



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION 138 OF 2019

(Before Hon. Lady Justice Maureen Onyango)

IN THE MATTER OF: ARTICLES 1, 2, 3(1), 4(2), 10, 19, 20, 21, 22, 23, 24, 27, 41(1), 47, 48, 50(1), 129, 153(4)(a), 156, 159, 165, 232, 234, 258 AND 259 OF THE CONSTITUTION OF KENYA.

IN THE MATTER OF: THE ALLEGED VIOLATION OF ARTICLES 3(1), 10, 19, 20(1), 27, 41(1), 47, 73, 129, 153(4)(a), 232, 234 AND 259(1) OF THE CONSTITUTION

IN THE MATTER OF: THE ALLEGED VIOLATION OF SECTIONS 11, 12, AND 81 OF THE PUBLIC SERVICE COMMISSION ACT 2012; SECTIONS 4, 5(2)(c) AND (h), AND 10(1) OF THE PUBLIC SERVICE (VALUES AND PRINCIPLES) ACT NO. 1A OF 2015; AND SECTION 4(1) OF THE FAIR ADMINISTRATIVE ACTION ACT 2015

IN THE MATTER OF: THE LEGISLATION ANTICIPATED UNDER ARTICLE 234(2)(a) AND THE FUNCTIONS AND POWERS OF THE PUBLIC SERVICE COMMISSION AND THE CONSTITUTIONAL VALIDITY OF PARLIAMENT’S CAPACITY TO DELEGATE TO ANY BODY OR AUTHORITY THE FUNCTIONS AND POWERS OF THE PUBLIC SERVICE COMMISSION CONTRARY TO ARTICLE 234(5) OF THE CONSTITUTION.

IN THE MATTER OF: THE CONSTITUTIONAL VALIDITY OF APPOINTMENTS TO THE BOARD OF THE COMMUNICATIONS AUTHORITY OF KENYA MADE DIRECTLY BY THE CABINET SECRETARY FOR INFORMATION, COMMUNICATIONS

BETWEEN

OKIYA OMTATA OKOITI.....PETITIONER

VERSUS

THE CABINET SECRETARY, FOR INFORMATION,

COMMUNICATION AND TECHNOLOGY.....1ST RESPONDENT

PUBLIC SERVICE COMMISSION.....2ND RESPONDENT

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

AND

MAHMOUD MOHAMED NOOR.....1ST INTERESTED PARTY

PAUL MURAGURI MUREITHI.....2ND INTERESTED PARTY

JACKSON KIPROTICH KEMBOI.....3RD INTERESTED PARTY

LAURA CHITE.....4TH INTERESTED PARTY

COMMUNICATIONS AUTHORITY OF KEN.....5TH INTERESTED PARTY

RULING

Vide Gazette Notice No. 6657 of 18th July 2019 published on 19th July 2019 in Special Issue of the Kenya Gazette Vol. CXXI-No. 91, the 1st Respondent announced that he had appointed the 1st, 2nd, 3rd and 4th Interested parties to be members of the Board of the Communications Authority of Kenya, for a period of 3 years, effective immediately.

The positions were not advertised and there was no public participation in their appointment. This was contrary to the Ruling in ***Okiya Omtatah Okoiti & 4 Others vs. The Hon. Attorney General & 5 Others; HC Petition 163 of 2019*** delivered on 12th July 2019, directing the 1st Respondent to be guided by section 6B of the Repealed Kenya Information and Communications Act.

The Applicant being aggrieved by the 1st Respondent's actions and decision, filed the instant Application on 22nd July 2019, seeking the following Orders:

1. Spent.
2. That pending the *inter partes* hearing and determination of this Application and Petition, the Court be pleased to issue and hereby issues an interim order suspending Gazette Notice No. 6657 of 18th July 2019 published in Nairobi on 19th July 2019 in Special Issue of the Kenya Gazette Vol. CXXI-No. 91, announcing that the 1st Respondent had appointed the 1st, 2nd, 3rd and 4th Interested parties to be members of the Board of the Communications Authority of Kenya (CAK), for a period of 3 years, with effect from 18th July 2019.
3. That the (sic) pending the *inter partes* hearing and determination of this Application/Petition, the Court be pleased to issue and hereby issues a temporary order of injunction prohibiting the Respondents and their agents and any persons howsoever acting from giving effect to Gazette Notice No. 6657 of 18th July 2019.
4. That costs be in the cause.

The grounds upon which the Application is founded are that the 1st Respondent's decision to handpick and appoint the interested parties is a nullity in law as it is inconsistent with the express provisions of the Constitution and statute which require an open, fair, competitive, merit-based and inclusive processes of recruiting and appointing individuals into public offices. Further, the processes should be subjected to public participation, which includes advertising vacancies, publishing lists of all applicants and shortlisted candidates and announcing and holding interviews in the open.

