



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**PETITION E025 OF 2020**

**LAW SOCIETY OF KENYA.....PETITIONER**

**VERSUS**

**THE CABINET SECRETARY FOR**

**TOURISM AND WILDLIFE.....1<sup>ST</sup> RESPONDENT**

**THE TOURISM REGULATORY AUTHORITY BOARD.....2<sup>ND</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**AND**

**KEVIN MUASYA.....1<sup>ST</sup> INTERESTED PARTY**

**ALAIS LENANA MOMOI.....2<sup>ND</sup> INTERESTED PARTY**

**ISAAC MUCHIRI NJAGU.....3<sup>RD</sup> INTERESTED PARTY**

**PAULINE NJOROGE.....4<sup>TH</sup> INTERESTED PARTY**

**NAJMA ISMAEL.....5<sup>TH</sup> INTERESTED PARTY**

**JUDGEMENT**

The petitioner is seeking the following orders;

- i. A declaration that the Interested Parties do not meet the required constitutional and statutory requirements, standards, qualifications and experience to be appointed to the position of members of the Tourism Regulatory Authority Board.*
- ii. A declaration that the purported appointment of the Interested Parties to the position of members of the Tourism Regulatory Authority Board vide Gazette Notice Vol. CXXII-NO. 150 NO. 5462 dated 7th August, 2020 did not meet the laid down substantive and procedural constitutional requirements applicable in public service appointments and is therefore unconstitutional, unlawful, irregular, null and void for being in contravention of Articles 10,27, 73(2) and 232 of the Constitution of Kenya, 2010*
- iii. A declaration that the 1st Respondent's purported handpick and appointment of the Interested Parties vide Gazette Notice Vol. CXXII-NO. 150 NO. 5462 dated 7th August, 2020 to the position of members of the Tourism Regulatory Authority Board without following the laid down substantive and procedural constitutional and statutory requirements applicable in public service appointments; the said purported handpick and appointment is unconstitutional, unlawful and irregular for being in contravention of Articles 10,27, 73(2) and 232 of the Constitution of Kenya, 2010*
- iv. An order quashing Gazette Notice Vol. CXXII-NO. 150 NO. 5462 dated 7th August, 2020 vide which the Cabinet Secretary for Tourism and Wildlife purported to appoint Kevin Muasya, Alais Lenana, Momoi Njoroge, Isaac Muchiri Njangu and Najma Ishmael as members of the Tourism Regulatory Authority Board.*
- v. A declaration that Najib Balala's conduct in the appointment of the Interested Parties to the position of members of the*

*Tourism Regulatory Authority Board violates Article 10, Chapter six and thirteen of the Constitution of Kenya and for that reason Najib Balala is unsuitable to hold Public Office appointive or elective*

*vi. An order directing the Respondents to ensure that future appointments to the Members of the Tourism Regulatory Authority Board whose membership is not automatic by virtue of their offices pursuant to Section 8 (1) (g) of the Tourism Act No. 28 of 2011, strictly adhere to the substantive and constitutional and statutory requirements applicable in the Public Service.*

*vii. Costs of this Petition be borne by the Respondents.*

*viii. Such other orders this Honourable Court shall deem fit pursuant to Article 23(3) of the Constitution of Kenya 2010*

## **PETITION**

The petitioner is a body corporate established under the Law Society Act. The 1<sup>st</sup> respondent is established under Article 152 of the Constitution and responsible for policy matters with respect to tourism and wildlife. The 2<sup>nd</sup> respondent is a corporate body established under section 4 of the Tourism Act and mandated to regulate the tourism sector in Kenya. The 3<sup>rd</sup> respondent is a public office under Article 156 of the constitution and the principal government advisor.

The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> interested parties are adults whose appointments as members of the Tourism Regulatory Authority Board vide Gazette Notice Vol.CXXII-No.150 No.5462 dated 7<sup>th</sup> August, 2020 is challenged in this petition.

The 5<sup>th</sup> interested party is an adult and whose appointment as member of the Tourism Regulatory Authority Board vide press release dated 8<sup>th</sup> August, 2020 by the 1<sup>st</sup> respondent is under challenge in this petition.

