



REPUBLIC OF KENYA



Chege & 43 others v Kenya Medical Supplies Authority & 5 others (Petition E174 of 2021) [2022] KEELRC 13072 (KLR) (3 November 2022) (Ruling)

Neutral citation: [2022] KEELRC 13072 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E174 OF 2021
MA ONYANGO, J
NOVEMBER 3, 2022

IN THE MATTER OF ARTICLE 22(1) OF THE CONSTITUTION OF KENYA IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 1(3)(C), 2, 10, 19(1) & (3), 27(1) & (8), 41, 47(1), 50(1), 73, 94, 153(4)(B), 232 AND 241 OF THE CONSTITUTION OF KENYA

BETWEEN

ANTHONY NYUTU CHEGE 1ST PETITIONER
ABDI HUSSEIN HADUN 2ND PETITIONER
ALEXANDER MWANGI KAMAU 3RD PETITIONER
CAROL MUGO 4TH PETITIONER
CATHERINE WANJIKU MAINGI 5TH PETITIONER
CHRISTINE NYAMBURA MWANGI 6TH PETITIONER
COLLINS WEKUKU SULULU 7TH PETITIONER
DUNCAN BUSOLO SITATI 8TH PETITIONER
ELIZABETH ESHO 9TH PETITIONER
ELIZABETH NJERI MWAI 10TH PETITIONER
FAITH MONGINA NDEGE 11TH PETITIONER
ISAAC MURIUKI KABURU 12TH PETITIONER
JACKLINE BOSIBORI MAINYE 13TH PETITIONER
JACKY NJOKI MILIMO 14TH PETITIONER
JAMES NZYOKA KILONZO 15TH PETITIONER
JOHN ONGER ADUDA 16TH PETITIONER



JOSEPH KARIUKI KINYANJUI	17 TH PETITIONER
JOYCE TIEGO RASUGU	18 TH PETITIONER
LEAH NASAMBU BIKETI	19 TH PETITIONER
LYDIAH NKIROTE NGEERA	20 TH PETITIONER
MARTIN JOEL EKITELA	21 ST PETITIONER
MARY NDUNGE KITAKA	22 ND PETITIONER
NAHASHON WAIGANJO KARANJA	23 RD PETITIONER
NEDDY ANYANGO MBORI	24 TH PETITIONER
PERMENAS DAVID MUTTU	25 TH PETITIONER
SAMUEL ODUOR OKANDA	26 TH PETITIONER
SAMUEL WAINANA MURINGI	27 TH PETITIONER
TERESAH GACHERI MUTE	28 TH PETITIONER
HEATHER NJUGUNA	29 TH PETITIONER
MAUREEN GATWIRI	30 TH PETITIONER
CATHERINE CHEPTOO	31 ST PETITIONER
NANCY MUTURI	32 ND PETITIONER
MAUREEN NYAKAKO	33 RD PETITIONER
HEDWICK OKONGO	34 TH PETITIONER
VERONICAH SANDE	35 TH PETITIONER
AMOS KIPKEMOI KIPLAGAT	36 TH PETITIONER
CHARLES MUIRU MWAURA	37 TH PETITIONER
CHRISTOPHER OOKO OKOTH	38 TH PETITIONER
DENNIS OTIENO NYAKAKO	39 TH PETITIONER
DINAH AWINO OUMA	40 TH PETITIONER
JOHN NDUNGU	41 ST PETITIONER
PRISCA MUTHONI MB AKA	42 ND PETITIONER
SIMON GITHAITHI KAIRU	43 RD PETITIONER
IGNATIUS KABURU MTARITHI	44 TH PETITIONER

AND

KENYA MEDICAL SUPPLIES AUTHORITY 1ST RESPONDENT
ATTORNEY GENERAL SUED ON BEHALF OF: PRESIDENT OF THE
REPUBLIC OF KENYA; CABINET SECRETARY, MINISTRY OF DEFENCE;
CABINET SECRETARY, MINISTRY OF HEALTH; CABINET SECRETARY,



MINISTRY OF PUBLIC SERVICE YOUTH AND GENDER AFFAIRS; CHIEF OF THE KENYA DEFENCE FORCES; AND DIRECTOR GENERAL, NATIONAL YOUTH SERVICE CAPTAIN (RETIRED) 2ND RESPONDENT
LAWRENCE WAHOME 3RD RESPONDENT
ROBERT NY ARANGO 4TH RESPONDENT
TERRY KIUNGE RAMADHANI 5TH RESPONDENT
LINTON NYAGA KINYUA 6TH RESPONDENT