The appointment of the 1st to 4th Interested Parties is invalid hence null *ab initio* as it contravenes the provisions of Articles 1, 2, 3 (1), 10 (2), 27 (1) and (2), 47, 73 (2) (a), 129, 154 (4) (a) and 232 (1) (d), (f), (g) and (i) of the Constitution. Further, the 1st Respondent's appointments did not meet the Applicant's reasonable expectations that the 1st Respondent would conform to the Constitution as directed by the High Court in HC Petition 163 of 2019.

It is the Applicant's position that failure to grant the orders sought will cause irreparable harm as the 1st to 4th interested parties are likely to make binding decisions against public interest and which this Court will not be able to reverse.

The Application has been opposed by the Respondents and the 5th

Interested Party.

In the Replying Affidavit of Juliana Yiapan, MBS, sworn on behalf of the Respondents, he avers that this matter is *res judicata* as the issue has already been canvassed in Petition 163 of 2019 wherein the 2nd Respondent was allowed to appoint members to the 5th Interested Party's Board. The Affiant also avers that the appointments reflect the interests of all sections of society and adheres to the 2/3 gender rule. As such, they are lawful and compliant with the Kenya Information and Communication Act as amended by the Statute Law (Miscellaneous Amendments) Act, 2018.

It is the Respondents' position that this Court lacks the jurisdiction to entertain this matter as the Petition does not fit into the list outlined in section 12 of the Employment and Labour Relations Act. Further, that the Applicant has not met the threshold for granting conservatory orders and that the court should take into account public interest in granting or declining the orders.

It is the Respondents add that the Applicant has not demonstrated what irreparable injury will be suffered in the event that the orders sought are not granted. It is their position that the balance of convenience tilts in favour of the Respondents since the injury to them from granting the orders sought would exceed that to the Petitioner of declining to grant them.

The Respondents aver that the Applicant has failed to demonstrate that the decision to appoint the Board members was unreasonable, irrational or illegal or even that the candidates are lacking in skill, values, competency and qualifications. As such, the Ministry of Information, Communications and Technology should have a duly appointed Board in office pending the hearing and determination of any

case challenging the appointment process and thereafter the Respondents allowed to implement the impugned Gazette Notice.

The 5th Interested Party vide the Replying Affidavit of Robin Mayeku Busolo, avers that for it to deliver its statutory mandate, a duly constituted Board must be in place or else its functions will be crippled. It is because of this, that the 1st Respondent appointed 4 out of the 7 Board members.

The Affiant avers that the Applicant has failed to demonstrate that section 6 (2) of the Kenya Information and Communications Act was not adhered to and as such the allegations that the appointments did not meet the threshold are premature hence not ripe for determination by this Court. It is its case that if the conservatory orders are granted, its operations will be hampered and as such public interest will not be served.

It is the 5th Interested Party's position that the appointments adhered to the directions in the Ruling delivered in Petition 163 of 2019.

The Applicant filed a rejoinder to the Respondents' Replying Affidavit wherein he avers that the Petition is as a consequence of that Ruling as it challenges the constitutionality of the appointments.

He contends that there is no way of demonstrating that the appointments met the required threshold due to the opaque manner in which appointments were made. He distinguishes this case with the intended appointment of Board members of the Media Council which vacancies were advertised and all the constitutional requirements complied with.

It is the Applicant's position that the 5th Interested Party has been without a board since the dissolution of the previous Board on 29th April 2019. Further, since the appointment of board members is not complete, provision of public services will not be hindered. The Applicant avers that if the conservatory orders are denied, the Board will appoint a new Director General who will be an agent of the 1st Respondent as opposed to the public, having been controlled by the 1st Respondent.

The Respondents filed a Further Replying Affidavit of Juliana Yiapan, MBS, in response to the Applicant's rejoinder. In the Affidavit, the Affiant avers that the 1st to 4th Interested Parties represent the Nubian, Luhya, Kalenjin and the Kikuyu Community. Further, the 1st Interested Party will appoint the remaining 3 board members from sections of the society, as required by law.

The Respondents contend that the impugned appointees are not government employees, members of parliament or county assemblies or officials of any political party's governing body and do not have any commercial interests that would conflict with the 5th Interested Party's mandate.

Parties made oral submissions in open Court.

Submissions by the Parties

The Applicant submitted that the evidence adduced by the Respondents has demonstrated that they have not discharged their burden of proof that the appointment of 4 members of the Board had complied with the law.

