



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**PETITION NO. 237 OF 2019**

*(Before Hon. Lady Justice Maureen Onyango)*

**IN THE MATTER OF: THE ENFORCEMENT OF ARTICLES 2, 3, 10, 19, 20, 21, 22, 23, 162(2)(a) 258(1) AND 259(1) OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

**AND**

**IN THE MATTER OF: ALLEGED VIOLATION AND INFRINGEMENT OF THE RIGHTS AND FREEDOMS IN ARTICLES 25, 27, 28, 33, 35, 41, 47, 48 AND 50 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: ALLEGED VIOLATION AND INFRINGEMENT OF SECTION 6(2) OF THE STATE CORPORATIONS ACT, CAP 446 LAWS OF KENYA**

**AND**

**IN THE MATTER OF: ALLEGED VIOLATION AND INFRINGEMENT OF SECTION 5(2)(e) OF THE KENYA POST OFFICE SAVINGS BANK ACT, CAP 493B OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF: ALLEGED VIOLATION AND INFRINGEMENT OF SECTIONS 4 AND 5 OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015**

**AND**

**IN THE MATTER OF: THE EMPLOYMENT ACT, NO. 11 OF 2007**

**BETWEEN**

**MOSES BANDA .....PETITIONER**

*VERSUS*

**CABINET SECRETARY FOR THE**

**NATIONAL TREASURY AND PLANNING .....RESPONDENT**

**AND**

**KENYA POST OFFICE SAVINGS BANK (POSTBANK)..... INTERESTED PARTY**

**JUDGMENT**

The Petitioner, Moses Banda filed a Petition dated 5<sup>th</sup> December 2019 against the Respondent, Cabinet Secretary for the National Treasury

and Planning. Kenya Post Office Savings Bank (Post Bank) is enjoined to the suit as an Interested Party. The Petitioner prays for Orders that:-

*A. A declaration that the 1<sup>st</sup> Respondent has violated the petitioner's fundamental rights and freedoms as protected under Articles 25, 27, 28, 33, 41, 47, 48, & 50 of the Constitution.*

*B. A declaration that the Petitioner be compensated the amount of money that the court deems sufficient and/or appropriate by the 1<sup>st</sup> respondents for the violation of the petitioner's rights and fundamental freedoms under Articles 25, 27, 28, 33, 41, 47, 48 and 50 of the Constitution.*

*C. An order of certiorari be issued to bring into this Court and quash the purported Gazette Notice No. 10740, Vol. CXXI-No. 155 issued on 12<sup>th</sup> November 2019 by the respondent purporting to revoke the appointment of the petitioner as a member of the Board of the Interested Party with effect from 6<sup>th</sup> November 2019.*

*D. This Court be pleased and do hereby grant an order of Permanent Injunction, restraining the Respondent, his representatives, employees, servants and/or agents or anybody working under or for him from purporting to appoint any other person to replace the petitioner as a member of the Board of the interested Party.*

*E. General and Punitive Damages for illegal revocation of the petitioner's appointment.*

*F. Any other or further relief that this Court may deem fit to grant.*

*G. The costs of this Application be provided for.*

He avers he was appointed a member of the Board of the Interested Party through Gazette Notice No. 9707, Vol. CXX-No. 117 of 21<sup>st</sup> September 2018 for a period of three years, with effect from 20<sup>th</sup> September 2018 and the appointment was thus to lapse on or about 20<sup>th</sup> September 2021. His appointment was also expressly made in terms of **section 5(2) (e) of the Kenya Post Office Savings Bank Act**. That he diligently performed his duties with dedication until 27<sup>th</sup> November 2019 when the Chairman of the Interested Party's Board informed him of the revocation of his appointment by the Respondent through **Gazette Notice No. 10740, Vol. CXXI-No. 155** issued on 12<sup>th</sup> November 2019 with effect from 6<sup>th</sup> November 2019. He avers that the purported revocation of his appointment was malicious, irregular, illegal, null and void and that the Respondent violated his right to fair administrative action under **Article 47 of the Constitution** for reasons that:

- a) No notice was given to the Petitioner of the intention to revoke his appointment whatsoever;
- b) No reason was given to the Petitioner why his appointment was revoked;
- c) The Petitioner did not meet any criteria for removal from holding office as contemplated under Section 6(2) of the State Corporations Act;
- d) No hearing was conducted to establish the suitability or otherwise of the Petitioner to hold office;
- e) The Petitioner did not commit any offence or subjected to any disciplinary process whatsoever;
- f) The Petitioner did not fail to discharge his duties as per the terms of his contract;
- g) The Respondent abused his powers in purporting to revoke the appointment of the Petitioner.

