



Kapoloni v Cabinet Secretary for the National Treasury and Planning & 3 others; Hussun (Interested Party) (Employment and Labour Relations Petition E172 of 2021) [2022] KEELRC 12892 (KLR) (13 October 2022) (Judgment)

Neutral citation: [2022] KEELRC 12892 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E172 OF 2021
JK GAKERI, J
OCTOBER 13, 2022

BETWEEN

JACKTON MANGENI KAPOLONI CLAIMANT

AND

**CABINET SECRETARY FOR THE NATIONAL TREASURY AND
PLANNING 1ST RESPONDENT**
ATTORNEY GENERAL 2ND RESPONDENT
DIRECTOR OF PUBLIC PROSECUTIONS 3RD RESPONDENT
KENYA RAILWAYS CORPORATION 4TH RESPONDENT

AND

MOHAMMED ALAWI HUSSUN INTERESTED PARTY

JUDGMENT

1. The Petitioner Mr Jackton Mangeni Kapoloni filed this Petition against the 4 Respondents and Interested Party on November 2, 2021 praying for;
 - i. A declaration be and is hereby issued that in view of the unresolved issues touching on the Interested Party's involvement in situations of conflict of interest and the recommendations of the National Assembly in its Report dated February 2019 that Interested Party be investigated with a view to being charged, the Interested Party is unfit to hold public office including the position of Board Member of the Kenya Railways Corporation.
 - ii. A declaration be issued that the appointment and subsequent gazettelement by the 1st Respondent of the Interested Party as a Board Member of the Kenya Railways Corporation



contravenes the provisions of chapter 6 of the Constitution of Kenya and the Principles of Public Service and the national values and principles.

- iii. An order of certiorari do issue for purposes of bringing into the quashing the impugned appointment and subsequent appointment of the Interested Party as a board member of the Kenya Railways Corporation.
 - iv. An order of Mandamus do issue compelling the 3rd Respondent to take appropriate actions against the Interested Party as recommended by the Public Accounts Committee in the Report dated June 30, 2017 and adopted on February 2019.
 - v. Costs be provided for.
2. The Petition is expressed under Articles 3(1), 10, 41, 47, 73, 75, 80, 159, 162(2), 232, 258 of the Constitution of Kenya, 2010, provisions of the Kenya Railways Corporations Act and Section 22(1) of the Public Officer Ethics Act.
 3. It is based on the grounds therein expressed and the supporting affidavit sworn by the Petitioner on November 2, 2021.
 4. The affiant states that by Gazette Notice Vol CXXIII No 208 published on October 8, 2021 under Gazette Notice No 10638 dated October 1, 2021, the 1st Respondent appointed the Interested Party as one of the members of the board of the Kenya Railways Corporation for 3 years effective October 6, 2021.
 5. That the appointment was done without regard to the law and the same was a gross violation of the Constitution in that;
 - i. Appointees to public office must be compliant with chapter 6 of the Constitution.
 - ii. Appointment to the position of board member should be in compliance with the requirements of Article 10(2) of the Constitution of Kenya.
 - iii. Mwongozo (The Code of Governance for State Corporations) provides the requirements for appointment to the boards of state corporations and provide the fit and proper requirements including compliance with chapter 6, profession and relevance experience and freedom from criminal conviction.
 - iv. The Interested Party was appointed without an investigation as to his suitability under chapter 6 of the Constitution and in particular fulfilment of Article 73.
 - v. The Interested Party was implicated in unlawful practice and lack of accountability at involving procurement at the IEBC and the institution lost public funds and the Public Accounts Committee of the National Assembly found that the Commissioners of the IEBC demonstrated conflict of interest in the procurement of KIEMS Kits and the Interested Party was one of the Commissioners at the IEBC and thus had integrity issues and investigations were recommended and no action has been taken thus the Interested Party has outstanding unresolved questions of integrity.
 - vi. The appointment of the Interested Party to the board of Kenya Railways before investigations means that he was appointed while tainted as the report shows that he was involved in loss of public funds.
 - vii. That his appointment as a board member was unlawful and poses danger to the general public and government since the Kenya Railways Corporation is a public institution.



That the Interested Party is unfit to hold public office until cleared and the 1st Respondent was aware of the fact that he did not meet the fit and proper test. That the 1st Respondent did not vet the Interested Party for purposes of appointment.

- viii. The 2nd Respondent failed to advise the 1st Respondent on the importance of observance of the provisions of chapter 6 of the Constitution.
- ix. That this court as a creature of Article 162(2)(a) of the Constitution has jurisdiction to hear and determine disputes relating to employment and labour relations and the matters involves constitutionality of the appointment of the Interested Party as a director of the 4th Respondent under the State Corporations Act and relate to employment and labour relations and the Interested Party's appointment was in violation of the Constitution.
- x. That board members earn some sort of wage as retainer fees and are such employees and the court has jurisdiction in this petition.
- xi. That the nature of the petition revolves around the appointment and gazette of the Interested Party by the 1st Respondent and the issues relate to violations of the Constitution.

1st and 2nd Respondents ground of opposition

6. In response to the Application, the respondents stated that the court had no jurisdiction in matters relating to appointment of the Interested Party which was constitutional and not an employer/employee appointment.

4th Respondent's Grounds of opposition

7. The 4th Respondent had no role to play in the appointment of its board of directors and the petition was devoid of merit and no prayers had been sought against the 4th Respondent.

Interested Party's grounds of opposition

8. The Interested Party contends the petitioner lacks locus standi to file and prosecute the petition and the Notice of Motion Application.
9. The Interested Party further contends that there are competent legislatively established bodies mandated to deal with complaints such as those raised by the petitioner who cannot usurp their powers.
10. It is his case that the court lacks jurisdiction to entertain and determine the petition or make the orders sought.
11. That the Petitioner has not exhausted other complaint resolution mechanisms.
12. In his Replying Affidavit, the Interested Party admits that he was appointed a member of the IEBC vide Gazette Notice dated November 19, 2011 and sworn into office on November 14, 2011 and served for 5 years 1 month upto January 18, 2017 and was appointed a Director of Kenya Railways on October 6, 2021 and the investigations by the Parliamentary committee were carried out after he had left the IEBC.
13. It is his case that neither him nor any other commissioner with whom he served at IEBC had been accused of wrongdoing or invited to testify or defend themselves.
14. That the Public Accounts Committee Report makes no allegations about the Interested Party and his name was not mentioned in Parliamentary report.



15. The affiant further states that the Parliamentary Report relates to Mr Chebukati and the Commissioners and he was not one of the commissioners referred to.
16. It is the affiant's case that he had no pending investigations by any state agencies for any conduct including criminal and has never been convicted for a criminal offence as evidence by the certificate of good conduct on record. That the allegations by the Petitioner are a witch-hunt to taint the Interested Party's image.
17. Finally, the affiant states that the Petitioner has not approached the court with clean hands as he has not made any specific allegations or justifiable claims against him.
18. The affiant prays for dismissal of the petition with costs.

Submissions for the 1st and 2nd Respondents

19. Counsel for the 1st and 2nd Respondents addresses two issues, namely; whether the court has jurisdiction over the appointment of the Interested Party and whether the application is merited to warrant the issue of judicial review orders.
20. On the first issue, the Supreme Court decision in the [*Matter of Interim Independent Electoral Commission \(2011\) eKLR*](#) is relied upon to urge that jurisdiction of courts in Kenya is granted by the [*Constitution*](#) and statute.
21. It is urged that the appointment of Interested Party is a constitutional not employment in nature.
22. The Court of Appeal decision in the [*Owners of the Motor Vessel 'Lillian' V Caltex Oil Kenya Ltd \(1989\) eKLR*](#) is relied upon to underscore the essence of jurisdiction as is the decision in Samuel Kamau Macharia & another V Kenya Commercial Bank & 2 others (Supra) to explain the foundation of a court's jurisdiction.
23. Reliance is further made on Article 162(2)(a) and 165(3)(5) of the [*Constitution*](#) of Kenya, 2010 and section 12 of the [*Employment Act*](#) to urge that the court has no jurisdiction to hear the petition at hand.
24. It is urged that the appointment of the Interested Party was done in accordance with Mwongozo and the [*State Corporations Act*](#).
25. Reliance is also made on the decision in [*Katiba Institute & another V Attorney General & another: Julius Waweru Karangi & 128 others \(Interested Party\) \(2021\) eKLR*](#) for the proposition that chairpersons and members of boards of state corporations and parastatals are not offices in the public service.
26. On the second issue, it is submitted that the petitioner has not met the basic tenets for the grant of orders of injunction as the petition had no chance of success.
27. The decisions in *Giella V Cassman Brown & Co Ltd (1973) EA 358* and [*Nguruman Ltd V Jan Bonde Nielsen & 2 others \(2014\) eKLR*](#) are relied upon to urge that the Petitioner must establish the prerequisites for the issuance of judicial review orders.
28. Finally, the decisions in *Mrao Ltd V First American Bank of Kenya & 2 others (2003) eKLR* and *Habib Bank Ag Zurich V Eugene Marion Yakob (1982) (unreported)* are relied upon to demonstrate the meaning of prima facie case and probability of success.
29. The court is urged to reject the petition on the premise that it had no jurisdiction over the matter.



4th Respondent's submissions

30. The pith and substance of the submissions is whether the unsubstantiated allegations made against a party are sufficient to warrant the grant of the prayers sought, an issues addressed in the disposal of the Notice of Motion Application dated November 2, 2021 and thus settled.

Interested Party's submissions on jurisdiction

31. The Interested Party submits that based on Article 157(4) and 157(10) as well as Article 79 of the Constitution of Kenya, 2010, the court cannot assume jurisdiction over an incompetent petition.
32. Reliance is made on the provisions of the Leadership & Integrity Act with specific reference to provisions on enforcement to urge that the law has created a mechanism through which complaints similar to the one in the instant case may be addressed through the Ethics & Anti-Corruption Commission.
33. Finally, the decisions in Samuel Kamau Macharia & another V Kenya Commercial Bank & others (Supra) and Benson Ambuti Adege V Kibos Distillers Ltd (2020) eKLR are relied upon to urge that a court derives its jurisdiction from the Constitution or other written law or both and cannot arrogate to itself any jurisdiction not conferred by law.

Analysis and determination

34. After careful consideration of the petition, grounds of opposition, responses and submissions by the parties, the issues for determination are;
- i. Whether this court has jurisdiction to hear and determine the petition herein.
 - ii. Whether the Petitioner is entitled to the reliefs sought.
35. As to whether the court has jurisdiction to entertain the petition, the starting point is the jurisprudence on the issue of jurisdiction of this court as the case turns on the issue.
36. On the essence of jurisdiction, the celebrated words of Nyarangi JA in *The Owners of Motor Vessel 'Lillian S' V Caltex Oil (K) Ltd* (Supra) are worth recapitulating
- ' Jurisdiction is everything, without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds that it is without jurisdiction.'
37. According to the learned judge,
- ' By Jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute charter or commission under which the court is constituted.'
38. As submitted by the Respondents and the Interested Party, a court of law cannot by craft or other ingenuity arrogate unto itself jurisdiction it does not have.
39. It is trite that a court of law derives its jurisdiction from the Constitution or legislation or both. It was so held in Samuel Kamau Macharia and another V Kenya Commercial Bank and 2 others (Supra).



40. Needless to emphasize, the Employment and Labour Relations Court derives its jurisdiction from the Constitution of Kenya, 2010 and the Employment and Labour Relations Court Act, 2011.
41. Article 162 of the Constitution provides;
- (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to –
- (a) Employment and labour relations;
- (b)
- (3) Parliament shall determine the jurisdiction and functions of the courts contemplated by clause (2).
42. In exercise of the powers conferred by Article 162(2)(a) of the Constitution of Kenya, 2010, Parliament enacted the Employment and Labour Relations Court Act, 2011 which establishes the Employment and Labour Relations Court and confers jurisdiction on it under section 12(1) which provides;
- The court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the court relating to employment and labour relations including –
- a. Disputes relating to or arising out of employment between an employer and an employee;
- b. Disputes between an employer and a trade union;
- c. Disputes between an employer’s organization and a trade union’s organisation;
- d. Disputes between trade unions;
- e. Disputes between employer organisations;
- f. Disputes between an employer’s organisation and a trade union;
- g. Disputes between a trade union and a member thereof;
- h. Disputes between an employer’s organisation or a federation and a member thereof;
- i. Disputes concerning the registration and election of trade union officials;
- j. Disputes relating to the registration and enforcement of collective agreements.
43. Although the foregoing list is inexhaustive, its scope is restricted by opening paragraph of section 12(1) which makes specific reference to Article 162(2) of the Constitution of Kenya, 2010 and other written laws pursuant to which disputes relating to employment and labour relations are referred to the court.
44. Further to the foregoing, the court has jurisdiction to enforce rights and fundamental freedoms guaranteed by the Constitution of Kenya, 2010 to the extent the same is incidental to the exercise of jurisdiction over matters germane to employment and labour.
45. The sentiments of Majanja J in *United States International University (USIU) V Attorney General (2012) eKLR* are instructive

By virtue of Article 162 (3), and section 12 of the Industrial Court Act, 2011 has set out matters within the exclusive domain of that court. Since the court is of the status of the High Court, it must have jurisdiction to enforce labour rights in Article 41 and the jurisdiction to



interpret the Constitution and fundamental rights and freedoms is incidental to the exercise of jurisdiction over matters within its domain. In any matter falling within the provisions of section 12 of the Industrial Court Act, then the Industrial Court has jurisdiction to enforce not only Article 41 rights but all fundamental rights ancillary and incidental to the employment and labour relations including interpretation of the Constitution within a matter before it. The Industrial Court as constituted under the Industrial Court Act, 2011 as court with the status of the High Court is competent to interpret the Constitution and enforce matters relating to breach of fundamental rights and freedoms in matters arising from disputes falling within the provisions of section 12 of the Industrial Court Act, 2011.'

46. These sentiments were adopted with approval by the Court of Appeal in Daniel N Mugendi V Kenyatta University and 3 others (2013) eKLR.
47. Finally on jurisdiction, section 2 of the Employment Act, 2007 defines the terms employer, employee and contract of service. For an employment relationship to arise, there must be a contract of service between the parties.
48. Having delineated the jurisdiction of this court, I will now proceed to apply the provisions and propositions of the law above to the facts of the instant case.
49. It is common ground that the Interested Party was a Commissioner with the Independent Electoral and Boundaries Commission (IEBC) from 2011 to January 2017.
50. Similarly, it is not in contest that the National Assembly Public Accounts Committee Report for the IEBC for the year ended June 30, 2017 recommended 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.'
51. It requires no belabouring that the Report recommended further investigation not prosecution.
52. Worthy of note, the report did not make any specific allegation against the Interested Party.
53. It is also not in dispute that by Gazette Notice No 10638 published on October 8, 2021, the Cabinet Secretary for the National Treasury appointed the Interested Party a member of the Board of the Kenya Railways Corporation for a period of three (3) years, effective October 6, 2021.
54. It is this appointment that the Petitioner herein is challenging.
55. In order to determine whether this court has jurisdiction to hear and determine this petition, it is elemental to unpackage the position of director of state corporations.
56. The Kenya Railways Corporation is established under the provisions of the Kenya Railways Corporation Act, Cap 397, Laws of Kenya.
57. Section 4 of the Act establishes the board of the corporation which consists of
 - a. A Chairman appointed by the Minister,
 - b. Managing Director,
 - c. Permanent Secretary to the Treasury,
 - d. Permanent Secretary to the Ministry for the time being responsible for railways,
 - e. Managing Director of the Kenya Ports Authority and



