



REPUBLIC OF KENYA

**IN THE EMPLOYMENT & LABOUR RELATIONS
COURT**

AT NAIROBI

PETITION NO.108 OF 2019

(Consolidated with Petition No.130 of 2019)

(Before Hon. Justice Hellen S. Wasilwa on 21st May, 2020)

KELVIN MAINA.....PETITIONER

VERSUS

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

KENYA REVENUE AUTHORITY.....2ND RESPONDENT

THE CABINET SECRETARY,

NATIONAL TREASURY & PLANNING...3RD RESPONDENT

AND

JAMES GATHII MBURU.....INTERESTED PARTY

JUDGEMENT

1. On 26/6/2019, the Petitioners both acting in the public interest filed 2 Petitions challenging the appointment of James Githii Mburu, the Interested Party, as the Commissioner General of the Kenya Revenue Authority. Petition 130 of 2019 which was formerly filed as Constitutional Petition 266 of 2019 in the High Court was consolidated with Petition 108 of 2019 that was filed in this Court.

Petition 108 of 2019

2. The Petitioner avers that on 28/5/2019, the 2nd Respondent shortlisted 5 candidates out of the 30 applicants who had applied for the position of the Commissioner General of the Kenya Revenue Authority. The 5 shortlisted candidates were; Mr. Julius Waita Mwatu, Mr. Andrew Kazora Okello, Mr. James Githii Mburu, Mr. Duncan Richard Boro Ndung'u and Mr. Duncan Otieno Onduru.

3. He contends that the 3rd Respondent, the Cabinet Secretary National Treasury and Planning, through a Gazette Notice dated 4/6/2019 appointed the Interested Party to the position of Commissioner General of Kenya Revenue Authority for a period of 3 years.

4. He avers that for the years between 2001- 2003, 2003 -2012 and 2012- 2019, the office of the Commissioner General has exclusively been occupied by members of the Kikuyu Community. Therefore, there has been a failure to afford adequate and equal opportunities to members of all ethnic groups.

5. He further avers that the management of KRA does not meet the constitutional requirements on gender as 7 out of the 8 commissioners are men.

6. He seeks the following prayers:-

a) A declaration that the appointment of the 1st Interested Party to the position of Commissioner General at the Kenya Revenue

Authority is gender insensitive, discriminatory against women, disrespectful of women and contrary to Article 27,2, 3, 10 and 232 of the Constitution of the Republic of Kenya and is therefore null and void.

b) A declaration that the appointment of the 1st Interested Party to the position of Commissioner General at the Kenya Revenue Authority is discriminatory against the other ethnic groups, contrary to article 27,2,3,10 and 232 of the Constitution of the Republic of Kenya and is therefore null and void.

c) An order of certiorari to remove to this Court for the purposes of quashing, Gazette No. 4857 dated 4th June 2019 for being unconstitutional.

d) An order restraining any further purported appointments of the 1st Interested Party to the position of Commissioner General at the Kenya Revenue Authority.

e) Costs of this Petition.

f) Or that such other relief as this Honourable Court shall deem just.

7. The Petition is supported by the affidavit of Kevin Maina, the petitioner, sworn on 24/6/2019. He depones that the Respondents have failed to purposely interpret Article 27 and 232 (1) (g) (h) and (i) of the Constitution on the gender representation.

8. He avers that the appointment of the Interested Party violated the Constitution, the Convention on the elimination of all Forms of Discrimination against Women (CEDAW) and other regional and international instruments on non-discrimination and gender equality ratified by Kenya.

Petition 130 of 2019

9. The Petitioner avers that on 24/5/2019, the President vide Gazette Notice No. 4854 appointed Dr. Patrick Ngugi Njoroge for a 2nd term as the Governor of Central Bank of Kenya. He avers that on 4/6/2019 the then Cabinet Secretary Henry Rotich vide Gazette Notice No. 4857 appointed James Githii to be Commissioner General of the Kenya Revenue Authority for a period 3 years.

