



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. E172 OF 2021

(Before Hon. Justice Dr. Jacob Gakeri)

JACTON MANGENI KAPOLONI.....PETITIONER/APPLICANT

VERSUS

THE CABINET SECRETARY FOR THE NATIONAL TREASURY

AND PLANNING..... 1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS..... 3RD RESPONDENT

KENYA RAILWAYS CORPORATION..... 4TH RESPONDENT

AND

MOHAMMED ALAWI HUSSUN..... INTERESTED PARTY

JUDGMENT

1. Before me for determination is the Petitioner's/Applicant's notice of motion application dated 2nd November 2021. It seeks the following orders **THAT**:

1. Spent.

2. Pending the hearing and determination of this application inter parties, the Honourable Court be pleased to issue Conservatory Orders staying the implementation and coming into effect of Gazette Notice No. 10638 dated 1st October 2021 only to the extent of appointing the Interested Party as a member of Board of Kenya Railways Corporation, the 4th Respondent herein.

3. The Honourable Court be pleased to issue interim preservatory order including an order of injunction stopping further implementation of Gazette Notice No. 10638 dated 1st October 2021 only to the extent of appointing the Interested Party as a member of Board of Kenya Railways Corporation and stopping the Interested Party from any further discharge of his mandate as a board member of the 4th Respondent herein pending hearing and determination of this Application.

4. Pending the hearing and determination of this Application, the Honourable Court be pleased to grant stay orders barring the Interested Party from assuming office and/or discharging duties as a member of the Board of Kenya Railways Corporation in respect to the said appointment.

5. Pending the hearing and determination of the Petition, the Honorable Court be pleased to grant Orders of stay against the implementation and coming into effect of Gazette Notice No. 10638 dated 1st October, 2021 appointing the Interested Party as a member of the Board of Kenya Railways Corporation.

6. Pending the hearing and determination of the Petition, the Honorable Court be pleased to grant stay Orders barring the Interested Party from assuming office and/or discharging his duties as a member of the Board of Kenya Railways Corporation.

7. The Honourable Court be pleased to issue an order directing the 1st Respondent to avail to the Petitioner/Applicant all the information and any documents leading to the appointment of the Interested Parties herein as a board member of the Kenya Railways Corporation for a period of three (3) years effective from 6th of October, 2021.

8. The costs of this application be borne by the Respondents.

2. This application is premised on the grounds **THAT**:

i. The 1st Respondent gazetted the Interested Party vide Gazette Notice No. 10638 dated 1st October 2021, as a member of the Board of Kenya Railways Corporation, for a period of three (3) years, effective 6th of October, 2021.

ii. The appointment of the Interested Party by the 1st Respondent was done without due regard to the law and the Constitution and his continued occupation constitutes gross violation of the Constitution considering his indictment by the National Assembly by virtue of his previous work history in the public office which touched on his integrity.

iii. There was a report on the Interested Party during his tenure as a commissioner at the Independent Electoral Boundaries Commission (IEBC) which recommended that action be taken by the 2nd Respondent as against the Interested Party among others on account of loss of public funds due to their actions.

iv. To date no action has been taken by investigative agencies against the IEBC Commissioners or the Interested Party as recommended by the Public Accounts Committee of the National Assembly.

v. The Constitution provides that persons appointed to public office must fit the test set out in Chapter 6 of the Constitution, and must be of impeccable moral fibre, work ethic, character and integrity. The Interested Party does not meet the constitution parameters.

vi. Based on the recommendations by National Assembly, the Interested Party lacks integrity, has violated national values and principles of good governance and his occupation of public office is unlawful and poses a danger to the general public.

vii. The 1st Respondent abdicated his Constitutional duty to ensure that it appointed a person who met the Constitutional threshold and the dictates of Section 34 of the Public Service Act.

viii. The appointment of the Interested Party as a member of the Board of Kenya Railways Corporation for a period of three (3) years is illegal unconstitutional and should be reversed.

3. The application is further supported by the affidavit of **JACKTON MANGENI KAPOLONI**, the Petitioner, sworn on 2nd November, 2021 in which he reiterates the grounds as set out on the face of the notice of motion application.

4. The application is expressed under Sections 12(2) and (3) of the Employment and Labour Relations Court Act, and all other enabling provisions of the law.

5. The 1st and 2nd Respondents filed grounds of opposition dated 26th November 2021.

6. The 1st and 2nd Respondents state that the application lacks merit and should be dismissed.

7. That the Court has no jurisdiction on this matter as the appointment of the Interested Party is constitutional and not employer/employee relationship.

