



**Sheria Mtaani na Shadrack Wambui & another v Muguna & another;  
Karanja & 10 others (Interested Parties) (Petition E212 of 2024)  
[2025] KEELRC 1540 (KLR) (22 May 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1540 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E212 OF 2024**

**HS WASILWA, J  
MAY 22, 2025**

**BETWEEN**

**SHERIA MTAANI NA SHADRACK WAMBUI ..... 1<sup>ST</sup> PETITIONER**

**GEORGE OTIENO OLWALO ..... 2<sup>ND</sup> PETITIONER**

**AND**

**ENG NAHASHON MUGUNA ..... 1<sup>ST</sup> RESPONDENT**

**NAIROBI CITY WATER & SEWERAGE COMPANY LTD ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**ARNOLD KARANJA ..... INTERESTED PARTY**

**OSCAR OMOKE ..... INTERESTED PARTY**

**ASHA ABDI ..... INTERESTED PARTY**

**ROBOW MOHAMED ..... INTERESTED PARTY**

**JOHNSTONE MUKABWA ..... INTERESTED PARTY**

**EMMAH MUKUHI ..... INTERESTED PARTY**

**CEDRIC ALARO ..... INTERESTED PARTY**

**ROSE WAMUIYA ..... INTERESTED PARTY**

**THE SALARIES AND REMUNERATION COMMISSION .... INTERESTED PARTY**

**THE PUBLIC SERVICE COMMISSION ..... INTERESTED PARTY**

**ATTORNEY GENERAL ..... INTERESTED PARTY**



## JUDGMENT

1. By a Petition dated 2<sup>nd</sup> September 2024, the Petitioner sought for the following reliefs; -
  - a. A declaration that the Section 4.3.2 of the Nairobi City Water & Sewerage Company of the Human Resource Policy & Procedure Manuals setting five-year term limit for the position of Managing Director is illegal, unlawful, unprocedural and a contravention of Regulation 11 of the Water Service Regulations as read together with Mwongozo Code of Governance for State Corporations.
  - b. A declaration that the extension of the 1<sup>st</sup> Respondent's term from 27<sup>th</sup> May, 2025 to 26<sup>th</sup> May, 2028 without proper appraisal and/or competitive recruitment process is un-procedural, unconstitutional, and null and void for violating Articles 10, 27, 73, and 232 of [the Constitution](#) as read with Mwongozo Code of Governance for State Corporations.
  - c. A declaration that extension of the 1<sup>st</sup> Respondent's term beyond the mandatory retirement age of 60 years is unlawful and contrary to the Section 80(1) of the [Public Service Commission Act](#) and regulation 70(1) of the Public Service Regulations.
  - d. A Judicial Review Order of Certioraridoes issue to bring to court for purpose of quashing the renewal of Employment Contract Letter dated 6<sup>th</sup> November 2024 issued to the 1<sup>st</sup> Respondent for violation of Articles 10, 27 & 73 of [the Constitution](#) as read with Sections 37, 41, 45(3) and 80 of the [Public Service Commission Act, 2017](#), Section 10 of [Public Service \(Values and Principles\) Act, 2017](#) and Mwongozo Code of Governance for State Corporations.
  - e. A Judicial Review Order of Mandamusdoes issue to bring to court for purpose of compelling the 2<sup>nd</sup> Respondent to advertise and appoint to the position of the Managing Director through competitive recruitment process.
  - f. Costs of this Petition be awarded to the Petitioners.
  - g. Any other relief the Court deems fit and just to grant.

### Petitioners' Case

2. The Petitioners aver that pursuant to Section 4.3.2 of the 2<sup>nd</sup> Respondent's Human Resource and Policy and Procedure Manual, the 1<sup>st</sup> Respondent was appointed as the 2<sup>nd</sup> Respondent's Managing Director for a five-year term. He served in this capacity for the past 5 years with his terms expected to lapse on 27<sup>th</sup> May 2025. Prior to the formal appointment, the 1<sup>st</sup> Respondent had already served as the Managing Director in an acting capacity for 2 years and 6 months.
3. The Petitioners aver that the 1<sup>st</sup> Respondent applied to the Interested Parties for an extension of his term. The Interested Parties in hastily pre-determined decision, convened a meeting on 6<sup>th</sup> November 2024 to conduct a performance appraisal of the 1<sup>st</sup> Respondent, following which, the Interested Parties resolved to extend his tenure as Managing Director for the period commencing 27<sup>th</sup> May 2025 to 26<sup>th</sup> May 2028.
4. It is the Petitioners' case that the 1<sup>st</sup> Respondent's contract was extended in the backdrop of him attaining the mandatory age which shall fall due on December 2025. This is in contravention of Circular No. PSC/ADM/13(41) that sets a higher threshold for extension of service upon attainment of the mandatory retirement age.