10. He avers that by dint of the provisions of Article 130 (1) of the Constitution, the appointments of the two public officers in their respective positions were skewed and biased in favour of one community/ethnic group in total violation of Article 232 of the Constitution.

11. He avers that under Article 129 (1) & (2) of the Constitution, the exercise of the executive authority and administrative authority pursuant to Article 47 of the Constitution by a State Officer must be lawful, reasonable and fair.

12. He avers that Article 27 of the Constitution guarantees and protects discrimination based on ethnic groups. He contends that it is within public knowledge that the current Central Bank of Kenya Governor, Dr. Patrick Ngugi Njoroge who succeeded Prof. Njuguna Ndung'u and the outgoing Commissioner General of Kenya Revenue Authority, John Njiraini who was succeeded by James Githii Mburu all share a common cultural background.

13. He contends that the appointment of James Githii Mburu by the 2nd Respondent against 5 other qualified candidates from different ethnic backgrounds was in violation of Article 10 (1) of the Constitution. He further contends that for Kenya Revenue Authority to be governed by one ethnic group is in violation of Article 2 (1), 3 (2), 10, 73 and 232 of the Constitution.

14. He avers that by dint of the provisions of Article 35 of the Constitution, the 2nd Respondent should be compelled to avail information and results in relation to interviews conducted by the 1st Interested Party following applications for the position of Commissioner General Kenya Revenue Authority.

15. He seeks the following prayers:-

a) A declaration be and is hereby issued that by appointing James Githii Mburu who is of the Kikuyu ethnic group to be Commissioner General of the Kenya Revenue Authority for a period of three years on 4th June 2019 by the Cabinet Secretary for National Treasury and Planning with effect from 1st July, 2019 after H.E the President of the Republic of Kenya had appointed Dr. Patrick Ngugi Njoroge who is also of Kikuyu ethnic group to be the Governor of the Central Bank of Kenya on 24th May 2019 with effect from 11th June 2019 is in total violation of the Constitution of Kenya and in particular it offends Articles 2 (1), 3(2), 10, 27(1), (4) & (5), 47 (1), 73 (1) & (2) and 232 of the Constitution of Kenya 2010.

b) A declaration be and is hereby issued that Gazette Notice No. 4857 dated 4th June 2019 and published vide special issue on 6th June 2019 appointing James Githii Mburu who is of the Kikuyu ethnic group to be Commissioner-General of the Kenya Revenue Authority for a period of three years with effect from 1st July 2019 after H.E the President of the Republic of Kenya had appointed Dr. Patrick Ngugi Njoroge who is also of Kikuyu ethnic group to be Governor of the Central Bank of Kenya on 24th May 2019 with effect from 11th June 2019 is in total violation of Articles 2 (1) & (2), 3 (2), 10, 27 (1), (4) & (5), 47 (1), 73 (1) & (2), 129, 130 (1) of the Constitution of Kenya 2010 and therefore is null and void ab initio.

c) The Honourable Court do issue and hereby issues a mandatory order prohibiting the 2nd Respondent, the Cabinet Secretary

for National Treasury and Planning from appointing the 2nd Interested Party, James Githii Mburu to be the Commissioner General of the Kenya Revenue Authority (KRA).

d) The Honourable Court do issue and hereby issue an order compelling the 2nd Respondent, the Cabinet Secretary for National Treasury and Planning to make a fresh appointment of the Commissioner General of the Kenya Revenue Authority (KRA) from the shortlisted candidates forwarded to him by the 1st Interested Party, Kenya Revenue Authority (KRA) Board of Directors bearing in mind the ethnic diversity of the Republic of Kenya but not only limited to an or to favour Kikuyu ethnic group.

e) Any other relief and or further orders, writs, declarations and directions as this Honourable Court may deem appropriate, fair, just and fit to grant.

f) Costs of and incidentals to this Petition.

16. The Petition is supported by the affidavit of Joseph Sawa, the Petitioner, sworn on 26/6/2019. He depones that key state appointments that are skewed and biased only favour one ethnic group are a threat to national unity, national cohesion and national integration and offend the provisions of National Cohesion and Integration Act, No. 12 of 2018 and Public Service (Values and Principles) Act No. 1A of 2015.

