



**Sheria Mtaani Na Shadrack Wambui v Kenya Civil Aviation Authority & 3 others; Arao & another (Interested Parties) (Employment and Labour Relations Petition E002 of 2022) [2024] KEELRC 1679 (KLR) (27 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1679 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
EMPLOYMENT AND LABOUR RELATIONS PETITION E002 OF 2022  
DN NDERITU, J  
JUNE 27, 2024**

**BETWEEN**

**SHERIA MTAANI NA SHADRACK WAMBUI ..... PETITIONER**

**AND**

**KENYA CIVIL AVIATION AUTHORITY ..... 1<sup>ST</sup> RESPONDENT**

**KENYA CIVIL AVIATION AUTHORITY BOARD ..... 2<sup>ND</sup> RESPONDENT**

**CABINET SECRETARY, MINISTRY OF TRANSPORT, INFRASTRUCTURE,  
HOUSING URBAN DEVELOPMENT & PUBLIC WORKS .... 3<sup>RD</sup> RESPONDENT**

**HON ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**EMILE NGUZA ARAO ..... INTERESTED PARTY**

**ASSOCIATION OF AFRICAN AVIATION TRAINING ORGANIZATION  
KENYA CHAPTER ..... INTERESTED PARTY**

**JUDGMENT**

**I. Introduction**

1. In a petition dated 14<sup>th</sup> March, 2022 the petitioner herein prays for the following -

- (a) A declaration be and is hereby made that the 3<sup>rd</sup> Respondent’s appointment of the Interested party as the 1<sup>st</sup> Respondent’s Director General is illegal, unconstitutional, null and void for the Interested party’s failure to meet the standard of integrity set under Article 10 and 73 of *the Constitution*.



- (b) A declaration does hereby issue that the 3<sup>rd</sup> Respondent's appointment of the Interested party as the 1<sup>st</sup> Respondent's director General without the consideration of the report by the Committee on accounts on the audited accounts of the East African Community for the year ended 30<sup>th</sup> June, 2018 is violative of the principles of national values and principles of governance and those of public service as set under Article 10 and 232 of *the Constitution*.
  - (c) A declaration does hereby issue that it offends Article 47 of *the Constitution* for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent to cause the appointment of the interested party as the 1<sup>st</sup> Respondents' Director General against a report by the Committee on accounts on the audited accounts of the East African Community for the year ended 30<sup>th</sup> June, 2018 showing his questionable conduct an integrity.
  - (d) A judicial review order of Certiorari does hereby issue to bring to this court for the purpose of quashing the decision of the 3<sup>rd</sup> Respondent's appointment of the Interested Party as the 1<sup>st</sup> Respondent's Director General and or the gazettement of the interested party for being illegal, unconstitutional, null and void due to the Interested party's failure to meet the standard of integrity set under article 10 and 73 of *the Constitution*.
  - (e) Alternatively, a Judicial review order of mandamus does hereby issue compelling the 3<sup>rd</sup> Respondent to terminate the appointment of the Interested Party as the 1<sup>st</sup> Respondent's Director General for his failure to match up the standards of integrity as set under Article 73 of *the Constitution* as a consequence of the report done by Committee on accounts on the audited accounts of the East African Community for the year ended 30<sup>th</sup> June, 2018.
  - (f) Costs of this petition be awarded to the Petitioner.
  - (g) Any other relief that this court may deem fit and just in the circumstances.
2. Contemporaneously, the petitioner filed a notice of motion of even date under certificate of urgency praying as follows -
- 1. That this application and the petition filed herewith be certified as urgent and apt for hearing on a priority basis and ex-parte in the first instance.
  - 2. That in the interim and pending the hearing and determination of this Application this Honourable Court be and is hereby pleased to issue a conservatory order staying the implementation of the 3<sup>rd</sup> Respondent's decision appointing the interested party herein Emile Nguza Arao as the 1<sup>st</sup> Respondent's Director General as communicated to the public vide a letter dated the 8<sup>th</sup> March, 2022 and/or an order does issue staying the assumption of the Interested party herein to the office of the Director General.
  - 3. That in the interim and pending the hearing and determination of this petition this Honourable Court be and is hereby pleased to issue a conservatory order staying the implementation of the 3<sup>rd</sup> Respondent's decision appointing the Interested party herein Emile Nguza Arao as the 1<sup>st</sup> Respondent's Director General as communicated to the public vide a letter dated 8<sup>th</sup> March, 2022 and/or an order does issue staying the assumption of the Interested party herein to the office of the Director General.
  - 4. Costs be provided.
  - 5. Any other order as this court will deem just and appropriate to issue.



3. On 15<sup>th</sup> March, 2022 the court granted ex parte interim conservatory orders in terms of prayer 2 above, but in a ruling delivered on 10<sup>th</sup> May, 2022 the above application was denied upon inter partes hearing.
4. On 27<sup>th</sup> January, 2023 the petitioner filed an application seeking to amend the petition which amendments were only affecting the body of the petition but not the prayers sought. The application was not opposed by the other parties and on 30<sup>th</sup> January, 2023 the same was allowed by consent and the petitioner ordered to file and serve the amended petition within seven days of that date. There is no evidence on record that the amended petition was filed and served as ordered and directed.
5. Nonetheless, the 1<sup>st</sup> and 2<sup>nd</sup> respondents filed their joint response to the amended petition on 17<sup>th</sup> February, 2023 while the 3<sup>rd</sup> and 4<sup>th</sup> respondents relied on a replying affidavit sworn by Dr. (ENG.) Joseph Njoroge, sworn on 14<sup>th</sup> April, 2022. The 1<sup>st</sup> interested party filed his response on 23<sup>rd</sup> February, 2023.
6. By consent, it was agreed and directed by the court that the petition be canvassed by way of written submissions. However, no submissions were filed on behalf of the petitioner. There are no submissions on record for the 1<sup>st</sup> and 2<sup>nd</sup> respondents. Miss Wanjeri for the 3<sup>rd</sup> and 4<sup>th</sup> respondents filed her written submissions on 11<sup>th</sup> April, 2023. No submissions were placed on record for the two interested parties.

## **II. The Petitioner's Case**

7. The Petitioner describes itself as a duly registered non-governmental organization whose goal and mission are to assist the members of public in accessing both procedural and substantive justice through advocacy and or protection of individual or collective rights, public interest litigation for the promotion of constitutionalism, rule of law, and good governance.
8. As can be distilled from the petition, the supporting affidavit and the annexures thereto, the petitioner's case in summary is as hereunder.
9. That on or about 10<sup>th</sup> March, 2022 the petitioner learnt from various media sources that the 1<sup>st</sup> interested party had been appointed by the 3<sup>rd</sup> respondent as the 1<sup>st</sup> respondent's director general as communicated in a press release of 8<sup>th</sup> March, 2022.
10. The petitioner further alleges that on 11<sup>th</sup> March, 2022 it came across some information published in People's Daily Newspaper touching on the credibility and integrity of the 1<sup>st</sup> interested party and which information, in the view of the petitioner, cast doubts on whether the 1<sup>st</sup> interested party was transparent, credible, and accountable to hold that position or if he should hold that office at all. Further it is the view of the petitioner that the revelations in that news item rendered the 1<sup>st</sup> interested party ineligible to hold the said position and office.
11. The negative information that the petitioner had allegedly obtained is allegedly to the effect that there allegedly was massive pilferage of public funds, mismanagement, wastage, and or theft by the 1<sup>st</sup> interested party when he served as the executive director of the East African Community's Civil Aviation Safety and Security Oversight Agency (CASSOA) as reported by the Committee on the Audited Accounts of the East African Community (the Committee) for the year that ended on 30<sup>th</sup> June, 2018. The petitioner attached a copy of the said report and pointed to the relevant pages as 115 to 121.
12. The petitioner further alleges that in view of the negative information concerning the 1<sup>st</sup> interested party the 2<sup>nd</sup> respondent ought not to have recommended him for the appointment and that the 3<sup>rd</sup> respondent ought not to have appointed him and hence it prays for judgment as recited above.



13. The petitioner takes the view that the 1<sup>st</sup> interested party does not meet the constitutional and legal thresholds required to occupy the position that he has been appointed to and seeks to have the 1<sup>st</sup> interested party prohibited from taking the office which he was supposed to assume on or about 22<sup>nd</sup> April, 2022.
14. Further, the petitioner alleges that the appointment of the 1<sup>st</sup> interested party as the director-general of the 1<sup>st</sup> respondent is vitiated by illegality in that the letter of appointment was executed for and on behalf of the 3<sup>rd</sup> respondent contrary to Section 19 of the *Civil Aviation Act* and against the principle of *delegare non potest delegare*.
15. It is on the basis of the foregoing that the court is urged to enter judgment in favour of the petitioner in the terms set out and recited in the introductory part of this judgment.

### **III. Respondents' Case**

16. In response to the amended petition the 1<sup>st</sup> and 2<sup>nd</sup> respondents filed a joint response to the petition dated 15<sup>th</sup> February, 2023. It is stated that the petitioner has not proved its case to the required standard. It is stated that the petition was filed prematurely as the report relied upon is subject to further scrutiny by the council of ministers of the East Africa Community and as such what is submitted to court by the petitioner is incomplete and inadmissible as conclusive evidence of the allegations made.
17. It is pleaded that the recruitment of the 1<sup>st</sup> interested party as the director-general of the Kenya Civil Aviation Authority (KCAA) was conducted in accordance with the law and in particular the provisions of Section 19 of the *Civil Aviation Act*.
18. The 1<sup>st</sup> interested party filed a response to the amended petition dated 23<sup>rd</sup> February, 2023 wherein he pleaded that he is a highly qualified and recognized manager in the civil aviation industry decorated by the African Civil Aviation Commission (ACAC) and the International Civil Aviation Organization (ICAO).
19. It is pleaded that the petitioner relied on incomplete report that is subject of further review and scrutiny by the Council of Ministers which is therefore incomplete, premature, and inadmissible as conclusive evidence of the allegations made against the 1<sup>st</sup> interested party. It is further pleaded that he was exonerated from any wrong-doing and the report found to be without merit.

### **IV. Submissions By Parties**

20. As noted above, the petitioner did not file its written submissions notwithstanding that he promised to do so on several occasions when the matter came up in court for mention. Likewise, there are no submissions on record for the 1<sup>st</sup> and 2<sup>nd</sup> respondents.
21. The only submissions on record are those filed by counsel for the 3<sup>rd</sup> and 4<sup>th</sup> respondents, Miss Wanjeri. It is submitted that in response to the petition the 3<sup>rd</sup> and 4<sup>th</sup> respondent relied on the replying affidavit of Dr. (Eng.) Joseph Njoroge sworn on 14<sup>th</sup> March, 2022 in response to the application dated 14<sup>th</sup> March, 2022 and to the petition.
22. Counsel raised the following issues for determination by the court –
  - a. Whether the 3<sup>rd</sup> respondent acted in contravention of the law by appointing the Interested Party as the Director General of the 1<sup>st</sup> Respondent?
  - b. Who should bear the cost of the suit?



