



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION 129 OF 2020 (EO25 OF 2020)

(Before Hon. Justice Hellen S. Wasilwa on 22nd October, 2020)

LAW SOCIETY OF KENYA.....PETITIONER/APPLICANT

BETWEEN

THE CABINET SECRETARY

FOR TOURISM AND WILDLIFE.....1ST RESPONDENT

THE TOURISM

REGULATORY AUTHORITY BOARD.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

AND.

KEVIN MUASYA.....1ST INTERESTED PARTY

ALAIS LENANA MOMOI.....2ND INTERESTED PARTY

ISAAC MUCHIRI NJANGU.....3RD INTERESTED PARTY

PAULINE NJOROGE.....4TH INTERESTED PARTY

NAJMA ISMAEL.....5TH INTERESTED PARTY

RULING

1. Before this Court is the Petitioner’s Application dated 11/8/2020 seeking the following orders–

- a. THAT the Application herein be certified as urgent and service of the same be dispensed with in the first instance for purposes of prayer two. [Spent]**
- b. THAT the Application herein be admitted for hearing during the Court’s summer vacation for the year 2020. [Spent]**
- c. THAT pending the hearing and determination of this Application inter partes, an interim Order be and is hereby issued suspending the Gazette Notice Vol CXXII - NO. 150 No. 5462 dated 7/8/2020 notifying of the appointment of the Interested Parties herein as members of the Tourism Regulatory Board for a period of three (3) years effective from 7/8/2020.**
- d. THAT pending the hearing, determination and final disposal of this Petition an interim order be and is hereby issued suspending the Gazette Notice Vol CXXII - NO. 150 No. 5462 dated 7/8/2020 notifying of the appointment of the Interested Parties herein as members of the Tourism Regulatory Board for a period of three (3) years effective from 7/8/2020.**
- e. THAT pending the hearing, determination and final disposal of this Petition, temporary order of injunction be and is hereby issued prohibiting the Respondents and the Interested Parties either by themselves, their agents and/or any other person(s)**

howsoever from acting and/or giving effect to the Interested Parties herein as members of the Tourism Regulatory Board for a period of three (3) years effective from 7/8/2020.

f. THAT the Honourable Court be pleased to issue an order directing the 1st and 2nd Respondents to avail to the Petitioners all the information and any documents leading to the appointment of the Interested Parties herein as members of the Tourism Regulatory Board for a period of three (3) years effective from 7/8/2020.

g. THAT the costs of this Application be borne by the Respondents.

2. The Application is supported by the grounds set out therein together with the Supporting Affidavit of Collins Odhiambo sworn on 11/8/2020. The 1st Respondent has opposed the Application vide the Replying Affidavit of Hon. Safina Kwekwe Tsungu CBS, sworn on 24/8/2020 while the 5th Interested Party has opposed the Application vide her Replying Affidavit sworn on 4/9/2020.

The Applicant's Case

3. The application seeks to question the validity of appointing the Interested Parties as members of the Tourism Regulatory Authority Board vide Gazette Notice Vol. CXXII – NO 150 No. 5462, save for the 4th Interested Party whose appointment was revoked and the 5th Interested Party appointed in her place. The Applicant avers that the procedure and the manner in which the Interested Parties were appointed did not comply with the substantive and procedural requirements for public service appointments as outlined in the Constitution and statute.

4. It is the Applicant's case that the 1st Respondent's decision to handpick and appoint the Interested Parties is a nullity in law and inconsistent with the express provisions of articles 1, 2, 3 (1), 10 (2), 27 (1) & 2, 47, 73 (2) (a), 129, 152 (4) (a) and 232 (1) (d) (f) (g) & (i) of the Constitution and section 8 (1) (g) of the Tourism Act 2011 which require an open, fair, competitive, merit-based and inclusive processes of recruiting and appointing individuals into public offices, taking into account their expertise in tourism and tourism related disciplines.

5. In addition, the said appointments were not subject to mandatory processes of public participation which includes advertising vacancies, publishing lists of all applicants and shortlisted candidates, holding interviews and announcing successful candidates in an open and transparent manner.

6. The Applicant avers that the constitutional contraventions infringed on its legitimate expectation that the 1st Respondent would conduct its affairs constitutionally and any public office appointments would conform to the imperative substantive and procedural requirements as envisioned in the constitution and statute.

7. It is the Applicant's case that if the orders sought are not granted, the public will suffer irreparable harm. In particular, the Interested Parties will incur expenditure, make decisions and policies that bind the public yet they are unqualified and hold the positions unconstitutionally. This will prejudice the public as well as public interest.

8. It is the Petitioner's position that by virtue of the definitions of public service, public office, public officer and public body under article 260 of the Constitution and due to the fact that the members of the Tourism Regulatory Authority Board are remunerated from public coffers, they are public officers hence their recruitment is subject to the provisions relating to public officers. It is the Applicant's further position that the Tourism Act does not exclude the implementation of the constitutional and statutory provisions relating to public service appointment.

9. It is the Applicant's case that the provisions of Section 8 (3) of the Act are in addition to and not in exclusion of the applicable constitutional tests and standards on public service employment as the same requires approval from the National Assembly before the six members are appointed.

10. The Applicant avers that the recruitment process was not competitive, did not consider regional balance or gender parity neither were the names tabled before Parliament for approval. In the Applicant's view, the constitutional and statutory provisions regarding recruitment in the public service was necessary to avoid *inter alia* bribery, nepotism, tribalism, favoritism, incompetence, non-inclusivity, unfair competition, discrimination that bedevil public appointments.

11. It is the Applicant's case that with the high rate of unemployment, the 1st Respondent had the duty to enhance access to employment for youths, minorities and marginalized groups. The Applicant urges that since the 1st Respondent has failed to demonstrate that the impugned appointments met the required constitutional and statutory threshold, the Application should be allowed.

The Respondents' Case

12. The Respondents contend that this Court lacks the jurisdiction to hear and determine matters pertaining to directors who are owners or representatives of the owners of the legal entity and not employees. The Respondents further contends that the appointments were done in line with Section 8 (1) (g) of the Tourism Act.

13. They aver that the Statute Law (Miscellaneous Amendments) Act 2014 deleted the introductory portion to the paragraph of Section 8 (1) (g) of the Tourism Act 2011. They further aver that Section 8 (3) relied upon by the Applicant was repealed by the same Act. They urge this Court to consider the principle of *lex specialis derogate legi generali* which provides that the law governing specific subject matters overrides a law which only governs general matters.

14. It is the Respondents' contention that the Applicant has not met the threshold for granting conservatory orders as outlined in the case of

Giella vs. Cassman Brown & Company Limited [1973] EA 358. It is their position that the Applicant has failed to demonstrate the irreparable damage it stands to suffer. Further, they aver that the balance of convenience tilts in their favour since granting the injunction order will be injurious to the Respondents rather than failing to grant the same. They urged this Court to allow them to implement the impugned Gazette Notice.

15. It is the Respondents' contention that the Applicant has not demonstrated the illegality, the unreasonableness, irrationality of appointing the Interested Parties neither has it demonstrated the Interested Parties' incompetencies. The Respondents urge this Court to consider public interest in making a determination on whether to grant the conservatory orders. They urged this Court to dismiss the Application for being frivolous, vexatious and an abuse of the Court process.

5th Interested Party's Case

16. The 5th Interested Party contends that her appointment was through a nomination by the 1st Respondent pursuant to Section 8 (1) (g) (ii), being an expert in tourism matters. She further contends that she has met the academic qualifications for appointment as a member.

17. It is the 5th Interested Party's case that she has a career in journalism which has prepared her to serve in the Board within the framework of the Constitution, statute, policies and practices applicable in the public service. This is because she is well positioned to use her marketing skills in marketing, to promote tourism. She also avers that through her journalist research and experience in tourism industry, she is capable of formulating policies that promote tourism.

18. She contends that being a qualified citizen, she has the legitimate expectation to be nominated as a member of the Board. She also contends that she has met the integrity test as required by Articles 10 and 73 (2) of the Constitution and Section 36 (1) of the Public Service Act 2017 as evidence in her curriculum vitae.

19. In light of the foregoing, she avers that the Petitioner's allegations that she does not meet the constitutional and statutory requirements in order to be appointed as a member of the Board is unsubstantiated hence cannot hold.

The Applicant's Rejoinder

20. The Applicant filed a Rejoinder in response to the Respondents' and the 5th Interested Party's Replying Affidavits which majorly reiterated the averments made in its Application and Supporting Affidavit.

21. In response to the Respondents' Replying Affidavit, the Applicant contends that this Court has the jurisdiction to hear this matter by dint of Section 12 (2), (3) of the Employment and Labour Relations Court Act and Articles 159, 160 (1), 162 (2) (a), 165 and 258 of the Constitution which grant this Court exclusive, original and appellate jurisdiction to hear and determine all employment and labour relations matters. The Applicant further contends that the issue of appointment falls squarely on matters relating to employment and labour relationship which is within the jurisdiction of this Court.

22. The Applicant avers that the maxim of *lex specialis derogate generali* is inapplicable in this instance as the Respondents failed to appreciate that the constitutional requirements on appointment of public officers was provided for by the Constitution, the Public Service (Values and Principles) Act, the Fair Administrative Action Act and the Leadership and Integrity Act; and not Statute Law (Miscellaneous Amendments) Act 2014 or the Tourism Act.

23. It is the Applicant's case that this Court has the power to grant conservatory orders or interim orders of protection pursuant to rule 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 as read together with Section 12 (3) of the Employment and Labour Relations Court Act. It is therefore their contention that if the orders sought are not granted, the petition will be rendered nugatory as there is a likelihood that the Board will make decisions that may be irreversible and contrary to public interest.

24. The Applicant avers that the balance of probability tilts in its favour as the Respondents failed to comply with the law. No advertisements or interviews were done, neither is the selection criteria or the appointees' qualifications known.

25. In response to the 5th Interested Party's Replying Affidavit, the Applicant contends that the process of appointment is what is in dispute and not the 5th Interested Party's qualifications. This notwithstanding, the Applicant contends that the 5th Interested Party has only demonstrated her qualifications and experience in journalism and not tourism related matters.

26. The Application was disposed of by way of written submissions with only the Applicant and the Respondents filing their written submissions. There is no record of the Interested Parties submissions in the Court file or the e-filing portal.

The Applicant's Submissions

27. The Applicant submits that this Court has the jurisdiction to hear and determine this matter pursuant to the provisions of Article 162 (2) (a) of the Constitution and Section 12 (1) (a) and (2) of the Employment and Labour Relations Court Act. The Applicant relies on the case of **Abdikadir Suleiman vs. County Government of Isiolo & Another [2015] eKLR** which held that this Court has the jurisdiction to handle matters relating to the employment relationship including enforcement of fundamental rights and freedoms under Articles 22 and 258 of the Constitution.

28. It is the Applicant's submissions that the executive order is unconstitutional and an impediment to the rule of law as the board members

were handpicked contrary to constitutional and statutory provisions.

29. The Applicant has relied on the cases of **Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others [2014] eKLR** and **Nubian Rights Forum & 2 Others vs. Attorney General & 6 Others; Child Welfare Society & 8 Others; Centre for Intellectual Property & Information Technology [2019] eKLR** to outline the following as the conditions that must be met before conservatory orders can be issued:-

a. An applicant must demonstrate an arguable prima facie case with a likelihood of success, and to show that in the absence of the conservatory orders, he/she is likely to suffer prejudice.

b. Whether the grant or denial of a conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights.

c. Whether failing to grant an interim conservatory order will render the petition or its substratum nugatory.

d. Whether public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order.

30. The Applicant submits that it has met the foregoing threshold and made out a *prima facie* case to warrant an award of interim orders in order to secure the substratum of the suit herein. The Applicant further submits that public interest lies in favour of preserving and protecting constitutional values and interests which might be jeopardized if the orders sought are not granted. Finally, the Applicant submits that failing to grant the reliefs sought will cause irreparable harm as the substratum of the suit will be rendered nugatory.

The Respondent's Submissions

31. The Respondents submit that the Statute Law (Miscellaneous Amendments) Act 2014 deleted the introductory portion to the paragraph of section 8 (1) (g) of the Tourism Act 2011. Further that section 8 (3) as relied upon by the Applicant was repealed by the same Act. It is therefore their submissions that the Petitioner has not come to Court with clean hands by relying on repealed provisions which clearly demonstrates that its case has no chance of success.

32. The Respondents submits that the appointment of the Interested Parties was lawful and done in accordance with section 8 (1) (g) of the Tourism Act 2011. It is further submitted that the Applicant has not challenged the constitutionality of the section but has instead relied on constitutional provisions which are of general application. They rely on the case of **Kenya Union of Domestic Workers, Hotels, Education Institutions & Hospitals, Workers Union vs. Kenya Revenue Authority & 3 Others [2014] eKLR** where it was held that every statute enjoys a presumption of constitutionality and the Court is entitled to presume that the legislature acted in a constitutional and fair manner unless the contrary is proved by the Petitioner.

33. The Respondents conclude by submitting that the Applicant is not entitled to any of the reliefs sought and contend that the reliefs sought should not be granted at an interlocutory stage.

34. I have considered the averments and submissions of the Parties herein. The issues for this Court's consideration are as follows:-

1. Whether this Court has jurisdiction to handle this Application and Petition.

2. Whether the Applicant has an arguable case with the likelihood of success to enable this Court to grant orders sought.

Jurisdiction

35. The issue of this Court's jurisdiction has been discussed and settled in many cases. This Court's jurisdiction is drawn from Act 162(2) (a) of the Constitution of Kenya and Section 12 of the Employment & Labour Relations Act which has settled the fact that this Court can handle all matters relating to employment and labour relations.

36. In **Abdikadir Suleiman vs County Government of Isiolo & Another** (supra), this issue was settled with the holding of the Court that this Court has jurisdiction to handle all matters relating to employment including enforcement of Fundamental Rights and Freedoms under Article 22 and 258 of the Constitution.

37. The current Petition relates to appointments in government and the appointment is remunerative. Because of the aspects of remuneration, an employment aspect is presumed and this Court therefore has jurisdiction to handle the matter. The submission that this Court has no jurisdiction therefore has no merit.

Prima facie case

38. In order for this Court to grant the injunctive reliefs sought, it must be established that the Applicant has demonstrated the existence of a *prima facie* case with the likelihood of success. The Applicant must also establish that they stand to suffer irreparable harm if the orders are not granted. It must also be demonstrated that the balance of probability tilts in its favour.

39. In trying to demonstrate the above perimeters, the Applicant has submitted that the Interested Parties were appointed without an open, competitive, merit based recruitment process. The Applicants also aver that if the orders sought are not granted, the Interested Parties will proceed and make decisions which can cause irreparable harm as the substratum of the suit shall be rendered nugatory.

40. The Respondents have submitted that the recruitment of the Interested Parties was done above board and that the law the Applicants seeks solely on was repealed and the Applicants came to Court with unclear hands.

41. In this application, the Respondent did not however demonstrate how the provision of Section 8 of The Tourism Act was adhered to. It remains to be demonstrated that the manner in which the Interested Parties were appointed.

42. The issue of the Interested Parties qualifications also remains to be established. It is therefore my finding that indeed there are arguable issues yet to be proved.

43. It would be absurd for this Court to make a finding at this point that the Interested Parties should continue serving as appointed unless the issue surrounding their appointments is cleared.

44. If the orders sought are granted, the substratum of this application might be destroyed. The balance of probability therefore tilts in favour of granting interim injunctive reliefs. I therefore confirm the interim orders granted suspending the Gazette Notice appointing the Interested Parties to serve as Board Members pending the hearing and determination of this Petition.

45. Costs in the Petition.

Dated and delivered in Chambers via zoom this 22nd day of October, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Wangechi for Respondent – Present

Oruenjo for 5th Interested Party – Present

Manwa for Applicant – Present