



REPUBLIC OF KENYA



**KENYA LAW**  
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**Okoiti v Kenya Revenue Authority Board of Directors & another (Petition E191 of 2023) [2023] KEELRC 3314 (KLR) (20 December 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3314 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**PETITION E191 OF 2023**  
**B ONGAYA, J**  
**DECEMBER 20, 2023**

**BETWEEN**

**OKIYA OMTATAH OKOITI ..... PETITIONER**

**AND**

**THE KENYA REVENUE AUTHORITY BOARD OF DIRECTORS .... 1<sup>ST</sup>  
RESPONDENT**

**THE HON. ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The petitioner filed the petition on 09.10.2023 in person. The petitioner prayed for:
  - a. A declaration that to the extent that it allows the Kenya Revenue Authority (hereafter, KRA) board to appoint both KRA commissioners and deputy commissioners, section 13(1) of the KRA Act is unconstitutional and therefore, invalid, null and void *ab initio*.
  - b. A declaration that the recruitment of KRA deputy commissioners based on section 13 (1) of the [KRA Act](#), is unconstitutional and therefore, invalid, null and void *ab initio*.
  - c. A declaration that KRA deputy commissioners should be recruited by the commissioner-general with the approval of the board.
  - d. An order quashing section 13(1) of the [KRA Act](#).
  - e. An order quashing the recruitment of KRA deputy commissioners based on section 13 (1) of the [KRA Act](#).
  - f. An order that each party shall bear its cost of this suit.
  - g. Any other relief the court may deem just to grant.



2. The petition was based upon the petitioner’s supporting affidavit and exhibits thereto filed together with the petition and further affidavit sworn on October 5, 2023. The petitioner’s case is as follows:
- a. The petitioner challenges the ongoing recruitment of eight KRA deputy commissioners based on a legal provision captured in section 13(1) of the [KRA Act](#) which allows the board to usurp the role of the KRA commissioner-general to make the appointments, and, therefore, allows the board to meddle in the operational, day to day running of KRA.
  - b. The recruitment comes fast on the heels of the amendments made to section 13(1) & (2) of the [KRA Act](#) by section 80 of the *Finance Act, 2023*.
  - c. Before the amendment, section 13 of the [KRA Act](#) provided:
    13. Appointment of commissioners and other officers
      - (1) The board shall appoint to the service of the Authority, such commissioners as may be deemed necessary.
      - (2) The Commissioner-General shall, with the approval of the Board, appoint such heads of departments as may be required for the efficient performance of the functions of the Authority.
      - (3) The Commissioner-General shall appoint all other members of staff as may be required by the Authority for efficient performance of its functions.
      - (4) The terms and conditions of all persons employed by the Authority shall be determined by the board.
      - (5) Except as may otherwise be determined by the board in any particular case, an officer referred to in subsection (1), or in his absence the immediate deputy, shall be entitled to attend and participate in the deliberations of any meeting of the board but shall have no right to vote.
  - d. After the amendment, section 13 of the [KRA Act](#) now provides:
    13. Appointments of commissioners and other officers
      1. The board shall appoint, to the service of the authority, such commissioners and deputy commissioners as may be deemed necessary.
      2. Deleted by Act No. 4 of 2023, s. 80(b)
      3. The commissioner – General shall appoint all other members of staff as may be required by the Authority for efficient performance of its functions.
      4. The terms and conditions of all persons employed by the Authority shall be determined by the board.
      5. Except as may otherwise be determined by the board in any particular case, an officer referred to in subsection (1), or in his absence the immediate deputy, shall be entitled to attend and participate in the deliberations of any meeting of the board but shall have no right to vote.
  - e. Pursuant to section 13(1) of the [KRA Act](#), and *vide* an advertisement placed in MyGov newspaper on August 22, 2023 the KRA board announced eight (8) vacancies in the



authority's office of Deputy Commissioner of the Authority and commenced the process of recruiting the following:

- i. Deputy commissioner – Trade Facilitation
  - ii. Deputy commissioner – Risk management
  - iii. Deputy commissioner – Revenue & Regional coordination
  - iv. Deputy commissioner – Information communication & technology
  - v. Deputy commissioner – Human resources
  - vi. Deputy commissioner – East & South of Nairobi – Tax service office
  - vii. Deputy commissioner – Supply chain management
  - viii. Deputy commissioner – Regional coordinator – southern region
- f. The petitioner faults section 13 (1) of the KRA Act for vesting in the KRA Board the absolute power to appoint both the Authority's Commissioner-General (CEO), Commissioners and the Deputy Commissioners. Being deputies to commissioners, the Deputy Commissioners are senior members of staff who are one tier below the commissioners. Effectively, where the board unilaterally appoints them, a direct link to the board, which sidesteps the CEO and other commissioners is created, and that automatically cuts the CEO off from the rest of the staff.
- g. The arrangement undermines the good governance of the Authority as it creates two canthers of power in the secretariat and strips the CEO of some of the powers he has over his deputies and vests them in the board.
- h. By being appointed by the same board, the deputy commissioners are for all practical purposes on the same footing with the commissioner-general and other commissioners.
- i. Pursuant to section 6(6) of the KRA Act, the authority's board of directors is, in agreement with the international best practices, responsible for settling the overall strategy and direction of the company. And management is responsible for the day to day operations and implementation of the strategy and direction of the company set by the board.
- j. As created under section 11 of the KRA Act, the commissioner general is responsible to the board for all staff member as the authority's CEO.
- k. The petitioner invites the Honourable Court to intervene and determine the constitutional validity of both section 13(1) of the KRA Act and the impugned recruitments of the deputy commissioners which are being conducted and anchored to it.
- l. Under the Mwangozo (the code of governance for state corporations), the board is only supposed to hire the CEO of a public entity, in turn the CEO then hires all the other staff members.
- m. The board is now directly involved in the day to day running of the authority, giving rise to the obvious conflict of interest which arises when the board meddles in the daily operations of the authority.



