



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA

PETITION NUMBER 4 OF 2020

[Formerly Mombasa HC Petition No. 29 of 2020]

**IN THE MATTER: OF ARTICLES 1, 2, 3 [1], 4, 10, 19, 20, 21, 22, 23,
 27, 33, 35, 41 [1], 47, 50, 73, 165, 232, OF THE CONSTITUTION OF KENYA;**

AND;

**IN THE MATTER: OF NATIONAL VALUES, PRINCIPLES OF GOVERNANCE,
 RIGHT TO INFORMATION AND DUE PROCESS ON APPOINTMENT
 OF THE MANAGING DIRECTOR, KENYA PORTS AUTHORITY.**

BETWEEN

COMMISSION FOR HUMAN RIGHTS & JUSTICE.....PETITIONER

VERSUS

- 1. BOARD OF DIRECTORS, KENYA PORTS AUTHORITY**
- 2. THE CABINET SECRETARY, TRANSPORT AND INFRASTRUCTURE**
- 3. THE HON. ATTORNEY-GENERAL.....RESPONDENTS**

AND

THE DOCK WORKERS UNION.....INTERESTED PARTY

Rika J

Lutta & Associates, Advocates for the Petitioner

Cootow & Associates, Advocates for the 1st Respondent

Attorney- General for the 2nd & 3rd Respondents

Oduor Siminyu & Company Advocates for the Interested Party

JUDGMENT

PETITION:-

1. The Petitioner is a Non-Governmental Human Rights Group, based at the Coastal Resort of Mombasa. The 1st Respondent is the Board of Directors, tasked with the role of overseeing the management of the Port of Mombasa, other Ports and waterways within the Republic of Kenya. The 2nd Respondent is the Cabinet Secretary, under whose portfolio the Port is resident. The 3rd Respondent is the Chief Legal Advisor to the National Government. The Interested Party is a registered Trade Union, representing nationally, Unionisable Employees of the Kenya Ports Authority [KPA].

2. On 26th March 2020, KPA Managing Director Dr. Daniel Manduku, resigned. The following day, 27th March 2020, the 1st Respondent appointed an acting Managing Director, Engineer Rashid K. Salim. On 8th April 2020, the 1st Respondent advertised on-line and in the national newspapers, for the vacant position of Managing Director, KPA. The deadline for applications was on 24th April 2020.

3. The Petitioner states, the Respondents went silent after the application deadline. There was no information to the Public, from the Respondents on applications received; details of the applicants; criteria to be adopted in their shortlisting and interview; and timelines for the interviews. There was no information or arrangement, from the Respondents, about public participation. The Petitioner therefore wrote to the 1st Respondent on 28th April 2020, seeking this information. The Petitioner argues that the process of interviewing for the position of Managing Director KPA, should follow the lead set by the Judiciary, in interviewing to fill the positions of Judges and Magistrates. There was no response to his request for information from the 1st Respondent. On 7th May 2020, the Petitioner filed this Petition, seeking the following orders:-

- a. Declaration that the intended decision and/ or decisions of the 1st Respondent, to conduct the interview for the post of Managing Director KPA, without prior public participation, offend Articles 10, 35, 73 and 232 of the Constitution, and is therefore, unconstitutional.
- b. The process is stayed indefinitely, until coronavirus situation abates, is controlled and curfew is lifted.
- c. The 1st Respondent to publish the entire list of the applicants in at least 2 newspapers with wide circulation, and invite the public to air their public participatory views on suitability of each candidate.
- d. Mandate the 1st Respondent to air live the entire interview process in at least 1 television network and online platform for purposes of transparency and accountability.
- e. 1st Respondent to publish the outcome of the interview in its website and newspapers of wide circulation, within 7 days of close of the interview process.
- f. Any other suitable order.
- g. Costs.

4. The Petition is based on the Affidavit of Petitioner's Director, Julius Ogogoh, sworn on 7th May 2020. He exhibits the following documents is support:-

- Advertisement for the position of Managing Director, KPA made on 8th April 2020.
- Petitioner's letter to the 1st Respondent dated 28th April 2020.
- Newspaper cuttings containing information relating to recent occurrences at the Port, revolving around corruption and the position of the Managing Director.
- Public Order on restriction of movement in and out of the city of Mombasa.
- Resignation letter of Dr. Daniel Manduku as the KPA Managing Director.

5. Julius states that the Petition is aimed at entrenchment of the rule law, integrity, transparency and accountability. The stakes in search for the new Managing Director, KPA, are high. There are widely held public views, regarding political influence; behind the curtains lobbying; the effect of coronavirus on credibility of the process; and distrust of the 1st Respondent. The duty of the Court is to safeguard constitutionalism and the rule of law. Until coronavirus is contained, stabilized and/ or abated, it is imprudent to go on with the process.