The petitioner has filed the petition pursuant to the provisions of Article 2, 10, 19, 20, 21, and 22 of the constitution and which provisions requires all persons and state orders be subject to the constitution and ensure the national values and principles of governance are applied and including human dignity, social justice, human rights, inclusiveness, equality, integrity, transparency, accountability, non-discrimination and fair administrative action.

Under these provisions a party may institute proceedings to claim that their rights and or fundamental freedoms have been denied, violated or infringed and under articles 23, 159, 160(1), 162(2) (a), 165 and 258 of the constitution the court has jurisdiction to hear and determine all employment and labour relations disputes and related matters on the enforcement of the constitution.

The petition is that Parliament enacted the Tourism Act (the Act) establishing the 2<sup>nd</sup> respondent with statutory mandate to provide and develop, manage market and regulate sustainable tourism and related activities. Under section 8 of the Act, the 2<sup>nd</sup> respondent once established is to be governed by a Board constituted as follows;

- a) A chairperson appointed by the President;*
- b) The permanent secretary in the Ministry for the time being responsible for matters relating to tourism or his representative;*
- c) The permanent secretary in the ministry for the time being responsible for matters relating to planning and national development or his representative;*
- d) The permanent secretary in the ministry for the time being responsible for matters relating to finance or his representative;*
- e) The permanent secretary in the ministry for the time being responsible for matters relating to environment or his representative;*
- f) The director – general of the authority who shall be the secretary;*
- g) Six members, not being public officer, nominated or selected through a competitive process taking into account regional and gender parity and appointed by the Minister, of whom –*
  - (i) To shall be nominated by the registered tourism sector associations; and*
  - (ii) Four shall be persons who have expertise in tourism or tourism – related disciplines.*

Pursuant to section 8(1)(g) of the Act, the 1<sup>st</sup> respondent vide Gazette Notice Vol.CXXII-NO.150 No.5462 dated 14<sup>th</sup> October, 2019 purported to appoint the interested parties herein as members to the Tourism Regulatory Authority Board (the Board) for a period of 3 years with effect from 7<sup>th</sup> August, 2020.

The appointment of the interested parties contravenes that provisions of section 8(1) (g) of the Act which requires that members be nominated or selected through a competitive process taking into account expertise in tourism or tourism-related disciplines. Before appointment, the interested parties as per section 8(3) of the Act were to be laid before the National Assembly for approval. This appointment of the interested parties is challenged by the petitioner for being unconstitutional and being contrary to the law and public

service appointments.

The petition is also that by virtue of the constitution defining 'public service', 'public office', 'public officer' and 'public body' under article 260 of the constitution and section 9(3) of the Act providing remuneration of the members of the Board from the public coffers, the members of the Board are public officers.

The petition is also that the Board members are therefore servants of the people engaged or employed within a framework of constitutional and statutory provisions as well as lawful policies and practices applicable to public service appointments.

The substantive law applicable to such members' employment ranging from declaration of vacancy, recruitment and selection procedures, appointment procedure and termination procedures would be the applicable public service constitutional and statutory provisions.

The petitioner's case is also that this petition relates to employment within the complex framework of public service or public sector employment and thus qualifies as an employment and labour dispute within the meaning of article 162(2)(a) of the constitution and section 12 of the Employment and Labour Relations Court Act and this court has jurisdiction.

The petition is also that whereas a majority of the Board members are automatic by virtue of the office they hold having been appointed to those offices through a competitive process applicable in the public service, before the 1<sup>st</sup> respondent can appoint any appointee to the membership of the board, the nominee must have been recruited through a fair, open, competitive, merit-based and inclusive recruitment process applicable in the public service to determine personal integrity, competence and suitability as required under the constitution and the law.

Under section 8(3) of the Act a person shall be qualified for appointment as a member of the board upon approval by Parliament.

In this case the 1<sup>st</sup> respondent appointed the interested parties without the due process of the law. he acted contrary to article 10 of the constitution, as there was no transparency and accountability; contrary to article 73(3) which demands that appointments conform to a selection on the basis of personal integrity, competence and suitability; he acted contrary to article 232 requires that the appointment conform to the principles and values of accountability, transparency and fair competition.

