



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR**  
**RELATIONS COURT AT MOMBASA**  
**PETITION NUMBER 4 OF 2018**

**IN THE MATTER OF: ARTICLE 1,2,3[1],4[2],10,19,20,21,22,23,24,27,41[1],47,  
48,50[1],156,159,165,232,236,258, AND 259 OF THE CONSTITUTION OF KENYA;**

**AND**

**IN THE MATTER OF: THE ALLEGED VIOLATION OF ARTICLES 1,2,3[1],10,27,41[1]  
47,73,75,129,232,234 AND 259[1] OF THE CONSTITUTION OF KENYA;**

**AND**

**IN THE MATTER OF: THE ALLEGED VIOLATION OF THE FAIR ADMINISTRATIVE  
ACTION ACT 2015 AND THE STATUTORY INSTRUMENTS ACT 2013;**

**AND**

**IN THE MATTER OF: CONSTITUTIONAL AND LEGAL VALIDITY OF THE  
GOVERNMENT'S DIRECTIVE ON MOVEMENT OF CONTAINERS TO THE INLAND  
CONTAINERS DEPOT NAIROBI VIA STANDARD GAUGE RAILWAY [SGR] FREIGHT  
SERVICE;**

**AND**

**IN THE MATTER OF: THE CONSTITUTIONAL AND LEGAL VALIDITY OF THE  
PURPORTED SACKING AND REPLACEMENT OF THE MANAGING DIRECTOR OF THE  
KENYA PORTS AUTHORITY;**

**BETWEEN**

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

**1. KENYA PORTS AUTHORITY BOARD OF DIRECTORS**

**2. THE ATTORNEY-GENERAL.....RESPONDENTS**

**RULING**

**Background:-**

1. This Petition is presented by Okiya Omtatah Okoiti. He describes himself at paragraph 1 of the

Petitioner, as a law-abiding citizen; a human rights defender; and a strong believer in the rule of law. He describes the 1<sup>st</sup> Respondent as a Board responsible for Kenya Ports Authority [KPA], a State Corporation established under an Act of Parliament to manage, operate, improve and regulate all scheduled seaports along Kenya's coastline. The 2<sup>nd</sup> Respondent is the Legal Adviser of the Government of Kenya.

2. The Petition arises out of a Special Board Meeting held by KPA Board on 30<sup>th</sup> May 2018, in which a resolution was made, to sack the Managing-Director Catherine Mturi-Wairi with immediate effect, and replace her with Daniel Manduku in an acting capacity.

3. The Petitioner questions the composition of the Board that made the resolution, and the validity of that resolution. He faults the manner in which the Managing Director was sacked. The Petitioner states that the Managing Director was not given the opportunity to defend herself, and that she was sacked, allegedly for failing to implement a roadside declaration made by the Government, on movement of containers from the Port of Mombasa, through the Standard Gauge Railway [SGR], to the Inland Container Depot at Nairobi. The Petitioner seeks the following substantive orders:-

a) A declaration that the Special Board Meeting held on 30<sup>th</sup> May 2018 was unlawful, and therefore unconstitutional, invalid, null and void.

b) A declaration that the resolutions of the Special Board Meeting were unlawful, and therefore unconstitutional, invalid, null and void *ab initio*.

c) A declaration that the sacking of Catherine Mturi-Wairi as the Managing- Director of the KPA, and her replacement by Daniel Manduku in an acting capacity, is unconstitutional, invalid, null and void *ab initio*.

d) A declaration that anything done, including the opening and award of tenders, in the absence of Catherine Mturi-Wairi as the Managing Director of the KPA, is illegal and therefore unconstitutional, invalid, null and void *ab initio*.

e) A declaration that the Hon. Attorney-General is not a Member of the Board of Directors of the KPA.

f) A declaration that the Government's directive on the movement of containers to the Inland Depot Nairobi, via the SGR Freight Service, is unconstitutional and therefore invalid, null and void *ab initio*.

g) All resolutions made by the irregular Special Meeting of the Board of Kenya Ports Authority held on 30<sup>th</sup> May 2018; and the Government's Directive on movement of containers to the Inland Container Depot through the SGR Freight Service, are quashed.

h) Any other or further remedy the Court shall deem fit to grant.

i) Costs to be paid to the Petitioner, by the Respondents.

