



## REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW NO. E007 OF 2021

REPUBLIC.....APPLICANT

VERSUS

HON. THE ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT

COMMUNICATIONS AUTHORITY OF KENYA.....2<sup>ND</sup> RESPONDENT

AND

HON. KEMBI GITURA.....INTERESTED PARTY

BENEDICT KABUGI NDUNGU.....EX PARTE APPLICANT

### JUDGMENT

1. Pursuant to leave granted by the Court on 19<sup>th</sup> March 2021, the *Ex Parte* Applicant Benedict Kabugi Ndungu filed a Notice of Motion application dated 22<sup>nd</sup> March 2021 against the Respondents, Attorney General and Communications Authority of Kenya while Hon. Kembi Gitura is enjoined as Interested Party. The *Ex parte* Applicants seeks for Orders:-

i. THAT an order of *Certiorari* be and is hereby issued to remove into this Honourable Court and quash the Gazette Notice No. 2215 of 2021 published on 10<sup>th</sup> March 2021 (Vol. CXXIII—No. 50) in a special issue of the Kenya Gazette, appointing Hon. Kembi Gitura to be the Chairperson of the Board of the Communications Authority of Kenya, for a period of three (3) years, with effect from the 18<sup>th</sup> April, 2021.

ii. THAT costs of and incidental to this application be provided for.

iii. THAT such further and other relief that the Honourable Court may deem just and expedient to grant.

2. The Application is supported by the Applicant's Statutory Statement and the Verifying Affidavit sworn on 18<sup>th</sup> March 2021. He avers that the impugned appointment of the Interested Party is procedurally flawed and *ultra vires* the lawful powers bestowed upon the appointing authority. The *Ex parte* Applicant asserts that no vacancy notice was declared in the Gazette Notice regarding the vacancy in the office of chairperson of the Board of the 2<sup>nd</sup> Respondent prior to the appointment of the Interested Party. Further, that no selection panel for purposes of selecting suitable candidates for the said appointment has been constituted as under the law and that the Applicant's wider public's justice, reprieve and relief lies in this Honourable Court. He further avers that the said appointment is arbitrary and excludes other eligible members of the public from competitively bidding for the position and that such unilateral appointment endangers the independence of the 2<sup>nd</sup> Respondent and that the decision to appoint the Interested Party violates the citizenry right to equal benefit and to protection of the law under Article 27 and is further contrary to the dictates of Articles 41 and 47 (1) and the values and principles underpinned by Articles 10 and 232 of the Constitution. The *Ex Parte* Applicant asserts that vide the Statute Law (Miscellaneous Amendments) Act, 2018, Section 6 of the Kenya Information and Communications Act (hereinafter "KIC Act"), 1998 was amended and Section 6B of the Act was further deleted and that the High Court through a judgment delivered on 30<sup>th</sup> January 2020 in the matter of **Okiya Omtatah Okioti & 4 Others v Attorney General & 4 Others; Council of Governors & 4 others (Interested Parties) [2020] eKLR** declared section 6 of the Kenya Information and Communications Act 1998 as amended by Statute Law (Miscellaneous Amendment) Act No. 18 of 2018 as unconstitutional, null and void. That accordingly, the subsisting operative law with regard to appointment of the chairperson of the Board of the 2<sup>nd</sup> Respondent is the KIC Act, 1998 as amended in 2013. That the appointment of the Interested Party herein is therefore unknown to law and thus untenable and that it ought to be quashed at the earliest stage. The Applicant avers that no known constitutional provision, statute or legal instrument whatsoever confers authority upon any person to overlook the provisions of Section 6 and 6B of the KIC Act, 1998 as amended through the KIC

(Amendment) Act, 2013. He avers that should the Interested Party's appointment be allowed to stand, the rule of law will be obliterated and independence of the 2<sup>nd</sup> Respondent will be dangerously suppressed. That this Court ought to quash the appointment of the Interested Party so as to pave way for due process in the filling up of the vacancy of the Chairperson of the Board of the 2<sup>nd</sup> Respondent and stop the legal breaches being perpetrated herein.

3. The 1<sup>st</sup> Respondent filed their Grounds of Opposition dated 19<sup>th</sup> April 2021 and asserts that the Applicant's allegations that the appointment of Hon. Kembi Gitura violates the judgment of the High Court delivered in the **Okiya Omtatah** case (*supra*) are unfounded since the amendments effected to Section 6 of the KIC Act were declared unconstitutional, null and void. They make reference to judgment issued on 29<sup>th</sup> October 2020 in **High Court Petition 284 & 353 of 2019 – Senate of the Republic of Kenya & 4 Others v Speaker of the National Assembly & Another; Attorney General & 7 Others (Interested Parties) [2020] eKLR**; which suspended orders nullifying the impugned Acts for a period of 9 months from the date of the judgment, within which period the National Assembly ought to have complied with the provisions of Article 110(3) of the Constitution and regularize the Acts which in default would stand nullified. The 1<sup>st</sup> Respondent submits that instructively, the amendments to Sections 6 and 6B of the KIC Act fall within the framework of the suspended orders and that the applicable law as at the effective date of the appointment of the Interested Party herein is therefore the KIC Act (as amended through the Statute Law (Miscellaneous Amendment) Act No. 18 of 2018. Further, it was submitted, the Boards of State Corporations are principal policy organs responsible for the overall governance, management and strategic direction of the corporations and for delivering corporate performance in accordance with the corporations' goals and objectives and consequently deliver on the vision and objectives of the appointing authority, being the President and the relevant Cabinet Secretary and that for this reason, appointments to Boards of State Corporations ought not to be competitive and merit based but be subject to the discretion of the President and the relevant Cabinet Secretary based on parameters of gender and regional balance, persons who will best deliver the objectives and targets of the corporation among others. That the appointment and dismissal of Board Directors cannot be inferred to be an administrative action but a political action. It was submitted that further, the Boards of Directors are not employees of the State Corporations in the strict sense as they do not draw remuneration from the corporations and their allowances cannot be presumed to be salaries. That they ought therefore to be exempted from the dictates of the Employment Act and that the Constitution anticipates that certain state and public offices are not subject to the provisions of Article 232. The 1<sup>st</sup> Respondent submitted that the Application neither discloses any reasonable cause of action against the 1<sup>st</sup> Respondent nor has any merit and is thus an abuse of the due process and precious time of this Honourable Court and that it should be dismissed with costs to the 1<sup>st</sup> Respondent. The 2<sup>nd</sup> Respondent had also filed Grounds of Opposition but withdrew the same.

4. The *Ex Parte* Applicant submits that the values and principles enunciated under Article 10 of the Constitution are clear that the path of interpretation to be adopted at all times is that which inclines to good governance and the rule of law. That the same was buttressed by the Supreme Court in **Re Speaker, County Assembly of Embu [2018] eKLR** where it expressed itself that every provision of the Constitution of Kenya shall be construed according to the doctrine of interpretation that the law is always speaking. He further respectfully submits that the 1<sup>st</sup> Respondent's argument that the judgment in the **Okiya Omtatah** case (*supra*) currently stands suspended by virtue of the decision in **High Court Petition 284 & 353 of 2019** (*supra*), is strange, unfortunate and mischievous. He submits that the Orders pronounced on 30<sup>th</sup> January 2020 in the **Okiya Omtatah** case (*supra*) were never suspended in any manner whatsoever and that they instantaneously took effect thereby annulling the amendments to Section 6 of KIC Act made through the Statute Law (Miscellaneous Amendment) Act No. 18 of 2018. The *Ex Parte* Applicant submitted that accordingly, the current applicable provisions in relation to the appointment of the chairperson of the 2<sup>nd</sup> Respondent are Sections 6 and 6B of the Kenya Information and Communications Act as amended through the Kenya Information and Communications (Amendment) Act, 2013 which provide as follows:

6. (1) *The management of the Authority shall vest on the Board which shall consist of—*

(a) *a chairperson appointed by the President in accordance with section 6B;*

6B (1) *Within fourteen days of the occurrence of a vacancy in the office of chairperson or member, the President or the Cabinet Secretary, as the case may be, shall—*

(a) *by notice in the Gazette and on the official website of the Ministry, declare a vacancy in the Board, and invite applications from qualified persons; and*

(b) *convene a selection panel for the purpose of selecting suitable candidates for appointment as the chairperson or member of the Board.*

5. That by failing to strictly adhere to the foregoing statutory provisions prior to publishing the impugned gazette notice, the President did not abide by the rule of law and that this Court cannot therefore sustain the illegal appointment of the Interested Party which is tainted with procedural impropriety. Further, that all state officers, organs and public officers are bound by the Constitution and the law and that Article 129 provides that executive authority derives from the people of Kenya and shall be exercised in accordance with the Constitution and in a manner compatible with the principle of service to the people of Kenya, and their well-being and benefit. He cited the case of **Republic v Public Procurement Administrative Review Board & 3 Others Ex-Parte Olive Telecommunication PVT Limited [2014] eKLR** where the court pronounced that where the law exhaustively provides for the jurisdiction of a body or authority, the body or authority must operate within those limits and ought not to expand its jurisdiction through administrative craft or innovation. He further cited the case of **Wambua Maithya v Pharmacy and Poisons Board; Pharmaceutical Society of Kenya & 2 Others (Interested Parties) [2019] eKLR** where the Court observed that the appointing authority is required, inter alia, to adhere to the twin principles of fair competition and merit in carrying out recruitment for public office. The *Ex Parte* Applicant submitted that the Court in **Wambua Maithya** (*supra*) went on to rely on authorities where the High Court stated in relation to public appointments, that the new Constitution signifies the end of 'jobs for the boys' era and that Article 10 sets out the values that must be infused in every decision-making process, including that of making appointments. The *Ex Parte* Applicant further submits that transparency in public appointments is paramount particularly in the instant case since the chairperson of the 2<sup>nd</sup> Respondent's Board sits at the helm of the communications regulator which oversees the media and the telecommunications sectors in Kenya. That appointment powers by an authority can only be lawful if undertaken within statutory confines as was held in **Githu Muigai & Another v Law Society of Kenya & Another [2015] eKLR**. The *Ex Parte* Applicant submits that as was held in **Resley v The City Council of Nairobi [2006] 2 EA 311**, a relief cannot be merely denied on the basis that the decision sought to be

quashed has been undertaken, and that the quashing thereof would lead to difficulties. He urges this Court to grant the reliefs sought on the grounds canvassed and on the invincibility of the law as the Court is vested with the requisite mandate to interrogate the impugned actions herein, within the principles of constitutionality and in addition to the doctrine of *ultra vires*. The *Ex Parte* Applicant submitted that the Court ought to make such further recommendations as it may deem necessary to uphold the dignity of the court, sustain the rule of law, and serve the ends of justice. On the issue of costs, the *Ex Parte* Applicant relies on the case of **Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others [2014] eKLR** where the Supreme Court held that even though costs follow the event, the vital factor in setting the preference is the judiciously-exercised discretion of the Court accommodating the special circumstances of the case, while being guided by ends of justice. He submits that the claims of the public interest will be a relevant factor in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation. That considering the circumstances of this case and in view of the alarming hostility towards the law and valid court orders, it is proper and befitting that the 1st Respondent bears the costs of this suit.

6. The 1<sup>st</sup> Respondent submits that as earlier noted, the Court in **Petition No. 163 of 2019-Okiya Omtatah** (*supra*) declared Section 6 as amended by the Statute Law (Miscellaneous Amendment) Act No. 18 of 2018 unconstitutional. The 1<sup>st</sup> Respondent submitted that the Court in **Senate of the Republic of Kenya & 4 Others** (*supra*) subsequently reiterated this position when it declared various Acts passed by the National Assembly as unconstitutional including the Statute Law (Miscellaneous Amendment) Act No. 18 of 2018 and that the court in the **Senate of the Republic of Kenya** case went further to suspend the orders for 9 months so that the Respondents comply and regularise the impugned Acts and in default, the impugned Acts stand nullified. The 1<sup>st</sup> Respondent cited the case of **Law Society of Kenya v Kenya Revenue Authority & Another [2017] eKLR** where the court recognised and described suspended declarations as follows:

*“19. A suspended declaration is a remedial device by which a court strikes down a constitutionally invalid law, but suspends the effect of its order such that the law retains force for a temporary period.*

*20. Suspended declarations of invalidity have become a familiar feature of Canadian constitutional jurisprudence. Having originated as an exceptional remedy, enabling courts to temporarily suspend the effect of a declaration invalidating a law on constitutional grounds, a suspended declaration is now included in the majority of Supreme Court of Canada decisions in which the power of statutory invalidation is utilized. As the usage of suspended declarations has grown, the justifications for their use have evolved. No longer are they reserved for instances of “emergency”, in which the invalidation of an unconstitutional law would result in imminent danger to the public. Rather, suspended declarations are now used to instantiate a particular conception of the proper roles of legislatures and courts.*

*21. Suspended declarations engage real consequences for individual litigants and others affected by judicial decisions, as laws found to violate the Constitution are permitted to have continued, temporary effect. A suspended declaration occurs when courts choose to delay the effect of invalidating a law. A court may declare a law to be invalid, but “suspend” the effect of the declaration until a future date. During the interim period, the law continues to apply. At the expiry of the period, the court's declaration takes full effect: unless the law has been replaced or amended to comply with the constitution, it is rendered null.” (Emphasis theirs)*

7. The 1<sup>st</sup> Respondent submitted that accordingly, the Statute Law (Miscellaneous Amendment) Act No. 18 of 2018 continues to apply in the interim period pending expiry of the nine (9) months as per the suspended declaration issued in the case of **Senate of the Republic of Kenya** (*supra*). The 1<sup>st</sup> Respondent submitted that this is so because Judgment in the said case was delivered on 29<sup>th</sup> October 2020 and the nine (9) months period ends on 29<sup>th</sup> July 2021 or thereabout. The 1<sup>st</sup> Respondent submitted that consequently, the current legislative authority with regards to the appointment procedure of the Chairperson and Members of the Board to the Communication Authority of Kenya is Section 6 as amended by the Statute Law (Miscellaneous Amendment) Act No. 18 of 2018. The 1<sup>st</sup> Respondent further submits that the President relied on Section 6 as amended by the Statute Law (Miscellaneous Amendment) Act No. 18 of 2018 in appointing the Interested Party the Chairperson of the Board to the 2<sup>nd</sup> Respondent Authority; and which provision does not require declaration of a vacancy in the Board via a notice in the Gazette and on the official website of the Ministry and inviting applications from qualified persons. That the said provision solely vests the power to appoint the Chairperson of the Board in the President and therefore the Interested Party's said appointment is not *ultra vires*, unlawful and procedurally flawed as alleged. It submits that the orders sought should therefore not be issued and that and the Judicial Review Application should be dismissed with costs to the Respondents.

8. The objection in respect of the appointment of the Chair of the 1<sup>st</sup> Respondent would have been well taken had the case of **Senate of the Republic of Kenya & 4 Others v Speaker of the National Assembly & Another; Attorney General & 7 Others (Interested Parties)** (*supra*) had not suspended the action in the case of **Okiya Omtatah Okoiti & 4 Others v Attorney General & 4 Others; Council of Governors & 4 others (Interested Parties)** (*supra*). As the action was suspended the Statute Law (Miscellaneous Amendment) Act No. 18 of 2018 continues to apply in the interim period pending expiry of the nine (9) months as per the suspended declaration issued in the case of **Senate of the Republic of Kenya** (*supra*). It is therefore proper and fit for the President to exercise his discretion in appointing the Chair of the 1<sup>st</sup> Respondent's Board as he did in the Gazette Notice No. 2215 of 2021 published on 10<sup>th</sup> March 2021 (Vol. CXXIII—No. 50) in a special issue of the Kenya Gazette, appointing Hon. Kembi Gitura to be the Chairperson of the Board of the Communications Authority of Kenya, for a period of three (3) years, with effect from the 18<sup>th</sup> April, 2021.

9. From the foregoing, the order that commends itself is one dismissing the Judicial Review in its entirety and given the fact that in public interest matters, a Court is well guided to consider not granting costs, I will not make any order as to costs other than order each party to bear their own costs.

It is so ordered.

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

**Nzioki wa Makau**

JUDGE