



**Okoiti v Board of Directors, Tea Board of Kenya & 2 others; Mutai
(Interested Party) (Employment and Labour Relations Petition
E244 of 2023) [2024] KEELRC 1296 (KLR) (17 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1296 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E244 OF 2023
AN MWAURE, J
MAY 17, 2024**

BETWEEN

OKIYA OMTATAH OKOITI PETITIONER

AND

THE BOARD OF DIRECTORS, TEA BOARD OF KENYA 1ST RESPONDENT

**THE CABINET SECRETARY, MINISTRY OF AGRICULTURE AND
LIVESTOCK DEVELOPMENT 2ND RESPONDENT**

THE HON. ATTORNEY GENERAL 3RD RESPONDENT

AND

WILLY KIPKOECH MUTAI INTERESTED PARTY

JUDGMENT

1. The Petitioner filed a Petition dated 21st December 2023.

Petitioner’s Case

2. The Petitioner avers that vide a job advertisement in The Standard of 27/06/2023, the 1st Respondent re-advertised the position of Chief Executive Officer (CEO) of the Tea Board of Kenya and invited eligible and interested persons to apply.
3. The Petitioner avers that after successful interviews were conducted, the 1st Respondent forwarded the names of the top 3 candidates to the 2nd Respondent for consideration and appointment.



4. The Petitioner avers that vide a letter dated 09/11/2023 Ref: MOALD/SDCD/LEGAL/TBK, the 2nd Respondent directed the 1st Respondent to appoint Mr. Willy Kipkoech Mutai as the CEO, Tea Board of Kenya.
5. Subsequently, on 23/11/2023, the outgoing Acting CEO introduced Mr. Willy Kipkoech Mutai as the new CEO of the Tea Board Kenya vide a Staff Memo Ref: TBK/HRM/16.
6. The Petitioner avers that the 2nd Respondent's involvement in the appointment of the CEO was ultra vires and in violation of Section 13(1) of the Tea Act, Cap 343, Laws of Kenya, which requires the Board to independently recruit and appoint the CEO through a competitive process. This is in violation of Article 27 of the Constitution on equality and freedom from discrimination, Section 5 of the Employment Act which prohibits discrimination in employment, and Section 10 of the Public Service (Values and Principles) Act, Cap 185A.
7. The Petitioner avers that the 1st Respondent's action of sending the names of the top 3 successful candidates to the Cabinet Secretary to appoint one as the CEO, undermined Articles 73(2)(a) and 232(1)(g) of the Constitution on personal integrity, competence, suitability, fair competition and merit as the bases of appointment and promotion in the public service.
8. It is the Petitioner's assertion that the 1st Respondent is competent to address matters incidental to the hiring of public officials, including regional and gender balance, and upholding the interests of minorities and marginalised groups.
9. The Petitioner suspects that contrary to Article 73(2)(b) of the Constitution, the irregular appointment of the Interested Party as CEO is a product of favouritism, other improper motives, or corruption.
10. The Petitioner avers that the impugned appointment, does not constitute fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair as provided under Article 47(1) of the Constitution.
11. The Petitioner avers that the 1st and 2nd Respondent actions in violation of Section 13(1) of the Tea Act, No. 23 of 2020, was unlawful, unconstitutional, invalid, null and void ab initio.

1st Respondent's Case

12. In opposition to the Petition, the 1st Respondent filed its response dated 17th January 2024.
13. The 1st Respondent avers that the contrary to the Petitioner's allegations, it competitively recruited and appointed the Interested Party.
14. The 1st Respondent maintains that it independently and without coercion or influence carried out the interviews and evaluated the qualifications and eligibility of all the shortlisted candidates and resolved that the Interested Party was the suitable candidate for the CEO position.
15. The 1st Respondent denies that the interested party was appointed by the 2nd Respondent and states that the 2nd Respondent's letter dated 09/11/2024 merely informed the 1st Respondent to proceed and appoint the successful candidate in accordance with Section 13 of the Tea Act.
16. The 1st Respondent avers that 2nd Respondent was not involved in the recruitment process as alleged and further says that it outsourced the Kenya School of Government to shortlist the confiscates for fairness, transparency and competitiveness.



