



Ogogoh (Suing on his Behalf and on Behalf of the General Public) v Kenya Ports Authority & 3 others; Mtalaki (Interested Party); Namadoa & 3 others (Intended Interested Party) (Employment and Labour Relations Petition 10 of 2022) [2023] KEELRC 1451 (KLR) (9 March 2023) (Ruling)

Neutral citation: [2023] KEELRC 1451 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

EMPLOYMENT AND LABOUR RELATIONS PETITION 10 OF 2022

AK NZEI, J

MARCH 9, 2023

IN THE MATTER OF: THE CONSTITUTION OF KENYA

AND

IN TH MATTER OF: THE LEADERSHIP AND INTEGRITY FOR PUBLIC OFFICERS UNDER CHAPTER 6 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF ARTICLES 73 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: ARTICLES 1,10,19,20,21,23,24,25 (C), 31,73,165,23,258 & 259 OF THE CONSTITUION OF KENYA, 2010

IN THE MATTER OF THE ENGINEERS ACT, AND THE PUBLIC OFFICERS ETHICS ACT, CAP 183 LAWS OF KENYA AND THE LEADERSHIP AND INTEGRITY ACT

BETWEEN

JULIUS OGOGOH (SUING ON HIS BEHALF AND ON BEHALF OF THE GENERAL PUBLIC) PETITIONER

AND

KENYA PORTS AUTHORITY 1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL 2ND RESPONDENT

THE CABINET SECRETARY NATIONAL TREASURY 3RD RESPONDENT

THE CABINET SECRETARY, MINISTRY OF TRANSPORT INFRASTRUCTURE, HOUSING, URBAN DEVELOPMENT & PUBLIC WORKS 4TH RESPONDENT



AND

ANDERSON MTALAKI INTERESTED PARTY

AND

CAPTAIN GEOFFREY NAMADOA INTENDED INTERESTED PARTY

EVERLYNE SHIGOLI INTENDED INTERESTED PARTY

THE INSTITUTE OF ENGINEERS OF KENYA INTENDED INTERESTED PARTY

THE PUBLIC SERVICE COMMISSION INTENDED INTERESTED PARTY

RULING

1. The Petition herein was filed in this Court on June 7, 2022, contemporaneously with a Chamber Summons dated June 7, 2022 seeking grant of conservatory orders pending hearing and determination of the petition. Directions on filing of responses to the said Chamber Summons were given by this Court on June 22, 2022, but shortly thereafter, the Petitioner filed yet another Chamber Summons, dated June 29, 2022, seeking joinder of the 2nd, 3rd, 4th, and 5th Intended Interested Parties to the petition, and leave to amend his petition in terms of an annexed draft amended petition.
2. On June 30, 2022, I directed that the Chamber summons dated June 29, 2022 be heard first, and granted the Respondents and the Interested Party an opportunity to file responses to the Application within set timelines. Subsequently, Counsel for the 2nd, 3rd, 4th and the 5th Respondents indicated that the said Respondents would not be participating in the hearing of the application dated June 29, 2022, and would await the outcome thereof. On their part, the 1st Respondent and the Interested Party (Anderson Mtalaki) opposed the application vide grounds of opposition dated September 16, 2022 and filed in Court on June 30, 2022.
3. As already indicated herein, the Petitioner's Chamber Summons dated June 29, 2022 seeks the following orders:-
 - a. That the Court be pleased to join Captain Geoffrey Namadoa, Everlyne Shigoli, the Institution of Engineers of Kenya and the Public Service Commission of Kenya as Interested Parties in the matter herein.
 - b. That the Court be pleased to grant leave to the Petitioner to amend the petition herein in terms of the draft amended petition annexed hereto.
 - c. that costs of the application be provided for.
4. The Petitioner/Applicant's application is expressed to be brought 'under all other enabling provisions of the law' and is supported by a supporting affidavit of Julius Ogogoh, the Petitioner/Applicant, sworn on June 29, 2022, which replicates the matters set out on the face of the application. These include depositions:-
 - a. That pursuant to the resolutions of the Special Board Meeting of the 1st Respondent held on April 20, 2022, the 1st Respondent appointed and promoted Captain Namadoa, the 2nd Intended Interested Party herein, as its General Manager Marine Operations, which appointment was expressed to take effect from April 20, 2022.



- b. that further, pursuant to the resolutions of the Special Board of the 1st Respondent held on April 20, 2022, the 1st Respondent appointed and promoted Everlyn Shigoli, the 3rd Intended Interested Party, as its General Manager, Supply Chain Management, which appointment was expressed to take effect from April 20, 2022.
- c. that in view of the foregoing, the appointment of the 2nd and 3rd Intended Interested Parties were effected together with the appointment of the 1st Interested Party.
- d. that the 2nd Intended Interested Party is not a registered pilot, and therefore lacks the educational and professional qualifications, experience, character, suitability and integrity, and it is therefore illegal, unlawful and unconstitutional for him to be appointed and/or promoted, and to hold the office of the General Manager, Marine Operations of the 1st Respondent.
- e. that the appointment and/or promotion of the 2nd and 3rd Intended Interested Parties violated with impunity, and/or was made contrary to the critical values and principles that govern and regulate appointments to public office, which include fair competition and merit as the basis of appointment, participation of the people and affording adequate and equal opportunities for appointment at all levels of the public service, good governance, integrity, transparency and accountability and sustainable development.
- f. that no competitive process was undertaken that would enable public participation in the appointment process and show the transparency and accountability required under the Constitution, and that the appointment and/or promotion was opaque, unilateral, exclusive, selective, illegal, discriminative, unconstitutional and was shrouded in mystery.
- g. that under Article 234 of the Constitution, the powers of the 5th (Intended) Interested Party are exercisable over the entire Public Service, save for the offices specified in that Article, and are exercisable over the state corporations like the 1st Respondent.
- h. that Article 234 was given effect by the enactment of the Public Service Commission Act (PSC Act); and that Section 3 of the Act states that the Act applies to all public bodies, persons holding office in the public service and state corporations like the 1st Respondent.
- i. that Article 234(2) (a) (i) of the Constitution gives the 5th (Intended) Interested Party the function and power to establish offices in the public service, whereas Sections 26 and 27 of the PSC Act were enacted to give (effect to) that Constitutional provision.
- j. that Section 26 of the PSC Act defines 'establishment of offices' to mean 'the determination and creation of the number and kinds of offices in the public service.' That Section 27 of the PSC Act reiterates the constitutional functions and powers of the 5th (Intended) Interested Party to establish offices in the public service, and sets the requirements precedent to establishing those offices.
- k. that in light of Section 26 of the PSC Act as read with Section 58(1) of the Act, the development or review of the organisational structure of a public service entity, such as the 1st Respondent (Kenya Ports Authority), should be approved by the 5th (Intended) Interested Party before implementation, and implementation of such organizational structure without the approval of the 5th Intended Interested Party is unconstitutional for violating the express provisions of Article 234(2) (a) (i) of the Constitution and Section 27 of the PSC Act.



- l. that the responsible Minister (Cabinet Secretary) has no power to approve organisational structure of the 1st Respondent as such powers no longer exist since the promulgation of the Constitution of Kenya 2010.
 - m. that the Petitioner has reason to believe that the 5th Intended Interested Party did not, and has not received a request to establish any new positions at Kenya Ports Authority as required under Article 234 (2) (a) (i) of the Constitution and Section 27 of the PSC Act, and that neither has the 5th Intended Interested Party received any request to review the organisational structure of the 1st Respondent (Kenya Ports Authority).
 - n. that the presence of the 2nd and 3rd (Intended) Interested Parties in the proceedings herein is necessary to enable the Court to factually and completely adjudicate upon and settle all the questions in the suit herein.
5. The 1st Respondent and the Interested Party opposed the Petitioner's foregoing application on the following grounds:-
- a. the Applicant has not established sufficient legal basis to enjoin the Intended Interested Parties in the proceedings herein.
 - b. the application for enjoinder lacks merit, as the petition is against the 1st Respondent whose decision is being challenged.
6. Written submissions were filed by Counsel for the Petitioner/Applicant and by Counsel for the 1st Respondent and the Interested party; for and against the application. I have considered the able submissions by Counsel.
7. Enjoinder of Interested Parties in a Constitutional petition is circumscribed in Rule 7 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 'Mutunga Rules' which provides as follows:-
- ' (1) A person may, with leave of the Court, make an oral or written application to be joined as an Interested party.
 - (2) A Court may on its own motion join any Interested party to the proceedings before it.'
8. Whereas Rule 7(1) contemplates a situation where the application for enjoinder as an Interested party is made by the person seeking to be joined as an Interested party, Rule 7(2) empowers the Court to join any Interested party to the proceedings before it.
9. Counsel for the 1st Respondent cited the case of Francis Karioko Muruatetu & Another -vs- Republic & 5 Others [2016] eKLR where the Supreme Court of Kenya referred to the case of Trusted Society Of Human Rights Alliance -vs- Mumo Matemu & 5 Others [2014] eKLR which defines an Interested Party as:-
- ' one who has a stake in the proceedings, though he or she was not a party to the cause ab initio. He or she is one who will be affected by the decision of the Court wherein it is made, either way such a person feels that his or her interest will not be well articulated unless he himself or herself appears in the proceedings, and champions his or her cause.'



10. Rule 2 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Mutunga Rules) defines an Interested Party as :-

' A person or entity that has an identifiable stake or legal interest or duty in the proceedings before the Court but is not a party to the proceedings or may not be directly involved in the litigation.'

11. In the petition herein, the Petitioner has pleaded that the Interested Party herein (Anderson Mtalaki) was appointed and/or promoted by the 1st Respondent to the post of General Manager, Engineering Services, pursuant to the Resolutions of the Special Board meeting of the 1st Respondent held on April 20, 2022. In the present application, the 2nd and 3rd Intended Interested Parties are alleged to have been appointed and/or promoted pursuant to the same resolutions of the Special Board Meeting of the 1st Respondent held on April 20, 2022. These allegations have not been denied by the 1st Respondent or any other party to the proceedings herein.

12. It follows, therefore, that the decision that this Court will make in determining the petition herein, either way, will affect the 2nd and the 3rd Intended Interested Parties.

13. The 4th Intended Interested Party, the Institution of Engineers of Kenya, is an entity whose presence in the proceedings will be necessary as one of the allegations made by the Petitioner herein is that the Interested Party does not have the necessary qualifications to hold the position of the 1st Respondent's General Manager, Engineering Services, which can only be held by a duly qualified and registered Engineer.

14. The 5th Intended Interested Party is the Public Service Commission, which the Petitioner/Applicant has ably demonstrated has a Constitutional and statutory duty regarding creation and review of offices in public bodies which include state corporations like Kenya Ports Authority, the first Respondent herein. The Petitioner has pleaded that he has reasons to believe that the 5th Intended Interested Party did not receive a request to establish any new positions in Kenya Ports authority (1st Respondent) as required under Article 234(2) (a) (i) of the Constitution and Section 27 of the PSC Act, or to review the Organisation Structure of the 1st Respondent. The presence of the 5th Intended Interested party will be necessary in the proceedings herein as the Court's decision on the petition herein will affect and/or touch on the 5th Intended Interested Party, either way.

15. The question which arises is whether the Petitioner/Applicant can apply to enjoin the Intended Interested Parties in the proceedings herein as he has done. The answer to this is that he cannot, in view of Rule 7(1) of the 'Mutunga Rules.' The Petitioner/Applicant's saving grace on the issue of joinder of the Intended Interested parties, will, however, come through his prayer for leave to amend his petition. Rule 18 of the Constitution of Kenya (Protection of Rights and Fundamental Rights) Practice and Procedure Rules, 2013 provides as follows:-

' A Party that wishes to amend his pleadings at any stage of the proceedings may do so with the leave of the Court.'

16. The foregoing Rule does not state and/or specify the nature of amendments that may be effected and that which may not be effected with leave of the Court. If the effect or import of the amendments sought to be effected by the Petitioner/Applicant is to bring on board the Intended Interested Parties, so be it.



17. In their submissions filed herein, Counsel for the 1st Respondent submitted that the Petitioner does not cite the legal provision for making the instant application, and faulted the Petitioner in that regard. Further, Counsel submitted that whereas Rule 17(1) of the Employment and Labour Relations Court (Procedure) Rules 2016 and Rule 19 of the Mutunga Rules contemplate applications to be brought by way of Notice of Motion, the Petitioner has brought his application by way of Chamber Summons, clearly flouting the procedure.
18. While it is imperative and highly recommended that parties and their legal Counsel do strive to comply with Rules of procedure at all times, a party who uses the wrong procedure in presentation of his or her pleadings will not be turned away from the seat of justice, and particularly where the procedural default does not go to the root or substance of the matter or dispute before the Court. Such are the procedural iniquities and transgressions that Article 159(2)(d) of the Constitution of Kenya 2010 came to atone for.
19. In sum, the Petitioner/Applicant's application dated June 29, 2022 partly succeeds, and is allowed in part as follows:-
 - a. The Petitioner is hereby granted leave to amend the petition herein in terms of the draft amended petition annexed to the Chamber Summons application dated June 29, 2022.
 - b. An amended petition shall be filed and served within fourteen days of this Ruling.
 - c. Costs of the application will be in the petition.
20. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 9TH MARCH 2023

AGNES KITIKU NZEI

JUDGE

ORDER

This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

.....for Petitioner/Applicant

..... for 1st Respondent

.....for 2nd, 3rd, 4th, & 5th Respondents.