He avers that his tribulations were occasioned by personal and political interests and due to the undesirable behaviour of state officers to appoint "their people" once they assume public office. That he was specifically victimized for the role he played in the recruitment of the new Chief Executive Officer to replace the outgoing one who did not want to exit the position despite having served her term and even attained the retirement age. That he had raised concerns about how an advertisement for the vacancy of the office of Managing Director of the Interested Party which had been occasioned by a Board Resolution was cancelled without the involvement of the Board. He contends that the cancellation of the said vacancy advertisement was meant to have the Managing Director stay in the office even after expiry of the six months' extension of her contract. Also, that the illegal revocation of his appointment was meant to intimidate the other Board Members from objectively and independently discharging their duties.

The Petitioner avers that the Respondent by innuendo inferred that he was unfit to hold public office and was suitable for removal which violates his right to a fair trial under **Articles 25(c)** and his right to be presumed innocent until proof of the contrary as under **Article 50(2) (a)**. That he was subjected to unjustified harassment, intimidation and mental torture that fell short of his dignity as a person and a senior officer/member of the commission contrary to **Article 28 of the Constitution**. That the Respondent purported to revoke only his appointment among all the board members who passed resolutions and thus discriminated against him contrary to **Article 27(1) of the Constitution** which provides for equal protection and benefit of the law. That he was further denied the enjoyment of the statutory provision governing any desired removal from office and that the Respondent victimizing him for seeking information on why the abovementioned vacancy advertisement had been cancelled was a violation of his freedom of expression under **Article 33(1)(a) of the Constitution**.

He further avers that the illegal process of revocation of his appointment irreparably injured his reputation as an international businessman

with integrity and was in violation of his fundamental right to fair labour practices as conferred under **Article 41 of the Constitution of Kenya**. That since the Respondent has infringed on his constitutional and legal rights, he is entitled to seek justice as enshrined under **Article 48** and that this Court should compensate him for damages to ensure justice is served.

In his Affidavit in Support of the Petition, the Petitioner avers that he is a public servant occupying a public office in terms of **Article 260 of the Constitution** and he refers this Court to *annexures marked MB 1 to MB 5 attached to the Petitioner's Notice of Motion dated 5<sup>th</sup> December 2019* being documents supporting his appointment to the Board of the Interested Party. He avers that the Respondent has further demonstrated overreach and impunity and is bent on running the affairs of the Interested Party like his home. He prays to this Court to grant the prayers sought in the Petition herein as prayed.

The Respondent filed a Replying Affidavit sworn on 16<sup>th</sup> March 2020 by the Permanent Secretary, National Treasury, Dr. Julius Muia who avers that the Petitioner's duties included chairing Board Sub-Committees and that for the period prior to 6<sup>th</sup> November 2019 when the Board did not have a substantive chairperson, the Petitioner chaired all board meetings with the approval of other board members. That the Petitioner however did not observe governance requirements including: exercising the highest degree of care and due diligence in the discharge of his duties; observing confidentiality as a Board member; promoting transparency and accountability at the Board; and balancing interests of stakeholders in the organization.

It is the affiant's averment that the Respondent revoked the appointment of the Petitioner as a board member of the Interested Party in order to protect the interests of the Bank and to balance the interest of the greater public. That the said revocation was the Respondent's exercise of powers bestowed upon his office under the Kenya Post Office Savings Bank Act read together with the State Corporations Act and was therefore within the law and on well-founded reasons. That there are therefore no reasons why the revocation of appointment of the Petitioner as a Board member should be quashed or interfered with in any way by the Court and avers that the same should be upheld in the interest of justice.

He contends that the Petitioner's allegations of malice, personal and political interests on the part of the Respondent are untrue, unfounded and have no legal basis and should be struck out of the pleadings. That the Petition herein does not disclose with precision the Constitutional issues to be determined by the court or the manner of violation of rights and thus lacks any legal foundation. He avers that the orders sought ought not to issue as the Petition is frivolous, vexatious, an abuse of the due process of this Court and that it should be dismissed.