It is the Applicant's submissions that the orders issued by Ongaya J. regarding status quo should be obeyed and the Court must ensure that the parties herein adhere to the same. He was of the position that what was not done on 26th July 2019 could not be done after that date.

The Applicant further submitted that the 1st Respondent ought to follow the law in appointing board members and that nothing prevented the 1st Respondent from redoing the process.

Mr. Kinyua, Counsel for the Respondents urged this Court not to grant the conservatory orders as it would paralyze the 5th Interested Party's operations. It was his submissions that the injuries likely to be suffered by the Applicant could be compensated by way of damages.

Counsel further submitted that the Orders of 26th July 2019 allowed for the implementation of the Gazette Notice of 18th July 2019 and assumption of office by the Board members including performance of duties until contrary orders are made by the Court. He relied on the cases of *Kenya Council of Employment & Migration Agencies & Another vs. Samwel Mwangera & 2 Others [2015] eKLR*, *Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others [2014] eKLR*, *Giella vs. Cassman Brown Limited [1973] EA 358* and *Anarita Karimi Njeru vs. Attorney General [1979] eKLR 154*.

Mr. Malonza, Counsel for the 5th Interested Party submitted that under section 6(2) of the Act, the Minister is supposed to take into account interests of all sections of society, give equal opportunities for persons with disabilities, marginalized groups and adhere to 2/3 gender rule. It was therefore premature for the Applicant to assume that the 1st Respondent would violate the law in appointing the remaining 3 board members.

Counsel further submitted that failing to grant the conservatory orders will not render the Petition nugatory. His argument was that the issue of whether appointments of the 1st to 4th Interested Parties were invalid and void, will still be alive even in the absence of the conservatory orders.

Analysis

After considering the pleadings and analyzing the evidence and submissions presented before this Court, the issues for determination is

whether this Court has jurisdiction to hear and determine the Application and whether the Applicant is entitled to the issuance of the conservatory orders sought.

Jurisdiction

Under Article 162(2)(a) of the Constitution, parliament is empowered to establish a court with the same status as the High Court to hear and determine disputes relating to employment and labour relations. Consequently, this Court was established under the Employment and Labour Relations Court Act. Section 12 (1) (a) of the Act, grants this Court exclusive original and appellate jurisdiction to hear and determine all disputes relating to or arising out of employment between an employer and an employee.

Under Articles 22(2)(c) and 258(2)(c) court proceedings may be instituted by a person acting in the public interest where a person's right or fundamental freedom in the Bill of Rights has been violated or denied or where the Constitution has been contravened or threatened with contravention.

The Court in **Abdikadir Suleiman vs. County Government of Isiolo & Another [2015] eKLR** held-

"...The original and unlimited jurisdiction to make a finding on legitimacy or lawfulness of decisions in disputes between employers and employees rests with this court as vested with the appropriate jurisdiction under Articles 159(1), 162 (2) (a) as read with Article 165(5) and (6) of the Constitution; Articles 22(1) and 258(1) of the Constitution, and the provisions of the Employment and Labour Relations Act, 2011. The court holds that the jurisdiction spreads to all issues in the employment relationship and related matters including the enforcement of the fundamental rights and freedoms under Article 22 of the Constitution and enforcement of the Constitution under Article 258 as far as the issues in dispute are, evolve, revolve or relate to employment and labour relations. The court holds that the compass or golden test for the court's jurisdiction is the subject matter in the dispute namely disputes relating to employment and labour relations as provided for Article 162 (a) of the Constitution and as amplified in the Employment and Labour Relations Court Act, 2011 and not the remedies sought or the procedure of moving the court or the situ of the applicable law or any other extraneous considerations as may be advanced by or for a litigant."

In view of the foregoing, I am of the view that this Court has the jurisdiction to hear and determine this Application whether the issues arising relate to employment law, policy or individual public officer's grievances, the jurisdiction of the Court would properly be available in that regard.

On the issue of whether the Application is *res judicata*, section 7 of the Civil Procedure Act provides as follows:

"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

Further, a perusal of the Ruling delivered in HC Petition 163 of 2019 reveals that the parties in the suit and the prayers sought are substantially different from those in this Application. The Applicant correctly distinguished the instant Petition with HC Petition 163 of 2019: the Court herein has been moved to determine the Constitutionality of the appointment of the 1st to 4th Interested Parties while the Court in Petition 163 of 2019 has been moved to determine the constitutionality of section 6(1)(e) of the Kenya Information and Communications Act. As such, the matter has not met the threshold that would qualify it as *res judicata*.