6. The present Board is tainted, recent Managing Directors having left the KPA under clouds of corruption and uncertainties. The Board has not lived up to its calling as an oversight organ. Its tenure is marred with damning allegations of corruption. Its ability to oversee the appointment of the Managing Director, is in doubt. The Board has failed the integrity test, under Article 73 of the Constitution, which requires State Officers to exercise authority in a manner that brings honour to the nation and dignity to their office, promoting public confidence in the integrity of their office. The Board has failed to act on audit reports, therefore failing to protect public resources. The interview for the position of Managing Director is scheduled for a place not known to the Petitioner. Articles of the Constitution mentioned at the outset, have been, or are about to be, disregarded by the Respondents. Mombasa is under public health lockdown. The Petitioner states, the city is a coronavirus epicentre. Potential applicants may not be able to attend the interview.

1st RESPONDENT'S REPLY:-

7. The 1st Respondent relies on the Replying Affidavit of its General Manager and Corporation Secretary Adraya Dena, on record. The KPA is a State Corporation, created under Section 3 of the KPA Act, Cap 391 the Laws of Kenya. It is governed further by the State Corporations Act, Cap 446 the Laws of Kenya. Other Instruments guiding the 1st Respondent, include Mwongozo Code of Governance for State Corporations. The Board is appointed under Section 4 of the KPA Act and is not a corporate body, capable of suing and being sued.

8. Members of the Board are appointed for no more than 3 years. They may resign. They may be removed by the 2nd Respondent on specified grounds. Taught Counsel, Adraya Dena, states, only the Cabinet Secretary can remove the Board Members, and the Court has no role to *meddle* in the affairs of the Board.

9. Some Members, such as the Principal Secretary, are Members by virtue of the positions they hold in Government. Under the State Corporations Act, Section 7[3] only the President can remove the Board of a State Corporation.

10. The Managing Director of the KPA is appointed by the Minister solely, in consultation with the Board. The terms and conditions of his employment are determined by the 2nd Respondent. On advice of the Lead Counsel for the 1st Respondent, Job Weloba, Dena states that Courts ought to refrain from interference with executive functions, under the doctrine of separation of powers, unless there is justification for interference.

11. The Board encompasses all stakeholders. Dr. Manduku was appointed substantively on 30th November 2018, after acting from 31st May 2018. This was after a rigorous exercise overseen by the 1st Respondent. He resigned on 26th March 2020. Engineer Rashid K. Salim was appointed in acting capacity for 6 months. Dena states that Section 42 [2] of the Employment Act, does not allow for appointment in acting capacity, for more than 6 months. There is need to fill the vacancy substantively, without further delay.

12. The Board received applications from over 150 applicants. The applications were uploaded electronically and respective e-folders created for each applicant. The Board was given access through a link, on 12th May 2020.

13. In its 373rd meeting, the Board constituted an *ad hoc* committee, tasked with analyzing the candidates, and shortlisting them for interview. Interview shall be carried out by the full Board. Inspector General of Corporations is part of the *ad hoc* committee. The committee shall submit recommendations to the Board, with candidates invited for face to face interviews. In the end the Board shall submit 3 names to the 2nd Respondent, for appointment of the Managing Director, from the 3 names.

14. Interviewing has not started.

15. Stakeholders' meetings, discussions and communications constitute adequate public participation. The Board comprises stakeholders from the shipping industry and the larger economy. Further pointer that the requirement for public participation has been satisfied, is to be found in the role played by the DCI, KRA, EACC and CRB in clearing the candidates. These agencies are mandated to collect data on the candidates nationwide.

16. The 1st Respondent concedes there is coronavirus pandemic, but posits that no one knows the day or hour, the pandemic shall be deemed to have been contained or eliminated. Global economies have identified innovative ways of co-existing with the pandemic. The 1st Respondent has been conducting its affairs virtually.

17. On why the 1st Respondent did not answer Petitioner's request for information regarding the interview process, Dena explains that the Board needed to first evaluate all the applications. The process of shortlisting has not yet arrived.

18. Dena states, the Petitioner has not shown what a televised interview is supposed to achieve. The Petitioner has not established a legal basis for such a requirement, in a process that is internal to the KPA. There are no criminal charges presented against any of the Board Members, to justify the view, that their integrity is tainted. There is no Managing Director of the KPA, who has been charged with any criminal offence. No proceedings of any nature are pending in any Court, to warrant questioning of integrity of the Board.

2nd & 3rd RESPONDENTS:-

19. The 2nd and 3rd Respondents rely on the Affidavit of Principal Secretary [PS], Department of Transport on record. Boards of Management of State Corporations, under the State Corporations Act, are independent. Their decisions are unfettered, other than by the law. Only Cabinet Secretary, can remove the Board Members. The PS confirms that Dr. Manduku resigned, necessitating the search for his replacement. The PS, like the 1st Respondent cautions the Judiciary against interference in statutory authority of the Board, and against interference in Executive functions. The Court lacks jurisdiction to supervise the Board. Any concerns the Petitioner has, can be addressed through the State Corporations Advisory Committee.

20. There is no lobbying which is going on behind curtains. These are mere figurations, created by the Petitioner

21. Dr. Manduku resigned a day before the Board was scheduled to discuss audit report. The Board did not overlook the report, or in any way fail in its oversight role. The Board is guided by Presidential Executive Order No. 7 of 2015, known as Mwongozo Code. Public participation does not amount to, nor limited to televised interview.

22. The PS states, the Petitioner has not offered any guidance, on what happens, after indefinite stoppage of the search for the Managing Director. Lastly, he states, the Board comprises different persons, each representing different interests. This composition ensures the public is well represented. The PS asks the Court to take stock of Section 34 [3] of the Public Service Commission Act, 2017, which states that Public

Officers can only serve in acting capacity for 1 month, and up to a maximum of 6 months. It is important and urgent, to allow the Respondents give the Country a substantive Managing Director of the KPA.

INTERESTED PARTY:-

23. The Interested Party's position is expressed through the Replying Affidavit of its Secretary General Simon Sang, sworn on 16th June 2020.

24. Sang states that the Petitioner merely quotes Articles of the Constitution, without specifying what rights have been violated. The Petition is defective, and ought to be struck out in *limine*. The recruitment process is being driven by the 1st Respondent meticulously, and in full awareness of constitutional and legal imperatives. This process is at its infancy, and the Petitioner has put the cart before the horse, by rushing to Court. The reliefs sought directly affect the 1st Respondent's statutory authority under the KPA Act.

25. The allegations raised by the Petitioner are generalized, lacking in details and evidence. Newspaper cuttings have no probative value. No Affidavits have been brought before the Court, sworn by the authors of these news items.

26. Sang states, it is not true that the process of recruitment of KPA Managing Director, is being carried out without public participation. The Interested Party has a huge stake in KPA. KPA is important to the economies of the entire East African region, and there must be no delay, in filling the position of its Managing Director. The Petition is made in bad faith, with the sole intention of frustrating, impeding and/ or delaying the conclusion of the process. The Interested Party states, it has ongoing collective bargaining and negotiations with the KPA, and the expected CBA can only be signed by a substantive Managing Director. Delay in the process of recruitment would imperil the collective bargaining process. KPA discharges essential services, and it must not be impeded in doing so. The Interested Party argues that without a substantive Managing Director, KPA stands to lose out business to competitors such as the Port of Dar es Salaam, in neighbouring Tanzania. The acting Managing Director has been in office for 3 months already. Section 34 [3] of the Public Service Commission Act, allows an Officer to act for 1 month and up to a maximum of 6 months.

27. The 1st Respondent has taken precautionary measures, to counter the effects of coronavirus, such as receiving all applications in soft copies. The Petition should be dismissed with costs.

SUBMISSIONS: -

28. The Petitioner submits, public participation is one of the values and principles of governance, under Article 10 of the Constitution, binding the State, and every other Person, whenever they interpret or enact any law. Article 73 [2] [a] requires that all Public Officers are selected based on their personal integrity, competence and suitability. All sovereign power belongs to the People. The 1st Respondent has not conducted the search a Managing Director of KPA, in accordance with the Constitution.

29. From the Affidavit of Addraya Dena, it is clear that the 1st Respondent does not intend to meet the requirement for public participation. The composition of the KPA Board, with various stakeholders represented, does not satisfy the requirement for public participation.

30. The Petitioner submits it seeks also, to have the 1st Respondent reconstituted. The 1st Respondent has lost public trust. The previous Managing Director, left employment prematurely, under a cloud of corruption. The 1st Respondent has failed in overseeing Management. There is no trust, that the 1st Respondent shall appoint a Managing Director, in accordance with Article 73 of the Constitution.

31. The Court has a constitutional obligation to ensure, that the 1st Respondent conducts its business in accordance with the law. It is not true that the Court lacks jurisdiction. Jurisdiction has been affirmed in various decisions of different Courts. The Petitioner in support of this submission, cites **High Court in Spendag Interfreight Kenya Limited v. Labour & Social Relations & 2 others [2019] e-KLR**, and **Court of Appeal in Registrar of Trade Unions v. Nicky Njuguna & 4 others [2017] e-KLR**.

