IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), W. KARANJA & KANTAI, JJ. A)

CIVIL APPEAL NO 313 OF 2018

BETWEEN

BEN CHIKAMAI.....1ST APPELLANT

THE BOARD OF DIRECTORS

KENYA FORESTRY RESEARCH INSTITUTE.....2ND APPELLANT

AND

PETER MACITHI MUIGAI .....1ST RESPONDENT

THE CABINET SECRETARY FOR ENVIRONMENT, NATURAL RESOURCES AND

REGIONAL DEVELOPMENT AUTHORITIES .....2ND RESPONDENT

THE ATTORNEY GENERAL OF KENYA ….....3RD RESPONDENT

(Being an Appeal against the Judgment and Decree of the Employment and Labour Relations Court of Kenya at Nairobi (Hon. Lady Justice Hellen Wasilwa) dated and delivered on 31st January 2018 In

E.L.R.C Petition No. 75 of 2016)

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JUDGMENT OF THE COURT

1. This appeal emanates from a constitutional petition filed by the 1st respondent against the 2nd appellant challenging the 1st appellant's re-appointment for a 3rd term, to the position of Executive Director of the Kenya Forestry Research Institute (KEFRI) by the 2nd appellant on 10th April, 2015.

2. A brief background of this case is that KEFRI is a state corporation established under the Science, Technology and Innovation Act, 2013. The 1st appellant (Ben Chikamai), was the Chief Executive Officer (CEO) and a director of KEFRI whose first appointment to office was on 1st May, 2009 for a term of 3 years. He was thereafter re-appointed for his second term with effect from 1st May, 2012 for a further 3 years which term was bound to expire on the 30th of April, 2015.

3. During the said 1st and 2nd tenure of the 1st appellant as CEO of KEFRI, his appointment process was guided by Government Circular Reference No. OP/CAB.9/1A dated 23rd November, 2010 issued by the then Permanent Secretary and Secretary to the Cabinet and Head of Public Service, Ambassador Muthaura, which set out the procedure and guidelines for re-appointment of Chief Executive Officers in State Corporations.

4. Pursuant to the foregoing circular, the 2nd appellant considered the 1st appellant's request seeking consideration of his re-appointment as Chief Executive Officer, KEFRI for a 3rd term. Following a review and evaluation of the 1st appellant's performance, the 2nd respondent approved the his contract for a 3rd term of 3 years which was to take effect from 1st May, 2015 and communicated the same vide a letter dated 10th April, 2015.

5. This does not appear to have settled well with the 1st respondent herein who filed a petition predicated on grounds that: the 1st appellant's

re-appointment was unlawful as it was in violation of the Code of Conduct for State Corporations ("Mwongozo") which required that persons in the office of Chief Executive Officers of State Corporations serve a maximum of 2 terms comprising a maximum cumulative period of 6 years; that even after expiry of the term of office of KEFRI's Board of directors sometime in 2015, KEFRI continued operating without a board hence allowing the 1st appellant through the management to irregularly make management decisions; that while the 1st appellant was in office for his 3rd term, there had been alleged cases of embezzlement of funds, nepotism, favoritism, corruption and breach of procurement laws which the 2nd respondent failed to investigate and act upon and; that the said actions of the 2nd respondent were in violation of the principles set out in **Article 10** and **Article 153** of the Constitution of Kenya 2010, hence unconstitutional, null and void.

6. The petition was opposed on grounds that: the contested re-appointment of the 1st appellant was within the ambit of the then applicable laws and that Mwongozo was not in force during such re-appointment; the documentary evidence produced to support the allegations that KEFRI had no existing Board after its term expired sometime in 2015 had no evidentiary basis; that the 1st appellant was acting without authority and that the 2nd appellant had failed to investigate and act upon the allegations of embezzlement of funds, nepotism, favoritism, corruption and breach of procurement laws allegedly perpetrated by the 1st appellant.

7. Upon consideration of the petition, the evidence on record and rival submissions, the trial Court found that the 1st appellant was illegally in office, that the 2nd respondent failed in its duty to ensure proper appointment of KEFRI's CEO and that no Board of KEFRI was in existence as at the time of the judgment. The learned Judge ultimately ordered that the 1st appellant vacates office, an acting CEO be appointed to sit in office for a maximum period of six months following which a Board would be appointed and competitive recruitment of the CEO be done.

