



**Kenya National Union Of Nurses v Cabinet Secretary National Treasury
and Economic Planning & another (Judicial Review Application
E019 of 2023) [2023] KEELRC 2966 (KLR) (20 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2966 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
JUDICIAL REVIEW APPLICATION E019 OF 2023**

B ONGAYA, J

NOVEMBER 20, 2023

**IN THE MATTER OF: AN APPLICATION BY KENYA
NATIONAL UNION OF NURSES FOR LEAVE TO
COMMENCE JUDICIAL REVIEW PROCEEDINGS
PURSUANT TO ORDER 53 OF THE CIVIL PROCEDURE
RULES**

-AND-

**IN THE MATTER OF: THE DECISION OF THE LAPFUND
BOARD AND CABINET SECRETARY NATIONAL
TREASURY & ECONOMIC PLANNING IN WITHDRAWING
THE APPOINTMENT OF MR. GALM GURACHA JALDESA
AS THE ACTING CEO OF LAPFUND**

-AND-

**IN THE MATTER OF: ARTICLES 10, 21, 22, 23, 41, 50,
153,162(2) AND 259(1) OF THE CONSTITUTION OF KENYA
2010, SECTION 5(3) OF THE STATE CORPORATIONS ACT AND THE EMPLOYMENT ACT**

BETWEEN

KENYA NATIONAL UNION OF NURSES EXPARTE APPLICANT

AND

**CABINET SECRETARY NATIONAL TREASURY AND ECONOMIC
PLANNING 1ST RESPONDENT**



JUDGMENT

1. The applicant trade union applied for judicial review orders and filed the application for leave to commence the proceedings on 30.05.2023 through Chisengo & Co Advocates. The Court granted the leave to file the notice of motion for judicial review application. The notice of motion was filed and dated 02.06.2023. The applicant prayed for:
 - a. An order of *certiorari* to remove into this Honourable Court and quash the 1st and 2nd respondents' decision withdrawing the appointment of Mr. Galm Guracha Jaldesa as the acting CEO of Lapfund.
 - b. An order of Mandamus compelling the 1st and 2nd respondent to accord and or ensure that Mr. Galm Guracha Jaldesa is accorded all the support accruing to him as the Acting CEO of Lapfund to seal any void being created thereto.
 - c. The costs and incidental to the application be provided for.
2. The application is based on the grounds stated in its body, the statutory statement on record, the supporting affidavit sworn by Seth Ambusini Panyako, the General Secretary of the applicant on 02.06.2023 as well as his further affidavit sworn on 26.06.2023, together with the attached exhibits.
3. The 1st respondent and 2nd respondents opposed the application by filing the replying affidavit of Njuguna Ndung'u, the Cabinet Secretary, the National Treasury and Economic Planning, sworn on 10.08.2023, together with the attached exhibits.
4. The applicant states that on 25.05.2023 the then chief executive officer of the Lapfund Mr. David Koros resigned from his position. The CEO was, among other functions, the administrator of the scheme and also the secretary to the board.
5. The CEO resigned a day to the 13th annual general meeting of the scheme that was slated for 26.05.2023. That the resignation of the CEO was ill timed hence necessitated the board to hold a special meeting on 26.05.2023 in the morning to address the gap that Mr. David Koros had left.
6. The board noted that Lapfund had 3 chief managers who were capable of taking up the role of the CEO in an acting capacity as they were at level 2 of the Lapfund organogram while the CEO was at level 1.
7. The chief managers were namely;
 - a. Mr. Bernard Weru Mbogoh – Chief Manager finance and investment
 - b. Mrs. Veronicah Leseya Owende – Chief manager strategy, human resource, ICT and strategy
 - c. Mr. Glam Guracha Jaldesa – Chief manager, marketing, benefits and customer service
8. In the intervening period the board appointed Mr. Glam Guracha Jaldesa as the acting CEO for a period of 6 months pending the recruitment of a substantive CEO.
9. That the board then forwarded the 3 names of the chief managers to the 1st respondent together with minutes and a self-explanatory forwarding letter, explaining the circumstances under which the board had appointed Mr. Galm Guracha Jaldesa to the position of acting CEO.



10. That in turn the 1st respondent responded and instructed the board to withdraw the name of Mr. Galm Guracha Jaldesa as the acting CEO. As a result, the scheme is without a CEO.
11. The applicant's case is that the actions of the 1st respondent offend Article 40(1), 47 and 153(4)(a) of the Constitution of Kenya and section 5(3) of the State Corporations Act. The Court observes that while citing the provisions of the Constitution and the statute, the applicant has not, in the statement supporting the application or in the application and supporting affidavits, explained the manner and extent to which the same have been violated or breached.
12. On the part of the respondents it is urged that the policy obligation and responsibilities of the CEO as secretary to the board and the scheme administrator necessitate appointment to said office to be conducted by the 1st respondent as provided for at section 5(1A)(7) of the Local Authorities Provident Fund, Act, Cap. 272 of the laws of Kenya.
13. That on the evening of 25.05.2023 the board informally met to temporarily fill the gap created by the resignation of Mr. David Koros the former CEO of Lapfund. It is then that Mr. Galm Jaldesa was appointed as the Acting Chief Executive officer.
14. That immediately after the AGM the board was convened formally and considered that the appointment of the CEO is the preserve of the 1st respondent. The board then resolved to forward three names of the chief managers who qualify to act in the position and advised the 1st respondent to appoint one of them in that capacity.
15. That vide a letter ref no TNT/ZZ 253/015/(121) dated 29.05.2023 the 1st respondent appointed Mr. Bernard Weru Mbogoh to be acting CEO for a period of six (6) months or until the position is filled substantively, whichever comes earlier.
16. The respondent maintains that the withdrawal of the appointment of Mr. Galm Jaldesa as acting CEO was in line with the provisions of the law and the procedure was in line with the requirements of the *Lapfund Act*.
17. That the circular ref no OP/CAB.9/1A dated 1st February 2023 issued by the chief of staff and head of public service, sets out the procedure for the appointment of acting chief executive officers in government institutions. That the actions taken by the board in forwarding the three names of the chief managers who qualified to act in the position and advising the cabinet secretary to make the appointment were in line with this circular.
18. That it is not true that the respondents did not give any reasons or justification for the withdrawal of the appointment of Mr. Galm Guracha as the acting CEO, as his appointment was temporary to ensure the smooth running of the AGM and it is the preserve of the cabinet secretary to appoint a chief executive officer.
19. The respondents also filed the grounds of opposition dated 20.06.2023 through Beatrice Akuno, Senior State Counsel, for Attorney General. It was stated that the application was opposed upon the following grounds:
 - a. The Court lacks jurisdiction.
 - b. The applicant lacks standing because Mr. Galm Guracha Jaldesa has not complained or authorised the applicant to intervene on his behalf. Further, Article 22 or 258 threshold on public interest matter to justify the intervention has not been shown. Further, Mr. Galm Guracha Jaldesa is not a member of the union.