The Interested Party filed a Replying Affidavit sworn on 26<sup>th</sup> May 2020 by its Chairman of the Board of Directors, Ntoros Baari Ole Senteu who deposes that the Interested Party opposes the Petition as it consists of material non-disclosures and misrepresentation of facts. He deposes that the Petitioner's appointment is at the discretion of the Government and the term is clearly spelt out in the appointment letter which the Petitioner executed an acceptance at page 2 thereof. He contends that the aforementioned discretion thus allowed the government to revoke the Petitioner's appointment without reference to him.

He avers that **Section 5(2) (e) of the Kenya Post Office Savings Bank Act** is clear that the three board members appointed by the minister shall not be employees of the Government and contends that with regards to membership of the interested party's board, the provisions of **section 6(1) and (2) of the State Corporations Act** do not apply because of the first word in **Section (6) (1) - "UNLESS"**.

The provision is as follows:

*"Unless the written law by or under which a state corporation is established or articles of association of the state corporation otherwise require, a Board shall, subject to subsection (4), consist of..."*

That the Petitioner has deceived this Court and/or has curiously failed to appreciate the nature and terms of his appointment because he is aware of the provisions of Section 5(2)(e) of the Kenya Post Office Savings Bank Act. That the Petitioner thus knows that the Board of the Interested Party is different from the board referred to in section 6(1) of the State Corporations Act. That the reason of the said misrepresentations and deception on the part of the Petitioner, he has come to this Court with unclean hands and the Petition should thus fail.

It is Ole Senteu's averment that the Board has to implement the directives issued by the Respondent because the Kenya Post Office Savings Bank Act charges the Respondent with full control over the strategic direction of the bank under **Section 5 (1)** which provides that:

*"The Bank shall be under the control of a Board of Directors which shall, subject to the direction of the Minister, take such steps as may be necessary and desirable for the proper management of the Bank and for the promotion of the objects and purposes of this Act."*

That **Section 6(1) of the Kenya Post Office Savings Bank Act** further explicitly charges the Respondent with the responsibility of appointing Postbank's Managing Director and is couched in mandatory terms as follows: *"The Minister shall appoint a Managing Director who shall be responsible for the implementation of the policy and savings programmes of the Bank as laid down by the Board from time to time."*

That Postbank is neither subject to the provisions of the Banking Act, Cap 488 nor supervision or regulation by the Central Bank of Kenya because it is a state corporation *sui generis*. That the Respondent's authority and statutory powers on the appointment of Postbank's Managing Director cannot be contradicted or overridden by the State Corporations Act, 'Mwongozo' or the Circulars issued by the Government from time to time as has previously also been held by this Court in **Nairobi ELRC Pet No. 103 of 2017 between The Petitioner, Okiya Omtatah v Kenya Revenue Authority Board of Directors, The Cabinet Secretary, National Treasury & John Karimi Njiraini**.

He avers that it is clear the Petitioner does not respect the Respondent or his directions given in the letter dated 23<sup>rd</sup> August 2019 which

justifies the Respondent's lack of confidence in the Petitioner. That the board only commenced the recruitment process on 5<sup>th</sup> November 2019 which is 74 days after 28<sup>th</sup> August 2019 when the Petitioner confirms receiving the Respondent's directive on the urgent recruitment of the Managing Director. That more particularly, the Petitioner countermanded the Respondent's directions on 23<sup>rd</sup> October 2019 when he called for a "Special Staff Board Meeting" whose agenda was contrary to the Respondent's directive and halted the recruitment process of the Managing Director in the guise that recruiting through a consultant would take longer considering any appeals that would arise from the tender process. Further, that neither he nor the outgoing Managing Director were invited for the meeting of 23<sup>rd</sup> October 2019 which should have been handled by the full Board of Directors. That the recent seamless recruitment of the new Managing Director which took a paltry 48 days confirms that the Petitioner had no lawful cause or legitimate reason to interfere with the first attempt to recruit the *Consultants for High Level Recruitment*.

