REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

PETITION NO. E031 OF 2021

LAW SOCIETY OF KENYA.....PETITIONER

VERSUS

1. THE CHAIRMAN, NAIROBI METROPOLITAN AREA COUNCIL

2. NAIROBI METROPOLITAN AREA COUNCIL

3. NAIROBI METROPOLITAN AREA TRANSPORT AUTHORITY

4. THE HON. THE ATTORNEY GENERAL.....RESPONDENTS

AND

MARY WAITHIGIENI CHEGE.....1ST INTERESTED PARTY

ZACHARIAH KARENGE MUNGAI.....2ND INTERESTED PARTY

RONALD NDIRANGU NDEGWA.....3RD INTERESTED PARTY

RULING

1. The Petitioner filed a Notice of Motion Application dated 1st March 2021 seeking for various orders some of which are spent but the balance of which is:-

i. THAT pending the hearing and determination of this Application inter partes, an interim Order BE and is HEREBY issued suspending the Gazette Notice Vol. CXXIII- NO. 42 No. 1714 dated 5th February 2021 notifying of the re-appointment of the Interested Parties herein as members of the Board of the Nairobi Metropolitan Area Transport Authority Board for a period of three (3) years effective from 10th February 2021

ii. THAT pending the hearing, determination and final disposal of this Petition, an interim Order BE and is HEREBY issued suspending the Gazette Notice Vol. CXXIII- NO. 42 No. 1714 dated 5th February 2021 notifying of the re-appointment of the Interested Parties herein as members of the Board of the Nairobi Metropolitan Area Transport Authority Board for a period of three (3) years effective from 10th February 2021

iii. THAT pending the hearing, determination and final disposal of this Petition, a temporary Order of injunction BE and is HEREBY issued prohibiting the Respondents and the Interested Parties either by themselves, their agents and/or any other person(s) howsoever from acting and/or giving effect to the Gazette Notice Vol. CXXIII- NO. 42 No. 1714 dated 5th February, 2021 notifying of the re-appointment of the Interested Parties herein as members of the Board of the Nairobi Metropolitan Area Transport Authority Board for a period of three (3) years effective from 10th February 2021

iv. THAT the Honourable Court be pleased to issue an order directing the 1st and 2nd Respondents to avail to the Petitioner all the information and any documents leading to the re-appointment of the Interested Parties herein as members of the Nairobi Metropolitan Area Transport Authority Board for a period of three (3) years effective from 10th February 2021.

v. THAT the costs of this application be borne by the Respondents

2. The Application is premised on the grounds that the initial appointment of the 1st to 3rd Interested Parties as council members of the 2nd Respondent expired on 5th February 2021 and the 1st Respondent re-appointed them for a further 3 year term vide Gazette Notice Vol. CXXIII - NO. 42 No. 1714. The Applicants asserts that the said re-appointment of the 1st to 3rd Interested Parties is unconstitutional, unlawful, illegal, unprocedural, null and void *ab initio* as they were done in total disregard of substantive, procedural, constitutional and statutory requirements applicable in public service appointments. Further, that the re-appointments do not take into consideration regional and ethnic representation and thus disregard the rule of law, equity, inclusivity, good governance, transparency and accountability as provided under Articles 10 and 232 of the Constitution. The Applicant asserts the Petition discloses a *prima facie* case with high chances of success and that the balance of convenience lies in granting the orders sought as failure to do so will cause irreparable harm and prejudice to the public. The Applicant seeks the Court should in the interest of the public issue the interim reliefs sought in this Application because:

a. The Interested Parties will be sitting in positions that hold the highest fiduciary and policy interest of the Nairobi Metropolitan Area Transport Authority Board and will make decisions that not only bind the public but incur expenditure against public interest if this Court ultimately nullifies the said appointments.

b. The Board of the Nairobi Metropolitan Area Transport Authority is a critical office in dealing with policy issues and it would be against public interest to allow any person to occupy the office unconstitutionally.

