

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

PETITION NO. E009 OF 2023

(Coram: F.M. Gikonyo J.)

IN THE MATTER OF THE ANTI-CORRUPTION AND ECONOMIC CRIMES

ACT NO.3 OF 2003

AND

IN THE MATTER OF LEADERSHIP AND INTEGRITY ARTICLES 10, 22, 73,

232 OF THE CONSTITUTION

AND

IN THE MATTER OF THE PUBLIC OFFICER ETHICS ACT, NO. 4 OF 2003

AND

IN THE MATTER OF SECTION 2 OF THE LEADERSHIP AND INTEGRITY

ACT NO. 19 OF 2012

BETWEEN

DR. MAGARE-GIKENYI B.....PETITIONER

-versus-

ANTHONY MWAURA.....1<sup>ST</sup> RESPONDENT

THE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT

THE CABINET SECRETARY NATIONAL

TREASURY.....3<sup>RD</sup> RESPONDENT

AND

ETHICS AND ANTI-CORRUPTION COMMISSION .....1<sup>ST</sup> INTERESTED

PARTY

THE KENYA REVENUE AUTHORITY ..... 2<sup>ND</sup> INTERESTED PARTY

JENNIFER GITIRI.....3<sup>RD</sup> INTERESTED PARTY

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## JUDGMENT

### Background of the case

- [1]. The 1<sup>st</sup> Respondent holds the position of Chairman of the Kenya Revenue Authority, the 2<sup>nd</sup> Interested Party herein.
- [2]. The 1<sup>st</sup> Respondent was appointed as the 2<sup>nd</sup> Interested Party's Chairman on 18<sup>th</sup> November 2022 by His Excellency the President of the Republic of Kenya on the advice of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.
- [3]. At the time of the appointment, the 1<sup>st</sup> Respondent was facing a myriad of corruption and economic crimes charges before the Anti-Corruption Court in Milimani Magistrate Court relating to theft of colossal sums of money from the Nairobi County Government in **Nairobi Milimani Chief Magistrates Anti-Corruption Case No. 32 of 2019 (Republic Vs. Kioko Mike Sonko Mbuvi Gideon, Anthony Ng'ang'a Mwaura and 16 others) (Criminal Suit)**.
- [4]. The 3<sup>rd</sup> Interested Party is the Deputy Director in Charge of Legal Services and Company Secretary at the Asset Recovery Agency who personally initiated asset freezing proceedings against the 1<sup>st</sup> Respondent as soon as criminal proceedings were instituted against the 1<sup>st</sup> Respondent in **Nairobi Milimani Chief Magistrates Anti-Corruption Case No. 32 of 2019 (Republic Vs. Kioko Mike Sonko Mbuvi Gideon, Anthony Ng'ang'a Mwaura and 16 others)**.
- [5]. The 3<sup>rd</sup> Interested Party successfully argued for freezing and seizure of the 1<sup>st</sup> Respondent's assets in **Assets Recovery Agency Vs. Hardi Enterprises Limited, Anthony Mwaura, and 2 others (2020) eKLR** before the Honorable Lady Justice Mumbi Ngugi J, (as she then was).
- [6]. After the appointment of the 1<sup>st</sup> Respondent as Chairman of the 2<sup>nd</sup> Interested Party on 18<sup>th</sup> November 2022, and as the forfeiture Suit was still pending against the 1<sup>st</sup> Respondent (still

pending to this day) on 10<sup>th</sup> January 2023 the 2<sup>nd</sup> Respondent at the instance of the 1<sup>st</sup> Respondent appointed the 3<sup>rd</sup> Interested Party as the 2<sup>nd</sup> Respondent's alternate on the Board of Directors of the 2<sup>nd</sup> Interested Party.

[7]. The petitioner claimed that, the 3<sup>rd</sup> Interested Party knew, at the point of her appointment to the 2<sup>nd</sup> Interested Party's Board that, the said Board was the chairperson was facing criminal charges, and forfeiture proceedings- she prosecuted the latter.

[8]. It has been argued that, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and 3<sup>rd</sup> Interested Party have misled and continue to mislead His Excellency the President in appointing and retaining the 1<sup>st</sup> Respondent as Chairman of the 2<sup>nd</sup> Interested Party when in fact the 1<sup>st</sup> Respondent is not qualified to hold public office due to pendency of corruption and economic crimes cases against him in which he is accused to have against the County Government of Nairobi.

[9]. The petitioner declared that, he has no contract of employment nor employer/employee relationship with any of the Respondents nor interested parties, thus, bona fide to invoke the jurisdiction of the High Court of Kenya to deal with this matter in keeping with the Court of Appeal decision in **Public Service Commission & 4 others V. Eric Cheruiyot & 20 others (Civil Appeal No. II9& I39 of 2017 (Consolidated)) (2022) KECA I5(KLR) (8 February 2022)**.

[10]. From the foregoing, the petitioner sees the action of the respondents as being capable of leading to, inter alia, loss of public confidence, subjugation of the law, and outright abuse of administrative power to the detriment of many Kenyans in the country.

[11]. The petitioner also considers the appointment of the 1<sup>st</sup> respondent to be illegal and highly irregular as it contravenes the Constitution and the law. He sought for an order of

certiorari, amongst other orders, to quash the appointment of the 1<sup>st</sup> respondent as the chairperson of KRA Board.

### The application and petition

[12]. The petitioner filed a notice of motion dated 06/12/2023. The application was seeking conservatory orders which are interlocutory in nature. And, since the petition is being determined, the interlocutory application has been rendered unnecessary intervention. It shall so lie.

[13]. The petition dated 06/12/2023 sought the following reliefs;

- i. THAT A DECLARATION be made that the 1<sup>st</sup> Respondent is not fit to hold the position of Chairperson of Boards of Directors of the Kenya Revenue Authority.
- ii. THAT A DECLARATION that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents failed, neglected, and or refused to advise His Excellency the President that the 1<sup>st</sup> Respondent is not fit to hold public office in light of Section 62 of the Anti-Corruption and Economic Crimes Act and the pendency of Milimani Chief Magistrates Anti-Corruption Case No. 32 of 2019 (Republic Vs. Kioko Mike Sonko Mbuvi Gideon, Anthony Ng'ang'a Mwaura, and 16 others against the 1<sup>st</sup> Respondent.
- iii. THAT an order of CERTIORARI to issue quashing the appointment of the 1<sup>st</sup> Respondent onto the Board of Directors of Kenya Revenue Authority.
- iv. THAT this Honourable Court be pleased to grant such further Order or Orders as may be just and appropriate.