RULING

1. Before me, for determination are two Applications. The first one is dated May 31, 2022 filed by the Petitioners under Certificate of Urgency and seeks the following orders that:-
 - (1) Spent
 - (2) Pending hearing and determination of this application, an order be and is hereby made directing the 1st Respondent to continue paying salaries, allowances and all benefits due to the Petitioners under their respective contracts of service with Kenya Medical Services Authority.
 - (3) Pending the hearing and determination of the Appeal by the Petitioners an Order be and is hereby made restraining the Respondents from barring the Petitioners from entering and remaining upon the premises of the Kenya Medical Services Authority wheresoever situated in the Republic of Kenya, and further accessing ICT platform of the 1st Respondent in their performance of duties under their contracts of service.
 - (4) Pending the hearing and determination of the Appeal by the Petitioners, an Order be and is hereby made directing the 1st respondent to continue paying salaries, allowances and all benefits due to the Petitioners under their respective contracts of service with Kenya Medical Services Authority.
 - (5) Pending hearing and determination of this Application, an Order be and is hereby made directing the 1st respondent to continue paying salaries, allowances and all benefits due to the Petitioners under their respective contracts of service with Kenya Medical Services Authority.
 - (6) The costs of this Application be provided for.
2. The Application is premised on the grounds on the face of the Motion and supported by the affidavit of James Nzyoka Kilonzo, the 15th Petitioner deponed on May 31, 2022 in which he reiterates the grounds on the face of the Motion.
3. This Application is brought under the provisions of Articles 22 and 23 of *the Constitution* of Kenya, 2010 and Rules 32 (3) of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedures Rules, 2013*, Section 66 of the *Civil Procedure Act*, Cap 21 Laws of Kenya and the inherent powers of this Court.
4. In response to the Application the 1st, 3rd, 4th and 5th Respondents through their Counsel on record filed a Preliminary Objection and Grounds of opposition dated July 13, 2022 raising the following grounds: -
 - a) That this Court has no jurisdiction to hear and determine this Application



- b) That in any event, this Court lacks residual jurisdiction to grant the mandatory orders sought.
5. In addition to the above the 1st, 3rd, 4th and 5th Respondents filed Grounds of Opposition dated 12th July, 2022 in which they contend that this Court is *functus officio* having rendered its Judgment on May 27, 2022 and is therefore incapable of granting the reliefs sought in the Petitioners' application.
6. It is further contended that this Court's Judgment as delivered on May 27, 2022 did not in any way bar the 1st Respondent from implementing its intended redundancy process for the reason that the petitions filed were unsuccessful. It further maintained that the only prayer allowed was in relation to the appointment of the 3rd, 4th, 5th and 6th Respondents to the Board of Directors of the 1st Respondent.
7. The Respondents' contend that the Application is an attempt by the Applicants to re-litigate on the same issues that had already been determined by this Court.
8. It is further the Respondents' contention that the 1st Respondent's Board of Directors was properly constituted despite this Court's decision nullifying the appointment of the 3rd to 6th Respondents to the Board in line with the provisions of Clause 2(1) of the schedule to the [Kenya Medical Supplies Agency Act](#) with regard to conduct and business of the Board, as it had four members of the Board in office.
9. The Respondents contend that the intended appeal does not in any way bar it from proceeding with the process of the intended redundancy. It further contends all the material on the same were placed before this Court for consideration in its Judgment and that no new evidence or material has been availed by the Applicants to warrant the grant of the Orders sought.
10. In conclusion, the Respondents urged this Court to find the Application dated May 31, 2022 without basis and to proceed to dismiss the same with costs to the 1st, 3rd, 4th, 5th and 6th Respondents.
11. The second Application is the Notice of Motion Application dated June 30, 2022, filed on behalf of the 1st, 3rd, 4th, 5th and 6th Respondents/Applicants and seeks the following orders that:
- a) Spent
- b) This Court be pleased to grant Orders suspending its Order No. 2 of its Judgment delivered on May 27, 2022 pending the hearing and determination of this Application
- c) This Court be pleased to suspend its Order No. 2 of its Judgment delivered on the 27th of May 2022 pending the hearing and determination of the intended Appeal.
- d) In the alternative, status quo prevailing before the delivery of the Judgment dated May 27, 2022 with respect to the composition of the Board of the 1st Respondent be maintained pending the hearing and determination of this Application.
- e) In the alternative, status quo prevailing before the delivery of the Judgment dated May 27, 2022 with respect to the composition of the



Board of the 1st Respondent be maintained pending the hearing and determination of the intended appeal.

f) The costs of this Application be provided for.

12. The Application is premised on the grounds that: -

- a. The Employment and Labour Relations Court Delivered a judgement on May 27, 2022 allowing petition E174 of 2021 in the following terms:
 - i. A declaration be and is hereby made that the appointment of captain (Retired) Lawrence Wahome, Robert Nyarango, Terry Kiunge Ramadhani and Linton Nyaga to the Board of the Kenya Medical Supplies Authority by the Cabinet Secretary, Ministry of Health, was done without prior competitive recruitment, was not based upon competence and suitability, did not afford adequate and equal opportunity and account of gender, ethnicity or regional balance, contravenes and violates Articles 10, 27(8), 73(2), 153 and 232 of *the Constitution* of Kenya with Section 5(1)(e)(ea), 4 and 7 of the *Kenya Medical Supplies Authority Act* No. 20 of 2013 and is therefore, null and void ab initio.
 - ii. An order of certiorari be and is hereby issued calling into this court and quashing the decision made by the cabinet Secretary, Ministry of Health and contained in Gazette Notice No. 4011 dated April 28, 2021 for the appointment of Captain (Retired) Lawrence Wahome, Robert Nyarango, Terry Kiunge Ramadhani, and Linton Nyaga to Board of the Kenya Medical Supplies Authority
- b. The applicants are aggrieved by the decision of this Court Relating to its pronouncement on the issue of appointment of Directors and have since filed a Notice of Appeal and applied for typed and certified copies of the proceedings and judgement to enable the filing of an appeal.
- c. The Court of Appeal in Nakuru Civil Appeal no 60 and 61 of 2015 *Rift Valley Water Services Board and Others Geoffrey Asanyo and Others* has since declared that Directors are not employees and therefore the Employment and Labour Relations Court has no Jurisdiction to quash the appointment of directors.
- d. The management of the 1st Respondent (“KEMSA”) vests in a Board of Directors and the aforementioned decision has prejudiced its operations and occasioned substantial strain and loss as the Board is fully constituted.
- e. It is just and equitable to grant the reliefs sought. The Application is further supported by the affidavit of Mary Mwadime sworn on June 30, 2022 in which she reiterates the grounds as set out on the face of the notice of motion application.

13. In response to the Application the Petitioners filed a Replying/Further affidavit deposed to by James Nzyoka Kilonzo, the 15th Petitioner on July 12, 2022 in which he avers that there is no ground for the grant of the stay orders sought by the Respondents in their Application on the appointment of the 3rd to 6th Respondents to the Board of the 1st Respondent as the decision was declared a nullity by this Court *vide* its Judgment dated May 27, 2022.



14. He further depones that the decision in the Court of Appeal case, Civil Appeal No. 61 of 2015, *Rift Valley Water Service Board & Others v Geoffrey Asanyo & Others* is not a valid ground upon which the Court can stay its judgment dated May 27, 2022.
15. The affiant further argues that the Court's declaration of May 27, 2022 are incapable of stay. He further argues that the Board of the 1st Respondent is improperly constituted for them to effect the intended redundancies.
16. It is on this basis that the Petitioners contend that the intended redundancies are unlawful, invalid and should not be allowed to proceed as intended.
17. Mr. Kilonzo maintains that the 1st Respondent cannot proceed with the intended redundancies of its staff without a fully constituted Board, a fact that is admitted in the instant Notice of Motion Application.
18. He further argues that there is no basis upon which this Court can allow the application dated June 30, 2022 and therefore urged this Court to dismiss the Application with costs to the Petitioners. He prayed that the Petitioners application on the other hand be allowed as prayed.
19. In a brief rejoinder the Applicants filed a further affidavit deponed by Mary Chao Mwadime, the Chairperson of the Board of Directors of the 1st Respondent, on July 19, 2022 in which she avers that this Court is bound by the decisions of the Court of Appeal and the Supreme Court and in particular the Court of Appeal decision in the case of *Rift Valley Water Services Board & Others v Geoffrey Asanyo & Others* (*Supra*) with regards to directorship and their appointments.
20. The affiant argues that on this basis this Court lacked jurisdiction to hear and determine the petition to the extent of nullifying the appointment of the 3rd, 4th, 5th and 6th Respondents as directors of the 1st Respondent. He further argues that on this ground this Court ought to suspend the implementation of the Orders as only the Court of Appeal can set it aside.
21. The Respondents further aver that this Court in its Judgment did not declare as a nullity and/or quash the letter of intended redundancy that was issued by the 1st Respondent on 4th November, 2022 despite the fact that the issue having been raised in the main petition.
22. The 1st Respondent maintains that despite this Court's decision nullifying the appointment of the 3rd to 6th Respondents it remained quorate and thus decisions taken remain valid and binding.
23. The Affiant further maintains that subsequent to the Court's judgment, the 5th Respondent was appointed to the position of Chief Executive Officer of the 1st Respondent vide the appointment letter dated May 13, 2022 and as such the redundancy notice was signed by the 5th respondent in the capacity of CEO and not director as contended by the Petitioners.
24. Ms Mwadime further contends that contrary to the Petitioners' allegation all the salaries and allowances were promptly paid by the 1st Respondent and thus the Petitioners' Application lacked basis and therefore urged this Court to dismiss it with costs to the Respondents.