Section 36(1) of the Public Service Act provide for personal integrity, merit, equity, aptitude and suitability with prescribed qualifications, provable experience and efficiency as the criteria of appointment in public office. The law also requires for fair competition and merit and section 22 of the Public Ethics Act requires that public officers shall practice and promote the principle of integrity, competence and suitability.

The petitioner has mandate to assist and advice government on matters relating to the administration of justice pursuant to section 4 of the Law Society Act and under Article 22 of the constitution has the right to institute these proceedings on behalf of the public in respect to a violation of the constitution. the petitioner has a legitimate expectation that the criteria of appointment and recruitment of the members of the board will ensure of hiring of persons of demonstrable and predetermined expertise and that the process of appointment will meet constitutional and legal threshold to ensure that the holders of the offices are not beholden to partisan interests but will be free to discharge their mandate fairly, independently, without fear or favour and according to the law.

The 1<sup>st</sup> respondent has not demonstrated that the recruitment of the interested parties did not meet the constitutional and legal threshold, is justifiable in any way or is one that was done in the public interest as a remedial and or temporary measure and or falls within legal expectations and or exemption. The 1<sup>st</sup> respondent is guilty of abuse of office for blatant violation of section 8(1) (g) of the Act, Article 10 of the constitution, the Public Service Act, the Public Service (Values and Principles) Act, the leadership and Integrity Act and the Public Officer Ethics Act and should therefore be declared unsuitable to hold public, appointive and elective office and the petition be allowed as prayed.

The petition is supported by the Affidavit of Collins Odhiambo the Deputy Chief Executive Officer for the petitioner and who avers that via Gazette Notice Vol.CXXII.NO.150 No.5462 dated 7<sup>th</sup> August, 2020 and by press release dated 8<sup>th</sup> August, 2020 where the 2<sup>nd</sup> respondent communicated that the appointment of the 4<sup>th</sup> interested party as contained in Gazette Notice Vol.CXXII.NO.150 No.5462 had been revoked and the 5<sup>th</sup> interested party appointed as her replacement.

Mr Odhiambo also avers that pursuant to section 8(1)(g) of the Act the 1<sup>st</sup> respondent appointed the interested parties as board members for a period of 3 years but pursuant to article 260 of the constitution and section 9(3) of the Act the members of the board are servants of the people and engaged in employment within a framework of constitutional and legal provisions and should be subject to an open, competitive, merit-based and inclusive recruitment process applicable in the public service to determine the nominee's personal integrity, competences and suitability.

Upon nomination such persons should attend before Parliament for approval.

In this regard, contrary to the public expectation and that of the petitioner, the 1<sup>st</sup> respondent proceeded and appointed the interested parties as board members of the 2<sup>nd</sup> respondent contrary to the constitutional values and principles and the applicable statutory provisions.

### Respondents

In reply, the respondents relied on the Replying Affidavit of Hon. Safina Kwekwe Tsungu (Hon. Kwekwe) the principal secretary, state department for Tourism in the Ministry of Tourism and Wildlife and on the onset the court has no jurisdiction to decide on matters

concerning the appointment of directors as these are not employees but owners or representatives of the owners of the legal entity. The court also lacks jurisdiction as the petition does not fit under the parties described under section 12 of the Employment and Labour Relations Court Act as held in **Kenya Council of Employment and Migration Agencies & another versus Samuel Mwangera Arachi & 2 others [2015] eKLR**.

Hon. Kwekwe also avers that the appointment under Gazette Notice Vol.CXXII-NO.150 No.5462 of 7<sup>th</sup> August, 2020 was lawful and done in line with the Tourism Act which under section 8(1) (g) provides that;

*Six other members, not being public officers, appointed by the Cabinet Secretary taking into account regional balance and gender parity, of whom –*

*i. Two shall be nominated by the registered tourism sector association; and*

*ii. Four shall be persons who have expertise in tourism or tourism-related discipline.*

The petition is based on a law that has since been amended through the **Statute Law (Miscellaneous Amendment) Act, 2014** which deleted the introductory portion to section 8(1) (g) of the Tourism Act No.28 of 2011.

The petition relies on section 9(3) of the Tourism Act No.28 f 2011 which has since been amended and in this regard the court is enjoined by the principle of that the law governing specific subject matters overrides a law which only governs general matters.

It is the respondent's case that the petitioner has not demonstrated that the decision to appoint the Board members was unreasonable, irrational or illegal and that the appointed persons lacked in skill, competency and qualifications. The 1<sup>st</sup> respondent acted as per the mandate provided under the constitution and the law. The orders sought are against public interest and public policy and will if granted occasion grave hardship to the respondents and affect the constitutionally granted mandate. The petitioner has not demonstrated any reasonable cause to warrant issuance of the orders sought and the petition should be dismissed with costs.

#### Interested parties

The 1<sup>st</sup> to 4<sup>th</sup> interested parties did not enter appearance.

The 5<sup>th</sup> interested party in her replying affidavit avers that she was appointed to the Board vide press release dated 8<sup>th</sup> August, 2020 by the 1<sup>st</sup> respondent and is aware the under section 8(1)(g) of the Act there is mandate to appoint as done. For of the board members should have expertise in tourism or tourism-related disciplines and she has not been a public officer and was nominated pursuant to section 8(1) (g) (ii) of the Act for being an expert on tourism matters. There is academic qualifications for appointment as member of the Board and has had an industrious career in journalism which has prepared her to serve in the Board.

The 5<sup>th</sup> interested party also avers that under section 36(2) of the Public Service Commission Act 'merit' means that one has the abilities, aptitude, skills, qualifications, experience and personal qualities relevant to carrying out of the duties in question. Has the potential for development and meet the criteria of appointment and which she does possess and the petition should be dismissed with costs.

In reply, the petitioner filed the Further Affidavit of Collins Odhiambo and who avers that the petition is filed under the provisions of articles 20, 21 and 22 of the constitution and under article 23 read with section 12(3) of the Employment and Labour Relations Court Act this court has jurisdiction to grant appropriate relief and including declaratory, conservatory and injunctive orders.

Under article 153(4) (a) a Cabinet Secretary in performing his duties should act in accordance with the constitution. This matter relates to the employment and labour relations dispute. The appointment of the interested parties is a matter for this court to address.

The appointments of the interested parties failed to observe the guidelines ton open interviews and vetting objective selection criteria based on qualification and the most suitable candidate in the circumstances of the appointments herein.

Mr Odhiambo also avers that the respondents have failed to appreciate that constitutional requirements on appointment of public officer have not been provided for in the Statute Law (Miscellaneous) Amendments, 2014 or in the Act and the same is provided under the Public Service (Values & Principles) Ac; Fair Administrative Action and the Leadership and Integrity Act. The respondents are estopped from interpreting the law in a manner that favour them.

The 5<sup>th</sup> interested party has not submitted any evidence with regard to her credentials making her fit for appointment as alleged and even where such are not in dispute the process leading to her appointment were irregular and unlawful. Though well versed in journalism, there is nothing to suggest any expertise in tourism or tourism-related matters a requirement of section 8(1) (g) (ii) of the Act. The 5<sup>th</sup> respondent has not been gazetted upon the reversal of the 4<sup>th</sup> interested parties nomination to the Board and on this basis the petition should be allowed as prayed.

#### Written submissions

The petitioner relied on the written submissions with regard to the Notice of Motion.

The respondents submitted that petitioner has no *prima facie* case and the petition is based on a law which has since been amended. The legal

provisions which required nominees to the Board be subjected to a parliamentary approval vide section 8(3) of the Act have since been amended. The basis of the petition is lost.

There are no violations of the constitution and the law as alleged and the orders sought should not issue. The 1<sup>st</sup> respondent has a statutory mandate under section 8(1)(g) of the Act to appoint 6 board members and which was done on 7<sup>th</sup> August, 2020 vide Gazette Notice NO.150 No.5462 which is legal and constitutional.

#### Determination

On the petition, the affidavits and submissions, the issues which emerge for determination can be summarised as follows;

Whether the court has jurisdiction;

Whether the orders sought should issue; and

Who should pay costs.

The Issue of jurisdiction was addressed by the court vide ruling dated 22<sup>nd</sup> October, 2020 and since there is no challenge of this ruling, I will not dwell on the subject.

The petition is based on the application of articles 2, 3, 10, 19, 20, 21, 23, 165(3), 258 and 259 of the Constitution, 2010 and on the grounds that there is contravention of the national values and principles, the principles of leadership and integrity, and the values and principles of public service.

The petition is also grounded on the alleged contravention of section 8(1)(g)(ii) and (3) of the **Tourism Act No.8 of 2011**.

In this regard, the petitioner has challenged the appointment of the 1<sup>st</sup> to 4<sup>th</sup> interested parties to the Board vide Gazette Notice Vol.CXXII-NO.150 No.5462 dated 7<sup>th</sup> August, 2020. By a press release the 5<sup>th</sup> interested party was appointed to the Board by the 1<sup>st</sup> respondent upon the reversal of the 4<sup>th</sup> interested party appointment.

Section 8 of the Tourism Act, 2011 provided as follows;

#### **8. Board of the Authority**

*(1) There shall be the Board of the Authority which shall consist of—*

*(a) a chairperson appointed by the President;*

*(b) the Permanent Secretary in the ministry for the time being responsible for matters relating to tourism or his representative;*

*(c) the Permanent Secretary in the ministry for the time being responsible for matters relating to planning and national development or his representative;*

*(d) the Permanent Secretary in the ministry for the time being responsible for matters relating to finance or his representative;*

*(e) the Permanent Secretary in the ministry for the time being responsible for matters relating to environment or his representative;*

*(f) the Director-General of the Authority, who shall be the secretary;*

*(g) six other members, not being public officers, nominated or selected through a competitive process taking into account regional balance and gender parity and appointed by the Minister, of whom—*

*(i) two shall be nominated by the registered tourism sector associations; and*

*(ii) four shall be persons who have expertise in tourism or tourism-related disciplines.*

*(2) The members of the Board of the Authority shall be appointed at different times so that the respective expiry dates of their terms of office shall fall at different times.*

*(3) The names of persons proposed for appointment under subsection (1)(a) and (g) shall, before they are appointed, be laid before the National Assembly for approval. [underline added].*

These provisions allowed the President to appoint the chairperson of the Board and other members by virtue of their office for tourism, planning and national development, finance, environment and the director general as Board members. The law also provided for 6 members to the Board nominated or selected member through a competitive process and who should be nominated taking into account *regional balance and gender parity* and who are then *appointed by the Minister*.

The law further provided that, the Minister in appointing the 6 Board members should take into account that *two were* nominated by registered tourism sector associations and *four* to be persons who have expertise in the tourism or tourism-related discipline.

Further to the nomination and meeting the set criteria pursuant to section 8(1)(a) and (g) of the Act, the nominated persons proposed for appointment were [shall ] be laid before Parliament for approval. That was the applicable threshold. It has since changed.

These provisions as relied upon by the petitioner were amended though **The Statute Law (Miscellaneous Amendment) Act, 2014**. There was a fundamental shift in the nomination, appointment and taking over of office by members of the Board.

Do the interested parties meet the threshold set in the law?

Taking the above provisions into account, through **The Statute Law (Miscellaneous Amendment) Act, 2014** the Tourism Act, 2011 the introductory part to paragraph (g) of section 8(1)(g) of the Act was deleted and substituted with the following provisions;

***(g) six other members, not being public officers, appointed by the Cabinet Secretary taking into account regional balance and gender parity, of whom - [(i) two shall be nominated by the registered tourism sector associations; and (ii) four shall be persons who have expertise in tourism or tourism-related disciplines.]***

Subsequently, section 8(3) of the Act was deleted. This previously required the submission and approval by Parliament of the nominated persons.

The remainder of section 8(g) of the Act following these amendments pursuant to **The Statute Law (Miscellaneous Amendment) Act, 2014** is as set out above that the Cabinet Secretary has power and or mandate to;

*[Appoint] six other members, not being public officers, appointed by the Cabinet Secretary taking into account regional balance and gender parity, of whom -*

*(i) two shall be nominated by the registered tourism sector associations; and*

*(ii) four shall be persons who have expertise in tourism or tourism-related disciplines.*

Previously, the Minister was required to appoint *six other members, not being public officers, nominated or selected through a competitive process taking into account regional balance and gender parity and appointed by the Minister*.

These amendments took effect upon publication on 24<sup>th</sup> November, 2014.

These amendments substantially changed the process of appointment of board members under the Act and giving the Cabinet Secretary the right to appoint 6 Board members unlike the previous provisions were nominated board members were required to go through a competitive process and to be laid out before the National Assembly for approval before appointment.

Under section 10 of the Act, Board members are appointed for a term of three (3) years and are non-executive and only sit in terms of the Second Schedule thereof and at least once in every three months to conduct the business of the Board and pursuant to section 9(3) of the Act;

*(3) Members of the Board of the Authority shall be paid allowances determined by the Minister, in consultation with the Minister for the time being responsible for matters relating finance*

The Board Members appointed are not in the full time employment of the Board. The requirement is to sit at least once in every three months to conduct the business of the Board. the members are paid an allowance. Such is not a wage, salary or remuneration ordinarily paid to an employee or an indentured learner so as to accrue rights and benefits which would ordinarily arise in an employment relationship.

The Board members appointed by the Cabinet Secretary are drawn from persons who are not public officers and the core criteria is that these are persons nominated by association(s) in the tourism sector and or have expertise in tourism or tourism-related disciplines. It has not been challenged that the interested parties have met that threshold for appointment or that there are objections, complaints or other matter raised by association(s) in the tourism sector against the interested parties

Recognising that the petitioner carry a public duty in accordance with Articles 19, 20, 21 and 22 of the Constitution, 2010; the law upon which the petition is premised has since been amended. The foundation of the petition does not exist.

Article 2 of the Constitution, 2010 not only asserts the supremacy of the Constitution but it also, in the same vein, removes any doubt on constitutionality of a law enacted contrary to the Constitution; it reads as follows:

## *2. Supremacy of this Constitution*

*(1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.*

*(2) No person may claim or exercise State authority except as authorised under this Constitution.*

*(3) The validity or legality of this Constitution is not subject to challenge by or before any court or other State organ.*

*(4) Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.*

Through an Act of Parliament, the 1<sup>st</sup> respondent appointed the 1<sup>st</sup> to 4<sup>th</sup> interested party as members of the Board. Such mandate is secured under the Act as amended through **The Statute Law (Miscellaneous Amendment) Act, 2014**. the 5<sup>th</sup> interested party was also appointed and through a press release announced to the public.

The 1<sup>st</sup> to 4<sup>th</sup> interested party have been gazetted vide Gazette Notice Vol.CXXII – NO.150 No.5462 of 7<sup>th</sup> August, 2020. The appointment of the 5<sup>th</sup> interested party remains to be regularised.

It has not been challenged that the interested parties are public officers; that there is no regional balance and or gender parity. A cursory look at the names listed under the interested parties a determination of region, gender or other factors is not possible to outline. The petition premised on the challenge contravention of the constitution and the law, the burden was on the petitioner to articulate these factors.

The interested parties were appointed for a given term and with legal duties outlined under section 9 of the Act. such legal mandate is not equivalent to an employment contract or a contract of service as regulated under the Employment Act, 2007.

The court finds no illegality in the action of the 1<sup>st</sup> respondent in the appointment of the interested parties. The only outstanding matter is to regularise the appointment of the 5<sup>th</sup> interested party.

The petition is based on a law that has since been amended through the **Statute Law (Miscellaneous Amendment) Act, 2014** which deleted the introductory portion to section 8(1)(g) of the Tourism Act No.28 of 2011. The overriding effect is that the petition lacks merit and is hereby dismissed with costs to the respondents. As the 5<sup>th</sup> interested party appointment is yet to be gazetted and regularised, she shall bear own costs.

**Accordingly, the petition is hereby dismissed. costs to the respondents.**

**DELIVERED IN OPEN COURT AT NAIROBI THIS 4TH DAY OF FEBRUARY, 2021.**

**M. MBARU**

**JUDGE**

In the presence of:

Court Assistance: Okodoi ..... and .....