The Chairman of the Interested Party's Board also avers that the operations and management of Postbank have been hampered by the impasse between the Petitioner and the Respondent and that it is in the best interest of the Interested Party that the same be resolved by enforcing the revocation of the Petitioner's appointment to the Board. That it is also just and fair that the Petitioner be ordered to refund all the allowances and emoluments he has received from 12<sup>th</sup> November 2019 - the date the revocation of his appointment was gazetted, to the date of this Court's judgement hereon since he obtained injunctive orders founded on misrepresentation of facts. He urges this Court to dismiss the Petition with costs to the Respondent and the Interested Party.

In a Further Affidavit sworn on 21<sup>st</sup> July 2020, the Petitioner avers that once appointed, only the president has power to revoke the appointment of a member of a board of a state corporation under **section 7(3) of the State Corporations Act** and that the Respondent did not therefore have power to revoke his appointment. The Petitioner believes there is no conflict whatsoever between the provisions of section 6 (1) of the State Corporations Act and section 5(2) of the Kenya Post Office Savings Bank Act and contends that such different composition of the board of directors does not oust the application of Section 6 (2) of the State Corporations Act. Further, that both the Respondent and Interested Party have not denied that the Petitioner neither committed nor was accused of committing any ground for removal or revocation of membership to the Board.

He avers that in a **Circular dated 9<sup>th</sup> May 2008 (annexed to further affidavit as MB 1)** to all the permanent secretaries and cabinet ministers on appointment of Chief Executive Officers, the Head of Public Service directed that;

*"in line with the Guidelines, Chief Executive Officers of State Corporations are selected competitively by the Boards themselves or through reputable recruitment agencies, in both cases the process should select the best three (3) candidates who will be recommended to the minister for appointment of one of them."*

That the Special Board Meeting convened by the Board on 23<sup>rd</sup> October 2019 was meant to review and consider the process of recruitment of the new Managing Director after noting that the process as overseen by the Managing Director was taking too long and that the Board by itself unanimously and collectively agreed to select the new Managing Director competitively. That this was in line with the Respondent's directive and furthermore, the Respondent never directed in his said letter dated 23<sup>rd</sup> August 2019 that the new Managing Director be recruited by the Recruiting Agencies. He denies that he countermanded any order by the Respondent noting that the Board ought to be independent and objective from micromanagement by the Respondent or else there would be no need for a Board if the Cabinet Secretary runs all the affairs of the State Corporation. He reiterates that questioning a procedural flaw does not constitute countermanding the directive of the Cabinet Secretary nor is it a ground for revocation of a board appointment.

The Petitioner avers that the Interested Party has therefore not demonstrated any viable ground for his removal as a member of the Board and has further not denied that there was no notice, hearing and reasons given by the Respondent prior to the purported revocation of the Petitioner's appointment.

### **Petitioner's Submissions**

The Petitioner submits that this Court is empowered under **Article 23(3) of the Constitution** to grant appropriate relief in any proceedings brought under **Article 22** where there has been violation of or threat of a violation of a fundamental right or freedom. That **Article 259(1)** provides that the Constitution shall be interpreted in a manner that promotes its purposes, values and principles; advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; permits the development of the law; and contributes to good governance. He cites the case of **Whiteman v Als of Trinidad and Tobago [1991] 1 L.R.C (Const.) 536 at pg 551** where the Privy Council held on the question of interpretation of the Constitution that:

*"the language of the Constitution falls to be construed, not in a narrow and legalistic way but broadly and purposively so as to give effect to its spirit and that this is particularly true of those provisions which are concerned with the protection of human rights."*

That the court in the case of **Joseph Mbalu Mutava v Attorney General & Another [2014] eKLR** observed that a key principle in interpreting the Constitution is the principle of harmonization: that all the provisions bearing upon a particular subject be construed as a whole, without any one provision destroying the other but each sustaining the other, as was held in the cases of **Olum & Another v Attorney General (1) [2002] 2 EA 508** and **Tinyefuza v Attorney General, Constitutional Appeal No. 1 of 1997**. It is the Petitioner's submission that as the court makes a determination as to the merit of this Petition, a most wholesome and liberal reading and interpretation of the Constitution should be employed. He urges this Court to find that there was violation of the Petitioner's fundamental human rights and freedoms as demonstrated at paragraphs 37 to 43 of the Petition.