Submissions by the Parties

25. Mr. Havi made his submissions on behalf of the Petitioners in support of his Application dated May 31, 2022 and in opposition to the 1st, 3rd, 4th and 5th Respondents' application dated June 30, 2022.
26. With regard to his application dated May 31, 2022, Mr. Havi submits that the Applicants have met the threshold for the grant of the injunctive orders they seek.
27. It is further the Petitioners submission that this Court is clothed with the requisite jurisdiction to hear and determine the Application dated May 31, 2022. They relied on the cases of *Erinford Properties Ltd v Cheshire County Council* [1974] 2 ALL E.R and *Alliance Media Kenya Limited v Kenya Duty Free Complex HCCC No. 678 of 2004* (unreported).
28. The Petitioners further argue that failure to grant the orders sought would lead to substantial loss as documented in the affidavit of James Nzyoka Kilonzo.
29. The Petitioners further argue that a declaratory order succeeded by an order of *certiorari* is incapable of stay as sought by the 1st, 3rd, 4th and 5th Respondents. Reference is made to the case of *Republic v The Municipal Council of Mombasa & Another ex parte Adopt a Light Limited* [2008] eKLR where the Court held that an Order of *certiorari* takes effect immediately and is incapable of stay.
30. It is on this basis that Counsel for the Petitioners urged this Court to be guided by the above authority and find in its favour by dismissing the Respondents' application dated June 30, 2022.

1st, 3rd, 4th and 5th Respondents' Submissions

31. The 1st, 3rd, 4th and 5th Respondents in opposition to the Petitioners' application dated May 31, 2022 maintained that the application is not one for stay as argued by the Petitioners. It was further argued that the orders sought by the Petitioners in their Application dated May 31, 2022 did not form the crux of the petition already determined by this Court.
32. The Respondents further submit that despite the fact that the issue of the intended redundancy was raised in the petition, this Court did not make any declarations on the same and that raising the issue at this stage is tantamount to the Petitioners raising a completely new course of action distinct and separate from this proceedings, which should not be entertained by this Court.
33. The above notwithstanding, the 1st, 3rd, 4th and 5th Respondents submitted that contrary to the Petitioners allegation of nonpayment of salaries, the 1st Respondent proved payment of the Petitioners for November 2021 to June 2022 salaries by attaching its payroll to its further affidavit deposed to by Mary Mwadime.
34. The Respondents maintained that despite this Court's Judgment nullifying the appointment of the 3rd, 4th, 5th and 6th Respondents to the 1st Respondent's Board of directors, the Board had quorum to perform its functions as provided under Clause 2(4) of the *KEMSA Act* and is therefore capable of conducting business of the Board.
35. In conclusion, the 1st, 3rd, 4th and 5th Respondents urged this Court to find the Petitioners Application dated May 31, 2022 devoid of merit and to dismiss it with costs to the Respondents.



