



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 MUNGAL.....2ND INTERESTED PARTY**
- RONALD NDIRANGU NDEGWA.....3RD INTERESTED PARTY**

JUDGMENT

1. The Petitioner seeks a declaration that the 1st and 2nd Respondents’ purported re-appointment of the Interested Parties vide Gazette Notice Vol. CXXIII – NO. 42 No. 1714 dated 5th February 2021 to the position of members of the Board of the Nairobi Metropolitan Area Transport Authority Board for a period of three (3) years effective from 10th February 2021 without following the laid out substantive and procedural, constitutional and statutory requirements applicable in public service appointments; the said appointment is unconstitutional, unlawful and irregular for being in contravention of Articles 10, 27, 73(2) and 232 of the Constitution of Kenya, 2010. The Petitioner also seeks an order quashing Gazette Notice Vol. CXXIII – NO. 42 No. 1714 dated 5th February 2021 vide which the Chairperson, Nairobi Metropolitan Area Council’s purported to re-appoint Mary Waithigieni Chege, Zachariah Karengi Mungai as officials of the Nairobi Metropolitan Area Council. The Petitioner has sought these orders on the basis that the appointments were made contra the ideals of public participation and Constitution of Kenya.

2. The Petition was disposed of by way of written submissions. The Petitioner submits that Article 10 of the Constitution obligates the 1st and 2nd Respondents to apply the national values and principles of governance which include *inter alia*, social justice, inclusiveness, equality, integrity, transparency, accountability, human rights, non-discrimination and fair administrative action in ensuring that the appointment meets the Constitutional and statutory threshold in public service. The Petitioner submits that Article 27 similarly guarantees equal treatment to all Kenyan Citizens including the right to equal opportunities in political, economic and social spheres, and equal protection and benefit of the law. The Petitioner argues that the said provision further prohibits direct and/or indirect discrimination on any ground including status especially in cases of public appointments and re-appointments. The Petitioner also cites Article 232 of the Constitution which obligated the 1st and 2nd Respondents to appoint the interested Parties in a process that conforms to the principles and values of: accountability for administrative acts; transparency and provision to the public of timely, accurate information; fair competition and merit as the basis of appointment and promotions; affording adequate and equal opportunities for appointment, training and advancement, at all levels of public service.

3. The Petitioner submits that the Respondent failed to uphold the national values, ethics and the due process during the appointment process in 2017, and the re-appointments on 5th February 2021. Further, the process lacked transparency and was devoid of public participation as required under the Constitution and the 1st and 2nd Respondents have not presented any single evidence to demonstrate that the process was a

competitive process through advertising, receiving applications, shortlisting, carrying out interviews and finally appointing the interested parties. It contends the only available evidence is that the interested parties were appointed on the basis of a Gazette Notice. The Petitioner submits that the Respondent also failed to take into account representation of Kenya's diverse ethnic communities and inclusiveness, equity and equality were not applied during the process. It submits that the public was kept unaware of the availability of opportunities for employment and information that those qualified were at liberty to participate by applying and competing favourably. That it was the mandate of the Respondent to ensure that public participation, transparency, equity and inclusiveness was adhered to throughout the process.

4. The Respondent submits that from the foregoing, the interested parties' appointment to the board is null and void ab initio as due process was not followed during their appointment, and which makes their reappointment also null and void *ab initio*. Further, the appointments having taken place in 2018, and there being no objection to the interested party's appointment until the lapse of their first term does not negate the Court from deciding on whether due process was followed by the Respondent. The Petitioner submits that this position was asserted in the case of **Sharack Kosgei & Another v Governor of Nakuru County & 2 Others [2016] eKLR** where the Court stated:

"...Certainly the appropriate time for any person and/or body to raise issues or grievances relating to an intended appointee would be during the vetting period when public participation is invited and indeed is called for. That is precisely the reason why these vetting sessions exist. However, if the constitutional criteria were not met, that renders the appointment null and void and the court when moved at any stage either before or after the appointments have been made has the powers to declare so. If the court were to so find then the removal of the 19 appointed officers would be a consequence of a judicial finding of unconstitutionality in the procedure and manner of appointment and not as a consequence of any procedure for removal from office. Therefore notwithstanding the fact that the Petitioner failed to raise any objection during the vetting of the candidates by the County Assembly they are not in my opinion barred or estopped from raising those concerns at any juncture subsequent to the appointments" (emphasis theirs)

5. The Petitioner cites the case of **Minister of Health and Another v New Clicks (Pty) Limited and Others CCT 59/2004 [2005] ZACC 14**, para 630 where the Constitutional Court of South Africa per Sachs J observed that,

"The forms of facilitating an appropriate degree of participation in law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and have an adequate say. What amount to a reasonable opportunity will depend on the circumstances of each case"