Conservatory Orders

The principles for grant of conservatory orders were outlined in **Board of Management of Uhuru Secondary School vs. City County Director of Education & 2 Others [2015] eKLR** as follows:

- a. The need for the Applicant to demonstrate an arguable *prima facie* case with a likelihood of success and to show in the absence of the conservatory orders, he is likely to suffer prejudice.
- b. Whether the grant or denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the bill of rights.
- c. The Court should consider whether, if an interim conservatory order is not granted, the Petition or its substratum will be rendered nugatory.
- d. Whether public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order.

I am of the view that the Applicant has established a *prima facie* case for the grant of the conservatory orders. Ordinarily, determining the constitutionality and legality of the appointments would be treading on very dangerous ground as it would be tantamount to an indirect determination of the constitutionality and validity of the amendments made by the Statute Law (Miscellaneous Amendments) Act 2018 to sections 6 (1) (a) & (e) and 6B of the Kenya Information and Communications Act. Something this Court must be cautious about.

The 5th Interested Party submitted that pending the determination of the unconstitutionality of section 6 of the Act in Petition 163 of 2019, it remains the law with respect to the appointments of its Board members. As such, section 6 was not violated. However, the parties referred to paragraph 79 of the Ruling in HC Petition 163 of 2019 in their pleadings and submissions and invited this Court to look at the same. The

paragraph reads as follows:

“In any case, we are of the view that Article 34 (5) (a) of the Constitution still binds the 6th Respondent to observe the principles therein in making any appointments to the Board of the Authority... The 6th Respondent, may, as a matter of necessity and for purposes of prudence, apply the requirements of the repealed provisions in order to fulfil the constitutional requirements. We do not hold legal brief for him, but the 6th Respondent may well be advised to proceed with utmost caution, as any appearance of unconstitutionality may also result in a separate challenge to those appointments.”

I agree with the Applicant in his Supplementary Affidavit that the High Court anticipated these proceedings as envisioned in the above paragraph. Therefore, I am of the view that the 1st Respondent was required to adhere to the provisions of the Repealed Act in making his appointments. Section 6B of the Act had outlined a detailed procedure to be followed in making the appointments which was not followed. The 1st Respondent only issued a Gazette Notice of 4 appointed Board Members. No advertisement or interviews were done, the appointee's qualifications were unknown and the criteria used to select them also unknown.

Additionally, Ongaya J. gave orders directing the parties to maintain the status quo as of 26th July 2019 with respect to performance of duties of persons as appointed in the Gazette Notice. However, this was not adhered to. At the hearing of the Application, the Applicant revealed that a board meeting had been scheduled, a fact which was not disputed by the 5th Interested Party.

This impending disobedience of the Court order confirms the Applicant's fears that decisions contrary to public interest are likely to be made. In his submissions, the Applicant gave the example of the imminent issuance of 5G licences which ought to have been undertaken having due regard to public interest which could only be achieved by having an independent board. Pursuant to Article 34(5)(a) of the Constitution, the 5th Interested Party is required to be independent of control by government, political or commercial interests, reflect the interests of all sections of the society and set, regulate and monitor compliance of standards. To achieve this, there must be clear checks and balances to ensure that the executive does not interfere with the Board of Authority. The procedure for appointment of the 1st to 4th Interested Parties was not transparent making it difficult to determine whether there had been such an interference.

In view of the foregoing, and in light of the 5th Interested Party's conduct, I am of the view that the Applicant has proved that the grant the conservatory orders will enhance the constitutional values and objects of the freedom of the media through checks and balances, public participation, transparency and inclusiveness, among others.

One of the orders that the Applicant is seeking in his Petition is to have the impugned Gazette Notice quashed. Bearing in mind the foregoing, if the conservatory orders are not granted, the Petition or its substratum will be rendered nugatory as there is a likelihood that the Board may act or make decisions contrary to public interest and which this Court will not be able to reverse. Further, there is a possibility that 1st Respondent may appoint the 3 board members in the same manner the current Board members were appointed.

The 5th Respondent being a public body, is heavily relied upon by the public for its operations and is likely to suffer if the same are halted by the issuance of the conservatory orders. However, this Court cannot aid the furtherance of a constitutional breach as it has the duty to uphold the Constitution which it must do without fear or favour.

In conclusion, this Court is convinced that the balance of convenience favours the granting of the conservatory orders. As such, this Court suspends Gazette Notice No. 6657 of 18th July 2019 and issues a temporary injunction prohibiting the Respondents and their agents and any persons howsoever acting from giving effect to Gazette Notice No. 6657 of 18th July 2019.

Costs be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 16TH DAY OF AUGUST 2019

MAUREEN ONYANGO

JUDGE