2nd Respondent and 1st Interested Party's Case

17. Paul Muema Matuku, the 2nd Respondent's Commissioner Legal Services & Board Co-ordination, filed a Replying Affidavit, on behalf of the Kenya Revenue Authority, sworn on 8/8/2019.

18. He avers that following the advertisement placed in the local dailies on 16th and 23rd April 2019, 30 persons applied for the position of Commissioner General, among them being 2 women. He avers that the 1st Interested Party shortlisted 5 persons who had vast experience in matters of taxation and met all the requirements in the advertisement.

19. He avers that the 2nd Respondent then placed an advertisement on 28/5/2019 requesting any person with information that was relevant for purpose of the Board's assessment of candidates suitability to share the same with the Chairman not later than 31/5/2019. He avers that the Petitioners never provided any information or complaint as had been requested.

20. He avers that after being subjected to interviews, the Interested Party, James Githii Mburu, was appointed as Commissioner General on 6/6/2019. He avers that his appointment was done in line with Part II of the Human Resource Policies and Procedure Manual for Public Service of May 2016.

21. He avers that the consolidated petitions do not meet the threshold set out in the *Annarita Karimi case*, which requires that anyone who alleges a violation of fundamental and constitutional rights must set out with precision the nature of the rights violated and the manner of such violation.

22. In respect of Petition 130 of 2019, he avers that the Petitioner has failed to take note of the fact that the Authority and Central Bank of Kenya are 2 independent bodies that have no correlation save that they are within the same ministry. He avers that the Petitioner was mischievous by comparing these 2 institutions and leaving out other authorities within the same ministry.

23. He avers that the ethnic background of the outgoing Commissioner General cannot be used as a basis to disqualify other future appointees including the Interested Party if they had met the requisite qualifications.

24. With respect to Petition 108 of 2019, he avers that the Petitioner has failed to demonstrate that the number of qualified persons with disabilities and women who applied for the said position and were not considered. He avers that the 2 women who applied for the position did not make the cut for further interview.

25. It is his case that the Petitions have no merit and are unfounded thus they should be dismissed.

1st and 3rd Respondents' case

26. Dr. Julius Monzi Muia, the Principal Secretary National Treasury filed a Replying Affidavit, on behalf of the Attorney General and Cabinet Secretary, National Treasury, sworn on 14/11/2019. He avers that vide a letter dated 4/6/2019, the Board of Kenya Revenue Authority recommended 3 candidates for appointment to the position of the Commissioner General. He avers that the 3 candidates were listed in order of merit as Mr. James Githii Mburu, the Interested Party, Mr. Andrew Kazora Omondi and Mr. Duncan Otieno Onduru.

27. He contends that the Cabinet Secretary appointed the most deserving candidate based on the recommendation of the Board and pursuant to Article 232 (1) of the Constitution. Subsequently, the Commissioner General was appointed on 6/6/2019 through Gazette notice No. 4857.

28. He avers that the fact that some of the former Commissioner Generals were from one tribe is a pure coincidence and that the current Board cannot be linked to the decisions made by the former Board.

29. He avers that the Petitioner had ample time to challenge the process when the 5 finalists were published but failed to do so. He further avers that violations of fundamental and constitutional rights must be placed with a reasonable degree of precision with and therefore the Petition herein lacks.

30. He contends that the Petition lacks merit as there is no reasonable cause of action that has been raised against the 1st and 3rd Respondents and that it aims at frustrating an otherwise transparent, impartial, efficient and equitable recruitment process.

31. The Petitioner in Petition 108 of 2019 filed an undated Further Affidavit on 24/9/2019 in response to the Affidavit sworn by Paul Mutuku. He depones that arithmetic failure by the Respondents to take cognisance of the historical injustices against women is for the fact that at the time of the applications, there was only one woman in the Board of Kenya Revenue Authority.

