



REPUBLIC OF KENYA



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**Wangari v Kenya Ports Authority & 2 others; Ogutu & 3 others (Interested Parties)
(Petition E005 of 2022) [2022] KEELRC 1304 (KLR) (15 July 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1304 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
PETITION E005 OF 2022**

B ONGAYA, J

JULY 15, 2022

**N THE MATTER OF APPOINTMENT IN THE PUBLIC SERVICE AND STATE OFFICES
IN THE MATTER OF ARTICLES 1, 2, 3, 10, 19, 20, 27, 28, 41, 59 AND 232
IN THE MATTER OF EMPLOYMENT ACT, 2007
IN THE MATTER OF LABOUR RELATIONS ACT, 2007
IN THE MATTER OF THE KENYA PORTS AUTHORITY ACT CAP 391
IN THE MATTER OF THE GENDER PRINCIPLE IN
THE APPOINTMENT OF PUBLIC AND STATE OFFICES**

BETWEEN

CATHERINE WANGARI PETITIONER

AND

KENYA PORTS AUTHORITY 1ST RESPONDENT

**PRINCIPAL SECRETARY, MINISTRY OF NATIONAL TREASURY 2ND
RESPONDENT**

ATTORNEY GENERAL 3RD RESPONDENT

AND

DANIEL OMONDI OGUTU INTERESTED PARTY

GENDER AND EQUALITY COMMISSION INTERESTED PARTY

PUBLIC SERVICE COMMISSION INTERESTED PARTY

DOCK WORKERS UNION INTERESTED PARTY



RULING

1. The 4th interested party has filed an application on May 17, 2022 by the notice of motion dated 16.05.2022 through its officer Mr. Leonard Rufus Ochieng. The application is under Article 23 of the Constitution of Kenya, 2010 and Rules 3,4, 5 and 6 of Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. The 4th interested party prays for orders:
 - 1) ...(spent).
 - 2) ...(spent).
 - 3) That pending the hearing and determination of the petition or further orders, a conservatory order does issue to restrain or stay the reinstatement of the 1st interested party as the General Manager in charge of Human Resource and Administration of the 1st respondent.
 - 4) That the costs of the application be borne by the 1st respondent.
2. The application is based upon the supporting affidavit of Simon Kiprono Sang, the applicant trade union's General Secretary annexed thereto, his further supporting affidavit filed on 13.06.2022, and upon grounds urged as follows:
 - a) The petition challenges the renewal of the contract of service of the 1st interested party by the 1st respondent. The renewal is allegedly unconstitutional and unlawful.
 - b) By order of the Court the applicant was enjoined to the suit. On 05.05.2022 the Court was informed by counsel for the 1st respondent that the office held by the 1st interested party had been abolished by operation of a new organisation structure approved by the line Ministry so that the 1st interested party was no longer in the employment of the 1st respondent – the consequence being that the petition would have thereby become overtaken by the event of the 1st interested party being in the employment of the 1st respondent. However, the turn of events was that on May 3, 2022 the 1st respondent had reinstated the 1st interested party to the position impugned in the instant proceedings being that of General Manager, Human Resource and Administration. The reinstatement impairs the Court's authority to interrogate the process or procedure which the 1st respondent applied to renew the contract of the 1st interested party and for the Court to determine the dispute in the best public interest.
 - c) The position held by the 1st respondent having been abolished by operation of the new organisational structure, the 1st respondent and the 1st interested part will not suffer prejudice if the Court grants the conservatory order as prayed.
 - d) The 1st respondent renewed the 1st interested party's contract of service in February, 2022 to take effect on May 1, 2022 for a period of 3-years while well aware that its own Board of Directors had forwarded to the Ministry its new organisational structure for approval. The 1st respondent's officers as public officers are bound to uphold the values and principles of public service provided for in Article 232 of the Constitution of Kenya, 2010. They are required to be honest and shall not pursue any personal interest in discharge of public duty and which appears not to be complied with in the instant dispute.



- e) If the 1st respondent's organisational structure changed and the office held by the 1st interested party abolished as at 05.05.2022 then the same office could not be available for reinstatement of the 1st interested party because such changes or amendments would have required further approval by the Ministry. The 1st interested party is due to report on duty on 16.05.2022 and the conservatory order should issue to prevent the resumption of duty by the 1st interested party as the 1st respondent's General Manager, Human Resource and Administration.
- f) The officers of the 1st respondent be resisted from turning the 1st respondent into a private entity which top officers can tinker with at will and 1st respondent's decisions made whimsically disregarding the constitutional provisions and law on public appointments.
- g) The Genesis Human Rights Commission has filed on May 16, 2022 ELRC Judicial Review Application No. 001 of 2022 challenging the new human resource organisational structure of the 1st respondent and the new structure was dated April 21, 2021 when the 1st interested party's contract of service was still alive. The 1st interested party and the 1st respondent therefore knew that the office held by the 1st respondent was being abolished under the new human resource organisational structure. In the Judicial Review Application No. 001 of 2022 the Court ordered on May 18, 2022 *inter alia*, "5. That for avoidance of doubt the prayer for leave as granted herein to operate as stay is hereby declined in view of the 38 employees said to have been already appointed and deployed flowing from the Human Resource Instruments now impugned and the 38 employees in issue not being parties to the present case." By that order, the applicant's case is that it is the new organisational structure dated 21.04.2021 which is in force and the office of the 1st interested party remains dissolved and redundant until (or unless) the new organisational structure is quashed and the old structure reinstated. The Board resolution at the meeting of April 21, 2022 reiterated the same new structure dated 21.04.2021 which abolished the office held by the 1st interested party. The effect of implementing the new structure was that the contract of appointment of the 1st interested party dated May 2, 2019 was rendered redundant and the renewal contract contemplated by the letter dated 23.02.2022 had not matured at all. At the 400th meeting of the 1st respondent's Board held on 20.04.2022 the new organisational structure was implemented by deploying 38 employees based on the new structure and by that resolution and deployment, the 1st interested party was rendered redundant by abolition of the office of General Manager, Human Resource and Administration. There cannot be an appointment in public service for an office which has been abolished by a lawful instrument or policy.
- h) The renewal of the 1st interested party's contract of service by the letter dated February 23, 2022 or any other instrument was unlawful and unconstitutional for failing to comply with Articles 10, 232, and 234 of *the Constitution*. The promised renewal by letter of 23.02.2022 was cut short by the Board resolution of April 20, 2022 as the contract dated May 2, 2019 was to lapse on April 30, 2022 but by resolution of April 20, 2022, the 1st interested party became redundant –ending the contract running from May 2, 2019 and due to lapse on April 30, 2022. Thus the contract of employment starting on 02.05.2019 was rendered redundant on 20.04.2022 prior to its lapsing on April 30, 2022 and the contract of service promised on February 23, 2022 was already overtaken by lapse of time and redundancy event. Further, without a fresh process commenced to appoint the 1st interested party, there is no valid contract document upon which his appointment would be hinged.
- i) The old human resource structure for the 1st respondent must give way to the new structure unless the new structure is quashed.



- j) The application should be allowed and thereby terminate the petition and judicial time be saved accordingly.
3. The 1st respondent opposed the application by filing on June 15, 2022 the replying affidavit of Stephen Kyandih, the 1st respondent's Principal Legal Officer, Litigation and Disputes and, filed through, Muriu Mungai & Company Advocates. The 1st respondent opposed the application and it was urged as follows:
- a) As a preliminary point the 4th interested party cannot seek a substantive relief from the Court but at most can only support the case for the petitioner or respondents – having not filed a petition or cross-petition. The application is a non-starter.
 - b) On March 10, 2022 the petitioner abandoned the application for conservatory orders to pave way for hearing of the main petition on merits. The 4th interested party cannot supplant the petitioner to become the aggrieved party.
 - c) The allegations in the petition on irregularity in appointment of the 1st interested party have not been proved and the appointment enjoys a presumption of regularity and lawfulness until shown otherwise. The 1st interested party should remain in office and if found irregularly appointed after hearing the petition the Court may order his removal. There is no overwhelming reason to justify removal of the 1st interested party from office and on interim basis.
 - d) The petition is not about whether the 1st interested party is in or out of office on the basis of any organisational structure but it is about if the 1st respondent acted in accordance with the law in extending the 1st interested party's contract of service. The issues of the new and old structure are not part of the matters pleaded in the petition and the 4th interested party is precluded from introducing such new matters. In any event in the new structure of April 2021 at page 84 the office of General Manager, Human Resource & Administration still exists.
 - e) The 1st respondent is subject to the line Ministry being the National Treasury and, the State Corporations Advisory Committee. Their decisions are conveyed to the Managing Director, then the General Manager, then the Head of Department, then, instructing Counsel. The communication may be peace-meal hence may be inaccurate like may be the case in the instant matter. The correct position is that the office held by the 1st interested party has always existed and continues to exist and the 1st respondent continues to hold the office unless lawfully removed. There was no intention to mislead the Court that the office had been abolished and any error deeply regretted.
4. Ms. Janet Langat, Deputy Chief Litigation Counsel for the Attorney General appeared for the 2nd and 3rd respondent and submitted that they supported the 1st respondent's case and submissions. Ms. Wangeci Gichangi, Principal Legal Counsel for the 3rd interested party submitted that they would not participate in the application. Mr. Henry Oduor Advocate for the petitioner did not oppose the application. Submissions were filed for the 4th interested party and the 1st respondent. The Court has considered the submissions and the material for and against the application and returns as follows.
5. The 1st preliminary issue is whether the applicant as an interested party was entitled to file the application and seek conservatory orders as was done. It is submitted for the 1st respondent that the 4th interested party has raised issues beyond those raised by the petitioner. The 1st respondent's case is that the applicant raises issues of an old and new human resource structure to urge that the 1st interested party's contract of service has been irregularly concluded. The Court finds that it is true



that the petition has not addressed issues of the new and old structure as establishing the position of General Manager, Human Resource and Administration and held by the 1st interested party. The real issue in dispute in the petition appears to be whether the renewal of contract of service also referred to as extension of contract was constitutional and lawful. The Court therefore finds that indeed the applicant has raised in the application matters not in dispute between the petitioner and the respondents as the primary parties to the petition. The Court is guided by the holding of the Supreme Court in *Methodist Church in Kenya – V- Mohamed Fugicha & 3 others* [2019] eKLR thus “Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. An interested party may not frame its own fresh issues or introduce new issues for determination by the Court.” In the same case, the Supreme Court held that an interested party could not introduce a cross-petition and if that was done, then the Court lacked jurisdiction to entertain the cross-petition. The Court finds that the applicant not being a primary or principal party to the present petition has introduced an application raising issues outside the matters pleaded for the petitioner and the respondents and thereby purported to introduce a new dispute all together. That cannot be permitted and as guided by the Supreme Court, the Court does not enjoy the jurisdiction to hear and determine the new cause of action or matters introduced in the application by the 4th interested party.

6. It is submitted for the applicant that under Article 3(1) of *the Constitution* every person has an obligation to respect, uphold and defend *the Constitution*. Further, under Article 258 of *the Constitution* every person has the right to institute court proceedings claiming that *the Constitution* has been contravened or is threatened with contravention. However, as per the holding of the Supreme Court, it is that the applicant should institute legal proceedings to make the claims which are being made but are indeed novel to the present petition. The applicant being an interested party is bound by the scope of the petition and answers thereto as pleaded for the petitioner and respondents. The application is found amenable to failing and on account of the successful preliminary point.
7. The 2nd issue is whether the applicant has met the threshold for grant of a conservatory order as prayed for. The Court considers that as already found there is no jurisdiction to determine the issue. The little is said about it the better. A conservatory order aims at maintaining the status quo so that the prevailing circumstance does not change pending the full hearing of the dispute and the rendering of the final judgment. The undisputed status quo in the present dispute is that the 1st interested party and the 1st respondent are in a running contract of service in which the 1st interested party is the in-post General Manager, Human Resource and Administration. The prayer as made is to restrain or stay the reinstatement of the 1st interested party by the 1st respondent into that position. It is not clear where the applicant finds the issue of reinstatement as the dispute between the principal parties appears to be renewal or extension of the 1st interested party’s contract of service. Assuming reinstatement in the prayer means renewal or extension, a restraining order appears belated or overtaken as the 1st interested party undisputedly is in office. As to whether the renewal or extension decision is amenable to a stay, it appears to the Court that once it was made nothing was left to be done and to be susceptible to halting or being arrested by way of a stay order. It appears to the Court that if the prayer as made were to be allowed, the same would amount to suspending or removing the 1st interested party from office, a drastic court order that may only be made after a full hearing and for clearly established grounds. In any event, the prayer as made then unsettles rather than maintains the prevailing status quo – it would not amount to a conservatory order in that sense. As submitted for the 1st respondent it would amount to a mandatory injunction and which can only be granted upon the clearest of the cases where in the opinion of the Court the suit would ultimately succeed as was held in *Lucy Wangui Gachara –V- Minudi Okemba Lore* [2015] eKLR. Further, if merited, the 1st interested party would be removable



