



**REPUBLIC OF KENYA**

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

**AT NAIROBI**

**PETITION E092 OF 2020**

**IN THE MATTER OF ARTICLES 22(I) & 258 OF THE CONSTITUTION AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS OR FUNDAMENTAL**

**FREEDOMS UNDER ARTICLES 10, 27, 73 & 232 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF PUBLIC SERVICE (VALUES AND PRINCIPLES) ACT, NO. 1A OF 2015**

**AND**

**IN THE MATTER OF THE LEADERSHIP & INTEGRITY ACT, NO. 19 OF 2012**

**AND**

**IN THE MATTER OF THE PUBLIC SERVICE COMMISSION ACT, NO. 10 OF 2017**

**AND**

**IN THE MATTER OF MWONGOZO,**

**THE CODE OF GOVERNANCE FOR STATE CORPORATIONS, 2015**

**JONATHAN MUIA.....PETITIONER**

**VERSUS**

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

**AND**

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

**FRIDA KABERIA.....2<sup>ND</sup> INTERESTED PARTY**

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

**JUDGMENT**

1. The Petitioner herein Jonathan Muia filed the Petition dated 3<sup>rd</sup> December 2020 against the Board of Directors Anti-Counterfeit Authority as the Respondent and the Ethics & Anti-Corruption Commission, Frida Kaberia and the Public Service Commission as Interested Parties. The 1<sup>st</sup> and 3<sup>rd</sup> Interested Parties are enjoined in the suit in their capacity as constitutional commissions while the 2<sup>nd</sup> Interested Party is

enjoined in her capacity as the Acting Executive Director of the Anti-Counterfeit Authority. The Petitioner averred that the Respondent is mandated under Section 10 of the Anti-Counterfeit Act and pursuant to policy as espoused in **Mwongozo, the Code of Governance for State Corporations**, to appoint the Executive Director of the Anti-Counterfeit Authority, a State Corporation and body corporate established under Section 3 of the Anti-Counterfeit Act. The Petitioner asserts that the Executive Director of the Anti-Counterfeit Authority is a public office with anyone occupying the said position either for a full term or on acting capacity expected to meet all the eligibility requirements set out in the Career Progression Guidelines for Staff of the Anti-Counterfeit Authority, the Constitution, the Leadership and Integrity Act, the Anti-Counterfeit Act, Mwongozo Code and the various Human Resource documents prescribed by the Public Service Commission and the Anti-Counterfeit Authority. The Petitioner asserts that it is also public knowledge that a prescribed qualification for holding such public office in Kenya is obtaining clearance from the 1<sup>st</sup> Interested Party as provided under Section 12A of the Public Service Act, 2017. He averred that the 2<sup>nd</sup> Interested Party does not meet the prescribed requirements to hold the position of Executive Director of the Anti-Counterfeit Authority as contained in the Career Progression Guidelines for Staff which prescribed the following qualifications: a Masters degree in Law, Science, Social Science, Information Technology, Business Administration or its equivalent from a recognized institution; a Bachelor's degree in Law, Science, Social Science, Information Technology or Business Administration or its equivalent from a recognized institution; at least fifteen (15) years working experience in matters relating to trade, industry or Intellectual property; demonstrated managerial, administrative and professional competence in work performance; and attended a Strategic Leadership Course not less than four (4) weeks.

2. The Petitioner averred that the additional qualifications provided in the Mwongozo Code to those contained in Section 10 of the Anti-Counterfeit Act for a Chief Executive Officer of a State Corporation are as follows: - have at least ten years knowledge and experience in the relevant field; meet the requirements of Chapter Six of the Constitution, has served in a position of senior management for a period of at least five years, meets the requirements of fit and proper test.

3. The Petitioner averred that the 2<sup>nd</sup> Interested Party lacks at least fifteen (15) years working experience in matters relating to trade, industry or intellectual property. The Petitioner averred that the also does not meet the additional qualifications under the Mwongozo Code and notably has a pending investigation by the 1<sup>st</sup> Interested Party for corrupt and unethical practice and that she therefore lacks the requisite competence for the position. The Petitioner averred that further, the 1<sup>st</sup> Interested has also not cleared the 2<sup>nd</sup> Interested Party for any appointment. The Petitioner averred that by the Respondent purporting to appoint the 2<sup>nd</sup> Interested Party as the Acting Executive Director of the Anti-Counterfeit Authority on 25<sup>th</sup> September 2020 is irregular and illegal because the 2<sup>nd</sup> Interested Party has not met the requirements for qualification as explained herein above. Further, that the Respondent appointed her without putting in place or setting in motion procedures to substantively recruit and fill in the position contrary to Section 34(5) (b) of the Public Service Commission Act, 2017. The Petitioner averred that the Respondent also made the selection and appointment without a special notice and specific agenda and consequently ambushed majority of the Respondent members and that the impugned selection and appointment of the 2<sup>nd</sup> Interested Party by the Respondent is null and void *ab initio* and can only liable to be quashed by this Honourable Court to uphold and promote respect for the Constitution, public policy and the rule of law. The Petitioner averred that the Respondent deliberately violated and disregarded the principles of the rule of law, equality, non-discrimination, good governance, integrity, transparency and accountability as under Article 10 of the Constitution of Kenya. He submitted that the Respondent has also violated the provisions of Article 27 of the Constitution on equal benefit of the law and equal treatment, by considering only the 2<sup>nd</sup> Interested Party in disregard of the applicable law and in an opaque manner for selection and appointment. The Petitioner submitted that the Respondent is also in violation of the dictates and mandatory requirements of the values and principles of public service as set out at Article 232 of the Constitution; as it failed to involve the public in the selection and appointment process of the 2<sup>nd</sup> Interested Party so as to ensure transparency in the process and that it further subordinated public interest to private and personal interest, by considering matter unknown to the public. He further averred that while Article 73 of the Constitution imposes on the Respondent the imperativeness not only to uphold but also practice integrity in the public service, the selection and appointment of the 2<sup>nd</sup> Interested Party was contrary to the mandatory requirements of Article 73. The Petitioner averred that this is so because there is an active and serious complaint against the 2<sup>nd</sup> Interested Party for engaging in corrupt and unethical conduct which was received by the 1<sup>st</sup> Interested Party but which the Respondent has failed to consider so as to promote public confidence in the integrity of the office of Executive Director of the Anti-Counterfeit Authority in the selection and appointment of the office occupant. The Petitioner averred that the Respondent has generally violated the mandatory requirements of Chapter Six of the Constitution on leadership and integrity thus making the selection and appointment of the 2<sup>nd</sup> Interested Party liable only to be quashed. He averred that the violation of the aforesaid specific provisions of the Constitution enumerated above have caused injury to all Kenyans, which injury can only be alleviated when the violations are corrected by appropriate orders of this Court and the Respondent obliged to walk the Constitutional path in making public appointments. The Petitioner is seeking for Orders:-

1. A declaration that every appointment in the public service within the meaning and definition of "appointment" under Section 2 of the Public Service Commission Act, No. 10 of 2017 must be subject to the requirements of Chapter Six of the Constitution and prior express clearance by the 1<sup>st</sup> Interested Party.

2. A declaration that the appointment of the 2<sup>nd</sup> Interested Party by the Respondent is unconstitutional, illegal and contrary to public policy and law for failure to meet all the prescribed qualifications and therefore null and void *ab initio*.

3. A judicial review order by way of *certiorari* does issue to bring into this Court and quash 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.

4. A declaration that the Respondent has no power or authority or jurisdiction to appoint or purport to appoint someone to act in the position of Executive Director of the Anti-Counterfeit Authority or to extend the impugned acting appointment of the 2<sup>nd</sup> interested Party but to competitively fill the said position once the initial six (6) months' acting appointment has lapsed.

5. Costs of the Petition.

4. In the Affidavit sworn in support of the Petition, the Petitioner averred that the said selection and appointment of the 2<sup>nd</sup> Interested Party

as the Acting Executive Director of the Anti-Counterfeit Authority was allegedly done at the Respondent's 71<sup>st</sup> meeting held on 21<sup>st</sup> August 2020. The Petitioner asserts that the Career Progression Guidelines for Staff is a critical document approved by the Respondent, the Cabinet Secretary and the State Corporations Advisor Committee (SCAC) and which document applies to all staff of the Anti-Counterfeit Authority. The Petitioner asserted that therefore where the 2<sup>nd</sup> Interested Party fails to meet a prescribed requirement under the said guidelines, her selection and appointment becomes unlawful. He further averred that the 1<sup>st</sup> Interested Party has routinely failed to clear Kenyans seeking its clearance under the guise and low standard that they are under investigations and that it would consequently be ridiculous for the same not to apply to the 2<sup>nd</sup> Interested Party. He averred that the Respondent had on 21<sup>st</sup> August 2020 appointed one John Akoten to the position of Executive Director of the Anti-Counterfeit Authority and which appointment was challenged before this Court in **Petition No. E050 of 2020 – Fredrick Ouma Jowi & Another v Board of Directors, Anti-Counterfeit Authority & 3 Others**. The Petitioner asserts that Justice Radido stayed the said appointment on 22<sup>nd</sup> September 2020 and the Respondent withdrew the said appointment but the Respondent proceeded to irregularly and illegally purport to once again appoint the 2<sup>nd</sup> Interested Party as the Acting Executive Director of the Anti-Counterfeit Authority, without ensuring that she meets the prescribed qualifications. That the subsequent appointment of the 2<sup>nd</sup> Interested Party is clear contempt of this Court and impunity by the Respondent to not follow the law and approved government policies. It is the Petitioner's averment that the Petition ought to be allowed in the interest of justice, public interest, the rule of law, the need to guard against impunity, accountability for public exercise of power, fair, apt and expedient in all circumstances of the case.

5. The 1<sup>st</sup> Interested Party filed a Replying Affidavit sworn on 26<sup>th</sup> January 2021 by the Commission's Deputy Director in Charge of Reports and Data Centre and Investigations, Susan Kinyeki. She averred that the Commission is mandated under Article 252 of the Constitution of Kenya to conduct investigations on its own initiative or on a complaint made by a member of the public, on alleged corruption or economic crime and unethical conduct of any person and/or body. She deponed that Article 79 of the Constitution as read with Section 4(2) of the Leadership and Integrity Act, 2012 also mandates the 1<sup>st</sup> Interested Party to superintend compliance with and enforcement of both Chapter six of the Constitution and the Leadership and Integrity Act. She further asserted 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 so that it makes a confidential report to the employing body informing and advising them appropriately. That the 2<sup>nd</sup> Interested Party was already an employee of the Anti-Counterfeit Authority before her appointment to the position of Acting Executive Director and would be mandated to get the integrity clearance from the 1<sup>st</sup> Interested Party during the substantive recruitment of the said position. On the issue of the 2<sup>nd</sup> Interested Party having active complaint under investigations by the Commission, she averred that the Commission received an anonymous complaint vide the BKMS System sometimes in August 2020. She deponed that the anonymous informant alleged unethical conduct on the part of Florah Mutahi, Stephen Mutoro and Fridah Kaberia involving a matter in Machakos High Court, Petition No. 7 of 2020. The deponed asserted that the Commission reviewed and analysed the complaint and/or report and advised the anonymous complainant vide the BKMS system to seek redress in court since the matter was pending before court for determination.

6. The Respondent, 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties also filed a Replying Affidavit sworn on 29<sup>th</sup> March 2021 by the Chairperson, Board of the Anti-Counterfeit Authority, Flora Mutai who concurs and supports the content and averments of the 1<sup>st</sup> Interested party's replying affidavit sworn by Susan Kinyeki. She further relies wholly on the Replying Affidavit she swore on 14<sup>th</sup> December 2020 and the Further Affidavit she swore on 30<sup>th</sup> December 2020 in response to the Petitioner's Notice of Motion application together with the annexures thereat. She averred that the Board of Directors duly appointed Fridah Kaberia on 25<sup>th</sup> September 2020 subsequent to a court order in ELRC Petition No. E050 of 2020 barring Dr. John Akoten from acting in the position of Executive Director. Further, that the Respondent is vested with the powers to appoint a holder of the Office of the Executive Director as per the Career Guidelines and the Mwongozo. It was deponed that the Respondent fully complied with the set procedures as stated in the various statutes, regulations and policy prior to appointing the 2<sup>nd</sup> Interested Party and further considered several aspects including qualification, competence and experience. She further averred that the allegations against 2<sup>nd</sup> Interested Party are mere witch-hunt designed to negatively taint her qualifications and that the Petitioner has in bad faith chosen not to bring to the attention of this Honorable Court, this significant provisions in the Career Progression Guidelines. That the said guidelines emphasize that the qualifications and/or any other conditions set in the career guidelines are the minimum requirements entitling an officer for consideration for appointment and/or promotion to higher grade as well as advancement from one grade to another. The Interested Party stated that the same is also dependent on merit and ability, existence of a vacancy and approval by the Board as may be delegated and that the Board may waive any of the minimum requirements in very exceptional cases. She averred that a vacancy in the Office of the Executive Director of the Authority affects payment of salaries in the Authority and it was thus necessary for the Respondent to appoint the 2<sup>nd</sup> Interested Party to the said office. Further, that issuance of clearances is only required in applications for the appointment of a position through competitive selection

7. It was averred that the appointment of the 2<sup>nd</sup> Interested Party was in an acting capacity for a period of 6 months pending conclusion of the merger process, in line with **Circular No. OP/CAB 9/1A** dated 11<sup>th</sup> March 2020 and that the Authority was one of the institutions earmarked for reforms under the ongoing Parastatal Reform programme. That any disruption and continuous vacancy in the Office of the Executive Director will cripple the functions of the Authority during the merger transition period and that the Petitioner in collusion with others has filed several cases aimed at removing all Acting Executive Directors and has further annexed documents of a questionable nature, not demonstrating whether or not they emanate from the Authority. She further averred that the Petition as framed does not meet the constitutional threshold as set down in various authorities of this Court and the Court of Appeal, as it is framed in general terms without particularity of the rights said to have been infringed and that it should be dismissed forthwith.

8. There was a further affidavit sworn by Florah Mutai on 30<sup>th</sup> December 2020 on behalf of the Respondent and the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties. She averred that in line with Section 2.1.2 of the Career Progression Guidelines for Staff Revised October 2016, the 2<sup>nd</sup> Interested Party has a Master of Business Administration degree, a Bachelor of Art Degree from the University of Nairobi, Certified Public Accountant CPA(K), Certified Secretaries CPS(K), attended Strategic Leadership and Development and a Member in good standing of ICPAK and ICPSK. She deponed that the 2<sup>nd</sup> Interested Party has further demonstrated managerial, administrative and professional competence in work performance where she was commended and recognized for outstanding leadership in the Finance & Accounts Division. That the 2<sup>nd</sup> Interested Party has also served in the related field since the year 2005 to date, and subsequent to her appointment to the current disputed position and that the Petitioner has not demonstrated with clear facts, documentation and or particularity how the Petitioner is unqualified vis-à-vis her appointment as the Acting Executive Director. She further averred that it is apparent that the court order in Petition E050 of

2020 did not stay any subsequent appointment in the said position.

9. The Petition was dispensed by way of written submissions. The Petitioner submitted that Section 2 of the Public Service Commission Act, No. 10 of 2017 defines “appointment” as including appointment, acting appointment, re-appointment, promotion and re-designation. That this Court ought to give full and true meaning to the aforesaid definition to avoid the charade being peddled by the Respondent that the prescribed qualifications for a given position including integrity clearance do not apply in case of acting appointments. That it is irrelevant whether the appointment is acting or re-appointment or otherwise and the appointee must meet all the prescribed qualifications including Chapter 6 requirements of the Constitution. The Petitioner submitted that Section 34 of the Public Service Commission Act provides as follows: -

34. (1) Acting appointments shall be —

(a) made by the lawful appointing authority; and

(b) subject to the prescribed regulations and procedures which apply to appointments.

(2) A person shall not be appointed to hold a public office in an acting capacity unless the person satisfies all the prescribed qualifications for holding the public office.

(3) An officer may be appointed in an acting capacity for a period of at least thirty days but not exceeding a period of six months.

(4) A public officer may be assigned to perform duties vested in another public officer during a temporary absence of the other public officer.

(5) An acting appointment under subsection (4) shall—

(a) be in favour of a public officer who is duly qualified and competent to perform the duty; and

(b) not undermine the expeditious appointment or deployment of a competent person to the public office concerned.

(6) The Commission shall, whenever it comes to its attention that an authorised officer has purportedly made an acting appointment or assignment, in contravention of the provisions of this section, take corrective action. (Emphasis his)

10. The Petitioner further submitted that Section 52 of the Leadership and Integrity Act provides as follows:

52. Application of Chapter Six of the Constitution and this Act to public officers generally (1) Pursuant to Article 80(c) of the Constitution, the provisions of Chapter Six of the Constitution and Part II of this Act except section 18 shall apply to all public officers as if they were State officers.

11. The Petitioner submitted that the decision to appoint the 2<sup>nd</sup> Interested Party falls within the meaning of “appointment” as defined in the Public Service Act and such appointment must meet the prescribed requirements as envisaged at Section 34(2) of the Public Service Commission Act. He urges 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, including the vacant position of Executive Director of the Anti-Counterfeit Authority and that it is irrelevant whether you are a current employee of the public service or from the private sector. The Petitioner submitted that the 1<sup>st</sup> Interested Party has not denied that the 2<sup>nd</sup> Interested Party is under investigation or disputed the record of complaint attached to the Petition and therefore the same is an unchallenged fact. He cited the case of **Linus Nganga Kiongo & 73 Others v Town Council of Kikuyu, Nairobi High Court Civil Case No. 79 of 2011** where the Court found the plaintiffs entitled to succeed since proof in civil cases are on a balance of probabilities and there was no evidence to contradict the evidence they gave on oath which was also supported by documentary evidence. The Petitioner submitted that the integrity issues surrounding the 2<sup>nd</sup> Interested Party have not been controverted or challenged and should be admitted as they are. He urges the Court to find and hold that integrity clearance by the 1<sup>st</sup> Interested Party is one of the prescribed requirements for appointment to any position in the public service on the occurrence of a vacancy. He cited the case of **Republic v Ethics and Anti-Corruption Commission Ex Parte Nairobi City County Assembly & 13 Others** where the Court held that Kenyans decreed under the Constitution that those whose conduct does not bring honor, public confidence and integrity have no place in the management of public affairs. He submitted that the said Court further noted with regards to the mandate of the 1<sup>st</sup> Interested Party under the Constitution being the power to oversee the implementation process and compliance with the provisions of Chapter six of the Constitution on leadership and integrity. The Petitioner urges the Court to thus find the appointment of the 2<sup>nd</sup> Interested Party unconstitutional, irregular and illegal and only liable to be quashed considering the absence of the integrity clearance. He further submitted that the test or standard for integrity was set out in the case of **Trusted Society of Human Rights Alliance v The Attorney General & 5 Others, Nairobi High Court Petition No. 229 of 2012** where the Court held:

“107. To our mind, therefore, a person is said to lack integrity when there are serious unresolved questions about his honesty, financial probity, scrupulousness, fairness, and reputation, soundness of his moral judgment or his commitment to the national values enumerated in the Constitution. In our view, for purposes of the integrity test in our Constitution, there is no requirement that the behavior, attribute or conduct in question has to rise to the threshold of criminality. It therefore follows that the fact that a person has not been convicted of a criminal offence is not dispositive of the inquiry whether they lack integrity or not. As the Democratic Alliance case held, it is enough if there are sufficient serious, plausible allegations which raise substantial unresolved questions about one’s integrity.”

12. The Petitioner also relied on the case of **Benson Riitho Mureithi v J.W. Wakhungu & 2 Others [2014] eKLR** where the Court declared the appointment of the interested party as Chairman of the Athi Water Services Board unlawful, unconstitutional and therefore null and void since the 1<sup>st</sup> Respondent had failed to consider personal integrity, character, competence and suitability when making the said appointment. The Petitioner submitted that this Court in **Kenya Young Parliamentarians Association v Cabinet Secretary for Labour & Social Protection & 3 Others, ELRC Petition No. 190 of 2019** quashed the appointment of Mary Wambui Munene as the Chairperson NEA after finding that the respondent had violated Articles 10, 73 and 232 of the Constitution and the Petitioner urges the Court to do the same in the instant case. The Petitioner submitted that he has demonstrated by way of affidavit evidence that the 2<sup>nd</sup> Interested Party has in her entire career been involved in matters to do with accounting and that the said experience is not a requirement for appointment to the position of Executive Director of the Authority. The Petitioner submitted that the Respondent and the 2<sup>nd</sup> Interested Party have failed to show and demonstrate experience in trade, industry or intellectual property and further show that the 2<sup>nd</sup> Interested Party has had a minimum of five years' service in a senior management position. He urges the Court to find that knowledge and experience in accounting or financial matters in mostly junior and middle-level positions do not meet the prescribed qualifications for the position of Executive Director of the Authority. He further submitted that the Respondent hiding under the so-called circular from the Cabinet Secretary is a ruse by the Cabinet Secretary and the Respondent to violate the law on appointments and keep the 2<sup>nd</sup> Interested Party acting *ad infinitum* under the guise of some nebulous merger process. The Petitioner submitted that the same was not envisaged in law and that this Court ought to find the appointment of the 2<sup>nd</sup> Interested Party as being contrary to Section 34 (5) of the Public Service Commission Act and therefore illegal. The Petitioner submitted that the issues raised in the Petition are of public interest and he has an obligation to defend the Constitution when fundamental rights and freedoms are being violated, as provided under Article 3(1) of the Constitution.