32. He further depones that there is no justification for the Respondent's abandonment of its obligations under Articles 10.27 and 232 of the Constitution as Articles 27 (8) and Articles 232 (1) (d) (g) (h) and (i) impose upon the Respondents the obligation to redress gender disadvantage by enacting laws that entail inter alia affirmative action.

33. In a further Response to the Petitioner's Affidavit, Paul Mutuku filed an affidavit sworn on 22/10/2019. He avers that being the Secretary to the Board, he is aware that the Board has 3 female directors Mrs. Susan Mudhune, MBS, Hon. Rose Waruhiu, OGW and Ms. Mary Ann Njau –Kimani, OGW, with the latter representing the Hon. Attorney General.

34. He avers that Ms. Mudhune and Ms. Rose Waruhiu have since been reappointed to the Board for a further 3 years vide Gazette Notice Nos. 9342 and 9344. He maintains that the Petitions should be dismissed with costs.

35. The Interested Party neither entered appearance nor filed a response to the Petition. The Petition proceeded by way of written submissions and only the Petitioner in Petition 108 of 2019 filed his submissions.

Petitioner's submissions

36. The Petitioner submitted that the Petition has met the threshold for a constitutional claim and that its filing was necessitated by Article 3 (1) of the Constitution. He further submitted that the appointment of the Interested Party as Commissioner General failed to meet the threshold under Article 232 (1) (g), (h) and (i) of the Constitution which provides for the values and principles of public service.

37. He submitted that it is no longer a moot point that the office of Commissioner General of KRA has exclusively been occupied by members of the Kikuyu community since its establishment in 2001. He further submitted that the position has never been occupied by a woman or a person living with disabilities.

38. He submitted that under Article 2 (1) of the Constitution pronounces the supremacy of the Constitution and provides that the Constitution binds all state organs at both levels of government. He submitted that Article 258 of the Constitution does not limit the court's jurisdiction to fashion an appropriate remedy to deal with a finding of invalidity or violation of the law. He relied on the case of **Marilyn Muthoni Kamuru & 2 others v Attorney General & another [2016] eKLR**.

39. I have considered all the averments and submissions of the parties herein. The issues for this Court's determination are as follows:-

1. Whether there were any constitutional infringements by the Respondent in the appointment of the Interested Party James Mburu as the Commissioner General of Kenya Revenue Authority.

2. Whether the Petitioner is entitled to the remedies sought.

Constitutional infringements

40. The Petitioner have averred that they have a constitutional right to bring up this Petition claiming that the Constitution has been contravened or threatened by virtue of Article 258(1) of the Constitution as read with Article 22 and 23(1) of the Constitution.

41. Indeed the above provisions of the Constitution allow "every person" a right to institute Court proceedings claiming that the Constitution has been contravened or is threatened with contravention.

42. The Petitioner must however establish the contraventions or infringements. The Petitioner herein submitted that on 24th May 2019, H.E the President of the Republic of Kenya, Uhuru Kenyatta gazetted Dr. Patrick Ngugi Njoroge as governor of the Central Bank of Kenya pursuant to provisions of Section 13(2) of Central Bank of Kenya Act.

43. That on 4th June 2019, vide gazette Notice No.4857, the Cabinet Secretary Henry K. Rotich appointed James Githii Mburu to be the Commissioner General of the Kenya Revenue Authority.

44. The Petitioner aver that the appointment of James Githii Mburu was unconstitutional as he replaced the outgoing Kenya Revenue Authority Commissioner General John Njiraini without safeguard of the constitutional guarantees and principles of public service based on ethnic diversity under Article 232(1) & (2) of the Constitution.

45. Article 232(1) & (g), (h), (i) & (2) (a) and (b) of the Constitution states as follows:-

1) "The values and principles of public service include:-

g) subject to paragraphs (h) and (i), fair competition and merit as the basis of appointments and promotions;

h) representation of Kenya's diverse communities; and

i) affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service, of:-

(i) men and women;

(ii) the members of all ethnic groups; and

(iii) Persons with disabilities.