- v. THAT the costs of, and incidental to this Petition be awarded to the Petitioner against the Respondents and interested parties, jointly and severally

[14]. The Attorney-General (the 2<sup>nd</sup> respondent) made an application dated 2<sup>nd</sup> January 2024 seeking to have the 3<sup>rd</sup> respondent struck out from the proceedings, on the reasons set out in the motion and in the supporting affidavit of Jennifer Gitiri sworn on 2nd January 2024.

[15]. The 1<sup>st</sup> Respondent's Notice of Motion Application dated 23rd February 2024 (the Application) seeks to strike out the petition on the basis that the same is overtaken by events. This will be of subsumed in the final determination of the petition.

### The responses

[16]. The 1<sup>st</sup> respondent filed a replying affidavit sworn by Anthony Ng'ang'a Mwaura on 13/03/2024.

[17]. The 1<sup>st</sup> respondent averred that a person facing criminal charges is not **ipso facto** rendered unfit to hold and enjoy public office as enshrined in Article 50(2)(a)

[18]. He further averred that his appointment was in strict compliance with the provisions of sections 6 (1), (2) & (3) of the Kenya Revenue Authority Act and he has diligently discharged his statutory duties and responsibilities with dedication and excellence leading to the 2nd Interested Party's massive improvement in tax collection efficiency. as such, his appointment may only be cut short under the provisions of section 8 of the said Act thereof by the President and hence the suspension provisions under section 62 of Anti-Corruption and Economic Crimes Act does not apply to him by dint of limitation at sub-section 6;

“This section does not apply with respect to an office if the Constitution limit or provides for the grounds upon which a holder of the office may be removed or the circumstances in which the office must be vacated.” and that in any case the charges were politically motivated against him.

[19]. In any event, the court vide a Ruling dated 7th February 2024 terminated the charges against him and all the others pursuant to the provisions of section 210 of the Criminal Procedure Code and therefore the Petition is rendered moot or overtaken by events

[20]. The 2<sup>nd</sup> respondent filed grounds of opposition dated 7<sup>th</sup> March 2024.

#### **Directions of the court**

[21]. The petition was canvassed by way of written submission. The petitioner, 1<sup>st</sup> respondent, the 2<sup>nd</sup> respondent, 2<sup>nd</sup> and 3<sup>rd</sup> interested parties have filed. The other parties did not participate in the matter.

#### **The petitioner’s submissions**

[22]. The petitioner submitted that the said administrative action of the respondents of irregular appointments was done in an outright violation of the constitution, and concealment of facts, and the respondents failed to adhere to tenets of chapter six of the constitution. The petitioner relied on **Institute of Social Accountability & Another v National Assembly & 4 Others High Court, (2015) ECLR, ENTICK vs- CARRINGTON (1965) 2 WILS, Hardware & Ironmongery Vs Attorney General (E.A) 1972, Salaries and Remuneration Commission & another v Parliamentary Service Commission & 15 others; Parliament & 4 others (Interested Parties) [2020] eCLR, south African constitutional court**

in minister of health & others vs treatment action campaign & others I42, DoucetBoudreau v Nova Scotia (Minister of Education).

[23]. The petitioner submitted that the respondents' actions of illegal and irregular appointment of the 1<sup>st</sup> respondent were not consistent with constitutional requirements and hence the said actions were liable to be rectified by this honourable court through appropriate reliefs as espoused in article 23 of the constitution. The petitioner relied on **Republic v Vice Chancellor Moi University & 2 others Ex parte Benjamin J. Gikenyi Magare** [2019] EKLK as quoted in **Pastoli v Kabale District Local Government Council and others** [2008] 2 EA 300 Court of Appeal case citing with approval **Council of Civil Unions v Minister for the Civil Service** [1985] AC 1 and **Re Application by Bukoba Gymkhana Club** (1963) EA 478 at 479.

[24]. The petitioner submitted that that the 1<sup>st</sup> Respondent is not exempted from the provisions of section 62 of ACECA of suspension and hence he was ineligible for appointment and thus his appointment as Chairperson of the Board of Management of the 2<sup>nd</sup> Interested Party on or around 18 November 2022 was and remains null and void ab initio. The petitioner relied on **David Kinusu Sifuna v Ethics and Anti-Corruption Commission & 3 others** [2017] eKLR.

[25]. The petitioner submitted that the illegality was as at the time of appointment and hence the decision to drop criminal proceedings against the 1<sup>st</sup> respondent long after appointment never cured the initial irregular appointment. In any case, illegality remains an illegality despite what happens later. The petitioner relied on the **County Government of**

**Kakamega & 2 others v Salaries and Remuneration Commission; County Government of Mombasa (Interested Party) [2018] eKLR.**

[26]. The petitioner submitted that the 3<sup>rd</sup> Interested Party's failure to appropriately advise the Presidency violated the principles of leadership, governance, and public service enshrined in Articles 10, 73, and 232 of the Constitution.

**The 1<sup>st</sup> respondent's submissions.**

[27]. The 1<sup>st</sup> respondent submitted that the Petitioner did not file any response to his application dated 23<sup>rd</sup> February 2024 thus the same is unopposed.

[28]. The 1<sup>st</sup> respondent submitted that the Petitioner has not provided any evidence to demonstrate that indeed the 2<sup>nd</sup> Respondent and the 3<sup>rd</sup> Interested Party failed to give that information to the president. Furthermore, the petitioner has not tendered any evidence to demonstrate that the president was not aware of the 1<sup>st</sup> Respondent's pending criminal case before appointing him as the chairman of the 2<sup>nd</sup> Interested Party's Board of Directors in any event. No law expressly obligates the 2<sup>nd</sup> Respondent and the 3<sup>rd</sup> Interested Party to give any information on the criminal culpability of the presidential appointee as the chairperson of the 2<sup>nd</sup> Interested Party. Furthermore, the cited law does not obligate the president to seek information on the criminal culpability of his nominee for the chairmanship of the 2<sup>nd</sup> Interested Party's Board of Directors. Most importantly, none of the cited laws, including the Kenya Revenue Authority Act under which the 1<sup>st</sup> Respondent was appointed, expressed or even impliedly prohibited the appointment of the 1<sup>st</sup> Respondent to the office of the chairperson of the 2<sup>nd</sup> Interested Party's Board of Directors while he still faced criminal charges. It is a trite law principle that whatever is not expressly included, is expressly



excluded. The 1<sup>st</sup> respondent relied on **Nairobi High Court Comm Civil Case No. 647 of 2015 – Jaribu Credit Traders Limited vs Fidelity Bank Limited & Another, County Government of Kakamega & 2 others v Salaries and Remuneration Commission; County Government of Mombasa (Interested Party) [2018] eKLR.**

[29]. The 1<sup>st</sup> respondent submitted that the appointment of the 1<sup>st</sup> Respondent was strictly in line with the requirements and guidelines for appointment under section 6 (1) - (3) of the Kenya Revenue Authority Act (the Act). The respondent contends that the president strictly followed the power conferred upon him under the KRA Act and did not violate any single provision of the law by appointing the 1<sup>st</sup> Respondent as the chairman of the 2<sup>nd</sup> Interested Party's Board of Directors.

[30]. The 1<sup>st</sup> respondent submitted that the reliance on section 62 of CECA by the petitioner as the basis for the allegation that the 1<sup>st</sup> Respondent was illegally appointed is misplaced. The 1<sup>st</sup> respondent contends that Section 62 of ACECA concerns Suspension if charged with corruption or economic crime. It has nothing to do with the appointment of the 1<sup>st</sup> Respondent into office by the president. The 1<sup>st</sup> respondent relied on **Republic v Registrar of Trade Marks Ex-Parte Kenafric Industries Limited & another [2017] eKLR**

[31]. The 1<sup>st</sup> respondent submitted that trite law that the mere fact that a person is facing a criminal charge does not ipso facto render him or her unfit to enjoy his or her rights and fundamental freedoms under the Constitution unless their enjoyment is restricted or limited by the law. The 1<sup>st</sup> respondent contends that in any event, the petitioner's basis of the allegation that the 1<sup>st</sup> Respondent lacks integrity, and therefore unfit to hold public office is now overtaken by events. The 1<sup>st</sup> respondent relied on **Nairobi Miscellaneous Civil**

Application Judicial Review No. 424 of 2014 – Republic vs Director of Public Prosecution  
& 4 others Ex Parte – Senator Johnson Nduva Muthama (2015) eKLR.

[32]. The 1<sup>st</sup> respondent submitted that the petitioner is now not facing any criminal charge, and hence the Petition herein now lacks any basis, discloses no reasonable cause of action in law, it is scandalous, frivolous, and vexatious, and an abuse of the court process. Thus, pray that the same be dismissed with costs to the Ist Respondent.

**The 2<sup>nd</sup> respondent's submissions.**

[33]. The 2<sup>nd</sup> respondent submitted that this court has jurisdiction at any stage of the proceedings to order the name of any party improperly joined to be struck out. Joinder of interested parties is a judicial function and not one left to the whim of petitioners. The 3<sup>rd</sup> interested party was joined as such by the Petitioner without leave of the Court. The 3<sup>rd</sup> interested party has been improperly joined as an interested party and is liable to be struck out from the proceedings. The 2<sup>nd</sup> respondent relied on the provisions of rule 5 (d) of the “Mutunga Rules, **Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others** [2014] eKLR, **Zephir Holdings Limited v Mimosa Plantations Limited, Jeremiah Matagaro & Ezekiel Misango Mutisya** [2014] eKLR, **Florence Nafula Ayodi and 5 others vs Jonathan Ayodi Ligure v John Tabalya Mukite & another; Benson Girenge Kidiavai & 67 others** (Applicants/Intended Interested parties), **James Ndung’u Kero v Chief Land Registrar, Director Of Survey & Attorney General (Environment & Land Case E046 of 2021)** [2022] KEELC I446 (KLR) (16 February 2022) (Ruling)

The 2<sup>nd</sup>, 3<sup>rd</sup> respondent, 2<sup>nd</sup>, and 3<sup>rd</sup> interested parties' submission to the petition.

[34]. The 2<sup>nd</sup>, and 3<sup>rd</sup> Respondents and the 2<sup>nd</sup> and 3<sup>rd</sup> Interested parties are opposed to the Petition herein. They relied on the grounds of opposition filed on their behalf by the Attorney-General on 7th March 2024.

[35]. The 2<sup>nd</sup>, 3<sup>rd</sup> respondent, 2<sup>nd</sup>, and 3<sup>rd</sup> interested parties submitted that the present petition has been rendered moot owing to developments subsequent to the institution of the suit and that the honorable court should so find and dismiss the petition. They relied on *Redhill Heights Investments Limited v Suzanne Achieng Butler & 4 others* [2018] eKLR, *Dande & 3 others v Inspector General, National Police Service & 5 others* (Petition 6 (E007), 4 (E005) & 8 (E010) of 2022 (Consolidated)) [2023] KESC 40 (KLR) (16 June 2023) (Judgment)

[36]. The 2<sup>nd</sup>, 3<sup>rd</sup> respondent, 2<sup>nd</sup>, and 3<sup>rd</sup> interested parties submitted that the Chairperson of the Kenya Revenue Authority is appointed pursuant to statutory provisions and therefore any allegation made against the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, imputing either negligence, failure, or refusal must be premised on a specific duty imposed upon them by the said statute. There is no provision of the said statute that predicates the President's decision to appoint Chairpersons on the advice of either the Attorney-General or the Cabinet Secretary of National Treasury. The power vests with the state corporation's advisory committee. They relied on *Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another* (Interested Parties); *Attorney General & another* (Amicus Curiae) (Presidential Election Petition I of 2017) [2017] KESC 42 (KLR) (Election Petitions) (20 September 2017) (Judgment).

[37]. The 2<sup>nd</sup>, 3<sup>rd</sup> respondent, 2<sup>nd</sup>, and 3<sup>rd</sup> interested parties submitted that owing to the provisions of the Official Secrets Act, the Oath of Secrecy subscribed to by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents coupled with the advocate client privilege that binds the Attorney-General in his professional dealings, the facts in respect to whether they advised and/or what they advised the President were not ordinarily within the knowledge of the Petitioner who would not be in any position to depose to the same. The Petitioner was unable to fulfill the requirements of the law as regards affidavit evidence by failing to disclose in his supporting affidavit, which facts were deposed to, on the basis of his knowledge, information, and belief and the sources thereof, rendering paragraphs 6, 7, 9, 10, 11,13,14 of his affidavit sworn on 6<sup>th</sup> December 2023 inadmissible and liable to be struck out. They relied on **Danros (K) Limited & another v Murtaza Adaamjee [2021] eKLR, Baseline Architects Limited & 2 others v National Hospital Insurance Fund Board Management [2008] eKLR.**

[38]. The 2<sup>nd</sup>, 3<sup>rd</sup> respondent, 2<sup>nd</sup>, and 3<sup>rd</sup> interested parties submitted that the supporting affidavit of the petition has glaring anomalies with averments in the same not being supported by the annexures referred to in the affidavit; contrary to Magare Gikenyi's averment in paragraph 10 of his supporting affidavit, the Annexure marked MGBI is not a copy of any court's ruling and most certainly not the ruling of Justice Mumbi Ngugi, contrary to Magare Gikenyi's averment in paragraph 11 of his supporting affidavit the annexure marked MGB2" is not a copy of any letter and certainly not a letter of appointment in respect to the 3<sup>rd</sup> Interested party as alleged or at all. It is the Attorney-General's observation that the copy of the ruling attached to the supporting affidavit of Magare Gikenyi is in respect to civil as opposed to criminal proceedings contrary to Magare Gikenyi's allegations. Further, a reading

of the copy of the ruling attached to the supporting affidavit of Magare Gikenyi makes it plain that the same was in respect to an application for rescission of preservation orders and not criminal proceedings as alleged by the Petitioner.

[39]. The 2<sup>nd</sup>, 3<sup>rd</sup> respondent, 2<sup>nd</sup>, and 3<sup>rd</sup> interested parties submitted that contrary to the Petitioner's assertions neither the 2<sup>nd</sup> Respondent nor the 3<sup>rd</sup> interested parties have the legal capacity to prosecute criminal cases by virtue of the offices that they hold.

[40]. The 2<sup>nd</sup>, 3<sup>rd</sup> respondent, 2<sup>nd</sup>, and 3<sup>rd</sup> interested parties submitted that none of the interested parties were joined by leave of the Court or upon any formal application as elucidated by the Supreme Court and are therefore liable to be struck out for improperly being joined in the proceedings.

[41]. The 2<sup>nd</sup>, 3<sup>rd</sup> respondent, 2<sup>nd</sup>, and 3<sup>rd</sup> interested parties submitted that to the extent that the Petitioner is seeking a financial benefit from the case by way of legal costs the same is not public interest litigation, and upon dismissal of the case, the Petitioner should bear the costs of the petition.

## ANALYSIS AND DETERMINATION

[42]. This court has considered the petition and the application dated 30/05/2023, the 1<sup>st</sup> respondent's application, the grounds of opposition, and the respective parties' submissions.

[43]. Several reliefs and declarations have been sought in the petition. However, the ultimate mission of the petition dated 06/12/2023 is a judicial review order of **Certiorari** to quash the appointment of the 1<sup>st</sup> respondent as the chairperson of KRA Board. Hence, the need to set out the court's remit to determine the petition.

[44]. The jurisdiction of the High Court under Article 165(3)d and (5) of the Constitution ‘is broad enough to cover review of the constitutionality or legality of appointments by other organs of government’ (Mumo Matemu vs. Trusted Society [2014] eKLR).

[45]. The Court of Appeal in the **Matemu case** rejected any approach that ‘would pose a recharacterization risk in similar forms of constitutional litigation’.

[46]. The court explained the nature of: -

‘...the petition before the High Court was not instituted as a removal procedure nor as a complaint against the appellant in his capacity as a State Officer. The petition was a challenge to the constitutionality of the process and manner of the appellant’s appointment.

[47]. And the Court of Appeal concluded that: -

This Court takes the view therefore that it is not the outcome of litigation that is determinative of its nature, but its substance at the time of seizure and proceedings. Viewed thus, an order setting aside the appointment of the appellant flows from a judicial finding of the unconstitutionality of the process and manner of appointment, not as a consequence of a removal procedure. We note with affirmation the holding of the High Court in the *Federation of Women Lawyers Kenya (FIDA-K) & 5 others v Attorney General & Another* (2011) eKLR, which we cite below in extenso for its relevance:

“In our view the jurisdiction of this Court under Article 165 is completely different from that of Tribunal under Article 168. It is clear that the Tribunal’s jurisdiction kicks in when there is an alleged misconduct on the part of the Judge or when he is unable to perform the functions of his office .....On the other hand, the question that is for our determination is about the process and it is our view that no step is greater than the other and any of the three steps are equally important and constitutionally mandatory. Therefore, what is at stake is the process used to nominate and appoint the Supreme Court Judges. It is our duty to evaluate and assess whether the business conducted by the Judicial Service Commission was in accordance with the law, fairness and justice. If the process of appointment is unconstitutional, wrong, unprocedural or illegal, it cannot lie for the Respondents to say that the process is complete and this Court has no jurisdiction to address the grievances raised by the Petitioners. In our own view, even if the five appointees were sworn in, this Court has the jurisdiction to entertain and deal with the matter. The jurisdiction of this Court is dependent on the process and constitutionality of appointment. In this sense, if the Judicial Service Commission a State Organ does anything or omits to do something under the authority of the Constitution and which contravenes that Constitution, that act or omission when so proved before the High Court shall be invalid. Accordingly we find and hold that we are

properly seized of this Petition as we have the requisite jurisdiction.”(emphasis supplied)

[48]. Therefore, this court has jurisdiction to hear and determine issues raised in the petition.

### Issues

[49]. Arising from the pleadings and rival parties’ submissions, are issues to do with: -

- i. The legality of the appointment of the 1<sup>st</sup> respondent. Under this head shall be discussed; i) the fact that the 1<sup>st</sup> respondent faced corruption and economic crimes charges in court at the time of his appointment; ii) issues to do with procedure for appointment and removal of the chairperson of the KRA Board; iii) whether the provisions of section 8 of the Kenya Revenue Authority Act oust the provisions of section 62 of the Anti-Corruption and Economic Crimes Act (ACECA).
- ii. Directly flowing from and related to (i) above; Whether the decision to drop criminal proceedings against or acquittal of the 1<sup>st</sup> Respondent long after the appointment cured the illegality or irregularity in the appointment.
- iii. Joinder of parties including whether the 3<sup>rd</sup> interested party failed to discharge her duties.

#### I. Whether the 3<sup>rd</sup> interested party failed to discharge her duties

[50]. The court inverts the order and starts with the last issue.

[51]. The 2<sup>nd</sup>, 3<sup>rd</sup> respondent, 2<sup>nd</sup>, and 3<sup>rd</sup> interested parties submitted that the Chairperson of the Kenya Revenue Authority is appointed pursuant to statutory provisions and therefore, any allegation made against the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, imputing either negligence, failure, or refusal must be premised on a specific duty imposed upon them by the said statute. To



them, there is no provision of the said statute that predicates the President's decision to appoint Chairpersons on the advice of either the Attorney-General or the Cabinet Secretary of National Treasury. The power vests with the state corporation's advisory committee. They relied on *Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney General & another (Amicus Curiae) (Presidential Election Petition I of 2017) [2017] KESC 42 (KLR) (Election Petitions) (20 September 2017) (Judgment)*.

[52]. The structure of the State Corporations Act contemplates that it is the State Corporations Advisory Committee that will advise on matters affecting and relating to State Corporations including but not limited to appointments into State Corporations.

[53]. The State Corporations Advisory Committee is established under section 26 of the State Corporations Act whose functions as set out in section 27 of the State Corporations Act inter alia are;

The Committee shall advise on the matters and perform any functions it is required by this Act to perform and in addition shall—

(a) with the assistance of experts where necessary, review and investigate the affairs of state corporations and make such recommendations to the President as it may deem necessary;

(c) where necessary, advise on the appointment, removal, or transfer of officers and staff of state corporations, the secondment of public officers to

**state corporations and the terms and conditions of any appointment, removal, transfer or secondment;**

[54]. The foregoing notwithstanding, Section 6 of the KRA Act provides for the establishment of the Board of Directors of the 2<sup>nd</sup> Interested Party and the Attorney-General or his representative, who in this case is the 3<sup>rd</sup> Interested Party, is a member (section 6 (2) (da) of KRA Act).

[55]. The purpose of the appointment of the Attorney General on the Board is on the basis of the function in Article 156 (4) (a) of the constitution that;

**The Attorney-General—**

**(a) is the principal legal adviser to the Government;**

[56]. The question is; whether the circumstances of the appointment herein at the time, may have required the advice of the Attorney-General as the principal legal adviser to the Government, especially of such matters of successful asset recovery proceeding as well as pending charges for corruption and economic crimes against the 1<sup>st</sup> respondent, and the legal complications and dilemmas that may arise therefrom in relation to the appointment of the 1<sup>st</sup> Respondent in a public office?

[57]. But, whether such advice was sought is a different thing altogether.

[58]. Nevertheless, as the AG is a party in these proceedings, it is improper to sue the 3<sup>rd</sup> respondent in her personal capacity, albeit she was the representative of the AG in the Board, or to personally bear the obligation of the AG.

[59]. Joinder of the AG in these proceedings is, nonetheless, in order as these kinds of proceedings are at the instance of the AG.

## Joinder of the other parties

[60]. In the interpretation section of the KRA Act; **“Cabinet Secretary”** means the Cabinet Secretary for the time being responsible for finance;

[61]. Therefore, the CS, Treasury is the responsible cabinet secretary, thus, proper party in these proceedings.

[62]. These proceedings relate to the Board of the 2<sup>nd</sup> interested party. Any orders issued herein may affect KRA. Therefore, KRA is properly joined.

[63]. However, it is not clear why the 1<sup>st</sup> interested party-EACC- was sued. Their presence in the proceedings has not been justified.

## **Whether the appointment was irregular, inconsistent with the Constitution and the law, therefore, illegal**

[64]. Ultimately, the petitioner is to convince the court that, the appointment of the 1<sup>st</sup> respondent was irregular, inconsistent with the Constitution and law, an illegality, thus, null and void.

[65]. One of the major grounds presented by the petitioner is that, the 1<sup>st</sup> respondent was facing corruption and economic crimes charges as well as forfeiture of proceeds of crime proceedings when he was appointed as chairperson of KRA Board. The petitioner is of the view that, in light of section 62 of ACECA and the integrity requirements in chapter six of the Constitution, the appointment was irregular, inconsistent with the Constitution and the law, and therefore, illegal, null and void. He sought it be quashed.

[66]. The 1<sup>st</sup> respondent submitted that the appointment of the 1<sup>st</sup> Respondent was strictly in line with the requirements and guidelines for appointment under section 6 (I) - (3) of the

Kenya Revenue Authority Act (the Act). The respondent contends that the president strictly followed the power conferred upon him under the KRA Act and did not violate any single provision of the law by appointing the 1<sup>st</sup> Respondent as the chairman of the 2<sup>nd</sup> Interested Party's Board of Directors.

[67]. He argued therefore, that he can only be removed pursuant to the provisions of section 8 of the KRA Act. And, section 62 does not apply to him by dint of the limitation in section 62(6) of ACECA. According to the 1<sup>st</sup> respondent, the reliance on section 62 of CECA by the petitioner as the basis for the allegation that the 1<sup>st</sup> Respondent was illegally appointed is therefore, misplaced. The 1<sup>st</sup> respondent contends that Section 62 of ACECA concerns suspension if charged with corruption or economic crime. It has nothing to do with the appointment of the 1<sup>st</sup> Respondent into office by the president. The 1<sup>st</sup> respondent relied on **Republic v Registrar of Trade Marks Ex-Parte Kenafic Industries Limited & another [2017] eKLR**

[68]. The 1<sup>st</sup> respondent submitted that it is trite law that the mere fact that a person is facing a criminal charge does not ipso facto render him or her unfit to enjoy his or her rights and fundamental freedoms under the Constitution unless their enjoyment is restricted or limited by the law. The 1<sup>st</sup> respondent contends that in any event, the petitioner's basis of the allegation that the 1<sup>st</sup> Respondent lacks integrity, and therefore unfit to hold public office is now overtaken by events. The 1<sup>st</sup> respondent relied on **Nairobi Miscellaneous Civil Application Judicial Review No. 424 of 2014 – Republic vs Director of Public Prosecution & 4 others Ex Parte – Senator Johnson Nduva Muthama (2015) eKLR**.

[69]. A number of issues arise under this head which are discussed below.

## Removal of I<sup>st</sup> respondent

[70]. These proceedings are not removal of the I<sup>st</sup> respondent from office pursuant to section 8 of the KRA Act. They are a challenge on the legality of the appointment. The Court of Appeal explained this difference in Mumo Matemu case, thus: -

**This Court takes the view therefore that it is not the outcome of litigation that is determinative of its nature, but its substance at the time of seizure and proceedings. Viewed thus, an order setting aside the appointment of the appellant flows from a judicial finding of the unconstitutionality of the process and manner of appointment, not as a consequence of a removal procedure.**

[71]. Be that as it may, this court appreciates the I<sup>st</sup> respondent submission that, he has diligently discharged his statutory duties and responsibilities with dedication and excellence leading to the 2<sup>nd</sup> Interested Party's massive improvement in tax collection efficiency. And, assures the I<sup>st</sup> respondent that his performance as the chairperson of KRA Board is not and will not be the subject of these proceedings.

## Application of section 62 to chairperson of the Board

[72]. The I<sup>st</sup> respondent was emphatic; that reliance on section 62 of CECA by the petitioner as the basis for the allegation that the I<sup>st</sup> Respondent was illegally appointed is misplaced. According to the I<sup>st</sup> respondent, Section 62 of ACECA concerns Suspension if charged with corruption or economic crime. He took the view that, it has nothing to do with the appointment of the I<sup>st</sup> Respondent into office by the President.

[73]. The 1<sup>st</sup> respondent also argued that removal of the chairperson of the KRA Board is provided under section 8 of the Kenya Revenue Authority Act.

[74]. For emphasis, Section 62 (1) of ACECA provides that:

A public officer or state officer who is charged with corruption or economic crime shall be suspended, at half pay, with effect from the date of the charge until the conclusion of the case: Provided that the case shall be determined within twenty-four months.

[75]. And, Section 62 (6) of ACECA provides that:

This section does not apply with respect to an office if the Constitution limits or provides for the grounds upon which a holder of the office may be removed or the circumstances in which the office must be vacated.

[76]. Section 8 of the KRA Act provides for termination, inter alia, of the appointment of chairperson of the KRA Board as follows;

The appointment of a member, other than an ex officio member, may be terminated, in the case of the Chairperson, by the President, and in the case of any other member, by the Cabinet Secretary, on any of the following grounds—

(a) for his inability to perform the functions of his office by reason of mental or physical infirmity;

(b) if he is declared or becomes bankrupt or insolvent;

(c) if he is convicted of a criminal offence and sentenced to a term of imprisonment of not less than six months;

(d) if, without reasonable cause to the satisfaction of the Cabinet Secretary, he is absent from six meetings of the Board in any financial year;

(e) if in any particular case, he fails to comply with the provisions of section 9;

(f) for such other sufficient cause as the Cabinet Secretary may, by notice in the Gazette, specify.

[77]. Section 62(6) of ACECA limits application of section 62 thereof;

‘...with respect to an office if the Constitution limits or provides for the grounds upon which a holder of the office may be removed or the circumstances in which the office must be vacated’ [Emphasis mine].

[78]. Section 8 of KRA Act is a statutory provision. Limitation of application of Section 62(6) of ACECA is in respect of constitutional offices and the reasons for the provision are noble and valid. The court supposes, inter alia, that, the limitation, is informed by the principle of the supremacy of the constitution over legislation (art. 2(4)), and in deference to the independence of constitutional offices proclaimed by the Constitution.

[79]. Therefore, the 1<sup>st</sup> respondent may not avail himself of the limitation in section 62 of ACECA, because the office he holds is not an office for which the Constitution limits or provides grounds for removal from office.

[80]. It bears repeating also that these proceedings are not for his removal under section 8 of the KRA Act.

[81]. It is therefore, the view of this court that, section 8 of KRA Act, does not oust application of section 62 to members of the Board of KRA.

### **Appointment of a person facing corruption and economic crimes charges**

[82]. Being of that orientation, does it matter in the process of appointment, that the 1<sup>st</sup> respondent was facing charges of corruption and economic crimes and forfeiture of proceeds of crime when he was appointed as chairperson of KRA Board?

[83]. According to the 1<sup>st</sup> respondent, the law cited by the petitioner, does not obligate the President to seek information on the criminal culpability of his nominee for the chairmanship of the 2<sup>nd</sup> Interested Party's Board of Directors.

[84]. The 1<sup>st</sup> respondent made further submission that, the petitioner has not tendered any evidence to demonstrate that the president was not aware of the 1<sup>st</sup> Respondent's pending criminal case before appointing him as the chairman of the 2<sup>nd</sup> Interested Party's Board of Directors in any event.

[85]. This court considers these two submissions by the 1<sup>st</sup> respondent to be quite unfortunate; arrogant and an indictment for insensitivity on the place and significance of the national values (art.10) and leadership and integrity provisions in Chapter Six of the



Constitution and as extended to all public officers through legislations, in public appointments. By these statements, the 1<sup>st</sup> respondent has passed an indictment on the appointing authority.

[86]. Further arguments by him were; that, most importantly, none of the cited laws, including the Kenya Revenue Authority Act under which the 1<sup>st</sup> Respondent was appointed, expressed or even impliedly prohibited the appointment of the 1<sup>st</sup> Respondent to the office of the chairperson of the 2<sup>nd</sup> Interested Party's Board of Directors while he still faced criminal charges. It is a trite law principle that whatever is not expressly included, is expressly excluded. The 1<sup>st</sup> respondent relied on **Nairobi High Court Comm Civil Case No. 647 of 2015 – Jaribu Credit Traders Limited vs Fidelity Bank Limited & Another, County Government of Kakamega & 2 others v Salaries and Remuneration Commission; County Government of Mombasa (Interested Party) [2018] eKLR.**

[87]. The 1<sup>st</sup> respondent further submitted that, his appointment was strictly in line with the requirements and guidelines for appointment under section 6 (1) - (3) of the Kenya Revenue Authority Act (the Act). The 1<sup>st</sup> respondent contended that, the President strictly followed the power conferred upon him under the KRA Act and did not violate any single provision of the law by appointing the 1<sup>st</sup> Respondent as the chairman of the 2<sup>nd</sup> Interested Party's Board of Directors.

[88]. The 1<sup>st</sup> respondent took issue with the reliance on section 62 of CECA by the petitioner as the basis for the allegation that the 1<sup>st</sup> Respondent was illegally appointed is misplaced. The 1<sup>st</sup> respondent is of the view that, that Section 62 of ACECA concerns Suspension if charged with corruption or economic crime. It has nothing to do with the

appointment of the 1st Respondent into office by the president. The 1<sup>st</sup> respondent relied on *Republic v Registrar of Trade Marks Ex-Parte Kenafric Industries Limited & another* [2017] eKLR

[89]. The 1<sup>st</sup> respondent submitted that trite law that the mere fact that a person is facing a criminal charge does not ipso facto render him or her unfit to enjoy his or her rights and fundamental freedoms under the Constitution unless their enjoyment is restricted or limited by the law.

[90]. The petitioner took a different view that, the fact that the 1<sup>st</sup> respondent faced corruption and economic charges as well as forfeiture of proceeds of crime, make him not fit to be appointed to the office of the chairperson of the KRA Board. He questioned the regularity and legality of such appointment of the 1<sup>st</sup> respondent in the circumstances of this case.

[91]. This court reiterates, the applicable test in such matters is: -

‘...whether the means applied by the organs of appointment to meet their legal duty has been performed in compliance with the object and purpose of the Ethics and Anti-Corruption Act as construed in light of Article 79 of the Constitution of Kenya’ (Matemu case supra).

[92]. Which test was elaborated in the said case thus: -

Under this test, the courts will not be sitting in appeal over the opinion of the organ of appointment, but only examining whether relevant material and vital aspects having a nexus to the constitutional and legislative purpose of integrity were taken into account in the actual process. Stated otherwise, the

analysis turns on whether the process had a clear nexus with a determination that the candidates meet the objective criteria established in law rather than a judgment over the subjective state of mind of the decision makers. This in our view provides a fact-dependent objective test that is judicially administrable in such cases.

[93]. Unpacking the important aspects of exercise of this jurisdiction: -

- i) The courts is not sitting in appeal over the opinion of the organ of appointment,
- ii) The court only examines whether relevant material and vital aspects having a nexus to the constitutional and legislative purpose of integrity were taken into account in the actual process. Stated otherwise, the analysis turns on whether the process had a clear nexus with a determination that the candidates meet the objective criteria established in law rather than a judgment over the subjective state of mind of the decision makers.
- iii) The analysis is fact-dependent objective test that is judicially administrable in such cases.

[94]. The court takes the following view of the matter. Understanding the principles which attend to appointments of persons to undertake a public duty, the requirements of leadership and integrity, the purport of section 62 of ACECA, proper exercise of public power, proper and prudent utilization of public resources, to mention but a few, forms the functional foundation for how the question, already posed; whether it matters in appointment to public

office that, a person is facing corruption and economic crime charges as well as forfeiture of proceeds of crime. In this case, the appointment is to the office of the chairperson of KRA Board.

[95]. The court will only be examining whether these matters are relevant material and vital aspects having a nexus to the constitutional and legislative purpose of integrity, and whether they were taken into account in the actual process of the appointment of the 1<sup>st</sup> respondent.

[96]. Section 62 of ACECA applies to the chairperson of KRA Board, if charged with corruption and economic crimes. Thus, applying judicial mind properly, salient questions shape the conversation in this case. Whether, it was not foreseeable that, the appointment may invoke section 62 of ACECA. Whether, the appointment, may suffer legal complications and dilemmas that the person so appointed may be suspended in accordance with section 62 of ACECA immediately upon appointment; on half pay until the conclusion of the case? And, whether, such eventuality portends proper exercise of authority or prudent utilization of public funds or instilling of confidence in the office concerned. Are these relevant material and vital aspects having a nexus to the constitutional and legislative purpose of integrity in the appointment of the 1<sup>st</sup> respondent?

[97]. The court is aware that, the 1<sup>st</sup> respondent has outrightly dismissed the purport of section 62 of CECA and its effects on his appointment, which is quite oblivious of the sensitivity of the office he holds; a public trust, and which is not exempt from integrity requirements and national values.

[98]. He has also argued that, it is law that the mere fact that a person is facing a criminal charge does not ipso facto render him or her unfit to enjoy his or her rights and fundamental freedoms under the Constitution unless their enjoyment is restricted or limited by the law.

[99]. He also urged that there is no prohibition, express or implied, in the KRA Act, under which he was appointed, of appointment of a person facing corruption and economic crimes to the office of chairperson of KRA Board.

[100]. This argument do not recognize or assign any weight to the power of integrity provisions in the Constitution, implementing legislations such as Leadership and Integrity Act, Public Officer Ethics Act, codes of conduct and ethics, requirements of declarations of wealth, to mention a few, in the appointment to public offices.

[101]. There is a misconception that, a person is said to lack integrity only when he is a convicted criminal- a thought or impression which has distorted the true character, purport and real effect of leadership and integrity as well as national values and principles of governance provisions in the Constitution and the law.

[102]. Under article 75(3) of the Constitution: -

**‘A person who has been dismissed or otherwise removed from office for a contravention of the provisions specified in clause (2) is disqualified from holding any other State office.’**

[103]. The power of integrity provisions cannot be underated.

[104]. Be that as it may, there is no requirement of a conviction for a person to fail the integrity test. Disciplinary action on the basis of integrity issues is relevant aspect in testing for integrity. Gross misconduct is also a relevant aspect in testing for integrity. Criminal

charges including corruption and economic crimes against a person are also relevant considerations in testing for integrity. Conviction of a criminal offence is also a relevant material in testing for integrity. Failure to disclose conflict of interest in a matter relevant to the office you hold or to be appointed to is also relevant material in testing for integrity. And, the list is long; it is not exhaustive.

[105]. The seeming conflation of integrity requirements with conviction is a distortion. The two are distinct and separate. Even where disqualification for election or appointment has been expressly provided for in the Constitution, conviction is set out separately from breach of chapter six of the Constitution. See for instance, article 99 of the Constitution.

[106]. Given the integrity provisions in the Constitution and the law, the law on corruption and economic crimes especially ACECA, generally, and the provisions of section 62 thereof, proper exercise of public power, proper utilization of public funds, the principle that public office is public trust, the fact that the 1<sup>st</sup> respondent was facing corruption and economic crimes charges as well as forfeiture proceedings ( the latter are still pending in court), are relevant material and vital aspects having a nexus to the constitutional and legislative purpose of integrity and were not taken into account in the actual process in the appointment of the 1<sup>st</sup> respondent as the chairperson of the KRA Board of Directors.

[107]. This formulation is understood better in light of the function of the KRA Board under section 6(6) of the KRA Act which are stated as below: -

**The Board shall be responsible for—**

- (a) the approval and review of the policy of the Authority**
- (b) the monitoring of the performance of the Authority in carrying out its functions; and**

(c) the discipline and control of all members of staff of the Authority appointed under this Act.

[108]. As well as the overall function of KRA stated in section 5(I) of the KRA Act as follows: -

The Authority shall, under the general supervision of the Cabinet Secretary, be an agency of the Government for the collection and receipt of all revenue.

[109]. Therefore, contrary to the submissions by the 1<sup>st</sup> respondent, the petitioner's arguments on the basis of section 62 of ACECA and the pending corruption and economic crimes charges as well as forfeiture proceedings for proceeds of crime to support the claim that the appointment of the 1<sup>st</sup> Respondent was inconsistent with the law and the Constitution, is not misplaced. These matters were relevant considerations in the process of his appointment as chairperson of KRA Board of Directors.

[110]. The argument by the 1<sup>st</sup> respondent that nothing prevented his appointment at the time is not defensible. The national values and principles of governance in article 10 and leadership and integrity provisions in chapter six of the Constitution are not mere adornment or embellishments. They are of real value in governance and regulate exercise of public power. The country should now embark on building national ethos, culture and practices for leadership based on, amongst others, the national values and principles of governance, integrity provisions in the law, principles of justice. Invest in integrity. The appointment of the 1<sup>st</sup> respondent went against every grain of any such ethos, culture and practice.

[111]. The appointment therefore, suffered procedural infirmity and illegality.

Whether the decision to drop criminal proceedings against the 1<sup>st</sup> respondent or acquittal long after the appointment cured the irregular or illegal appointment.

[112]. The basis of this petition is illegality of the appointment made on or around 18<sup>th</sup> November 2022 of the 1<sup>st</sup> Respondent as Chairperson of the Board of Management of the 2<sup>nd</sup> Interested Party (KRA).

[113]. The 1<sup>st</sup> respondent argued that, the criminal proceedings alluded to by the Petitioner have since been terminated in his favour; and he is not facing any such charges now.

[114]. The issue arising here is not about his innocence or otherwise, but the legality of his appointment. An illegality in appointment cannot be moot or made regular other than by full atonement.

[115]. Termination of the criminal case in his favour does not ipso facto atone for an appointment made in breach of the law. The controversy is on the legality or otherwise of the appointment of the 1<sup>st</sup> respondent given the obtaining circumstance at the time, and not his conviction or acquittal of the charges he faced. The argument by the 1<sup>st</sup> respondent that the case was politically motivated is neither here nor there. His appointment, while the cases were pending is the problem-it constitutes the breach of law in his appointment.

[116]. The court has found that an appointment was irregular and illegal for breaching the law and the Constitution. The court should not accept this argument by the 1<sup>st</sup> respondent lest it should set a dangerous precedent where the appointing authority commits illegalities, and later, find ways of 'sanitizing' them. Such course will also make the court part of the 'sanitization' of illegalities.

[117]. It is worth repeating that, atonement for illegality is to purge or remove the illegality by judicial remedy.



## Conclusion and orders

[118]. From the authorities cited, in principle, the High Court may conduct review of appointments to State or Public Office on grounds of procedural soundness as well as the legality of the appointment decision itself to determine if it meets the constitutional threshold, provided that it accords with this Court's holding in Ex Chief Peter Odoyo Ogada- on separation of powers.

[119]. The appointment herein suffers procedural infirmities and illegality as relevant material and vital aspects having a nexus to the constitutional and legislative purpose of integrity were not taken into account in the actual process of the appointment. These were; he was facing corruption and economic crimes charges in court at the time of the appointment. These matters had a clear nexus with a determination that the candidates meet or does not the objective criteria established in law.

[120]. In the upshot, this court makes the following orders: -

- i. A DECLARATION is hereby made that the 1<sup>st</sup> Respondent suffered illegality and procedural infirmities as it was made when the 1<sup>st</sup> respondent was facing corruption and economic crimes charges in Milimani Chief Magistrates Anti-Corruption Case No. 32 of 2019 (Republic Vs. Kioko Mike Sonko Mbuvi Gideon, Anthony Ng'ang'a Mwaura, and 16 others against.
- ii. A DECLARATION is hereby issued that the 3<sup>rd</sup> Respondent is not personally liable for advising the appointing authority in respect of the

appointment of the I<sup>st</sup> respondent. She was wrongly sued in her private capacity and her name is hereby struck out from the proceedings.

- iii. THAT an order of CERTIORARI is hereby issued quashing the appointment of the I<sup>st</sup> Respondent as the chairperson of the Board of Directors of Kenya Revenue Authority.
- iv. THAT any prayer that is not expressly granted is deemed to be denied.
- v. That as these are public interest litigation, each party shall bear own costs.

[121]. Orders accordingly.

Dated, signed, and delivered at Narok through Microsoft Teams online application this 15<sup>th</sup> Day of July, 2024.

.....

Hon. F. Gikonyo  
Judge

In the Presence of: -

C/A: Raymond

Makhoha for I<sup>st</sup> Respondent – Present

Ms. Wambugu for Ms. Maina for I<sup>st</sup> interested Party – Present

Dr. Magare (Petitioner) – Present

N/A for AG and KRA