The Petitioner submits that it is trite law that in assessing compensation for the violation of fundamental rights, the Court ought to be fair and reasonable in awarding damages and that Courts tend to award between Kshs.1.5 million to Kshs.2.5 million for every violation of a fundamental human right and freedom. That most recently, the court in **Robert K. Ayisi v Kenya Revenue Authority & Another [2018] eKLR** awarded the petitioner thereto Kshs.2 million as damages for violation of his right to dignity. The Petitioner prays that this Court fairly compensates him for every violation of a fundamental human right and freedom he has pleaded so as to uphold the rule of law and

prevent any future abuses and impunity by state officers and agencies.

He submits that the law on grounds for grant of Judicial Review is now fairly settled and that the Court in **Republic v Kenya Bureau of Standards & 3 others Ex parte Unifresh Exotics (K) Limited [2019] eKLR** restated these grounds from the case of **Pastoli v Kabale District Local Government Council & Others [2008] 2 EA 300 at pages 303 to 304** thus:

*"In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See **Council of Civil Service Union v Minister for the Civil Service [1985] AC2**; and also **Francis Bahikirwe Muntu and others v Kyambogo University, High Court, Kampala, miscellaneous application number 643 of 2005 (UR)**.*

*Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality...*

*Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: **Re: An Application by Bukoba Gymkhana Club [1963] EA 478 at page 479 paragraph "E"**.*

*Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non- observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (**Al-Mehdawi v Secretary of State for the Home Department [1990] AC 876**)."*

That the Respondent disregarded all the tenets of fair administrative action guaranteed under **Article 47 of the Constitution of Kenya** and **Sections 4 and 5 of the Fair Administrative Action Act**, by illegally and maliciously purporting to revoke his appointment and that the same should be quashed. That the court in **Kenya Bankers Association v Kenya Revenue Authority [2018] eKLR** emphasized the importance of fair administrative action as now being a constitutional right as opposed to a mere common law remedy and insisted on its strict adherence especially by state agencies. He submits that he never committed any of the acts contemplated by law that constitute the grounds for removal of a member of the board of a state corporation established in **Section 6(2) of the State Corporations Act** which provides that the said membership only ceases if the appointee –

- (a) serves the Minister with written notice of resignation; or**
- (b) is absent, without the permission of the Minister notified to the Board, from three consecutive meetings; or**
- (c) is convicted of an offence and sentenced to imprisonment for a term exceeding six months or to a fine exceeding two thousand shillings; or**
- (d) is incapacitated by prolonged physical or mental illness from performing his duties as a member of the Board; or**
- (e) conducts himself in a manner deemed by the Minister, in consultation with the Committee, to be inconsistent with membership of the Board.**

On the prayer for a permanent injunction to restrain the Respondent from appointing another person to replace him, the Petitioner refers to **Halsbury's Laws of England, Fourth Edition, volume 24, paragraphs 927 to 932** on the principles upon which the court considers before grant of permanent injunction being: a plaintiff (petitioner) must establish his right at law and establish that there is likelihood of further threatened invasion of his legal rights. The Petitioner submits that there is likelihood the Respondent might repeat the abuse and immediately appoint someone else in the Petitioner's position to circumvent the court order.

The Petitioner further submits that it is a paradox how the Respondent and Interested Party do not deny that Postbank is a State Corporation under the meaning accorded in **section 2 of the State Corporations Act** but still contend that the provisions of the State Corporation Act do not apply to it. He submits that this argument is *prima facie* untenable in law. That the Respondent has also not denied that the Petitioner is a public servant who is deemed an employee to the citizenry and thus subject to protection by the Constitution in terms of holding a public office and discharging the functions thereof.

He submits that the issues in the present Petition are substantially similar to those in the **Ronoh Sitenei and 4 Othrs v Pharmacy and Poisons Board & Others** which was relied upon by the Respondent and wherein the court stated:

*"...The Court considers that section 7(3) State Corporations Act is carefully drafted to ensure that Boards of State Corporations remain in place and a member's appointment thereto is revocable only by the President and within the confines of that provision's safeguards.*

*While making that finding the Court returns that the authorities cited for the 1<sup>st</sup> respondent and where section 51(1) of the Interpretation and General Provisions Act was held to apply are clearly distinguishable because they clearly did not relate to appointment and revocation of appointment with respect to a member of the board of management of a state corporation...*