3. The Application is supported by the affidavit sworn by the Petitioner's President, Mr. Nelson Andayi Havi who avers that the purported re-appointment of the Interested Parties by the 1st and 2nd Respondents took effect from 10th February 2021. He avers that members of Boards are public officers by definition and to that extent their remuneration is from the public coffers. He deposed that board members of the 3rd Respondent are therefore public servants who are subject to the applicable public service, constitutional and statutory provisions and such other lawful policies and practices on procedures for declaration of vacancy, recruitment and selection, appointment and termination. He deponed that the nominees to the membership of Board of the 3rd Respondent ought to therefore have been recruited through a fair, open, competitive, merit-based and inclusive recruitment process and on the basis of integrity, competence and suitability. He further avers that the constitutional and statutory values and principles governing public appointments are critical safeguards against bribery, cronyism, nepotism, tribalism, favouritism, incompetence, non-inclusivity, unfair competition, discrimination among other such-like vices bedevilling public employment. He stated that advocating for such re-appointment criteria that does not meet the constitutional threshold may also give the executive arm room to abuse public office to reward cronies and consequently discriminating the qualified and fit to serve. He deponed that it is in the public interest that the appointment and re-appointment of members of the Board of the 3rd Respondent be further open to unemployed and deserving Kenyans from other ethnic communities.

4. The Respondents filed a Preliminary Objection dated 15th March 2021 premised on the ground that this Honourable Court does not have the jurisdiction to determine this matter as set out under Section 12 of the Employment and Labour Relations Court Act, 2011. That there is no employer-employee relationship as the Board Members are not employees of the Nairobi Metropolitan Area Transport Authority and there is further no dispute of the nature envisaged under Article 162(2)(a) of the Constitution and Section 12(1) of the Employment and Labour Relations Act. The Respondents also filed a Replying sworn on 30th March 2021 by the Cabinet Secretary-Ministry of Transport, Infrastructure, Housing and Urban Development and the Chairperson of the 2nd Respondent, Mr. James Macharia EGH. He avers that the 3rd Respondent Authority was established by His Excellency the President vide an Executive Order, Nairobi Metropolitan Area Transport Authority Order, Legal Notice No. 18 of 2017 and that the said Nairobi Metropolitan Area Transport Authority Order provides that appointment of the board members under Order 8(1)(f) shall be by the Council and that under Order 8(2), appointment of such board members shall conform to Sections 6(2) and (3) of the State Corporations Act. He further avers that under Chapter 1.5 of the Mwongozo Code (The Code of Governance for State Corporations), a board member's cumulative tenure is six (6) years and renewal of a Board Member's tenure for a second term is subject to a favourable evaluation. He avers that in December 2017, the 2nd Respondent Council advertised the position of Board Members to the 3rd Respondent Board through the Ministry of Transport, Infrastructure, Urban Development and Public Works website and consequent interviews were done in February 2018. That the 1st, 2nd and 3rd Interested Parties qualified to be Board members of the 3rd Respondent as outlined in Order 8(1)(ii), 8(1)(viii) and 8(1)(i) respectively and were consequently appointed as Board Members of the 3rd Respondent after meeting the requirements of appointment. That they were re-appointed by the Council in February 2021 to support the ongoing operationalization of the Authority due to their remarkable service and institutional memory and having satisfactorily supported the Authority from inception. He further avers that the Petitioner/Applicant has misapprehended and misapplied the law by stating that every person after the expiry of their term of office would be subjected to an open and competitive process before earning a second term in office. That the Applicant alleging that the 3rd Respondent has 8 board members from the same community is a conjecture as the composition of the Board includes membership appointed by the President and by virtue of the offices of the Principal Secretaries for Transport and Finance, County Executive Committee Members in the required five counties and the Director General. He avers that this Court should not grant the orders sought in the Notice of Motion Application dated 1st March 2021 as suspending a reappointment process that has complied with the dictates of the Constitution and Mwongozo would undermine the principles that underpin the running of public institutions.

5. The Application was disposed of by way of written submissions. The Applicant submitted that the Preliminary Objection lacks merit and should be dismissed for reasons that the Constitution of Kenya 2010 brought significant changes on aspects of leadership and transparency under Articles 10 and 73. It further submitted that the State Corporations Act (Cap 446) on the basis of which the Interested Parties were appointed fails to meet this requirement as such appointments made under the said Act are not based on personal integrity, competence and suitability. That failure by the State Corporations Act to address the criteria to be applied disqualifies the Act from meeting the constitutional requirement of transparency or public participation envisaged under Article 10(2)(c) of the Constitution. The Applicant submitted that the subject matter herein therefore concerns the constitutionality of the appointment and further re-appointment of the Interested Parties herein as Council members under the State Corporations Act and that the issues relate to employment and labour relations and fall squarely under the Jurisdiction of this Court. The Applicant relied on the case of **Okiya Omtatah Okoiti *v* Kenyatta University Council & 4 Others, Nairobi ELRC Petition No 89 of 2015** where the Court addressed its jurisdiction to entertain such matters. The Applicant also cited the case of **Nick Githinji Ndichu *v* Clerk, Kiambu County Assembly & Another [2014] eKLR** where Nduma J. held that the law is not concerned with the method of acquiring an employment or whether the person was appointed or elected and that the main concern is that the person must have an oral or written contract of service and be receiving a wage/salary for the services rendered. The Applicant asserts that going by such finding, the Court has jurisdiction to determine the matter before it considering that the Interested Parties herein are entitled to a salary and an

