



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATION COURT**  
**AT NAIROBI**  
**PETITION NO. 114 OF 2019**

(Before Hon. Lady Justice Maureen Onyango)

**IN THE MATTER OF: ARTICLES 1, 2, 3, 4(2), 6, 10, 12(1)(a), 19, 20, 21, 22, 23, 24, 47, 41(1), 47, 48, 50(1), 73, 75, 156, 159, 162, 165(5), 232, 234, 236, 256 AND 259 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF: ALLEGED VIOLATION AND INFRINGEMENT OF THE RIGHTS AND FREEDOMS IN ARTICLES 27, 41(1), 4 AND 50(1) OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF: ALLEGED VIOLATION AND INFRINGEMENT OF THE CONSTITUTION IN ARTICLES 2(6), 10, 21(1) AND (3), 22(1), 23, 73, 232(1)(b), (d), (e), (f), (g) AND (2), 234, 236, 256 AND 259 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF: ALLEGED VIOLATION OF THE CONSTITUTION AND THE NATIONAL LEGISLATION IN THE IMPLEMENTATION OF THE KENYA RAILWAYS CORPORATION’S APPROVED STAFF RESTRUCTURING THROUGH AN IRREGULAR PROCESS ARBITRARY RUSHED AND TILTED TO SUIT CERTAIN PREFERRED INDIVIDUALS**

**AND**

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF SECTION 4(1) OF THE FAIR ADMINISTRATIVE ACTION ACT 2015**

**BETWEEN**

**PROSCOVIA VITSENGWA..... PETITIONER**

**VERSUS**

**THE CHAIRPERSON, KENYA RAILWAY CORPORATION BOARD..1<sup>ST</sup> RESPONDENT**

**THE KENYA RAILWAY CORPORATION..... 2<sup>ND</sup> RESPONDENT**

**THE MANAGING DIRECTOR, KENYA RAILWAY CORPORATION..3<sup>RD</sup> RESPONDENT**

**PUBLIC SERVICE COMMISSION.....4<sup>TH</sup> RESPONDENT**

**STATE CORPORATIONS ADVISORY COMMITTEE.....5<sup>TH</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....INTERESTED PARTY**

For determination before me is the Respondents' notice of motion application dated 29<sup>th</sup> May, 2020, in which the Applicants seek the following orders **THAT**:

1. The Application is certified urgent and the initial service to be dispensed with due to the urgency.
2. The entire Petition be dismissed with costs for failing to comply with Court orders of 3<sup>rd</sup> December 2019 directing the Petitioner to file written submissions to the Petition and the Application dated 2<sup>nd</sup> July 2019 and 28<sup>th</sup> August 2019 within 30 days of 3<sup>rd</sup> December 2019.
3. In the alternative, the ex parte interim order issued on 3<sup>rd</sup> September 2019 and 17<sup>th</sup> December 2019 be discharged
4. Costs.

The Application is premised on the grounds **THAT**:

- a. The ex-parte interim orders issued on 3<sup>rd</sup> September 2019 and 17<sup>th</sup> December 2019 suspending recruitment of key personnel are unduly denying the corporation the critical capacity to implement its role in development projects entrusted to it by the National Government.
- b. The ex-parte orders in force have lasted more than 8 months contrary to the provisions of Rule 17(4) of the ELRC Act that provides that such orders can be issued once for a period not exceeding 14 days and may only be extended with consent of the parties.
- c. The Petitioner has failed to take any steps to comply with this Court's orders and/or otherwise ensure that her Petition is prosecuted thus frustrating its hearing thereof.
- d. The Petitioner is guilty of causing various adjournments when the Petitioner was listed for hearing and/or file her written submissions in support of her Petition filed herein as directed by this Court.
- e. The continued delay to finalize the Petition has hampered the implementation of essential projects to ensure efficiency in provision of public transport in the entire country.
- f. The Petition has no chance of succeeding since the allegations of impropriety are not supported by any documentary evidence under Section 35(1) or oral evidence under Section 63 of the Evidence Act.
- g. The continued subsistence of the restraining orders is causing colossal economic losses to the Country as the 2<sup>nd</sup> Respondent is identified as a critical and essential service for transportation of freight especially during the Covid – 19 lockdown.
- h. The allegations levelled by the Petitioner of unfairness, partiality, discrimination (if any) in the staff restructuring process can be redressed in the unlikely event the same is proved by dint of the provisions of Section 12(3)(iv) of the Employment Labour Relations Court Act, surcharging under Article 226 (5) of the Constitution of Kenya, 2010.
- i. The Petition is a mask for internal politics aimed at abusing the Court process with a view of sabotaging key projects and embarrass certain officials.
- j. The restraining orders in force are not serving any useful purpose in law or reality and therefore need to have them discharged.

