



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

JUDICIAL REVIEW NO. 1 OF 2018

IN THE MATTER OF: THE APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA ARTICLES 10, 23, 27, 35, 41, 46 AND 47

AND

IN THE MATTER OF: LAW REFORMS ACT, CAP 261 LAWS OF KENYA

AND

IN THE MATTER OF: ORDER 53 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF: THE KENYA MARITIME AUTHORITY ACT, CAP 370 LAWS OF KENYA

AND

IN THE MATTER OF: THE MERCHANT SHIPPING ACT, CAP 389 LAWS OF KENYA

BETWEEN

COMMISSIONER FOR HUMAN RIGHTS & JUSTICE.....APPLICANT

VERSUS

KENYA MARITIME AUTHORITY.....RESPONDENT

RULING

The Application

1. By Notice of Motion application dated 16th January, 2018 the ex parte applicant prays for an order of prohibition to permanently stay the decision by the Kenya Maritime Authority, its servants, agents/or employees from proceeding with advertising, recruiting or short listing individuals for the post of Director General of the Respondent and to declare the advertisement made on 17th October, 2017 and 17th December, 2017 respectively for the same post on the Star Newspaper irregular and illegal. The ex parte Applicant also prays that he costs of the application be provided for.

2. The motion was filed pursuant to leave granted by this court on the 5th January, 2018. Subsequently, on 15th January, 2018 vide an application of even date the Respondent sought to have the aforesaid leave set aside. However, on 22nd January, 2018 when parties appeared before the court for the hearing of the Respondent's above said motion parties agreed to abandon the same with no orders on costs and to instead go ahead with the ex parte Applicant's motion herein. With the leave of court parties filed submissions to the motion.

3. The ex parte Applicant is a human rights commission based in Mombasa. It alleges that it lobbies both internationally and locally for

good governance practices, accountability, due process of law and social justice. The ex parte Applicant's case as contained in the Supporting Affidavit of its Executive Director Julius Ogogoh, and in its grounds set out in the application, is that the decision to shortlist the Applicants for the post of Director General was done without following the required Legal procedure. The Applicant's case is that the Respondent is a Public Authority under Cap 370 Laws of Kenya. It operates through its Board of Directors. It is alleged that the Board which allegedly carried advertised/carried out the said interview or short listing was not properly constituted, and that the process by which the decision to advertise and to shortlist the Applicants for the post of Director General was tainted and biased and illegal. In arriving at the aforesaid decision the committee member of the Respondent board failed to take relevant matters into account, making the aforesaid decision unreasonable, apprehensive, frivolous and reprehensible and a total abuse of Administrative powers and against fair Administrative actions. It is averred that the decision to advertise and shortlist the individuals for the post of Director General of the Respondent constituted breaches of regulations contained in the Kenya Maritime Act and the Constitution of the Republic of Kenya and is an abuse of Administrative powers. Further, it is alleged that the decision to advertise and shortlist individuals for the post of Director General of the Respondent was done without giving the public and other interested Public institution an opportunity to vet and/or interrogate the Applicants. It is alleged that the time given between the date of the Advertisement on the 17th October 2017 and the date of short listing for interview on 12/12/17 was too short and could not enable the public and necessary Government agencies participate and forward their views regarding each and every applicant. Further it is alleged that none of the Advertisement was published on the official website of the Organization and that the Advertisement was done by the Chairman Finance and Human Resource Committee instead of the Board Chairman or the Legal Officer to the corporation.