36. With regard to the application dated June 30, 2022, it is sub-mitted that this Court is not clothed with the requisite jurisdiction to hear this matter with relation to the functions and appointment of the Board of Directors of the 1st Respondent. To buttress this argument the Respondents rely on the Court of Appeal decision in Civil Appeal No 61 of 2015: *Rift Valley Water Services Board & 3 Others v Geoffrey Asanyo & 2 Others* where it was held that the Employment and Labour Relations Court lacked jurisdiction to make a determination on issues revolving around appointment of Directors.
37. Further reference was made to the case of *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others* [2012] eKLR on the issue of jurisdiction.
38. The Respondents further argued that this Court is bound by the decisions of both the Court of Appeal and Supreme Court and ought to have downed its tools on that basis.
39. It is on this basis that the Respondents argue that this Court ought to suspend the Orders issued vide its Judgment delivered on the May 27, 2022.
40. In conclusion, the 1st, 3rd, 4th and 5th Respondent urged this Court to find their application dated June 30, 2022 with merit and to allow it in terms of the reliefs sought.

2nd Respondent's Submissions

41. Mr. Mulili, Counsel on record for the 2nd respondent relied on the grounds of opposition dated June 22, 2022. He submitted that the Application dated May 31, 2022 seeks to have this Court relook at issues it had fully addressed in the Petition. For emphasis the 2nd Respondent relied on the Court of Appeal decision in the case of *Telkom Kenya Limited v John Ochanda (Suing On His Own Behalf and on Behalf Of 996 Former Employees of Telkom Kenya Limited)* [2014] eKLR where the Court noted that where a final determination has been issued, the Court is barred by the doctrine of *functus officio* from re-litigating on the same issue.
42. He further submitted that the Application before this Court is not an issue of Stay, the same having been presented under the provisions of Article 22 and 23 of *the Constitution* of Kenya, 2010 on violation of fundamental rights and freedoms. Additionally, the 2nd Respondent maintains that the Petitioners have failed to comply with the laws on violation of fundamental rights and freedoms as enumerated in the case of *Anarita Karimi Njeru v Republic* (1979) eKLR.
43. The 2nd Respondent further submits that the Petitioners are relying on speculations to support their case for the grant of the Orders they seek in their Application dated May 31, 2022. Further, they seek to have this Court interfere with the human resource functions of the 1st Respondent which should not be allowed.
44. In conclusion, counsel urged this Court to find the Petitioners' application without merit and to accordingly dismiss it in its entirety with costs to the Respondents.
45. On the Application dated June 30, 2022, the 2nd Respondent expressed its support to the same and fully associated itself with the submissions of the 1st, 3rd, 4th and 5th Respondents and therefore urged this Court to allow the application in terms of the reliefs sought.



6th Respondent's Submissions

46. The 6th Respondent associated himself with the submissions of the 1st to 5th Respondents. He urged this Court to allow the 1st, 3rd, 4th and 5th Respondents' application dated June 30, 2022 and dismiss the Petitioners' application dated May 31, 2022.

Rejoinder by the Petitioner

47. In a brief rejoinder, Mr. Havi for the Petitioners maintained that their Application is one of stay and that the Petitioners have met the threshold for the grant of the orders they seek in their application dated May 31, 2022.
48. Mr. Havi further submitted that the prayers sought in the Petitioners' application are founded on the petition contrary to the Respondents' submission and as such ought to be allowed.
49. He further questioned the reliance of the Respondent upon the Court of Appeal's decision in the case of *Rift Valley Water Services Board & 3 others v Geoffrey Asanyo & 2 others* (*supra*) impugning the Court's jurisdiction to determine the issue of directorship of the 1st Respondent. He maintained that this argument is based on the arguability of the intended appeal before the Court of Appeal.
50. The Petitioners further submit that the above authority is distinguishable from the present case before this Court for the reason that what was contested was the status of a limited liability company.
51. It is further submitted that should this Court allow both applications the parties would return to the position they were in before judgment was delivered in this matter and essentially will balance interests of all parties.

Analysis and Determination

52. After considering the applications, affidavits, the submissions and authorities relied upon by the parties hereto, I find that the issues for determination are:-
- a) Whether this court has the jurisdiction to hear this matter;
 - b) Whether the Applications dated 3May 1, 2022 and June 30, 2022 are merited.

