



**Wambui v Kenya Civil Aviation Authority & 3 others; Kenya Chapter (Interested Party) (Petition E002 of 2022) [2022] KEELRC 70 (KLR) (10 May 2022) (Ruling)**

Neutral citation: [2022] KEELRC 70 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
PETITION E002 OF 2022  
DN NDERITU, J  
MAY 10, 2022**

**BETWEEN**

**SHADRACK WAMBUI ..... PETITIONER**

**AND**

**KENYA CIVIL AVIATION AUTHORITY ..... 1<sup>ST</sup> RESPONDENT**

**KENYA CIVIL AVIATION AUTHORITY BOARD ..... 2<sup>ND</sup> RESPONDENT**

**DEVELOPMENT AND PUBLIC WORKS ..... 3<sup>RD</sup> RESPONDENT**

**HON. ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**KENYA CHAPTER ..... INTERESTED PARTY**

**RULING**

**I. INTRODUCTION**

1. In a petition dated 14<sup>th</sup> March, 2022 the Petitioner herein prays for the following:

- (a) A declaration be and is hereby made that the 3<sup>rd</sup> Respondent’s appointment of the Interested party as the 1<sup>st</sup> Respondent’s Director General is illegal, unconstitutional, null and void for the Interested party’s failure to meet the standard of integrity set under Article 10 and 73 of *the Constitution*.
- (b) A declaration does hereby issue that the 3<sup>rd</sup> Respondent’s appointment of the Interested party as the 1<sup>st</sup> Respondent’s director General without the consideration of the report by the Committee on accounts on the audited accounts of the East African Community for the year ended 30<sup>th</sup> June, 2018 is violative of the principles of national values and principles of governance and those of public service as set under Article 10 and 232 of *the Constitution*.



- (c) A declaration does hereby issue that it offends Article 47 of *the Constitution* for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent to cause the appointment of the interested party as the 1<sup>st</sup> Respondents' Director General against a report by the Committee on accounts on the audited accounts of the East African Community for the year ended 30<sup>th</sup> June, 2018 showing his questionable conduct an integrity.
  - (d) A judicial review order of Certiorari does hereby issue to bring to this court for the purpose of quashing the decision of the 3<sup>rd</sup> Respondent's appointment of the Interested Party as the 1<sup>st</sup> Respondent's Director General and or the gazettment of the interested party for being illegal, unconstitutional, null and void due to the Interested party's failure to meet the standard of integrity set under article 10 and 73 of *the Constitution*.
  - (e) Alternatively, an Judicial review order of mandamus does hereby issue compelling the 3<sup>rd</sup> Respondent to terminate the appointment of the Interested Party as the 1<sup>st</sup> Respondent's Director General for his failure to match up the standards of integrity as set under Article 73 of *the Constitution* as a consequence of the report done by Committee on accounts on the audited accounts of the East African Community for the year ended 30<sup>th</sup> June, 2018.
  - (f) Costs of this petition be awarded to the Petitioner.
  - (g) Any other relief that this court may deem fit and just in the circumstances.
2. Contemporaneously, the Petitioner filed a Notice of motion dated 14<sup>th</sup> March, 2022 under certificate of urgency praying as follows:-
1. THAT this application and the petition filed herewith be certified as urgent and apt for hearing on a priority basis and ex-parte in the first instance.
  2. THAT in the interim and pending the hearing and determination of this Application this Honourable Court be and is hereby pleased to issue a conservatory order staying the implementation of the 3<sup>rd</sup> Respondent's decision appointing the interested party herein EMILE NGUZA ARAO as the 1<sup>st</sup> Respondent's Director General as communicated to the public vide a letter dated the 8<sup>th</sup> March, 2022 and/or an order does issue staying the assumption of the Interested party herein to the office of the Director General.
  3. THAT in the interim and pending the hearing and determination of this petition this Honourable Court be and is hereby pleased to issue a conservatory order staying the implementation of the 3<sup>rd</sup> Respondent's decision appointing the Interested party herein EMILE NGUZA ARAO as the 1<sup>st</sup> Respondent's Director General as communicated to the public vide a letter dated 8<sup>th</sup> March, 2022 and/or an order does issue staying the assumption of the Interested party herein to the office of the Director General.
  4. Costs be provided.
  5. Any other order as this court will deem just and appropriate to issue.
3. The said Notice of motion is supported by the affidavit of DORCAS MWAE, an Advocate and director of Petitioner, with several annexures thereto.
4. The said application is brought under Articles 22, 23, and 165 of *the Constitution* of Kenya and Rules 4, 13, 19 and 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Rules of Practice and Procedure Rules 2013.



