



Republic v Kenya Ports Authority Board of Directors & 2 others; Public Service Commission (Interested Party); Commission for Human Rights Justice (Exparte Applicant) (Judicial Review Application E001 of 2022) [2023] KEELRC 1943 (KLR) (13 July 2023) (Judgment)

Neutral citation: [2023] KEELRC 1943 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
JUDICIAL REVIEW APPLICATION E001 OF 2022**

**M MBARŪ, J
JULY 13, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

KENYA PORTS AUTHORITY BOARD OF DIRECTORS 1ST RESPONDENT

HON. ATTORNEY GENERAL 2ND RESPONDENT

CABINET SECRETARY MINISTRY OF TRANSPORT 3RD RESPONDENT

AND

PUBLIC SERVICE COMMISSION INTERESTED PARTY

AND

COMMISSION FOR HUMAN RIGHTS JUSTICE EXPARTE APPLICANT

JUDGMENT

- 1 The *ex parte* applicant, Commission for Human Rights Justice, is a registered non- governmental organisation. The 1st respondent is a statutory body pursuant to *Kenya Ports Authority Act*. The 2nd respondent is the government legal advisor. The 3rd respondent is a government agency.
- 2 In a Notice of Motion dated May 19, 2022 the *ex parte* applicant is seeking for orders that;
 1. This court be pleased to grant the *ex parte* applicant herein an order of certiorari to remove into this court and quash the decision of the 1st respondent vide resolution dated April 20, 2022 to purportedly implement the proposed revised Human Resource Instruments of the Kenya Ports Authority and effect new staff appointments/deployments.



2. This court be pleased to grant the ex parte applicant herein an order of prohibition to remove into this court and prohibit the 1st respondent to implement through a resolution dated April 20, 2022 the proposed revised Human Resource Instruments of the Kenya Ports Authority and effect new staff appointments/deployments.
3. Costs of this application be provided for.
- 3 The application is premised on the Statutory Statement and Supporting Affidavit, Further Affidavit, Further Replying Affidavit sworn by Caleb Ngwena.
- 4 The application was opposed by the 1st respondent through the Replying Affidavit of Elijah Kitur.
- 5 The ex parte applicant's case is that on 20 April 2022 the 1st respondent through a resolution of the 400th Special Board Meeting approved 38 staff appointments and deployments within the Kenya Ports Authority. The said considerations and approval were based on a letter dated 11 May 2021 from the Cabinet Secretary, National Treasury and Planning addressing the request of approval of the Kenya Ports Authority Human Resource Policy Instruments.
- 6 The Public Service Commission (PSC) is mandated in law to provide new approvals for any human resource instruments including amended policies with regard to state corporations and therefore the letter by the Cabinet Secretary, is irregular and ultra vires. The letter proffers a conditional approval based on an assessment to be undertaken by the 1st respondent to determine costs benefit value of a medical scheme to inform the proposed revised Human Resource Structure.
- 7 In a letter dated July 5, 2021 addressed to the General manager Human Resource and Administration following a meeting convened by the CS National Treasury, the letter raised concerns that the new approved organisation structure of the 1st respondent may be suffering from fundamental flaws which may negatively affect the business of the 1st respondent and negatively affect the morale of the staff members. Among the concerns the CS noted were that the changes would strain the financial position of the 1st respondent.
- 8 The board in the 395th Meeting noted the flaws in the proposed structure. In a letter dated October 18, 2021 the board addressed concerns and noted the need to re- examine the approved organisation structure with a new view of identifying structural and legal flaws. It noted the need to seek reviews consultations with the parent Ministry and relevant government agencies. But the 1st respondent refused, failed and ignored to carry out the necessary consultations as recommended, carry out public participation and fixing the fundamental flaws before formulation and presentation for approval of the said proposed revised Human Resource Policy instruments thus denying the process legitimacy, trust and cohesiveness.
- 9 The effect of the resolution of the 1st respondent is that a few employees benefited from a non-inclusive process in an undeserving way casting away the traditional career progression and promotion using the all-competitive recruitment process. The numerous appointments were made in total contravention of the rule of law, specifically and not limited to the appointment of Anderson Mtalaki as the General Manager in charge of Engineering and yet he is not a registered engineer under the *Engineers Act*.
- 10 The ex parte applicant case is that if the irregularity carried out by the 1st respondent goes ahead unchecked, a trend will be set where the rule of law and laid down procedures in coming up with policies in public institutions will be disregarded and it is important for the court to issue the orders sought.



- 11 In reply, the 1st respondent through the Replying Affidavit of Elijah Kitur the head of board affairs regulatory compliance and governance aver that the 1st respondent is a state corporation established under the [Kenya Ports Authority Act](#) with mandate to develop, operate and manage ports in Kenya with its head office in Mombasa. It has offices in Nairobi, Kisumu, Uganda, Rwanda, Burundi, Democratic Republic of Congo, Ethiopia and Somalia with over 7,800 employees.
- 12 Prior to the 5 SCAC watermarked Kenya Ports Authority Human Resources Instruments approved for implementation on April 20, 2022 by the board, the same had been discussed by senior management and approved on June 3, 2021 by the 1st respondent. The ex parte applicant does not seek to quash the 5 SCAC instruments but to quash the decision that approved its implementation on April 20, 2022.
- 13 Pursuant to 1st respondent's board approval made on April 20, 2022 about 41 senior managers of the 1st respondent who are not parties herein were appointed to new positions. These appointments will be affected if the court were to quash the resolutions of the 1st respondent's board which implemented the human resource instruments. The entire organisation structure of the 1st respondent would fall in limbo given that this structure was a culmination of a merger between the 1st respondent and the KFSL.
- 14 The instruments have already been implemented by the appointment of senior managers of the 1st respondent from resolution of the 1st respondent dated April 20, 2022 and an order of prohibition cannot issue. The senior managers of the KFSL who would be affected by the 5 SCAC instruments were consulted and participated in the formulation of the said instruments passed on April 20, 2022.
- 15 In February 2021 through a Cabinet Resolution, the government directed ferry operations at the Likoni Channel which was then operated by the Kenya Ferry Services Limited and the floating passenger bridge to be mutually operated by the 1st respondent. The effect was that the assets, liabilities, staff contract and other obligations of KFSL were to be transferred to the 1st respondent upon the dissolution of KFSL. Following consultations of all critical stakeholders and guidance of the 2nd respondent, the transfer to the 1st respondent was effected in line with Section 86 of the [Public Finance Management Act](#) read together with Regulation 216 of the Public Finance Management (National Government) Regulations, 2015. It was agreed that the ferry and floating bridge services be operated by the 1st respondent and SCAC approved the consolidation of the instruments for staff transition framework given on 19 April 2021. The 1st respondent was then required to develop new instruments and in consultations held in December 2020 and March 2021 from representatives of the defunct KFSL, SCC, Ministry of Transport and National Treasury and Planning, the 1st respondent developed the consolidated instruments.
- 16 The 1st respondent's board confirmed the appointments of senior staff under its mandate and the provisions of Section 58 of the [Kenya Ports Authority Act](#) read together with Article 232 of [the Constitution](#), this was necessary to achieve government reform measures to streamline operations of the 1st respondent. The re-deployments, confirmations and appointments of senior management staff made by the board was largely lateral movements where staff members who had been holding those positions were retained, those on acting capacity were appointed and where the structure created new positions that did not exist before, staff who had headed the Divisions which were elevated to departments were appointed.
- 17 The judicial review orders sought cannot issue since the ex parte applicant is not affected by any of the measures taken by the respondents.



- 18 The 2nd and 3rd respondents through the Replying Affidavit of Dr. Eng. Joseph Njoroge the Principal Secretary for the State Department of Transport in the Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works aver that under Article 132(3)(b) of *the constitution*, the President in organising government, the 1st respondent was placed under the National Treasury and pursuant to Section 4 of the *State Corporations Act*, the recruitment of staff is a function of the board. The 2nd respondent was not involved as such would be illegal. The 2nd respondent is not privy to the subject matter herein and the application should be dismissed with costs.
- 19 The interested party filed the Replying Affidavit of Dr Simon Rotich the secretary and chief executive officer and aver that the 1st respondent is a state corporation and a public entity established under Section 3 of the *Kenya Ports Authority Act*. The interested party is a constitutional commission established pursuant to Article 233 with functions under Article 234 over the entire public service save for the public service excluded in Article 234(3) of *the Constitution*.
- 20 Article 234 of *the Constitution* is given effect through the enactment of the *Public Service Commission Act* by making further provisions as to the functions, powers and the administration of the Public Service Commission and which Act applies to all public bodies and persons holding office in the public service. A corporation is one such body under the regulation of the interested party and applies to the Kenya Ports Authority.
- 21 Sections 26 and 27 of the *Public Service Commission Act* were enacted to give effect to Article 234 (2) of *the Constitution* and Section 26 of the Act defines the establishment of offices to mean the determination and creation of the number and kinds of offices in the public service while Section 27 of the Act reiterates the constitutional function and power of the interested party to establish offices in the public service and sets the requirements precedent to the interested party establishing offices in the public service.
- 22 Dr. Rotich also aver that an office in the public service falling under its mandate cannot be established without approval. The development or review of the organisation structure of a public service body such as the Kenya Ports Authority should be approved by the interested party before implementation in terms of Section 26 and 58(1) of the *Public Service Commission Act*. Any implementation without such approval is unlawful and in violation of the express provisions of Article 234(2)(a)(i) of *the Constitution*.
- 23 Dr Rotich aver that the interested party did not receive a request to establish any new positions at the Kenya Ports Authority neither has it received any request to review the organisation structure and any that exists is unlawful and in violation of *the Constitution*. Without approval, the revised organisation structure cannot be implemented.

Determination

- 24 The issues at hand are whether the court should quash and prohibit the 1st respondent from implementing the revised Human Resource Instruments which effect new staff appointments/ deployments vides resolution dated April 20, 2022 to implement the revised Human Resource Instruments of the Kenya Ports Authority.
- 25 Judicial review mandate of the court is time stipulated under the *Law Reform Act* read together with the *Civil Procedure Act* and the rules thereto (Order 53). The preliminary objections addressed by the court in the ruling delivered on 8 July 2022, the mandate of the court under Rule 7(3) of the Employment and Labour Relations Court (Procedure) Rules, 2016 allow a party to move the court



through a Memorandum of Claim and urge its case so as to allow the other parties address the same in a manner devoid of any technicalities;

(3) Notwithstanding anything contained in this Rule, a party is at liberty to seek the enforcement of any constitutional rights and freedoms or any constitutional provision in a statement of claim or other suit filed before the Court.

26 The above put into account, the ex parte applicant ought to have moved the court well under the applicable rules of the court.

27 With regard to the substantive issues raised, on the decision of the 1st respondent resolution dated 20 April 2022 to implement the revised Human Resource Instruments of the Kenya Ports Authority and effect new staff appointments/deployments, the 1st respondent is a state corporation with mandate under the [Kenya Ports Authority Act](#) and as such bound in its operations as a public entity managing national resources hence subject to the constitutive Act and [the Constitution](#). Operationally, even though run by a Board of Directors who ordinarily are appointed by the Cabinet Secretary, the essence of the 1st respondent is to provide a national service through its public officers.

28 The human resource instruments formulated by the 1st respondent with the effect of staff appointments and or deployments following a cabinet decision merging functions of KFS functions under the 1st respondent is evidence of its national character in its functions. Indeed, Mr Kitur for the 1st respondent in his Replying Affidavit to the instant application aver that, the Human Resource Instruments of the Kenya Ports Authority were approved by the Board in terms of Section 58 of the [Kenya Ports Authority Act](#) read together with Article 232 of [the Constitution](#).

29 However, with that appreciation, the constitutional body with mandate to formulate national policy with regard to public service employees and employers in their terms and conditions including appointments and or deployments is situate under the article 234 of [the Constitution](#) with the PSC, the interested party herein. The PSC has mandate to;

2. The Commission shall—

a. subject to this Constitution and legislation--

i. establish and abolish offices in the public service; and

ii. appoint persons to hold or act in those offices, and to confirm appointments;

30 It is therefore a constitutional imperative that while the PSC is undertaking such constitutional function to apply the values and principles of article 10 and 232 of [the Constitution](#) stipulated under article 234 (2) (c) of [the Constitution](#) which requires the PSC to promote the values and principles mentioned in articles 10 and 232 throughout the public service and fundamentally under clause (g) thereof, to;

(g) review and make recommendations to the national government in respect of conditions of service, code of conduct and qualifications of officers in the public service;

31 In the case of Consumers Federation of Kenya (COFEK) suing through its officials namely Stephen Mutoro, Ephraim Kanake and Henry Ochieng v National Social Security Fund Board of Trustees & another; Cabinet Secretary, Ministry of Labour and Social Protection (Interested Party) [2022] eKLR the court in addressing the import of Article 234 of [the Constitution](#) held that;

... the responsibility of issues of human resource in state corporations is now specifically vested in the Public Service Commission as a constitutional imperative, the provisions of



Article 234 of the Constitution prevail over Sections 5(3), 27 or any other provisions of the State Corporations Act. Finally, a cursory glance of the Act reveals that it is yet to be aligned to the provisions of the Constitution.

...

32 Bearing in mind that the Public Service Commission Act was enacted in 2017 and came into operation on 20th April 2017, it is the Court's view that its provisions were intended to reinforce the provisions of Article 234 of the Constitution of Kenya, 2010 and underscore its preeminent character.

33 In nutshell, these constitutional and statutory provision demonstrate that the Public Service Commission is the only body with constitutional authority to approve human resource instruments of state corporations and other state bodies.

34 The 1st respondent well situated as a state corporation and managed by the Board under the provisions of the Kenya Ports Authority Act, such retains the policy direction save, in matters that constitutionally are within the mandate of the PSC particularly the formulation, development and creation of standards of public service, this is it the body with authority to approve human resource instruments with regard to appointments and or deployment. The decision of the 1st respondent board on 20 April 2022 on the revised human resource instruments of the Kenya Ports Authority with regard to new staff appointments and deployments cannot be justified in the absence of the PSC approval. Any approval of these instruments outside the constitutional threshold is *ultra vires*.

35 As noted above, the *ex parte* application moved the court through judicial review proceedings which are time bound in nature. Following the decision of the 1st respondent on 20 April 2022 officers were appointed or deployed albeit under the belief that the Board had mandate to revise the instruments applied. This taken into account and to forestall service disruptions, the PSC has mandate to promote the values and principles mentioned in Articles 10 and 232 throughout the public service and in this regard investigate the public body and review and make recommendations in terms of Article 234(2) (d) to (g) of the Constitution;

- d. investigate, monitor and evaluate the organisation, administration and personnel practices of the public service;
- e. ensure that the public service is efficient and effective;
- f. develop human resources in the public service;
- g. review and make recommendations to the national government in respect of conditions of service, code of conduct and qualifications of officers in the public service;

36 It is therefore imperative for the court to invoke these provisions in this case.

37 Accordingly, the orders sought in the instant application addressed, the resolution of the 1st respondent on April 20, 2022 on the implementation of the Human Resource Instruments of the Kenya Ports Authority that effect new appointments and deployments shall be subject to an audit by the PSC, the interested party herein and who shall make recommendations that ensures efficiency and effective for approval as appropriate. This process shall be undertaken within the next six (6) months at the cost of the 1st respondent. The Public Service Commission shall report to the court for adoption as appropriate.

38 The *ex parte* applicant being a non-governmental organisation to bear own costs.



39 Mention on 30 November 2023 for progress report by Public Service Commission and further directions.

Delivered in open court at Mombasa this 13 day of July, 2023.

In the presence of:

Court Assistant: Japhet Muthaine

..... and

