



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**PETITION NO. 153 OF 2016**

**(Before Hon. Lady Justice Hellen S. Wasilwa on 27<sup>th</sup> April, 2018)**

**IN THE MATTER OF: ARTICLES 1, 2, 3, 4(2), 10, 12(1)(a), 19, 20, 21, 22, 23, 24, 27, 41(1), 47, 48, 50(1), 73, 75, 156, 159, 162, 165, 232, 234, 258 and 259(1) OF THE CONSTITUTION OF KENYA**

**IN THE MATTER OF: THE ALLEGED VIOLATION OF ARTICLES 1, 2, 3, 4(2), 10, 27, 41(1), 47, 232, 234 AND 259(1) OF THE CONSTITUTION**

**IN THE MATTER OF: THE ALLEGED VIOLATION OF SECTION 27(C) OF THE STATE CORPORATIONS ACT (CAP 446), AND OF SECTION 5(2) OF THE KENYA AIRPORTS AUTHORITY ACT (CAP 395)**

**IN THE MATTER OF: THE ALLEGED VIOLATION OF THE KENYA AIRPORTS AUTHORITY’S HUMAN RESOURCE MANUAL 2011 AND OF THE KENYA AIRPORTS AUTHORITY’S JOB DESCRIPTION FOR GENERAL MANAGER PROJECTS AND ENGINEERING SERVICES**

**IN THE MATTER OF: THE CONSTITUTIONAL AND LEGAL VALIDITY OF THE ON-GOING RECRUITMENT OF THE GENERAL MANAGER PROJECTS AND ENGINEERING SERVICES FOR THE KENYA AIRPORTS AUTHORITY**

**OKIYA OMTATAH OKOITI.....PETITIONER**

**VERSUS**

**THE BOARD OF DIRECTORS, KENYA**

**AIRPORTS AUTHORITY.....1<sup>ST</sup> RESPONDENT**

**PUBLIC SERVICE COMMISSION.....2<sup>ND</sup> RESPONDENT**

**STATE CORPORATIONS**

**ADVISORY COMMITTEE.....3<sup>RD</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**THE ENGINEERS BOARD OF KENYA (EBK).....5<sup>TH</sup> RESPONDENT**

**AND**

**THE KENYA AIRPORTS AUTHORITY.....1<sup>ST</sup> INTERESTED PARTY**

**ERIC MOGOI NYANGESI.....2<sup>ND</sup> INTERESTED PARTY**

**CECILIA BEATRICE MAGNER.....3<sup>RD</sup> INTERESTED PARTY**

**COSMAS KIPROTICH LANG’A.....4<sup>TH</sup> INTERESTED PARTY**

**RULING**

1. The Application before Court is one dated 18<sup>th</sup> January 2018 brought under Articles 20, 22, 23, 40(6), 50(1), 159, 162(2)(b), 164(3), 165(5)(b), 226(5), 258, 259(1) of the Constitution of Kenya, 2010, Section 20 of the Employment and Labour Relations Court Act No. 20 of 2011, Order 42 Rule 6 of the Civil Procedure Rules, Section 1A, 1B, 3A and 63(e) of the Civil Procedure Act and all other enabling provisions of the Law seeking orders:-

1. *THAT this Honorable Court be pleased to certify this application as extremely urgent and hear it ex-parte at the first instance.*
2. *THAT pending the hearing and determination of this Application inter-partes, this Honourable Court be pleased to issue a temporary injunction restraining the 1<sup>st</sup> Respondent whether by themselves, or any of their employees or agents or any person claiming to act under their authority, from proceeding to appoint, confirm or in any other way whatsoever to fill the vacant position of the General Manager Projects and Engineering Services for the Kenya Airports Authority and or from taking advantage or effecting the Judgement of this Honourable Court made on the 9<sup>th</sup> November, 2017.*
3. *THAT pending the hearing and determination of the Civil Appeal No. 420 of 2017 pending in the Court of Appeal, this Honourable Court be pleased to issue an injunction restraining the 1<sup>st</sup> Respondent whether by themselves, or any of their employees or agents or any person claiming to act under their authority, from proceeding to appoint, confirm or in any other way whatsoever to fill the vacant position of the General Manager Projects and Engineering Services for the Kenya Airports Authority and or from taking advantage or effecting the Judgement of this Honourable Court made on the 9<sup>th</sup> November, 2017.*
4. *THAT such other or further orders as may be just be made to meet the ends of justice and to safeguard and protect the authority and dignity of this Honourable Court, the Court of Appeal and the rule of law.*
5. *THAT costs hereof be provided for.*