The Petitioner submits that advertising through the 3rd Respondent's website did not allow for reasonable opportunity to the members of the public to lodge their applications. It submits that firstly, the medium used reached a certain demographic of people and was not sufficient to afford adequate and equal opportunities for the application. Secondly, the object of public participation and transparency was not met as there is no shortlist of the candidates, minutes of the interviews and scores for each of the candidates. The Petitioner relies on the case of **Benson Riitho Mureithi v J. W. Wakhungu & 2 Others [2014] eKLR** where Mumbi Ngugi J. (as she then was) expressed that because of history and experience, the onerous burden imposed on those responsible for making public appointments by the Constitution to allow for public participation and for the appointed to meet certain integrity and competence standards, is justified. It also relies on the authority of **David Kariuki Muigua v Attorney General & Another [2012] eKLR** where the Court observed there was no evidence of a competitive process enabling public participation and showing the transparency and accountability required under the Constitution, and stated that it is imperative that all public appointments are made in accordance with constitutional values and principles. The Petitioner also submits that notwithstanding the illegality of the initial appointments in 2017, the Respondent should have ensured the dictates of the Constitution were followed to word while carrying out the reappointments. The Petitioner relies on the case of **Republic v Principal Secretary Agriculture Livestock and Fisheries & 2 Others Ex-parte Douglas M. Barasa & 2 Others [2015] eKLR** opined that the provisions and principles ought to also apply to reappointments as the appointee may have in the course of his duties committed certain acts or omissions which contravene the said provisions and principles hence the necessity for the appointing authority to comply before reappointing. The Petitioner submits that in the case of **Joseph Mutuura Mberia & Another v Cabinet Secretary for Education, Science & Technology & 2 Others [2014] eKLR**, the Court stated that even where the immediate incumbent is seeking re-appointment and the employer has assessed his performance to be good and wants to retain him, the vacant position must be subjected to the appointment process, for his performance to be considered in determining whether to retain him or not as against the other candidates who have been afforded an opportunity to compete for the same position. On the issue of costs, the Petitioner submits that under Section 27(1) of the Civil Procedure Act, costs follow the event unless the court orders otherwise and submits that the decision on whether or not to award costs is determined by the court at its discretion and such discretion must be exercised judicially as affirmed in the case of **Little Africa Kenya Limited v Andrew Mwitii Jason [2014] eKLR**. It further relies on the case of **Republic v Independent Electoral and Boundaries Commission Ex- Parte Mohamed Ibrahim Abdi & Others [2017] eKLR** where the Court outlined factors that should be considered in determining an order for award of costs and held that the court may not only consider the conduct of the party in the actual litigation, but the matters which led up to litigation, the eventual termination thereof and the likely consequences of the order for costs. The Petitioner submits that it has proved its case to warrant judgment being entered in its favour as against the Respondents who did not give any evidence to rebut the allegations of having not followed due process on the appointments and reappointments of the Interested Parties.

6. The Respondents submit that the issue of the initial appointment of the Interested Parties is a subject matter pending in **High Court Constitutional and Human Rights Division Petition No. 94 of 2018: Wanjiru Gikonyo v Attorney General and Others**. The Respondent submits that the Petitioner is inviting this Honourable Court to look into matters in issue in a previously instituted suit, which goes against the principle of *res sub judice*. They rely on the case of **Republic v Registrar of Societies - Kenya & 2 Others Ex-Parte Moses Kirima & 2 Others [2017] eKLR**. The Respondents further submit that this Honourable Court must look at the initial appointment of the Interested Parties to determine whether their re-appointment was valid and in compliance with the applicable law and Constitution. The Respondents submit that since the Court has not invalidated the initial appointment of the Interested Parties, delving into the issue of the initial appointment without staying the proceedings in the said matter pending before court whose outcome may affect the decision of this Court will be opening doors to two different judgements on the same issue. The Respondents thus invite this Honourable Court to only determine the issue of the re-appointment of the Interested Parties and consider the status quo as was at the time of re-appointment. Without prejudice to the foregoing, the Respondents submit that they have demonstrated that due process was followed and they complied with the provisions of Order 8(1) and (2) of the Nairobi Metropolitan Area Transport Authority in the initial appointment of the Interested Parties.

The Respondent submits that the Petitioner has misapprehended and misapplied the law by stating that every person after the expiry of his/her term of office would be subjected to an open and competitive process before earning a second term in office. They rely on the case of **Republic v Cabinet Secretary for Education, Science & Technology & 3 Others [2014] eKLR** where 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."