The Application is further supported by the Affidavit of **DAVID NJOGU**, the Corporation Secretary of the 2<sup>nd</sup> Respondent sworn on 29<sup>th</sup> May, 2020 in which he reiterates the grounds as set out on the face of the Notice of Motion Application.

The Application is filed under Rule 17(4) & (7) of the Employment Labour Relations Court Rules, Section 16 of the Employment Labour Relations Court Act and Rule 25 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms Practice and Procedure Rules, 2013).

In response to the application, the Petitioner filed a Replying Affidavit sworn on 18<sup>th</sup> July, 2020. She deposes that it is preposterous for the Respondents to try using the back door to have the Petition dismissed while they have been on the forlorn path of constantly acting in contempt of this Court's orders.

The affiant deposes that on 27<sup>th</sup> February, 2020 the Court found the 3<sup>rd</sup> Respondent guilty of contempt of this Court's orders issued on 3<sup>rd</sup> September 2019 and directed that he should appear in person for sentencing, on 11<sup>th</sup> March, 2020.

She avers that upon the contempt orders being granted, the Respondents quickly filed an application to set aside the said orders and on 9<sup>th</sup> March, 2020 the Court granted a temporary stay for 21 days and a further mention on 30<sup>th</sup> March 2020 for further directions.

She avers that none of the orders granted in this matter have been set aside, vacated or appealed against and that the Applicants have all along

continued to act as though this Court's orders are mere suggestions. She further avers that a perusal of the court record would show the Respondents' persistent attempt to frustrate the conclusion of this Petition.

She further avers that at some point, this Court advised that it would be in the best interest of the Respondents if they opted to forego their numerous applications and set the Petition down for hearing but this advice fell on deaf ears.

She contends that this is a public interest petition with overwhelming chances of success and she intends to prosecute it to its fruitful conclusion. According to her, the application should be dismissed and this Court should then issue directions as to the sentencing of the 3<sup>rd</sup> Respondent.

Parties agreed to dispose of the Application by way of written submissions.

### **Submissions by the Parties**

The Applicants in their submissions maintained that the existence of the Orders in force hamper the operations of the 2<sup>nd</sup> Respondent in implementing various National Government project and therefore the orders ought to be set aside on the grounds of public interest. The Applicants relied on the Court of Appeal decision in the case of **Kenya Human Rights Commission & Another v Attorney General & 6 Others (2019) eKLR**.

It is further submitted that the Orders restraining recruitment is in fact disproportionate to the alleged irregularities as the orders are more drastic than is necessary to achieve the objective of preventing the alleged irregularities. For emphasis the Applicants relied on the case of **ELRC Petition No. 21 of 2018 Okiya Omutata Okiiti v Kenya Railways Board of Directors & 4 Others** on proportionality between order and lawful activity where the Court was of the view that a Court Order ought to let a lawful activity proceed at the same time it may prohibit the speculative allegations of irregularities.

The Applicants contend that the Petition as a whole is an abuse of the court process as the Petitioner has failed to file her submissions as directed by this Court on 3<sup>rd</sup> December 2019.

It is further contended that the Petitioner has further failed to take any steps to ensure speedy determination of her petition despite the same being fixed severally in Court and therefore it ought to be dismissed in its entirety with costs to the Applicants.

It is further argued that the continued delay in filing submissions and finalizing the Petition and the resultant exparte injunctive orders in force are frustrating the overriding objectives of the Respondents and is therefore an abuse to the Court process.

In conclusion the Applicants urged this Court to find merit in its Application and allow it in terms of the reliefs sought therein.

### **Petitioner's Submissions**

The Petitioner, in her submissions, reiterated the averments in her Replying Affidavit. She argued that before the Covid-10 pandemic she was proactive in moving the Court but the Respondents have made every attempt to hinder speedy conclusion of the Petition. She further argued that all applications as a matter of course must be dispensed with before the main Petition is heard and determined.

She submitted that her submissions in respect of the main Petition shall be filed within 7 days from the date of ruling herein. It was her submission that the application is unnecessary as the matters raised would have been sorted out by seeking a mention date before this Court.

