



**Mwangi v Governor, Nairobi City County & another; Kwamboka (Interested Party)
(Petition E153 of 2023) [2024] KEELRC 500 (KLR) (7 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 500 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E153 OF 2023**

**B ONGAYA, J
MARCH 7, 2024**

BETWEEN

CAROLINE WAMBUI MWANGI PETITIONER

AND

THE GOVERNOR, NAIROBI CITY COUNTY 1ST RESPONDENT

NAIROBI CITY COUNTY GOVERNMENT 2ND RESPONDENT

AND

LYDIA KWAMBOKA INTERESTED PARTY

JUDGMENT

1. The petitioner filed the petition dated 01.08.2023 through Robinson Maina & Co. Advocates seeking the following prayers:
 - a. A declaration be and is hereby issued that the occupation of the office of the Nairobi City County Attorney by the Interested Party after 31st December 2022, violates Articles 1, 2(1), 3(1), 10, 41 and 259(8) of the *Constitution*.
 - b. An order be and is hereby issued to permanently restrain the Interested Party from exercising the mandate, powers or discharging any duties or functions conferred upon or reserved for the office of the Nairobi City County Attorney.
 - c. An order be and is hereby issued compelling the Interested Party to refund all public funds, allowances, monies and or benefits accrued after 31st December 2022 when her tenure expired.
 - d. An order of mandamus be and is hereby issued directing the respondents to take immediate measures or steps to lawfully fill the office of the Nairobi City County Attorney and in any event not later than 14 days.



- e. Provide for costs and incidentals.
 - f. The Honourable Court be at liberty to grant any other orders or reliefs that may be just and expedient.
2. The petition was based upon the petitioner's supporting affidavit and annexures thereto filed together with the petition and sworn on 01.08.2023. The petitioner's case is as follows:
- a. That she is a public-spirited female adult Kenyan of sound mind and a defender of the Constitution.
 - b. That section 4 of the Office of the County Attorney Act, 2020, establishes the office of the County Attorney and which is an office in the county public service. Section 6(1) of the office of the County Attorney Act, 2020, further provides that the County Attorney shall have the status and rank of a member of the county executive committee.
 - c. That the mandate of the County Attorney is extremely critical as envisaged in section 7 of the Office of the County Attorney Act, 2020.
 - d. That section 5 of the Act stipulates that the County Attorney shall be appointed by the Governor with approval of the county assembly.
 - e. That there has been inordinate delay by the respondents in lawfully filling the office of the County Attorney by the Respondents since December 2022 when the mandate of the former office holder lapsed and the Office of the Nairobi City County Attorney fell vacant.
 - f. That vide a letter dated 3rd May 2018, the interested party was appointed as County Attorney by former Nairobi County Governor Hon. Mike Mbuvi Sonko per the appointment letter exhibited as CWM-1.
 - g. That subsequently via a letter dated 1st October 2019 exhibited as CWM-2, the contract of the Interested party was renewed to run until December 2022.
 - h. That vide a replying affidavit sworn by interested party on 6th May 2022 in response to ELRCJR Application No E004 of 2022; Republic v Hon Ann Kananu Mwenda & 3 others ex parte Mohammed Gufu the Interested party in paragraph 5 of the said affidavit admitted that the duration of her employment as Nairobi City County Attorney was from 1st October 2019 to December 2022 and annexed the affidavit as CWM-3.
 - i. That the Interested Party in defiance of the law continues to serve as Nairobi City Council Attorney contrary to the law and beyond the legally prescribed tenure.
 - j. That the respondents and the interested party are in contempt of an ELRC judgment delivered on 12th March 2021 being Commission for Human Rights and Justice v Michelle Bibi Fondo & 2 others [2021]eKLR where the court held that a County Attorney can serve for a term commensurate to the term of the Governor, or, until lapsing of six years from 27.07.2020 whichever comes first which judgement the petitioner annexed as CWM-4.
 - k. They concluded by urging the court to intervene and uphold justice and the rule of law.
 - l. That the constitutional and statutory provisions violated or threatened with violation included the preamble of the Constitution of Kenya and Articles 1, 2 ,3 (1), 10, 22 ,23, 41,47, 48, 73, and 259 of the Constitution of Kenya.



