUTHORITY INTERESTED PARTY

ETHICS AND ANTI-CORRUPTION COMMISSION INTERESTED PARTY

FELIX KOSGEY INTERESTED PARTY



AUDITOR GENERAL OF KENYA INTERESTED PARTY
THE NATIONAL TREASURY INTERESTED PARTY
PUBLIC ACCOUNTS COMMITTEE (NATIONAL TREASURY) ... INTERESTED PARTY
EMBASSY OF THE FEDERAL REPUBLIC OF GERMANY IN KENYA INTERESTED PARTY

JUDGMENT

1. The petitioner filed the petition dated 15.04.2025. The petitioner prayed for:
 - a. An order of declaration declaring that the appointment of Philemon Kiprof Kandie, the respondent herein, as Director General KeRRA, is unconstitutional, unlawful and null and void.
 - b. A declaration that the appointment of Philemon Kiprof Kandie as Director General, KeRRA, is unconstitutional, unlawful, null and void and remains so notwithstanding Gazette Notice No. 4309 of 2022.
 - c. An order of certiorari to quash any contract, terms of service, benefits or allowances accruing to the respondents as DG of KeRRA post-judgment in *Judicial Review Application E013 of 2022*.
 - d. An order of prohibition barring the Respondent from holding or being appointed to any state office or public office within the meaning of Article 260 of the Constitution.
 - e. An order directing the Ethics and Anti-Corruption Commission (2nd Interested Party) to undertake immediate investigations into the financial irregularities and maladministration committed under the leadership of the Respondent, including a full forensic audit.
 - f. An order directing the 2nd interested party to conduct a lifestyle audit on the respondent and recover any public funds misappropriated, illegally acquired or unjustly enriched including but not limited to unlawfully benefits, perks or assets.
 - g. An order directing the 1st interested party to commence a lawful, transparent, competitive and gender-compliant recruitment process for the office of Director General KeRRA.
 - h. A declaration that the continued retention of the respondent in public office violates Articles 10, 27, 73, 75, 47 and 232 of the Constitution.
 - i. An order compelling the National Treasury and Public Accounts Committee to submit full reports to the court on all funds allocated and utilized by KeRRA over the last 5 financial years including pending bills and project status.
 - j. An order directing the Auditor General to conduct a forensic audit of all KeRRA projects funded by KfW and AFD and submit a special report to parliament within 90 days.
 - k. An order compelling the Embassy of the Federal Republic of Germany in Kenya and the Embassy of the French Republic in Kenya to suspend any further financial assistance to KeRRA until the Respondent is removed from office and the identified irregularities are fully investigated and resolved.