5. The Petitioner describes itself as a duly registered non- governmental organization whose goal and mission is to assist the members of public in accessing both procedural and substantive justice through advocacy and or protection of individual or collective rights, public interest litigation for the promotion of constitutionalism, rule of law, and good governance. A copy of the certificate of registration has been supplied to court as an annexure to the supporting affidavit.
6. On 14<sup>th</sup> March, 2022 this court issued iterim conservatory orders in the following terms:-
  1. THAT the Notice of Motion dated 14<sup>th</sup> March, 2022 be and is hereby certified urgent to be heard on priority basis.
  2. THAT pending the hearing and determination of the said application and or such other or further orders of this court, an interim conservatory order be and is hereby issued staying the implementation of the 3<sup>rd</sup> Respondent's decision appointing the Interested Party herein, EMILE NGUZA ARAO, as the 1<sup>st</sup> Respondent's Director General as communicated to the public vide a letter dated 8<sup>th</sup> March, 2022 and consequently the interested party herein is hereby injunctioned and stayed from assuming the office of the Director General of the 1<sup>st</sup> Respondent.
  3. THAT the said application, the petition and all materials filed herein, together with this order be served upon all the parties herein by the Petitioner before the close of business on Friday, 18<sup>th</sup> March, 2022.
  4. THAT this matter be mentioned before this court on Thursday 31<sup>st</sup> March, 2022 for further orders and or directions on the hearing and disposal of the application.
7. The said iterim conservatory orders have since been extended pending the hearing and determination of the application.
8. In response to the application the Respondents and the Interested Parties responded by way of replying affidavits and on 19<sup>th</sup> April, 2022 the court directed, with consent of Counsel for all the parties, that the application be disposed of by way of written submissions. Counsel for all the parties filed their written submissions. The Petitioner also filed a supplementary affidavit with the leave of court.

## **II. PETITIONER'S CASE**

9. As distilled from the petition, the Notice of motion, the supporting affidavit and the annexures thereto, the supplementary affidavit, and the written submissions by Counsel, the Petitioner's case in summary is as hereunder.
10. That on or about 10<sup>th</sup> March, 2022 the Petitioner learnt from various media sources that the 1<sup>st</sup> Interested Party had been appointed by the 3<sup>rd</sup> Respondent as the 1<sup>st</sup> Respondent's director general as communicated in a press release of 8<sup>th</sup> March, 2022.
11. The Petitioner further alleges that on 11<sup>th</sup> March, 2022 it came across some information published in People's Daily Newspaper touching on the credibility and integrity of the 1<sup>st</sup> Interested Party and which information, in the view of the Petitioner, cast doubts on whether the 1<sup>st</sup> Interested Party was transparent, credible, and accountable to hold that position or if he should hold that office at all.  
  
Further it is the view of the Petitioner that the revelations in that news item rendered the 1<sup>st</sup> Interested Party ineligible to hold the said position and office.
12. The negative information that the Petitioner had allegedly obtained is that there was massive pilferage of public funds, mismanagement, wastage, and or theft by the 1<sup>st</sup> Interested Party when he served as



the executive director of the East African Community's Civil Aviation Safety and Security Oversight Agency (CASSOA) as reported by the Committee on the Audited Accounts of the East African Community (the Committee) for the year ended 30<sup>th</sup> June, 2018. The Petitioner attached a copy of the said report and pointed to the relevant pages as 115 to 121.