The Response

4. The application is opposed by the Respondent through a Supporting Affidavit of Jane Florence Otieno sworn on 15th January, 2018 in support of the Respondent's application dated 15th July, 2018 which was withdrawn but the affidavit was retained as a response to the ex parte Applicant's motion. Ms. Jane Florence Otieno describes herself as the Corporation Secretary and Head of Legal Services of the Respondent and is conversant with the facts of the matter before the court. The Respondent's case is that the Kenya Maritime Authority (*hereinafter referred to as "KMA"*) is established under Section 3 of the Kenya Maritime Authority Act Cap 370 of the Laws of Kenya with the responsibility of monitoring, regulating and coordinating activities in the maritime industry in the Country. Further, being a State Corporation KMA is also governed by the State Corporations Act, The Merchant Shipping Act, 2009 and the Code of Governance for State Corporations (*hereinafter "Mwongozo"*) an order promulgated by the President under the said Act to guide governance of State Corporations. The Respondent's case is that the office of the Director General, the subject of the judicial proceedings herein, is created pursuant to the provisions of section 11 of the Kenya Maritime Authority Act with the mandate to *inter alia*;

- a. oversee the day to day management and operations of the Authority and have control over all personnel and other activities of the Authority;*
- b. ensure that the provisions of the Kenya Maritime Authority Act and any rules and regulations made thereunder are complied with;*
- c. encourage and foster the safe development of maritime matters in Kenya waters;*
- d. plan, develop and formulate safe and efficient utilization of the Kenya ocean space;*
- e. acquire, establish and improve ocean navigation facilities where necessary within the limits of available appropriation;*
- f. monitor the deployment and utilization of the movable and immovable property of the Authority; and*
- g. prepare the annual report and financial statement of the Authority.*

5. The Respondent's case is that in light of the onerous responsibilities set out hereinabove, the Kenya Maritime Authority Act expressly outlines the qualifications and manner in which the Director General should be recruited. The Kenya Maritime Authority Act under section 11 (4) sets out the qualifications as follows:

- h. Must be a holder of a degree from a recognized University; and*
- i. Must have at least ten (10) years' working experience, in a relevant field, which in the opinion of the Board and the Minister is sufficient to enable the person so appointed to carry out his or her duties as the Director-General.*

6. The Respondent avers that pursuant to Section 11 (1) of the Kenya Maritime Authority Act, the Director General of the Authority is appointed by the Cabinet Secretary on the recommendation of the Board of Directors. Further to the above, the *Mwongozo* outlines the manner in which the position of the Director General ought to be filled. In particular Chapter One Clause 1.18 empowers the Board to appoint the CEO and in doing so must:

- j. Ensure that the Director General is recruited through a competitive process;*
- k. Ensure that the Director General possesses the minimum qualifications and relevant experience set out;*

7. The Respondent states that *vide* a Board Resolution passed on 10th October, 2017 the Respondent's Board resolved to immediately advertise and invite applicants to apply for the vacant position of the Director General. (The said resolutions are annexed to the Replying Affidavit and marked "JFO 1"). Pursuant to the afore-stated resolution an advertisement of the vacancy in the office of the Director General of the Authority was published in the Kenya Maritime Authority Website, the government portal www.mygov.go.ke and "My Gov.

newspaper (a weekly insert in the Standard Newspaper) which Newspaper is of nationwide circulation, and the same invited qualified interested persons to apply and gave a deadline of 8th November, 2017. (Copies of the said adverts are annexed to the Replying Affidavit as “JFO 2”). The afore-stated advertisements set out the qualifications and experience required for the vacant position of Director General. The Respondent’s case is that upon receipt of the Applications the Board reviewed all the Twenty Three (23) Applications received and shortlisted Nine (9) candidates who met the criteria sought by the Board. The Board thereafter resolved to have the names of the shortlisted applicants publicized. **(Annexed and marked JFO3 is a true copy of the Board Minutes together with the advertisement of the shortlisted candidates)**. It is the Respondent’s case that the Board has at all material times complied with all the provisions of the Law in conducting the subject recruitment process, and more specifically that the vacant opportunity was publicized to the general public, any interested and qualified applicant made aware through various modes of publication including the government portal, the Kenya Maritime Authority website and a daily newspaper; interested applicants were given adequate time to prepare and lodge their applications for the position through email and/or post; the required qualifications were in strict compliance with the stipulations of the Kenya Maritime Authority Act and only intended to guide the recruitment process; the Authority has at no point received any complaint or request for clarification regarding the recruitment process or extension of time from the general public, any interested applicant and/or the *ex-parte* Applicant herein; the recruitment process has at all time and stages been undertaken by the Respondent’s Board, the body statutorily mandated to do so; and that in conducting the recruitment process, the board has at all material times been guided by the provisions of chapter 6 of the Constitution on lead and integrity.

9. The Respondent’s case is that pursuant to section 3(5) of the Second Schedule to the Kenya Maritime Authority Act the quorum for the conduct of the business of the Board is five members excluding the Director-General. This is further reiterated by the “*Mwongozo*” and in particular Chapter 1 Clause 1.8 which stipulates that the quorum for Board meetings should be any five members of the Board. The Respondent further avers that pursuant to section 3(8) of the Second Schedule of the Kenya Maritime Authority Act **a vacancy in any position in the Board of Directors does not invalidate the proceedings of the Board provided that there is quorum during the conduct of such a Board meeting**. It is thus evident and as reflected by the Minutes, that the Board was and has been at all material times properly constituted for the purposes of conducting its affairs effectively.

The Submissions

10. With leave of court parties filed submissions. The *ex parte* Applicant submitted that the application is purely based on fair administration action as provided for under the Constitution of Kenya, 2010 and Fair Administrative Actions Act. This include powers, functions and duties exercised by public authorities or quasi-judicial bodies or authority that effects legal rights or interest of a person to which such action relate. In that respect, Section 4 of the Fair Administrative Action Act and Article 47 of the Constitution of Kenya require that every person affected by decision by any authority shall be given opportunity to be heard, including hearing through public participation. The Applicant submitted that in this case the order regarding the decision that was made by the Respondent was disputed and the Applicant went to Court and an order of this court was served upon the Respondent staying the said decision on the 5th January, 2018. Immediately upon receipt of an order of this court, the Respondent issued another notice which was duly published on the Daily Standard Newspaper cancelling the said action. The Applicant submitted that the Respondent has already given in to the demands of the Applicant. By issuing the notice to cancel the intended interviews the Respondent does not have any further claim before this court except to request this court to confirm the orders sought herein. That notwithstanding the *ex parte* Applicant submitted that there was no due process in the shortlisting of the applicants for the position of Director General of the Respondent. The Applicant submitted that currently the Board Chairman one Mwalimu Digare had resigned to contest for Matuga Parliamentary seat and no one had been appointed in the manner required in law to replace him hence no proper recruitment and vetting can take place in the absence of the Chairman and therefore the alleged recruitment by the Respondent could not take place legally. The Applicant’s case is that the Board resolution and minutes passed on 10th October, 2017 and marked as JFO1 on the Respondent’s affidavit does not fulfil the requirements of the resolution of a Board meeting as the said resolution does not disclose the Board members who were present and passed those resolutions; does not disclose minutes that were to be discussed on that day; does not disclose who chaired the Board meeting; does not disclose who called the Board meeting

11. On its part the Respondent submitted that they fully relied on the law in the recruitment process. The Respondent cited **Section 11 (1)** of the Kenya Maritime Authority Act provides that the Director General of the Authority is appointed by the Cabinet Secretary on the recommendation of the Board of Directors. In addition to the Kenya Maritime Authority Act, in undertaking the recruitment of the Director General, the Board is also guided by State Corporations Act and the Regulation made thereunder being the Code of Conduct Governing State Corporations (*Mwongozo*). Chapter 1, Clause 1.18 “*empowers the Respondent’s Board to appoint the Chief Executive Officer/Director General and in doing so must:*

- a) *Ensure that the Chief Executive Officer is recruited through a competitive process,*
- b) *Ensure that the Chief Executive Officer possesses the minimum qualifications and relevant experience set out in the Act”.*

Under this limb, the Respondent examined the arguments by the *Ex-parte* Applicant, in the motion and supporting documents which reveal

- (a) That the Board which advertised and shortlisted the applicants was not properly constituted;
- (b) That the decision to shortlist the applicants was done without following the required legal procedure;
- (c) That the advertisement was done by the Finance and Human Resource Committee instead of the Chairman;
- (d) That in arriving at the decision to advertise and shortlist the candidates, the Respondent’s Board failed to take relevant matters into account.

12. The Respondent submitted that the allegations by the applicant were not proved. In response to the said allegations and with reference to the constitution of the Board the Respondent submitted that pursuant to section 3(5) of the second schedule to the Kenya Maritime Authority

Act, the Quorum for the conduct of the business of the Board is **five (5)** members excluding the Director General. This is further reiterated by the “*Mwongozo*” and in particular Chapter 1, Clause 1.8 which stipulates that the Quorum for Board Meetings should be **any five (5)** members of the Board. Further to the foregoing, Section 3 (8) of the second schedule to the Act stipulates that a vacancy in any position of the Board of Directors does not invalidate the proceedings of the Board provided that there is quorum during the conduct of such a board meeting. In light of the foregoing, the resignation of the previous Board chairman did not render it incapable of carrying out its functions as alleged by the Applicant.

13. As for the legal procedure the Respondent submitted that once the Board was properly constituted all its actions were through valid resolutions and therefore in accordance with the Law. Upon due consideration of the applications submitted, the Board shortlisted nine (9) qualified candidates and *vide* its resolution of **8th January, 2018** directed that the list be publicized. The Respondent submitted that it follows that the advertisement published by the Chairman, Finance and Human Resources was done pursuant to the resolution of the Board and therefore the same is proper and in accordance with the Law.

14. The Respondent further submitted that they took into consideration the requirement under the law that the recruitment process must be competitive and only candidates who meet the qualifications and relevant experience as per Section 11 of the Kenya Maritime Authority Act are shortlisted. Further, the recruitment was competitive and was done after the various modes of advertisement which included a daily newspaper of nationwide circulation, the government portal and the Respondent’s website. This was to ensure that the vacant opportunity attracted all interested and qualified candidates. The Respondent submitted that as can be seen from the fact that twenty-three (23) candidates applied, it was clear that the process was highly competitive and attracted a wider array of candidates.

15. As for the allegation that there was no public participation, the Respondent submitted that public participation is a process which can be qualified. The extent of public participation in the recruitment process of public officers was well outlined by the court in the case of **Consumer Federation of Kenya (COFEK) vs. Attorney General & 2 others [2012]eKLR**. The court noted that in the absence of a specific constitutional, legislative or policy standard of what constitute public participation in matters of public appointments, the actions of the authority must be tested **on the basis of rationality (paragraph 65 of the authority)** the court also discussed the issue of public participation in the recruitment process of public officers by stating as follows:

“...the shortlisted candidates were also advertised. This meets the object of public participation and transparency. On one part, the public is entitled to know who has been shortlisted. The public participates by being able to send any reports or objection on any of the persons who have been selected. Those who have not been shortlisted are given an opportunity to make inquiries as to why they have not been shortlisted. The Petitioner has not shown that there was any complaint by any of the persons who applied for the position and was not shortlisted or any Kenyan who was aggrieved by the process”.

16. The Respondent submitted that the Respondent’s Board adopted a **rational** procedure as enumerated. The remit of the court on the rationality question was addressed in **Community Advocacy and Awareness Trust & 8 Others vs. Attorney General [2012] eKLR** where court quoted with approval the South African Case of **Pharmaceutical Manufacturers of SA: In re Ex Parte President of the Republic of South Africa 2000(2) SA 674 (CC)** and stated that:

“Rationality in this sense is a minimum threshold requirement applicable to the exercise of all power by members of the Executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of the Constitution and therefore unlawful. The setting of this standard does not mean the Courts can or should substitute their opinions as to what is appropriate for the opinions of those in whom power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary’s decision, viewed objectively, is rational, a Court cannot interfere with a decision simply because it disagrees with it or considers that the power was exercised inappropriately.”

17. The Respondent submitted that it is trite principle of law that where a body has been established by statute such as the Respondent, then that body must act rationally in accordance with the powers conferred upon it. In **Githu Mungai & Another vs. Law Society of Kenya & Another [2015] eKLR** cited with approval in **Joy Brenda Masinde vs. Law Society of Kenya & Another [2015] eKLR** the court stated:

“In our view, where a statute donates powers to an authority, the authority ought to ensure that the powers that it exercises are within the four corners of the statute...”