To answer the 1<sup>st</sup> issue for determination, the Court returns that once the members of the 2<sup>nd</sup> Interested Party were appointed by the 1st respondent, the tenure of individual members as appointed could be cut short by revocation only under section 7(3) of the State Corporations Act. The Court returns that by revoking the appointments of the petitioners and the 3rd to 5th interested parties, the 1<sup>st</sup> respondent acted ultra vires section 7(3) of the State Corporations Act and Gazette Notice No. 6599 dated 01.07.2019 was clearly null and void. To that extent, the Court returns that the 1st interested party acted unreasonably in contravention of Article 47 of the Constitution. Further, as argued for the petitioners and the 2nd interested party, the 1st respondent thereby violated the petitioners' respective right to equality before the law as provided for in Article 27 of the Constitution. The petitioners have established that the protection of public officers under Article 236 was undermined. The revocation of the appointments is found ultra, vires, unconstitutional, null and void ab initio.

...The Court returns that the revocation being empty of necessary statutory authority and trapped by the constitutional violations as found, evaluation of its propriety in terms of considerations of procedural and merit or substance will serve no practical purposes as the purported revocation was null and void ab initio. Nevertheless, it is sufficient for the Court to return that in every removal of a public officer from the office held, Article 236 on due process applies and if the 1<sup>st</sup> respondent had authority in making the impugned revocation, the material on record shows that prior to the revocation there had been no prior notice, hearing, and reason given so that the tenets of fairness or due process or natural justice were clearly breached.

The Petitioner similarly submits that even if the Respondent had powers to revoke the appointment of the Petitioner to the board, he ought to have exercised such power fairly while observing the rules of natural justice pursuant to procedural fairness.

### **Respondent's Submissions**

The Respondent submits that the Kenya Post Office Savings Bank Act does not set criteria for appointment of a board member nor does it set ground for removal of a board member which is thus a discretionary power of the Minister. That in the circumstances, **Section 51(1 and 2) of the Interpretation and General Provisions Act** comes into play and stipulates:

***“Where by or under a written law, a power or duty is conferred or imposed upon a person to make an appointment or to constitute or establish a board, commission, committee or similar body, then, unless a contrary intention appears, the person having that power or duty shall also have the power to remove, suspend, dismiss, or revoke the appointment of, and to reappoint or reinstate, a person appointed in the exercise of the power or duty or to revoke the appointment, constitution or establishment of, or dissolve, a board, commission committee or similar body appointed, constituted or established, in exercise of the power or duty, and to reappoint, reconstitute or re-establish it.”***

He cites the case of **Fred A. Odhiambo v Attorney General & another [2013] eKLR** where Nduma J. held that on a proper reading of Section 6 (1) (b) of the Postal Corporation of Kenya Act, as read with Section 51 (1) and (2) of the Interpretation and General Provisions Act Cap 2 of the Laws of Kenya, it is the Minister who has the power to appoint and terminate the employment of the Postmaster General. Further, in **ELRC Petition No. 137 of 2019, Mr. Ronoh Sitienei & 4 others v Pharmacy & Poisons Board; Attorney General & 5 other interested parties**, Ongaya J. held that **section 7(3) of the State Corporations Act** provides for circumstances where the tenure of a member of the Board of Management of a state Corporation was to be cut short prior to lapsing of the prescribed tenure and that this was for good order of running state corporations in the national interest. The Respondent submits that he revoked the appointment of the Petitioner in the interest of the bank and the public and that he had no malice in doing so.

Further, that even though they pleaded the Petitioner's failure to adhere to governance requirements which was contrary to the **Code of Governance for State Corporations** anchored under inter alia **Articles 73 and 232 of the Constitution**, the same has not been rebutted by the Petitioner.

The Respondent submits that the Petitioner was in the category of special employment within the public service that would not be deemed employment within the meaning of the Employment Act as was held in **Tom Luusa Munyasya & Another v Governor, Makueni County & Another [2014] eKLR**. Further, the appointment of the Petitioner was clearly tenable at the discretion of the Government and he did not therefore enjoy protected term in office. That the provisions of the Employment Act which stipulate reasons for termination does not apply to board members. He submits that the revocation of appointment of the Petitioner was reasonable, justified and within the law and that the Petitioner has not discharged the burden of proof that the revocation was arbitrary and unreasonable.