Whether this Court has the jurisdiction to hear this matter

53. Whenever the jurisdiction of a Court is contested by any party in proceedings before the Court, the issue of jurisdiction must be addressed as a preliminary point, as without jurisdiction the Court ought to down its tools.
54. In *Peter Lai Muthoka v Standard Group* [2017] eKLR the Court held:

“Jurisdiction is everything and without it, a court has no power to make any step. This was stated in the classic case of *The Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] KLR 1. where Nyarangi J.A. held as follows:

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. 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 a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

“Where does jurisdiction emanate from? A court's jurisdiction flows from either *the Constitution* or legislation or both. The Supreme Court of Kenya in the case of *Samuel Kamau Macharia v KCB & 2 Others*, (supra) stated thus:

“A Court's jurisdiction flows from either *the Constitution* or Legislation or both. Thus, a Court of Law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by Law”

55. *Black's Law Dictionary*, Tenth Edition defines “*functus officio*” to mean “without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.”
56. In *Telkom Kenya Limited v John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Limited)* [2014] eKLR, the Court of Appeal held as follows on the *functus officio* doctrine:

“Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon –

The general rule that final decision of a court cannot be re-opened derives from the decision of the English Court of Appeal *In re-St Nazaire Co*, [1879], 12 Ch. D 88. The basis for it was that the power to rehear was transferred by the Judicature Acts of the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions. --”
57. The Supreme Court of Kenya in the case of *Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others* [2013] eKLR, cited with approval an excerpt from an article by Daniel Malan Pretorius entitled, “*The Origins of the Functus Officio Doctrine*, with Special Reference to its Application in Administrative Law” (2005) 122 SALJ 832 which reads: -

“The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker.”
58. The Petitioners have in their application sought orders that this Court orders the Respondents to continue paying their salaries allowances and benefits and that they be allowed into the office premises with access to ICT platform pending hearing and determination of their appeal.
59. In the judgment delivered by this Court on May 27, 2022, I made a finding that there was no proof of redundancy by the Petitioners. I further made a finding that there was no justification for the Respondents to send all employees home on paid leave even if they were on full salary.
60. Based on the foregoing I do not see how the doctrine of *functus officio* is applicable to the application filed by the Petitioners. It is my considered view that the Petitioners have a right



to approach the Court of Appeal against my findings herein on the issue of redundancy. It is further my considered view that they are within their right to seek the preservation of the status quo while their appeal is pending to ensure that the appeal is not rendered nugatory should they be successful. This is more so as the Respondents have submitted that they have a right to continue with the intention to declare redundancies.

61. Faced with a similar argument in *Erinford Properties Ltd v Cheshire County Council* [1974] 2 All ER 448 Lord Megarry had this to say:

“I cannot see that a decision that no injunction should be granted pending the trial is inconsistent, either logically or otherwise with holding that an injunction should be granted pending an appeal against the decision not to grant the injunction, or that by refusing an injunction pending trial the judge becomes *functus officio* quoad granting any injunction at all.”

62. The said decision was quoted with approval by Njagi J. (as he then was) in *Alliance Media Kenya Ltd v World Duty Free Company Complex Ltd T/A Kenya Duty Free Complex* [2005] eKLR when the Judge after quoting the above paragraph by Megarry J., asserted: “It can’t be doubted that the court has jurisdiction to grant the injunction sought.”

63. I am in full agreement with the decisions of the Learned Judges in the two cases and find that this Court is not *functus officio* with respect to the application and has jurisdiction to grant the injunctive orders sought.

64. Having found as above, is the Petitioner’s application merited? In the judgment I observed as follows at paragraphs 90 and 91: –

90. The foregoing notwithstanding, the mass sending home of almost all employees, even if on full salary, is not provided for by any law. Even though the various investigative reports disclosed serious mismanagement of KEMSA that required radical administrative intervention, the Respondents have not justified any cause for sending all the affected employees to work from home. Section 7 of the *State Corporations Act* provides sufficient powers to the President to address the situation...

91. The President in consultation with the State Corporation Advisory Committee has sufficient powers under the Act to address the issues at KEMSA within the provisions of the law. The issue of staff can be dealt with administratively. I therefore cannot find any justification in sending home all the employees of the Respondent to work from home and none has been presented to the Court by the Respondents.

65. The implication of the two paragraphs was that the sending of all employees home, even on full salary, was unlawful. The Court however found that redundancy is a prerogative of an employer provided for under the *Employment Act* and that the Petitioners had not proved that there was any redundancy as at the time they filed suit.

66. The Court further found that the contracts of the Petitioners had not been terminated by the Respondents.

67. The 1st, 3rd, 4th and 5th Respondents have through the replying



affidavit and further affidavit filed in response to the application of the Petitioners, stated that all the Petitioners are still on the payroll. They have annexed the payroll as proof the same.

68. The Petitioners have a right to appeal against my findings in the judgment and it is the responsibility of this Court to ensure the subject matter of the appeal is preserved.
69. I thus find merit in the application dated May 31, 2022 but only to the extent of the preservation of the status as at the time of judgment in terms of prayer 4 of the application.
70. The next issue for determination is whether the application dated June 30, 2022 filed by the 1st, 3rd, 4th and 5th Respondents is merited. The application seeks the suspension of order no. 2 of this Court's judgment delivered on May 27, 2022 or in the alternative, that status quo prevailing before the delivery of the judgment dated May 27, 2022 with respect to the composition of the Board of the 1st Respondent be maintained pending the intended appeal.
71. The main ground in support of the application is that the Court of Appeal in Nakuru Civil Appeal No. 60 and 61 of 2015 *Rift Valley Water Services Board and others v Geoffrey Asanyo & others* has declared that the Employment and Labour Relations Court does not have jurisdiction to quash the appointment of directors as directors are not employees.
72. The other reason is that the management of the 1st Respondent (KEMSA) vests in a Board of Directors and the aforementioned decision has prejudiced its operations and occasioned substantial strain and loss as the Board is not fully constituted.
73. I have perused the judgment in Nakuru Civil Appeal No. 61 of 2015 *Rift Valley Water Services Board & 3 others v Geoffrey Asanyo & 2 others*. At paragraph 19 thereof the Court stated as follows –

“19. It was not in dispute that the 1st respondent was originally appointed to the 2nd respondent's board in accordance with the company's Memorandum and Articles of Association for a term of 3 years ending on the December 17, 2012. His appointment was subsequently extended for a further term of 3 years ending on or about December 17, 2015. His initial appointment and the subsequent extension of appointment for a further term did not by any means constitute him an employee within the meaning of the *Employment Act*. His functions as a director of the 2nd respondent's governance body, and the terms on which he was appointed to represent the interests of the business community on the Board, were governed by the *Companies Act* and the 2nd Respondent's Memorandum and Articles of Association. The *Employment Act* did not apply to that relationship so as to confer on the Industrial Court jurisdiction to determine any claim relating to appointment to the board.[Emphasis added]

74. From the excerpt above, it is clear that the reason the Court of Appeal held that a Director of the Rift Valley Water Services Board was not an employee under the *Employment Act* was because he was engaged in accordance with the Company's Memorandum and Articles of Association. In the instant case, none of the parties brought to the attention of the Court the nature of contract issued to the members of the Board of the 1st Respondent.
75. Secondly, the Act under which the appointments were made refers to competitive recruitment of the Chairperson and Directors of the 1st Respondent. In that respect, Section 5(2), (3) and (4) of *KEMSA Act* provides as follows –



- (2) The chairperson shall be competitively recruited and appointed by the President from amongst persons who—
- (a) have at least a university degree in a relevant discipline;
 - (b) have at least fifteen years experience in matters relating to healthcare or business management;
 - (c) satisfy the requirements of Chapter Six of *the Constitution*.
- (3) The persons referred to in subsection (1)(e) shall be competitively recruited and appointed by the Cabinet Secretary from amongst persons who—
- (a) have at least a university degree in a relevant discipline;
 - (b) have at least ten years experience in management or in the health sector; and
 - (c) satisfy the requirements of chapter six of *the Constitution*.
- (4) In making the recruitment and appointment under subsection (3), the Cabinet Secretary shall ensure that the appointments fulfill the requirements of the gender and regional balance as enshrined in *the Constitution* and that at least one person is appointed from each of the following categories—
- (a) a procurement or supply chain management specialist;
 - (b) a pharmacist experienced in drug and medical supplies management; and
 - (c) one person with knowledge and experience in finance or commerce.
76. Further Section 7 of *KEMSA Act* provides for remuneration of Directors as follows –
7. Remuneration of directors
- The Authority shall pay the directors such remuneration, fees or allowances as it may determine on the advice of the Salaries and Remuneration Commission.
77. The fact that the remuneration and benefits of the directors is subject to approval by the Salaries and Remuneration Commission (SRC) means that they are public officers. Article 230(4) of *the Constitution* provides that –
- (4) The powers and functions of the Salaries and Remuneration Commission shall be to –
- (a) set and regularly review the remuneration and benefits of all State officers; and
 - (b) advise the national and county governments on the remuneration and benefits of all other public officers.
78. Public Officer is defined at Article 260 of *the Constitution* to mean –
- “public officer” means—
- (a) any State officer; or
 - (b) any person, other than a State Officer, who holds a public office;



79. *The Constitution* further defines “public office” and “public service” as follows –
- “public office” means an office in the national government, a county government or the public service, if the remuneration and benefits of the office are payable directly from the Consolidated Fund or directly out of money provided by Parliament;
- “public service” means the collectivity of all individuals, other than State officers, performing a function within a State organ;”
80. Section 16 of the *KEMSA Act* further provides at Section 2(a) that the payment of the salaries, allowances and other charges in respect of directors and staff of the Authority shall be provided for in the estimated expenditure of the Authority for the financial year.
81. Other than the decision of the Court of Appeal in the appeal referred to above, the Respondents/Applicants have not referred this Court to any legislation that ousts the jurisdiction of this Court from making determinations in respect of directors of a state corporation like the 1st Respondent herein.
82. It would be worth noting that the values and principles applicable in the appointment of the directors of the 1st Respondent are the very same principles applicable in the appointment of the Chief Executive Officer and other staff of the 1st Respondent. The said values and principles are those set out under Articles 10 and 232 of *the Constitution*.
83. Further, remuneration is defined in the *Employment Act* to mean “the total value of all payments in money or in kind, made or owing to an employee arising from employment of that employee.”
84. The *Employment Act* further provides for “piece work” which means any work the pay for which is ascertained by the amount of work performed irrespective of the time occupied in its performance; and “task” means such amount of work as can, in the opinion of an authorised officer, be performed by an employee in an ordinary working day.
85. In my view, directors are employees who are paid either as piece rate workers or task workers as they are not full time employees. That does not make them any less employees as they are paid a remuneration for the work that they perform.
86. Any definition that excludes such directors from the jurisdiction of this Court would in my view be illogical and unfounded either in law or interpretation thereof. It cannot be that this Court can interpret the principles when they apply to regular employees and is not capable of interpreting the same principles when dealing with appointment of directors.
87. It is further important to note that the jurisdiction of this Court is not limited to “employees” and “employers” as defined in the *Employment Act* but is as provided in Article 162(2)(a) as read with Section 12 of the *Employment and Labour Relations Court Act*.
88. Further the decision in the Court of Appeal having been made after the judgment herein, there would be no justification to stay the orders made in this Court’s judgment on account of the same.
89. From the foregoing, it is my considered opinion that the decision of the Court of Appeal in Nakuru Civil Appeal No. 61 of 2015 (*supra*) is distinguishable and not applicable to this case and therefore does not justify the suspension of the orders made in the judgment in this suit.



90. In addition to the foregoing, it is a cardinal principle of law that an order of certiorari takes effect immediately and is incapable of being stayed. This was the purport of the decision in *Republic v Municipal Council of Mombasa & 2 others Ex - Parte Adopt - A - Light Limited* [2008] eKLR where the Court of Appeal held –

“The applicant seeks a stay of the order of nullification of the resolution of the Council and the nullification of the contract. The court has no such jurisdiction under Rule 5(2)(b) to stay the nullification of the resolution and the contract. It can only stay the execution of the decree or orders of the superior court. The order of certiorari granted by the superior court is not capable of execution as the superior court did not order any party to do anything or refrain from doing anything or to pay any sum other than costs. (See *Western College of Arts and Applied Sciences v Oranga & Others* [1976] KLR 63 at page 66 paragraph C – D). The applicant is not seeking stay of execution for costs.

Furthermore, the order of *certiorari* granted by the superior court quashing the resolutions of the Council and the Agreement is final and conclusive and took effect immediately. If the application is allowed the effect would be to reverse the decision of the superior court and legalise the resolution and the contract already nullified until the determination of the appeal. This Court has no jurisdiction at this stage to undo what the superior court has done. It can only reverse the order of certiorari upon the hearing of the appeal.”

91. For the foregoing reasons I find no merit in the Respondents’ application dated June 30, 2022.

92. In the final analysis, I make the following orders –

- (i) The Respondent’s application dated June 30, 2022 and the preliminary objection dated July 13, 2022 are without merit and are dismissed with costs.
- (ii) The application dated May 31, 2022 filed by the Petitioners succeeds partially in terms of prayer 4 thereof to the effect that pending the hearing and determination of the appeal by the Petitioners an Order be and is hereby made directing the 1st Respondent to continue paying salaries, allowances and all benefits due to the Petitioners under their respective contracts of service with Kenya Medical Services Authority.
- iii. The costs of the application dated May 31, 2022 shall be borne by the 1st Respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 3RD DAY OF NOVEMBER 2022

MAUREEN ONYANGO

JUDGE