4. Filed under Certificate of Urgency, together with the Petition is an Application for interim measures. The main orders sought in the Application are:-

- That pending the *inter partes* hearing and determination of this Application and Petition, the Honourable Court be pleased to issue an interim order, suspending the decision made on 30<sup>th</sup> May 2018 at a Special Board Meeting of the KPA, chaired by Michael Maina, a Board Member, to sack Catherine Mturi-Wairi as Managing Director of the KPA and with immediate effect replace her with Daniel Manduku in an acting capacity.

- That pending *inter partes* hearing and determination of the Application and Petition, the Court be pleased to issue a temporary order of injunction prohibiting the Respondents and their agents, or any other persons howsoever acting, from giving effect to the decision made on 30<sup>th</sup> May 2018 at a Special Board Meeting of the KPA, chaired by Michael Maina, a Board Member, to sack Catherine Mturi-Wairi as the Managing Director of the KPA and with immediate effect replace her with Daniel Manduku in an acting capacity.

5. This Application was argued *ex parte* by the Petitioner on 5<sup>th</sup> June 2018, and is the subject matter, of today's Court Ruling.

**Petitioner's Submissions:-**

6. The Petitioner submits that the dispute arose on 30<sup>th</sup> May 2018. He moved the Court expeditiously, on 5<sup>th</sup> June 2018. If the Court does not intervene, the dispute will be aggravated.

7. There was a press release dated 12<sup>th</sup> July 2016, from James Macharia, Cabinet Secretary in the Ministry of Transport, Infrastructure, Housing, and Urban Development which announced the appointment of KPA Managing Director. Catherine Mturi-Wairi was ranked the best candidate for the position in competitive recruitment, with a score of 72.5%. She was appointed the Substantive Managing Director on merit for a period of 3 years. Gazette Notice No. 5357 of 12<sup>th</sup> July 2016 shows she was appointed for a period of 3 years with effect from 12<sup>th</sup> July 2016. The contract would lapse in 2019. A valid contract of employment has been terminated. It is urgent to interrogate the circumstances of termination.

8. The Board that met on 30<sup>th</sup> May 2018 was not validly composed. It did not have quorum. Section 4 of the KPA ACT Cap 391 the Laws of Kenya, defines the composition of the Board.

9. The last Chairman of the Board was Marsden Madoka. His tenure expired in April 2018. The Managing Director, being the subject of the special meeting, could not participate. Principal Secretary Transport was present, and qualified to attend the meeting. The Principal Secretary in the Treasury has appointed alternate Director Esther Koimet. Koimet was not present. Someone called Muhu purported to represent the Principal Secretary Treasury. The Managing Director of the Kenya Railways Atanas Maina is another Member. He did not attend. Engineer Maxwell Mengich attended. Kennedy Ogeto, the Solicitor- General attended, purporting to represent the Attorney-General. The Attorney-General is not a Member of the Board, under the KPA Act. There were only 3 Members validly present- Kamanda Maina, Paul Maringo and Valentine Mwakamba.

10. The Board comprises 11 Directors. Only 3 were validly present. There was no quorum to conduct business. Section 8 [1] [e] of the State Corporations Act, Cap 446 the Laws of Kenya states that the quorum for the conduct of business at a meeting of a State Corporation Board, shall be two-thirds of the total Members of the Board, or the number nearest to, but not less than two-thirds. 3 out of 11 Directors cannot comprise quorum necessary for conduct of business. The decision of the Board of 30<sup>th</sup> May 2018 cannot stand.

11. A meeting to discuss the Managing Director must be attended by the Chairman. There is no substantive Chairman of the KPA Board presently.

12. Catherine Mturi-Wairi was condemned for failure of movement of containers from the Port in Mombasa, to the Inland Depot in Nairobi, through the SGR. There was no public participation in this directive. Even if the Board which convened on 30<sup>th</sup> May 2018 was properly constituted, the complaint against the Managing Director was based on an illegal policy directive of the Government.

