



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPL. NO. 281 OF 2016

IN THE MATTER OF APPLICATION FOR JUDICIAL REVIEW

AND

APPOINTMENT OF GODFREY SIFUNA WANYONYI AS MANAGING DIRECTOR, NZOIA SUGAR COMPANY

BETWEEN

REPUBLICAPPLICANT

VERSUS

NZOIA SUGAR COMPANY.....1ST RESPONDENT

THE CHAIRMAN, BOARD OF DIRECTORS

NZOIA SUGAR COMPANY.....2ND RESPONDENT

AND

EX PARTE APPLICANT.....JACK MUKHONGO MUNIALO

JUDGEMENT

Introduction

1. The ex parte applicant herein, **Jack Mukhongo Munialo**, instituted these proceedings by way an amended Motion on Notice dated 11th July, 2016 seeking the following orders:

- 1) That the Applicant, Jack Mukhongo Munialo be granted an order of Certiorari to remove into this court and quash the decision of the 2nd respondent to appoint Mr. Godfrey Sifuna Wanyonyi as the Managing Director of Nzoia Sugar Company.**
- 2) That the Respondents be condemned to pay costs of this Application.**

2. According to the Applicant, the position of Managing Director of the 1st respondent (herein called the “company”) fell vacant when the then Managing Director was retired after being found to be unfit to hold the office and **Mr. Godfrey Sifuna Wanyonyi** was appointed as the acting Managing Director by virtue of the fact that he was the Finance Manager. While acting as the Managing Director, **Mr. Godfrey**

Sifuna Wanyonyi, with no due regard to preferred company procedure, went ahead and sought for a consultant to advertise the position of the Managing Director to wit, he appointed the firm of **Eliud and Associates** to assist the company in the recruitment of the Managing Director. This was contrary to the company policy where the same ought to have been done through open tendering as per the Procurement Manual for the company.

3. It was averred that the actions of the then acting managing director was contrary to the norm in the company where such tendering was open so as to avoid the issue of favouritism arising where a consultant having vested interests as was the case herein is awarded the contract. It was further averred that **Mr. Godfrey Sifuna Wanyonyi**, did restricted tendering and chose the said firm of consultants and gave them a contract to do the recruitment of the Managing Director of the Company where he was an interested candidate for the said position.

4. The firm went ahead and advertised the position of Managing Director of Nzoia Sugar Company on 9th February, 2016 in the *Standard Newspaper* and several were applicants shortlisted for the post. It was averred that the advertisement had clear requirements as to the qualification, duties and responsibilities required from the applicants in order to be appointed as a Managing Director of Nzoia Sugar Company as below;-

a) Must have a first degree in Agriculture, engineering, business, finance or social sciences from a recognized university.

b) Masters in Finance, Strategy, Corporate Management, Leadership, Governance or Business is an added advantage.

c) At least 10 years of relevant work experience, seven (7) of which must be at a senior level in large organization(s). Part of the experience must be in a milling manufacturing sector.

d) Aged 35 and above.

e) Computer literate; and

f) Leadership, Management and Governance training from a recognized training institution will be an added advantage.

5. Further a personal attribute required was for the applicants to have high levels of integrity and honesty which qualifications are also enshrined in The Code of Governance for State Corporations on page 56 which was in operation before the appointment of the Managing Director.

6. It was averred that the consultant hired to interview applicants came up with a list of five (5) candidates out of 11 candidates in a short list who were then shortlisted for consideration by the board of directors and out of the five (5) candidates, only three (3) met all the requirements and **Mr. Godfrey Sifuna Wanyonyi** did not meet the requirements and more so did not meet the first and basic academic requirement of a first degree as advertised. According to the applicant, prior to the advertisement, **Mr. Godfrey Sifuna Wanyonyi** was involved in questionable acts that led to him being investigated for corruption and even charged for the same and his integrity was seriously undermined. For example, in a report dated 14th September 2012 prepared by PKF Consulting Limited on behalf of Nzoia Sugar Company, it details how he was involved in corrupt actions and recommended legal action to be taken against him and furthermore he had numerous suspensions from duty when he was financial manager. The applicant disclosed that he was facing cases pending before the Ethics and Anti-Corruption Commission regarding rampant corruption in Nzoia Sugar Company as per the annexed documents and correspondences from various government agencies and stakeholders detailing corruption in the 1st respondent company. Currently the investigation and the audit is taking place by EACC whereas he is the chief architecture of the financial malpractices in the company and that he has aided the company to procure a loss of over 3 billion as a finance manager and acting Managing Director.

7. The applicant averred that despite all the glaring faults the **Mr. Wanyonyi** had, the consultant went ahead and gave him the highest score effectively making him the probable candidate to be appointed as the Managing Director. The names of the five candidates were forwarded to the board of directors for further interview in which board, **Mr. Wanyonyi** was a member, went ahead to forward three (3) names to the Cabinet Secretary of Agriculture for the gazette and appointment of the Managing Director of the company. In that list was **Mr. Wanyonyi's** name as the best qualified candidate as advised by the consultant. It was the applicant's contention that **Mr. Wanyonyi** had close relationship with Board of Directors since they sat on the same Board and decides Board remuneration.

8. However even before the gazette, the 2nd respondent went ahead and appointed **Mr. Godfrey Sifuna Wanyonyi** as the Managing Director of the company vide a letter dated 17th May 2016 contrary to the provisions of the law where it is the Cabinet Minister who is the appointing authority in all government parastatals.

9. It was the applicant's contention that the whole process of recruiting of the Managing Director was tainted with gross conflict of interest and thus was devoid of transparency and integrity. To him, **Mr. Wanyonyi** does not hold the basic and bare minimum academic qualification as required to hold the position of Managing Director as per the company advertisement and Nzoia Sugar Company human resource manual. That even the Masters Degree exhibited by him was never equated by the Commission for University Education as is required for the same to be recognized in the country and it does not state what course in business administration. He was accused of single handedly selecting the firm of consultants whom he had had previous dealing with to select the Managing Director. He is still facing cases of corruption and his integrity is highly doubted whereas **Eliud and Associate** has a running contract of strategic planning with Nzoia Sugar Company, the director is personally known to managing director and board of directors where through restricted tendering he was selected to aid the appointment of **Mr. Wanyonyi** fraudulently to meet some interests.

10. The ex-parte applicant contended that the operations of the company has tremendously declined with the appointment of **Mr. Wanyonyi** for example the tonnage price of farmers cane reduced from Kshs 3,800/= to Kshs 3,000/= and the same is a continuous effect as when he had been appointed as the acting managing director when profitability of the company had gone down and they are justifiably apprehensive that they together with other cane farmers and the general public will stand to lose immeasurably should the current Managing Director be allowed to continue dispensing his duties that he does not qualify for at all.

11. The applicant contended that the chairman of the board has upon request by the applicant's lawyer, refused to give information on the process of recruitment whereas they were hiding important information that could reveal the fraudulent issues on recruitment process. To the applicant, it is important that the whole process that led to the long list and shortlist be provided for scrutiny by the court.

12. In response to the replying affidavits filed on behalf of the Respondents, the applicant averred that both respondents have failed to demonstrate that the appointed Managing Director is actually qualified as they have failed to even attach any of his qualification certificates to counter the accusations. The applicant insisted that the matter before court is the irregular appointment of the Managing Director of the 1st Respondent and this court has jurisdiction to hear the matter. In his view, the fact that the respondents do not want the documents he obtained from public offices to be in the open does show that they have something to hide. To him, communications by public officers cannot and should not be construed as private communication as the respondents wish it to be.

13. The applicant averred that indeed, the authenticity of the documents is not in dispute as he obtained them through the proper offices as an interested member of the public who's been affected by their actions. He insisted that it cannot be said that the process of recruiting the Managing Director was fair, whereas the person appointed doesn't meet the bare minimum qualifications for the position.

14. The applicant denied that he had been engaged in political functions whereby he incited farmers not to deliver cane to the 1st Respondent, since as a farmer he does also deliver cane and couldn't advise against

it.

15. It was his position that apart from mere denials, the respondent failed to prove his accusations as false and have instead tried to shift the focus of the suit to him.

16. It was submitted on behalf of the applicant that what is before this court for trial is one of challenging the process of appointing the Managing Director of the 2nd respondent and he relied on **Civil Misc. Application No. 168 of 2015 (JR) Republic -vs- Principal Secretary Agriculture, Livestock and Fisheries and 2 Others, Saul Wasilwa (Interested party, Ex-parte Douglas M. Barasa and 2 Others.**

17. According to him, the process involved in the appointing of a Managing Director was not fair but was full of irrationality and procedural impropriety.

18. It was submitted that the laid down procedure is enshrined in the code of Governance of State Corporations, chapter 6 of the Constitution, section 3(e) of the ***Leadership and Integrity Act*** were not considered by the respondents herein.

19. The Court was therefore urged to consider the prayers sought as the respondents completely failed to show that the current Managing Director of the 2nd respondent company does qualify to hold the position and consequently their action have put the ex-parte applicant and the general public at risk of having a public corporation being headed by an unqualified person.

20. He therefore prayed that the Court grants the orders as prayed for in the Amended Notice of Motion dated 11th July 2016 and the Notice of Motion dated 2nd November 2016.

1st Respondents' Case

21. The application was opposed by the 1st Respondent.

22. According to the said Respondent, the procedure for appointing the Managing Director or the Chief Executive Officer of a as a State Corporation is set out in section 5(3) of the ***State Corporations Act*** Cap 446 Laws of Kenya and the Code of Governance for state Corporations (Mwongozo) (Exhibit JMM 3 of the Applicant's supporting affidavit). However the entire procedure of appointing a consultant, subsequent advertising for the vacant position and interviews of the applicants is purely within the ambit of the Board of Directors.

23. It was averred that the Board of Nzoia Sugar Company undertook the process of appointing a managing director through an advertisement and subsequent interviews. Upon the completion of the process, the Board forwarded to the 1st respondent the proposed names of the candidates for the position of a managing director and enumerated the recruitment process followed and based on the scores, the 1st respondent concurred with the board of directors that the 1st candidate as per the interview rating be appointed as the managing director. Thereafter the board appointed the interested party and forwarded the name to the 1st respondent to publish in the Kenya Gazette via gazette notice No. 6314 dated 12th August 2016.

24. According to the 1st Respondent, the allegations raised therein by the applicant on corruption consists only of internal memos within Nzoia Sugar Company without evidence of how the contents of the memos prejudices the company and sugar cane farmers. The applicant fails to provide evidence of investigations by and/or reports of investigative bodies such as the Inspector General (State Corporations) and the Auditor General whereas the authenticity of the memos is in doubt.

2nd Respondent's Case

25. The 2nd Respondent (hereinafter referred to as "the Chairman"), in opposition to the application

contended that **Nzoia Sugar Company Limited** is a limited liability company incorporated under the old **Companies Act**, Chapter 486 of the Laws of Kenya, and the same is controlled by the Government of the Republic of Kenya. It is also a State Corporation as defined at section 2(b)(v) of the **State Corporations Act**, Chapter 446 of the Laws of Kenya.

26. According to the Chairman, the composition of the Board of Directors of **Nzoia Sugar Company Limited** is as provided for in its Articles of Association as well as under section 6 of the **State Corporations Act**, Chapter 446 of the Laws of Kenya. To him, the Company has directors appointed by names under section 6 of the **State Corporations Act**, Chapter 446 of the Laws of Kenya and based on legal advice believed that there is no legal person in law called “*Board of Directors of Nzoia Sugar Company*” that is capable of being sued as purportedly done in this case.

27. It was therefore his case that the *Ex Parte* Applicant’s Application as filed is not only grossly incompetent, but also incurably defective on the grounds that the 2nd Respondent is not a legal entity capable of suing and being sued in such capacity as the Chairman, Board of Directors, Nzoia Sugar Company; the *Ex Parte* Applicant is guilty of material non – disclosure by failing to state the fact that he and two (2) others had filed in the Constitutional Division a Petition which raised similar issues as this case being **High Court Petition Number 143 of 2016 – Nairobi – Jack Mukhongo Munialo & Two Others vs. Board of Directors, Nzoia Sugar Company and the Cabinet Secretary, Ministry of Agriculture, Livestock and Fisheries**, which was later withdrawn; that no sufficient interest and or nexus has been established by the *Ex Parte* Applicant as to grant him the requisite *locus standi* to prosecute this matter; that the ultimate decision of employing the Managing Director of the Company was not made by either the 1st or 2nd Respondents, but rather the Cabinet Secretary, Ministry of Agriculture, Livestock and Fisheries, and in the disclosed circumstances, they have been improperly sued in this matter; that the main questions before this Honourable Court is one challenging the process of employment of the Managing Director of Nzoia Sugar Company Limited by the 1st and 2nd Respondents as well as procurement related issues, and based on legal advice he believed to that under the Constitution of Kenya, 2010, matters falling within the jurisdiction of the Court’s contemplated in Article 162 (2) and with employment and labour relations are divested of the jurisdiction of this Court; and that the application is otherwise frivolous, vexatious and an abuse of the process of this Court and the same together with the Petition should be struck out and or dismissed with costs.

28. In his view, the application for judicial review, in any case, does not have any merit and ought to be dismissed out rightly.

29. The Chairman explained that when the term of the former Managing Director of Nzoia Sugar Company Limited by the name **Saul Wasilwa** ended on or about November 2015, one **Godfrey Sifuna Wanyonyi** was appointed by the Board to act pending formal and or competitive recruitment of a substantive holder of the position. However, **Mr. Wanyonyi** participated in the process of recruitment of Nzoia Sugar Company Limited’s Managing Director as a candidate and has since been appointed as the substantive Managing Director after competitively and fairly defeating all the other rivals for the same job. It was the Chairman’s position that while acting fairly as well within confines of all the relevant and or applicable law, the Company sought the services of a consultant to assist the Board of Directors in undertaking the task of recruitment of the Company’s Managing Director. According to him, the consultant was competitively sourced through the method of restricted tendering pursuant to provisions of section 102(1) of the **Public Procurement and Assets Disposal Act, 2015**.

30. It was explained that in order to actualize the process of transparently procuring the consultant, formal requests for proposals were sent out to thirty (30) bidders on 26th January, 2016 and out of the said bidders when the proposals were opened 02/02/2016, only six (6) entities responded which included Eliud & Associates. An Evaluation/Tender Committee comprising of **Frank Khisa** - the Cane Development Manager, **Protus W. Munialo** – Human Resource Manager, **Rita Mukhongo** - Legal Officer and **Henry Wanyera** – the Purchasing Officer, was constituted to conduct the preliminary technical and financial evaluation, finalize the analysis for recommendation on a favourable award and there was communication by the Purchasing Manager to this effect and dated 02/02/2016.

31. It was however averred that the acting Managing Director (now duly appointed and or confirmed Managing Director) did not sit and or participate in any way in the proceedings as well as deliberations by the Evaluation/Tender Committee during the entire process from inception to completion. Upon conclusion of the evaluation process, an appropriate report was prepared by the Evaluation/Tender Committee and the same was forwarded to the Acting Managing Director (now duly appointed and or confirmed Managing Director) under cover of the Procurement Manager's internal Memo dated 04/02/2016. Subsequently thereafter, a notification of award to the winning bidder, as well as letters of regrets to the unsuccessful bidders were sent out to the respective recipients in accordance with relevant provisions of the **Public Procurement and Asset Disposal Act of 2015**. The contract was then prepared and executed by all the parties thereto accompanied by a Local Purchase Order (LPO) both dated 08/02/2016.

32. It was explained that the then Acting Managing Director of Nzoia Sugar Company Limited (now duly appointed and or confirmed Managing Director) executed the contract in the presence of **Benson Khwatenge**, the Company Secretary. This they both did in their official, and not personal capacities, and also pursuant to provisions of section 135 of the **Public Procurement and Asset Disposal Act of 2015**.

33. The Chairman's position was that the document exhibited by the applicant was an outdated procurement manual and currently all procurements for State organs are governed by the **Public Procurement and Asset Disposal Act of 2015** which Nzoia Sugar Company fully complied with.

34. It was reiterated that the firm of Eliud & Associates advertised, shortlisted, interviewed and recommended candidates for recruitment by the 1st Respondent to the position of Managing Director, Nzoia Sugar Company Limited and that the Board of Directors of Nzoia Sugar Company Limited deliberated the consultant's report and made recommendations to the Cabinet Secretary, Ministry of Agriculture, Livestock and Fisheries for formal appointment of the Managing Director, Nzoia Sugar Company Limited.

35. In terms of academic qualifications, it was averred that the Board of Directors of Nzoia Sugar Company was looking for a graduate in the stated relevant fields and indeed the Board confirmed that **Mr. Godfrey Sifuna Wanyonyi** was not only a degree holder, but a graduate in the area of Finance and thus not only competent, but also qualified for the advertised job.

36. Upon satisfaction by the Board of Directors of Nzoia Sugar Company Limited that the process of recruiting the Managing Director was done fairly, three (3) top names were forwarded to the Cabinet Secretary in charge of the Ministry of Agriculture, Livestock and Fisheries for appointment of one of the candidates. The Cabinet Secretary in charge of the Ministry of Agriculture, Livestock and Fisheries, reviewed the Board's report about the three (3) names independently and made a considered decision to appoint the top candidate who happened to be one **Mr. Godfrey Sifuna Wanyonyi** through a letter dated 16th May, 2016. Upon receipt of the aforesaid letter from the Cabinet Secretary in charge of the Ministry of Agriculture, Livestock and Fisheries, the Board of Directors of Nzoia Sugar Company Limited through a letter dated 17th May, 2016 formally appointed **Mr. Godfrey Sifuna Wanyonyi** as the Managing Director of Nzoia Sugar Company Limited and thereafter, the appointment was published by the Cabinet Secretary through the Kenya Gazette Notice 6314 dated 25th May, 2016, appearing in Vol. CXVIII – 92, which was published on 12th August, 2016.

37. It was noted that the Cabinet Secretary in charge of the Ministry of Agriculture, Livestock and Fisheries was a party in High Court Petition Number 143 of 2016 – Nairobi – **Jack Mukhongo Munialo & Two Others vs. Board of Directors, Nzoia Sugar Company and the Cabinet Secretary, Ministry of Agriculture, Livestock and Fisheries**, alluded to herein above filed in the constitutional division of the High Court. In the circumstances, the said Cabinet Secretary was very much alive to all the issues raised herein because they are the same issues which have been raised in High Court Petition Number 143 of 2016 – Nairobi – **Jack Mukhongo Munialo & Two Others vs. Board of Directors, Nzoia Sugar Company and the Cabinet Secretary, Ministry of Agriculture, Livestock and Fisheries**, that was later withdrawn.

38. According to the Chairman, if any of the allegations raised by the *Ex Parte* Applicant herein carried any weight, then the Cabinet Secretary, who had three (3) names from which to choose one candidate could have declined the Board's recommendation and either appointed any of the other two (2) candidates and or directed that the recruitment process be undertaken afresh. To him, by targeting one candidate, **Mr. Godfrey Sifuna Wanyonyi**, only and not all the other candidates who were involved in the recruitment process, it is clear that the *Ex Parte* Applicant's Application seeking judicial review orders is not only discriminatory, done in bad faith, but the same is also subjective and therefore amounts to a violent abuse of the process of this Court, a state of affairs that ought not to be entertained under any circumstances whatsoever.

39. It was reiterated that the manner in which the Board of Directors of Nzoia Sugar Company Limited went about recruiting the Managing of the Company was through a confidential process and this Court should frown upon the way the *Ex Parte* Applicant has gone around soliciting information about the subject process.

40. Based on information received from the said **Mr. Godfrey Sifuna Wanyonyi**, the Chairman averred that **Mr. Wanyonyi** is not in any way related to the proprietors or employees of the consultancy firm of Eliud & Associates, which assisted the 1st Respondent in conducting the process of recruitment of the Company. To him, apart from the general complaint letters attached to the Application seeking judicial review orders, the said **Godfrey Sifuna Wanyonyi** has neither been investigated as a person nor invited for a response on any corruption allegation.

41. The Chairman held the view that comparing the performance of Nzoia Sugar Company Limited previously and when **Mr. Wanyonyi** took over, there is tremendous improvement in the performance, notwithstanding the fact that there has been a huge investment in capital projects. As if that is not enough, there has also been a marked improvement in cane supply, improvement in quality of sugar and market reach. In the 2014/2015 financial year, the company made a loss before tax of Kshs. 2.1 Billion as compared to a loss before tax as at 31st March, 2016 of Kshs.608 Million with huge capital investments like trans - loading stations and factory rehabilitation of over Kshs. 500 million.

42. The Chairman confirmed that contrary to perceptions, **Mr. Wanyonyi** did not sit in the Board of Directors of Nzoia Sugar Company Limited meeting that conducted the interviews and only appeared in the meeting for purposes of being interviewed like any other candidate for the job at hand.

43. To him, the *Ex parte* Applicant's application has no basis at all in law or fact, and is only motivated by malice as well as bad faith and the same is merely an attempt to arm twist the Managing Director on account of the *ex parte* Applicant being a former employee of Nzoia Sugar Company Limited who was dismissed from employment on 10th November, 2011 on account of gross misconduct at a time when he was engaging in political functions and inciting farmers not to deliver cane to Nzoia Sugar Company Limited for reasons best known to himself. After his dismissal from employment, he filed **Milimani case number - 54 of 2013** and has been making persistent appeals for reinstatement even during the pendency of his case in court and he has been advised to wait for conclusion of the court case.

44. It was contended that the *Ex Parte* Applicant is not a sugarcane farmer but a mere busy body and thus has no *locus standi*, to prosecute this matter.

45. It was submitted on behalf of the 2nd Respondent that it is evident that this Application lacks merit and is based on pure misrepresentation and false allegations. The orders sought by the Applicants of Certiorari and mandamus are unfounded as there was evidently no impropriety. The court was urged to be guided by the decision in **Republic vs. Kenya Power & Lighting Company Limited & Another [2013] eKLR** where it was stated:

“it is not enough for an applicant in judicial review proceedings to claim that a tribunal has acted illegally, unreasonably or in breach of rules of natural justice. The actual sins of a tribunal must be exhibited for judicial remedies to be granted.”

46. The Court was therefore urged to dismiss the Amended Notice of Motion dated 11th July 2016 and the Notice of Motion dated 2nd November 2016 and awards costs.

Interested Party's Case

47. In opposition to the application, the interested party, **Mr. Godfrey Sifuna Wanyonyi** (hereinafter referred to as "the MD"), averred that in November 2004, he was appointed as the Finance Manager of the Company. In June 2015 following the departure of the then Managing Director, **Saul Wasilwa**, the Board of the Company appointed him as the Acting Managing Director pending the appointment of a substantive Managing Director.

48. It was averred that on or about January 2016, the Company invited firms through a Standard Request for Proposal for the provision of consultancy services for the recruitment of the Managing Director and the 1st Respondent's Evaluation Committee recommended the award of the Tender to M/s Eliud & Associates and the Head of the Procurement function gave his professional opinion concurring with the Evaluation Committees' findings. According to the MD, he did not sit in the Evaluation Committee and further that did not in any way influence their decision on the award of tender. Similarly, he did not collude nor influenced the decision of the head of the procurement function. However, as required by section 135 of the **Public Procurement and Asset Disposal Act, 2015**, he executed the resulting contract with M/s Eliud & Associates in his capacity as accounting officer of the Company.

49. On or about 9th February, 2016, he saw that M/s Eliud & Associates had carried a newspaper advertisement in the *Standard Newspaper* inviting applications from suitable and competent individuals to apply for the position of the Managing Director of the Company and he applied for the said position and submitted all the requisite documents including updated curriculum Vitae, certified true copies of the certificates and testimonials, all which showed/illustrated his qualifications, competencies, knowledge, skills and personal attributes; clearance from KRA, EACC, HELB and Certificate of Good conduct from the Directorate of Criminal Investigations. On 17th March, 2016, he appeared before M/s Eliud & Associates for an interview relating to his job application for the position of Managing Director and on 7th April, 2016, was interviewed by the Board of Directors of the 1st Respondent. On 17th May, 2016, he received a letter of appointment notifying him that he had been appointed as the Managing Director of the Company which appointment was confirmed by the 1st Respondent vide Gazette Notice No. 6314 Vol. CXVIII No. 92 of 12th August, 2016.

50. The MD insisted that he did not source, choose, appoint and gave contract to a consultant, in particular Eliud & Associates to advertise and recruit for the position of Managing Director as the same was done by the 1st and 2nd Respondents after following the due process. He insisted that he met the requirements for appointment as the Managing Director of the Company and attached a copy of his CV and Masters Certificate. According to him, the Consultant and the Board of Directors looked at his application and the documents in support thereof and were satisfied that he had met the requirements and full qualifications for appointment as the Managing Director.

51. With respect to the Report by PKF Consulting Limited exhibited by the applicant, it was averred that the same was titled "Draft Report" and was unsigned. He averred that at the time of the interviews and his appointment, he was not under any investigation and there was no Court case filed against him by the Ethics and Anti-Corruption Commission or any other person challenging his integrity. He therefore denied the allegations that he had been making grave decisions to the detriment of the Company and asserted that the Ex-Parte Applicant was not his employer to use his yardstick of what constitutes performance. Based on legal advice he believed that the Ex-parte Applicant was seeking a merit review of his academic qualifications which jurisdiction this Honourable court does not have under judicial review.

52. It was disclosed that the Ex-Parte Applicant had filed a Constitution Petition, Petition No. 143 of 2016, in which the Ex-Parte Applicant was challenging his academic qualification and similar issues and which Petition he withdrew by consent. He insisted that the Commission for University Education

recognizes his Masters qualification from Heriot-Watt University and exhibited a letter to that effect.

53. Based on legal advice the MD averred that judicial review remedies are discretionary and by withdrawing the Petition and again filing these proceedings, the Ex-Parte Applicant is abusing the Court process. In addition, this Honourable Court does not have the jurisdiction to delve into the procurement matters being paraded by the Ex-Parte Applicant as those should be dealt with by the Public Procurement and Administrative Review Board and other agencies as provided for under the ***Public Procurement and Asset Disposal Act, 2015***.

54. In his submissions the interested party noted that that the grounds contained in the statement are:-

a. The Respondents have irregularly appointed Mr. Godfrey Sifuna Wanyonyi as Managing Director despite him not been qualified and there being other qualified applicants.

b. Mr. Godfrey Sifuna Wanyonyi in his capacity as Managing Director has made and is bound to make decisions that are to the detriment of the Company and the sugar cane farmers.

c. The Respondents had no basis to appoint Mr. Godfrey Sifuna Wanyonyi who does not have the qualifications to hold the position of Managing Director.

55. The Interested Party submitted that the Ex-Parte Applicant is bound by the judicial review grounds captured in his statement and cannot deviate from the same to plead other grounds of “irrationality and procedural impropriety” as he has attempted to do through its Written submissions and relied on **Khobesh Agencies Limited & 32 Others vs. Minister of Foreign Affairs And International Relations & 4 Others [2013]**. The Interested Party urged the Court should disregard those aspects of the Ex-Parte Applicant’s Written Submissions.

56. According to the interested party, from the grounds of judicial review as captured in the Statement, the crust of the Ex-Parte Applicant’s case is that the Interested Party is not qualified to be appointed the Managing Director of the 2nd Respondent allegations the interested party has denied. After reiterating the contents of his replying affidavit the interested party submitted that the jurisdiction of this Court is to address the process leading to appointment of the Managing Director and not the merits of the appointment and relied on **Republic vs. Director of Public Prosecutions & 4 Others Ex Parte - Senator Johnson Nduya Muthama [2015] eKLR**.

57. According to the interested party the challenge to the academic qualification of the Interested Party that he did not have a “first degree”. is not related to the process and relied on **Kenya Pipeline Company Limited vs. Hyosung Ebara Company Limited & 2 Others [2012] eKLR**, and submitted that the Ex-Parte Applicant is indeed saying that the decision of the Respondents is wrong which issue goes to the merits of what is right or wrong on what constitutes a first degree. To the interested party, the Ex-Parte Applicant’s Notice of Motion applications are a cloak, mask, smoke screen and disguise challenging the academic qualification of the Interested Party which state of affairs this Honourable should not countenance. To him, in order for the Court to determine academic qualifications, then an audit of the entire applicants who applied for the position will have to be done. The Court will have to call for all the applicant’s documentation so as to determine what their qualifications are. The Court cannot make the determination in isolation of the other candidates’ documentation. In his view, what amounts to a “first degree” is a merit test that cannot be determined in judicial review proceedings as that is a matter that requires educational experts such as Commission for Higher Education and University dons to testify on what is considered to be a first degree.

58. It was submitted that various Courts have held that canvassing the issue of qualification is indeed a merit review which is untenable in judicial review and relied on **Republic vs. Secretary County Public Board & Another Ex Parte Hulbai Gedi Abdille [2015] eKLR** and **Republic vs. Registrar General & 2 Others Ex-Parte Thomas Asiago & 2 Others [2016] eKLR**.

59. The Interested Party submitted that the impeached process cannot be rendered irregular by just a

definition of what is a first degree. Judicial review does not call for a re-examination of the evidence and for the Court to form its own view as the Ex-Parte Applicant wants the Court to do and relied on **Republic vs. Public Procurement Administrative Review Board & 3 Others Ex-Parte Olive Telecommunication PVT Limited [2014] eKLR** and **Ndombi Tom Wachakana Osolika vs. Disciplinary Committee of the Law Society of Kenya & Another [2015] eKLR.**

60. In view of the foregoing paragraphs, the Interested Party submitted that the order of certiorari does not lie as the Ex-Parte Applicant is seeking a merit review of the decision of the Respondents.

61. It was in any case submitted that judicial review remedy of certiorari is discretionary and not guaranteed hence a Court may refuse to grant them even where the requisite grounds exist and relied on **Republic vs. President & 7 Others Exparte Wilfrida Itolondo & 4 Others [2014] eKLR.**

62. It was submitted that in the circumstances of this case, the reputation, future professional career and livelihood of the Interested Party is at stake and the Court should not on the basis of affidavit evidence determine whether or not the Interested Party has a first degree without viva voce evidence of experts of the prevailing practice in Kenya and other jurisdictions. It should be noted that the prior to the suit, the Interested Party was in an acting capacity for about one (1) year as Managing Director and his competence to head the 2nd Respondent was never questioned. Further, The Interested Party's professional career has over spanned over 27 years and the Court should exercise its discretion and not grant the order of certiorari.

63. Further, the Court was urged to examine the conduct of the Interested Party who filed Petition No. 143 of 2016 and consented to its withdrawal and now coming to file two judicial review applications before the judicial review division and relied on **Council of Governors vs. Senate & Another [2014] eKLR** where it held that a party engages in forum shopping when they file an application before Court and withdraws it when faced with objections on jurisdiction of the Court as the practice clogs the judicial system and wastes judicial time.

64. To the Interested Party, the Ex-Parte Applicant cannot use these judicial review proceedings as a collateral attack on the procurement process of the consultant. It was submitted that the ***Public Procurement and Asset Disposal Act, 2015*** is clear on the process of challenging the decision by the 2nd Respondent and reliance was placed in the Supreme Court decision in **Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others [2014] eKLR** where the Supreme Court held that:-

“[333] We find that the petition at the High Court had sought to relitigate an issue already determined by the Public Procurement Administrative Review Tribunal. Instead of contesting the Tribunal’s decision through the prescribed route of judicial review at the High Court, the 1st, 2nd and 3rd respondents instituted fresh proceedings, two years later, to challenge a decision on facts and issues finally determined. This strategy, we would observe, constitutes the very mischief that the common law doctrine of “issue estoppel” is meant to forestall. Issue estoppel “prevents a party from using an institutional detour to attack the validity of an order by seeking a different result from a different forum, rather than through the designated appellate or judicial review route” (Workers’ Compensation Board v. Figliola [2011] 3 S.C.R. 422, 438 (paragraph 28)).

[334] Whatever mode the 1st, 2nd and 3rd respondents adopted in couching their prayers, it is plain to us, they were challenging the decision of the Tribunal, in the High Court. It is a typical case that puts the Courts on guard, against litigants attempting to sidestep the doctrine of “issue estoppel”, by appending new causes of action to their grievance, while pursuing the very same case they lost previously. In Omondi v. National Bank of Kenya Ltd. & Others, [2001] EA 177 the Court held that “parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.”

[335] It remains to determine, however, the question whether the process before the Tribunal

was a “judicial proceeding”. Although there are differences of substance and of form, between judicial and administrative forums, traditionally, when a non-judicial tribunal acts in a quasi-judicial capacity, its determinations are entitled to the same effect as a duly-rendered judicial determination.

[336] Although the Public Procurement Administrative Review Tribunal is not a Court of law, the administrative proceeding (ie, the appeal by the National Signal Networks) that took place before it was judicial in nature. The parties were represented by counsel, who presented their case on the basis of the evidence before the panel. In other words, the parties were in attendance, and were involved in the conduct of the proceedings. Section 93 of the Public Procurement and Disposal Act, provides that a party may request the Tribunal to review an order. Section 112 provides that a party may seek a review of the Tribunal’s decision at the High Court within 14 days of the decision having been rendered. Thus, under the law, there is a procedure for a party to seek redress.

[337] In this case, National Signal Networks chose not to exercise its right to appeal against the Tribunal’s decision, at the High Court. The Tribunal had no capacity to alter or rescind its own decision and, therefore, its decision was final, having been conclusively rendered. It is eminently fair, therefore, to hold that the 1st and 2nd respondents were bound by the decision of the Tribunal, regarding the BSD licence. Thus, in normal judicial practice that finality would give rise to estoppel.”

65. It was submitted that this Court cannot impeach the procurement process as it is not seized of all the facts and documentary evidence touching on the procurement process. Accordingly, the order of Mandamus cannot issue in the circumstances of this case and prayed that the Notice of Motion applications be dismissed with costs to the Interested Party.

Determination

66. I have considered the foregoing.

67. Order 53 rule 4(1) of the *Civil Procedure Rules* provides:

(1) Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement.

68. In his statement of facts the applicant herein set out his grounds as hereunder:

a) **The Respondents have irregularly appointed Mr. Godfrey Sifuna Wanyonyi as Managing Director despite him not been qualified and there being other qualified applicants.**

b) **Mr. Godfrey Sifuna Wanyonyi in his capacity as Managing Director has made and is bound to make decisions that are to the detriment of the Company and the sugar cane farmers.**

c) **The Respondents had no basis to appoint Mr. Godfrey Sifuna Wanyonyi who does not have the qualifications to hold the position of Managing Director.**

69. Therefore a party is not entitled to rely on any ground or seek any relief and the Court is barred from granting relief other than those sought in the statement and based on any ground other than those stated in the statement. See **Republic vs. Land Disputes Tribunal Court Central Division and Another Ex parte Nzioka [2006] 1 EA 321.**

70. The rationale for this is that in granting leave to apply for judicial review, the Court looks at the material before it and a party having obtained leave based on particular grounds ought not to change his case midstream by abandoning the grounds upon which leave was granted and in effect change the nature of his case by relying on totally different state of affairs. Again where leave is granted to apply for a particular relief, it is that relief that the applicant is entitled to seek in the substantive Motion and he cannot be allowed to seek a relief for which leave was neither sought nor granted. This is so because an application for judicial review can only be granted where leave of the court has been sought to apply for a particular relief. Accordingly, a relief for which leave to apply therefor was not sought cannot be granted. I will therefore not consider the ground of failure to enact the enabling legislation as one of the grounds upon which the reliefs sought herein may be granted.

71. In this case therefore the ex parte applicant's case is substantially hinged upon the allegation that the Respondents have irregularly appointed **Mr. Godfrey Sifuna Wanyonyi** as Managing Director despite him not being qualified and there being other qualified applicants.

72. This issue calls for a discourse as to the scope of judicial review process. The purpose of judicial review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large. It is meant to uplift the quality of public decision making, and thereby ensure for the citizen civilised governance, by holding the public authority to the limit defined by the law. Judicial review is therefore an important control, ventilating a host of varied types of problems. The focus of cases may range from matters of grave public concern to those of acute personal interest; from general policy to individualised discretion; from social controversy to commercial self-interest; and anything in between. As a result, judicial review has significantly improved the quality of decision making. It has done this by upholding the values of fairness, reasonableness and objectivity in the conduct of management of public affairs. It has also restrained or curbed arbitrariness, checked abuse of power and has generally enhanced the rule of law in government business and other public entities. Seen from the above standpoint it is a sufficient tool in causing the body in question to remain accountable.

73. Judicial review is a constitutional supervision of public authorities involving a challenge to the legal validity of the decision. It does not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or through a failure for any reason to take into account a relevant matter, or through the taking into account of an irrelevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. While the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies, it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence. See **Reid vs. Secretary of State for Scotland [1999] 2 AC 512.**

74. In my view Article 47 of the Constitution is now emphatic on the fairness of administrative action.

75. However, it is important to remember that Judicial Review is a special supervisory jurisdiction which is different from both (1) ordinary (adversarial) litigation between private parties and (2) an appeal (rehearing) on the merits. The question is not whether the Judge disagrees with what the public body has done, but whether there is some recognisable public law wrong that has been committed. Whereas private law proceedings involve the claimant asserting rights, judicial review represents the claimant invoking supervisory jurisdiction of the Court through proceedings brought nominally by the Republic. See **R vs. Traffic Commissioner for North Western Traffic Area ex parte Brake [1996] COD 248.**

76. The parameters of judicial review were set out by the Court of Appeal in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** in which it was held that:

“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.”

77. In **Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR** it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See ***Halsbury’s Laws of England 4th Edition Vol (1)(1) Para 60.***

78. The broad grounds, though not exhaustive, on which the Court exercises its judicial review jurisdiction were restated in the Uganda case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300.** In that case the Court cited with approval **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478** at 479 and held:

“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.”

79. Therefore, in this application I am not concerned with the merits of the decision to appoint the said **Mr. Godfrey Sifuna Wanyonyi** as Managing Director of Nzoia Sugar Company Ltd but rather whether the process of the said appointment was procedural.

80. I agree that when an issue arises with respect to the suitability of a person to serve in a public office the provisions of the ***Leadership and Integrity Act***, specifically sections 4 and 42 thereof are to be noted. Section 3 titled **“Guiding values, principles and requirements”** provides as hereunder:

(1) The primary purpose of this Act is to ensure that State officers respect the values, principles and requirements of the Constitution.

(2) A State officer shall respect the values, principles and the requirements of the Constitution, including—

(a) the national values and principles provided for under Article 10 of the Constitution;

(b) the rights and fundamental freedoms provided for under Chapter Four of the Constitution;

(c) the responsibilities of leadership provided for under Article 73 of the Constitution;

(d) the principles governing the conduct of State officers provided for under Article 75 of the Constitution;

(e) the educational, ethical and moral requirements in accordance with Articles 99(1)(b) and 193(1)(b) of the Constitution;

(f) in the case of County governments, the objectives of devolution provided for under Article 174 of the Constitution; and

(g) in so far as is relevant, the values and principles of Public Service as provided for under Article 232 of the Constitution.

(3) Nothing in this Act shall be construed as in any way diminishing or derogating from the values and principles under subsection (2).

81. With regard to the implementation of the Act, section 4 provides as follows:

“(1) Every person has the responsibility of implementing the provisions of this Act to the extent required by this Act.

(2) The Commission is responsible for overseeing and enforcing the implementation of this Act.

(3) In undertaking its mandate, the Commission may request a State organ to assist it in ensuring compliance with and enforcing Chapter Six of the Constitution and this Act.

(4) The Commission may require any public entity to carry out such functions and exercise such powers as may be necessary under this Act.

(5) Where a public entity has failed to comply with the requirements under subsection (3), the Commission may make an application before a High Court judge for appropriate orders requiring the public entity to comply. (Emphasis added)

82. At section 42, the Act provides with regard to the lodging of complaints and investigations, as follows:

(1) A person who alleges that a State officer has committed a breach of the Code, may lodge a complaint with the relevant public entity and the public entity shall register and inquire into the complaint.

(2) A public entity may authorize any of its officers to inquire into a complaint on its behalf and determine whether a State officer has contravened the Code.

(3) An investigation may be made at the instance of a public entity.

(4) A State officer being investigated under this section shall be informed by the investigating authority, of the complaint made against that State officer and shall be given a reasonable opportunity to make a representation relating to the issue, before the investigation is concluded.

(5) A person who has lodged a complaint against a State officer shall be entitled to be informed of any action taken or to be taken in respect of the complaint and shall be afforded a hearing. Where an investigation under this section is initiated while the State officer is in office, it may be

continued even after the person under investigation has ceased to be a State officer.

(7) Subject to the Constitution and any regulations for the enforcement of the Code made under this Act, a State officer may be suspended from office pending the investigation and determination of allegations made against that State officer where such suspension is considered necessary.

(8) The Commission shall prescribe disciplinary mechanisms and procedures to be followed in the event of contravention of the Code, and those mechanisms and procedures shall comply with Article 47 of the Constitution or any other applicable written law for the time being in force.

(9) The public entity or an authorized officer may take disciplinary action against a State officer serving in the public entity.

83. It is also worth mentioning the definition of a public entity under the interpretations section contained at section 2 of the Act as follows:

“public entity” means—

(a) the Government, including the National or County Government, or any department, State organ, agency, service or undertaking of the National or County Government;

(b) the National Assembly or the Parliamentary Service Commission;

(c) any corporation, council, board, committee or other body which has power to act under and for the purposes of any written law relating to the undertakings of a public utility or otherwise to administer funds belonging to or granted by the Government or money raised by rates, taxes or charges in pursuance of any such law; or

(d) a corporation, the whole or a controlling majority of the shares of which are owned by a person or entity that is a public body by virtue of any of the preceding paragraphs of this definition; and (e) statutory public bodies;

84. The section defines a “public officer” as having the meaning assigned to it under Article 260 of the Constitution. At section 52, the Act states that:

...pursuant to Article 80(c) of the Constitution, the provisions of Chapter Six of the Constitution and Part II of this Act except section 18 shall apply to all public officers as if they were State officers.

85. I defer to the position held by **Mumbi Ngugi, J** in **Benson Riitho Mureithi vs. J. W. Wakhungu & 2 Others [2014] eKLR** where the learned Judge expressed herself as follows:

“It would appear from the material before the Court that the question of the Interested Party’s suitability for public office was not addressed in accordance with the requirements of the Constitution. The Cabinet Secretary, the 1st respondent, had power of appointment under section 51 of the Water Act... At section 2 of the First Schedule to the Act, it is provided that those proposed for appointment as Board members of Water Services Boards must be appointed on the basis of educational qualifications, experience, character and integrity of potential candidates for membership. Similar provisions are contained in section 22 of the Public Officers Ethics Act...The 1st respondent, however, had a duty, imposed on her by the people of Kenya, to consider the Interested Party’s suitability under the Constitution, and to make the appointment to the Board in accordance with the dictates of the Constitution...What does the Constitution require with regard to appointments to public office? As already observed, public officers must be appointed on the basis of the criteria set out in Chapter 6. They must also, in addition, be appointed in accordance with the national values and

principles set out in Article 10... It has been conceded by Counsel for the respondents, however, that no-one knew or had any inkling that the Interested Party was going to be appointed as Chairman of the Water Services Board; and consequently, there was no opportunity for the petitioner or any other person to seek information about the appointment, or raise objections to the appointment, which objections would be expected to be considered by the Minister, and if found to be valid and sufficient to bar the appointment, the intended appointment ought not to be made...It seems to me therefore that the primary responsibility lay on the 1st respondent, and indeed on any other state officer making a similar appointment, to put in place a mechanism for recruitment or appointment of members of Boards of state corporations that would allow for public participation and consideration of the suitability and integrity of potential appointees as the Constitution now demands... It may seem that the Constitution has imposed an irksome and onerous burden on those responsible for making public appointments by requiring that they make the appointments on the basis of clear constitutional criteria; that they allow for public participation; and that those they appoint meet certain integrity and competence standards. This burden, however, is justified by our history and experience, which led the people of Kenya to include an entire chapter on leadership and integrity in the Constitution... In the present case, as the respondents tacitly concede, there are serious unresolved questions with regard to the integrity of the Interested Party which do not appear to have been considered by the 1st respondent in making the appointment to the Chairmanship of the Athi Water Services Board. It is the duty of the 1st respondent to consider the issues and, in exercise of the powers vested in her office under section 51 of the Water Act, applied in accordance with the Constitution, make a determination of the suitability of the Interested Party under Chapter 6 of the Constitution...In the premises, this petition succeeds to the extent that the Court finds that the 1st respondent failed to act in accordance with the Constitution, and her appointment of the Interested Party as Chairman of the Athi Water Services Board fell below the standard set by the Constitution... In the present case, the Court has found that no inquiry was made with regard to the suitability of the Interested Party under the Constitution, a responsibility that fell on the 1st respondent under the provisions of the Water Act as read with section 7 of the 6th Schedule to the Constitution. The responsibility still remains to make that inquiry. It is a responsibility that the Court does not deem proper to assume, but should require its proper exercise by the office vested with the authority to exercise it- the 1st respondent.”

86. The learned Judge relied on International Centre for Policy and Conflict & 4 Others -vs- Hon. Uhuru Kenyatta and Others, Petition No. 552 of 2012 where it was held:

“On the issue canvassed by the parties on the threshold of integrity required to be met, we note that the purpose of Chapter Six is to set higher standards of integrity for persons seeking to serve as State officers. Integrity is the firm adherence to moral and ethical values in one’s behaviour. Integrity is therefore not only about an individual’s own perception about the correctness or appropriateness of their conduct, but also has a fundamental social and public quality to it. It is our view that as the society also expects certain values to be upheld, the integrity provisions of the Constitution demand that those aspiring to State office be like Caesar’s wife: they must be beyond reproach.”

87. I also agree with the decision in David Kariuki Muigua –vs- Attorney General & Another Petition No. 161 of 2011, which dealt with an appointment by the Minister for Industrialisation of the Chairman of the Standards Tribunal, and in which the Court observed at Paragraph 13 and 15 as follows:

13.“However, it would be expected that the Minister, in making the appointments to the Tribunal, would be guided by the national values and principles set out in Article 10 of the Constitution, in particular participation of the people, equity, good governance, integrity, transparency and accountability. Section 7(1) of Schedule 6 provides that

‘All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.’

Any appointments under the Standards Act should have been done in conformity with the provisions of the constitution and should have observed the national values and principles.

15. There is no evidence that there was a competitive process that would enable public participation in the process and show the transparency and accountability required under the Constitution, thereby giving legitimacy to the appointment of the petitioner. Like his successor, the petitioner was appointed on the basis of a Gazette Notice; the basis of the appointment, the criteria followed in appointing him and the other members of the Tribunal was, from all appearances and regrettably so, more in keeping with the old order that preceded and indeed gave impetus to the clamour for the new Constitution when public officers were appointed at the whim of the Minister or President. To uphold the appointment of the petitioner would be to give a seal of approval to the old order. It is imperative that all public appointments are made in accordance with constitutional values and principles.”

88. It is based on the same reasoning that I find that where an appointing authority is contemplating the appointment of a person to a public office, before the power of appointment is exercised, the above provisions and principles must be adhered to.

89. However, judicial review by its very nature is not the procedure by which contested matters of facts are to be resolved. In his submissions the applicant was clear that this Court ought to consider the prayers sought as the respondents completely failed to show that the current Managing Director of the 2nd respondent company does qualify to hold the position and consequently their action have put the ex-parte applicant and the general public at risk of having a public corporation being headed by an unqualified person. In other words what the ex parte applicant seeks is that this Court should conduct an inquiry as to the suitability of the said **Mr. Godfrey Sifuna Wanyonyi** to serve as Managing Director of Nzoia Sugar Company Ltd.

90. In **Republic vs. Secretary County Public Board & Another Ex Parte Hulbai Gedi Abdille [2015] eKLR** it was held that:

“...I agree that the Board’s decision on qualifications, experience and achievements of the persons who applied for the various positions and their conduct as well as ethnic consideration and individual performance are matters which are more merit oriented...”

91. Similarly in **Republic vs. Registrar General & 2 Others Ex-Parte Thomas Asiago & 2 Others [2016] eKLR**, the court held that:

“Other issues including qualifications of General Secretary are matters of evidence for scrutiny. In Judicial Review proceedings, the court exercises special jurisdiction which does not permit examination of merits of the process leading to the decision.”

92. I associate myself with the foregoing holdings. In my view, the issue whether the said **Godfrey Sifuna Wanyonyi** was qualified or not and whether there were other more qualified candidates than him can only be resolved in a merit investigation. For this Court for example to make a finding as to who amongst the candidates deserved the post, the Court would have to inquire into the qualifications of those other candidates yet I do not have material in that regard.

93. Those are issues which in my view were more appropriate for the Employment and Labour Relations Court rather than this Court.

94. In this case the applicant lamented that the chairman of the board had upon request by the applicant’s lawyer, refused to give information on the process of recruitment whereas they were hiding important

information that could reveal the fraudulent issues on recruitment process. To the applicant, it is important that the whole process that led to the long list and shortlist be provided for scrutiny by the court. In other words the applicant was asking this Court to direct the Board to furnish the Court with material on the basis of which the Court could find whether or not the applicant's case was sound on merits. Apart from the fact that this Court does not, in the exercise of its judicial review jurisdiction dwell on a merit investigation, in **East African Community vs. Railways African Union (Kenya) and Others (No. 2) Civil Appeal No. 41 of 1974 [1974] EA 425**, it was held by the East African Court of Appeal that the onus lies on a person seeking the grant of a prerogative order to establish that it is essential for it to issue since these are not orders that are lightly made. Judicial review or prerogative writs as they were known in the past, it has been held are orders of serious nature and cannot and should not be granted lightly. They should only be granted where there are concrete grounds for their issuance. It is not enough to simply state that grounds for their issuance exist; there is a need to lay basis for alleging that there exist grounds which justify the grant of the said orders.

95. I associate myself with the holding in **Republic vs. Kenya Power & Lighting Company Limited & Another [2013] eKLR** to the effect that:

“It is not enough for an applicant in judicial review proceedings to claim that a tribunal has acted illegally, unreasonably or in breach of rules of natural justice. The actual sins of a tribunal must be exhibited for judicial review remedies to be granted.”

96. Whereas the applicant may well be entitled to such information pursuant to Article 35 of the Constitution, where the applicant contends that the actions of the Respondents were unlawful, it behoves the applicant to place before the Court material upon which such a decision ought to be arrived at.

97. In this case I am afraid that there is no satisfactory material upon which this Court can find that the appointment of **Mr. Godfrey Sifuna Wanyonyi** as Managing Director of Nzoia Sugar Company Ltd was irregular and that the Respondents' actions were unlawful.

98. I however do not attach substance to the withdrawal of the earlier petition as I am not satisfied that the same was informed by *mala fides* on the part of the applicant.

99. This application must therefore fail. However taking into account the reasons for disallowing the application which do not determine compliance by the Board with the provisions of the Constitution, the ***Leadership and Integrity Act*** and the principles relating thereto, I make no orders as to costs.

100. It is so ordered.

Dated at Nairobi this 27th day of October, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Udoto for the applicant

Miss Kaburu for Mr Wanyama for the 2nd and 3rd Respondents and holds brief for Mr Malebe for the interested party

CA Ooko