



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

PETITION NO. 25 OF 2016

BETWEEN

HENRY NYABUTO ONDIEKO PETITIONER

AND

CHARLES APUDO OWELLE 1ST RESPONDENT

ATTORNEY GENERAL (SUED ON BEHALF OF THE CABINET SECRETARY, MINISTRY OF

AGRICULTURE, LIVESTOCK & FISHERIES) 2ND RESPONDENT

CHAIRMAN OF THE BOARD CHEMELIL SUGAR COMPANY LIMITED 3RD RESPONDENT

JUDGMENT

1. The matter was originally filed in the Employment and Labour Relations Court and transferred to this court and registered as a petition. For that reason, I shall refer to the applicant as a petitioner. This claim was commenced by an Originating Notice of Motion dated 16th September 2016 and amended on 16th November 2016 and it seeks the following declarations:

a. That the continued stay in office of the 1st respondent Mr. Charles Apudo Owelle as Chief Executive Officer of Chemelil Sugar Co. Limited violates and is in contravention of State Corporations Act Cap 446 Laws of Kenya.

b. That Charles Apudo Owelle is heading Chemelil Sugar Company Limited which is a state corporation against the law.

c. That the failure by the cabinet secretary for Agriculture to appoint a substantive holder to office of a contravention of the law.

d. That the 1st respondent's stay in office as Chief Executive Officer of Chemelil Sugar has resulted in farmers not being paid colossal sums of money and is against interest of the public.

e. That Charles Apudo Owelle is not fit to hold office due to his corrupt dealings and trading with a proxy company known as Cubic Business Solutions Limited registered in family name.

2. The petitioner's case is contained in the body of his application, his affidavit sworn in support of the

Originating summons and written submissions. From the prayers, I have set out above the case concerns that 1st respondent who was appointed as Managing Director of Chemelil Sugar Company Limited (“Chemelil”) by the Minister of Agriculture and the appointment notified by Gazette Notice No. 6260 dated 30th April 2012. The appointment was for a period of 3 years with effect from the 11th May 2012. The petitioner alleged that during his term in office, the 1st respondent in association with the 3rd respondent engaged in corrupt dealings thereby denying farmers colossal sums of money amounting to Kshs. 198.4 million. He further contended that the 1st respondent engaged in unethical behavior and other conflicts of interest by contracting a company known as Cubic Business Solutions Limited owned by his family to supply gunny bags and other items to Chemelil.

3. The petitioner further argued that after end of his term in office, the 1st respondent has refused to vacate office and he is still running the company without renewal of the contract or fresh appointment by the Cabinet Secretary for Agriculture, Livestock and Fisheries (“the Cabinet Secretary”).

4. The respondents opposed the motion and set out their case in the replying affidavits of the 1st and 3rd respondents sworn on 30th September 2016, the replying affidavit of Dr. Richard Leresian Lesiyampe, the Principal Secretary State Department for Agriculture in the Ministry of Agriculture, Livestock and Fisheries (“the Principal Secretary”) and their written submissions.

5. The 1st respondent set out background of his first and second appointment as Managing Director of Chemelil. Prior to the expiry of his term in office, he requested the Secretary of State Advisory Committee (“SCAC”) to arrange and carry out a performance appraisal of the Managing Director and Board of Directors (“the Board”) by a letter dated 15th October 2014. In due course and with the assistance of SCAC, the Board carried out an appraisal and he scored 92.06%. Following the evaluation, the Board held a meeting on 4th March 2015 and recommended that since he had scored highly in the performance appraisal he was fit for renewal of contract for another term of 3 years. Subsequently, the Chairman wrote to the Principal Secretary recommending that his term be renewed for a further 3 years. By a letter dated 4th May 2015, the Principal Secretary recommended that the 1st respondent’s term be extended for 6 months as the Government had put on hold recruitment of Chief Executive Officers for state corporations scheduled for privatization including Chemelil.

6. After the expiry of the 6-month extension, the Board, by a letter dated 2nd October 2015, wrote to the Cabinet Secretary for Agriculture, Livestock and Fisheries (“the Cabinet Secretary”) recommending a renewal of the 1st respondent’s contract for 3 years or until privatization of the company whichever came first. The 1st respondent contended that following such recommendation, the Cabinet Secretary agreed with the Board and his contract was renewed for a term of 3 years. The 1st respondent denied any involvement in corrupt dealings as was alleged by the applicant. The 3rd respondent supported the position taken by the regarding the appointment and denied any involvement in corruption as alleged by the petitioner.

7. In his deposition, the Principal Secretary stated that the responsibility of appointing a Managing Director or Chief Executive of a state corporation is vested in the Board pursuant to **section 5(3) of the State Corporations Act (Chapter 466 of the Laws of Kenya)** (“the Act”). He further deposed that the appointment is governed by the **Mwongozo Code of Governance for State Corporations** (“Mwongozo”) which is a document setting out guidelines for state corporations issued by the SCAC. The Principal Secretary thus contended that the Board acted within its mandate in renewing the 1st respondent’s contract and that it was not necessary to gazette the renewal. The Principal Secretary was also of the view that the allegations of impropriety and integrity raised by the applicant were unsubstantiated and ought to be referred to the Auditor General or the Inspector General (Corporations) as they are the offices vested with the power to investigate such allegations.

8. From the pleadings and submissions of the parties, there are two issues for determination. First, whether the 1st respondent is legally in office and second, whether the 1st respondent is a fit person to

hold public office.

9. The appointment of the Managing Director or Chief Executive Officer of a state corporation is set out in **section 5(3)** of the **Act** which states:

A state corporation may engage and employ such number of staff, including the chief executive, on such terms and conditions of service as the Minister may, in consultation with the Committee, approve.

According to Chapter 1 Part 1.2(K) of *Mwongozo*, the Board of a State Corporation is empowered to hire the Managing Director or Chief Executive, on such terms and conditions of service as may be approved by the relevant Government Organ(s).

10. The **Act** as read with *Mwongozo* is clear that the Board is vested with the power to hire a Chief Executive or Managing Director of a state corporation but such appointment must be approved by the Minister or the relevant Government Organ(s). The petitioner's case is that the appointment done without the approval of the relevant organs is null and void. In the present case, the Board wrote to the Principal Secretary on 10th March 2015 informing him of the impending lapse of the 1st respondent's contract as Managing Director. The Principal Secretary wrote back and approved the extension of the 1st respondent's contract for 6 months as the Chemelil were among the state corporations slated for privatisation. The 6 months lapsed whereupon the Board wrote to the Cabinet Secretary recommending that 1st respondent's contract be renewed retrospectively for three years or until privatisation of Corporation whichever came earlier.

11. In a letter dated 3rd February 2016, the Principal Secretary wrote to the Secretary of SCAC seeking approval for Chemelil to give the 1st respondent a two-year appointment effective from 12th May, 2015 awaiting the privatisation process. He stated as follows:

...The Board has written to the Ministry proposing that Mr. Charles Owelle be given a full 2nd term appointment with effect from 12th May 2015. The Ministry is supportive of the Board's proposal as it will bring certainty and stability in the management of the Company.

The purpose of this letter therefore is to seek your approval for Chemelil to give Mr. Owelle a two year appointment effective from 12th May, 2015. The two year period will accommodate the eight (8) months his contract expired and an additional sixteen (16) months awaiting the privatization process.

12. From the evidence, the 1st respondent's engagement for another 3-year term had already been approved by the Board after an evaluation done with assistance of SCAC. The Board had already exercised its powers in terms of **section 5(3)** of the **Act** at its meeting on 9th May 2016 re-appointing him for a second full term of 3 years or up to privatisation of the company whichever came earlier. The Minister had already expressed his concurrence through the Principal Secretary's letter of 3rd February 2016. The only process left was for SCAC to express its concurrence by advising the Minister. A reading of **section 5(3)** of the **Act** does not give the SCAC a veto over the appointment. The requirement of under the **Act** is for the Minister to consult SCAC and he has expressed his intent to do so albeit in a manner to suggest that the approval of SCAC is required.

13. Should I void the appointment for failure by SCAC to carry out its statutory obligation to consult with the Minister? A plain reading of the statute without more would dictate that I set aside the appointment but this approach would undermine the principle and value of good governance under **Article 10** of the Constitution that underpins the running of public institutions. Moreover, it would lead to a situation where SCAC would veto appointments by failing to perform its statutory duty of consulting with and advising the Cabinet Secretary when requested to do so. In the circumstances of this case I find that the renewal of the 1st respondent's contract was in accordance with the law as the Board had authority to do so. The

Cabinet Secretary expressed his approval of the appointment initially on a condition that did not materialize and after the Board exercised its power to appoint the 1st respondent for the full term, it sought approval of the Cabinet Secretary's approval. The Cabinet Secretary has expressed his concurrence and it is only the SCAC that has not responded. The remedy in this case is to direct SCAC to express its position in regard to the consultation with the Cabinet Secretary in order to complete the process. Fair administrative action demands that expeditious an expeditious response. I wish to emphasise that the Board and the 1st respondent have acted in the accordance with the law and cannot be faulted. What remains is for SCAC to respond to the Principal Secretary's request and I direct that it does so within the next 21 days.

14. Regarding the allegations of corrupt dealings against the 1st respondent, I agree with the 2nd respondent's submissions that the **section 18 and 19** of the **Act** provide for the Office of Inspector General (State Corporations) which is responsible inspections of the corporation's books, records, returns and other documents. The Inspector General may surcharge a person for any loss or deficiency which is a result of his negligence or misconduct. Apart from the Office of the Inspector General, there are other offices and authority which are legally mandated to deal with such issues for example the Police Service, the Director of Public Prosecutions or the Public Procurement Regulatory Authority and the Anti-Corruption and Ethics Commission. It is evident from the petitioner's petition that the Public Procurement Regulatory Authority has already expressed its view on some of the petitioner's complaints. Likewise, there is evidence that the Company is investigating some complaints regarding bribery against its members of staff.

15. It is for the reasons I have set out above, that I have exercised circumspection in commenting on the rather thread-bare allegations made against the 1st respondent. I would only reiterate the general principle that has been settled in a line of cases from our courts. The principle is that where the legislature has established specific procedures for ventilating a grievance, then that procedure ought to be followed (***The Speaker of The National Assembly v The Hon James Njenga Karume, Civil Application No 92 of 1992 (Unreported)***). I also decline to deal with the allegations of corruption are against third parties who are not party to this suit hence as these claims cannot be adjudication in their absence. I therefore find and hold that there is no basis for finding that the 1st defendant is unfit for public office.

16. Since the State Corporations Advisory Committee has not responded to the letter dated 3rd February 2016 from the Principal Secretary, Ministry of Agriculture, Livestock and Fisheries, it is directed to signify its decision within the next **twenty-one (21) days** from the date of service of this decision for the Minister to act and give his approval in terms of **section 5(3)** of the ***State Corporations Act***.

17. Save for the aforesaid order, the petitioner's case is dismissed. As to whether I should impose the costs on the petitioner, I consider that the case was not entirely frivolous. Each part shall bear their own costs.

DATED and DELIVERED at KISUMU this 27th day of April 2017.

D.S. MAJANJA

JUDGE

Petitioner in person.

Ms Lang'at, Principal Litigation Counsel, instructed by the Officer of the Attorney General for the 2nd respondent.

Mr Oyuko instructed by Amos O. Oyuko and Company Advocates for the 1st and 3rd respondent.