17. The 1st Respondent maintains that it sought the 2nd Respondent's concurrence to promote national values and principles of governance within the state agency as envisioned under Article 10 of the Constitution to ensure good governance, integrity, transparency and accountability.
18. The 1st Respondent avers that the Petitioner failed to tender any evidence that the 2nd Respondent participated in the interviews, evaluation and internal deliberations concerning the recruitment of the CEO. The 2nd Respondent concurrence does not amount to involvement.
19. The 1st Respondent states that the Petitioner has failed to tender any evidence to support his suspicion that the Interested Party is a product of favouritism or corrupt practices.
20. The 1st Respondent says that the Petition does not demonstrate the Respondents' inaction violated the Article 41 and 47 of the Constitution. On the contrary, the evidence tendered demonstrate the recruitment process was expeditious, efficient, lawful, reasonable and procedurally fair.
21. The 1st Respondent avers the Petitioner's argument that the recruitment and appointment did not consider regional balance is baseless as he had not laid any basis to demonstrate this allegation.

Petitioner's Submissions

22. The Petitioner submitted that the involvement of the CS from the point the three names were forwarded to him tainted the process with illegality, and that voided the resultant appointment.
23. It is the Petitioner's submission that the Respondents violated Article 73(2)(a) and 232 (1)(g) by choosing top 3 candidates rather than the top candidate.
24. The Petitioner submitted that by involving the Cabinet Secretary to meddle in the affairs of the Board, the 1st Respondent violated the right to fair labour practices. This is based on the ground that Section 13(1) of the Tea Act provides that the CEO shall be competitively recruited and appointed by the Board on such terms and conditions as the Board shall determine.
25. The Petitioner further submitted that the involvement of the Cabinet Secretary was discriminatory and additionally, the top candidate was not appointed as CEO, the appointment was given to another person which is discriminatory in nature as the standard of appointment to office ought to be done based on merit.
26. The Petitioner submitted that the top candidate was dropped due to political interference amounting to selective appointments thus making the whole process discriminatory towards the top candidate. Furthermore, the Respondents' actions undermined the element of competitiveness in the recruitment process violating Articles 73(2)(a) and 232(1)(g).
27. The Petitioner submitted that the Respondents breached, violated and or threatened Article 47(1) of the Constitution to the extent that the impugned appointment does not meet the requisite threshold of fair administrative action which ought to be expeditious, efficient, lawful, reasonable, and procedurally fair.

1st Respondent's Submissions

28. The 1st Respondent submitted that 2nd Respondent merely concurred with its recommendation to appoint the Interested Party which did not amount to a directive or usurpation of power conferred to the 1st Respondent under Section 13(1) of the Tea Act.
29. The 1st Respondent further submitted that the Petitioner has not tendered any evidence to demonstrate the recruitment of the CEO was carried out outside the ambit of Section 13(1) of the Tea Act.



30. It is the 1st Respondent’s submission that the 2nd Respondent’s letter dated 09/11/2023 acknowledged the recruitment of the CEO was guided by Section 13 of the [Tea Act](#) and that the Cabinet Secretary did not appoint the Interested Party. Further, the Petitioner failed to tender any evidence that the latter contravened Section 13 of the [Tea Act](#) as the recommendation was subsequent to a competitive recruitment process carried out by the 1st Respondent.
31. The 1st Respondent submitted that the process of seeking concurrence from the 2nd Respondent is aimed to promote transparency so as to promote national values and principles of governance envisioned under Article 1 of the [Constitution](#). The Petitioner has not demonstrated how forwarding one name instead of three names violated Article 10 of the [Constitution](#).
32. It was submitted for the 1st Respondent that the Petitioner has not cited any instances that demonstrates there was discrimination of any candidate or the spirit of fair competition or merit violated. Further, no evidence was tendered before court that the 1st Respondent or the outsourced agency violated Article 27 of the [Constitution](#) read together with Section 5 of the [Employment Act](#) and Section 10 of the [Public Service \(Values and Principles\) Act](#).
33. The 1st Respondent submitted that it has demonstrated by way of evidence that the recruitment process was carried out independently and within the guidelines of the [Tea Act](#) hence; it was well within Article 47(1) of the [Constitution](#) that prescribes fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

Analysis and Determination

34. The issues raised for determination are:
 - a. Whether the appointment of the Interested Party was ultra vires and in violation of Section 13(1) of the [Tea Act](#).
 - b. Whether the Petitioner is entitled to the orders sought.

Whether the appointment of the Interested Party was ultra vires and in violation of Section 13(1) of the Tea Act.

35. Section 13(1) of the [Tea Act](#) states:

“The chief executive officer shall be competitively recruited and appointed by the Board on such terms and conditions as the Board shall determine.”
36. In view of the foregoing, the responsibility to recruit the CEO of the Tea Board of Kenya is held by the Board and the same shall be done competitively.
37. There is a letter on record being one of the exhibits dated 9th November 2023 signed by Cabinet Secretary Hon. Mithika Linturi. The letter clearly states that section 13 of Tea Board of Kenya Act No 23 of 2020 the Chief executive officer shall be competitively recruited and appointed by the board on such terms and conditions as the board shall determine.
38. Paradoxically, the Cabinet Secretary goes to recommend to the board to appoint Mr Willy Kipkoech Mutia as the Chief Executive Officer. So the said section 13 of the said act does not give room to the Ministry to participate in the appointment of the Chief Executive Officer. The court finds rightfully so the appointment was made ultra vires by the Cabinet Minister of Agriculture and Livestock Development.



39. It is not in dispute that the Board re-advertised the position of CEO vide the newspaper advertisement of 27/06/2023, and undertook interviews accordingly and eventually settled on 3 candidates who topped the interview process.
40. The names, qualifications and points scored during the interview were forwarded to the 2nd Respondent for consideration and appointment vide a letter dated 18/09/2023.
41. The 2nd Respondent subsequently vide a letter dated 09/11/2023, recommended the appointment of the Interested Party as the CEO of the Tea Board of Kenya even though he was placed second among the top 3 candidates with a score of 72.4 and side-lining the candidate with the most points who was Dr. Bahati Kizindaro who scored 78 points.
42. The said section 13 of the said *Tea Act* make it abundantly clear the appointment of the Chief Executive Officer shall be competitively recruited. Again, the respondents did not demonstrate how the recruitment was competitive considering the 1st interested party was not even the top most according to the score sheet from the interview. That act shows the respondent violated right to fair labour practices contrary to article 41 of the *Constitution* of Kenya. If there was a good reason and it was not favouritism that caused the respondents to settle for the interested party they should have made it clear in the appointment letter. In the absence of the same then the court can only hold that there was favouritism in the respondents appointing Dr Willy Kipkoech Mutai as the Chief Executive Officer.
43. The court is persuaded that the above observations do clearly demonstrate clearly, the provisions of the law violated. In the case HCC Petition No 4 of 2013 *Garissa Northern Disabled Persons Organisation vs the Governor of Garissa & another* the court cited with approval the principal in *Anarita Karimi vs The Republic* where the court held as follows:
- “we would however again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the *Constitution*, it is important if only to ensure that justice is done in the case that he should set out with a reasonable degree of precision that of which he complains, the provision said to be infringed and in the manner in which they are alleged to be infringed.”
44. The petitioner has demonstrated that the interested party was appointed contrary to section 13 of *Tea Act* and furthermore the respondents did not demonstrate how he competitively chose him as against
45. the other two candidates. Section 10 of *Public Service Values and Principles Act* No 1A of 2015) states:
- A public service institution or an authorised officer shall ensure public officers are appointed and promoted on the basis of fair competition and merit.
46. The court decisively holds this was not adhered to by the respondents and so the appointment of the interested party by the 1st and 2nd respondent was unlawful and unprocedural and so void ab initio.
47. Consequently, the reliefs sought by the petitioner in his petition dated 21st December 2023 being prayers I, II, III, IV & VI are merited and are granted by this honourable court save prayer VII and VIII.
48. This is a public interest litigation and so each party will meet their costs of this petition.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 17TH DAY OF MAY, 2024.

ANNA NGIBUINI MWAURE

JUDGE



ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