He urges the Court to uphold the revocation of the appointment of the Petitioner relying on the case of **County Government of Nyeri & another v Cecilia Wangechi Ndungu [2015] eKLR** where the Court of Appeal observed that the removal of a County Executive Officer entails reasonableness on the part of the Governor in exercising this power. The said Court relied on **David Dunsmuir v New Brunswick (2008) 1 S.C.R 190** where the Supreme Court of Canada while discussing reasonableness observed: -

*“47. Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness; certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions... A court conducting a review of reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.”*

It is the Respondent's submission that the Petitioner in this case does not specifically and precisely show how each of the provisions which he alleges were violated, were indeed violated. That the court in the case of **Anarita Karimi Njeru v The Republic (1976-1980) 1 KLR 1272** held that a constitutional petition must state, with reasonable precision, the provisions of the Constitution which are alleged to have been contravened and the manner in which they are infringed. That in **Mumo Matemu v Trusted Society of Human Rights Alliance**

(2013) eKLR, the High Court emphasized that the test is a substantive one and inquires whether the complaints against Respondents in a constitutional petition are fashioned in a way that gives proper notice to the Respondents about the nature of the claims being made so that they can adequately prepare their case. The Respondent thus submits that the Petition should be dismissed with costs as there is no cause of action against him and further, there is no violation of the Petitioner's constitutional rights by the Respondent as alleged.

### Analysis and determination

The issues for determination are: -

- i). Whether the Petitioner is a public officer by virtue of his membership to the Board of Postbank (Interested Party).
- ii). Whether the Respondent has the statutory authority and power to revoke the appointment of the Petitioner as was done by Gazette Notice No. 10740, Vol. CXXI-No. 155.
- iii). Whether the Respondent violated the Petitioners' fundamental rights and freedoms as protected under Articles 25, 27, 28, 33, 41, 47, 48, & 50 of the Constitution.
- iv). Whether the Petitioner should be granted the reliefs and orders sought in his Petition.

It is not disputed that the Interested Party is a State Corporation. To that extent, the State Corporations Act Cap 446 as read together with the Kenya Post Office Savings Bank Act Cap 493B are applicable in this case. Under **Article 260 of the Constitution**, a "public officer" is defined as any State officer; or any person, other than a State Officer, who holds a public office. **Article 232(2) of the Constitution** provides that the values and principles of public service apply to public service in all State organs in both levels of government and all State corporations. Based on these constitutional provisions, it is clear that the Petitioner herein is a public officer because he is a member of the Board of Postbank which is a State Corporation. In the case of **Okiya Omtatah Okoiti v Attorney General & 2 Others and Francis K. Muthaura & 5 Others [2019] eKLR** the Court observed:

*"... The Court finds that the chairperson and the members of the Board of the KRA (just like the chairpersons and members of other state corporations or boards of other public bodies) are public officers bound by applicable constitutional and statutory provisions and lawful policies and practices that govern public employment. The Court holds that in the constitutional framework under the Constitution of Kenya 2010, the public officers despite their designation or position held in the service, they are all in public or state service and governed by specific applicable constitutional and statutory provisions and lawful policies and practices – so that the variance in positions held or designation does not render any of the public or state officers to escape their being servants of the people, employed by the people, within such applicable constitutional and statutory provisions, and, lawful policies and practices. Thus the provisions of Article 73 as read with Article 80 (c), and, Article 232 apply accordingly. In view of that finding, the dispute in the present petition is about employment within the complex framework of public service or public sector employment. The substantive law applicable to such employment ranging from declaration of vacancy, recruitment and selection procedures, appointment procedure, and termination procedure would be the applicable public service constitutional and statutory provisions and such other lawful policies and practices to the extent that they prescribe minimum or better terms and conditions of service than those envisaged in the Employment Act, 2007."*

The foregoing settles the first issue for determination.