13. The 1<sup>st</sup> Interested Party submitted that it would have become mandatory for the 2<sup>nd</sup> Interested Party to get integrity clearance from the 1<sup>st</sup> Interested Party during the substantive recruitment of the position. The 1<sup>st</sup> Interested Party relied on the case of **Professor Samson Rosana Ondigi v Council of Masinde Muliro University of Science and Technology [2021] eKLR** for this proposition. The 1<sup>st</sup> Interested Party further relied on its Replying Affidavit sworn by Susan Kinyeki on 26<sup>th</sup> January 2021.

14. The Respondent, 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties submitted that the letter from the Head of Public Service on the management of state corporations Guideline (F)(2) states that:

*“...consequently, and in addition to guidelines as contained in circular no. OP/SAC.9/73A (96) of 5th august 2016, boards of state corporations are to adhere to the following:*

*i) Where a vacancy exists in the office of the Chief Executive Officer arising from criminal prosecution, retirement, resignation, end of term and other circumstances;*

*a) An Acting Chief Executive Officer is to be appointed by the board in consultation with the parent ministry within 7 days thereof.”*

15. They submit that delayed staff salaries and an ongoing merger called for the due appointment of the 2<sup>nd</sup> Interested Party as the Acting Executive Director as relevant policies and regulations dictate and that she was appointed in accordance with State Corporation guidelines. They further submit that the Petitioner has selectively ignored the procedure set out in Section 11(1) of the EACC Act which states that upon conducting investigations conclusively and there is a finding that the public officer is culpable, the EACC can either recommend to the DPP for charges, or recommend to the public body on action to follow. They submitted that there is no communication from the EACC to the Respondent and 2<sup>nd</sup> Interested Party about investigations on a purported complaint against the 2<sup>nd</sup> Interested Party and that the Petitioner is therefore misleading the Honorable Court in asserting the involvement of the 1<sup>st</sup> Interested Party Commission. Further, that there are no provisions in the law, regulations and internal policies that require the 3<sup>rd</sup> Interested Party's clearance on a continuous basis especially when the employee has been appointed in acting capacity to any position and that the same is required if they apply for the appointment of a position through competitive selection. It is their submission that the Respondent in dispensing its function therefore adhered to all prescribed procedures in appointing an acting executive director. The Respondent, 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties submit that this is an employer employee issue which ought to have been filed as a normal claim as there is no clear demonstration on how the fundamental rights mentioned therein have been violated. They submitted that the Petition does not therefore merit the issuing of the orders as enumerated in the case herein and that it lacks merit and forms a classical description of an abuse of due court process. They urge the Court to strike it out with costs to the Respondents and Interested Parties.

16. The Petitioner seeks the bar of the 2<sup>nd</sup> Interested Party as the Acting Director of the Anti-Counterfeit Authority. Whereas there would be an illegality in an indefinite appointment in acting capacity, the Respondent did not require to seek the clearance of the 2<sup>nd</sup> Interested Party from the 1<sup>st</sup> Interested Party for clearance to act in the position. The 2<sup>nd</sup> Interested Party already serves at a substantial position in the Respondent and the Constitution never contemplated that a party would require to get clearance from the 1<sup>st</sup> Interested Party to act within the organisation they already serve in. That clearly would inundate the 1<sup>st</sup> Interested Party with such requests and clog the operations of the 1<sup>st</sup> Interested Party to the extent it would be unable to exercise any of its other mandates in the service of Kenyans per its mandate in Chapter 6 of the Constitution. The existence or otherwise, of an ongoing probe in the probity of the 2<sup>nd</sup> Interested Party would of course be of concern. However, as noted by the Court the matter is pending before the Machakos High Court and cannot be subject of this suit. In my view, nothing in the Petition demonstrates the 2<sup>nd</sup> Interested Party does not qualify to act as Executive Director. In parting, it would be appropriate for the Respondent to move with dispatch to fill the vacant position of Executive Director as this is one of a few Petitions that have been mounted against it on account of the said position. In the final analysis, the Petition lacks merit and is dismissed with no order as to costs.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 29<sup>TH</sup> DAY OF JUNE 2021**

**NZIOKI WA MAKAU**

**JUDGE**