allowance as provided under Section 17(2)(a) of the Legal Notice No. 18 of 2017 that created the Nairobi Metropolitan Area Transport Authority. It submitted that limiting the jurisdiction of the Court just to disputes arising out of employment contracts between the employer and an employee or employer-employee relationship amounts to ousting the provisions of Article 22(2)(b) & (c) and 258(2)(b) & (c) of the Constitution in matters concerning Article 41 and related issues. The Applicant asserts that this Court has a duty to look into the constitutionality, legality and procedural integrity of the process of recruiting and appointing Chairpersons and Members of Boards, Council Members of State Corporations and especially interrogate if the recruitment process was in harmony with Articles 10, 27, 41, 47, 232 and 259(1) of the Constitution. The Applicant submitted that the Court of Appeal in **Civil Appeal No. 6 of 2012, Prof. Daniel N. Mugendi *v* Kenyatta University & 3 Others** made a conclusion that the Industrial Court can determine industrial & labour relations matters alongside claims of fundamental rights ancillary and incident to these matters. The Applicant cited the case of **United States International University *v* Attorney General (Eric Rading & COTU as Interested Parties) [2012] eKLR** where Majanja J. addressed this Court's jurisdiction and stated that:

> *"The intention to provide for a specialist court is further underpinned by the provisions of Article 165(6) which specifically prohibits the High Court from exercising supervisory jurisdiction over superior courts. To accept a position where the Industrial Court lacks jurisdiction to deal with constitutional matters arising within matters its competence would undermine the status of the court. Reference of a constitutional matter to the High Court for determination or permitting the filing of constitutional matters incidental to labour relations matters would lead to the High Court supervising a superior court. Ordinarily where the High Court exercises jurisdiction to interpret the Constitution or enforce fundamental rights, its decisions even where declaratory in nature will require the court to follow or observe the direction. This would mean that the High Court would be supervising the Industrial Court which is prohibited by Article 165(6). In the final analysis, I would adopt the position of the Constitutional Court of South Africa in **Gcaba v Minister of Safety and Security (Supra)**. The Industrial Court is a specialist court to deal with employment and labour relations matters. By virtue of Article 162(3), Section 12 of the Industrial Court Act, 2011 has set out matters within the exclusive domain of that court. Since the court is of the status of the High Court, it must have the jurisdiction to enforce labour rights in Article 41 and the jurisdiction to interpret the constitution and fundamental rights and freedoms is incidental to the exercise of jurisdiction over matters within its exclusive domain. In any matter falling within the provisions of section 12 of the Industrial Court Act, then the Industrial Court has jurisdiction to enforce not only Article 41 rights but also all fundamental rights ancillary and incidental to the employment and labour relations including interpretation of the Constitution within a matter before it.*
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> *In light of what I have stated, I find and hold that the Industrial Court as constituted under the Industrial Court Act, 2011 as court with the status of the High Court is competent to interpret the Constitution and enforce matters relating to breach of fundamental rights and freedoms in matters arising from disputes falling within the provisions of section 12 of the Industrial Court Act, 2011"*

5. The Applicant submitted that it has a reasonable and legitimate expectation by virtue of Article 2(3) and 2(4) that individuals can only legitimately occupy public office if they are appointed through recruitment process that is in compliance with the Constitution and does not contravene the law in any way. The Applicant submitted that this Court ought to consider whether the Applicant has satisfied the principles laid down in the case of **Giella *v* Cassman Brown & Company Ltd [1973] EA 358** namely: a *prima facie* case with probability of success; irreparable damage which cannot be compensated by an award of damage; and the balance of convenience. That the principles in regard to the grant of interim or conservatory orders were outlined in **Supreme Court Application No. 5 of 2014, Gatirau Peter Munya *v* Dickson Mwenda Kithinji & 2 Others [2014] eKLR** where the Court held that:

> *""Conservatory orders" bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as "the prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the supplicant's case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes."*

6. The Applicant submitted that the Court in **Nubian Rights Forum & 2 Others *v* Attorney-General & 6 Others; Child Welfare Society & 8 Others (Interested Parties); Centre For Intellectual Property & Information Technology (Proposed Amicus Curiae) [2019] eKLR, Petition Nos. 56, 58 & 59 of 2019** observed that:

> *[92] The applicable principles for the grant of conservatory orders were detailed by Onguto J. in **Board of Management of Uhuru Secondary School v City County Director of Education & 2 Others [2015] eKLR**.*
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> *[93] We are also guided by the principle that in determining whether or not to grant conservatory orders, the Court must bear in mind that it is not required to enter into a detailed analysis of the facts and the law. As Musinga, J. (as he then was) observed in **High Court Petition No. 16 of 2011, Nairobi - Centre for Rights Education and Awareness (CREAW) & 7 Other**s: "...It is important to point out that the arguments that were advanced by Counsel and that I will take into account in this ruling relate to the prayer for a Conservatory Order in terms of prayer 3 of the Petitioner's Application and not the Petition. I will therefore not delve into a detailed analysis of facts and law. At this stage, a party seeking a Conservatory Order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the Conservatory Order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution."*

7. The Applicant submitted that it follows therefore that in order to satisfy the grant of interim orders -

> 1. An Applicant must first demonstrate an arguable *prima facie* case with a likelihood of success and show that in the absence of the conservatory orders they are likely to suffer prejudice.
>
> 2. The Court should consider whether the grant or denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights.

3. The Court should consider whether the petition or its substratum will be rendered nugatory if an interim conservatory order is not granted.

4. The Court should consider whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order.

8. It submitted that it has satisfied the foregoing principles in regard to the grant of interim and/or conservatory orders and that in the present case, public interest lies in favour of preserving and protecting constitutional values and interests and the Court ought to intervene by exercising its checks and balances against the excesses of the Executive which has purported to use administrative craft to extend its powers. The Applicant asserts that public interest would thus be greatly jeopardized and compromised if the Court declines to grant the interim orders preserving the substratum of the suit herein. It further submitted that the Respondents have failed to adduce any evidence in their replying affidavit demonstrating that the appointment and re-appointment of the Interested Parties had complied with the law, especially the requirements provided for under Article 232 of the Constitution of Kenya. It is the Applicant's submission that the balance of convenience lies in granting of the orders sought as its failure will result in great prejudice to the public and public interest.

9. The Respondents submitted that the jurisdiction to determine whether anything done under the authority of the Constitution contravenes the Constitution is governed by Article 165(3)(d)(ii) and that the Supreme Court stated in the case of **Republic *v* Karisa Chengo *&* 2 Others [2017] eKLR** that matters reserved for specialised court cannot be determined by the High Court and vice versa. The Respondents further submitted that the parties in the suit do not fall within any of the categories stated in Section 12 of the Act and that the Petition therefore has no legal basis. The Respondents submitted that in the case of **Kenya Council of Employment and Migration Agencies *&* Another *v* Samuel Mwongera Arachi *&* 2 Others [2015] eKLR** this Honourable Court examined incidences where the Court would have jurisdiction to determine a matter that involves a Constitutional question and held that such constitutional questions must arise within the broad relationship parameters set out under Section 12 of the Act and can only be agitated by persons identified under Section 12(2) of the Act acting in person or through authorized representative. The Respondents submit that the Constitutional issues raised in the Petition do not in any way arise from employment or labour issues and that this Honourable Court would consequently be determining a purely Constitutional issue, which would be outside its jurisdiction. The Respondents submitted that the Court of Appeal decision in **Attorney General *&* 2 Others *v* Okiya Omtata Okoiti *&* 14 Others [2020] eKLR** where the Court held that the Constitution has granted the High Court the requisite jurisdiction to hear and determine those issues and which ought to have thus been raised in the High Court. The Respondents submitted that the Petitioner/Applicant has not met the threshold for grant of the prayers sought as it has not established a *prima-facie* case by establishing that a legal wrong or a legal injury has been caused. The Respondents assert that the Applicant has further not demonstrated the real danger which may be prejudicial to it if the conservatory orders are not granted and has more importantly not demonstrated that grant of the orders would be in the public interest. They submitted that the guiding principles for grant of conservatory orders were well outlined by the Court in **Petition No. 167 of 2016, Michael Osundwa Sakwa *v* Chief Justice and President of the Supreme Court of Kenya *&* Another [2016] eKLR**. They further submitted that the Applicant has not met the threshold as set out in **Giella *v* Cassman Brown Co. Ltd [1973] E.A. 358** for grant of the orders sought and pray that the Application be dismissed with costs to the Respondents. The Respondents submitted that the appointment of the board members of the 2nd Respondent which include the Interested Parties herein is a subject matter in **High Court Constitutional and Human Rights Division Petition No. 94 of 2018, Wanjiru Gikonyo *v* Attorney General and Others** which is pending judgement in the High Court. The Respondents argue that the appointment of the 3 Interested Parties is not the subject before this Honourable Court and that in **JR Case No. 280 of 2013, Republic *v* Cabinet Secretary for Education, Science *&* Technology *&* 3 Others [2014] eKLR**, the Court stated that:

> *"…I do not think that the drafters of the Constitution expected that any person eligible for re-appointment to a public office ought to be taken through a competitive process. One cannot compare the appointment to a public office to an electoral process in which the incumbent seeking another term should submit himself/herself to an election. The competitive process, in my view, only kicks in when a person is being recruited for the first time. When it comes to re-appointment for a further term the body responsible for re-appointment assesses the person and makes a decision whether to re-appoint the incumbent or open up the position for competition."*

10. The matter of appointment of board members after a recruitment process is what is the gravamen of the dispute here. It is argued by the Respondents that this does not fall within the purview of the Employment & Labour Relations Court. In support of the proposition, the Respondents cite the Supreme Court decision in **Republic *v* Karisa Chengo *&* 2 Others** *(supra)*. The Karisa Chengo decision has been repeatedly misapplied. Whereas the decision clarified the different roles in existence post 2010 for the High Court, the Employment & Labour Relations Court as well as the Land and Environment Court, it did not bar the Employment & Labour Relations Court from dealing with constitutional questions that arise before it. The Karisa Chengo case emanated from the Gazettement and subsequent empanelling of benches which had judges from all the Superior Courts to deal with the mind boggling backlog in the criminal justice chain. In order to deal with the appeals that had been pending for very many years, the first Chief Justice after the promulgation of the Constitution of Kenya Dr. Willy Mutunga, empanelled benches that had a mix of ELRC Judges, High Court Judges and ELC Judges to hear and dispose of the appeals. Three of the appellants in Malindi were dissatisfied with the decision of the bench comprising Angote J. (of the ELC Court) who sat with Meoli J. (of the High Court). This is what led to the oft cited case the Respondent relies on. That case is clearly distinguishable from this case as the Employment and Labour Relations Court is clothed with jurisdiction to deal with Constitutional issues that may arise in a suit before it as has happened here. This matter relates to appointment of board members after a competitive recruitment which recruitment the Applicant herein attacks as being unconstitutional. That is an employment matter and this suit is rightly before this Court. The preliminary objection therefore fails as it is without any merit.

11. The Applicant seeks what it calls interim relief in respect to the appointment of the Board members who are joined as Interested Parties. It is argued that their appointment contravenes the Constitution in that substantive, procedural, constitutional and statutory requirements applicable in public service appointments were lacking in their appointment. In the challenge to their appointment the Applicant argues that re-appointment of the 1st to 3rd Interested Parties is unconstitutional, unlawful, illegal, unprocedural, null and void *ab initio.* It is not in doubt that the grant of an injunction is at the discretion of the Court. In order to obtain injunctive relief, the Applicant has to meet the standard in **Giella *v* Cassman Brown Co. Ltd**, that is, first, an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience. The test is to be applied using the three limbs. On the *prima facie* test it is probable that the Applicant could succeed in a quest

to overturn the appointments. However, under the second test, an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. The Applicant herein is the Law Society of Kenya and there is no demonstration that it might otherwise suffer irreparable injury if an injunction does not issue. On the balance of convenience, the same tilts in favour of declining to interfere with the *status quo* as there would be a remedy by way of damages should the Applicant be ultimately successful. Having found as I have that an award of damages would be adequate to compensate the Applicant, I see no reason to grant any injunctive relief herein. The Applicant's motion dated 1st March 2021 is dismissed albeit with no order as to costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF JUNE 2021

Nzioki wa Makau

JUDGE