32. The State Corporations Act, establishes the State Corporations Advisory Committee. The role of this Committee is not to adjudicate. The Petitioner cannot take its grievance before the Committee, as advanced by the Respondents. The right platform is the Court. The State Corporations Act, the KPA Act and Mwingozo Code, do not have a mechanism for dealing with the propriety of appointment of the Managing Director. The High Court, in **Benson Riitho Mureithi v. J.W.Wakhungu & 2 others [2014] e-KLR**, held that, where there is no such mechanism, the Petitioner was entitled to be heard before the Court.

33. Observance of the Constitution is important at every turn in the process. It is immaterial when the process started, and when it is finalized. The Respondents cannot be allowed to disregard the Constitution on the ground that the process is in its formative stage. The Petition is not premature.

34. Chapter 2 of Mwingozo Code, places a premium on transparency and disclosure. The gravamen of the Petition is that recruitment of the Managing Director must be transparent and accountable. It must be carried out with the involvement of stakeholders, and with public participation.

35. The Respondents submit that some of the prayers sought in the Petition are not within the jurisdiction of the Court, as there are statutes offering alternative means for resolving issues raised. Other issues are not justiciable.

36. Section 5 [1] of the KPA Act, mandates the 2nd Respondent, in consultation with the 1st Respondent, to appoint the Managing Director. Boards of Management of State Corporations are independent. Their decisions are only fettered by the law. Section 26 and 27 of the State Corporations Act, provides an avenue for dealing with Board mismanagement and illegalities. There is created a State Corporations Review

Board. There is a State Corporations Advisory Committee. These are the entities that ought to deal with complaints against Boards of Management of State Corporations.

37. The Respondents submit allegations against the 1st Respondent, made by the Petitioner, are unsubstantiated. Newspaper cuttings offer no probative value. The Ministry, the Board, and the State Corporations Advisory Committee, have not received any complaint against individual Members of the Board. The Respondents reiterate that the 1st Respondent had called a meeting to discuss audit report, at the time Dr. Manduku resigned. The 1st Respondent has not failed in its oversight role.

38. It is submitted that the Court lacks jurisdiction to investigate the Board. Any order that touches on reconstitution of the Board would touch on the KPA Act. The Act provides for composition of the Board, with some Principal Secretaries coopted in the Board by virtue of their positions in the Government.

39. The 1st Respondent advertised in the media for the position of Managing Director. This was in accordance with Articles 10 and 232 of the Constitution. It complied with the provisions of the KPA Act, the State Corporations Act and Mwongozo Code. Public participation cannot be limited to televised interview. It has not been shown that any candidate has been locked out, or is unable to attend the interview. No one knows if, or when, covid-19 shall be contained or eliminated, and businesses have come up with innovative ways, of conducting their day to day activities. They have adopted appropriate technologies in meeting the challenges of doing business in the midst of covid-19. Relying on **Supreme Court of Kenya decision in Petition No. 5 of 2017, British American Tobacco Kenya Limited v. Cabinet Secretary, Ministry of Health**, the Respondents submit that stakeholders' meetings, discussions and communications constitute adequate public participation.

40. The Interested Party reiterates in its Submissions, the position contained in the Affidavit of its General Secretary Simon Sang. In **Godfrey Paul Okutoyi v. Habil Olaka & another [2018] e-KLR**, the Court ruled that anyone who wishes the Court to grant a relief for violation of a fundamental right or freedom, must precisely show what constitutional right or freedom has been violated. The Petitioner herein has failed this test, having just made generalized allegations about infringement of fundamental rights. The 1st Respondent invited all qualified persons to apply for the position of Managing Director. There was no discrimination. The Petitioner has not shown to what end, information on the applicants was sought, from the 1st Respondent. In **Nairobi Law Monthly v. Kenya Electricity Generating Company & others [Petition No. 278 of 2011]**, the Court held that the right of access to information is not absolute, and can only be granted, if the Petitioner is able to show that the information is needed, for the exercise or protection of another right. Lastly the Interested Party reiterates that the process of recruitment for the position of Managing Director is above reproach, and that the Petitioner has not shown in precise terms, in line with the authority of **Anarita Karimi Njeru v. The Republic [1976-1980] KLR 1272**, what fundamental right has been violated.

ISSUES

41. The issues for determination are fairly stated by the Petitioner, in its Closing Submissions, to include:-

- Whether the Court has jurisdiction.
- Whether the decision by the 1st Respondent to ignore public participation is in violation of the Constitution.
- Whether the 1st Respondent has the trust of the Public, to enable the 1st Respondent recruit the Managing Director, KPA.

The Court Finds:-

Jurisdiction.

42. On jurisdiction, there is no doubt, based on Article 162 [2] [a] of the Constitution, and a catena of judicial authorities, such as **Supreme Court in Republic v. Karisa Chengo & 2 others [2017] e-KLR**; **Court of Appeal in Prof. Daniel N. Mugendi v. Kenyatta University & 3 others [2013] e-KLR**; and **High Court in United States International University [U.S.I.U] v. Attorney-General [2012] e-KLR**, that the Court has jurisdiction.

43. Whereas the Boards of Management of State Corporations are intended to exercise discretion in their operations as envisaged under their constitutive Acts, the State Corporations Act, and Presidential Executive Order No. 7 of 2015, popularly known as Mwongozo Code, the intervention of Courts when the exercise of discretion by these Boards, is shown or suspected of failing to adhere to the law, is justifiable. It is the role of the Courts to adjudicate, and resolve disputes, whether the disputes are between Private Citizens or between the State, Its Organs and the Citizens. It is the role of the Courts to ensure all the arms and organs of the State, operate within the confines of the organic law. It is not true, as stated by Legal Services Manager of the KPA, Addraya Dena that the Court's intervention, in enforcing principles and values enunciated in the Constitution of Kenya, would amount to meddling with the affairs of State Corporation Boards of Management. The use of the word '*meddle*,' by the 1st Respondent in its Replying Affidavit, which word is described in Cambridge Dictionary to mean "*to try to change or have influence on things that are not your responsibility*," appears to the Court, not to be in consonance with acceptable language of the legal profession. How does the Court, when called upon to discharge its constitutional mandate, meddle?

44. Boards of Management of State Corporations are not adjudicatory platforms. They do not decide cases. Courts of law do, and those with disputes cannot be faulted for approaching Courts. The Respondents have not established their objection on jurisdiction. The KPA Act, the State Corporations Act and Mwongozo have not been shown to have any mechanisms for resolution of disputes involving allegations of non-compliance with Articles of the Constitution. They do not have a mechanism for challenging the recruitment of the Managing Director, on the grounds set out in the Petition. The Court adopts the decision of the High Court in **Benson Riitho Mureithi v. J.W. Wakhungu & 2 others**, and in the absence of any other adjudicatory mechanism, assumes jurisdiction.

Public participation.

45. Public participation is the main thread running through this Petition.

46. Submission on public participation is based on Article 10 [1] and 2 of the Constitution, which state:

‘ 1. The national values and principles of governance in this Article bind all State Organs, State Officers, and all Persons, whenever any of them-

- a. applies or interprets this Constitution;
- b. enacts, applies or interprets any law; and
- c. Makes or implements public policy decisions.

[2] The national values and principles of governance include-

- a. patriotism, national unity, sharing and devolution of power, rule of law, democracy and participation of the people;
- b. human dignity, equity, social justice, inclusiveness, equality, human rights, nondiscrimination and protection of the marginalized;
- c. good governance, integrity, transparency and accountability; and,
- d. Sustainable development.

47. The facts are not disputed and may be summarized as follows: immediate previous Managing Director Dr. Manduku resigned on 26th March 2020; the 1st Respondent appointed Eng. Rashid K. Salim in an acting capacity on 27th March 2020; the vacancy was advertised through print and electronic media on 8th April 2020; applications closed on 24th April 2020; the Petitioner wrote to the 1st Respondent on 28th April 2020 asking for list of the applicants, publication of the list, notice on the date of interviews, steps taken to ensure the process was fair, and the guidelines leading the process; there was no response to the Petitioner’s letter of 28th April 2020; and the Petition was filed after this, on 7th May 2020.

48. It must also be pointed out that at the time of filing of the Petition, and issuing of an order of temporary injunction barring the Respondents from going on with the process, there was no dispute that the Government had imposed restriction on movement in and out of Mombasa, under Public Order No. 2 of 2020, as a measure of containment of covid-19 pandemic. At the time of writing this Judgment, that order has since been reversed.

49. Another important and undisputed fact, is that the applicants for the position of Managing Director, said by the 1st Respondent to be over 150 in number, have not been shortlisted, and interviewing has not commenced. The Respondents state, the process is at its formative stage.

50. Is there evidence of compliance by the Respondents, under Article 10 of the Constitution, as read with the other relevant Articles cited by the Petitioner?

51. The principle of public participation is not well articulated in our judicial authorities and academic papers. Levels of public participation, are not well crystallized. The Court has not seen judicial authorities defining in detail, who the public is. In this Petition we have the Petitioner, an NGO involved in human rights advocacy, speaking for the public, and taking a different position from the Interested Party, who speaks for its Members, Employees of the KPA, who certainly are a critical part of the public, with regard to the Petition. The principle of public participation appears in a motley of apparitions. Constitutional Scholars are not in agreement on the scope of the principle of public or people participation, also in certain legal traditions called citizens’ involvement.

52. Former Chief Justice of Kenya, Dr. Willy Mutunga, recently broached the subject in his lecture paper, presented on 10th February 2020, at **The East Africa Institute of the Aga Khan University titled ‘People Power in the 2010 Constitution: a Reality or an Illusion?’**

53. Dr. Mutunga is effusive about public participation in the governance of Makueni County, while castigating the idea that the wider national initiative called the Building Bridges Initiative [BBI], a brainchild of 2 of Kenya’s most popular politicians, H.E. President Uhuru Kenya and former Premier Raila Odinga, is subversive of the principle of public participation. In his view, Makueni County Experiment in the implementation of the 2010 Constitution breathes life into sovereignty of the People, while BBI subverts the same sovereignty.

54. The former Chief Justice of Kenya, views Makueni County as the beacon of progress in actualization of the idea of public participation, observing that Makueni County has a county agenda, discussed right from the grassroots, in a six-tier consultation process. Consensus reached at the grassroots cannot be varied at the County Assembly.

55. Case study 2 in Dr. Mutunga’s Lecture, is the BBI. He questions the category of persons and the numbers of interest groups, sampled by the BBI taskforce, arguing that, there is no justification for the Taskforce to announce from the rooftops, that the People have spoken. According to Dr. Mutunga, BBI pays lip service to the principle of public participation, in contrast to the Makueni Experiment. He terms the

BBI as a monumental political distraction, and an abdication of the national interest, for the interests of the ruling elites.

56. The former Chief Justice appears to doubt the validity of public participation in the BBI on the ground that, it is driven by the political elites, ignoring that these elites, have massive political following in the country, and most of their followers believe they are well represented by the elites, in public decision-making processes. The elites' words, tend to be the words of their massive followers. The elites are personifications of their followers. For public participation to have validity, the paper seems to suggest, it must be founded at the grassroots, rather than driven from above.

57. Outside of Kenya, there is a lot of insightful work of jurists, which is worth looking at, in understanding the principle of public participation, and in resolving the dispute at hand.

58. Shery R. Arnstein, a leading jurist on the subject, in her pioneering article '**A Ladder of Citizen Participation,**' **Journal of American Institute of Planners, published online on 26th November 2007,** argues that the controversy over public participation [also known as citizen control, citizen participation, and maximum feasible involvement of the poor] has been waged largely in terms of exacerbated rhetoric and misleading euphemism.

59. Arnstein developed Eight Rungs on a Ladder of Citizen Participation, to assist in understanding the principle, and in particular the levels of participation or nonparticipation, using persuasive gradations.

60. At the bottom, is what she called **nonparticipation**, including manipulation and therapy? These describe levels that have been contrived by some, to substitute for genuine participation. Their real objective is not to enable the People to participate in planning and conducting programs, but to enable powerholders to 'educate' or 'cure' the participants. In Dr. Mutunga's paper, it would seem BBI is at this level of public participation, where the Political Leadership, rather than allow for genuine participation, is 'educating' and 'curing' the People in the name of public participation. Nonparticipation includes rung 1 and 2 in Arnstein's Ladder.

61. The median rungs involve **degrees of tokenism**, dangled by authorities to the public. 3 categories are identified by Arnstein to include informing, consultation and placation. This is rung 3, 4 and 5, which in general involve degrees of tokenism. Arnstein holds that in these rungs, the People are allowed to hear and to have a voice. But there is a flaw in informing and consultation. The public may hear and be heard, but they do not have the power to insure that their views will be heeded by the authorities. In the Petition herein, the Petitioner invokes the right to information, under Article 35 of the Constitution, in asking for details of the applicants for the position of Managing Director, from the Respondents. Placation is characterized simply as a higher level of tokenism, because the public is allowed by the ground rules to advise the authorities, but the right to decide remains firmly in the hands of the authorities.

64. The top group in the ladder comprises degrees of **citizen power**. The rungs are partnership [6], delegated power [7] and citizen control [8]. Rung 6, comes with increasing degrees of decision-making clout. The People can enter into partnerships that enable them to negotiate and engage in trade-offs with traditional powerholders [concerned authorities]. Arnstein places delegated power and citizen control at the top of her ladder. At this summit, the People [have-not citizens] obtain the majority decision-making seats or full managerial power.

65. Arnstein cautions that her ladder is a simplification of the principle of public participation, but it helps to illustrate the point that many have missed- that there are significant gradations of public participation. Our jurisprudence seems to have failed to fully recognize these significant gradations of public participation.

64. Article 10 as submitted by the Parties, defines public participation as one of the national values and principles of governance. How is this value and principle to be implemented, and to what extent, taking guidance from Arnstein's ladder?

65. The answer lies in Legislation. Parliament published The Public Participation Bill [No. 2] of 2019 in Kenya Gazette Supplement No. 170 on 11th October 2019. The Court has not seen anything to suggest the Bill has been enacted into legislation.

66. The Bill seeks to give effect to Articles 10 [2, 69 [1] [d] 118 and 174 [c] 181 [c] 196[1] [b] 201 [a] and 232 [1] [d] of the Constitution. It defines public participation. Its object and purpose, is to provide a framework for the involvement of the public in the process of decision-making by state organs and public offices; and informed, effective and efficient engagement of the public in decision-making. It offers guiding principles in conducting public participation. It requires a state organ or public office, to establish structures for public participation as may be required, for effective public participation.

67. The Bill has not become law. The Supreme Court in the decision cited by the 1st Respondent, **BAT Kenya PLC v. Cabinet Secretary for Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another [Interested Parties]; and Mastermind Tobacco Kenya Limited [the Affected Party]**, held that lack of prescribed legal framework cannot be an excuse for not conducting public participation. The onus, the Supreme Court held, is on the entity to give effect to this principle, using reasonable means. In the absence of a Public Participation Act, and on authority of this Supreme Court decision, the question that begs this Court's response, is whether the Respondents have given effect to the principle of public participation, using reasonable means.

68. In the Petition filed herein, it is clear to the Court that the Respondents have, employing the legal framework and instruments of governance at their disposal, adequately satisfied the requirement for public participation. They have offered degrees of tokenisms. They cannot be adjudged to be espousing nonparticipation. The Interested Party, itself representing a sizeable portion of the public, has confirmed it has been informed about the process of recruitment of Managing Director. Its Members are not in the dark about this process that shall culminate in the appointment of their Managing Director. The Interested Party, has given the process a clean bill of health, and even endorsed the view by the Respondents, that there is an urgent need, to conclude the process timeously. There is no reason for the Court to assume, that the Petitioner's voice should be heard over and above other genuine public participants, such as the Interested Party, who confirms it has publicly participated, and continues to publicly participate, in the process of recruitment of the Managing Director, KPA.

69. The 1st Respondent advertised for the vacancy in online and print media platforms. The Newspaper cuttings exhibited by the Petitioner, while not of probative value as submitted by the Respondents, suggest that the media is aware about the names of the candidates. Certain persons have been named as candidates in the newspaper cuttings. Televising the interviews does not in the view of the Court, add value to the fulfilment of public participation obligation. The existing legal framework does not compel the Respondents to have the interviews televised. There are cost implications in live broadcasts.

70. Should the process of appointment of the Managing Director of the KPA, be equated to the process of making legislation or regulations in public entities? The High Court, in **Robert N. Gakuru & Others v. Governor Kiambu County & 3 others [2014] e-KLR**, held that it behoves County Assemblies, in enacting legislation, to do whatever is reasonable, to ensure that many of their Constituents are aware of the intention to enact legislation. The constituents must be exhorted to give their input. Should the level of public participation be the same, in appointment of the Managing Director of a State Corporation? Should the Respondents exhort Kenyans to participate in the process of appointment of the Managing Director? In the respectful view of this Court, appointment of the Managing Director, KPA, is a highly specialized undertaking, which is best discharged by the technocrats comprising the Board, assisted by human resource expert committees as the Board deems fit to appoint. The existing law governing the process of appointment of the Managing Director KPA, leans in favour of technocratic decision-making. Democratic decision-making, involving full-blown public participation may be suitable in the processes of legislation and related political processes, such as the Makueni County Experiment and the BBI, subject matter of Dr. Mutunga's case studies. But technocratic decision-making suits the appointment of CEOs of State Corporations. Even as we promote democratic [people-centric] decision-making processes, we must at the same time promote technocracy, giving some space to those with the skills and expertise to lead the processes, and trusting them to provide technical solutions to society's problems. The Board and the Committees involved in the process are in the view of the Court, well -equipped to give the Country a rational outcome. The Court agrees with the Respondents, that the 1st Respondent is sufficiently representative of stakeholders of the KPA, and the appointment of the Managing Director, is more of a technocratic decision-making process, than a democratic- decision making process. It need not totally open itself up, to the scrutiny of every person. The public is aided by public watchdogs – DCI, EACC, CRB, KRA and HELB – in assessing the antecedents of the applicants. The State Corporations Inspector General, is part of the *ad hoc* committee set up by the 1st Respondent, to evaluate and shortlist applicants. Interviews shall be carried out by the full Board, face to face with the candidates. There are adequate measures taken by the 1st Respondent to ensure the process meets the demands of transparency and accountability to the public.

