



**REPUBLIC OF KENYA**

**High Court at Eldoret**

**Petition 8 of 2011**

**IN THE MATTER OF ARTICLES 22, 23, 28, 35, 47, AND 165 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF MOI TEACHING AND REFERRAL HOSPITAL ORDER 1998**

**IN THE MATTER OF THE STATE CORPORATIONS ACT-CAP 446 OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF A PETITION FOR BREACH OF MANDAMUS AND PROHIBITION**

**AND**

**IN THE MATTER OF THE PROCEEDINGS AND DECISIONS OF THE PRIME MINISTER**

**BETWEEN**

**CENTRE OF HUMAN RIGHTS AND DEMOCRACY.....  
.....PETITIONER**

**VERSUS**

**MOI TEACHING AND REFERRAL HOSPITAL BOARD.....1<sup>ST</sup>  
RESPONDENT**

**MINISTER OF MEDICAL SERVICES HON. ANYANG NYONG'O.....2<sup>ND</sup>  
RESPONDENT**

**ATTORNEY GENERAL.....3<sup>RD</sup>  
RESPONDENT**

**JUDGMENT**

**INTRODUCTION**

1. The Petition before this court is dated 21<sup>st</sup> June, 2011. The Petitioner is The Centre of Human Rights

and Democracy –Eldoret and operates as a Non Governmental Institution monitoring human rights and governance issues on behalf of the public in the Rift Valley and the Western part of Kenya.

2. The 1<sup>st</sup> Respondent is the Management Board of the Moi Teaching and Referral Hospital which shall be referred to hereinafter as ‘**MT&RH**’ and it is established under the provisions of the State Corporations Act and mandated to run and manage the affairs of **MT&RH**.

3. The 2<sup>nd</sup> Respondent is the Minister of Medical Services.

4. The 3<sup>RD</sup> Respondent is the Attorney General and is impleaded as the legal advisor for and on behalf of the Government of Kenya.

### **FACTS**

5. The facts of this Petition are that on the 19<sup>th</sup> June, 2011 the Centre for Human Rights and Democracy – Eldoret received information that the Honourable Minister for Medical Services had unilaterally appointed and intended to gazette a particular person as the Director of the Moi Teaching and Referral Hospital and that the Minister and the Management Board had failed to observe due and fair administrative process in accordance with Article 4 of Legal Notice No.78 of 1998 and Article 47 of the Constitution of Kenya 2010.

### **PETITIONERS SUBMISSIONS**

6. The MT&RH is a State Corporation established vide Legal Notice No.634 Of 1986.

7. The MT&RH Management Board under Section 5(3) of the State Corporations Act is empowered to engage and employ the Chief Executive on such terms and conditions of service as the Minister may in consultation with the Committee, approve.

8. The Board did exercise these powers and short listed applicants for interviews and thereafter forwarded its list of three (3) persons to the Minister for consideration who found the process wanting and declared the process a nullity and proceeded to cancel the results.

9. The Petitioner was apprehensive that due process as required under the Constitution of Kenya 2010 and the State Corporations Act would not be adhered to and that the Minister for Medical Services would be prevailed upon by the Honourable Prime Minister to gazette a particular individual as The Chief Executive.

10. The prayers sought in the Petition by the Petitioner are for Orders of Mandamus, Prohibition and Injunction and are as listed hereunder.

### **THE PETITIONER’S PRAYERS**

i. An order for Mandamus compelling the Board of the Moi Teaching and Referral Hospital to observe due process in the advertising ,interviewing and selection of a Director in accordance with Article 47 of the new Constitution of Kenya

ii. An order of Prohibition restraining the Minister of Health Services from unilaterally nominating, appointing and gazetting a candidate contrary to (i) above.

iii. An order of Injunction to restrain the Minister from usurping the role of the Board and Gazetting a person not interviewed and passed in accordance with Chapter 6 of the new Constitution of Kenya

iv. Any other order the court may deem fit

v. Costs of the Petition.

### 1<sup>ST</sup> RESPONDENTS SUBMISSIONS

1. The Petition was opposed and it was submitted that the Petition was premature as the Petitioner brought the same on the grounds that it was apprehensive due to a roadside declaration made by the Right Honourable Prime Minister and that the Petitioner had no tangible evidence to make out a prima facie case so as to warrant the Conservatory orders sought.
2. That **MT&RH** is a State Corporation and the Management Board, the 1<sup>st</sup> Respondent, herein had a duty to observe the due process of appointing the Chief Executive Officer and submits that the procedure as set out under the provisions of Section 5(3) of the State Corporations Act was complied with and adhered to.
3. The Order sought for Prohibition was unconstitutional and detrimental to the public and if granted the 1<sup>st</sup> Respondent would be without a Chief Executive Officer until the conclusion of the case.
4. The 1<sup>st</sup> respondent did not in any way exceed its mandate in searching for a Chief Executive Officer. The Petitioner is seeking that due process be followed which is the prayer shared by the 1<sup>st</sup> Respondent and the 1<sup>st</sup> Respondent had a duty too adhere to Articles 10 and 47 of the Constitution of Kenya, 2010.
5. The 1<sup>st</sup> Respondent submitted that the Petitioner did not merit the Orders sought and urged the Court to dismiss the Petition with costs to the 1<sup>st</sup> Respondent.

### 2<sup>ND</sup> RESPONDENTS SUBMISSIONS

6. The Petition was opposed and the 2<sup>nd</sup> Respondent supported the submissions of the 1<sup>st</sup> Respondent.
7. The Petition is incompetent as it is not supported by any supporting affidavit that contains facts the Petitioner seeks to rely on in support of the Petition. Counsel referred to the 'GICHERU RULES' and the Court of Appeal authority **Commissioner General, Kenya Revenue Authority thru' Republic vs Silvano Anna Owaki T/A Marenga Filing Station (CA No.45 of 2000)** where it was held that;  
**'.....a Verifying Affidavit which does not contain facts and the documents to be relied upon is incompetent and cannot support an application.....'**
8. The 2<sup>nd</sup> Respondent further submitted that the Petitioner is only apprehensive that the Minister may proceed to unilaterally gazette a person yet the Petitioner has placed no material before the court to support and to show such intention by the Minister.
9. It was the contention of the 2<sup>nd</sup> Respondent that the Minister had annexed letters as evidence to overwhelmingly show that the Minister intends to act within the confines of Legal Notice No. 78 of 1998.
10. The evidence of the 2<sup>nd</sup> Respondent shows that the Minister intends to fully comply with the aforementioned Legal Notice and that the Petitioner is not deserving of the Order for Prohibition and Injunction as no factual evidence had been produced to show that the Minister intended to usurp the role of the Management Board of MT&RH.
11. The 2<sup>nd</sup> Respondent has not contravened Article 47 as no final recommendation or decision has been made to the final authority that being The President of the Republic of Kenya and that any position or action taken by the 2<sup>nd</sup> Respondent was inadvertent and done in ignorance and that the action had been promptly rectified to accord with the law as at the date the Petition was filed.

12. Therefore the 2<sup>nd</sup> Respondent's prayer is that Petition as it stands is premature and also incompetent and should be dismissed at the first instance as the Petitioner failed to place before this court probative material in support of the Petition.

13. The matter being of public interest therefore the 2<sup>nd</sup> Respondent submits that each party should bear their own costs.

### **3<sup>RD</sup> RESPONDENTS SUBMISSIONS**

14. The competence of the Petition as set down by the '**GICHERU RULES**' was revisited. It was submitted that no facts are stated in the Verifying Affidavit rendering the same a nullity and incompetent.

15. It is conceded that the 1<sup>st</sup> Respondent followed the due process and followed due diligence and the 2<sup>nd</sup> Respondent conceded that he not only acted ultra vires but had contravened Article 47 of the Constitution.

16. That the Constitution was promulgated to ensure fairness and the 3<sup>rd</sup> Respondent urged the Court not to shy away from making a finding that the Board had conducted the first exercise in a proper manner and that that the Prime Minister's declaration was the right thing.

### **ISSUES FOR DETERMINATION**

17. Upon hearing the submissions of all the Counsels for the Petitioner and all the Respondents and upon perusing the Petition and the written submissions the court finds the following issues for determination;

i) The competency of the Petition

ii) Were the administrative actions of the Respondents, ultra vires to their mandates and were the Respondents actions, in particular, that of the 2<sup>nd</sup> Respondent unconstitutional.

iii) Does the Petitioner merit the orders sought for Mandamus or Prohibition or Injunction.

iv) Costs.

### **ANALYSIS**

1. The Counsels for the all parties consented that the Judicial Review Miscellaneous Application be held in abeyance pending the outcome of the Petition and this Court made an Order to that effect on the 29<sup>th</sup> February, 2012.

2. On the competency of the Petition, the court having perused the said Petition concurs with the Respondents submissions and finds that the Petition does not conform to the '**GICHERU RULES**' which are set down in Schedule 6 Part 5 Section 19 of the Constitution of Kenya, 2010. It is trite law that every Petition shall be supported by an affidavit that must contain evidence and facts that are supportive of the Petition. The Affidavit annexed is devoid of the same and for the reasons stated the court finds the Petition incompetent.

3. Nevertheless, the above notwithstanding this court has proceeded to address the substantive issues contained in the Petition.

4. All parastatals are established by an Act of Parliament in this case the Moi Teaching and Referral was established under the State Corporations Act (Cap 466) and in particular under the provisions of Legal Notice No.78 of 12<sup>th</sup> June,1998.

5. The Government exercises control of Parastatals through the State Corporations Act and through the Ministries and the Moi Teaching and Referral Hospital falls under the Ministry of Medical Services and its current Minister is the Honourable Anyang Nyong'o.

6. Under the State Corporations Regulations the Management Board is required to recruit a Chief Executive and the board is mandated to consider persons with the caliber, credibility and persons who have the necessary skills, experience and expertise in the area of business of the parastatal. The area and core business in **MT&RH** in this current case is in the medical field.