- l. An order directing the respondent to refund all misapplied or unaccounted for funds including: Kshs 145,848,184 in donor fund discrepancies. Kshs 125, 626,462 in overstated counterpart funding. Kshs 82, 492, 200 in undisclosed donor refund. Kshs 220, 621, 047 in nugatory interest payments. Kshs 158, 138, 018 in unrecovered advances.
 - m. An order that the respondent accounts for all public funds used during his tenure as acting and later purported Director General and refund any amounts unlawfully paid to him.
 - n. Any other orders that the Honourable Court may deem just, fair and just.
 - o. Costs
2. The petition was based upon the petitioner's supporting affidavit and exhibits thereto filed together with the petition. The petitioner's case is as follows:
 - a. That the appointment of the respondent as Director General of KeRRA was irregular, unlawful and unconstitutional as it failed to adhere to the requirements of fairness, merit and inclusivity as stipulated under Articles 27(8) and 232 of the *Constitution*.
 - b. The petitioner contends that the advertisement by the 1st interested party, made on 22.03.2022 on the vacancy of the position of director general, failed to comply with Articles 27(8) of the *Constitution* of Kenya, 2010 as well as sections 10 of the *Public Service (Values and Principles) Act* no 1A of 2015 and Sections 36(3)(a) of the *Public Service Commission Act* no 10 of 2017 for failure to adhere to the two thirds gender principle.
 - c. The advertisement failed to adhere to section 37(4) of the *Public Service Commission Act*, which requires the advertisement to provide for the applicable remuneration including salary, allowance and other benefits.
 - d. The advertisement gave applicants up to 04.04.2022 to apply for the position, and due to the short timeline, which the petitioner believes was on purpose, the position attracted only 9 applicants.
 - e. The interviews were set down for 12.04.2022, giving the interested party 6 days to shortlist candidates and invite them for an interview.
 - f. The interested party failed to adhere to clause 2.18.2 of its own Manual, KeRRA Human and Resource Management Policy and Procedures Manual which provides that all candidates should be informed of their interview date, time and venue at least one week in advance.
 - g. The respondent herein emerged as the successful candidate and on 14.04.2022 signed a contract accepting his appointment and on the same day he was appointed Director General of the 1st interested party vide Gazette Notice no 4309.
 - h. The petitioner maintains that the circumstances revolving around the advertisement, recruitment and appointment as well as the short timelines, were suspicions and point towards a scheme to have the position granted to the respondent.
 - i. The findings of the auditor general in the report for the fiscal year 2023/2024 revealed systemic financial mismanagement at KeRRA under the leadership of the respondent.
 - j. That KeRRA held 13.89% of idle cash in commercial banks according to the national treasury's May report, despite a dismal 63% fund absorption rate.



- k. The court in *Judicial Review Application E013 of 2022* found the appointment of the respondent to have been marred with illegality and procedural impropriety and quashed gazette notice no 4309 of 13.04.2022.
 - l. The petitioner contended that this petition is anchored not only in illegality of appointment but also on ongoing mismanagement, unethical conduct and risk to the public interest under the respondent's continued tenure.
 - m. The Ethics and Anti-Corruption Commission has legal constitutional duty to step in and conduct the necessary investigations but have failed to do so.
3. In response to the petition, the Respondent filed a Notice of Preliminary Objection dated 02.06.2025 through Omingo & Associates Advocates, on the following grounds;
- a. That the present suit is barred by the doctrine of res judicata under section 7 of the [Civil Procedure Act](#), Cap 21, the issues herein having been substantially determined by a court of competent jurisdiction in Judicial Review Application No. E013 of 2022 [Republic v Kenya Rural Roads Authority ex parte Samson Nzivo Muthiani & 2 others](#) and a judgment therein rendered which is subject before the Court of Appeal in Civil Appeal (Application) No 238 of 2023 [Philemon Kiprop Kandie v Kenya Rural Roads Authority & 2 others](#).
 - b. That by virtue of section 7 of the [Civil Procedure Act](#), the petition is incompetent, frivolous and an abuse of court process.
 - c. That the petition herein be forthwith struck out and/or dismissed with costs to the respondent.
4. Subsequently, the respondent filed his Replying Affidavit sworn on 06.06.2025. wherein he stated and urged as follows;
- a. That the issues raised in the petition were substantially and conclusively determined by a competent court in Judicial Review Application No. E013 of 2022 [Republic v Kenya Rural Roads Authority ex parte Samson Nzivo Muthiani](#).
 - b. That the issues raised in the instant petition are barred by the doctrine of res judicata.
 - c. The petitioner is a perennial litigant who thrives on forum shopping and has filed several suits against the respondent and has since withdrawn some, namely, Petition no. E461 of 2025, petition 333/2024 and Petition No E708 of 2025.
 - d. The petitioner has not provided sufficient or proper evidence to support his allegations and the petition fails to present legitimate reasons or justifications for the reliefs sought.
5. Additionally, the respondent filed a Notice of Preliminary Objection dated 02.06.2025 on the following grounds;
- a. That the petitioner is a busy body and petition should be struck out ab initio. It is well settled in law that a petition ought to demonstrate how the respondent's conduct or action contravene the petitioner's fundamental rights ([Anarita Karimi Njeri v R](#) [1976-1980] KLR 1270).
 - b. That the petition offends the protection of rights and fundamental practice and procedure rules. These rules govern the drafting of such constitutional petitions. This petition is amorphous and does not heed to the said rules.
 - c. The alleged irregularities and procedural improprieties have not been brought out in the petition.



