



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO. 114 OF 2019

(Before Hon. Justice Hellen S. Wasilwa 16th September, 2020)

PROSCOVIA VITSENGWA.....PETITIONER

VERSUS

THE CHAIRPERSON KENYA

RAILWAY CORPORATION BOARD.....1st RESPONDENT

THE KENYA RAILWAY CORPORATION.....2nd RESPONDENT

THE MANAGING DIRECTOR

KENYA RAILWAY CORPORATION.....3rd RESPONDENT

PUBLIC SERVICE COMMISSION.....4th RESPONDENT

STATE CORPORATIONS

ADVISORY COMMITTEE.....5th RESPONDENT

THE ATTORNEY GENERAL.....INTERESTED PARTY

RULING

1. Before this Court, is the 1st, 2nd and 3rd Respondent's Application dated 29/5/2020 seeking the following orders:-

a. Spent

b. The entire Petition be dismissed with costs for failing to comply with the Court order of 3/12/2019 directing the Petitioner to file written submissions, the Petition and the application dated 2/7/2019 and 28/8/2019, within 30 days of 3/12/2019.

c. In the alternative, the ex parte interim order issued on 3/9/2019 and 17/12/2019 be discharged.

d. Costs.

2. The Application is founded on the grounds set out therein and the Supporting Affidavit of David Njogu sworn on 29/5/2020. It has been opposed by the Petitioner's the Replying Affidavit sworn on 18/7/2020.

The Applicant's Case

3. On 3/9/2019 and 17/12/2019 *ex parte* orders were issued, suspending the recruitment of key personnel including engineers and technical managers from operating and managing railways. It is averred that the said orders are denying the 2nd Applicant the critical capacity to implement the following development projects entrusted to it by the national government:-

a. Rehabilitation of Thika-Nanyuki Railway line.

b. Rehabilitation of Nairobi Commuter Railway lines and stations.

c. Rehabilitation of Nairobi-Konza Railway line.

d. Rehabilitation of Motor Vessel Uhuru and the Railway Infrastructure of Kisumu Port.

e. Purchase and delivery of diesel multiple units.

f. Operation of Mombasa-Suswa SGR railway for passengers and freight services.

g. Implementation of executive order No. 1 appointing the Corporation as the Coordinating body of public transport in Nairobi.

h. Implementation of Nairobi Railways City Project.

4. The Applicants aver that the *ex parte* orders have lasted for 8 months contrary to rule 17 (4) of the Employment and Labour Relations Act which provides that *ex parte* orders can only be issued once for not more than 14 days and cannot be extended except by consent.

5. It is averred that the Petitioner has failed to comply with the directions for dispensing with the petition and has also failed to take steps to prosecute the same. For instance, she failed to file and serve written submissions before 30/1/2020, applied for an adjournment on 17/2/2020 thereby frustrating the hearing of the petition, and did not file any written submissions thereafter.

6. The Applicants aver that the above enumerated projects are essential in creating countrywide efficiency in public transport. They contend that the petition has no chance of succeeding since the allegations of impropriety, discrimination and victimization are not supported by any documentary evidence. It is their position that the Court ought to take into account the colossal economic losses occasioned to the country.

7. The Applicants aver that the Petitioner is misusing the Court process to sabotage key projects and embarrass certain officers. It is their position that the irregularities can be addressed by declaring the recruitment unlawful, surcharging the person liable for the said recruitment and awarding monetary compensation for violation of employment rights. They conclude by stating that the restraining orders are not serving any lawful purpose in law or reality.

The Petitioner/Respondent's Case

8. It is the Petitioner/Respondent's view that the Applicant is using a back door to have the petition dismissed. She avers that it is a matter of record that on 11/12/2019, this Court was moved for issuance of contempt orders upon discovery that the Respondent was acting in contempt of the orders issued on 3/9/2019.

9. It is averred that the application was heard, the 3rd Applicant found guilty of contempt and directed to appear in person on 11/3/2020 for sentencing. The Applicants filed an application for stay and on 9/3/2020, were granted stay of 21 days with a further mention set for 30/3/2020; for giving further directions.

10. The Petitioner/Respondent contends that none of the orders granted herein have been set aside, vacated or appealed; and avers that the Respondents have continuously acted in total disregard of Court orders.

11. The Petitioner/Respondent avers that the Applicants have approached this Court with unclean hands. Lastly, she avers that the petition is one of public interest with overwhelming chances of success, and contends that she intends to prosecute it to its logical conclusion. She urged this Court to dismiss the application and make directions as to the sentencing of the 3rd Applicant.

12. The parties agreed to dispense with the Application by way of written submissions, with only the Applicants filing their submissions.

The Applicant's Submissions

13. It is the Applicants' submissions that it is in the public interest that the infrastructure projects outlined above be implemented promptly and efficiently, and urges the Court to take judicial notice of that. They rely on the Court of Appeal case of **Kenya Human Rights Commission & Another vs. Attorney General & 6 Others [2019] eKLR** which defined public interest as:-

“The general welfare of the public that warrants recognition and protection, something in which the public as a whole has stakes.”

14. The Applicants submit that the orders restraining recruitment are disproportional to the alleged irregularity as they are unnecessarily drastic for the mere prevention of an irregularity. It is their position that the orders ought to restrain the irregularity not the activity. They suggest that for proportionality, the lawful activity of recruiting personnel should be allowed to continue with conditions stipulated within the law that prohibit the speculative allegations of irregularities.

15. The Applicants further submit that the alleged constitutional violations can be remedied by damages and rely on the case of **Helmut Rame vs. Republic [2015] eKLR**, to support this position.

16. Lastly, the Applicants submit that the Petition ought to be struck out for being an abuse of court process as the Petitioner as not filed her

submissions as required, and failed to explain the delay.

17. I have consider the averment of the Parties herein. As submitted by the Respondents after the initial orders were granted, the Applicants were found to be in contempt of Court and as such, they were scheduled to appear in Court for further directions on 30/3/2020 which fact was interfered with due to Covid 19 and downscaling of Court operations.

18. In my view, the application in Court is therefore premature as what should 1st be finalized is the sentencing of the Contemnor.

19. I therefore order that the issue of contempt be dispensed with before further directions from this Court.

20. Costs in the Petition.

Dated and delivered in open Court this 16th day of September, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Ongaya holding brief Mukira for Petitioner – Present

Ondego holding brief Ndegwa for 1st, 2nd and 3rd Respondents