8. They further state that the applicant has no *locus standi* to institute and prosecute the notice of motion and petition herein.

9. They further state that the grounds raised by the Applicant does not warrant the issuance of the orders sought and submit that the application is baseless, misconceived and devoid of any merit.

4th Respondent's Response

10. In response to the notice of motion application, the 4th Respondent filed grounds of opposition dated 21st February 2022.

11. It is submitted that the 4th Respondent is a non-suited party as both the petition and the notice of motion application make no allegation of violation of the constitution by the 4th Respondent and no prayers have been sought against it.

12. The 4th Respondent states that it has no role in the appointment of its Board members and thus its involvement in this petition is devoid of any merit.

13. It further states that the petition and the application are fatally and incurably defective as the Court has no jurisdiction to direct the 3rd Respondent to initiate any investigations or prosecutions against any person or body.

14. That the interested party has not been found culpable of any violation of values principles of good governance and mere allegations cannot be a ground for barring any individual from appointment to public office.

15. The 4th Respondent further states that the Petitioner has not exhausted all the available avenues of dispute resolution before approaching the Court.

Interested Party's Response

16. In response to the application, the Interested Party filed a Replying Affidavit sworn on 29th November, 2021 in which he contends that the Applicant has not come to Court with clean hands and has failed to make any specific allegation and justifiable claim against his integrity and appointment.

17. The affiant states that by his profession as an advocate and work history having previously worked in the public service at the Kenya Ports Authority and served as a Commissioner of the Independent Electoral and Boundaries Commission, he fully qualifies for the appointment to the membership of the Board of Kenya Railways Authority Corporation.

18. The affiant further states that his appointment was legitimate, legal and constitutional having been made by the 1st Respondent in accordance to the provisions of Section 4(f) of the Kenya Railways Corporation Act, 2016.

19. It is the affiant's case that he was appointed as a Commissioner of the IEBC vide gazette notice Vol CXII dated 19th November 2011 where he served for a period of 5 years and 1 month and his appointment was revoked vide Gazette Notice CXIX No. 8 dated 18th January 2017.

20. The affiant states that the Petitioner relies on a report by the Public Accounts Committee, a committee that was established on 18th December 2017, 11 months after he had left office.

21. The affiant states that neither he nor any of the commissioners he served with were accused of any form of wrongdoing or invited to give comments, testify or defend themselves before the committee.

22. Pushing the case further, the affiant states that he has no pending investigations by any government agency for corrupt, unethical practice or any other criminal activity and he has never been charged nor convicted of any criminal offence.

23. The affiant states that the allegations by the Petitioner are mere hunt designed to negatively taint him.

24. Finally, the affiant states that the Petitioner/Applicant did not come to court with clean hands as he has failed to make any specific allegation or justifiable claim against his integrity and appointment. The affiant prays that the petition and the notice of motion be dismissed with costs.

1st and 2nd Respondents' Submissions

25. The 1st and 2nd Respondents highlighted two issues for determination namely whether:

- i. This court has jurisdiction over the appointment of the Interested Party;
- ii. The application has merit to warrant issuance of judicial review orders sought by the Applicant.

26. The 1st and 2nd Respondents submit that this Court has no jurisdiction over the appointment of the interested party as a member of the Kenya Railways Corporation Board. It is their submission that the appointment of the Interested Party is constitutional in nature and not an employer/employee appointment to be entertained by this Court. They rely on the celebrated words of Nyarangi JA in **The Owners of Motor Vessel "Lilian S" v Caltex Oil Kenya Ltd [1989] KLR 1** as well as the Supreme Court's decision in **Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 others [2010] eKLR**. Reliance is also made on Articles 165(3), (5) and 162(2)(a) of the Constitution of Kenya, 2010 and Section 12 of the Employment and Labour Relations Court Act, to urge that the Court has no jurisdiction to entertain the matter before it.

27. The 1st and 2nd Respondents submit that appointment of a member of board does not fall under Section 12 of the Employment and Labour Relations Court Act, 2011.

28. They submit the appointment of the Interested Party is governed by Mwongozo Code of Governance for State Corporations, 2015.

29. That Section 6(1)(a) and (e) of the State Corporations Act is constitutional in so far as it is construed together with Article 234(2)(a)(ii) of the Constitution of Kenya, 2010 and the appointment of the Interested Party herein.

30. It is submitted that the appointment of the interested party is political in nature and does not fall in within the jurisdiction of this Court.