8. Aggrieved by this decision, the 1st and 2nd appellants lodged this appeal which is premised on 15 grounds as enumerated in the memorandum of appeal which can be summarized as: the learned Judge erred in law and in fact in holding that the provisions of Mwongozo) were applicable at the time of the reappointment of the 1st appellant for the third term; that the provisions of the Mwongozo were mandatory at the time of reappointment of the 1st appellant and failed to appreciate that the Mwongozo required progressive application; by nullifying an appointment conducted pursuant to the provisions of the law; by finding that the 2nd appellant had the requisite mandate to appoint the Chief Executive Officer of KEFRI yet that is the mandate of the 2nd respondent; by finding that there was no Board of Directors of KEFRI hence issuing a directive that a Board be appointed and failing to appreciate that the issue was not one of the issues for determination; by failing to appreciate that the 1st respondent was bound by his pleadings and could not be granted cumulative reliefs that he had not sought; by finding that the 1st respondent's evidence was hearsay and lacked probative value; and by failing to appreciate the appellant's submissions and evidence.

9. Learned counsel for the 1st appellant, Mr Masinde submitted that theMwongozo, was issued by the Public Service Commission (PSC) and the State Corporations Advisory Committee (SCAC) in January 2015 and implemented pursuant to Executive Order No. 7 of 2015 dated 28th April, 2015. Further, by virtue of the said order, all Boards of state Corporations were to be in compliance with Mwongozo except as otherwise provided by written law.

10. Counsel submitted that Mwongozo was intended to apply prospectively as provided under clause 1.5 which anticipates the extension of the tenure of the Board for a second term upon the first implementation of Mwongozo irrespective of the number of terms previously served by a Board Member before the effective date of Mwongozo.

11. It was Counsel's contention that the Mwongozo guidelines were created under an Act of Parliament and cannot be superior to the Act of Parliament itself. Therefore, if in any event there is an inconsistency between Mwongozo and any written law, the latter has to prevail. Further, that Executive Order No. 7 of 2015 also makes it clear that Mwongozo is inferior to written law as the order stated that the Mwongozo was to be implemented forthwith except as otherwise provided by any written law.

12. Counsel contended that KEFRI was established under the Fourth Schedule of the repealed Science and Technology Act Cap 250 Laws of Kenya. That the aforementioned Act under **section 15(1)(d)** established the Board of Management for Research Institutes with the Director of the Research Institute being the Secretary to the Board while **section 19** of the Act provided for the mode of appointment of the Director including terms and conditions of service and his general duties and responsibilities.

13. He maintained that under **section 6(2)** of the State Corporations Act, the appointment to the Board is to be for a renewable period of five years or less as may be specified in the Notice. Further, that under the Act the 1st appellant's term was renewable subject to favourable evaluation and recommendation by the 2nd appellant as per the contract for re-appointment hence it was not necessary for the 1st appellant to be subjected to a competitive recruitment process.

14. He maintained that failure by the Minister to gazette the 1st appellant's third term in office did not invalidate or vitiate the re-appointment.

15. In support of the appeal, Mr. Ligunya, learned counsel for the 2nd appellant, echoed the 1st appellant's submissions contending that the 1st appellant's re-appointment to office for a 3rd term was not unlawful as it was in accordance with the then prevailing laws. He maintained that as at the time of renewal of the term of office of the 1st appellant, Mwongozo was not in operation. Further, that before implementation of Mwongozo, there was an existing policy governing the appointment of CEOs of state corporations which provided that the position of CEO would only be advertised in the event that the Board of Directors of that corporation had no intention of renewing the appointment of the incumbent CEO.

16. Counsel submitted that Mwongozo expressly provides for an implementation approach called "comply or explain" which is an evident contemplation that its implementation allows for a progressive realization seeking future uniformity in all state corporations as to the terms of service of CEOs. He argued that it would be detrimental to apply Mwongozo retrospectively as it would interfere with already existing rights, and obligations under other laws. On this point he relied on the case of **Samuel Kamau Macharia & Another v. Kenya Commercial Bank Limited & 2 Others (2012) eKLR**.

17. Citing the case of **Communications Commission of Kenya & 5 Others v. Royal Media Services Limited & 5 Others (2014) eKLR** Mr. Ligunya maintained that the application of the Mwongozo would have caused untold violation of the 1st appellant's right to legitimate expectation having already been appointed for a 3rd term of service by the time the circular was sent out.