- c. That the application is therefore bad in law, mischievous, misconceived and made in bad faith, and, it be dismissed with costs.
20. The parties filed their respective submissions. The Court has considered the parties' respective cases and makes finding as follows.
21. To answer the 1st issue, the Court has jurisdiction to entertain the dispute. The Court has considered the submission that the parties are not in employment relationship. However, under section 12(2) of the *Employment and Labour Relations Court Act*, 2011 any person may file legal proceedings against an employer or an employee. The guiding principle is whether the subject matter of the dispute relates to employment and labour relations as envisaged in Article 162(2) of the *Constitution*. The Court has jurisdiction in the instant case which is about termination of an acting appointment, an obvious human resource function vested in the respondents.
22. To answer the 2nd issue, it appears that the dispute is the manner in which Mr. Galm Guracha Jaldesa was removed from acting in the office. The issue is whether the Union had standing to file the proceedings about the removal of Mr. Galm Guracha Jaldesa in circumstances that he is not a union member and the acting appointment was a private arrangement or right between him and his employer. As urged for the respondents, Black's Law Dictionary defines locus standi as the right to bring an action or to be heard in a given forum. It appears that in the circumstances of the case, the applicant appears to have failed to establish standing with respect to that very short time of a private arrangement for Mr. Galm Guracha Jaldesa to act and then get removed from acting. The parties agree that he was appointed to fill a sudden gap and with respect to the AGM that had to take place as had already been scheduled. In view that the acting was very short and for specific purpose in circumstances that the 1st respondent and not the board of the 2nd respondent in fact had the statutory power to appoint the CEO, it would appear that the acting appointment and sudden removal was purely discretionary and private arrangement. The applicant appears not to have established the public interest served in the circumstances and as submitted for the respondents, standing is lacking. The union appears to have initiated the proceedings frivolously.
23. While making that finding the Court has considered the holding in *Timothy Otuya Afubwa & another v County Government of Trans Nzoia & 3 Others* [2016]eKLR that a petition under Articles 258(2)(c) and 22 (1) of the *Constitution* can be brought by a person acting on behalf of the public. The Court further follows *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013]eKLR, where the Court of Appeal stated, thus "Today, by dint of Articles 22 and 258 of the *Constitution*, any person can institute proceedings under the Bill of Rights, on behalf of another person who cannot act in their own name, or as a member of, or in the interest of a group or class of persons, or in public interest." Again, this Court in *Trusted Society of Human Rights Alliance v Nakuru Water and Sanitation Services Company & another* [2013]eKLR held that a petitioner had the relevant locus standi once it was established that the petition was about a public interest. In the instant application, the trade union appears to have failed to establish the public interest in the purported and alleged acting appointment that has long ceased to exist. It is purely a moot point.
24. The 3rd issue for determination is whether the applicant has established justification for granting the prayers for the judicial review orders as prayed for. Section 5 (1A) (7) of the *Local Authorities Provident Fund Act*, Cap 272, provides that the Minister shall appoint the secretary to the Board. The secretary to the Board is also the Chief Executive Officer of the Fund. To that extent, the Court considers that the 1st respondent enjoys the statutory authority to appoint the acting Chief Executive Officer. Section 34 of the *Public Service Commission Act* provides that acting appointments shall be made by the lawful appointing authority and a holder of an acting appointment must satisfy all prescribed qualifications



for holding the public office in issue. Section 34(4) of the Act states that a public officer may be assigned to perform duties vested in another public office during a temporary absence of the other public officer. Per section 34 (3) of the *Public Service Commission Act*, 2017 the tenure for an acting appointment is for not less than 30-days and not more than 6-months. It therefore becomes apparent that the applicant is misconceived that Mr. Galm Guracha Jaldesa was appointed to act. It is that the Board only appointed him to temporarily perform the duties of the Chief Executive Officer at the AGM on 26.05.2023 which was underway in view that the substantive Chief Executive Officer and CEO, Mr. David Koros had resigned on 25.05.2023. It was essentially an assignment to perform the duties of the CEO as provided for under section 34(4) of the Act, as in any event, the Board had no statutory authority to appoint an acting CEO. Thus, at MIN.7/SFB/05/13/2023 of the minutes of the 55th Special Full Board Meeting held on 26.05.2023 it was stated, “The Board appointed Mr. Galm Jaldesa as the Acting CEO on 25th May 2023 to hold fort for the office and to present the Scheme Administrators report during the AGM.” The Board was alert that it had no authority to appoint an acting CEO or Board Secretary and moved promptly by the letter dated 26.05.2023 to request the 1st respondent to appoint an acting CEO or Secretary. The 1st respondent then, correctly so, appointed Mr. Bernard Weru Mbogoh, Chief Manager Finance and Investment per the letter dated 29.05.2023 to act as the CEO for 6-months or until the position is filled substantively, whichever comes earlier. The law is that Mr. Bernard Weru Mbogoh shall not act for more than six (6) months. To that extent, the Court finds that the respondents acted strictly per section 34 of the *Public Service Commission Act*, 2017. The application must fail. The Court has considered all the circumstances of the case including the growth of the jurisprudence evolving around the instant application and parties to bear own costs.

In conclusion, the judicial review application by the notice of motion dated 02.06.2023 is hereby dismissed with orders each party to bear own costs of the proceedings.

Signed, dated and delivered by video-link and in court at Nairobi this Monday 20th November, 2023.

BYRAM ONGAYA

PRINCIPAL JUDGE