5. The Petitioners aver that 1<sup>st</sup> Respondent's appointment was confirmed without the mandatory probationary period prescribed under Section 41 of the [Public Service Commission Act](#) and Clause 4.3.2 of the HR Manual rendering the confirmation irregular and unlawful.
6. It is the Petitioners' case that the 1<sup>st</sup> Respondent's cumulative service including on acting capacity and subsequent confirmed term, exceeded the maximum permissible limits under Regulation 11 of the Water Services Regulations ([Legal Notice 45 of 2021](#)), Section 45(3) of the [Public Service Commission Act](#) and the Mwongozo Code of Governance for State Corporations. Further, Section 4.3.2 of the 2<sup>nd</sup> Respondent's Human Resources Policy & Procedures Manual setting the Managing Director's term at 5 years contravenes the mandatory 3-year term limits.
7. The Petitioners challenged the Interested Parties' decision to extend the 1<sup>st</sup> Respondent's contract without subjecting the position to a competitive recruitment process as required under Section 37 and 59(d) of the [Public Service Commission Act](#) and the HR Policy and Procedure Manual.
8. The Petitioners aver that the extension of the 1<sup>st</sup> Respondent's contract to May 2028 contravenes the mandatory retirement age of 60 years under Section 80(1) of the [Public Service Commission Act](#) and Regulation 70(1) of the Public Service Regulations and disregards the circular no. PSC/ADM/13/(41) issued by the Public Service Commission Chair directing that extension of service upon attainment of the mandatory retirement age be subjected to higher threshold.
9. The Petitioners aver that the Interested Parties' failure to subject the 1<sup>st</sup> Respondent to an extensive performance appraisal prior to extension of term or conduct a competitive process to fill the Managing Director position violates the principle of fairness, transparency enshrined in Articles 10,27,47,73 and 232 of [the Constitution](#) and denies qualified Kenyans equal opportunities to compete for the position.
10. It is the Petitioners' case that allowing the 1<sup>st</sup> Respondent to serve beyond legal limits undermines public trust and breaches principles of integrity, accountability and good governance under Article 73 of [the Constitution](#).
11. The Petitioner avers that the Interested Parties failure to prepare a succession plan for the organization in light of the 1<sup>st</sup> Respondent's pending term lapse and age retirement violates Section 1.18 and 1.19 which obligates a parastatal to establish proper management structures.
12. The Petitioner avers that unless this Court's intervenes, they are apprehensive the Respondents shall proceed to implement the renewal of employment letter dated 6<sup>th</sup> November 2024 issued to the 1<sup>st</sup> Respondent against constitutional violations against public service guiding principles.
13. It is the Petitioner's case that the alleged Internal Audit was done in secrecy and the failure to her was in violation Article 10, 19(2), 47 and 50 (1) of [the Constitution](#).

#### **2<sup>nd</sup> Respondent and 1<sup>st</sup> to 8<sup>th</sup> Interested Parties' Case**

14. In opposition to the Petition, the 2<sup>nd</sup> Respondent and 1<sup>st</sup> to 8<sup>th</sup> Interested Parties filed a Replying Affidavit dated 17<sup>th</sup> January 2025 sworn by Arnold Karanja, the Chairperson of the 2<sup>nd</sup> Respondent's Board of Directors.
15. The Respondents aver that the petition is untenable as it is anchored on illegally obtained evidence contrary to the binding precedent and does not meet the basic legal threshold set out in *Anarita Wairimu Njeru v Republic* [1976-80] KLR 1272 to the extent that they comprise entirely of mere restatements of constitutional and legal provisions.



16. The Respondents aver that the petition offends the doctrines of separation of powers and exhaustion to the extent that it is sub judice to the proceedings of the Nairobi City County Assembly's Sectoral Committee on Water and Sanitation ('the Sectoral Committee'). The proceedings are actuated by the collateral motive of retaliating against the Respondents and the 1<sup>st</sup> to 8<sup>th</sup> Interested Parties from acting against persons who had fraudulently secured employment using forged and fake academic certificates.
17. It is the Respondents' case that the 1<sup>st</sup> Respondent and the 1<sup>st</sup> to 8<sup>th</sup> Interested Parties have mis-joined to the suit as the petition relates to alleged acts of a limited liability company.
18. The Respondents aver that the renewal of the Managing Director's contract complied with all relevant laws and that the engagement of retired public servants on contract basis is a common practice in both national and county governments, a matter worth judicial notice of this Court.
19. The Respondents further aver that the Board considered Circular No. PSC/ADM/13/(41) before renewing the contract and that the circular permits the appointment of CEOs on a contract basis even where the appointee has reached the mandatory retirement age.
20. The Respondents aver that the Petitioner has not pleaded with a reasonable degree of precision or adduced admissible evidence of the manner in which the Board breached Regulation 11 of the Water Services Regulations (*Legal Notice 45 of 2021*), Section 41, 45(3), 59 (d), 80(1) of the *Public Service Commission Act*, Regulation 70 of the Public Service Regulations, Sections 1.18 and 1.19 of the Mwingozo Code of Governance for State Corporations and Section 4.3.2 of the 2<sup>nd</sup> Respondent's Human Resources Policy & Procedures Manual.
21. The Respondents aver that the placement of the 1<sup>st</sup> Respondent on probation was unnecessary because he had been tried, tested, appraised and found qualified for the position. The Petitioners' issue is sinister as they did not question the 1<sup>st</sup> Respondent's qualifications, experience or achievements during his tenure as the Managing Director.
22. It is the Respondents case that the Petitioners' inclusion of holding office in acting capacity in computing the maximum permissible term limit is anchored on the assumption that there is no legal distinction between holding an office in an acting capacity and in a substantive capacity which the laws, policies and regulations alleged to be infringed do not support it.
23. The Respondents aver that the renewal or extension of an existing contract would be nonsensical if the same was subject to a competitive recruitment process that usually precedes the initial conclusion of the contract. The law, policies and regulations that the Petitioners allege were infringed do not support the assumption that a competitive recruitment process must be conducted before renewing or extending the term of an existing contract.
24. The Respondents aver that the minutes of the Board's meeting that approved the renewal of the contract confirms that the renewal was subject to performance appraisal and the 1<sup>st</sup> Respondent's performance had exceeded expectations. The Respondents have provided documents evidencing the 1<sup>st</sup> Respondent's performance appraisal was conducted and the results.
25. It is the Respondents' case that the 1<sup>st</sup> Respondent has consistently performed well throughout his tenure as the Managing Director hence the decision to renew the contract. Further, the minutes of the meeting of 6<sup>th</sup> November 2024 confirmed that the decision to renew was informed by the stability of the company, knowledge transfer and new ongoing projects.



26. Additionally, the Board considered the 1<sup>st</sup> Respondent's approaching retirement against his performance, competencies and achievements and concluded that 'the MD possessed rare knowledge, skills and competencies and that his age would not impair his performance.'
27. It is the Respondents' case that the organisation has always been well staffed at all levels and thus cannot be said to lack a succession plan; the 2<sup>nd</sup> Respondent has a succession policy which has been produced in court.
28. The Respondents aver that the Board considered the discrepancy between section 4.3.2 of the Human Resources Manual and other relevant legal and regulatory instruments before renewing the contract. The Board considered the issue of potential illegality and renewed the contract for 3 years instead of 5 years.
29. The Board is committed to revising its Human Resources Manual with Regulation 11 of the Water Services Regulations and the Mwongozo Code of Governance for State Corporations.

### **9<sup>th</sup> Interested Party's Case**

30. In opposition to the Petition, the 9<sup>th</sup> Interested Party filed grounds of opposition dated 6<sup>th</sup> March 2024 on grounds that: -
  1. The Petition as filed reveals no cause of action, reasonable or otherwise against the 9<sup>th</sup> Interested Party.
  2. The issues raised in the Petition fall outside the mandate of the 9<sup>th</sup> Interested Party as provided under Article 230(4) (a) and (b) of *the Constitution*.
  3. Petition as filed against the 9<sup>th</sup> Interested Party is scandalous, frivolous, vexatious and an abuse of the Court's process.
  4. The 9<sup>th</sup> Interested Party prays that it be expunged from the proceeding and/or in the alternative that no adverse orders/relief be issued against it.

### **10<sup>th</sup> Interested Party's Case**

31. In opposition to the Petition, the 10<sup>th</sup> Interested Party filed grounds of opposition dated 7<sup>th</sup> February 2025 on the following grounds:
  1. The 10<sup>th</sup> Interested Party is improperly enjoined in the proceedings.
  2. The petitioners have not disclosed any cause of action and/or sought any adverse orders against the 10<sup>th</sup> interested party.
  3. The 10<sup>th</sup> interested party's mandate under Article 234 of *the Constitution* and relevant national legislation does not extend into corporations under County Governments.
  4. The 10<sup>th</sup> interested party prays that it be expunged from the proceedings and/or in the alternative that no adverse orders/reliefs are issued against it.

### **11<sup>th</sup> Interested Party's Case**

32. In opposition to the Petition, the 11<sup>th</sup> Interested Party filed grounds of opposition dated 14<sup>th</sup> April 2025 on the following grounds:
  1. The Hon. Attorney General has been mis-joined in the proceedings.



2. That the 2<sup>nd</sup> Respondent and Nairobi City County is a legal entity which can sue and be sued on its own behalf.
3. That Article 6(1) and (2) of *the Constitution* 2010 establishes counties as distinct and independent entities and can only cooperate with the national government.
4. That Article 152(2) of *the Constitution* establishes the Cabinet and makes Hon. Attorney General a member therein at the National level where the Hon. Attorney General thus represents the National government other than in criminal cases.
5. The Hon. Attorney General can only be a party to a proceeding where the National Government is a party otherwise in this case he can only be present as friend of court.
6. The court cannot issue the Hon. Attorney General with orders with no legal force otherwise the 2<sup>nd</sup> Respondent and Nairobi City County would be subordinate to the National Government which would offend it.
7. The application and petition do not disclose any cause of action against the Hon. Attorney General.
8. The Hon. Attorney General prays that it be expunged from the proceedings or in the alternative that no adverse orders/reliefs are issued against it.

#### **Petitioners' Submissions**

33. The Petitioners submitted on four issues:
  - (a) Whether the impugned re-engagement of the 1<sup>st</sup> respondent is illegal and ought to be vitiated as pleaded;
  - (b) Whether the evidence adduced is illegal as suggested;
  - (c) Whether the issues raised regarding separation of powers, exhaustion, and sub judice are valid;
  - (d) Whether the Nairobi City Water & Sewerage Company of the Human Resource Policy & Procedure Manuals are contra legem.
34. On the first issue, the Petitioners submitted that what began in contravention of the law cannot be allowed to conclude in equal disregard of it. It is the Petitioners' case that the 1<sup>st</sup> Respondent held an acting position for two and a half years in breach of Section 34(3) of the Public Service Act, which caps such appointments at six months. An illegality was perpetuated for two full years, and now, in defiance of the mandatory retirement age, the Respondents seek to extend this unlawful tenure for yet another two years.
35. The Petitioners submitted that it is undisputed that 1<sup>st</sup> Respondent will reach the mandatory retirement age of 60 years in 2025. Section 80 of the Public Service Act, read together with Regulation 70 of the Public Service Regulations provides that public officer shall retire from the service with effect from the date of attaining the mandatory retirement age of 60 years unless he/she possesses rare knowledge, skills and competencies for the time being required in the service.
36. It is the Petitioners' submission that the Respondents bore the burden of proving what specialized expertise or exceptional competencies justify the 1<sup>st</sup> Respondent's reengagement despite express statutory limitations. Their response, however, consists of unsubstantiated claims of strong institutional performance, backed only by the 1<sup>st</sup> Respondent's CV which lacks no evidentiary value



in this context. The Petitioners submit that without any certifications or substantive proof provided, these claims remain mere allegations.

37. The Petitioners relied in *Peter Macithi Muigai v Cabinet Secretary for Industrialisation and Enterprise Development & 4 others* [2016] KEELRC 1751 (KLR) where the petitioner therein challenged the reappointment of a CEO way over the retirement age and the Court allowed the petition and said: “Having said so, I must rule that by the time of the re-appointment in issue, the 4<sup>th</sup> Respondent who had passed the retirement age of 60 years was not an eligible candidate for re-appointment as CEO, which is a distinct administrative position. I need to add that nothing bars the 4<sup>th</sup> Respondent from candidating for a research role as provided under Government circular dated 14<sup>th</sup> May 2015, which he himself produced.”
38. On the second issue, the Petitioners submitted it is trite that evidence should not be admitted if it would render the trial unfair or would otherwise be detrimental to the administration of justice as entrenched under Article 50(4) of *the Constitution*. The Petitioners affirm that no illegally obtained evidence is in play as alleged by the Respondents. However, if their claim held—which it does not—the exclusion of evidence is not automatic. The test under Article 50, as upheld in *Chitembwe v Tribunal Appointed to Investigate Into the Conduct of the Hon. Justice Said Juma Chitembwe, Judge of the High Court* [2023] KESC 114 (KLR), is twofold: First, has its admission rendered the trial unfair? The Respondents have not pleaded this. Second, has it caused detriment to the administration of justice? Again, there is no such assertion in their pleadings.
39. It is the Petitioners’ submission that annexures GOO-2 and GOO-4, which constitute the letter of offer of employment and the renewal of contract respectively. These documents simply affirm that the 1<sup>st</sup> Respondent was employed his contract renewed which has been admitted by the Respondents in their responses. Consequently, even if these annexures were rendered inadmissible, the suit would remain unaffected, as the 1<sup>st</sup> Respondent’s employment and renewal are uncontested facts. The Petitioners proceeded to aver that for avoidance of doubt, they deny any claim that these documents were illegally obtained, as there exists no proof to support such an allegation.
40. On the third issue, the Petitioners submitted that for the doctrine of exhaustion to apply, the Respondents must show that an alternative forum capable of granting the constitutional reliefs sought exists; they have not. They relied in Court of Appeal decision in *Speaker of the National Assembly v Njenga Karume* [1992] KLR 21 where the Court stated: “Where there is a clear procedure for redress of any particular grievances prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed.”
41. It is the Petitioners’ submission that the doctrine of exhaustion and separation of powers has been misapplied as the Respondents have not pointed to any legitimate alternative forum; the Nairobi City County Assembly Sectoral Committee on Water and Sanitation could be expected to adjudicate on these constitutional questions. Article 162(2)(d) expressly mandates this Court to interrogate whether any act purportedly done under the law violates *the Constitution*. Separation of powers does not insulate anyone, even the county assembly from judicial oversight where constitutional infractions are alleged.
42. On the issue of sub judice, it is the Petitioners’ submission that this argument does not hold any water. The Respondents has neither cited any multiple suits on this matter nor is there any real risk of conflicting decisions on the same subject matter. And whatever determination by the county assembly cannot be considered sub judice to the jurisdiction of this Court.



43. On the final issue, the Petitioners submitted that Section 4.3.2 of the Nairobi City Water & Sewerage Company of the Human Resource Policy & Procedure Manuals that sets a five-year term limit for the position of Managing Director is illegal, unlawful, un-procedural and a contravention of Regulation 11 of the Water Service Regulations as read together with Mwongozo Code of Governance for State Corporations.
44. The Petitioner highlighted the Section 4.3.2 of the Nairobi City Water & Sewerage Company of the Human Resource Policy & Procedure Manuals provides; “Managing Director, Functional directors, Managers, Coordinators and officers shall be employed on contract basis with each contract term running for a period of five years. The contracts may be renewed based on performance and for a period not exceeding two terms for the managing director and functional directors, three terms for managers and for a period not exceeding four terms for coordinators and officers.....”
45. Regulation 11 (3) of the Water Service Regulations reads: “Without prejudice to subregulation (1), a chief executive officer of a water services provider shall serve for a term of three years which may be renewed twice subject to satisfactory performance.”
46. The Mwongozo: The code of governance for state corporations states at part 1.1 that the CEO is an automatic member of the board with no voting rights. Part 1.5 speaks on the term members of the board members (the CEO included therein) and provides; “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 1.12 below.”
47. It is the Petitioners’ submission that Section 4.3.2 of the Manual provides for a five-year term, renewable once (ten years in total), this is significantly more generous than the Water Service Regulations, which cap tenure at three years, renewable twice (nine years), and even more so than the Mwongozo Code, which limits service to six years as the CEO is treated as an ex officio board member subject to board tenure rules. This reveals an unlawful attempt to extend tenure beyond what is legally permissible; the manual, being an internal policy, cannot override express statutory and regulatory provisions.

#### **Respondents and 1<sup>st</sup> to 8<sup>th</sup> Interested Parties’ Submissions**

48. The Respondent the Petitioners failed to provide clear, precise and cogent evidence to demonstrate how constitutional rights were violated, therefore, the petition failed to meet the threshold set in *Anarita Karimi Njeru v Republic* [1976-80] KLR 1272.
49. The Respondents submitted that Sectoral Committee on Water and Sanitation (“Sectoral Committee”) is mandated under the Third Schedule and Standing Order 209 (6) (a) to investigate, inquire into, report on and oversee all matters relating to water and sanitation services, water distribution, departmental administration, regulation, marketing, and sewerage services; therefore, it is seized of the issue of the 1<sup>st</sup> Respondent’s reappointment. Therefore, this Court’s jurisdiction has been prematurely invoked
50. It is the Respondents’ submission that the supervisory jurisdiction of this Court under Article 165 (6) of *the Constitution* cannot be invoked to challenge policy preferences or matters within the administrative judgment and discretion of other arms of government. The Petitioners are inviting this Court to encroach on the Sectoral Committee’s functions in breach of the doctrine of separation of powers; doctrine of exhaustion; doctrine of judicial restraint; doctrine of ripeness; and Section 9 of the *Fair Administrative Action Act*.



51. The Respondents submitted that the Petitioner's Affidavit in support of the Petition constitutes confidential human resource documents that would not ordinarily be available to them. The Petitioners have not explained how and when they got these documents, hence the claim that they were obtained illegally in violation of Articles 31 and 35 of *the Constitution*, section 8 of the *Access to Information Act* and Regulation 13 of the Access to Information (General) Regulations.
52. The Respondents submitted that contrary to the Supreme Court's decision in *Mue & another v Chairperson of Independent Electoral and Boundaries Commission & 3 others* [2017] KESC 45 (KLR) and *Kenya Railways Corporation & 2 others v Okoiti & 3 others* [2023] KESC 38 (KLR), the Petitioners have neither demonstrated that: they requested the information or documents as per Article 35 of *the Constitution* and section 8 of the *Access to Information Act*; nor obtained and adduced certified documents in the manner set out under Sections 80 and 81 of the *Evidence Act*.
53. It is therefore the Respondents submissions that the Petition is inadmissible and should be struck out as it is anchored on illegally and irregularly obtained evidence.
54. The Respondents submitted employment of retired public servants on a contract basis is a common practice in national and county governments, a matter worth judicial notice of this Honourable Court. This position is underscored in Sections 45 (3) and 80 (2) of the PSC Act; Regulation 70 (6) of the PS Regulations; Regulation 11 (3) of the Water Service Regulations; and in *David Kipchumba Kimosop v Kerio Valley Development Authority* [2022] KEELRC 14708 (KLR) and *Okiya Omtatah v Joseph Kinyua & another* [2018] KEELRC 1657 (KLR).
55. It is the Respondents' submission that the petition is actuated by the motive to retaliate against the Respondents and the 1<sup>st</sup> to 8<sup>th</sup> Interested Parties for acting against persons who had fraudulently secured employment using forged and fake academic certificates. Further, it is key to note that the Petitioners have not questioned the 1<sup>st</sup> Respondent's qualifications, experience or achievements during his tenure as Managing Director, underscoring their claim's baseless and retaliatory nature.
56. The Respondents submitted that impugned Contract adhered to Section 80 (2) of the PSC Act, and a performance appraisal was done in compliance with the 2<sup>nd</sup> Respondent's Succession Planning Policy, therefore, the Petitioners' claims on the absence of the 1<sup>st</sup> Respondent's performance appraisal are frivolous and vexatious to the extent that even their illegally obtained evidence confirms that a performance appraisal was conducted.
57. The Respondents submitted that the 2<sup>nd</sup> Respondent's Board renewed the 1<sup>st</sup> Respondent's impugned contract after evaluating his exceptional performance as the Managing Director and prioritising NCWSC's stability, seamless transfer of institutional knowledge and successful execution of ongoing and new projects. The Respondents further considered the 1<sup>st</sup> Respondent's impending retirement against his performance and achievement; and the Board exercised its policy and discretion and concluded the 1<sup>st</sup> Respondent's rare expertise and skills remained invaluable to the 2<sup>nd</sup> Respondent and that his age would not impede his ability to discharge his duties.
58. It is the Respondents' submission that the 1<sup>st</sup> Respondent's initial Contract of Employment was entered into on 27<sup>th</sup> May 2020 before Regulation 11 of Water Service Regulations took effect on 7<sup>th</sup> April 2021. Therefore, it would be misconceived for the Petitioner to argue that the five-year term in the initial contract is ultra vires Regulation 11 of Water Service Regulations since the said regulations cannot be invoked retrospectively.



59. It is the Respondents' submission that contrary to the Petitioners' allegations of breach of various laws, policies and regulations, the Board thoroughly considered the applicable legal and regulatory framework before renewing the impugned contract.
60. The Respondents submitted that Section 37 of the PSC Act which mandates advertising vacancies does not apply to contract renewal. And Section 41 of the PSC Act, which governs probationary terms before an initial appointment, is irrelevant to renewing a subsisting contract, as the 1<sup>st</sup> Respondent had been tried, tested, appraised and found qualified for the position of Managing Director.
61. It is the Respondents' submission that the Petitioners neither specified with a reasonable degree of precision nor adduced admissible evidence demonstrating how the 2<sup>nd</sup> Respondent's "personnel practices" or the renewal of the contract offended section 59 (d) of the PSC Act which requires public bodies to include advertisement of vacancies, recruitment and selection procedures and criteria as part of their personnel practices.
62. The Respondents submitted that the 2<sup>nd</sup> Respondent has a succession policy in compliance with sections 1.14 and 1.19 of the Mwongozo Code of Governance for State Corporations.
63. It is the Respondents' submissions that since 1986, Section 6 (2) of the *State Corporations Act* has provided for an appointment, renewal or re-engagement period of five years, a provision that shaped Section 4.3.2 of the 2<sup>nd</sup> Respondent's Human Resources Manual. The 2<sup>nd</sup> Respondent operated within the framework of the *State Corporations Act* for 8 years before the Water Service Regulations took effect on 7<sup>th</sup> April 2021.
64. The Respondents submitted that the 2<sup>nd</sup> Respondent has noted and committed to revising Section 4.3.2 of its of the Human Resources Manual in line with Regulation 11 of the Water Services Regulations and the Mwongozo Code. In view of this, the Board considered the issue of potential illegality and renewed the contract for 3 years instead of 5 years.
65. I have examined all the evidence and submissions of the parties herein, the issues for this court's determination are follows:
  1. Whether the issues in this petition are sub judice to the proceedings of the Nairobi City County Assembly's Sectoral Committee on Water and Sanitation
  2. Whether renewal of an existing contract should be subjected to competitive recruitment process
  3. Whether the 2<sup>nd</sup> Respondent can appoint anyone to the position of Managing Director in contravention of the mandatory retirement age
  4. Whether the renewal of the 2<sup>nd</sup> Respondent as the 1<sup>st</sup> Respondent's Managing Director was done procedurally
  5. What orders to grant to the circumstances

**Whether the issues in this petition are sub judice to the proceedings of the Nairobi City County Assembly's Sectoral Committee on Water and Sanitation.**

66. The Respondents have submitted that the issues before this court are matters pending before the Sectoral Committee are in in breach of the doctrine of separation of powers; doctrine of exhaustion; doctrine of judicial restraint; doctrine of ripeness; and Section 9 of the *Fair Administrative Action Act*. They therefore argue that the matter is sub judice to the proceedings of the Nairobi City County



Assembly's Sectoral Committee on Water and Sanitation. The 2<sup>nd</sup> Respondent did not produce any evidence before this Court of the alleged proceedings. That as it may be, the proceedings of a Committee cannot limit the proceedings of this Court.

### **Whether renewal of an existing contract should be subjected to competitive recruitment process**

67. On whether a contract renewal should be subjected to a competitive recruitment process, I wish to refer to the cited authority *Peter Macithi Muigai v Cabinet Secretary for Industrialisation and Enterprise Development & 4 others* [2016] KEELRC 1751 (KLR), where the Court held as follows:

“ 50. The Petitioner states that the 4th Respondent's re-appointment ignored the above cited values especially because the process was not competitive. The answer by the 1st, 3rd, 4th and 5th Respondents is that since the 4th Respondent's initial appointment was by a competitive process, the renewal did not require such a process.

51. In this regard, the Court was referred to *Republic v Cabinet Secretary for Education, Science & Technology & 3 Others* [2014] EKLR where Korir J stated the following:

“I do not think that the drafters of *the Constitution* expected that any person eligible for re-appointment to a public office ought to be taken through a competitive process. One cannot compare the appointment to a public office to an electoral process in which the incumbent seeking another term should submit himself/herself to an election. The competitive process, in my view, only kicks in when a person is being recruited for the first time. When it comes to re-appointment for a further term the body responsible for re-appointment assesses the person and makes a decision whether to re-appoint the incumbent or open the position for competition.”

52. I agree with the holding by Korir J. However, this ratio is only applicable where the candidate is eligible for re-appointment by virtue of law and past satisfactory performance. It cannot be used to cure an otherwise flawed re-appointment. I have already stated that the 4th Respondent was not a competent candidate for re-appointment, based on law and regulation”

68. I do agree with this proposition that the 1<sup>st</sup> Respondent falling within the candidates for reappointment and having only served one term, was not subject to a fresh competitive process.

Whether the 2<sup>nd</sup> Respondent can appoint anyone to the position of Managing Director in contravention of the mandatory retirement age

69. On issue of enforcement of the mandatory retirement age, Section 80 of the *Public Service Commission Act* provides the basis of Retirement on the basis of age and provides;

“ 80. Retirement on the basis of age

(1) Where a public officer has attained the mandatory retirement age as may be prescribed in regulations—

(a) the public officer shall retire from the service with effect from the date of attaining the mandatory retirement age; and



- (b) the Commission or other appointing authority shall not extend the service of such retired public officer beyond the mandatory retirement age.
- (2) Despite subsection (1)(b), the Commission or other appointing authority may engage the public officer for service after the retirement upon such terms of contract as may be agreed if —
  - (a) the public officer possesses rare knowledge, skills and competencies for the time being required in the service;
  - (b) the retired officer is willing to be engaged on contract; and
  - (c) the retired public officer's performance shall not in any way be impaired by age. “

70. This was reiterated under Regulation 70 of the Public Service Regulations as follows:

- “(1) Subject to *the Constitution*, section 80 of the Act, any other relevant written law or a specific government policy, the mandatory retirement age in the public service shall be—
  - (a) sixty years;
  - .....
- (6) Subject to section 80 (2) of the Act, in determining whether to engage an officer after attainment of retirement age, the Commission shall determine and document the rare knowledge, skills or competencies that the officer possesses.
- (7) In this regulation—
  - (a) “rare knowledge, skills and competencies” means knowledge, skills and competencies that are scarce, unique and not readily available in the job market.; and
  - (b) “disability” means a permanent physical or other impairment or condition that has, or is perceived by significant sectors of the community to have, a substantial or long-term effect on an individual's ability to carry out ordinary day to day activities.”

71. Other than the above provisions of law, the Presidential Directive dated 8<sup>th</sup> July 2024 from the Executive Office of the President reiterated the mandatory retirement age for public officers serving on permanent and pensionable terms as follows:

“Henceforth, public servants who attain the retirement age of 60 years shall be required to immediately proceed on retirement, with no extension to their tenure of service.” [Emphasis]

In that regard, as set out in previous circulars Ref. No. PSC/ADM/13/(7) of 19<sup>th</sup> November, 2020 and Ref. No. PSC/ADM/13/(41) of 4<sup>th</sup> April 2023; and the prevailing human resource guidelines of respective service commissions, it is reiterated that the government policy on the mandatory retirement age for career civil servants serving on permanent and pensionable terms is sixty (60) years. Consequently, all persons who attain



the mandatory retirement age shall henceforth be required to proceed on retirement without fail. No extensions of service should be accommodated in any regard.”

72. It has been submitted before this court that the 1<sup>st</sup> Respondent will reach his mandatory retirement age of sixty years in December 2025. Under Section 80 of the *Public Service Commission Act* as read with Regulation 70 of the Public Service Regulations, he cannot be appointed on contract to serve beyond the mandatory retirement age of sixty years unless he possesses rare knowledge, skills and competencies for the time being required in service.
73. Given that the 1<sup>st</sup> Respondent will reach his mandatory retirement age in December 2025, his reappointment beyond December 2025 cannot hold as it is in direct contravention of the law and there is no indication that he holds rare knowledge, skills and competencies which are scarce, unique and not readily available in the job market.

**Whether the renewal of the 2<sup>nd</sup> Respondent as the 1<sup>st</sup> Respondent’s Managing Director was done procedurally and orders to be granted**

74. Having analysed the pleadings and submissions herein, I find that the 2<sup>nd</sup> Respondent followed the right process in the renewal of the 2<sup>nd</sup> Respondent’s contract having received his request for renewal and having analysed his performance. However, the 2<sup>nd</sup> Respondent erred in renewing his contract beyond the mandatory retirement age.
75. In the circumstances of the case, I find that the renewal of contract beyond December 2025 is illegal, null and void.
76. The 2<sup>nd</sup> Respondent is free to issue the 1<sup>st</sup> Respondent a final contract that does not extend beyond his retirement age of December 2025.
77. The 2<sup>nd</sup> Respondent should also proceed and start the process of recruitment of a substantive Managing Director through a competitive process beyond the retirement of the 1<sup>st</sup> Respondent in December 2025, if the 2<sup>nd</sup> choose to extend his tenure to December 2025.
78. There shall be no order of costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 22<sup>ND</sup> OF MAY, 2025.**

**HELLEN WASILWA**

**JUDGE**