18. Mr. Ligunya submitted that contrary to the trial Court's findings, KEFRI was not operating without a Board of Directors. He submitted that there was no concrete evidence to support the said finding as the documentary evidence i.e. reports relied on by the 1st respondent covered periods between 2001/2002 to 2011/2012. Further, that as at the time the petition was filed, the term of the previous Board had already lapsed on 30th December, 2015 and KEFRI was in the process of constituting a new Board. He submitted that the appointments to the Board and its overall mandate were not subjects of the petition hence not open for the Court's determination.

19. Urging the Court to allow the appeal, Mr. Odukenya, for the 2nd and 3rd respondents, echoed the 1st and 2nd appellants' sentiments. Relying on the case of **Republic v. Cabinet Secretary for Education, Science & Technology & 3 Others Judicial Review Case No. 280 of 2013,** counsel submitted that re-appointment need not be competitive. He maintained that the 1st appellant's re-appointment was in accordance with the prevailing laws and procedures laid down at the time.

20. Counsel contended that Mwongozo could not be applied retrospectively and by virtue of its provisions it was not to be implemented immediately on a mandatory basis upon being operationalized and that state corporations had a leeway to implement it in the most seamless way possible.

21. Citing the case of **Dr. Wilfrida Itolondo & 4 Others v. The President & 7 Others Nairobi Civil Appeal No.120 of 2014** Mr. Odukenya submitted that the 2nd respondent's action to re-appoint was not a power under **Article 153(2)** as held by the learned Judge. Therefore, the 2nd respondent was not accountable to the President for upholding the 2nd appellant's recommendations to re-appoint the 1st appellant; that this was not an action warranting sanction by the President.

22. Placing reliance on the case of **Raila Odinga v. IEBC & 3 Others Supreme Court Election Petition No. 5 of 2013,** citing the doctrine of presumption of legality, counsel submitted that the re-appointment of the 1st appellant was lawful and is presumed to have been done legally. Further, that the 1st respondent did not adduce any evidence to rebut such legal presumption.

23. This being a first appeal, the duty of this Court was set in the case of **Selle & Another v. Associated Motor Boat Co. Ltd. [1968] 123 at p 126:**

> ***"An appeal to this Court from the trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial Judges findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hamid Saif v. Ali Mohamed Sholan [1955] 22 EACA 270)."***

24. With the above principles in mind, and having reconsidered all the material before us as summarized above, we identify the issues for determination before this Court as follows:-

> ***a) Whether the Mwongozo was applicable in the circumstances and whether the 1st appellant's re-appointment for a third term was unlawful.***
>
> ***b) Whether the learned Judge erred in finding that Board of KEFRI was not in existence and issuing orders that the same be constituted.***

25. On the first issue, it is common ground that the 1st appellant's two terms as CEO of KEFRI were not in dispute. The bone of contention was his re-appointment to serve for a third term.

26. As appears in the record, the process of the 1st appellant's re-appointment to a third term was commenced vide a letter dated 15th September, 2014 addressed to the 2nd appellant, where the 1st appellant sought to be considered for another term in office. Subsequently, the 2nd appellant having reviewed and evaluated the 1st appellant's past performance recommended his re-appointment as CEO of KEFRI. Following such recommendation, the 2nd respondent renewed the 1st appellant's contract for a further 3 years effective from 1st May, 2015 vide a letter dated 10th April, 2015.

27. It was the 1st respondent's case, before the trial Court, that: the re-appointment of the 1st appellant as CEO of KEFRI was unlawful as it was in violation of the Mwongozo; the 1st appellant was not eligible for re-appointment as CEO having already served 2 terms and; he was not subjected to a competitive recruitment before re-appointment. The appellants opposed the 1st respondent's petition as well as the findings of the trial Judge arguing that the Mwongozo did not apply as at the time of the 1st appellant's re-appointment to office as the same could not be applied retrospectively.

28. The statutory basis of the Mwongozo is traced back to the State Corporations Act, Cap 446, Laws of Kenya. **Section 30**, of the Act, mandates the President to formulate regulations with a view of the optimum operation of State Corporations. The said provision provides thus; -

> ***"30. The President may make regulations generally for the better carrying into effect of the provisions of this Act and the powers conferred by this section may be assigned…"***

29. The record shows that the Mwongozo, was issued jointly by the Public Service Commission (PSC) and the State Corporations Advisory Committee (SCAC) in January 2015, it having been duly executed by the President in December 2014. The Code was intended to address the question of leadership, governance and management of public resources within State Corporations including KEFRI and was to be implemented to increase efficiency and accountability in use and deployment of resources and to entrench corporate governance aligned to the principles set out in the Constitution.

30. A careful perusal of the record shows that the implementation of the Mwongozo was effected through a Government Circular dated 28th April, 2015. Further, in the replying affidavit filed before the trial Court, the 1st appellant concedes to being aware of the said circular and its contents.

31. The 1st appellant's letter for renewal of contract was dated 10th April, 2015 but the terms of service were to commence effective 1st May, 2015. It therefore follows that the 1st appellant's term of employment was to commence after the Executive Order No. 7: Mwongozo was implemented. Having been issued way back in January 2015, it was incumbent upon the 2nd appellant to consider the appointment of the CEO in accordance with the Mwongozo which was applicable at the time even if it meant that the letter issued to the 1st appellant was to be recalled.

32. In view of the fact that Mwongozo was issued jointly by PSC and SCAC in January 2015, the 1st appellant having been at the realm of a state corporation and the second appellant having been in place, it cannot be reasonably said that they were unaware of the document. Moreover, the process of the 1st appellant's appointment had not been completed by the time Mwongozo came into effect on 28th April, 2015, while the 1st appellant's term of office was to commence on 1st May,2015. Application of Mwongozo in the circumstances was not therefore retrospective.

33. The appellant further posited that the Mwongozo was inconsistent with existing laws, therefore, that it would be a violation of such existing laws if the same were to be applied in the re-appointment of the 1st appellant. It is trite that he who alleges must prove. **Section 107** of the Evidence Act is instructive that it lies with the party who desires any Court to give judgment as to any legal right or liability to show that the facts which his case depends upon exist. The same principle of law is echoed in the Halsbury's Laws of England, 4th Edition, Volume 17, at paras 13 and 14 where it describes it thus:

> ***"The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.***
>
> ***14 The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues."***

34. The appellants have not specifically pointed out which provisions of the Mwongozo are inconsistent with the law. Further, they have not demonstrated how such provisions of the Mwongozo are inconsistent with the law if at all. Moreover, it is evident that the implementation of the Mwongozo was to be in tandem with existing laws but adhering to established constitutional principles which the Mwongozo intended to be aligned with.

35. Besides, the argument by the appellants that the 1st appellant's re-appointment was in line with a government circular reference no. OP/CAB.9/1A dated 23rd November, 2010 is not tenable as Executive Order No. 7 dated, 28th April, 2015 implementing the Mwongozo was intended to override the provisions of the former circular as far as the appointment or re-appointment of Chief Executive Officer of KEFRI was concerned and it was therefore incumbent upon the concerned parties to forthwith implement the said provision.

36. Having established that the Mwongozo was applicable, it is paramount to interrogate the pertinent provisions thereof in order to establish the legality of the 1st appellant's re-appointment. The pertinent provisions are as follows; -

37. **Clause 1.18** on ***Appointment of CEO*** states as follows:-

> ***"1. The Board should:***
>
> ***a) Appoint and remove the CEO.***
>
> ***b) Ensure that the CEO is recruited through a competitive process***
>
> ***c) Ensure that the CEO possess the minimum qualification and experience set out in Attachment I***
>
> ***d) Define and approve authority levels for the CEO***
>
> ***e) Set the performance targets of the CEO***
>
> ***f) Ensure that it has put in place a succession plan for the CEO and other senior management staff"*** (Emphasis supplied)

38. **Clause 1.2** on the ***Role and functions of the Board*** states as follows: -

> ***"… (k) Hire the CEO, on such terms and conditions of service as may be approved by the relevant government organ(s) and approve the appointment of senior management staff."*** (Emphasis supplied)

39. **Clause 1.5** on ***Term Limits for Board Members*** states as follows:-

> ***1. The tenure of a Board member shall not exceed a cumulative term of six years or two terms of three years each provided that upon first implementation of this Code, the appointing authority may extend the term of not more than a third of the members of the Board in order to achieve continuity as set out in 1.13 above."***

(Emphasis supplied)

40. Relying on **clause 1.5** that "***the appointing authority may extend the term of not more than a third of the members of the Board in order to achieve continuity…."***, the appellants submitted that by virtue of this provision, a Board member could rightfully be re-appointed to the Board beyond the two terms prescribed in the term limits for Board Members as set out in the Mwongozo. The justification of reliance on this provision was that it ensured continuity and seamless transition in terms of the operations of the board during the first implementation of the Mwongozo.

40. Although the appellants placed so much emphasis on the aforementioned provision of the Mwongozo regarding appointment of Board Members, the substratum of the petition before the trial Court was in respect of the appointment of the 1st appellant as a CEO of KEFRI and not as a Board Member. A careful reading of the Mwongozo will show that the positions of CEO and that of Member of the Board are two distinct provisions, however pursuant to **clause 1.1(4)** the CEO shall be a board member with no voting rights.

41. Having been faced with the same argument, the ELR Court in the persuasive case of **Peter Macithi Muigai v. Cabinet Secretary for Industrialization and Enterprise Development & 4 Others (2016) eKLR,** held as follows; -

> "***44. A related issue is whether having served two terms of three years each, the 4th Respondent could get a further extension of his contract. Attachment I to Mwongozo provides the tenure of the CEO as:***
>
> ***a. Three year term or as otherwise provided under any written law;***
>
> ***b. Renewable once subject to performance evaluated by the Board.***
>
> ***45. The Court was referred to Clause 1.5 of Mwongozo on term limits for Board members. Under this Clause, the appointing authority was given some leeway at the first implementation of Mwongozo to extend the term of one third of the members of the Board in order to achieve continuity.***
>
> ***46. Having looked at this Clause alongside other provisions in the policy document, I do not think it can be legitimately applied to a CEO. I say so for two reasons; first, under Clause 1.1.4, the CEO though a member of the Board, has no voting rights. Second, the appointment of the CEO is provided for under a separate clause and it could not therefore have been the intention of the drafters of the policy document to mix the appointment of the CEO with other Board members. At any rate, the CEO is an employee and is only a member of the Board by virtue of office."***

42. We are aware that the above case is pending judgment before this Court and we shall therefore say no more. Having come to the conclusion that the 1st appellant's recruitment was in contravention of Mwongozo and could not be sanctioned by law, we need not get into the issue as to whether he ought to have been competitively recruited. The long and short of it all is that he was not entitled to be re-appointed for another term because the new term was supposed to commence after Mwongozo had been operationalized.

43. On the second issue, the 2nd appellant fault the learned Judge's finding that there was no Board in place as at the time the 1st appellant was being re-appointed; that there was no concrete evidence to prove otherwise. It was the petitioner's submission before the trial Court that KEFRI's Board of Management had been appointed through Gazette Notice No. 206 on 31st December, 2012 for a three-year period and that during the 1st appellant's term of office and even as at the time the petition was filed, the Board did not exist. A copy of the said gazette notice appears in the record of Appeal. The 2nd appellant on the other hand argues that by the time the petition was filed, the Board had completed its term on 30th December, 2015 and was in the process of being reconstituted.

44. Indeed, **Section 6** of the State Corporation Act provides that every appointment of Board members of State Corporations shall be by name and by notice in the Gazette and shall be for a renewable period of five years or for such shorter period as may be specified in the notice.

45. It is evident from the record that pursuant to the foregoing provision there was a gazette notice No. 206 dated 31st December, 2012 appointing Members of the Board for 3-year term which period was bound to expire on 31st December, 2015. Therefore, it is evident that the Board was still in operation during the re-appointment of the 1st appellant and its decisions thereafter were proper in law until its term expired.

46. That notwithstanding, we observe that it is evident from the face of the petition filed before the ELRC that there was no prayer regarding the existence or otherwise of the Board of Directors of KEFRI. Whether there was an operational Board or not was not an issue before the court, and the learned Judge appears to have ventured outside her remit when she interrogated the constitution of the Board.

47. In the case of **Independent Electoral and Boundaries Commission & Another v. Stephen Mutinda Mule & 3 Others (2014) eKLR** this Court cited with approval the decision of the Supreme Court of Nigeria in **Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002** where Slyvester Umaru Onu, JSC stated that: -

> ***'….It is settled law that it is not for the courts to make a case of its own or to formulate its own from the evidence before it and thereafter proceed to give a decision based upon its own postulation quite separate from the case the parties made before it…***
>
> ***It is settled law that parties are bound by their pleadings…the court below was in error when it raised the issue contrary to the pleadings of the parties.'***

48. In view of the above, we are constrained to say that the findings by the learned Judge that there was no Board of Directors in place at the time had no factual or legal foundation both in terms of the pleadings and the evidence adduced by the parties. Other than for this finding on the reconstitution of the Board, which was inconsequential as far as the impugned reappointment of the appellant was concerned, we believe we have said enough to demonstrate that this appeal is for dismissal. The same is dismissed with orders that each party bears its own costs.

Dated and delivered at Nairobi this 22nd day of May, 2020.

W. OUKO, (P)

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

S ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR