



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**PETITION NO. E050 OF 2020**

**FREDRICK OUMA JOWL.....1<sup>ST</sup> PETITIONER**

**GEORGE BALA.....2<sup>ND</sup> PETITIONER**

**VERSUS**

**BOARD OF DIRECTORS, ANTI-COUNTERFEIT AUTHORITY.....RESPONDENT**

**THE ETHICS AND ANTI-CORRUPTION COMMISSION.....1<sup>ST</sup> INTERESTED PARTY**

**JOHN AKOTEN.....2<sup>ND</sup> INTERESTED PARTY**

**PUBLIC SERVICE COMMISSION.....3<sup>RD</sup> INTERESTED PARTY**

**RULING**

1. The 2 Petitioners filed a Notice of Motion Application dated 21<sup>st</sup> September 2020 seeking for an interim order staying the decision of the Respondent to select and appoint the 2<sup>nd</sup> Interested Party as the Acting Executive Director of the Anti-Counterfeit Authority pending the hearing and determination of this Application and the Petition. They also seek that costs be provided for. The Application is based on the grounds that the 2<sup>nd</sup> Interested Party was allegedly appointed by the Respondent to the said acting position in a meeting held on 21<sup>st</sup> August 2020, contrary to the provisions of Articles 10, 27, 73 and 232 of the Constitution and public policy as contained in Mwongozo (Code of Governance for State Corporations). They assert that the 2<sup>nd</sup> Interested Party lacks the prescribed requirements to be appointed to the said position as he is incapable of obtaining a clearance certificate or at all from the 1<sup>st</sup> Interested Party due to active and ongoing investigations on corrupt practice and conduct. Further, they assert that the Respondent is mandatorily bound by virtue of the Constitutional provisions on national values and principles of governance and of public service and the integrity requirements under Chapter 6. They articulate that the Respondent however failed to involve the 1<sup>st</sup> Interested Party and further ensure that the process of selection and appointment of the 2<sup>nd</sup> Interested Party was objective, impartial and transparent. The Application is additionally supported by the affidavit sworn by the 1<sup>st</sup> Petitioner who avers that the impugned appointment is irregular and illegal because the Respondent purported to select and appoint the 2<sup>nd</sup> Interested Party to the said acting position for an unlimited period instead of the statutorily capped 6 months period. He deponed that the Respondent ought to have known that the 2<sup>nd</sup> Interested Party does not meet the integrity requirements and consequently conspired or abetted the illegal appointment, without special notice and specific agenda. He deponed that the appointment was therefore an ambush on the majority of the members of the Respondent and did not serve the public interest. He further avers that to the extent that the 2<sup>nd</sup> Interested Party was never subjected to the mandatory integrity clearance means the Respondent acted discriminatively to the exclusion and detriment of other qualified, eligible and skilled Kenyans. He contends that any appointment to a public office that is contrary to the law is null and void *ab initio* and should not stand.

2. In opposition, the Respondent filed a Replying Affidavit sworn on 7<sup>th</sup> October 2020 by its Acting Executive Director Fridah Kaberia who avers that at the 3<sup>rd</sup> Special Board Meeting held on 25<sup>th</sup> September 2020, the Respondent considered and resolved to appoint her the Acting Executive Director of the Anti-Counterfeit Authority for 6 months. That the orders being sought by the Petitioners/Applicants are therefore incapable of being issued as they have long been overtaken by events and it is in the public interest and balance of convenience that the Authority has in office a duly appointed CEO pending hearing and determination of the case. She further states that the Petitioners have not demonstrated any reasonable and/or justifiable cause and/or sufficient interest in the matter to warrant issuance of the orders sought.

3. The 1<sup>st</sup> Interested Party opposed the Motion vide a Replying Affidavit sworn on 9<sup>th</sup> December 2020 by its Officer In-charge of integrity verification, Eunice Hinga who avers that the 1<sup>st</sup> Interested Party has to date not received any application for integrity clearance with regard to the 2<sup>nd</sup> Interested Party, as stipulated under the Leadership and Integrity Act, 2012. She avers that the 2<sup>nd</sup> Interested Party would have

been mandatorily required to get integrity clearance from the 1<sup>st</sup> Interested Party during the substantive recruitment of the position. She is aware that the 2<sup>nd</sup> Interested Party had been replaced as the Acting Executive director of the Authority and avers that in the absence of a formal request for integrity clearance and with the aforementioned replacement, the Notice of Motion and the Petition stand overtaken by events.