- d. The orders sought in the petition have been overtaken by events.
 - e. That the orders sought cannot be granted on an interlocutory application since they do not pass the legal muster under *Giella v Cassman Brown & Co Ltd* (1973) EA 358 (The ingredients – prima facie case, prejudice and balance of convenience).
 - f. That the Honourable Court has no jurisdiction to compel independent investigating agencies like the EACC to probe individuals or entities.
 - g. The petition is frivolous, vexatious and otherwise an abuse of court process and should be dismissed with costs to the respondent.
6. The 1st Interested party filed the Replying Affidavit of William Abung'u, Principal accountant at the Kenya Rural Roads Authority (KeRRA) sworn on 04.06.2025 and drawn by SMS Advocates. It was stated and urged as follows:
- a. The issues raised at paragraph 4 to 20 and 26 to 30 of the affidavit in support of the petition were substantially and conclusively determined by a competent court in Judicial Review application no. E013 of 2022 Republic v Kenya Rural Roads Authority ex parte Samson Nzivo Muthiani which decision was delivered on 31.05.2023 and said decision has since been appealed against under Civil Appeal (Application) No. E238 of 2023.
 - b. That the issues raised in the instant petition are barred by the doctrine of res judicata.
 - c. The interested party states that the petitioner referred to the findings of the Auditors report and attached excerpts of various reports whose authenticity, has not been proved and thus questioned its reliability and admissibility.
 - d. Issues being raised by the petitioner relating to the Auditor general's report on the KeRRA for the various Fiscal years were resolved and communicated in the interested party's management response dated 15.12.2021.
 - e. The management response was subsequently confirmed by the Public Investments Committee 24th Report whose mandate is to examine how public funds are used and particularly those invested in state corporations.
 - f. Investigative bodies such as EACC must be allowed reasonable time to carry out their mandate without undue pressure or interference from premature judicial intervention such as is being sought in the petition. That this undermines the integrity of investigations and violates the doctrine of separation of powers.
 - g. The petitioner has not tendered any evidence to demonstrate that EACC has declined or refused to act or that the petitioner has exhausted available mechanisms within the commission before seeking constitutional reliefs.
 - h. Article 75 of the constitution and the *Leadership and Integrity Act*, 2012 impose high standards of conduct on state officers. However, the petitioner has failed to demonstrate any actual or specific breach of these provisions by the interested.
7. The 6th respondent filed Grounds of Opposition dated 09.06.2025 through Abraham Cheboryot, Advocate, on the grounds:
- a. That the Honourable court lacks the requisite jurisdiction to hear and determine the petition and the notice of motion application dated 15.04.2025 as the issues raised therein are non-



justiciable, fall within the exclusive domain of parliamentary processes, and contravene the provisions of Article 119 of the Constitution of Kenya, 2010 and the *Petition to Parliament (Procedure) Act*, No 22 of 2012 which provide for the appropriate mechanism for redress of grievances arising from the actions or inactions of Parliament or its committees.

- b. That the proper and constitutional avenue for obtaining information or reports from Parliament or any its communities including the PAC, is by petitioning the National Assembly. To seek such orders from the court without first exhausting this constitutionally provided mechanism undermines the principles of separation of powers and the autonomy of Parliament in conducting its oversight functions.