2) The values and principles of public service apply to public service in:-

a) all State organs in both levels of government; and

b) all State corporations.

46. It is the contention of the Petitioner that the above constitutional principles were flouted in that the 2 appointments of Central Bank of Kenya and of Kenya Revenue Authority Commissioners were from the same ethnic group, that is Kikuyu Community.

47. The Petitioner's contention is also that Kenya comprises of over 42 ethnic groups and hence it is not fair and equitable and in line with Article 232 of the Constitution for the 2 appointments in respect of Kenya Central Governor and Kenya Revenue Authority to favour one ethnic group.

48. The Petitioner have pointed out that Kenya Revenue Authority has previously been headed by one ethnic group for consecutive time and yet Kenya is a diverse country with more than 42 tribes and ethnic groups.

49. It is indeed true that Kenya comprises 42 ethnic groups and it is also true that in the past 18 years from 2001 to 2019, the Kenya Revenue Authority has been headed by men appointed from one ethnic group being Kikuyu.

50. The Petitioner also brought out the fact that the position of Kenya Revenue Authority Commissioner General has never been occupied by a woman or a person with disabilities.

51. In determining whether the appointment of Interested Party as Commissioner General of Kenya Revenue Authority is unconstitutional or not, I refer to **Community Advocacy & Awareness & 8 Others vs the Attorney General, Interested Party National Gender & Equality Commission and 5 Others (2012) eKLR** where Hon J. Majanja faced with a matter of ethnicity in appointments in government cited **Jayne Mati & Another vs the Attorney General Nairobi Petition No. 108 of 2011** (unreported) and stated as follows:-

“The principle of the separation of powers is at the heart of the structure of our government, each organ is independent of each other but acting as a check and balance on the other and also working in concert to ensure that the machinery of the state works for the good of Kenyans. The role of the Judiciary within this framework is to state what the law is and to ensure that every authority conforms to the dictates of the Constitution when called upon to do so.”

52. Indeed the law at Article 232 of the Constitution envisages high standards of professional ethics fair competition and merit as the basis of appointments and promotions and representation of Kenyas' diverse communities and affording adequate and equal opportunities for appointments, training and advancement at all levels of the public service of men and women, members of all ethnic groups and persons with disabilities amongst other principles.

53. The Respondent have submitted that they followed the above principle in appointment of the Interested Party as there were advertisements made for the position and short listing followed and interviews were carried out. The Interested Party was then appointed after an open and competitive process which was merit based.

54. Despite the fact that Kenya has 42 ethnic communities, the Respondent submitted that the Interested Party was appointed after an open and competitive merit based process.

55. The Petitioner was to establish that though the Interested Party was appointed, he was appointed solely on the premise of his tribe and lacked the requisite qualifications as opposed to his competitors who were of other ethnic inclinations.

56. In the case of **Community Advocacy and Awareness Trust** (supra) Hon. J. Majanja further considered the request made to give guidelines and directions by the Court on the issue of ethnicity regional affiliation and related consideration in appointment to public office for women in Kenya. He opined that it was difficult to give guidelines sought as no party submitted on this issue as what proper guidelines were.

57. In the current case, though the Petitioner pointed out that the Interested Party was appointed unconstitutionally because he hails from the Kikuyu community, there was no evidence that he was less qualified compared to the other contenders and so was unfairly appointed.

58. I am asked to declare the appointment of the Interested Party unconstitutional and quash it. I am however not averse to this as I am aware

that Kenya has diverse ethnic groups. However, in appointments to be made, there must remain a balance between competences and competitiveness while achieving regional balance.

59. The Petitioner in my view failed to address the issue of non-competitiveness of the Interested Party and I therefore find the Petition has no merit. I dismiss it accordingly with no order as to costs.

Dated and delivered in Chambers via zoom this **21st day of May, 2020.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Ndegwa for Petitioner in Pet 108/2019

Checyna for 1st Respondent and 3rd Respondent in Pet. 108/2019 and holding brief Rono for Gatonye for 2nd Respondent – Present