13. The Petitioner further alleges that in view of the negative information concerning the 1<sup>st</sup> Interested Party the 2<sup>nd</sup> Respondent ought not to have recommended him for the appointment and that the 3<sup>rd</sup> Respondent ought not to have appointed him and hence it prayed for conservatory orders as described above.
14. The Petitioner takes the view that the 1<sup>st</sup> Interested Party does not meet the constitutional and legal thresholds required to occupy the position that he has been appointed to and seeks to have the 1<sup>st</sup> Interested Party prohibited from taking the office which he was supposed to assume on or 22<sup>nd</sup> April, 2022.
15. Further, the Petitioner alleges that the appointment of the 1<sup>st</sup> Interested Party as the director general of the 1<sup>st</sup> Respondent is vitiated by illegality in that the letter of appointment was executed for and on behalf of the 3<sup>rd</sup> Respondent contrary to Section 19 of the Civil Aviation Act and against the principle of *delegare non potest delegare*.
16. It is on the basis of the foregoing that this court issued conservatory interim orders on 14<sup>th</sup> March, 2022 as expressed above pending the service and the responses from the Respondents and the Interested Parties.
17. To conserve the subject matter and maintain the status quo the interim conservatory orders were extended on 19<sup>th</sup> April, 2022 pending the hearing and determination of the application interpartes.

### III. RESPONDENTS' CASE

18. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed joint responses to the application by way of a replying affidavit sworn by GEORGE OMBASI MOGAKA, the Corporation Secretary of the 1<sup>st</sup> Respondent and secretary to the 2<sup>nd</sup> Respondent, on 5<sup>th</sup> March, 2022. The same deponent swore a supplementary affidavit on 13<sup>th</sup> April, 2022.
19. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents through the above named senior officer hold the position that the 1<sup>st</sup> Interested Party was legally and lawfully recruited and appointed to the position of director general of the 1<sup>st</sup> Respondent through a transparent and competitive process that was carried out in accordance with the law.
20. Further, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents argue that even if the appointment letter of the 1<sup>st</sup> Interested Party was signed for and on behalf of the 3<sup>rd</sup> Respondent, which is however denied, that did not and cannot of itself vitiate the recruitment process as Section 19 of the Civil Aviation Act does not read that the 3<sup>rd</sup> Respondent shall sign the said letter in his own hand. In any event, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents hold, it is the 3<sup>rd</sup> Respondent who issued the gazette notice that made the appointment being No. 3188 of 18<sup>th</sup> March, 2022 and hence the principle of *delegare non potest delegare* was neither abused nor violated as the appointment was done by the 3<sup>rd</sup> Respondent and not a third party.
21. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents are categorical that the 1<sup>st</sup> Interested Party is academically, professionally, and morally qualified and fit to occupy the office of the director general of the 1<sup>st</sup> Respondent.
22. The deponent annexed to the replying affidavit documents to demonstrate and illustrate each and every step taken in the recruitment process culminating in the appointment of the 1<sup>st</sup> Interested Party.