13. The Petitioner argues that there are cartels which seek to control the Port of Mombasa. The KPA has a Deputy Managing Director. The Deputy has not been asked to act, in the absence of the Managing

Director. The action against the Managing Director is totally against public interest. The Petitioner urges the Court to grant provisional measures. There is no substantive Managing Director in place yet. The Petitioner prays the Court to fast-track hearing of the Petition.

**The Court Finds:-**

14. The Court agrees with the Petitioner, that the Petition raises grave issues of governance of a public body. The Petitioner submits he has come to this Court, to protect the rule of law at the workplace. It cannot be doubted that the Petition raises fundamental questions of constitutional governance, and that the Petitioner, as submitted under paragraphs 4 to 10 of the Petition, has capacity to present the Petition before the Court, as a redoubtable defender of public interest.

15. The question arises however, whether the Court should grant the 2 prayers sought in the Application filed on 5<sup>th</sup> June 2018, in the absence of the Respondent, and in the absence of other Parties the Court feels should be joined to the Petition.

17. Underlying this public interest litigation are 2 contracts of employment. First is a contract of employment of Catherine Mturi-Wairi. There is a Gazette Notice, and a Press Release, exhibited by the Petitioner, confirming that Catherine Mturi-Wairi was employed as the Managing Director of KPA for a period of 3 years. Section 5[1] of the KPA Act under which the Managing Director is appointed states that the terms and conditions of service shall be determined by the Minister in the instrument of appointment, or otherwise in writing from time to time. The Gazette Notice appointing Catherine Mturi-Wairi only indicates the period of the contract. There must be other terms and conditions of employment elsewhere.

18. We do not know at this stage, what other terms of this contract of employment are. We do not know what Parties to that contract agreed would be the salary payable to the Managing Director. Importantly, we do not know what the terms of termination of this contract are. Could the contract be terminated before maturing, and in what circumstances? These are terms unknown to other Parties, except those who are privy to the contract of employment in question.

19. Catherine Mturi-Wairi has not sworn any affidavit disclosing her terms and conditions of employment. There is no document attached to the Petition, showing details of her contract of employment.

20. The Petitioner states this contract was terminated unfairly, without valid reasons, and without Catherine Mturi-Wairi being heard by her Employer. There is no information on record from the Employee that she was not heard, or that termination was not based on valid reason.

21. There is no *prima facie* evidence indeed, placed before the Court that the contract between Catherine Mturi-Wairi and KPA, has been terminated. There is no letter of termination. There is no resolution of the Board communicating termination decision. There is no document showing that the contract has been terminated for any reason. All that the Petitioner has placed before the Court is evidence of appointment of Catherine Mturi-Wairi as Managing Director of the KPA. There is no evidence of termination. There is no affidavit or other evidential material from the Managing Director, confirming her contract has been prematurely terminated, on the grounds stated by the Petitioner, or indeed any other ground.

22. Grant of interim orders, without the presence of the other Parties, and all other necessary Parties, would result, assuming termination of the contract has taken place, in reinstatement of Catherine Mturi-Wairi to the position of Managing Director. Employment law abhors reinstatement of Employees, through *ex parte* proceedings. Rule 17 [10] of the Employment and Labour Relations Court [Procedure] Rules 2016, underlines this abhorrence, stating: ... *“the Court shall not grant an ex parte order, that reinstates into employment, an Employee whose services have been terminated.”* Employment law places the obligation of justifying termination decision on the Employer. Even at a preliminary stage, the Employer must be given an opportunity to state the reason justifying termination, and show *prima facie* evidence that there is justification, if only to enable the Court determine if there is good ground to warrant issuing

an order of reinstatement in the interim. An *ex parte* order of reinstatement denies the Employer the preliminary opportunity of stating the reason justifying termination. In this Petition, the reason is given not by the Employer; not by the Employee; but by the Petitioner.

23. To grant the prayers sought by the Petitioner without the presence of Catherine Mturi-Wairi would result in reinstatement of the Lady to the position of Managing Director. The Court would be making a presumption that Catherine Mturi-Wairi necessarily wants to continue serving as the KPA Managing Director. What if the Petitioner is allowed this interim order and the Lady does not wish to take back her position? She has not indicated anywhere in the Petition that she wishes to be reinstated. Does she have a grievance, and should the Court compel her to work, on the assumption that her continued service is in the public interest? In reinstatement of Employees, whether sought as an interim or final order, the Court must consider the wish of the Employee. Has the Lady expressed her wish to be reinstated, assuming her contract has been terminated? The Court cannot grant interim orders in the absence of the Employee. There are certain aspects in an employment relationship, which are peculiar to the Parties to that relationship, and which cannot be presumed. These aspects cannot be overlooked, even in the context of public interest litigation.

