



**REPUBLIC OF KENYA**

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

**PETITION NUMBER 4 OF 2020**

**[Formerly Mombasa High Court Petition Number 29 of 2020]**

**BETWEEN**

**COMMISSION FOR HUMAN RIGHTS**

**& JUSTICE.....PETITIONER/ APPLICANT**

**VERSUS**

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

**2. THE CABINET SECRETARY, TRANSPORT & INFRASTRUCTURE**

**3. THE HON. ATTORNEY-GENERAL.....RESPONDENTS**

**AND**

**THE DOCK WORKERS UNION.....INTENDED INTERESTED PARTY**

***Rika J***

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***Lutta & Associates, Advocates for the Petitioner***

***Cootow & Associates, Advocates for the 1<sup>st</sup> Respondent***

***Attorney-General for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent.***

**FURTHER ORDERS**

1. The Petitioner lodged Petition at the High Court Mombasa, on 8<sup>th</sup> May 2020, seeking orders *inter alia*, that pending hearing and determination of the application *inter partes*, that the 1<sup>st</sup> Respondent is barred from conducting interviews for the vacant position of Managing Director, Kenya Ports Authority, pursuant to an advertisement made on 8<sup>th</sup> April 2020.

2. The application is based on the affidavit of the Petitioner’s Advocate, Julius Ogot, sworn on 7<sup>th</sup> May 2020. The matter was transferred through an order of the High Court to the E&LRC, and placed before Hon. Lady Justice Ndolo electronically, who issued directions 15<sup>th</sup> May 2020, on the filing of response to the application. Further directions were to issue on 21<sup>st</sup> May 2020. It is not clear what was recorded on 21<sup>st</sup> May 2020. The file has been transmitted to the undersigned Judge this afternoon, 2<sup>nd</sup> June 2020.

3. The Dock Workers Union filed an application on 14<sup>th</sup> May 2020, seeking to be added to the Petition. The application is based on the affidavit of the Union Secretary-General, Simon Kiprono Sang, sworn on 14<sup>th</sup> May 2020.

4. The Petitioner is opposed to the joinder of the Dock Workers Union, arguing through a replying affidavit sworn by Advocate Julius Ogogoh, that the Dock Workers Union has not established prima facie interest in the Petition.

5. The Attorney-General, for 2<sup>nd</sup> and 3<sup>rd</sup> Respondent is opposed to the Petitioner's application, on the ground, among others, that the application is pre-emptive, speculative and seeks to waste judicial resources.

6. The 1<sup>st</sup> Respondent is similarly opposed to the application, through a detailed affidavit sworn by KPA General Manager Legal Services and Board Secretary. Its position is that the Court should not interfere with the jurisdiction of the Board in appointment of the Managing Director. The law and instruments regulating management of the KPA, does not envisage unnecessary intervention by the Court, in the work of the Board. It is conceded that the process is taking place in the midst of severe limitations imposed on the Country and the Globe, by the novel corona virus. It is similarly admitted that the Government has spelt out certain measure, including restriction of movement in and out of Mombasa City, where the KPA is domiciled. Government business, which included management of KPA, and principally the filling up of the position of the Managing Director, must go on.

7. The 2<sup>nd</sup> Respondent, in addition to the Grounds of Opposition of record, relies on an affidavit sworn by Solomon Kitungu, Principal Secretary State Department in the parent Ministry. The affidavit was sworn on 20<sup>th</sup> May 2020. The affidavit expounds the contents of the Ground of Opposition, and adopts a similar position to that of the 1<sup>st</sup> Respondent.

**The Court Finds:-**

8. The Petitioner has established a *prima facie* case, warranting grant of an interim order, barring the Respondents from proceeding with the interview and filling up of the position of Managing Director, pending hearing of the application *inter partes*.

9. It is not disputed that the Country is focused on a life threatening pandemic, and that Mombasa, and KPA itself, has been affected by this pandemic.

10. This is not, *prima facie*, conducive to conducting an open, transparent, inclusive and nationwide search for the Managing Director of KPA, a public entity, whose governance must conform to the tenets of the Constitution, highlighted in the Petition.

11. In the interim, the Court agrees that, the KPA is not hampered in its operations by keeping the position vacant, until the hearing *inter partes*. There is an acting Managing Director, who in the admission of the Respondents, has a mandate, of up to September 2020. The KPA has General Managers for its various departments, and would certainly not come to a standstill if the interim order of injunction issued.

12. Lastly, the Dock Workers Union has demonstrated it has interest in the Petition. It is the workplace trade union, with a stake in how its members, are managed. It is a major industrial player, with a duty to keep in check, the management of KPA and the welfare of members. It must be allowed to ventilate its concerns in this process.

IT IS ORDERED:-

- a. ***Pending hearing and determination of the application filed by the Petitioner inter partes, the Respondents are barred from conducting interviews for the position of Managing Director, KPA.***
- b. ***The Dock Workers Union is joined to the Petition as an Interested Party.***
- c. ***The application shall be considered and determined through written submissions, to be filed and exchanged electronically on or before 16<sup>th</sup> June 2020.***
- d. ***Parties may also file and exchange answers to the substantive Petition, and skeleton submissions with regard to the Petition, within the same period.***
- e. ***The Deputy Registrar shall communicate with the Parties on other directions than may be deemed necessary between now and then.***
- f. ***Mention on 17<sup>th</sup> June 2020.***

**Dated, signed and released to the Parties electronically at Chaka, Nyeri County, under the Covid-19 Judiciary Guidelines, this 2<sup>nd</sup> of June 2020.**

**James Rika**

**Judge**