23. In regard to the first issue it is submitted that the 3<sup>rd</sup> respondent acted within the provisions of Section 19 of the *Civil Aviation Act* in appointing the interested party following a transparent and merit-based competitive recruitment process. It is submitted that the recruitment was in tune with Article 10 of *the Constitution*. Counsel cited *Keroche Industries Limited V Kenya Revenue Authority & 5 Others* (2007) eKLR and *John Harun Mwau V Attorney General* (2015) eKLR in urging the court that there are no grounds upon which the court may interfere with the discretion of the 3<sup>rd</sup> respondent as exercised in appointing the interested party to the position of the director-general of KCAA.
24. On the second issue it is submitted that in a letter dated 8<sup>th</sup> March, 2022, annexed to the affidavit, the chair of the 1<sup>st</sup> respondent informed the 3<sup>rd</sup> respondent of the steps that had been undertaken towards recruitment of the director-general. The vacancy was advertised on 1<sup>st</sup> February, 2022. Three candidates had been recommended for appointment out of which the 3<sup>rd</sup> respondent was to appoint any one of them. The 3<sup>rd</sup> respondent subsequently appointed the 1<sup>st</sup> interested party to the position with effect from 22<sup>nd</sup> April, 2022 for a period of four years.
25. It is submitted that the fact that the letter of appointment was signed by the principal secretary for an on behalf of the 3<sup>rd</sup> respondent does not vitiate or invalidate the appointment as the same was done with the express permission of the 3<sup>rd</sup> respondent which has not been challenged by the petitioner.
26. It is submitted that the mere and unsubstantiated allegations made by the petitioner should not be used to deny the 1<sup>st</sup> interested party an opportunity to serve in a position that he earned through a competitive recruitment process. It is submitted that no procedural or substantive irregularities or illegalities have been demonstrated or proved by the petitioner as to found grounds for the court to allow the petition.
27. On the third issue, it is submitted that alleged constitutional violations have neither been properly pleaded nor proved and counsel has cited *Anarita Karimi Njeru V Republic* (1979) KLR and *Mumo Matemu V Trusted Society of Human Rights Alliance & 5 Others* (2013) eKLR in firming-up the position that the petition does not meet the threshold. It is submitted that on a balance of convenience the petitioner has failed to prove its case as to deserve the orders sought.
28. The court is thus urged to dismiss the petition with costs.

## V. Issues for Determination

19. The court has carefully gone through the materials placed before it by all the parties as summarized above. Upon perusing the said materials, that is to say the petition, the affidavits, annexures thereto, and the written submissions by Counsel, the following two issues commend themselves to this court for determination -
  - (a) Are there good and sound legal reasons and grounds for this court to interfere with the recruitment and appointment of the 1<sup>st</sup> interested party as the director-general of the 1<sup>st</sup> respondent? Put in another way, does the petition by the petitioner meet the legal threshold for this court to issue the orders sought by the petitioner in the petition?
  - (b) Costs.

## VI. Analysis & Determination

30. As far as the court can discern, the petitioner is challenging the appointment of the 1<sup>st</sup> interested party as the director-general of the 1<sup>st</sup> respondent on two main grounds -



- (i) That the 1<sup>st</sup> interested party does not meet the constitutional, legal, moral, and ethical probity required for the holder of that office in that he fails the accountability, integrity, and transparency tests for allegedly being of corrupt ways and character; and,
  - (ii) That the letter of appointment for the 1<sup>st</sup> interested party to the said position was not signed by the 3<sup>rd</sup> respondent in person but by a third party against the *delegare non potest delegare* principle.
31. In respect of ground (i) the petitioner alleges that in the discharge of its mandate it obtained the voluminous February 2020 report of Committee on accounts on the audited accounts of the East African Community for the year ended 30<sup>th</sup> June, 2018 showing massive pilferage of public funds, mismanagement, wastage and or theft of public funds allegedly by the 1<sup>st</sup> interested party while he was serving as the Executive Director of the East African Community's Civil Aviation Safety and Security oversight Agency (CASSOA). The petitioner referred to pages 115 to 121 of the said report and attached a copy of the same.
32. The court has taken time to keenly go through the referenced pages, and indeed the entire report, with a view of establishing if indeed the 1<sup>st</sup> interested party was said to have engaged in "massive pilferage of public funds, mismanagement, wastage and or theft of public funds."
33. The court notes that in all the referenced pages the said committee was making recommendations to either the Assembly or the Council of Ministers to hold the 1<sup>st</sup> interested party, and others who are not parties to this petition, accountable for any losses that may have been incurred or occasioned through the commission or omission of the 1<sup>st</sup> interested party and or the other named persons.
34. It is therefore very clear that the proposed actions or recommendations by the said Committee were subject to further discussion and scrutiny by the Assembly and or the Council of the Ministers. The petitioner has not, either in the said supporting affidavit or the further affidavit, informed this court what the Assembly of the member states or indeed the Council of Ministers found or recommended following or upon deliberating on the said recommendations of the committee.
35. It follows, therefore, that the recommendations by the said committee were subject to further scrutiny and or approval by the Assembly or the Council of Ministers and hence the committee did not have the final word on the issues that it raised. They were proposed recommendations and not conclusive positions.
36. The petitioner has not shed light to this court on whether the 1<sup>st</sup> interested party was investigated, charged, or tried, and the outcome thereof. Further, now that the petitioner is in possession of allegedly negative information, that it alleges to portray the 1<sup>st</sup> interested party as a corrupt individual who is unfit to hold a public office, what other steps beyond filing this petition has it taken? Has the alleged corrupt acts/conduct by the 1<sup>st</sup> interested party been reported to the EACC, DCI, or indeed any other investigative agency?
37. The answers to the above rhetorical questions have been provided for by the 3<sup>rd</sup> and 4<sup>th</sup> respondents and the interested parties in their responses. The 1<sup>st</sup> Interested Party has availed and filed a management letter by the auditors-general of the member states which report he states did not find any fault on his part. He also states that the Committee that prepared the earlier report did not invite him to make his comments or explanations before unfairly condemning him unheard, against the rules of natural justice.



38. The 1<sup>st</sup> interested party vehemently denies abusing any provisions of *the Constitution* in the Bill of Rights, Leadership and Integrity Principles, or any other law including the *Leadership and Integrity Act*, and challenges the petitioner to point out and demonstrate which provisions of the law he has breached, abused, or violated.
39. It is the view of the 1<sup>st</sup> interested party that the petitioner has filed this petition in bad faith to portray him as a corrupt individual with a view of denying him the opportunity to serve in the said office by maliciously tarnishing his name.
40. The petitioner has not raised any issues regarding the academic and professional qualifications of the 1<sup>st</sup> interested party to hold the position of the director-general of the 1<sup>st</sup> respondent. The court has also not come across allegations of unprocedural or illegal steps in the advertisement, shortlisting, and interviewing of the candidates. The only issue raised in this regard is that the 1<sup>st</sup> interested party was not supposed to be shortlisted or interviewed for the job, let alone being appointed, for the reasons of allegedly being unfit to hold a public office.
41. The court is of the considered view that the petitioner has not made out a case against the respondents that the 1<sup>st</sup> interested party is a corrupt individual who should not hold the office of the director-general of the 1<sup>st</sup> respondent.
42. The court finds and holds that the allegations of corruption and lack of values and principles in public service against the 1<sup>st</sup> interested party are mere and unsubstantiated suspicious claims based on media reports that do not warrant this court to declare the said appointment a nullity.
43. On issue (ii) above, the 1<sup>st</sup> and 2<sup>nd</sup> respondents have given a detailed account on the recruitment process that culminated in the appointment of the 1<sup>st</sup> interested party. The appointment was done pursuant to Section 19 of the *Civil Aviation Act*, 2013 and no evidence has been availed to prove violation of that law by the appointing authority, the 3<sup>rd</sup> respondent.
44. In view of the foregoing, this court is at a loss as to how the 3<sup>rd</sup> respondent abused his role or indeed the delegare non potest delegare principle. That allegation is found to hold no water.
45. So far, this court has been examining the first issue for determination as to whether there are good factual grounds for this court to interfere with the recruitment and appointment of the 1<sup>st</sup> interested party as the director-general of the 1<sup>st</sup> respondent and this court has concluded and holds that there are no good and sound factual or legal basis upon which the court may set aside and or nullify the said appointment.

## VII. The Law Applicable

46. The petition is expressed to be brought under Articles 2, 3, 10, 19, 20, 22, 27, 28, 41, 47, 48, 55, & 259 of *the Constitution*, Fair Administrative Actions Act, Public Service Act, *Public Service (Values and Principles) Act*, *Employment Act*, and the *Civil Aviation Act*.
47. Article 22 is on enforcement of the Bill of Rights and the right of every person to institute court proceedings if the rights are denied, violated, infringed, or threatened. Article 23 is on authority of courts to uphold and enforce the Bill of Rights wherein the courts are mandated to hear and determine application for redress of a denial, violation, infringement, or threat to a right or fundamental freedom in the Bill of Rights. Article 165 is on the constitutional mandate of the High Court, and by extension this court (ELRC), in application and interpretation of *the Constitution*.



- 48. This Court (ELRC) has jurisdiction in the interpretation and application of *the Constitution* in matters relating to Employment and Labour Relations based on Article 165(5) (b). Hence, the Petition is properly before this court as the same relates to the recruitment and appointment (employment) of the 1<sup>st</sup> interested party to the position of the director-general of the 1<sup>st</sup> respondent, a position in public service.
- 49. The court has concluded and held in an earlier part of this judgment that on the basis of the materials placed before it, alleging that the 1<sup>st</sup> interested party is a corrupt individual who is unfit to hold a public office has neither been substantiated nor proved to the required standard. It is based on suspicion that is not adequate prove on a balance of probabilities that the interested party is indeed not fit to hold that office.
- 50. No evidence of investigations by the legally established agencies has been presented and there is no evidence of any charges, let alone a conviction, against the 1<sup>st</sup> interested party based on the alleged pilferage, theft, and mismanagement. It shall be grossly unfair to deny the 1<sup>st</sup> interested party the opportunity to serve in the impugned office based only on the allegations made by the petitioner without further and better and solid evidence being placed before the court.
- 51. If this court were to issue the orders sought, it shall amount to condemning the 1<sup>st</sup> interested party unheard as he was not invited by the audit/accounts committee to defend himself and he has not been, as far as the materials before the court speak, investigated, charged, and or convicted in accordance with the law. The court is fully cognizant of the fact that this is a civil petition which does not require proof beyond reasonable doubts such as would be required in a criminal case. However, the general fundamental principles of natural justice and the presumption of innocence until proven guilty still hold.
- 52. In a ruling dated 10<sup>th</sup> May, 2022 the court advised the petitioner that it is in the public interest for the petitioner and indeed any other person or body to forward and submit any evidence of corruption or theft that they may have against the 1<sup>st</sup> interested party to the EACC, DCI, or any other agency as that is the right forum for such investigations to be carried out and appropriate action taken. This court is not an investigative body nor a criminal court as that is not in its constitutional and legal mandate.
- 53. On the basis of the evidence placed before the court, I find that the petition has not been proved and it shall be grossly unfair to deny the interested party an opportunity to serve in the position of the director-general of KCAA. The petitioner and indeed any other person or entity is legally obligated to submit any evidence of impropriety to the relevant authorities for an appropriate action.

**VIII. Disposal**

54. The petition is denied and hereby dismissed.

**IX. Costs**

55. In my view, this petition falls in the realm of public litigation and as such there is no order as to costs.

**DELIVERED VIRTUALLY, DATED, AND SIGNED AT NAKURU THIS 27<sup>TH</sup> DAY OF JUNE, 2024.**

.....

**DAVID NDERITU**

**JUDGE**