24. The other concern of the Court relates to Daniel Manduku, who the Petitioner states, was appointed to head the KPA in the interim. If this is correct, Daniel Manduku has a contract of employment which should not be invalidated by the Court, without giving him an opportunity to be heard. The Court needs to understand how he was appointed; where he has come from; what his rights and obligations are; and how they may be affected by orders made in this Petition. The Petitioner submits he has come to Court to protect and promote the rule of law at the workplace. Daniel Manduku, as a Managing Director appointed in the interim, needs to feel that he too, has the equal protection of the laws. His short term contract of employment must not be brought to an abrupt halt by the Courts, without at the very least, hearing him, when the Petitioner's Application comes up for *inter partes* hearing.

25. Catherine Mturi- Wairi and Daniel Manduku are persons with identifiable stake, legal interest or duty in this Petition. They ought to be joined to the Petition, in order to enable the Court adjudicate upon and settle the matter. There are contractual rights and obligations which cannot be ignored, on the ground that this is public interest litigation. Relying on Rule 5 [d] [ii] of The Constitution of Kenya [Protection of Rights and Fundamental Freedoms] Practice & Procedure Rules 2013, ***the Court orders that Catherine Mturi-Wairi and Daniel Manduku are added to the Petition as Interested Parties.***

26. The Petitioner questions the composition and resolution of the Board Meeting held on 30<sup>th</sup> May 2018. There is however not sufficient evidential material to support the Petitioner's position with regard to these issues, to warrant grant of *ex parte* orders. There is no resolution of the Board, exhibited in the Petition. There are no minutes of the meeting held on 30<sup>th</sup> May 2018, showing who was in attendance, and what resolution or resolutions were made. What the Petitioner has availed to the Court are Gazette Notices showing when Directors of the KPA Board were appointed, and when their terms expired, or are set to expire. There are extracts downloaded from the KPA website showing facial images of some of the Directors. There are plenty of news items revolving around the allegation that the Government has compelled traders to use the SGR Freight Services. The authors and sources of these reports have not been made clear to the Court. These documents do not tell what transpired on 30<sup>th</sup> May 2018. They do not show who was in attendance, what was the agenda, and what was resolved. They do not establish legally, that the Managing Director's contract was terminated for anything to do with the SGR. The Petitioner argues eruditely on the law relating to composition of the Board, and its quorum for purpose of conducting business. But there is no material, other than copies of newspaper cuttings, factually supporting what is said to have transpired on 30<sup>th</sup> May 2018. The Petitioner has an obligation to establish a *prima facie* case, for the orders sought to issue. ***The Petitioner may file a supplementary affidavit supplying the Court with proper documents, or more information clarifying issues of prima facie evidence, raised by the Court in this Ruling.***

27. Lastly the Court agrees with the Petitioner that the Application is urgent. ***The Application is certified urgent, and the Petition as a whole shall be heard on accelerated basis.***

IT IS ORDERED:-

- a) The prayer for ex parte orders suspending decision of the KPA Board Meeting held on 30<sup>th</sup> May 2018, and for temporary injunction prohibiting the Respondents from acting on the said Board decision, is declined.*
- b) Catherine Mturi-Wairi and Daniel Manduku are added to the Petition as Interested Parties.*
- c) The Petitioner may file a supplementary affidavit.*
- d) The Petitioner shall serve the Respondents, and the Interested Parties, with the Petition, and the Application dated 5<sup>th</sup> June 2018.*
- e) The Respondents and the Interested Parties shall file their Replying Affidavits and Statements in support or opposition to the Petition, within 14 days of service.*
- f) The Application shall be heard inter partes, on 28<sup>th</sup> June 2018.*

**Dated and delivered at Mombasa this 7<sup>th</sup> day of June 2018.**

**James Rika**

**Judge**