from office after the hearing of the petition as per holding in *Attorney General & Another – V- Tolphin Nafula & 5 others* [2021] eKLR thus, the process could quite perfectly be nullified if the petition is ultimately found merited. The Court therefore finds that apart from the findings on the preliminary point, there was no proper prayer for a conservatory order and there would be no prima facie case established for granting the order as prayed for.

8. For the 3rd issue, detailed submissions were made about counsel for the 1st respondent misleading the Court that the office held by the 1st interested party had been abolished. The Court has revisited the proceedings in issue on 05.05.2022. Mr. Henry Oduor Advocate for the petitioner had attended Court belated and informed the Court that he had read in the media that the 1st interested party no longer worked for the 1st respondent and if that was the case, he would withdraw the petition. Mr. Kongere Advocate for the 1st respondent and 1st interested party then responded thus, “Give me time to confirm from the client. We can deal with the issue on 10.05.2022.” The Court then made directions inter alia, “(a) If the 1st interested party is confirmed to have ceased employment with the 1st respondent, the petition may be marked as overtaken and withdrawn as per counsel for petitioner’s oral application.” On 10.05.2022 Ms. Janet Langat, Deputy Chief Litigation Counsel held brief for Mr. Kongere Advocate and informed Court that Mr. Kongere conveyed to the Court that the position was abolished and no longer available for anyone to fill it, the 1st interested party was no longer in office, and, the petition be marked as withdrawn. Mr. Henry Oduor Advocate for the petitioner submitted that he needed a confirmation that the 1st interested party was in another office and in which event he would seek to amend the petition. The Court then ordered that the matter be mentioned on June 8, 2022 at 9.00am for the petitioner to withdraw the petition or to file application to amend and for further orders.
9. The application subject of this ruling was then filed on May 17, 2022. It should then be clearer that it is submitted for the 1st respondent that the Court was misled that the office held by the 1st interested party had been abolished and the misleading information was deeply regretted as flowing from the 1st respondent’s bureaucratic communication channels by which counsel on record was instructed. In that misleading communication, it is observed that the Court never made an order that the office had been abolished as counsel for the petitioner had rightly so, insisted that the 1st respondent confirms the abolition of office and the 1st interested party’s employment status with the 1st respondent. Going forward, it should be that the 1st respondent strictly complies with values and principles of public service in Article 232 in the manner counsel is instructed for subsequent communications to the Court and, to other parties to the proceedings. In view of the findings in that regard, there shall be no orders on the costs of the application.
10. For avoidance of doubt, on 10.03.2022 counsel for the 1st respondent and the petitioner submitted that the petitioner’s application for interlocutory orders be dispensed with and the Court, inter alia, ordered, “(6) The application is hereby dispensed with to pave way for hearing of main petition and orders above to be construed accordingly.” The Court therefore returns that the principal parties to the petition appear to have taken the direction that the main petition proceeds to hearing and the 4th interested party’s application was therefore out of step with the intentions of the principal parties.
11. In conclusion the notice of motion filed for the 4th interested party on May 17, 2022 and dated May 16, 2022 is hereby dismissed with no orders on costs, and, parties to take steps towards the expeditious hearing of the main petition.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 15TH JULY, 2022.



BYRAM ONGAYA
JUDGE