71. The Respondents have balanced the requirement for public participation, against the legally-mandated requirement for a technocratic recruitment process.

72. There is no evidence provided by the Petitioner to establish, that the current Board has failed in its oversight of Management. No audit report has been placed before the Court, implicating the Board, or past Managing Directors, in alleged acts of monumental sleaze. There is no evidence on lost public trust in the Board, placed before the Court by the Petitioner. There are no official reports from the General Inspector of State Corporations, the EACC or DCI, implicating the Board in any way, which have been availed to the Court. The Petitioner needed to exhibit some evidential material, showing there is loss of trust in the Board. It is not enough to make a bare allegation about loss of trust. If the Board has failed, it is not the role of the Court to disband the Board, or indefinitely bar the Board from carrying on with its statutory mandate. There are Independent Anti-Corruption and other Investigative Agencies, which must be called in, and allowed to discharge their respective mandates at the KPA, before judicial intervention in the affairs of the 1st Respondent, sought. There does not in any event, seem to be a prayer in the main Petition, for the Court to interfere in the composition or the work of the Board. It has not been established that the Board is incapable of offering the Country a credible Managing Director, in accordance with Article 73 of the Constitution.

73. The submission on coronavirus was not pursued by the Petitioner in its Final Submissions. The Court has observed that the public health order restricting movement in and out of Mombasa has since been lifted. It is noted also that the 1st Respondent has put up measures to mitigate the effect of the pandemic. It is noted that the current acting Managing Director of the KPA has a mandate running up to September 2020. Section 34 [3] of the Public Service Commission Act, 2017 does not allow the 1st Respondent to stretch the acting role beyond 6 months. The submission by the 1st Respondent that Section 42 [2] of the Employment Act 2007 has such restriction on acting capacity, is incorrect. Section 42 of the Employment Act governs probationary contracts, not contracts where the Employee is acting in another's role. Probationary, and acting capacity, are distinguishable concepts in employment law.

74. The last question relates to Article 35 of the Constitution, which the Court thinks, must be looked at independent of Article 10. The Article states that every Citizen has the right of access to information held by the State; and information held by another person and required for the exercise or protection of any right of fundamental freedom. In the **High Court case, Katiba Institute v. President's Delivery Unit & 3 others [2017] e-KLR**, it was held that the right to access information held by the State and its Organs, is not a fringe right to other rights contained in the Bill of Rights. It was held that the State and its Organs, have the obligation in release of information, and where not possible, to give reasons for it. The decision cited above, by the Interested Party, involving **Nairobi Law Monthly**, appears to diverge slightly, holding that the right is limited, and the Petitioner must show that the information sought, is necessary in pursuing redress for an identified violation or fundamental right or freedom.

75. The Parties did not submit on **Access to Information Act No. 31 of 2016**. The Act is relevant because, it is the legislation which gives effect to Article 35. Unlike Article 10, Article 35 is specifically given effect by an Act of Parliament, and not left solely for the Courts, to define its scope and application. It restates the right to information under Section 4. It requires a Public Officer to make a decision within 21 days, on receiving an application for information. The decision must be communicated to the applicant, within 15 working days of its making.

76. The Petitioner made a written request for the list of applicants for the position of Managing Director, which is information held by the Respondents. There was no reply, either declining the request with, or without reasons. The Respondent did not explain its stonewalling satisfactorily before the Court. There was a clear obligation under Article 35, separate from the requirements of other Articles cited by the Petitioner, to grant him access to the list of the applicants, or at the very least, reply to his application with reasons why the application could not be granted. The 1st Respondent's silence however, should have been understood by the Petitioner as a refusal of the application.

77. The Act states that decisions on the application for information, are reviewable by the Commission on Administrative Justice, established by Section 3 of the Commission on Administrative Justice Act No. 23 of 2011. Section 20 confers upon the Commission, the powers of oversight and enforcement of the Act. The Commission is constitutionally independent. It does not act under the direction or control of anyone.

78. The Petitioner did not seek recourse under the Access to Information Act, after its application for information went unanswered. There was nothing addressed to the Commission from the Petitioner. The resort to Court was premature. There is a statutory avenue for redress, where an application for information is declined, which the Petitioner did not consider. In the end, the Court is of the view that the Petition has no merit.

IT IS ORDERED:-

- a. The Petition is declined.**
- b. The Respondents are at liberty to continue with the recruitment process.**
- c. No order of the costs.**

Dated, issued and released to the Parties electronically, at Chaka, Nyeri County, under Ministry of Health Covid -19 Guidelines, and Rule 38 of the E&LRC [Procedure] Rules, 2016, this 10th day of July 2020.

James Rika

Judge