23. On the Committee report for the financial year ending 30<sup>th</sup> June, 2018 of the CASSOA as submitted by the said Committee to the East African Legislative Assembly, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents allege that the process has not yet been completed and that in any event the 1<sup>st</sup> Interested Party has neither been summoned nor investigated, charged, and or convicted in a court of law as to form conclusive evidence that he was either involved in theft, wastage, mismanagement, or pilferage of public funds.
24. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents urge that the said Committee and the East African Legislative Assembly did not invite the 1<sup>st</sup> Interested Party for clarification on the issues raised before making the recommendation and adopting the same respectively. In any event, they argue, the Council of Ministers of member states is yet to adopt the said report and the recommendations therein and hence the process is still incomplete.
25. In the circumstances, if the 1<sup>st</sup> Interested Party is condemned, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents argue, he shall have been denied fairness in an administrative process which is against Article 47 of *the Constitution*, Provisions of the Fair Administrative Actions Act, and the rules of natural justice in general.
26. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents further allege that an audit that was subsequently carried out did not place any blame on the 1<sup>st</sup> Interested Party and that the said report exonerated him and that the instant application is made in bad faith and malice.
27. In the supplementary affidavit by the same deponent, GEORGE OMBASO MOGAKA, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have further explained each step taken in the process that culminated in the appointment of the 1<sup>st</sup> Interested Party as the director general of the 1<sup>st</sup> Respondent. They have attached documents in support and verification of that process.
28. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents have attached to the affidavit letters and or documents from the National Intelligence Services(NIS), Ethics and Anti-Corruption Commission (EACC), the Directorate of Criminal Investigations (DCI), Credit Reference Bureau (CRB), and Higher Education Loans Board (HELB) to authenticate and confirm that due diligence was carried out in respect of the 1<sup>st</sup> Interested Party, along with the other applicants, before he was interviewed, recommended, and subsequently appointed to the said position and the subsequent gazettement.
29. It is the position of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents that the recruitment process was transparent and accountable and there is no reason for the same to be faulted. They hence urged this court to vacate the interim conservatory orders and dismiss the application with costs.
30. Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents summed up their case along the same arguments summarized in the foregoing paragraphs in her written submissions dated 18<sup>th</sup> April, 2021(sic), the correct year is 2022.
31. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents reacted to the application by way of replying affidavit sworn by Dr.(ENG.) JOSEPH NJOROGI, the Principal Secretary for the state Department of Transport in the Ministry of Transport, Infrastructure, Housing, urban Development, and public works.
32. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents took a similar, if not the same, position as taken by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. The deponent in the replying affidavit elaborated on the process that culminated in the appointment of the 1<sup>st</sup> Interested Party and each and every step taken along the way.
33. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents took the position that the recruitment was regular, lawful, and procedural, in accordance with the law, and that this petition and indeed the instant application has no merit and should be dismissed with costs.



34. Like the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, the 3<sup>rd</sup> and 4<sup>th</sup> Respondents urged his court to determine and dispose of this application without delay to avoid a vacuum that could interrupt the operations of the aviation industry in Kenya.
35. The case for the 3<sup>rd</sup> and 4<sup>th</sup> Respondents was summed up in the written submissions by their Counsel dated 14<sup>th</sup> April, 2022.

#### **IV. 1<sup>ST</sup> INTERESTED PARTY'S POSITION**

36. The 1<sup>st</sup> Interested Party reacted to the application by way of a replying affidavit that he swore on 25<sup>th</sup> March, 2022 which has several annexures to it.
37. He has explained in detail how he came across an advertisement calling for suitable and qualified persons to apply for the position of the director general of the 1<sup>st</sup> Respondent. He holds the view that he is qualified and thus went ahead and applied for the job. He was subsequently shortlisted, interviewed, appointed, and gazetted for the said position. He has attached copies of documents in regard to his academic and professional qualifications.
38. The 1<sup>st</sup> Interested Party has urged that the report of the Committee on accounts on audited accounts of the East African Community for the year ended 2018, upon which the Petitioner is relying to attack his character and suitability for the job, does not state that there was theft by himself nor does it state that he lacks integrity as alleged, and in particular in pages 115 to 121 of the said report.
39. The 1<sup>st</sup> Interested party has explained in detail the process of auditing and reporting at the East African Community Institutions and Agencies. He states that the issues relied upon by the Petitioner were addressed in a management letter on the financial statements for the CASSOA prepared in December, 2018. He has annexed a copy of that report.
40. He states that the accounts were unqualified and if he or indeed any one else had engaged in mismanagement, theft, pilferage, or wastage as alleged the accounts would have been qualified and action taken against him and or any one else involved in the alleged mismanagement.
41. The 1<sup>st</sup> Interested Party states that he is a decorated professional and that the Petition and the instant application are misguided and based on unsubstantiated and malicious allegations aimed at soiling his good profession and moral standing and image. He concludes that he has not abused and or violated any statutory or constitutional values and principles that would render him unsuitable or unfit to hold the office to which he has been appointed.
42. Further, the 1<sup>st</sup> Interested Party has challenged the Petitioner to deliver any evidence of corruption that it may be holding against him to the EACC as that is the right forum for such issues.
43. He opines that the petition and the instant application amount to abuse of court process as they disclose no issues of substance to be adjudicated upon by this court and prays for dismissal thereof with costs.
44. The 1<sup>st</sup> Interested Party's case is summoned up in the written submissions by his Counsel dated 14<sup>th</sup> April, 2022.

#### **V. 2<sup>ND</sup> INTERESTED PARTY'S POSITION**

45. The 2<sup>nd</sup> Interested Party Association of African Aviation Training Organization – Kenya Chapter, applied to join this Petition vide a Notice of motion dated 14<sup>th</sup> April, 2022 through its officials



GITHAE MWANIKI, JOSEPH MARTIN RIRIANI, and AMOS SAMSON AKETCH. The said application was allowed by consent of Counsel for all the parties on 19<sup>th</sup> April, 2022.

46. The said Interested Party responded to the application by way of a replying affidavit sworn by Eng. GITHAE MWANIKI, the Secretary General thereof, sworn on 19<sup>th</sup> April, 2022. He depones that the said organization is an umbrella body which coordinates and represents aviation training and incidental matters in Kenya and is duly recognized by the 1<sup>st</sup> Respondent, the regulatory body.
47. The said Interested Party has pleaded that the Petition and the instant application be heard and determined expeditiously as a vacuum in the office of the director general of the 1<sup>st</sup> Respondent could hamper the operations of the 1<sup>st</sup> Respondent and negatively affect the aviation industry in Kenya where it carries its business and holds stake.
48. The position of the 2<sup>nd</sup> Interested Party has been summed up in the written submissions by its Counsel dated 19<sup>th</sup> April, 2022.

## **VI .ISSUES FOR DETERMINATION**

49. This court has carefully gone through the materials placed before it by all the parties as summarized above. Upon distilling the said materials, that is to say all the affidavits, annexures thereto, and the written submissions by Counsel, the following two issues commend themselves to this court for determination:-
  - (a) Are there good and sound legal reasons and grounds for this court to interfere with the recruitment and appointment of the 1<sup>st</sup> Interested Party as the director general of the 1<sup>st</sup> Respondent pending the hearing and determination of the petition? Put in another way, does the application by the Petitioner meet the legal threshold for this court to issue the conservatory orders sought by the Petitioner pending the hearing and determination of the petition?
  - (b) Costs.

## **VII.FACTUAL MERITS OF THE APPLICATION OR LACK THEREOF**

50. As far as this court can discern, the Petitioner is challenging the appointment of the 1<sup>st</sup> Interested Party as the director general of the 1<sup>st</sup> Respondent on two (2) grounds:-
  - (i) That the 1<sup>st</sup> Interested Party does not meet the Constitutional, legal, moral, and ethical probity required for the holder of that office in that he fails the accountability, integrity, and transparency tests for allegedly being of corrupt ways; and
  - (ii) That the letter of appointment for the 1<sup>st</sup> Interested Party to the said position was not signed by the 3<sup>rd</sup> Respondent but by a third party against the delegare non potest delegare principle.
51. In respect of ground (i) the Petitioner states as follows in paragraph 8 of the supporting affidavit by DORCAS MWAE:-

"THAT the Petitioner has in the discharge of its mandate obtained the voluminous February 2020 report of Committee on accounts on the audited accounts of the East African Community for the year ended 30<sup>th</sup> June, 2018 showing massive pilferage of public funds, mismanagement, wastage and or theft of public funds by the interested party while he was



serving as the Executive Director of the East African Community’s Civil Aviation Safety and Security oversight Agency (CASSOA).”

52. Specifically the Petitioner has referred to pages 115 to 121 of the said report and attached a copy of the same.
53. This court has taken time to keenly go through the referenced pages with a view of establishing if indeed the 1<sup>st</sup> Interested Party was said to have engaged in “massive pilferage of public funds, mismanagement, wastage and or theft of public funds.”
54. This court notes that in all the referenced pages the said Committee was making recommendations to either the Assembly or the Council of Ministers to hold the 1<sup>st</sup> Interested Party, and others who are not parties to this petition, accountable for any losses that may have been incurred or occasioned through the commission or omission of the 1<sup>st</sup> Interested Party and or the other named persons.
55. It is therefore very clear that the proposed actions or recommendations by the said Committee was subject to further discussion and scrutiny to by the Assembly and or the Council of the Ministers. The Petitioner has not, either in the said supporting affidavit or the further affidavit, informed this court what the Assembly of the member states or indeed the Council of Ministers found or recommended following or upon deliberating on the recommendations of the committee.
56. It is therefore very clear that the recommendations by the said committee were subject to further scrutiny and approval by the Assembly or the Council of Ministers and hence the committee did not have the final word on the issues that it raised.
57. The Petitioner has not shed light to this court on whether the 1<sup>st</sup> Interested Party was investigated, tried, and the outcome thereof. Further, now that the Petitioner is in possession of this allegedly negative information, which it alleges portrays the 1<sup>st</sup> Interested Party as a corrupt individual who is unfit to hold a public office, what other steps beyond filing this petition has it taken? Has the alleged corrupt acts/ conduct by the 1<sup>st</sup> Interested Party been reported to the EACC, DCI, or indeed any other investigative agency?
58. However, the answers to the above rhetorical questions posed by the court have been provided for by the Respondents and the interested parties in their responses.
59. In his replying affidavit, the 1<sup>st</sup> Interested Party has annexed a management letter by the auditors-general of the member states which report he states did not find any fault on his part. He also states that the Committee that prepared the earlier report did not invite him to make his comments or explanations before unfairly condemning him unheard, which is against the rules of natural justice.
60. The 1<sup>st</sup> Interested Party vehemently denies abusing any provisions of *the Constitution* in the Bill of Rights, Leadership and Integrity Principles, or any other law including the *Leadership and Integrity Act*, and challenges the Petitioner to point out and demonstrate which provisions of the law he has abused or violated.
61. It is the view of the 1<sup>st</sup> Interested Party that the Petitioner has filed this petition in bad faith to portray him as a corrupt individual with a view of denying him the opportunity to serve in the said office by maliciously tarnishing his name. He hence urges that the conservatory orders be denied and the interim conservatory orders be set aside and vacated.
62. The supplementary affidavit by the Petitioner does not answer to the issues raised as above by the 1<sup>st</sup> Interested Party but rather reiterates the contents of the supporting affidavit.



63. The Petitioner has not raised any issues regarding the academic and professional qualifications of the 1<sup>st</sup> Interested Party to hold the position of the director general of the 1<sup>st</sup> Respondent. This court has also not come across allegations of unprocedural or illegal steps in the advertisement, shortlisting, and interviewing of the candidates. The only issue raised in this regard is that the 1<sup>st</sup> Interested Party was not supposed to be shortlisted or interviewed for the job, let alone being appointed, for the reasons of allegedly being unfit to hold a public office.
64. This court is of the considered view that the Petitioner has not made out a case against the Respondents and or indeed the 1<sup>st</sup> Interested Party that would render this court to, *prima facie*, conclude that the 1<sup>st</sup> Interested Party is a corrupt individual who should not hold the office of the director general of the 1<sup>st</sup> Respondent.
65. This court finds and holds that the allegations of corruption and lack of values and principles in public service against the 1<sup>st</sup> Interested Party are mere and unsubstantiated claims that do not warrant issuance of the conservative orders sought for.
66. On issue (ii) above, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have given a detailed account on the recruitment process that culminated in the appointment of the 1<sup>st</sup> Interested Party. The appointment was done pursuant to Section 19 of the *Civil Aviation Act*, 2013. The Petitioner has not disputed the facts as narrated in the replying and supplementary affidavits for and on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents other than the allegation that the 1<sup>st</sup> Interested Party was not supposed to have been shortlisted and or interviewed for reasons that have been found wanting in the foregoing paragraphs.
67. To the replying affidavit on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents is annexed a letter from the 3<sup>rd</sup> Respondent appointing the 1<sup>st</sup> Interested Party to the position of director general of the 1<sup>st</sup> Respondent dated 8<sup>th</sup> March, 2022 with effect from 22<sup>nd</sup> April, 2022. There is also a letter of offer and acceptance duly executed by the parties and the gazette notice by the 3<sup>rd</sup> Respondent.
68. This court has scrutinized the supporting affidavit for and on behalf of the Petitioner and looked for the appointment letter allegedly executed by a third party instead of the 3<sup>rd</sup> Respondent but none is found. The said letter, as per paragraph 17 of the supporting affidavit, is marked SM4. However, SM4 is the report of the committee on accounts. Further SM5 is a press release which is again duly signed by the 3<sup>rd</sup> Respondent.
69. In view of the foregoing, this court is at a loss as to how the 3<sup>rd</sup> Respondent abused his role or indeed the delegare non potest delegare principle. That allegation is found to hold no water.
70. So far, this court has been examining the first issue for determination as to whether there are good factual grounds for this court to interfere with the recruitment and appointment of the 1<sup>st</sup> Interested Party as the director general of the 1<sup>st</sup> Respondent and this court has come to the conclusion and holding that there are no good and sound factual basis upon which this court may grant the conservatory orders as sought by the petitioner pending the hearing and determination of the Petition.

