



Republic v Board of Directors, Agriculture & Food Authority & 3 others; Gikonyo (Nuts and Oil Crops Directorate & 6 others (Interested Parties); Kiume (Exparte Applicant) (Judicial Review Application E027 of 2024) [2025] KEELRC 482 (KLR) (21 February 2025) (Judgment)

Neutral citation: [2025] KEELRC 482 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
JUDICIAL REVIEW APPLICATION E027 OF 2024

B ONGAYA, J
FEBRUARY 21, 2025

IN THE MATTER OF ARTICLES 1, 2, 3, 10, 19, 20, 22, 23, 27, 41, 73, 75, 232, 233, 234 AND 258 OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, THE LAW REFORM ACT AND ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010

IN THE MATTER OF THE AGRICULTURE AND FOOD AUTHORITY (NO. 13 OF 2013)

IN THE MATTER OF THE ILLEGAL, IRRATIONAL DISPROPORTIONATE, UNFAIR AND PROCEDURALLY IMPROPER DECISION BY THE BOARD OF DIRECTORS OF THE AGRICULTURE AND FOOD AUTHORITY TO ALTER THE ORGANISATIONAL STRUCTURE OF THE AUTHORITY.

IN THE MATTER OF THE AGRICULTURE AND FOOD AUTHORITY’S ORGANISATIONAL STRUCTURE, GRADING AND STAFF ESTABLISHMENT POLICY, OF APRIL 2024.

BETWEEN

REPUBLIC APPLICANT

AND

THE BOARD OF DIRECTORS, AGRICULTURE & FOOD AUTHORITY 1ST RESPONDENT

CABINET SECRETARY, MINISTRY OF AGRICULTURE & LIVESTOCK DEVELOPMENT 2ND RESPONDENT

STATE CORPORATIONS ADVISORY COMMITTEE 3RD RESPONDENT

PUBLIC SERVICE COMMISSION 4TH RESPONDENT

AND



ANNE GIKONYO (NUTS AND OIL CROPS DIRECTORATE INTERESTED PARTY

BENSON APUOYO (COFFEE DIRECTORATE) INTERESTED PARTY

CALISTUS EFUKHO (FOOD CROPS DIRECTORATE) INTERESTED PARTY

CHRISTINE CHESARO (HORTICULTURAL CROPS DIRECTORATE) INTERESTED PARTY

JUDE CHESIRE (SUGAR DIRECTORATE) INTERESTED PARTY

FELIX MUTWIRI (MIRAA, PYRETHRUM & OTHER INDUSTRIAL CROPS) INTERESTED PARTY

GRACE KYALO (FIBRE CROPS DIRECTORATE INTERESTED PARTY

AND

CHRISTINE MUMBI KIUME EXPARTE APPLICANT

JUDGMENT

1. The ex-parte applicant filed the notice of motion dated 28.05.2024 through Ekusi Lore & Company Advocates. It was brought under Section 8 of the *Fair Administrative Action Act*, 2015, Section 8 and 9 of the *Law Reform Act*, Rule 7 (2) of the Employment and Labour Relations Court (Procedure) Rules, 2016, Order 53 of the Civil Procedure Rules, 2010 and all other enabling provisions of law. The applicant prayed for reliefs as follows:
 - a. A Judicial review order in the nature of Certiorari to remove into this Honourable Court and quash forthwith, the Organisational Structure, Grading and Staff Establishment Policy for the Agriculture and Food Authority, April 2024 issued by the 1st Respondent upon the recommendation of the 3rd Respondent.
 - b. A judicial review order in the nature of Prohibition to bring unto the Honourable Court for purposes of restricting or preventing the 1st Respondent from implementing the Organisational Structure, Grading and Staff Establishment Policy for the Agriculture and Food Authority, April 2024 issued by the 1st Respondent upon the recommendation of the 3rd Respondent.
 - c. The costs of this application be borne by the respondents.
2. The application was based upon the following grounds:
 - a. Section 11 of the *Agriculture and Food Authority Act*, 2013 (the Act) requires the Agriculture and Food Authority to organise its Secretariat into Directorates and to include a Directorate of Food Production.
 - b. Under the foregoing provision of the Act, the Agriculture and Food Authority, with the Approval of the 2nd Respondent, may determine such Directorates taking into account its functions under the Act, and the requirement that each Directorate has to have autonomy as to enable it to discharge its professional mandate to enable the Republic of Kenya meet the relevant international obligations especially with respect to standards.



- c. However, without any colour of right, justification in law or reason whatsoever, in the most unlawful, illegal, irrational, disproportionate and procedurally improper of manners, the 1st Respondent has issued to its Staff members and the General Public, a document purporting to be the Organisational Structure, Grading and Staff Establishment Policy, prepared at the recommendation of the 3rd Respondent, to wit, reorganising the Secretariat of the Agriculture and Food Authority by eliminating the Directorates.
 - d. The Organisational Structure, Grading and Staff Establishment Policy of April 2024, not only undermines the express and mandatory provisions of the Act but was also arrived at in a manner that is oppressive, without any prior notice of the nature and reasons thereof, without affording any opinion of the members of staff or persons affected and was therefore not informed.
 - e. Since time-immemorial and its establishment, the Agriculture and Food Authority, has operated in Directorates, with its management comprising the Interested Parties and the Funds of the Authority collected and remitted to the respective directorates for good governance. As such, the Respondents and Interested Parties will not suffer any prejudice if the orders sought are granted.
 - f. The Application herein demonstrates good grounds for grant of the reliefs sought herein. g. It is fair and just that the application be allowed.
3. The application was further based upon the material filed at the leave stage including the statutory statement and the verifying affidavit of the applicant and exhibits thereto sworn on 24.05.2024. The applicant stated that the application was filed in the public interest.
 4. The verifying affidavit exhibited the impugned Agriculture and Food Authority, Organizational Structure, Grading and Staff Establishment, April 2024.
 5. The 1st respondent opposed the application by filing the replying affidavit of Bruno Mugambi Linyiru, the Director General of the Agriculture and Food Authority sworn on 12.06.2024 and filed through Lubulellah & Associates Advocates. The affidavit urged as follows for the 1st respondent:
 - a. The Agriculture and Food Authority (formerly the Agriculture Fisheries and Food Authority) is a body corporate established the *Agriculture and Food Authority Act*. The 1st respondent Board of Directors and the Agriculture and Food Authority are separate corporate bodies.
 - b. The members of the 1st respondent Board were appointed on 24.03.2023 by Gazette Notice No. 3667 and prior to that the Agriculture and Food Authority had operated without a board.
 - c. No leave was obtained to bring instant proceedings against the Agriculture and Food Authority.
 - d. Section 11 of the Agriculture and Food Authority provides as follows:
 - (1) The Authority shall organise its secretariat into such directorates as the Authority, with the approval of the Cabinet Secretary, may determine taking into account the functions of the Authority under this Act and any other Act of Parliament, and shall include a directorate in food production.
 - (2) Deleted by *Act No. 7 of 2016*, Sch., *Act No. 35 of 2016*, Sch.
 - (3) Each directorate of the Authority shall have such autonomy as to enable it discharge its professional mandate and shall for purposes of enabling Kenya meet the relevant



international obligations especially with respect to standards, each directorate shall be the recognized entity to represent Kenya in that behalf as the competent authority.