4. The 2<sup>nd</sup> Interested Party also opposed the Motion in his Replying Affidavit sworn on 5<sup>th</sup> October 2020. In his affidavit he deponed that the Petition and motion were academic, based on hearsay, falsehoods and malicious in nature with no legal basis. He asserts they are underserving of this Court's precious judicial time. He deponed that the Petitioners were misleading the Court as his appointment in acting capacity was for a period of 6 months in line with the law and that his appointment was after the exit of the former Executive Director Mr. Elema Halake. He deponed that he was aware that it is common practice in organisations especially in the public service to appoint individuals to act in positions left vacant until the substantive holder is either appointed or recruited so as to ensure continuity of operations where to keep such post vacant would occasion operational difficulties.

5. The Applicants/Petitioners submitted as though the 2<sup>nd</sup> Interested Party was still the Acting Executive Director of the Authority. They urge the Court to find and hold by way of judicial notice based on public notoriety that meeting the requirements of Chapter Six of the Constitution is one of the prescribed qualifications to be appointed to a position in the public service whether you are a current employee of the public service or from the private sector. That every appointing authority in the public service is under a duty to inquire into the personal integrity of any prospective appointee from the 1<sup>st</sup> Interested Party and the Respondent was consequently under a Constitutional and statutory duty to inquire into the personal integrity of the 2<sup>nd</sup> Interested Party before appointing him. Further, that this Honourable Court has jurisdiction to adjudicate whether the 2<sup>nd</sup> Interested Party was/is exempted from complying with Chapter Six of the Constitution when being appointed as the Acting Executive Director of the Respondent. They submit that there is no undertaking given by the Respondent from its filed response to indicate that the 2<sup>nd</sup> Interested Party will not be appointed again as Acting Executive Director of Anti-Counterfeit Agency before the Petition herein is heard and determined by this Honourable Court. That the Court should therefore grant the stay orders as prayed.

6. The Respondent and the Interested Parties did not file submissions. The main issue for determination is whether the Petitioners' Application dated 21<sup>st</sup> September 2020 meets the threshold for grant of the Orders sought. The principles to consider in granting equitable remedies were laid down in the celebrated case of **Giella v Cassman Brown (1973) E.A 358** where the Court held that:

*“An applicant has to demonstrate firstly, that he has a prima facie case with probability of success. Secondly, an applicant has to show that he will suffer irreparable loss or damage if the interlocutory injunction is not granted, that is what an award of damages will not adequately compensate the damage. Thirdly, if the court is in doubt on the above two requirements, then it will decide the application on the balance of convenience.”*

7. Further in the case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] eKLR** Bosire JA while considering what constitutes a *prima facie* case in civil cases observed:

*“So what is prima facie case? I would say that in civil cases it is a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.*

*...It is not sufficient to raise issues. The evidence must show an infringement of a right and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case.”*

8. In the case **Eric V.J. Makokha & 4 others v Lawrence Sagini & 2 Others [1994] eKLR** the Court of Appeal at Nairobi held that it is trite law that a court cannot stultify itself by making orders which cannot be enforced or grant an injunction which will be ineffective for practical purposes. In the case of **Mussolini Kithome v Attorney General & Another [2016] eKLR**, the Court referred to the case of **B v Attorney General [2004] 1 KLR 431** whereby Ojwang J (as he then was) stated:

*“The Court does not, and ought not to be seen to make Orders in vain; otherwise the Court would be exposed to ridicule, and no agency of the Constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people.”*

9. The Petitioners/Applicants are seeking stay orders for actions that have already taken place and this Court would be granting the orders sought in vain. In my opinion that the Petitioners/ Applicants have not established a *prima facie* case to warrant a grant of the orders sought which in any event have already taken place. Further, injunctive/ stay orders are discretionary, have a limited scope and can only be granted in the most deserving circumstances which is not the case in the instant case. In the premises the Petitioners motion is so devoid of merit that it must suffer the only outcome it must – dismissal with costs to the Respondent and the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties.

10. As the 2<sup>nd</sup> Interested Party is no longer the Acting Executive Director of the Respondent, the Petition herein is overtaken by events, moot and a mere academic exercise. Entertaining it beyond this Ruling would be a waste of scarce judicial resources. It is therefore struck out.

It is so ordered.

**Dated and delivered at Nairobi this 26<sup>th</sup> day of January 2021**

**Nzioki wa Makau**

JUDGE