3. The respondents filed the replying affidavit of Patrick Analo, the Acting County Secretary and Head of County Public Service, Nairobi City County Government, sworn on 10.11.2023 and through, Adrian Kamotho Njenga and Company Advocates. It was stated and urged as follows:
- a. That at all times material to the petition filed herein, the 1st and 2nd respondents have adhered to the Constitution and performing functions as a devolved unit under Part II of the Fourth Schedule to the Constitution.
 - b. That the petition has been prematurely filed since they have not refused to lawfully appoint the Nairobi City County Attorney as alleged by the petitioner.
 - c. That the petitioner has not demonstrated any violation of the Constitution and statutory provisions as alleged in the petition.
 - d. That the petitioner has not demonstrated the existence of any injury, if any, occasioned to her or the public and that there is an acting office holder in the position of County Attorney and therefore the averments in the petition are not well substantiated.
 - e. That the process of filling the position of the Office of the County Attorney is underway and that the court should be conscious of saving its resources and time in determining this petition.
 - f. That the Office of the County Attorney Act, 2020 does not prescribe the period in which appointing authority must appoint an individual as provided for under section 6, which provides for a term of six years.
 - g. That the petitioner has not proved how the respondents acted in unreasonable and inordinate delay in failing to appoint substantive officer holder to the Office of the County Attorney within the meaning and confines of section 7(3) of the Fair Administrative Action Act, 2015.
 - h. That the question of contempt of the judgement of the Employment and Labour Relations Court delivered on 12.03.21 in Commission for Human Rights and Justice v Michelle Bibi Fondo & 2 others [2021]eKLR does not arise as it has a totally different set of facts and issues.
 - i. That the petitioner has not given any evidence on the allegation that the Office of the County Attorney is being unlawfully or fraudulently exploited as allegations are unfounded.
 - j. The the petition herein be found unmerited and the Court declines to issue the orders sought.
4. The Interested party also filed her replying affidavit sworn on 09.08.23 in which she swore and stated as follows:
- a. That she is the duly appointed and rightful holder of the Office of the County Attorney Nairobi County appointed under the Office of the County Attorney Act by the then Governor Mike Mbuvi Sonko vide a letter dated 3rd May, 2018. She exhibited the letter as LK-1.
 - b. That by letter dated 1st October 2019 she was recalled from a suspension that she had been sent on by the then Governor Hon. Mike Mbuvi Sonko on 19th September 2018. Her contract was extended to December 2022. She annexed a copy of the letter as LK-2. Hon. Mike Mbuvi Sonko, the Governor, signed the letter.
 - c. That on 20th July 2022 before the expiry of the then existing contract, her term in office extended by Her Excellency Governor Anne Kananu in line with section 6(1) of the County Attorney Act 2020. She annexed a copy of the letter as LK-3. The letter stated that section 6(1) of the Office of the County Attorney Act, 2020 provides that the County Attorney shall



hold office for a term of six years. Accordingly, the interested party's term of service had been extended to six years with effect from the commencement of the Office of the County Attorney Act 2020 being 13.07.2020.

- d. That the extension was not a fresh appointment that would require another approval by the County Assembly as per section 4 (2) of the Nairobi City County Office of the County Attorney.
 - e. That the current Governor, H.E Sakaja Arthur Johnson in Executive Order No.1 of 2022 also retained her as the County Attorney. She annexed a copy of the order as LK-4.
 - f. That the purpose of enacting the Office of the County Attorney Act was to standardize and unify the structure, functions and roles of the legal departments across the 47 counties.
 - g. That she transitioned into County Attorney under section 31 of the *Office of the County Attorney Act, 2020* having served as the County Attorney under the Nairobi City Office of the County Attorney Act 2016 and that she meets all the required qualifications. Section 31(2) which provides for Transition states that;
 - “(2) Despite the provisions of subsection (1), a person employed by the county public service board to perform the functions of the County Attorney, County Solicitor or County Legal Counsel at the commencement of this Act shall continue to hold their respective positions in the Office after the coming into effect of this Act only if they meet the qualifications specified in this Act.”
 - h. That she has properly and lawfully transitioned into office according to the law.
 - i. That she is adversely being mentioned in the subject application and orders sought against her but has not been included as a substantive respondent to adequately participate in the petition.
 - j. That as a County Attorney she has diligently discharged her duties and in the cause of it made decisions that did not please certain quarters.
 - k. That from the foregoing, this has led to her getting persons hired to pose as petitioners and have filed matters against her including ELRC JR Misc. Applications No E004 of 2022 and JR Application No E037 of 2021 which raised similar issues and have all been dismissed. She attached a copy of the ruling delivered on 30.09.2022 by Rutto J in JR E004 of 2022 as exhibit LK-5.
 - l. That the intention to remove her from office is malicious and contrary to the provisions of section 13 of the *Office of the County Attorney Act, 2020* as read together with section 8 of the Act.
 - m. That the proceedings herein be dismissed and the intimidation and the threat of the removal of County Attorney stopped.
5. Final submissions were filed for the parties. The Court has considered all the material on record. The Court returns as follows.
6. To answer the 1st issue, the Court returns that as submitted for the respondents, section 6(1) of the Office of the County Attorney Act provides that the County Attorney shall hold office for 6-years and the interested party has exhibited letters showing that she has been duly appointed to hold the office for 6-years. Further, it appears that the appointment was pursuant to transitional provisions in



section 31(2) of the Act. The appointment appears not to have fallen under section 5(1) of the Act, which provides that the County Attorney shall be appointed by the Governor with approval of the County Assembly. Being a transitional appointment, it appears that the County Assembly had no role. However, after the August 2022 elections, the elected new Governor would be at liberty to appoint in terms of section 5(1) of the Act- provided the interested party's tenure ended lawfully. Article 259 (3) (a) of the Constitution provides that a function or power conferred on an office may be performed or exercised as occasion requires, by the person holding the office. Article 259 (8) guides that if time is not prescribed for performing a required act, the act shall be done without unreasonable delay, and as often as occasion arises. The petitioner has not shown that the respondents and particularly the Governor has failed to act within those general guiding principles. It appears that the interested party is lawfully in office or the Governor has not yet acted under section 5(1) of the Act and which failure has not been shown to amount to unreasonable delay or that the occasion to act had arisen and no action taken.

7. To answer the 2nd issue, the Court finds for the respondents that the petitioner has not shown compliance with section 7(3) of the Fair Administrative Actions Act because it has not been shown that the Governor has refused to act per section 5(1) of the Act to appoint the County Attorney within a period specified in law or without unreasonable delay.
8. To answer the 3rd issue, the Court finds that the petitioner has failed to establish the alleged constitutional violations. The case appears to be a genuine public interest litigation convoluted in the cited statutory transitional provisions in appointment of the County Attorney. In that consideration each party to bear own costs of the proceedings.

In conclusion the petition is hereby dismissed with orders each party to bear own costs of the petition.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS THURSDAY 7TH MARCH 2024.

BYRAM ONGAYA

PRINCIPAL JUDGE