2. The Application is supported by the Affidavit of one Okiya Omtatah Akoiti and premised on the grounds:-

- a) *THAT the matter herein is very urgent since, having offered him the job, the 1<sup>st</sup> Respondent can ask the 4<sup>th</sup> Interested Party to assume office any time now thus taking advantage of the judgement of this Honourable Court made on the 9<sup>th</sup> November, 2017 dismissing the petition.*
- b) *THAT on 20<sup>th</sup> December 2017, Civil Appeal No. 420 of 2017 was filed in the Court of Appeal and subsequently an application under Rule 5(2)(b) was filed in the same Court on the 5<sup>th</sup> January, 2017 but the matter cannot be heard immediately due to the strict nature of the calendar and workings of the Court of Appeal.*
- c) *THAT the purpose of appeal is to challenge the judgement aforesaid of this Honourable Court and generally to stop the 1<sup>st</sup> Respondent from employing the 4<sup>th</sup> Interested Party, who is a person not qualified under the law, policy and best practice, to be the General Manager Projects and Engineering Services of the 1<sup>st</sup> Interested Party.*
- d) *THAT the injunction/conservatory orders sought herein, suspending the 1<sup>st</sup> Respondent's decision to employ the 4<sup>th</sup> Interested Party as the General Manager Projects and Engineering Services of the 1<sup>st</sup> Interested Party, is required to conserve or preserve the subject matter of the appeal from being overtaken by events.*
- e) *THAT unless the effect of the judgment of this Honourable Court, that dismissed the Petition, is suspended pending the hearing and determination of the appeal, the appeal will be rendered nugatory or otherwise superfluous where successful.*
- f) *THAT to protect the instant appeal from being rendered nugatory if successful, it is absolutely necessary to grant an injunction restraining the 1<sup>st</sup> Respondent from employing the 4<sup>th</sup> Respondent as the General Manager Projects and Engineering Services of the 1<sup>st</sup> Interested Party.*
- g) *THAT if the 4<sup>th</sup> Interested Party is allowed to assume office as the General Manager Projects and Engineering Services of the 1<sup>st</sup> Interested Party, the appeal will have been overtaken by events, since the process of removal is totally different from the process of preventing the employment, and will need different grounds which may not exist, since the grounds underpinning the appeal will have been defeated.*
- h) *THAT the Applicant has an arguable appeal with a high probability of success.*
- i) *THAT in the facts and circumstances of this case, it is urgent, meet and just that the Notice of Motion application be heard and determined to ensure that the Appeal does not become either infructuous or a fait accompli before it is heard and determined.*
- j) *THAT the situation herein requires conservatory orders to be issued to protect and or preserve the instant appeal, and any delay in hearing the Notice of Motion will be tantamount to dismissal of the appeal itself.*
- k) *THAT given the very strategic nature of the position of the General Manager Projects and Engineering Services of the 1<sup>st</sup> Interested Party, Kenyan taxpayers stand to suffer irreparable harm and damage unless the application herein is heard and determined urgently and an interim injunction issued.*

*l) THAT the Applicant has an arguable appeal that raises triable issues thus the need to allow the determination of the instant appeal on merit by suspending the employment of the 4<sup>th</sup> Interested Party.*

*m) THAT the Petitioner/Applicant and the general public stand to suffer irreparable loss and/or harm if the restraining orders sought herein are not granted.*

*n) THAT any prejudice that the respondents are likely to suffer in the course of the proceedings including the appellate proceedings are outweighed by the huge public interest in the matter.*

*o) THAT this Honourable Court has jurisdiction and powers in the wider interest of justice to grant the orders sought.*

*p) THAT the Appellant/Applicant has demonstrated that there are compelling reasons for protecting the appeal now pending in the Court of Appeal, which has high chances of success, from being rendered nugatory if successful.*

*q) THAT in the premises, it is urgent, meet and just that the application be disposed of immediately.*

3. In their Replying Affidavit, the Interested Party opposed the Application stating that it was an abuse of the Court process given that the Petitioner had admitted to having filed a similar Application before Court of Appeal in Civil Appeal No 420 of 2017.