On whether the Respondent has power to revoke the Petitioner's appointment, I agree with the finding of the Court in **Mr. Ronoh Siteni case (supra)**, that section 7(3) of the State Corporations Act is the legitimate and the specific manner of dealing with a situation where the tenure of a member of a board of State Corporation is to be revoked. In that matter the Court further held that Section 7(3) of the State Corporations Act is carefully drafted to ensure that Boards of State Corporations remain in place and a member's appointment thereto is revocable only by the President and within the confines of the provisional safeguards. **Section 7(3) of the State Corporations Act** provides:

**Notwithstanding the provisions of any other written law or the articles of association establishing and governing a Board, the President may, if at any time it appears to him that a Board has failed to carry out its functions in the national interest, revoke the appointment of any member of the Board and may himself nominate a new member for the remainder of the period of office of that member or he may constitute a new Board for such period as he shall, in consultation with the Committee, determine.**

On the other hand, the Kenya Post Office Savings Bank Act does not provide for the revocation of appointment of the members of the Board. It is thus the provisions of Section 6(2) and 7(3) of the State Corporations Act that guide the removal from office of members of the Board of the Interested Party.

It is the Respondent's case that the Petitioner's appointment was revoked "to protect the interests of the Bank and further balancing the interest of the great public". This averment is not supported by any evidence. No grounds were given to the petitioner nor was he asked to respond to any charges against him before his appointment was revoked by Gazette Notice. He was only informed about the revocation of the appointment after the gazetting thereof.

To that extent, the Respondent acted unreasonably in contravention of **Article 47 of the Constitution** and **Section 4 of the Fair Administrative Action Act** which provide that a person likely to be affected by administrative action must be given prior notice, the reasons for and an opportunity to respond to the said reasons before the action is taken.

**Article 236 of the Constitution** also provides for due process of law in the removal of a public officer from office. As already observed above, the Petitioner was not subjected to any due process before the revocation of his appointment.

I however do not find any proof of breach of the petitioner's fundamental rights and freedoms under Articles 25, 33, 41 and 50. Specifically, Article 41 is not applicable to the Petitioner as he is not an employee in the manner contemplated therein.

The respondent and Interested Party pleaded that the Petitioner has not demonstrated with specificity the violation of his fundamental rights and freedoms. I do not agree. The Petitioner has demonstrated at *paragraphs 37 to 43 of the Petition* with reasonable precision, the provisions of the Constitution which are alleged to have been contravened and the manner in which they are infringed. I also do not agree with the Petitioner that his right to fair trial and presumption of innocence in specific were violated as there was no trial that took place for this Court to deduce that the said rights were violated.

### **Reliefs**

The Petitioner prays for a declaratory order for compensation for every violation of a fundamental human right and freedom that he has pleaded and further prays for general and punitive damages for the illegal revocation of his appointment. He however has only submitted for a fair and reasonable compensation. In the case of **Nyagwa Meshack Onindo & 5 others v Teachers Service Commission & 2 others [2020] eKLR**, the court found that the petitioners and claimants did not prove violation of the rights and freedoms under some of the constitutional provisions they had pleaded and went on to award the petitioners Kshs.300,000 as general damages for violation of their rights under Articles 41 and 47 of the Constitution.

Having found the revocation of the Petitioner's membership to the Board of the Interested Party to be in violation of the Constitution, the Fair Administrative Action Act and the State Corporations Act, I make the following orders –

1. A declaration be and is hereby issued that the 1<sup>st</sup> Respondent has violated the petitioner's fundamental rights and freedoms as protected under Articles 47 and 236 of the Constitution and Section 4 of the Fair Administrative Action Act.
2. An order of certiorari be and is hereby issued to quash the Gazette Notice No. 10740, Vol. CXXI-No. 155 issued on 12<sup>th</sup> November 2019 by the respondent revoking the appointment of the petitioner as a member of the Board of the Interested Party with effect from 6<sup>th</sup> November 2019.
3. An order of Permanent Injunction be and is hereby granted restraining the Respondent, his representatives, employees, servants and/or agents or anybody working under or for him from purporting to appoint any other person to replace the petitioner as a member of the Board of the Interested Party unless the Petitioner's term expires or he is removed in accordance with the relevant provisions of the law.
4. With respect to prayer B, the Petitioner is awarded general damages in the sum of **Kshs.300,000.00** to paid by the respondent.

I find no justification for the award of punitive damages as the petitioner has not proved the conditions for award thereof.

The Responded shall pay the Petitioner's costs of this suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 18<sup>TH</sup> DAY OF SEPTEMBER 2020**

**MAUREEN ONYANGO**

**JUDGE**

### **ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**MAUREEN ONYANGO**

**JUDGE**