She relied on the case of **Samuel Kahiu v Jecinta Akinyi Soso Assistant County Commissions Iloodokilani Ward/Division & another (2018) eKLR** where the court held that vexatious litigation can take the form of a frivolous law suit or unwarranted filing of meritless motions in a meritorious cause of action.

In conclusion, she urged the Court to dismiss the application and issue directions as to the sentencing of the 3<sup>rd</sup> Respondent and conduct the Petition herein.

### **Analysis and Determination**

Having considered the Application, Affidavits, submissions and authorities cited by the parties, I find that the only issue for determination is whether the Application dated 29<sup>th</sup> May, 2020 is merited.

It is the Respondents' contention that the Petitioner has failed to comply with this Court's directions of 3<sup>rd</sup> December 2019 and therefore urged this Court to dismiss the Petition in its entirety. From the record of the Court the directions given on 3<sup>rd</sup> December 2019 were that: -

1. Leave was granted to the Respondents to cross examine the Petitioner at the hearing that was set for the 17<sup>th</sup> February 2020.
2. In view of the urgency of the issues, the issues raised in the 3 Applications be determined together with the issues in the main Petition.
3. The parties to file their respective skeleton submissions by 31<sup>st</sup> January, 2020.

Further from the record it is clear that none of the above was complied with as a chain of Applications were filed by the parties which took precedence over the hearing of the main Petition thus hindering its expedient determination.

It is noteworthy to point out that the Respondents filed the instant Application about 4 months after the Court's directions and even before they actually put in their submissions and/or cross examined the Petitioner.

To that end, this Court is of the view that the delay in conclusion of this matter cannot be attributed to the Petitioner alone and that all the parties had a duty to comply with the Court's directions.

I find that the dismissal of the suit would be prejudicial to the Petitioner as it will violate her rights to a fair hearing as protected under Article 50 of the Constitution of Kenya, 2010. I further find the grounds advanced by the Respondent for the dismissal of the Petition are procedural matters which cannot be a basis for locking out a party from litigating a matter properly before the Court.

Further, the failure to file submissions falls under the ambits of the provisions of Article 159 of the Constitution of Kenya and can therefore not form a basis for this Court to dismiss the entire Petition.

On the issue of discharge of the ex parte orders in force the Respondents/Applicants maintained that the continued existence of the orders has occasioned it loss as it has hindered them from proceeding with the recruitment exercise as planned.

They further maintained that they have since been experiencing difficulties in the implementation of projects in the public transport.

They therefore urged that it is in the public interest for this Court varies and/or sets aside the orders as the Petitioner has no chances of success since the allegations leveled against the Respondents have not been supported by evidence.

The Petitioner on the other hand maintained that she is keen on having her Petition heard and determined by this Court and that the delay has been occasioned by the Respondents who have filed various Applications and even obtained orders from the Court of Appeal staying the sentencing of the 3<sup>rd</sup> Respondent thus stalling the matter.

She further submitted that she is ready and willing to file her submissions within 7 days in compliance with Court's direction.

From the record it is evident that the orders issued on 3<sup>rd</sup> September, 2019 were extended on 18<sup>th</sup> September, 2019 and those issued on 17<sup>th</sup> December, 2019 were to be in force until the hearing of the Application which is yet to be determined. Therefore, both orders are rightfully in force.

The purpose of Courts issuing interim Orders is to protect the substratum of the matter pending hearing and determination of the Application and eventually the main suit.

In the instant case the Orders were extended till hearing of the Application, which is yet to be heard.

I further find the grounds advanced in support of the Application to be at variance with the orders sought. Whereas the Applicant seeks orders to dismiss the Petition for failure by the petitioner to file submissions, within the timeframe allocated by the court, the grounds advanced seem to be in respect of the subsistence of the interim orders on record. For the same reason I find the application to be frivolous and vexatious.

The upshot is that I find no merit in the Application dated 29<sup>th</sup> May, 2020 and dismiss the same with costs to the Petitioner. The Court further directs that the parties fix the main Petition for hearing and that all pending Applications be heard together with the Petition in view of the nature of the subject matter which requires expeditious disposal.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19<sup>TH</sup> DAY OF FEBRUARY 2021**

**MAUREEN ONYANGO**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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.

**MAUREEN ONYANGO**

**JUDGE**