4. The Interested Party further avers that the prayer for injunction against any kind of recruitment and or fresh recruitment is misplaced and incompetent because the Court lacks jurisdiction to grant such a prayer given that the matter is fully determined and in any event the entire application and the Appeal have been overtaken by events and rendered academic because by an e-mail dated 10<sup>th</sup> of January 2018 the 4<sup>th</sup> Interested Party declined to take up the appointment and therefore there was no event that was capable of being stopped from happening.

5. In their opposition, the 1<sup>st</sup> Respondent and the 1<sup>st</sup> and 4<sup>th</sup> Interested Parties opposed the Notice of Motion dated 18<sup>th</sup> January 2018 stating that the Court had found *inter alia* that the Petition had been overtaken by events meaning that there was nothing to stay hence the application could not succeed.

6. In his submissions, the Petitioner argued that, in light of the grounds as stated in the Memorandum of Appeal as lodged, it therefore becomes critically necessary for this Honourable Court to examine closely the grounds as enumerated in the Memorandum of Appeal aforesaid and be minded to allow the prayers sought to allow the Court of Appeal to look into the Appeal as the same might be rendered nugatory if the prayers sought are not granted.

7. The Petitioner/Applicant is apprehensive that the 1<sup>st</sup> Respondent and the 1<sup>st</sup> Interested Party will now proceed and fill the vacant position of the General Manager Projects and Engineering Services for the Kenya Airports Authority and or take advantage of effecting the Judgement of this Honourable Court made on the 9<sup>th</sup> November, 2017.

8. They submit that this Honourable Court has jurisdiction to grant the orders sought including an order for injunction pending Appeal. They argue that it is important to note that an injunction order had subsisted prior to the determination of the Petition and which injunction order had been issued by this Honourable Court on the 22<sup>nd</sup> December, 2016 after the Petition had been filed simultaneously with an application under certificate of urgency on the 21<sup>st</sup> December, 2016.

9. They submit that the said order automatically lapsed following the judgement of this Honourable Court made on the 9<sup>th</sup> November, 2017 delivered in the absence of parties otherwise an application for injunction pending appeal would have been made orally to this honourable Court for consideration at the time and immediately upon the delivery of the judgement now a subject of Appeal.

10. They urge the Court to note that it will also be important to point out to this Honourable Court that the Application for injunction filed under Rule 5(2) (b) of the Court of Appeal Rules in the Court of Appeal has already been certified urgent by a single Judge of the Honourable Court (**Court of Appeal**) but who cannot issue any orders as the rules of the Court do not permit a single Judge to proceed as the rules require the Application to be considered by the full Court, ordinarily a three –Judge- bench of the Honourable Court.

11. They have submitted that due to the strict nature of the diary and calendar of the Court of Appeal, the Application for injunction pending in the Court of Appeal cannot be heard immediately and or on time and therefore it becomes critical for this Honourable Court to consider the instant application.

12. They have pointed out that this Honourable Court whilst appreciating the workings of the Court of Appeal proceeded on the 23<sup>rd</sup> January, 2018 to issue a temporary order of injunction in the following terms; that the pendency of the two applications both in the Court of Appeal aforesaid and in this Honourable is NOT in any way an abuse of the process of Court as is been suggested by the 1<sup>st</sup> Respondent, 1<sup>st</sup> and 4<sup>th</sup> Interested Parties in their Grounds of Opposition dated the 29<sup>th</sup> January, 2018 and filed in Court on the same date and Replying affidavit sworn by one KATHERINE KISILA on the 2<sup>nd</sup> February, 2018 and filed in Court on the same date. They relied on the case of **Madhupaper International Limited v Kerr** (1985) KLR 840. It was stated in holding number 1 and 2 as follows:-

**1. “Where a judge dismisses an application for interlocutory injunction, he has jurisdiction to grant the unsuccessful applicant an injunction pending appeal against the dismissal and there is no inconsistency in doing so as the purpose of granting the injunction would be to prevent the decision of the appellate court from being nugatory should the appeal succeed.**

**2. It is preferable for the High Court to deal with an application for injunction pending an appeal from its decision not so much**

*as to protect the Court of Appeal from inconvenience but more because the Court of Appeal would have the advantage of seeing what the High Court judge made of the application”.*

13. In light of the foregoing, they submit that this Honourable Court has jurisdiction to grant the orders sought notwithstanding the pendency of a similar application in the Court of Appeal as there is concurrent jurisdiction. It is also their case that the instant application has NOT been overtaken by events as suggested by the 1<sup>st</sup> Respondent, 1<sup>st</sup> and 4<sup>th</sup> Interested Parties allegedly following the withdrawal of acceptance of offer by the Fourth Interested Party.

14. Their position is fortified by the following germane grounds that the orders sought are generally to restrain the 1<sup>st</sup> Respondent whether by themselves, or any of their employees or agents or any person claiming to act under their authority, from proceeding to appoint, confirm or in any other way whatsoever to fill the vacant position of the General Manager Projects and Engineering Services for the Kenya Airports Authority and or from taking advantage or effecting the Judgement of this Honorable Court made on the 9<sup>th</sup> November, 2017.

15. They argue that the withdrawal by the 4<sup>th</sup> Interested Party does not affect the prayers sought bearing that the position for the General Manager Projects and Engineering Services should not be filled generally until the Appeal is heard and determined.

16. In their written submissions, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondent stated that the Petitioner is engaged on forum shopping hence abusing the Court as the sole issue for determination is whether the Court’s order dismissing the Petitioner’s Petition issued on 9<sup>th</sup> November 2017 is capable of being stayed and that though the Petitioner enjoys interim injunction, the order in place is contrary to the law and case law.

17. They submitted that an order for dismissal is a negative order, one where nothing can be executed, as such, one cannot seek for stay on the same. They cited the case of **Tom Owiti vs Guilderberto Cuturi Civil Appeal No. 91 Of 2013** which stated:

*“That a dismissal was a negative order incapable of being stayed. Even if it is stayed it will not reinstate the Applicant’s application to set aside the expert judgement of the Kwale Magistrate’s Court”. To injunct the 1<sup>st</sup> respondent from filling in the vacant position with any other qualified candidate amounts to managing the Human resource management of the 1<sup>st</sup> Respondent which responsibility this court does not possess. This Honourable court cannot stay a negative order as the same amounts to overturning your own order dismissing the petition and sets a negative precedent unsupported in law.”*

18. I have examined all the submissions before Court. The application is basically for stay. Vide my Judgement of 9/11/2017 I dismissed the Petition and claim which had sought certain declarations.

19. The Petitioner obtained stay order on 23/1/2018 before Hon. J. Radido and also filed a Notice of Appeal before the Court of Appeal which is still pending before Court.

20. It is my view, that the Petitioner having already filed an appeal and an application for stay before the same Court, the Applicant should not seek the same orders before this Court other than that. The gist of orders being sought to be stayed were orders which were barring the 4<sup>th</sup> Respondent herein from being appointed to the position of General Manager Projects and Engineering Services of Kenya Airports Authority.

21. The 4<sup>th</sup> Respondent has since declined to take up the said appointment. In this respect then, I find that the application has been overtaken by events and the orders of stay are not tenable. I therefore dismiss this application for stay and allow execution to proceed. The Applicant is at liberty to pursue the Appeal at the Court of Appeal.

**Dated and delivered in open Court this 27<sup>th</sup> day of April, 2018**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Kasanga holding brief for Masika for Petitioner – Present

Pembela holding brief for Mutua for 1<sup>st</sup> Respondent and 1<sup>st</sup> and 4<sup>th</sup> Interested Party – Present

OduKenya for 2<sup>nd</sup> to 4<sup>th</sup> Respondent – Present