Determination

18. The Respondent submitted that the application before the court lacks merit and should be dismissed with costs. I have carefully considered the motion before the court. I have also considered the submissions of the parties and I raise the following issues for determination:

- Whether the Respondent complied with the law and procedure for recruitment of the Director General.
- Whether the ex parte Applicant’s motion is merited.

19. The Respondent has narrated to this court both in their Supporting Affidavit and in their submissions the duties, functions and responsibilities of the Respondent and the guiding principles in recruiting the Director General. The Respondent has relied on the provisions of the law, especially Section 11(1) and 4 of the Kenya Maritime Authority Act. They have explained how the Board is constituted and how in this case the same was done. There was no response to these submissions. The ex parte Applicant did not state which provisions of the Kenya Maritime Authority Act were violated. The complaints by the ex parte Applicant contained generalities which cannot be the basis upon which a court of law can act.

20. On the allegation that there was no public participation on the recruitment process, it is noted that the ex parte Applicant did not specify the kind of public participation which was required. In this regard the court is left to believe the Respondent that its Board adopted a rational procedure in tandem with the law and national expectation.

21. It is clear to this court that the Respondent followed both the law and procedure in seeking to recruit the Director General. There were necessary advertisements pursuant to which 23 applicants applied and 9 were shortlisted for an interview. It is clear that the following steps undertaken by the Respondent ensured public participation. As outlined in paragraph 11 of the Respondent's Supporting Affidavit, the vacancy of the position of the Director General was widely advertised through various modes; upon shortlisting of qualified candidates, the Respondent once again widely advertised the shortlisted candidates to promote transparency and invite any reports, comments and or objections from the general public on the shortlisted candidates; having advertised the shortlisted candidates on 12th December, 2017 the interviews were scheduled for 8th January, 2018 thereby affording adequate opportunity to the applicants to prepare for the interview and the general public to make any input regarding the shortlisted candidates.

22. On the issue of public participation, the Court of Appeal in **Independent Electoral and Boundaries Commission (IEBC) vs. National Super Alliance (NASA) & 6 others [2017] eKLR** held that:

“the mode, degree, scope and extent of public participation is to be determined on a case by case basis and that what is critical is a reasonable notice and reasonable opportunity for public participation... which reasonableness is determined from the nature and importance of legislation or decision to be made, and the intensity of the impact of the legislation or decision on the public.”

23. This court is satisfied that in the subject recruitment, advertisement and publication of the shortlisted candidates for the post of the Director General of the Respondent was sufficient in ensuring public participation to the fullest extent possible. Further, the *Ex-Parte* Applicant has not shown that there was any complaint by any of the persons who applied for the position and was not shortlisted or any Kenyan who was aggrieved by the recruitment process. It is the finding of this court that the subject recruitment process met the threshold of public participation as stipulated under the Law.

24. On the second issue, as to whether the ex parte Applicant's motion is merited, I cite the case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300 (Uganda)**. 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...”

25. I have found out that there were no procedural irregularities in the recruitment process. And whereas the Applicant refers to Executive Circular dated 26th February, 2016 issued by the Cabinet Secretary for Finance to all the State Corporations freezing recruitment of staff, I find that the same is irrelevant as it deals with new recruitments and not replacement.

26. From the foregoing, it is the finding of this court that the ex parte Applicant's motion lacks merit and is dismissed.

27. On the issue of costs, this court notes that the ex parte Applicant is a human Rights body. The court believes that the matter was brought to court out of a genuine concern for good public governance. If the court were to sanction the Applicant with prohibitive costs its duty as a public watch dog would be severely hampered. I therefore direct parties to bear own costs of the application.

Orders accordingly.

Dated, Signed and Delivered in Mombasa this 3rd day of May, 2018.

E. K. O. OGOLA

JUDGE

In the presence of:

Mr. Odhiambo holding brief for Mkan for Applicant

Mr. Obinja for Respondent

Mr. Kaunda Court Assistant.