#### **VIII.LAW APPLICABLE\***

71. The instant application is expressed to be brought under Articles 22, 23, and 165 of *the Constitution* of Kenya and Rules 4, 13, 19, and 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, \*2013 and all other enabling provisions of the law.
72. Article 22 is on enforcement of the Bill of Rights and the right of every person to institute court proceedings if the rights are denied, violated, infringed, or threatened. Article 23 is on authority of



courts to uphold and enforce the Bill of Rights wherein the courts are mandated to hear and determine application for redress of a denial, violation infringement, or threat to a right or fundamental freedom in the Bill of Rights. Article 165 is on the constitutional mandate of the High Court, and by extension this court (ELRC) in application and interpretation of *the Constitution*.

73. This Court (ELRC) has jurisdiction in the interpretation and application of *the Constitution* in matters relating to Employment and Labour Relations based on Article 165(5) (b). Hence, the Petition and the instant application are properly before this court as they relate to the recruitment and appointment (employment) of the 1<sup>st</sup> Interested Party to the position of the director general of the 1<sup>st</sup> Respondent, a position in public service.
74. The territory of granting or denying conservatory (stay) orders was marked by the Supreme Court in the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji*(2014) eKLR. By analogy, this court has to consider whether the pending Petition is arguable and not frivolous and whether if the conservatory orders are denied the Petition shall be rendered otiose or nugatory, were it to succeed. This court has to consider the public interest as well.
75. In *Centre for Rights Education and Awareness (CREAW) v Attorney General* (2011) eKLR, a decision prior to the *Peter Munya* case (Supra) Musinga J (as he then was) stated that an applicant in such applications has to demonstrate a prima facie case with likelihood of success and that if the conservatory orders are denied there is real danger that the applicant will suffer prejudice due to the denial, infringement, or threat to the right(s) claimed.
76. In the *Peter Munya* case the Supreme Court made the following observations as paragraph 86:-

[86]“Conservatory Orders” bear a more decided public-law connotation. For these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, like interlocutory injunctions, linked to such private party issues as “the prospects if irreparable harm “occurring during the pendency of a case; or “high probability of success” in the applicant’s case for orders of stay. Conservatory orders. Consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes and priority levels attributable to the relevant causes.”
77. Flowing from the foregoing paragraphs, the Petitioner/Applicant herein has to satisfy the following ingredients for the conservatory orders to be issued as prayed in prayer 3 of the application:-
  - (a) Establish and demonstrate prima facie case with likelihood of success and demonstrate that the Petition is not frivolous.
  - (b) Demonstrate that it is likely to suffer prejudice if the conservatory orders are not granted which may render the petition otiose or nugatory, if the same subsequently succeeds.
  - (c) Demonstrate that it is in public interest that the conservatory orders be granted pending the hearing and determination of the Petition.
78. In regard to item (a) above, and without going into detailed analysis of the petition at this stage, this court has found in an earlier part of this ruling that on the basis of the materials placed before it the allegations that the 1<sup>st</sup> Interested Party is a corrupt individual who is unfit to hold a public office has not been substantiated to a level where it can be said that a prima facie case has been established.



79. There is no evidence of investigations by the legally established agencies and there is no evidence of any charges, let alone a conviction, against the 1<sup>st</sup> Interested Party based on the alleged pilferage, theft, and mismanagement. It would be grossly unfair at this stage to deny the 1<sup>st</sup> Interested Party the opportunity to serve in the said office based only on the allegations made by the Petitioner without further and better evidence being placed before this court. In other words, this court is unable to positively assess the likelihood of success of the Petition at this stage based on the materials placed before it – See Korir J *in the matter of Appointment of the Commissioners of Independent Electoral and Boundaries Commission* (2021) eKLR.
80. If this court was to issue the conservatory orders at this stage it would amount to condemning the 1<sup>st</sup> Interested Party unheard as he was not invited by the audit/accounts committee and he has not been, as far as the materials before the court speak, investigated, charged, and or convicted in accordance with the law.
81. Therefore, as far as *prima facie* case is concerned, without going into the merits of the Petition, this court is not satisfied that conservatory orders should issue at this stage. In any event it is still open to the parties, and moreso the Petitioner, to amend their pleadings or apply to present further and or better evidence in support of their respective positions and hence, this court shall leave this issue at that.
82. On issue (b), even if the conservatory orders are denied at this stage, the recruitment and appointment of the 1<sup>st</sup> Interested Party can still be declared null and void and set aside upon the hearing of the Petition in full. In any event, if the 1<sup>st</sup> Interested Party engages in corruption, pilferage, theft, and or mismanagement in his new position, the government has mechanisms and agencies to deal with such misconduct including investigation by EACC or DCI, prosecution by the DPP, trial and if found guilty conviction by a competent court of law.
83. It is the view and opinion of this court that no prejudice shall be suffered by the Petitioner if the conservatory orders are not granted at his point. On the contrary such orders would deny the 1<sup>st</sup> Interested Party fair administrative action under Article 47 of the Constitution and Section 4 of the Fair Administrative Actions Act. It would be against the rules of natural justice.
84. The other issue (c) is about public interest. While it is in public interest that corrupt and unfit individuals should not be appointed to hold public offices, the converse is also true. It is in public interest that Kenyans be served without unnecessary hindrances and or interruptions in the operations of public institutions, bodies, and agencies. It is also equally true the Kenyans who are qualified and fit to hold public offices should not be denied the opportunities to serve unless there are good and well established reasons to halt or deny them that chance.
85. It is also in public interest that the operations of the aviation industry in Kenya should not be interrupted especially in the contemporary hard economic times unless there are good and well established reasons.
86. In any event, as stated elsewhere in this ruling, if upon the hearing of the Petition it is found with finality that the 1<sup>st</sup> Interested Party is unfit to hold the said office he shall be removed in accordance with the law.
87. In the meantime, it is only fair and just that the operations of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, and the aviation industry in Kenya in general, be allowed to operate without undue hindrance.
88. It is also in public interest that the Petitioner and indeed any other person or body do forward and submit any evidence of corruption or theft that they may have against the 1<sup>st</sup> Interested Party to the **EACC, DCI**, or any other agency as that is the right forum for such investigations to be carried out



and appropriate action taken. This court is not an investigative body as that is not in its constitutional and legal mandate.

89. It is hence the considered view of this court that it is in the public interest that the conservatory orders as sought by the Petitioner be denied at this juncture.

#### **IX. DISPOSAL**

90. In view of all that is stated above, the conservatory orders sought by the Petitioner in the Notice of Motion dated 14<sup>th</sup> March, 2022 are hereby denied. The interim conservatory orders issued by this court on 19<sup>th</sup> April, 2022 pending the hearing and determination of this application are hereby set aside and vacated.

#### **X. COSTS**

91. This court orders that the costs of this application shall abide with the orders on costs in the Petition.

#### **XI. GRATITUDE**

92. This court wishes to thank all Counsel for the co- operation and hard work that they have put in this matter. All the good and well written pleadings and submissions by Counsel for all the parties have been read and considered by this court in writing this ruling. They have all been considered and they have, without doubt, added value and enriched this ruling.

**DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAKURU THIS 10<sup>TH</sup> DAY OF MAY, 2022.**

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**DAVID NDERITU**

**JUDGE**

