



REPUBLIC OF KENYA



KENYA LAW
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Maweu v Cabinet Secretary for Transport, Infrastructure, Housing, Urban Development and Public Works & another; Kenya National Highway Authority Board & 2 others (Interested Parties) (Petition 177 of 2022) [2023] KEELRC 1715 (KLR) (6 July 2023) (Ruling)

Neutral citation: [2023] KEELRC 1715 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION 177 OF 2022

MN NDUMA, J

JULY 6, 2023

**IN THE MATTER OF ARTICLES 10, 19,20,21, 22, 23, 232, 234, 258, 259 AND 260
OF THE CONSTITUTION OF KENYA, 2010.**

AND

**IN THE MATTER OF THE ALLEGED VIOLATION OF ARTICLES 3(1), 10, 27 41(1)
47, 73, 129, 232, 234, 259(1) OF THE CONSTITUTION AND SECTION 7(1) OF THE
SIXTH SCHEDULE OF THE CONSTITUTION**

AND

**IN THE MATTER OF ALLEGED VIOLATION OF SECTION 4 (1) OF THE FAIR
ADMINISTRATIVE ACTION ACT 2015**

AND

**IN THE MATTER OF CONSTRUCTION AND APPLCIATION OF THE KENYA ROADS
ACT NO. 2 OF 2007**

AND

**IN THE MATTER OF APPOINTMENT OF WANGAI NDIRANDU AS THE
CHAIRPERSON OF THE BOARD OF THE KENYA NATIONAL HIGHWAYS
AUTHOTIRY**

AND

**IN THE MATTER OF THE IRREGULAR, ILLEGAL AND UNCONSTITUTIOANAL
SUBSEQUENT APPOINTMENT OF WINFRIDA NGUMI AS THE CHAIRPERSON OF
THE BOARD OF KENYA NATIONAL HIGHWAYS AUTHORITY**

AND



**IN THE MATTER OF ENFORCEMENT OF HUMAN RIGHTS AND FUNDAMENTAL
FREEDOMS, UNDER ARTICLES, 50, 33, 35, 43, 53 AND 55 OF THE
CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF CONTRAVENTION OF THE RIGHT TO HUMAN RIGHT,
HUMAN DIGNITY, THE RIGHT TO PROTECTION OF THE LAW, THE RIGHT TO
FAIR LABOUR PRACTICES, THE RIGHT TO ADMINISTRATIVE JUSTICE AND THE
RIGHT TO ACCESS TO JUSTICE**

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTIONS OF RIGHTS
AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

BETWEEN

RAPHAEL MUEMA MAWEU PETITIONER

AND

**THE CABINET SECRETARY FOR TRANSPORT, INFRASTRUCTURE,
HOUSING, URBAN DEVELOPMENT AND PUBLIC WORKS 1ST
RESPONDENT**

THE ATTORNEY GENERAL 2ND RESPONDENT

AND

KENYA NATIONAL HIGHWAY AUTHORITY BOARD .. INTERESTED PARTY

WANGAI NDIRANGU INTERESTED PARTY

WINFRIDA NGUMI INTERESTED PARTY

RULING

1. The petition dated May 16, 2022 was filed together with the notice of motion of the instant date seeking for orders that:-
 1. Spent
 2. Spent
 3. Spent
 4. The appointment of the 3rd interested party as the chair of the 1st interested party is unprocedural, in breach of the *Constitution* and the rules of natural justice and therefore null and void.



5. The honorable court be pleased to issue and hereby issues an order of certiorari removing into this honourable court and quashing the Gazette Notice No 9295 of August 5, 2022, in its entirety.
 6. Spent.
 7. Spent.
 8. The honourable court be pleased to grant any other conservatory orders to preserve the position and the continued service of the 2nd interested party for the remainder of his appointment term.
 9. That the honourable court be pleased to order and hereby orders the respondents to pay the costs of this application.
2. The application is premised on grounds (a) to (h) set out on the face of the notice of motion and buttressed in the supporting affidavit of the petitioner/applicant the butt of which is that the 3rd interested party was appointed as the chairperson of the 1st interested party when the 2nd interested party's appointment is still subsisting and therefore the appointment is irregular, unreasonable, illegal, null and void. That the appointment is an administrative absurdity which should be corrected by the court.
 3. The application is opposed *vide* replying affidavit of Engineer Kungu Ndungu, the Director of the 1st interested party who deposes that there is an overlap in the tenure of the 2nd interested party and the 3rd interested party or the 2nd interested party's term lapsed on July 22, 2022 by operation of the law pursuant to section 22(1) of the Act which provides:-

“The chairman and members of each board other than the ex officio members and public officers, shall hold office for a period of three years from the date of appointment but shall be eligible for re-appointment for one further term.”
 4. The 2nd interested party is therefore no longer eligible to hold position of chairman of the board, his term having already lapsed. It was incumbent on the 1st interested party to appoint another chairperson. The 3rd interested party who was already a member of the board was then lawfully appointed to replace the 2nd interested party as the chairperson of the board.
 5. The petition and the application are therefore premised on a misapprehension of the law by the petitioner/applicant.
 6. In any event whilst the petition and application were still pending and at the time of filing submissions by the 3rd interested party, the 2nd interested party's tenure as the Chairman of the Board had already lapsed on November 12, 2022. Therefore, the application and the petition has since been overtaken by events and is merely an academic exercise. The 3rd interested party has reiterated the position set out by the 1st interested party in the relying affidavit by the 3rd interested party Winfrida Ngumi.
 7. Mr Mulili advocate for the respondent submitted from the bar that he was not going to file any submissions since this matter is now moot and has been overtaken by events.
 8. Upon a careful consideration of the facts set out by the applicant vis a vis those set out by the respondent and the interested parties, it is clear that the application and the petition were premised on misapprehension of facts and applicable law by the applicant.



9. The applicant has thus not met the threshold for grant of an interim injunction pending the hearing and determination of the petition as set out in the case of *Gielle v Cassman Brown Co Limited* 1978 EA. and in the Supreme Court decision in application No 5 of 2014 *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR where the court held:-

“Before a court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the court that:

- i. the appeal or intended appeal is arguable and not frivolous; and that
- ii. unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory.

These principles continue to hold sway not only at the lower courts, but in this court as well. However, in the context of the *Constitution* of Kenya, 2010, a third condition may be added, namely:

- iii. that it is in the public interest that the order of stay be granted.”

10. Accordingly, the applicant has not established a *prima facie* case with probability of success to warrant grant of a temporary injunction in the public service arena.
11. Indeed, the applicant has also not demonstrated that he stands to suffer irreparable harm incapable of being remedied by way of damages in the event the petition is eventually successful.
12. The balance of convenience is heavily weighed in favour of not granting this application; the application being premised on a misapprehension of the facts surrounding the appointment of the 3rd interested party to replace the 2nd interested party.
13. Accordingly, the application lacks merit and is dismissed with costs in the cause.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 6TH DAY OF JULY, 2023.

MATHEWS N. NDUMA

JUDGE

Appearances

M/s Kisiangani for Applicant

Mr. Mulili for respondents

Mr. Ngugi for 1st interested party

M/s Owino for 1st and 3rd interested party.