- (4) Without prejudice to the general power of the Authority to establish directorates as contemplated under subsection (1), the Authority may establish directorates for each produce as may be necessary to enable the carrying out of any specialized activities with respect to the promotion or management of that agricultural product.
- e. The process to formulate the impugned organizational document was initiated in 2015.
 - f. In 2017 and 2019 the management attempted to get the organizational structure approved by the State Corporations Advisory Board and the resultant organizational structure is exhibited.
 - g. The management initiated the development of new human resource instruments in its retreat of April 2022. The instruments included staff establishment and grading structure; career guidelines; and human resource policy and procedures manual. The drafts were submitted to the Cabinet Secretary and the State Corporations Advisory Committee. The Committee reviewed them in August 2022.
 - h. The 1st respondent Board's Human Resource and Administration Committee met on 16.05.2023 and was informed about the progress made in developing the new human resource instruments. The Committee considered that in view of section 11 of the *Agriculture and Food Authority Act*, it was its sole prerogative to develop and issue new human resource instruments and involving other agencies would undermine its prerogative under section 11 of the Act.
 - i. After deliberations members of the 1st respondent under guidance of the State Corporations Advisory Committee developed and approved one document on the new human resource instruments comprising Organizational Structure; Grading Structure; Staff Establishment; Career Guidelines; and, Human Resource Policy and Procedures Manual and, exhibited BML8, essentially the impugned organizational structure.
 - j. It is the 1st respondent's case that the impugned structure is an internal executive matter. The members of the 1st respondent made the impugned structure as a matter of executive policy per the mandate in section 11 of the Act. It was a sound product made in a fair procedure. The Authority is entitled and has discretion to decide and apply appropriate administrative structure subject to approval by the Cabinet Secretary, Public Service Commission and, State Corporations Advisory Committee.
 - k. The applicant has not shown how the impugned structure affects her.
 - l. The 1st respondent approved the human resource instruments on 15.09.2023 and on 18.09.2023 the same were submitted to the Cabinet Secretary for Approval. The State Corporations Advisory Committee approved the instruments by the letter dated 03.04.2024 addressed to the Cabinet Secretary.
 - m. The application should therefore be dismissed.
6. The 4th respondent filed the replying affidavit of Remmy Mulati, the Acting Secretary and Chief Executive Officer of the Commission sworn on 11,07.2024 and filed through Jacqueline Manani Advocate. It was urged as follows:
- a. Under section 2 of the *Public Service Commission Act*, 2017 "public body" is defined and the meaning includes state corporations such as the Agriculture and Food Authority.



- b. Article 234(2) (a) (i) of *the Constitution* vests in the 4th respondent the power and function to establish and abolish offices in the public service and section 26,27 and 28 of the *Public Service Commission Act* give effect to that constitutional mandate. Under sections 26,27, and 28 of the Act, an office cannot be established or abolished without approval of the 4th respondent. Similarly, under section 58(1) and 26 of the *Public Service Commission Act* the development and review of the organizational structure of a public body like the Agriculture and Food Authority must be approved by the 4th respondent prior to implementation. The impugned instruments had not been approved by the 4th respondent and indeed, no approval had been sought and obtained. Implementation of the impugned instruments without the 4th respondent's approval would be unlawful as unconstitutional.
 - c. Previously and prior to promulgation of *the Constitution* of Kenya 2010, the the Cabinet Secretary (then, the Minister) had power to approve organizational structures of State Corporations upon advise of the *State Corporations Act* but the power no longer exists as such following the cited constitutional powers and functions of the 4th respondent as vested in that regard. Section 7 of the sixth Schedule to *the Constitution* of Kenya 2010 renders such position correct as no existing law can be construed in a manner not consistent with *the Constitution*. Thus in *Manyara Muchai Antony –Versus- Communications Authority of Kenya and 3 others* [2022] eKLR it was held that regulation of the human resource of state corporations fell squarely under the constitutional mandate of the 4th respondent, the Public Service Commission. Similar findings had been made in several other cases such as *Consumer Federation of Kenya (COFEK) –Versus- National Social Security Fund Board of Trustees and 2 others* [2022]eKLR; *Republic –Versus- Kenya Ports Authority Board of Directors and 2 others* and *Public Service Commission as Interested Party Exparte Commission for Human Rights Justice ELRC JR Application No. E001 of 2022at Mombasa*; and *Enos Namasaka and Others –Versus- KEMSA & Others ELRC Petition No.E149 of 2022*. The Court was urged to uphold the holdings.
7. The 3rd respondent filed the replying affidavit of Simon M. Indimuli sworn on 11.10.2024 and filed through Ernest Kioko, Principal State Counsel, for the Attorney General. It was urged as follows.
- a. The n3rd respondent was involved in the making of the impugned instruments as per the 1st respondent's replying affidavit.
 - b. The *State Corporations Act* empowers the 3rd respondent to render advisory as was done in the instant case.
 - c. The dispute about the constitutional mandate of the 4th respondent and the role of the 3rd respondent has been subject of an advisory by the Attorney General and is subject of litigation in some pending cases in the Court of Appeal and as set out in the replying affidavit.
 - d. The impugned instruments should be allowed to stand.
8. The Court has considered the material on record and the parties' respective final submissions. The Court returns as follows:
- a. The 1st respondent's replying affidavit and case is that the human resource instruments such as the ones impugned in the instant application are subject to approval by the Public Service Commission, the Cabinet Secretary and the State Corporations Advisory Committee. The impugned instruments did not receive the approval of the 4th respondent. It should be obvious that they could not be valid without such Commission's approval. The submissions and case as



urged for the 4th respondent and the applicant is upheld. While making that finding the Court observes the function of the Commission to establish and abolish offices in the public service, and to, appoint persons to hold or act in those offices and to confirm appointments, is subject to *the Constitution* and legislation. Section 11 (1) of the *Agriculture and Food Authority Act* states that the Authority may organise its secretariat into such directorates as the Authority may determine, with the approval of the Cabinet Secretary taking into account the functions of the Authority under this Act and any other Act of Parliament. The Court finds that the *Public Service Commission Act* 2017 is such Act of Parliament that imposes functions upon the Authority in undertaking human resource functions as was envisaged in *the Constitution* and the *Public Service Commission Act*, 2017. It therefore appears to have been misconceived to be urged for the 1st respondent that the Authority was autonomous and in making the human resource instruments it was exercising internal executive, administrative and policy function. The Court finds that in making and implementing human resource instruments, the Authority and the 1st respondent were bound by the 4th respondent's constitutional mandate as amplified in the *Public Service Commission Act* 2017, the regulations thereunder, and the instructions given by the 4th respondent from time to time. Without compliance with the provisions of the *Public Service Commission Act* 2017, it cannot be said that the Actions by the 1st, 2nd and 3rd respondents effectively made the impugned instruments valid and lawful. Thus while section 11 is capable of being implemented within the constitutional mandate of the 4th respondent, that has not been shown to have been the case in the instant proceedings.

- b. It was urged and submitted that the 4th respondent could not establish and abolish offices in the Authority in view of the cited section 11. However, the Court observes that in fact the said section 11 does not refer and vest in the Authority the power to create and abolish offices. The Court further observes that in any event the Authority could not validly and in exclusion of the 4th respondent undertake the roles in section 11 of the Act in view of the wide 4th respondent's mandate in Article 234 (2) such as ensuring the public service is efficient and effective; developing human resource in the public service; and, investigating, monitoring, and evaluating organisation, administration and personnel practices of the public service; and the role to promote and reporting the values and principles in Articles 10 and 232 of *the Constitution*. It appears to the Court that the 1st respondent, the Authority and indeed all the other respondents should devise harmonious working channels with the 4th respondent to prevent disputes such as in the instant case.
 - c. The Court returns that the reliefs prayed for will issue accordingly.
9. The applicant filed an application for contempt dated 29.08.2024 and cited Dr. Bruno Linyiru, the Director General of the Agriculture and Food Authority; Ms. Imelda Koskei; Wambua Musee; Dr Paul Ronoh and Ms. Emma Wairimu for disobeying the order of the Court given on 27.05.2024 that the leave that was granted to apply for instant judicial review proceedings to operate as stay of implementation of the impugned instruments. It was urged that the cited persons proceeded with preparation and organizational restructuring of the Agriculture and Food Authority devoid of any public participation. However, as submitted for the 1st respondent, the applicant has not alleged and shown the material respects in which the stay order has been disobeyed by the cited persons. As urged and submitted for the 1st respondent, the stay order related to the impugned instruments and disobedience had not been proved. As stated for the cited persons the stay order did not bar the making of new instruments in accordance with the law but the order stayed implementation of the impugned instruments. The application for contempt will fail as unfounded.



10. The Court has considered that it was a public interest application and in view of the margins of success in the main application and contempt application, each party will bear own costs of the entire proceedings.

In conclusion judgment is entered with orders as follows:

- a. The Judicial review order in the nature of Certiorari hereby issued to remove into the Honourable Court and quashing forthwith, the Organisational Structure, Grading and Staff Establishment Policy for the Agriculture and Food Authority, April 2024 issued by the 1st Respondent upon the recommendation of the 3rd Respondent.
- b. The judicial review order in the nature of Prohibition hereby issued restricting or preventing the 1st Respondent from implementing the Organisational Structure, Grading and Staff Establishment Policy for the Agriculture and Food Authority, April 2024 issued by the 1st Respondent upon the recommendation of the 3rd Respondent.
- c. The contempt application herein is dismissed.
- d. Each party to bear own costs of the entire proceedings.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 21ST FEBRUARY, 2025.

BYRAM ONGAYA

PRINCIPAL JUDGE