7. The parastatal board when carrying out this function of recruiting of the Chief Executive must utilise a competitive and effective process to ensure they get a balanced mix of proficient persons. The **MT&RH** board in this case carried out a competitive process of recruiting a Chief Executive Officer and came up with a list of the three (3) best among many persons whose names they presented to the Minister to forward to the President.

8. The sector Minister's role is advisory and limited to forwarding the three (3) best names of those persons who scored highly in the interviews to the President. In this case the Minister nullified the persons chosen by the **MT&RH** board and ordered that the position be re-advertised. The board duly complied with the Minister's directive and re-advertised the post in a local daily on the 31<sup>st</sup> May, 2011.

9. Thereafter what followed was a lot of intermeddling played out in the public domain that made the Petitioner apprehensive leading to the filing of the Petition as the Petitioner was correct in being apprehensive that a particular person had been designated to be appointed as Chief Executive Officer.

10. The parastatal's management board answers to the Minister who is in turn accountable to Parliament for the parastatal's vote. A Minister has powers to give directions of a general nature to the parastatal and the Ministers and Ministries are responsible for developing policy, identifying objectives and allocation of resources for their sector parastatal. This power then tends to lead to the supervision of the parastatal by sectoral Ministries which in turn tends to lead to excessive government control and interference and the usurping of the powers of the management board.

11. With the advent of the new Constitution of Kenya 2010 it is a requirement that all appointments to parastatals must be based on fair competition and merit and adherence to Article 47 and Chapter Six is of utmost importance and the Management Boards are also now accountable to the People of Kenya and not to politicians and other bureaucrats.

12. An Order for Mandamus lies to compel a public body to perform a public duty or action which is imposed by statute and that person or body of persons has failed to do that which he is obligated to do. The Respondents in this case, in particular the 2<sup>nd</sup> Respondent was over zealous but again the court reiterates that the 2<sup>nd</sup> Respondent made a hasty retreat upon realising his error and made amends. Therefore the Respondents had not failed to observe due process. The relief sought in this instance does not obtain.

13. An order for Prohibition is to prevent or forbid an administrative body from committing acts that are in excess of its jurisdiction or that are against the rules of natural justice. In this case only the sector Minister acted ultra vires to his mandate but rectified the actions upon realising the error and has stated that he intends comply with the law, vide his letter dated the 22<sup>nd</sup> June, 2011 which is dated the same date as at when the Petition was filed. Therefore the relief sought does not obtain.

## **FINDINGS**

14. It is not in dispute that the Petition was filed on the same date that is the 22<sup>nd</sup> June, 2011 when the 2<sup>nd</sup> Respondent wrote to the letter of apology to The Prime Minister and the court finds that by dint of this letter that there was interference by the sector Minister in the selection process.

15. Upon realising his mistake the Minister proceeded to rectify the anomaly and therefore the Minister did not unilaterally appoint anyone nor did he gazette any name for the post of Chief Executive of **MT&RH**. The court finds that there is no need to compel, prohibit or injunct the Respondents as there was no failure to observe due process nor were there any erroneous administrative actions committed by the Respondents and that there has been no breach of Article 47 of the Constitution by the Respondents that warrant the Orders prayed for.

16. The court finds that the Orders sought for Prohibition and Injunction are premature as the sector Minister had not yet committed the administrative actions as set out in the Petition.

17. The court concurs with the submissions of all Counsels for the Respondents that the Petition filed is incompetent and also premature.

18. On the issue of costs the court concurs with the submissions of the Counsel for the 2<sup>nd</sup> Respondent that this being a public interest matter each party shall bear their/its own cost.

## **CONCLUSION**

19. For the reasons stated above the court finds that the Petition seeking for orders of Mandamus and Prohibition is incompetent and the same is hereby dismissed.

20. The court also finds that the Petition is premature and that the administrative actions complained of had not yet taken place therefore there was no violation or infringement of Article. 47 of the Constitution. The court is not hesitant to add that so as to avoid the controversies such as the one being played out at a well known parastatal and at any other Parastatal there is need for the proper streamlining of the process for the appointment of Chief Executives. In the absence of this due process the sector Minister for **MT&RH** is reminded that the people of Kenya are watching the Executive's lurking hand behind the appointment of the Parastatal head and the people shall not fail to act to have any unprocedural actions declared unconstitutional. The Petitioner, herein, is at liberty to petition to move the High Court, again, at any point in time to stop any anticipated violation or infringement of the Legal Notice herein and Article 47 of the Constitution.

21. On the issue of costs, it is the desire of the courts to encourage public interest groups to litigate on matters of general public interest and condemning the losing party to pay costs will discourage and act as a deterrent to potential litigants. It is hereby ordered that each party shall bear their own costs.

It is so ordered.

Dated and Delivered at Eldoret this 27<sup>th</sup> day of September 2012.

**A.MSHILA**  
**JUDGE**

Ngumbi: For 2<sup>nd</sup> and 3<sup>rd</sup> Respondent.

Kathili: Holding brief for Onyinkwa for 1<sup>st</sup> Respondent.

Namiti: Holding brief for Angu Kitigin for Petitioner.

Ayuma: Holding brief for Gicheru for Interested Party.

**A.MSHILA**  
**JUDGE**