7. The Respondents further submit that the Interested Parties were not being recruited but being reappointed and therefore the aspect of 'competitive recruitment' did not arise, which was similarly the position of the Court of Appeal in **Wilfrida Itolondo & 4 Others v President & 7 Others [2015] eKLR**. The Respondents submit that the re-appointment of the Interested Parties was lawful and in line with Chapter 1.5 of the Mwongozo (The Code of Governance for State Corporations) which provides that:

1) *The tenure of a Board member shall not exceed a cumulative term of six years or two terms of three years each provided that upon first implementation of this Code, the appointing authority may extend the term of not more than a third of the members of the Board in order to achieve continuity as set out in 1.13 below.*

2) *The renewal of a Board Member's tenure for a second term should be subject to a favourable evaluation.*

8. The Respondents submit that the Petitioner has been unable to demonstrate the nature of the legal duty imposed upon the Respondents and that the Respondents have refused to perform that particular duty. The Respondents submit that they have demonstrated the Petitioner is not entitled to the reliefs because: it has not demonstrated the applicability and the manner in which the Respondents have allegedly violated either the Constitutional or any other law; the Respondents have clearly demonstrated compliance with the Constitution and the applicable laws in the discharge of their respective roles in the recruitment process; and no cogent reasons have been advanced by the Petitioner to warrant the intervention by this Honourable Court by issuance of any of the reliefs sought. The Respondents further submit that this Honourable Court has the Constitutional obligation pursuant to Article 3(1) of the Constitution to respect, uphold and defend the Constitution, and this includes safeguarding and securing the independence of constitutionally established public bodies and to aid the performance of their statutory mandated functions. They thus urge the dismissal of the Petition.

9. The Petitioner is seeking the cancellation of the appointment of the interested parties. The Respondents assert that the initial appointment is subject of another matter before the High Court and that this Court cannot therefore delve into the matter as it is *res judicata*. *Res judicata* is defined by **Blacks Law Dictionary Ninth Edition** as "An issue that has been definitely settled by judicial decision. The three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties". The case before the High Court has NOT been determined. There is no judgment on the merits, there is no indication that there is a definitive settlement of the judicial decision. There is therefore no basis for impugning the proceedings before me on the grounds of the principle of *res judicata*. The matter therefore that falls for determination before me is the question as to whether the Gazette Notice Vol. CXXIII – NO. 42 No. 1714 dated 5th February 2021 vide which the Cabinet Secretary re-appointed Mary Waitigieni Chege, Zachariah Karengi Mungai and Ronald Ndirangu Ndegwa as officials of the Nairobi Metropolitan Area Council ought to be quashed as the appointments were made without following the laid out substantive and procedural, constitutional and statutory requirements applicable in public service appointments. It is 2021, the Constitution has been in existence for the last 11 years. Under Article 10 of the Constitution it behoves all Kenyans to uphold the national values and principles of governance and more so all State organs and State officers and public officers. The Nairobi Metropolitan Area Authority and the Cabinet Secretary in charge of Transport, Infrastructure, Housing and Urban Development are not immune from the provisions of Articles 10, 27(4), 232(1)(d) and (h). Mumbi Ngugi J. (as she then was) held in the case of **Benson Riitho Mureithi v J. W. Wakhungu & 2 Others** (*supra*)

What does the Constitution require with regard to appointments to public office? As already observed, public officers must be appointed on the basis of the criteria set out in Chapter 6. They must also, in addition, be appointed in accordance with the national values and principles set out in Article 10. In David Kariuki Muigua –vs- Attorney General & Another Petition No. 161 of 2011, which dealt with an appointment by the Minister for Industrialisation of the Chairman of the Standards Tribunal, the Court observed at Paragraph 13 and 15 as follows:

13. "However, it would be expected that the Minister, in making the appointments to the Tribunal, would be guided by the national values and principles set out in Article 10 of the Constitution, in particular participation of the people, equity, good governance, integrity, transparency and accountability. Section 7(1) of Schedule 6 provides that

'All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.'

Any appointments under the Standards Act should have been done in conformity with the provisions of the constitution and should have observed the national values and principles.

15. *There is no evidence that there was a competitive process that would enable public participation in the process and show the transparency and accountability required under the Constitution, thereby giving legitimacy to the appointment of the petitioner. Like his successor, the petitioner was appointed on the basis of a Gazette Notice; the basis of the appointment, the criteria followed in appointing him and the other members of the Tribunal was, from all appearances and regrettably so, more in keeping with the old order that preceded and indeed gave impetus to the clamour for the new Constitution when public officers were appointed at the whim of the Minister or President. To uphold the appointment of the petitioner would be to give a seal of approval to the old order. It is imperative that all public appointments are made in accordance with constitutional values and principles."*

10. The Court agrees entirely with the decision of my learned sister Mumbi JA. The Interested Parties subject of this suit are all from one ethnic community and do not represent the diverse fabric that is the Kenyan nation. Their appointment therefore smacks of the evils of old which Kenyans opted to do away with in the Constitution we took on for ourselves on 27th August 2010. The only inevitable outcome is an order quashing the Gazette Notice Vol. CXXIII – NO. 42 No. 1714 dated 5th February 2021 as I hereby do calling to this Court the said Gazette Notice and issuing an order quashing it *certiorari* style. The Interested Parties therefore cease holding the offices in respect of the impugned appointment contained in the Gazette Notice forthwith as their appointment on 5th February 2021 was unconstitutional, unlawful and thus void *ab initio* for the wanton disregard to the national values espoused in our Constitution. As this matter was a public interest litigation each party shall bear their own costs for the Petition.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF SEPTEMBER 2021

NZIOKI WA MAKAU

JUDGE