- f. Not more than 6 persons who are not public officers or employees of the corporation appointed by the Minister by virtue of their knowledge and experience in railways or transport matters or in commerce, industries, finance or administration generally.
58. Section 8 of the Act prescribes the general and specific duties of the board one of which is to allocate functions to employees.
59. Similarly, it is not in dispute that the Interested Party was appointed under the provisions of section 4(f) of the Act as evident from the Gazette Notice as opposed to the provisions of the [Employment and Labour Relations Court Act, 2011](#).
60. The court is in agreement with the submissions of the 1st and 2nd Respondents that the [State Corporations Act](#) and other statutes such as [Kenya Railways Corporation Act](#) give the President and Cabinet Secretaries power to appoint chairpersons and board members of State Corporations. The Code of Governance for State Corporations, 2015 (Mwongozo) contains detailed provisions on operations of boards of State Corporations.
61. The appointment of chairpersons and board members of State Corporations is an executive prerogative and the court has no jurisdiction in such appointments.
62. Relatedly, the provisions of the [Constitution](#) allegedly violated in the appointment were not violated in the context of the matters contemplated by section 12 of the [Employment and Labour Relations Court Act, 2011](#).
63. This reasoning finds support in the sentiments of the court in [Public Service Commission & 4 others V Cheruiyot and 32 others \(2022\) eKLR](#) as follows;
- ' Our interpretation of the provisions of section 12 of the [Employment and Labour Relations Court Act](#) is that the Employment and Labour Relations Court has jurisdiction to entertain any dispute or any contemplated dispute under section 12(1) but the dispute between the parties must be related to their employment and/or touching on labour relations. This is therefore to mean that the jurisdiction of the Employment and Labour Relations Court is not limited to the determination of disputes arising out of a contract of employment between an employee and an employer, the court can also determine any constitutional violations of the rights of any party arising from an employee-employee relationship. However, for the court to entertain a petition premised on the breach of a party's fundamental rights under the [Constitution](#), the alleged constitutional breach must be ancillary and incidental to the matter contemplated under section 12 of the Act. Our view is fortified by the preamble to the [Employment and Labour Relations Court Act, 2011](#) which provides that it is 'An Act of Parliament to establish the Employment and Labour Relations Court to hear and determine disputes relating to employment and labour relations and for connected purposes.'
64. The court is guided by these sentiments.
65. In the instant case, the Interested Party is not an employee of the 4th Respondent. The Petitioner has not demonstrated anything germane to employment and labour relations or connected purposes for invocation of the jurisdiction of this court.



66. This position is reinforced by the sentiments of the court in *Katiba Institute & another V Attorney General & another: Julius Karangi and 128 others (Interested Party)* (Supra) as follows;

' Positions of Chairpersons and members of boards of state Corporations and parastatals are not offices in the public service. In arriving at this conclusion, we are further guided by the decision of the Supreme Court in *Fredrick Otieno Outa V Jared Odoyo Okello & 4 others* (2014) eKLR where the court stated that the proper meaning of Public Officer is that the person concerned is either a state officer or any other person who holds public office within the national government, county government or public service or a person holding such an office is sustained in terms of remuneration and benefits from the public exchequer.'

67. The Court of Appeal recently adopted a similar reasoning in *Nakuru Water and Sanitation Co Ltd V Asanyo & 2 others (2022) eKLR* where it held that the 1st Respondent who had served as a director of the appellant but was left out after a reconstitution of the board could not invoke the jurisdiction of the court as he was not an employee of the appellant.

68. For the foregoing reasons, the court finds and holds that it has no jurisdiction to hear and determine the petition.

69. Having so held, the issue of the orders sought fall by the way side.

70. The Petition herein is accordingly dismissed.

71. Parties to bear own costs.

72. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 13TH DAY OF OCTOBER 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