Article 119 of the constitution provides:

Right to petition Parliament

1. Every person has a right to petition Parliament to consider any matter within its authority, including to enact, amend or repeal any legislation.
2. Parliament shall make provision for the procedure for the exercise of this right.

c. That the furtherance of Article 119, Parliament enacted the *Petition to Parliament (Procedure) Act* 2012, which prescribes the procedure, for petitioning Parliament. Additionally, Standing Orders 219 to 229 of the National Assembly Standing Orders elaborate on the procedural steps for the tabling, consideration and determination of petitions submitted to the house.

d. That the petitioner has not demonstrated any attempt to engage the National Assembly through the prescribed petitioning process to address the alleged financial irregularities or lapses in oversight. Instead, they have prematurely and improperly invoked the jurisdiction of this Honourable Court, thereby bypassing a constitutionally sanctioned institutional mechanism. In *Pevans Esta Africa Limited & Another v Chairman, Betting Control & licensing board & 7 others* (2018)eKLR the court held as follows:

“Where the Constitution had reposed specific functions in an institution or organs of state, the courts must give those institutions or organs sufficient leeway to discharge their mandates and only accept an invitation to intervene when those bodies are demonstrably shown to have acted in contravention of the Constitution, the law or that their decisions are so perverse, so manifestly irrational that they cannot be allowed to stand under the principles and values of our Constitution.

e. That the 6th interest party has been improperly joined in its personal capacity for actions undertaken in the course of presiding over proceedings of the National Assembly, despite being a parliamentary committee that is duly entitled to the privileges and immunities guaranteed under Article 117 of the constitution and section 13 of the *Parliamentary Powers and Privileges Act*, No. 29 of 2017.

f. That these proceedings violates the decision of the Supreme Court of Kenya in Supreme Court Petition no 32 of 2014; *Justus Kariuki Mate & another v Martin Nyaga Wambora & Another* (2017) eKLR that members of the



legislature and their speakers are protected from judicial proceedings from the act done in the performance of their legislative functions.

- g. That the petitioner improperly seeks to invoke judicial authority to direct and compel the public accounts committee of the national assembly to produce documents and undertake actions falling squarely within its oversight mandate, thereby encroaching upon the exclusive jurisdiction of parliament and undermining its institutional independence.
 - h. That the petitioner fails to disclose any violation or threatened violation of the constitution attributable to the 6th interested party and does not establish any nexus between the committee's constitutional mandate and the alleged violations.
 - i. That the reliefs sought against the 6th interested party are vague, speculative and incapable of enforcement against a parliamentary committee which neither enacts legislation nor executes policy.
 - j. That the petition and notice of motion applications are otherwise an abuse of the process of the Honourable Court, intended to circumvent established oversight processes within parliament and frustrate ongoing accountability mechanisms.
 - k. That the petition, as currently framed fails to disclose any specific constitutional or statutory obligation violated or threatened to be violated by the public accounts committee. The petitioner has not demonstrated any nexus between the public accounts committee's actions or omissions and the alleged constitutional violations.
 - l. That the petition is prejudicial as it does not clearly outline what grievances are levelled against the public accounts committee with sufficient precision to enable the National Assembly to know what to respond to, noting the ambiguity of the petitioner's grievances.
 - m. That the petition is ambiguous and unintelligible as it raises immaterial matters, which unreasonably enlarge the scope of the issues for determination by the Court. The petition should therefore be dismissed in its entirety with costs.
8. Final submissions were filed for the parties. The Court has considered all the material on record including the submissions filed for the parties. The Court returns that the petition must fail because of the following findings:
- a. The petitioner has pleaded that he is aware that the Court (Rika) in Judicial Review Application No. E013 of 2022 *Republic v Kenya Rural Roads Authority ex parte Samson Nzivo Muthiani & 2 others* [2023] KEELRC 1377 (KLR) found the appointment of the respondent as Managing Director of 1st interested party herein marred by illegality, bad faith and procedural impropriety and subsequently quashed Gazettee Notice No. 4309 of 13.04.2022. That is the petitioner's own pleading in paragraph 43 and 44 of the petition. The petitioner fully aware of that decision seeks that the Court makes a declaration that the respondent's appointment per the same gazette notice in the earlier proceedings was unconstitutional, unlawful, null and void. It should be obvious that it is an abuse of Court