31. The decision in **Tom Luusa Munyasya & another v Governor Makueni County & 2 others [2014] eKLR** is relied upon to reinforce the submission.

32. It is the Respondent's submission that the orders of injunction being sought by the applicant/petitioner should not be granted as the application and the grounds raised by the applicant do not meet the basic tenets of granting the injunctive orders. The decisions in **Giella v Cassman Brown & Company Ltd [1973] EA 358** and **Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR** are relied upon to urge that the Petitioner/Applicant has not established the prerequisites for the issuance of injunctions.

33. The 1st and 2nd Respondents submit that this honourable court has no jurisdiction over this matter and the allegations raised against the interested party are unfounded hence the judicial review orders sought should not be granted.

Submissions by the Interested Party

34. As regards prayer 1, the Interested Party submits that Article 157(4) and Article 157(10) of the Constitution provides that the Office of the Director of Public Prosecutions is not subject to the directions of any person or body in the discharge of its mandate.

35. The Interested Party further submits that the petition is incompetent as the Petitioner lacks the requisite *locus standi*.

36. It is the Interested Party's submission that the Constitution of Kenya, 2010 has established a legal authority to ensure compliance with and enforcement of the provisions of Chapter 6 of the Constitution, not the Petitioner.

37. That the petition is a nullity from inception. Provisions of the Leadership and Integrity Act 2012 and Ethics and Anti-Corruption Commission Act 2011 are relied upon to urge that compliance and enforcement of Chapter 6 is vested upon the Ethics and Anti-Corruption Commission (EACC) which employs defined procedural mechanisms in dealing with breaches of Chapter 6 of the Constitution of Kenya, 2010.

38. In a nutshell, it is urged that constitutional and statutory provisions prescribe a procedural mechanism for disciplining public and state officers who violate the provisions of Chapter VI. That the EACC is the only public institution mandated to ensure compliance with and enforcement of Chapter VI of the Constitution including matters that are referred to the courts for further action.

39. The Interested Party relies on the Supreme Court decision in **Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 others (supra)** to urge that the Court has no jurisdiction to determine the issues before it.

40. Reliance is also made on the decision in **Benson Ambuti Atega & 2 others v Kibos Distillers Limited & 5 others [2020] eKLR** for the proposition that:

“A party or litigant cannot be allowed to confer jurisdiction on a Court or oust jurisdiction of a competent organ through the art and craft of drafting pleadings. Even if a Court has original jurisdiction, the concept of original jurisdiction does not operate to oust the jurisdiction of other competent organs...”

41. It is further submitted that the prayers relate to prerogative orders issued by a Court exercising judicial review jurisdiction. The Interested Party relies on Article 47 of the Constitution to reinforce the submission.

42. Reliance is made to the preamble to the Fair Administrative Actions Act as well as Section 9 which restricts the power of the High Court to review an administrative action or decision under the Act, unless the mechanism including internal mechanisms for appeal or review and other remedies available in law have been exhausted.

43. The Interested Party submits that the remedies available to the Petitioner have not been exhausted. That the complaints ought to be addressed through other legal avenues and the Petitioner has not sought an exemption under Section 9(4) of the Public Officer Ethics Act, 2002.

44. It is submitted that the Court has no power to exercise its review jurisdiction.

Analysis and Determination

45. After careful consideration of the notice of motion application supporting affidavit and submissions by Counsel, the issues for determination are whether: -

- a. The Court has jurisdiction to direct the 2nd or 3 Respondents to take action as recommended by the Public Accounts Committee;
- b. The Petitioner/Applicant's allegations are sufficient for the grant of the prayers sought.

46. Although the Court was invited to address the question of jurisdiction it is reluctant to do so since the parties agreed to proceed with the application first before disposing of the petition on merit.

47. Before delving into the issues set above, it is important to dispose of the issue of whether the 4th Respondent is an unsuited party in these proceedings as raised by its Counsel.

48. It is not in dispute that no allegation of violation of any law including the Constitution has been made against the 4th Respondent and no order has been sought against it.

49. Order 1, Rule 10(2) of the Civil Procedure Rules, 2010 provides that:

The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out...

50. The decision **George G. Mbatha v Small Enterprises Finance Company Limited & others HCC 1403 of 1997** aptly captures the effect of Order 1 Rule 10 above, where Mwera J. pronounced himself as follows:

“Only parties to the issues in controversy are proper parties to be enjoined to a suit.”

51. Similarly, it is not in contest that the 4th Respondent did not participate in the appointment of the Interested Party as its director as submitted by its Counsel and prays for the 4th Respondent’s name to be struck out as a party to these proceedings.

52. Granted that the Petitioner/Applicant raised no objection, the Court is in agreement with the 4th Respondent’s submission that its name be struck out of the proceedings.

53. As to whether the Court has jurisdiction to direct the 2nd and/or 3rd Respondent to action on the recommendations of the Public Accounts Committee of the National Assembly, the first point of call is the Constitution of Kenya, 2010 which creates the two offices. While the Office of Attorney General is established by Article 156 of the Constitution, the Office of the Director of Public Prosecutions (DPP) is established by Article 157. Article 157(10) of the Constitution underscores the independence of the Office of the DPP.

54. Section 6(5) of the Office of the Attorney General Act 2012 underlines the independence of the Office of the Attorney General. The Petitioner/Applicant states that the Public Accounts Committee Report recommended that action be taken by the 2nd Respondent but the actual recommendation is directed to investigative agencies as follows “that upon adoption of this report, the relevant investigative agencies should institute investigations on the conduct of the commissioners involved with a view to initiating prosecution where culpability is established.” This quotation makes reference to neither the 2nd nor the 3rd Respondent.

55. Section 2(1) of the Office of the Director of Public Prosecutions Act, 2013 defines an investigative agency as follows –

In relation to public prosecutions means the National Police Service, Ethics and Anti-Corruption Commission, Kenya National Commission on Human Rights, Commission on Administration of Justice, Kenya Revenue Authority, Anti-Counterfeit Agency or any other Government entity mandated with criminal investigation role under any written law;

56. Neither the 2nd nor the 3rd Respondent is identified as an investigative agency.

57. In a similar vein, the Petitioner/Applicant has neither indicated whether and when copies of the report were forwarded to the 2nd and/or 3rd Respondent’s offices nor when he last enquired about the status and the response he received.

58. There is no evidence of any communication between the Petitioner/Applicant and the 2nd or 3rd Respondent.

59. Puzzlingly, the Petitioner/Applicant has not stated why he did not loop in other investigative agencies yet the committee report refers to relevant agencies.

60. There is no justification why the Petitioner/Applicant sought the Court’s intervention before ascertaining the factual situation with all the relevant investigative agencies including the Ethics and Anti-Corruption Commission. The Court is in agreement with the Interested Party’s submission that the Petitioner had not exhausted other available avenues or remedies before approaching the Court for redress as mandated by Section 9(2) of the Fair Administrative Action Act. The Petitioner/Applicant has not shown that he invoked the provisions of the Leadership and Integrity Act, 2012 and the Public Officer Ethics Act 2003.

61. Finally, the decisions of Majaja J. and Mumbi J. in **Douglas Maina Mwangi v Kenya Revenue Authority & another HCCP No. 528 of 2013** and **Francis Anyango Juma v Director of Public Prosecutions & another [2012] eKLR** respectively underscore the independence of the Office of the Director of Public Prosecutions in the discharge of its mandate.

62. For the foregoing reasons, it is the finding of the Court that the Court has no jurisdiction to direct the 2nd and/or the 3rd Respondent to take any action as recommended by the Public Accounts Committee.

63. A closely related issue is whether the Petitioner/Applicant has established the requirements for the award of the reliefs sought with specific reference to the order of injunction as enunciated in *as and* **Giella v Cassman Brown & Company Ltd (supra)** as restated in **Nguruman Limited v Jan Bonde Nielsen & 2 others (supra)** as follows:

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

a. establish his case only at a prima facie level,

b. demonstrate irreparable injury if a temporary injunction is not granted, and

c. allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially.”

64. In **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] KLR 125** the Court explained the requirements of a prima facie case as follows:

“A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”

65. As regards irreparable injury in **Nguruman Limited v Jan Bonde Nielsen & 2 others (supra)** the Court stated as follows:

“... An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”

66. The Court is guided by these sentiments.

67. From the evidence on record, it is clear that the Petitioner/Applicant’s Applicant has not met the threshold for the orders of injunction sought. The Petitioner/Applicant has neither demonstrated a *prima facie* case nor irreparable injury.

68. As to whether the allegations made are sufficient to warrant the grant of other orders sought, the home port is an analysis of the allegations and the supportive evidence to determine their probative value.

69. The pith and substantive of the Petitioner/Applicant’s case is that Public Accounts Committee Report for the year ended 30th June 2017 recommended that investigative agencies should institute investigations on the conduct of the IEBC commissioners with a view to initiating prosecution where culpability was established.

70. It is the Petitioner/Applicant’s averment that the report recommended that action be taken by the 2nd Respondent but furnished no evidence of the specific recommendation to the 2nd Respondent. That although the Public Accounts Committee Report was adopted by the National Assembly on 23rd April 2019 no action was been taken against the IEBC Commissioners or the Interested Party.

71. It is alleged that since the report has not been fully implemented by the 2nd Respondent, there are serious unresolved questions concerning the integrity of the Interested Party by virtue of having been a Commissioner with the IEBC.

72. That the Constitution of Kenya, 2010 requires appointees to public office to be of impeccable moral fibre character, work ethic and integrity. That because of the unresolved integrity issues, the Interested Party lacks integrity, has violated national value and principles of good governance and his occupation of public office is illegal and poses a danger to the general public.

73. The Court is in agreement with the assertions that persons appointed to public offices must meet the threshold prescribed by law but that is all to say at this stage.

74. I will now proceed to determine whether the foregoing allegations by the Petitioner/Applicant have been substantiated.

75. Section 107 of the Evidence Act provides as follows:

1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

76. Section 107 encapsulates the sagacious proposition that he who alleges must prove.

77. The dearth of facts and evidence in support of the foregoing allegations is puzzling.

78. First, the Applicant has not availed the Public Accounts Committee Report or at least the relevant pages for the parties and the Court to appreciate the specific allegations made against the IEBC commissioners and the Interested Party in particular. Other than the generalised statement that the relevant investigative agencies should institute investigations after the report is adopted by the National Assembly, no other evidence has been furnished to substantiate the allegations made against the Interested Party.

79. Closely related to the foregoing is the allegation that the 2nd Respondent has not fully implemented the report of the Public Accounts

Committee. No constitutional or statutory provision is cited to show that it is the obligation of the 2nd Respondent to implement such a report. In addition, no evidence has been led to demonstrate the timelines within which the 2nd Respondent is required to implement the report and that no action has been taken.

80. Second, the Petitioner/Applicant has not placed any material before the Court to show that the Interested Party was at any point identified as a person of interest by the committee or any other body subsequently. No specific allegation has been made against the Interested Party and no evidence has been led that he is being investigated by any of the investigative agencies.

81. Third, the so called “*serious unresolved questions concerning the integrity of the Interested Party*” are not supported by any shred of evidence. Without setting out particulars of the alleged unresolved issues, the allegation, in the Court’s view remains unsubstantiated

82. Fourth, the Petitioner/Applicant led no evidence to buttress the allegation that the Interested Party lacks integrity or has violated national values or the principles of good governance.

83. It is common ground no investigation has been conducted against the former commissioners of the IEBC and no evidence was provided to show that any of them and more so the Interested Party has been found culpable.

84. In **Josphat Koli Nanok & another v Ethics and Anti-Corruption Commission [2018] eKLR** Muriithi J. stated as follows:

“...I think that it trivializes the Constitution, its values and principles when empty allegations of infringement are made. A petitioner who cites a violation of the Constitution must by cogent evidence relate alleged breaches with real, concrete and direct loss, damage or injury arising out of the violation. It does not help to allege violation, drop conceptual abstracts and interpolations to fit some artificial textbook arguments of the nature and extent of constitutional principles...”

85. Finally, the Petitioner/Applicant furnished no evidence to demonstrate that the Interested Party has violated any article of the Constitution or other statutory provision.

86. Needless to emphasise, the Interested Party is entitled to all the rights and fundamental freedoms guaranteed by the Constitution of Kenya, 2010 as well all other safeguards prescribed by law. It has not been shown that his holding office as a board member of the Kenya Railways Corporation is unlawful or a danger to the general public as alleged.

87. In a nutshell, the Petitioner/Applicant has not provided sufficient evidence to demonstrate that the Interested Party does not meet the fit and proper test requirement or “*integrity and suitability test*” anchored in Chapter Six of the Constitution of Kenya, 2010. The evidence before the Court is of no probative value.

88. This position is supported by the decision in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR** the Court expressed itself as follows:

“Therefore, we respectfully hold that the court misdirected itself by concluding that the appellant was unsuitable to hold office, despite its own finding that there had been no conclusive proof of the allegations. It is our considered view that in cases seeking review of an appointment on grounds of the integrity of the appointee, the review cannot be half-hearted. It must be conclusive, fair and just.”

89. For the foregoing reasons, it is the finding of the Court that that notice of motion application dated 2nd November 2021 is unmerited and is accordingly dismissed with no orders as to costs.

90. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 20TH DAY OF APRIL 2022

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE