



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL MISC APPLICATION NO. 168 OF 2015 (JR)**

**IN THE MATTER OF AN APPLICATION BY DOUGLAS M. BARASA, COLLINS WAFULA MAKUNJA AND RICHARD WAMALWA MAKHINO FOR ORDERS OF MANDAMUS, PROHIBITION AND CERTIORARI**

**AND**

**IN THE MATTER OF EXTENSION OF THE TERM OF THE MANAGING DIRECTOR OF NZOIA SUGAR COMPANY MR SAUL WASILWA**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**PRINCIPAL SECRETARY AGRICULTURE,**

**LIVESTOCK AND FISHERIES.....1<sup>ST</sup> RESPONDENT**

**JOASH WAMANGOLI,**

**CHAIRMAN NZOIA SUGAR COMPANY.....2<sup>ND</sup> RESPONDENT**

**THE BOARD OF DIRECTORS**

**NZOIA SUGAR COMPANY.....3<sup>RD</sup> RESPONDENT**

**SAUL WASILWA.....INTERESTED PARTY**

**EX PARTE: DOUGLAS M. BARASA, COLLINS WAFULA MAKUNJA AND RICHARD WAMALWA MAKHINO**

**JUDGEMENT**

**Introduction**

1. The ex parte applicants herein, **Douglas M. Barasa, Collins Wafula Makunja and Richard Wamalwa Makhino**, have instituted these proceedings in their capacity as sugarcane farmers

within the Nzoia Sugar Belt where the subject Nzoia Sugar Company (hereinafter referred to as “the Company”) is situate.

2. In these proceedings, the applicants seek the following orders:

**1. An order of certiorari do issue to remove to the High Court of Kenya for quashing the decision of the 1<sup>st</sup> Respondent made on the 4<sup>th</sup> May 2015 through a letter dated 4<sup>th</sup> May 2015 and based on the recommendation of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to extend the term of the managing director of Nzoia Sugar Company, Mr. Saul Wasilwa whose term expired on 19<sup>th</sup> May 2015.**

**2. An order prohibition to prohibit the Respondent its officers, agents, servants, officers from extending, renewing or gazetting the extension of the term of officer of the managing director Mr. Saul Wasilwa**

**3. An order of mandamus do issue directed at the Respondent to withdraw and cancel the extension of the term of the managing director of Nzoia Sugar Company Limited dated 4<sup>th</sup> May 2015.**

**4. Such further or other relief as the honourable court may deem just and expedient to grant**

**5. Costs of and incidental to the application be provided for;**

3. According to the Applicants, the interested party herein, **Mr. Saul Wasilwa**, has been the Managing Director of Nzoia Sugar Company since 17<sup>th</sup> May 2009. His first term expired on 18<sup>th</sup> May 2012 and was renewed through a gazette notice dated 15<sup>th</sup> February 2012 with effect from 20<sup>th</sup> May 2012. The notice was issued 3 months before the expiry. The applicants however protested the manner in which the renewal of the managing director’s term was done since in their view, the interested party had already served two terms in office and his term could not be extended or renewed. However, the 1<sup>st</sup> Respondent in a letter dated 4<sup>th</sup> May 2015 addressed to the 2<sup>nd</sup> Respondent purported to extend the managing directors term for a period of six months.

4. It was further contended that the said letter purported that there was a board evaluation done on 9<sup>th</sup> January 2015 yet the Company Limited has had no board for about 2 years as the current board, it was contended, was appointed on 17<sup>th</sup> April 2015 through a gazette notice dated 27<sup>th</sup> April 2015

5. To the applicants, the purported extension of the term of office of the managing director is irregular and ought to be quashed for the following reasons:-

a. The Principal secretary has no power or authority to extend the term of office of the managing director and has therefore acted *ultra vires*.

b. The interested party has already served two terms as Managing Director and upon the expiry of his second term on 19<sup>th</sup> May 2015 he was not eligible to continue serving in the same capacity.

c. The purported extension of the interested party’s term has been done in violation of National Government circular OP/CAB.9/1A

d. The purported board evaluation dated 9<sup>th</sup> January 2015 is fictitious as Nzoia Sugar Company had no board as at that time.

6. It was the applicants’ case that under the two terms of the interested party, there has been a lot of mismanagement at Nzoia Sugar Company which led the applicants to make various complaints to different bodies and authorities such as the Director of Public Prosecution, the President, the Inspector General State Corporations and the Ethics and Anti-Corruption Commission.

7. It was disclosed that the mismanagement and fraudulent transactions at Nzoia Sugar Company were also captured in a report published in the ***Business Weekly*** of 6<sup>th</sup> November 2012. To the applicant, based on the foregoing, the interested party's performance cannot have been evaluated as satisfactory.
8. It was therefore averred that it is in the interested of justice that the letter of extension dated 4<sup>th</sup> May 2015 irregularly extending the managing director's term be brought before the court and be quashed as the same was irregular and has no basis in law.

### **1<sup>st</sup> Respondent's Case**

9. The 1<sup>st</sup> Respondent, in opposition to the application contended that the Interested Party herein was appointed as the Managing Director of Nzoia Sugar Company Limited on 31<sup>st</sup> December 2008 for a term of three years which contract was renewed on 15<sup>th</sup> February 2012 for a further period of three years with effect from 20<sup>th</sup> May 2012.
10. It was averred that the Interested Party herein applied for renewal of his contract as the Managing Director of the Company and the Board of Directors of the company undertook an evaluation of his performance where on 13<sup>th</sup> January 2015, the Board met, deliberated thereon and via letter dated 22<sup>nd</sup> April 2015, sought the 1<sup>st</sup> Respondent's indulgence to approve extension of the Interested Party's Appointment as the Managing Director of the company which request was acceded to for six months.
11. It was the 1<sup>st</sup> Respondent's position that the later dated 4<sup>th</sup> May 2015 did not and/or was to meant extend the term of the interested Party's term of service but it was a mere advice as the extension was done by the board of directors. It was further disclosed that the same Board on 15<sup>th</sup> May 2015, resolved to extend the Interested Party's contract of service to serve as the Nzoia Sugar Company managing director by six (6) months with effect from 20<sup>th</sup> May 2015.
12. The 1<sup>st</sup> Respondent was categorical that the extension was done by the Board of Directors of the Company as provided by law and not by the 1<sup>st</sup> Respondent. To the 1<sup>st</sup> Respondent, the ***State Corporations Act*** gives power to the Board of Directors of the Company to engage and employ the managing directors and thus their extension of his contract of service and that extensions of contract of service does not violate National Government Circular OP/CAB.9/1A dated 16<sup>th</sup> December 2013 circulated to all Chief Executive Officers of State Corporations and the extensions of contract of service does not in any way violate that circular.

### **2<sup>nd</sup> and 3<sup>rd</sup> Respondents' Case**

13. On the part of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents it was contended that the Company is a State Corporation and its operations are governed by the ***Companies Act*** Cap 486 as well as the ***State Corporation Act*** Cap 446 and that under section 3(2) (b) thereof, a State Corporation can sue and be sued in its own corporate name. However, the Company is not a party to this suit.
14. It was contended that both the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have been wrongly joined in these proceedings and the case against the 2<sup>nd</sup> Respondent and 3<sup>rd</sup> Respondents should be truck out with costs.
15. It was disclosed that the Board of the Company was reconstituted through the Kenya Gazette of 27<sup>th</sup> April 2015 and that the Interested Party has been the Managing Director of the Company with effect from 31<sup>st</sup> December, 2008 and his contract was on 15<sup>th</sup> February, 2012 renewed for a further period of three years and which was due to expire on the 19<sup>th</sup> May, 2015. However, the interested party vide a letter of 23<sup>rd</sup> October, 14 addressed to the then Board of the Company applied for the renewal of his contract as the Managing Director of the Company and his performance was on the 13<sup>th</sup> January, 2015 evaluated by the then Board of Directors pursuant to its mandate under the provisions of the ***State Corporations Act***. To the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, there is no legal provision in the ***State Corporations Act*** or any other law that limits the appointment of a Managing Director of a State Corporation to two terms of three years each.

16. It was averred that the 3<sup>rd</sup> Respondent under the chairmanship of the 2<sup>nd</sup> Respondent did a letter dated 22<sup>nd</sup> April, 2015 to the Principal Secretary, Ministry of Agriculture, Livestock & Fisheries, informing her of the board's intention to renew the Interested Party's contract, for a further three years and vide her reply of 4<sup>th</sup> May, 2015, the Principal Secretary, Minister of Agriculture, Livestock & Fisheries advised the board to possibly consider a six months extension in view of the current Government policy. Accordingly, on the 15<sup>th</sup> May, 2015 the Board extended the contract of the Interested Party by six (6) months. It was reiterated that the decision to extend the contract of the Interested Party was effected by the Board of the Company as opposed to the Principal Secretary, Ministry of Agriculture, Livestock & Fisheries and that by 28<sup>th</sup> May, 2015 and when the application for leave got filed, the extension had already been fully perfected.
17. To the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, as per the provisions of the ***State Corporation Act***, it is not necessary to gazette the extension of the contract of the Interested Party and further, the reliefs sought in this application would not legally obtain as the application has been overtaken by events.

### **Interested Party's Case**

18. According to the interested party, he was first employed by Nzoia Sugar Company Limited as the company Secretary/Legal Officer in the year 2004 and was subsequently appointed as the Managing Director of the Company on 31<sup>st</sup> December 2008 for a term of three years. His contract was renewed on 15<sup>th</sup> February 2012 for a period of three years with effect from 20<sup>th</sup> May 2012 and by letter dated 23<sup>rd</sup> October 2014 he applied to the Chairman of the Board of Directors of the Company for renewal of his contract of employment as the Managing Director of the Company pursuant to which the said Board undertook an evaluation of his performance as the Chief Executive Officer and on 13<sup>th</sup> January 2015 met and during the board meeting of 13<sup>th</sup> January 2015 deliberated upon the request for renewal of his contract of employment at which though a member of the board he did not participate in the deliberations thereof.
19. According to the interested party the Company had a functional board of directors in January 2015 and on 13<sup>th</sup> January 2015 and which comprised of:
- i. Mr. Simiyu Abiud Wasike-Chairman
  - ii. Mr. Richard Njoba-Alternate Director (Fives Cail)
  - iii. Ms. Roselinder Simiyu-Director
  - iv. Mr. Timothy Tiampati- Managing Director (IDB Capital)
  - v. Ms Monica Mueni -Alternative Director (Ministry of Agriculture Livestock & Fisheries)
  - vi. Mr. Walter Owindo -Alternate Director (The National Treasury)
  - vii. Saul Wasilwa- Managing Director
20. It was disclosed that the said Board was reconstituted through the Kenya Gazette of 27<sup>th</sup> April 2015 and on 15<sup>th</sup> May 2015 it held a Board meeting at which the matter of renewal of the said contract of service was one of the agenda items deliberated and it was disclosed that on the 15<sup>th</sup> May 2015 after the meeting that his contract of service as the managing director of the company had been extended for six (6) months with effect from 20<sup>th</sup> May 2015.
21. According to the interested party, when the Applicants came to court on 28<sup>th</sup> May 2015, his contract of service as a managing director of Nzoia Sugar Company Limited had already been extended by the board for six months on 15<sup>th</sup> May 2015 and prior to the expiry of the previous contract of service on 19<sup>th</sup> May 2015.

22. It was asserted by the interested party that his right to fair labour practices under Article 41 of the Constitution ought to be safeguarded by this honourable court in the premises of the extension of his contract of service bestowed on him on 15<sup>th</sup> May 2015.
23. To him, there is no provision of the law that bars him from serving as the Managing Director of the Company by reason of his having already served two terms and it is the board of directors of Nzoia Sugar Company Limited that did extend his term as the managing director of the company and not the 1<sup>st</sup> Respondent, a power the Board has under the **State Corporations Act** gives to engage and employ the managing director and thus their extension of his contract of service.
24. The interested party denied the allegation that Nzoia Sugar Company Limited had no board for about two years and reaffirmed that as at 9<sup>th</sup> January 2015 Nzoia Sugar Company Limited had a board of directors which could lawfully transact board business as averred hereinabove.
25. To him the extension of his contract of service made by the Board of Directors on 15<sup>th</sup> May 2015 is not in violation of National Government Circular OP/CAB.9/1A as alleged and that the National Government circular OP/CAP.9/1A dated 16<sup>th</sup> December 2013 circulated to all chief Executive Officers of state Corporations and the extension his contract of service does not violate the circular at all.
26. He however denied that during his two terms as Managing Director of Nzoia Sugar Company Limited “there has been a lot of mismanagement as Nzoia Sugar Company” as alleged and averred that the letters referred to by the applicants were never given to him and are false, malicious and defamatory of him and if they had reached him he would have appropriately answered them and taken suitable court proceedings to have the authors substantiate them in defamation. Further, when the report published by the Standard Newspaper referred to appeared Nzoia Sugar Company Limited and himself challenging its veracity and the *Standard Newspaper* was unable to substantiate the same.
27. It was contended that the Board of directors of Nzoia Sugar Company is not a legal person capable of being sued as purportedly done by the Applicants.
28. In his view, the question of extension of my contract of employment is a matter that is for the jurisdiction of the Employment and Labour Relations Court as provided for under Article 162(2) (a) of the Constitution and this court the Judicial Review Division of the High Court ought to decline to exercise a jurisdiction that is not vested with it.

### **Determination**

29. I have considered the foregoing.

30. 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.***

31. The grounds upon which the Motion herein is based were that the 1<sup>st</sup> Respondent had no power or authority to extend the interested party’s term; that the interested party having served as Managing Director for two terms could not serve in the said position for another term; that since the Company had no Board for about two years, the interested party’s performance could not have been evaluated as alleged; that the extension of the interested party’s term of office was therefore irregular and an abuse of the process; that the 1<sup>st</sup> Respondent’s actions were ultra vires; and that the applicants stood to suffer substantial losses due to the imposition of an irregularly appointed Managing Director which would plunge the Company into a worse crisis.
32. It is therefore clear that there was no ground contesting the interested party’s competency on the ground of malpractices during his tenure at the company. Similarly, the application was not grounded on the fact that the renewal of the interested party’s term was not consultative or was not subjected to public participation. Accordingly, I will not deal with the issues raised in the submissions which did not comprise the grounds in the statement.

33. 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.”**

34. 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 4<sup>th</sup> Edition Vol (1)(1) Para 60*.

35. It must be remembered that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. See *R vs. Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282*, at P. 285.

36. 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.”**

37. Therefore, in this application we are not concerned with the merits of the decision to withdraw the approval which had been given to the applicant with respect to cedar fencing and gravelling of the suit land.

38. It was contended that the 1<sup>st</sup> Respondent had no power or authority to extend the interested party's

term. However no legal provision was cited by the applicant's to support this contention. Section 5(3) of the *State Corporations Act* provides:

*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.*

39. Section 51 of the *Interpretation and General Provisions Act*, Cap 2 Laws of Kenya, on the other hand provides:

*(1) Where by or under a written law a power or duty is conferred or imposed upon a person to make an appointment or to constitute or establish a board, commission, committee or similar body, then, unless a contrary intention appears, the person having that power or duty shall also have the power to remove, suspend, dismiss or revoke the appointment of, and to reappoint or reinstate, a person appointed in the exercise of the power or duty, or to revoke the appointment, constitution or establishment of, or dissolve, a board, commission, committee or similar body appointed, constituted or established, in exercise of the power or duty, and to reappoint, reconstitute or re-establish it.*

*(2) Where the power or duty of a person under this section is exercisable only upon the recommendation, or is subject to the approval or consent, of another person, then the power shall, unless a contrary intention appears, be exercisable only upon that recommendation or subject to that approval or consent.*

40. It is therefore clear that unless the law provides otherwise the appointing authority has the power to reappoint a person appointed to the position in question. Of course it goes without saying that in exercising that power the provisions of Chapter 6 of the Constitution must be adhered to. In other words the person to be appointed or reappointed must meet the leadership and integrity requirements stipulated in the Constitution and the relevant legal provisions. If that is not adhered to the appointment may well be unconstitutional and judicial review, it has been held, stems from the doctrine of *ultra vires* and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure (the three "I's") and has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness. See **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43**

41. However when an issue arises with respect to the suitability of a public officer to continue serving, 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).**

42. 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)**

43. 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.***

44. 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;***

45. 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.”***

46. 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 1<sup>st</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> respondent in making the appointment to the Chairmanship of the Athi Water Services Board. It is the duty of the 1<sup>st</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> respondent under the provisions of the Water Act as read with section 7 of the 6<sup>th</sup> 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 1<sup>st</sup> respondent.”

47. 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.”

48. 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.”

49. It may be argued that the aforesaid provisions and principles only apply to initial appointment. In my view the said provisions ought to apply to reappointment as well. The appointee may have in the course of his duties committed certain acts or omissions which contravene the said provisions and principles hence it is necessary that before exercising the powers of reappointment the appointing authority complies with the same provisions and principles. In other words the appointing authority before renewing the appointment ought to ensure that the appointee still meets the conditions for the appointment. The appointee ought not in the course of his appointment to have been blemished in a manner that militates against his eligibility to continue serving in the same position otherwise such reappointment would defeat the constitutional provisions and principles and violate the same hence defeat the spirit of the Constitution. In Godfrey Mwaki Kimathi & Others vs. Jubilee Alliance Party [2015] eKLR, this Court held that:

**“the mere fact that at one point in time a nominee was found to be a person of integrity does not bar issues of integrity being raised against him or her in subsequent nominations. Similarly, it is my view that the issue of integrity must be based on the prevailing circumstances and the mere fact that one was found to lack integrity at one point does not ipso facto permanently bar him or her from being nominated subsequently as long as he or she can prove that the circumstances have since changed in his or her favour. In other words integrity or lack of it is not a permanent feature.”**

50. It is based on the same reasoning that I find that in the event that the appointing authority contemplates the reappointment of a person whose term has expired, even if there is no time limit provided for the tenure of service, before the power of reappointment is exercised, the above provisions and principles must be adhered to.

51. However, according to the respondents and the interested parties, the re-appointment was not done by the 1<sup>st</sup> Respondent but by the Company’s Board of Directors in the exercise of their power under the *State Corporations Act*. It is clear from section 5(3) aforesaid that the power to engage the services of the Chief Executive of a corporation vests in the Board with the Minister’s role simply being to set the terms and conditions of such engagement in consultation with the Board. In this case the evidence is that the reappointment was done by the Board which consulted the 1<sup>st</sup> Respondent and the 1<sup>st</sup> Respondent, as he is entitled to do, set the terms of the said reappointment by limiting the period of reappointment to six months. There is no evidence therefore that the 1<sup>st</sup> respondent acted in excess of the powers conferred upon him. If any entity failed to carry out his mandate it would have been the Board which is the appointing authority. In this case regrettably, what is sought to be quashed is the alleged decision of the 1<sup>st</sup> respondent. To the extent that the decision was made by the Board, there is no decision capable of being quashed made by the 1<sup>st</sup> Respondent.

52. The other prayers seek orders of prohibition and mandamus. However without quashing the decision of the Board reappointing the interested party, the orders of prohibition and mandamus would be in vain since the two reliefs would not have the effect of quashing the interested party’s

reappointment. See Kenya National Examinations Council vs. Republic ex parte Geoffrey Gathenji Njoroge and 9 Others Civil Appeal No. 266 of 1996 [1997] eKLR.

53. Order 53 rule 4(1) of the *Civil Procedure Rules* bars this Court from granting relief which has not been sought in the statement. The applicant in the statement herein does not seek to quash the decision of the Board. Dealing with the same issue the Court of Appeal in Kenya National Examinations Council Case (supra) while declining to grant the prayers sought held:

**“In the present appeal the respondents did not apply for an order of *certiorari* and that is all we want to say on that aspect of the matter.”**

54. Similarly, in the instant application the applicants have not sought the relief of *certiorari* to quash the Board’s decision reappointing the interested party and that is all I wish to say on the matter.

55. It was contended that that the interested party having served as Managing Director for two terms could not serve in the said position for another term. In other words the interested party was not eligible to be appointed for another term. Again there was no provision cited by the applicant to support the contention that the interested party could not serve more than two terms in the same position. In absence of such limiting provision there is no basis upon which this Court can find that the interested party was ineligible for reappointment. 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.

56. 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.”**

57. It was contended that that since the Company had no Board for about two years, the interested party’s performance could not have been evaluated as alleged. The respondents have however contended that there was in fact a Board in existence and provided the evidence of the said Board members. No further affidavit was filed by the applicants to contest that this was in fact not the position. Judicial review by its very nature is not the procedure by which contested matters of facts are to be resolved. Accordingly, that issue cannot possibly be resolved in these proceedings without the Court delving into the merits of the challenged proceedings.

58. I have already found that there is no material on the basis of which I can find that the extension of the interested party’s term of office was irregular and that the 1<sup>st</sup> Respondent’s actions were *ultra vires*. It follows that the issue of substantial losses to the applicants do not arise. It may well be that the interested party is not the best suitable person for the position but that does not justify this Court in interfering with his reappointment as long as the same is lawful and the due process was adhered to by the person or entity whose decision is under challenge. I must have reiterate that in this decision I have not determined the issue whether the Board followed the due process for the simple reason that the applicant has not sought orders quashing the Board’s decision as opposed to that of the 1<sup>st</sup> Respondent who was not the appointing authority.

59. It was contended that the Court ought not to grant the orders sought as the interested party had already been reappointed by the time these proceedings were instituted. The answer to this contention is to be found in Federation of Women Lawyers–(FIDA – K) & Others -vs- the Attorney General & Anor, High Court Petition Number 102 of 2011:

**“If the process of the appointment is unconstitutional, wrong, unprocedural and illegal, it cannot lie for the Respondents to say that the process is complete and this Court has no**

**Jurisdiction to address the grievance raised by the petitioners. In our view, even if the five appointees have been sworn in, this Court has jurisdiction to entertain and deal with the matter.”**

60.As was appreciated in *Riitho Case* (supra):

**“the fact that the Interested Party may have assumed office as Chairman of the Athi Water Services Board is no bar to the exercise of the jurisdiction of the Court”**

61.In the circumstances of this case, it is my view that the mere fact that the interested party had already been reappointed would not have barred the Court from granting the orders sought if the same were merited.

62.Nevertheless having considered the application it is my view and I so hold that the prayers sought herein cannot be granted in the manner sought. 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. It is so ordered.

**Dated at Nairobi this 9<sup>th</sup> day of December, 2015**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

***Ms Kariuki-Owesi for Mr Wekesa for the interested party and Mr Kiarie for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents***

***Cc Mutisya***