process for the petitioner to seek the same relief which the Court already granted in the earlier judicial review proceedings. It could be that the petition is not *res judicata* in the sense that the parties are not the same or claiming in the same right as was in the earlier judicial review proceedings. However, as found, the petitioner is aware that the impugned gazette notice in the instant case was already quashed by the Court in the earlier judicial review proceedings. It was an abuse of court process for the petitioner to proceed in that manner. The petition is indeed *res-judicata* as submitted for the 1st interested party that per Black’s law dictionary 10th Edition, an issue is *res judicata* if it has been definitely settled by judicial decision and the three elements being an earlier decision on the issue; a final judgment on the merits; and, the involvement of same parties or parties in privity with the original parties. By the petitioner’s pleading and full knowledge of the judgment in the earlier judicial review proceedings, the Court finds that the petitioner was in privity with the parties therein.

- b. The petitioner has submitted that the petition is not *res judicata* because it is brought in the public interest and it raises broad constitutional issues not previously litigated. At paragraph 45 of the petition the petitioner has pleaded thus “45. Therefore, this petition is anchored not only in illegality of appointment but also on ongoing mismanagement, unethical conduct and risk to the public interest under the Respondent’s continued tenure.” It is true that the petitioner appears to make a case beyond the unlawfulness and unconstitutionality of the impugned appointment of the respondent and which was determined in the earlier judicial review application, and to which extent alone, is the Court making a finding of *res-judicata*. However, with respect to the other claims and reliefs, the Court makes the subsequent findings which make the residual petition to fail.
- c. Further, in any event, the respondent and the 1st interested party have shown that the judgment of the Court in the said earlier judicial review proceedings is subject of Court of Appeal proceedings particularly on whether the appointment in the gazette notice was unconstitutional and unlawful. It therefore appears to the Court that the instant petition in relation to the propriety of the gazette notice is trapped by the doctrine of *sub-judice* as it is a matter properly seized and pending before the Court of Appeal.
- d. As submitted for the 6th interested party it has not been shown that the petitioner has moved the National Assembly per the applicable legislation and Standing Orders as cited for the 6th interested party. The petition is therefore trapped by the doctrine of want of exhaustion of the primary prescribed procedure. The petitioner has not (by pleadings, and submissions) rebutted or defeated in any material respects the 6th interested party’s case and submission in that regards.
- e. As submitted for the 1st interested party and with respect to the audit reports in issue, it is that the petitioner has failed to show the audit findings led to criminal charges, disciplinary proceedings or adverse action against the respondent. The Court considers that the primary jurisdiction to deal with any alleged misconduct on the part of the respondent as a public officer would be to trigger a disciplinary process as is envisaged in the [Public Officer Ethics Act, 2003](#) or appropriate criminal proceedings. The Court’s jurisdiction has been invoked without care by the petitioner to invoke such primary and prescribed procedures.
- f. The petitioner has prayed for compelling orders in the nature of mandamus as against 1st, 2nd, 7th and 8th interested parties but without demonstrating that the interested parties owe a duty to act or perform in that respect; and, that despite a demand, they have neglected to act or perform the duty so owed. In the circumstances, the Court finds that the petitioner has failed to establish the threshold for grant of the compelling orders as prayed for.



- g. The court has weighed all circumstances in this otherwise litigation styled as public interest proceedings with live issues to be decided by the Court of Appeal in the pending appeal or in other appropriate fora and there will be no orders on costs.

In conclusion the petition is hereby dismissed with no orders on costs.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS THURSDAY 17TH JULY, 2025.

**BYRAM ONGAYA,
PRINCIPAL JUDGE**

