



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

CONSTITUTIONAL PETITION NO. 47 OF 2018

OKIYA OMTATAH OKOITI.....PETITIONER

VERSUS

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

PUBLIC SERVICE COMMISSION.....2ND RESPONDENT

STATE CORPORATIONS

ADVISORY COMMITTEE.....3RD RESPONDENT

AND

FRANCIS K. MUTHAURA.....1ST INTERESTED PARTY

MUKESH SHAH.....2ND INTERESTED PARTY

LEONARD ITHAU (ENG).....3RD INTERESTED PARTY

SUSAN MUDHUNE.....4TH INTERESTED PARTY

CHARLES MAKORI OMANGA.....5TH INTERESTED PARTY

RULING

1. On 29th May, 2018 the Petitioner filed a Petition together with an urgent application. The Petitioner challenged Gazette Notices No. 5142, 5140 and 5141 all of 2018. The petitioner was heard ex-parte on the application on 29th May, 2018 and the Court made orders as follows:-

- a. That the application is certified urgent to be served by close of today for mention on 30th May, 2018 at 9.00 a.m. for further orders and directions.
- b. That pending the mention on further orders by the Court there be stay of the taking effect of Gazette Notices Nos. 5142, 5140 and 5141 all dated 25th May, 2018.
- c. Costs in the cause.

2. The Petitioner's major concern was that the appointments in the challenged Gazette Notices would take effect on 30th May, 2018. The Court granted the interim orders in that view and directed a mention on 30th May, 2018 for further directions and orders. The petitioner was to serve the petition and application together with the order.

3. On 30th May, 2018 the Petitioner informed the Court that he had not managed to serve the Interested Parties and that the order had not been extracted.

The Court directed the order be extracted and service be effected for mention at 2.30 p.m. the same day.

4. The Petitioner extracted the order and served the Attorney General. The parties have addressed the Court and made extensive submissions on whether the interim orders should be extended or not.

5. The Petitioner submits that the interim orders should be extended, so as to preserve the subject matter in dispute. The Petitioner agrees that the subject matter in dispute is whether sections 7(3) 26 and 27(c) of the State Corporation Act (Cap. 446) and sections 6(2) (a) and (e) of the Kenya Revenue Authority Act(Cap. 469) are in conflict and inconsistent with Articles 2,10,27, 47, 73(2), 129(1), 153(4), 232, 234(2) and 259(1) of the Constitution of Kenya, 2010.

The sections being in force today, it is the opinion of the Court that no conservatory orders in the nature of the interim orders as prayed for would preserve the dispute. Further the Court considers that if the interim orders as prayed for are not granted, the dispute as urged for by the applicant will not be rendered nugatory.

6. The Court has considered the petitioner's concerns that the outgoing Board Members as per the Gazette Notices may have suffered injustice because they have been removed prior to lapsing of their term of service, the shortest of such pending tenures being due to lapse in October, 2019. The respondents say that the outgoing Board Members have not raised a grievance about their removal. They are not parties to the suit.

7. I have considered the submissions and return that the revocation of appointment of the outgoing Board Members would take effect today. There is no material before the Court to show their dissatisfaction with the revocation of their service.

I have particularly considered the strategic and crucial role the Kenya Revenue Authority performs and consider that it will not serve public interest to stay the taking effect of the appointment of the Interested Parties as per the challenged Gazette Notices in circumstances whereby it was not shown to the Court that the outgoing Board Members will be willing and able to continue in office. The Court will not act on a presumption that they would be so available and ready to so serve or continue in office.

8. Parties have made submissions on issues of jurisdiction, presumption that statutory provisions are constitutional unless otherwise declared, that there is a pending High Court Constitutional Petition No. 331/2016 at Nairobi and whether the present petition should be consolidated with the High court Petition 331/2016. The court considers that the matters as raised are important but are not of immediate consideration as to whether the interim orders should be extended. The matters are reserved for future and further consideration after close of pleadings or at appropriate stage in the proceedings.

9. In the circumstances, the Court having considered the material on record and the submissions made this afternoon, orders are made as follows:

- a. The interim orders are now vacated.
- b. The respondents to file their respective replying affidavits and to serve by 8th June, 2018.
- c. The petitioner to file and serve a further affidavit as may be appropriate by mention date on 12th June, 2018 at 9.00 a.m.
- d. Today's costs in the cause.

Signed, dated and delivered in Court at Nairobi this 30th day of May, 2018 at 1730 hours.

BYRAM ONGAYA

JUDGE