- n. The petitioner urges the court to declare both section 13(1) of the *KRA Act* and the impugned recruitment of deputy commissioners by the board based on the section, to be unconstitutional null and void ab initio.
  - o. The decision to delete section 13(2) of the *KRA Act* to remove the requirement for the Commissioner-General to appoint heads of departments with the approval of the board, also undermines good governance, by removing the obvious checks and balances inbuilt therein. In the circumstances, the KRA has become a weak institution with poor governance structures resulting from a bad law for appointing deputy commissioners.
  - p. This Court has the mandate to determine if employment laws meet the constitutional threshold of good governance.
  - q. The provision in section 13(1) of the *KRA Act*, which allows the KRA board to sidestep the KRA Commissioner-General (CEO) and meddle in the running of the authority's secretariat by appointing deputy commissioners, violates articles 10(2)(c) and 258(1)(d) of the *Constitution* on good governance.
3. The respondents filed the replying affidavit of Anthony Ng'ang'a Mwaura, the Chairman of the Board of Directors of the Kenya Revenue Authority, sworn on October 19, 2023 and through the office of the Attorney General. The learned Deputy Litigation Counsel Ms. Schola Mbilo appeared in that behalf. It was argued and stated as follows:
- a. The KRA approved Human Resource Policies of July 1, 2023 set out the board is responsible for the recruitment of top management staff of the KRA including deputy commissioners.
  - b. The role of the 1<sup>st</sup> respondent is to strictly implement the law that has been duly legislated and passed by the National Assembly.
  - c. The Parliament is constitutionally mandated as the law-making body of the Republic of Kenya and not the respondents herein hence issues touching on constitutionality of the law can only be addressed by the parliament.
  - d. Section 13(1) and (2) of the *KRA Act* as amended by section 80 of the *Finance Act, 2023* is not in violation of the constitution at all.
  - e. The provisions of the *KRA Act* and more specifically section 13(1) are in line with, *inter alia*, the *Constitution*, the *State Corporations Act*, *Mwongozo Guidelines* and other corporate governance principles and the KRA approved Human resource policies of 01.07.2023.
  - f. The petitioner has failed to disclose with precision the provisions of the *Constitution* which have been violated by the 1<sup>st</sup> respondent at all to support allegations in his petition.
  - g. The respondents are acting within the law in conducting the recruitment exercise, the petitioner has not demonstrated any violation of the law by any of the respondents or any other party.
  - h. The Kenya Revenue Authority being a body corporate mandated to collect and receive all revenue for the country is key strategic institution for the functioning of the government and the country as a whole and the recruitment of top management staff is very crucial and stopping the recruitment would be detrimental in the public interest as the same will paralyse the functions of the institution causing great public outcry.



- i. The great public interest in the matter outweighs the personal interest of the petitioner and it is in the great public interest that the orders sought are declined as the petitioner has not demonstrated any breach of the law by the respondents.
  - j. The legislative process of amending the *KRA Act* was passed by members of Parliament by virtue of legislative authority derived from the people based on article 94 of the *Constitution of Kenya*. Thus, it reflects the aspirations of the Kenyan people and the stakeholders have no choice other than to comply with its provisions.
4. Final submissions were filed for the parties. The Court has considered all the material on record. The Court returns as follows.
  5. The only issue for determination is whether section 13(1) and (2) of the *KRA Act* as amended by section 80 of the *Finance Act, 2023* is in violation of the constitution at all. The Court upholds the case as urged for the respondents. The Court finds that the petitioner has not identified any constitutional rule or provision which the amendment as was enacted violated. It has also not been shown by the petitioner that the amendment when implemented or as implemented in the on-going recruitment, selection and appointment by the KRA Board thereby offends any of the constitutional provisions. It appears to the Court that the amendment fosters the principle and value of sharing of power envisaged in article 10 of the *Constitution* thereby enhancing rather than derogating from the constitutional values and principles of good governance. The Court has reconsidered the petitioner's case in its entirety including the submissions and nowhere is it shown that the amendment has violated the constitutional provisions or it is being implemented in a manner that its impact or effect offends a constitutional provision. All the petitioner is urging is that the regime obtaining prior to the amendment would be a preferable policy position, in his view, to the one introduced by the amendment. The consideration of such or other policy enacted into law like the amendment in issue would obviously fall outside the Court's justiciable consideration unless it is shown that the policy was inherently unconstitutional by violating a constitutional rule or provision, or, the manner it was being implemented offended the *Constitution* in impact or effect. That being not shown, the policy options as propagated by the petitioner are found unjustifiable.
  6. Thus, the Court upholds the respondent's case as urged and submitted. The litigation was in public interest and has not been said to have been frivolous or vexatious and each party will bear own costs of the petition.

In conclusion the petition is hereby dismissed with orders each party to bear own costs of the petition.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS WEDNESDAY 20TH DECEMBER, 2023.**

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

