



REPUBLIC OF KENYA



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**Maad CHRP v Council of the Institute of Human Resource Management
& 3 others; Kanisa (Interested Party) (Petition E154 of 2023)
[2024] KEELRC 268 (KLR) (16 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 268 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E154 OF 2023
B ONGAYA, J
FEBRUARY 16, 2024
IN THE MATTER OF CONTRAVENTION OF ARTICLES 2, 3,
10, 19, 20, 21, 22, 27, 28, 41, 47, 48, 55 AND 259 OF THE
CONSTITUTION OF KENYA, 2010
AND
IN THE MATTER OF THE FAIR ADMINISTRATIVE
ACTION NO. 4 OF 2015
AND
IN THE MATTER OF THE PUBLIC SERVICE ACT, 2011
AND
IN THE MATTER OF THE PUBLIC SERVICE (VALUES AND
PRINCIPLES) ACT, 2015
AND
PAGE 1 OF 29
IN THE MATTER OF EMPLOYMENT ACT, 2007
AND
HUMAN RESOURCE MANAGEMENT PROFESSIONALS
ACT, 2012
-BETWEEN-
BETWEEN
CS ABDIAZIZ SHEIKH MAAD CHRP PETITIONER



AND

COUNCIL OF THE INSTITUTE OF HUMAN RESOURCE
MANAGEMENT 1ST RESPONDENT
HUMAN RESOURCE MANAGEMENT PROFESSIONALS EXAMINATIONS
BOARD 2ND RESPONDENT
THE CABINET SECRETARY, MINISTRY OF PUBLIC
SERVICE 3RD RESPONDENT
ATTORNEY GENERAL 4TH RESPONDENT

AND

NICHOLAS KANISA INTERESTED PARTY

JUDGMENT

1. The petitioner filed the amended petition dated 06.09.2023 through the firm of Masaki & Gathu Advocates LLP. The petitioner prayed for:
 - a. A declaration that the 2nd respondent's appointment of the interested party as the 2nd respondent's Chief Executive Officer (CEO) is illegal, unconstitutional, null and void for the interested party's failure to disclose conflict of interest in the process running up to his appointment under Article 10, 73 and article 232 (1) (g) of the Constitution of Kenya, 2010.
 - b. A declaration that the 2nd respondent's appointment of the interested party as its Chief Executive Officer (CEO) was without the consideration of the fact he was a board member who had taken part of critical processes leading to creation of the vacancy of the CEO and his subsequent appointment before firstly resigning and declaring conflict of interest thus violating the principles of national values and principles of governance and those of public service as set under Article 10 and Article 232 of the Constitution.
 - c. A declaration that the Board Members of the 2nd respondent violated provisions of Articles 10, 73 and 232 of the Constitution as well as the petitioner's rights under Article 41 of fair labour practices when they appointed the interested party to the position of CEO notwithstanding the fact that he failed to disclose conflict of interest.
 - d. A Judicial Review Order of *Mandamus* to issue compelling the 2nd respondent to terminate the appointment of the interested party as its Chief Executive Officer for his failure to match up to the standards of integrity as set under Article 73, expectations under Article 10 and 232 of the Constitution of Kenya.
 - e. A Judicial Review Order of Prohibition against the 2nd respondent from appointing any member of its board into the position of its Chief Executive Officer especially those whom participated in the recruitment process and failed to declare conflict of interest.
 - f. A Judicial Review Order of *Certiorari* bringing to the Court for purposes of quashing and to quash the interested party's letter of appointment dated 4th July, 2023 and the appointment as the Chief Executive Officer, Human Resource Management Professionals Examination Board (HRMPEB).



- g. A Judicial Review Order of *Mandamus* compelling the 2nd respondent to conduct the recruitment of Chief Executive Officer, Human Resource Management Professionals Examination Board (HRMPEB) in a competitive manner that is adherent to the principles of governance, Values of Public Service, Mwongozo as well as ethics and integrity as stipulated under Chapter 6 of the [Constitution](#) of Kenya, 2010.
 - h. An order barring the 1st, 3rd and 4th respondents from extending the term of the board members of the 2nd respondent slated to expire in the month of August and or any future date due to their individual and collective violation of Articles 10, 73 and 232 of the [Constitution](#) of Kenya, 2010.
 - i. Award costs of the petition to the petitioner.
 - j. Any other relief that the Court may deem fit and just in the circumstances.
2. The amended petition was based on the supporting affidavit of Abdiaziz Sheikh Maad, the petitioner herein, sworn on 06.10.2023 and exhibits thereto filed together with the amended petition. The petitioner's case is as follows:
- a. The petitioner filed his amended petition alleging illegality and unconstitutionality in the manner in which the interested party was appointed to the position of Chief Executive Officer (CEO) of the 2nd respondent.
 - b. On or about 30.04.2023, the three - year renewable term of the 2nd respondent's CEO ended thereby necessitating the 2nd respondent to conduct an exercise of evaluation of renewal of the said contract. That as a result the 2nd respondent constituted its Human Resource, Strategy & Finance Committee to review the outgoing CEO's performance and recommended the non-renewal of the term of the CEO. The Petitioner avers that the interested party herein, who at the time was a sitting board member and secretary to the board, served in the said committee as chairperson to the committee.
 - c. That following the recommendation from the committee, the 2nd respondent proceeded to advertise for the position of Chief Executive Officer (CEO) inviting applications from qualified persons including the petitioner herein, who put in his application with the belief that the exercise or process was going to be transparent and above board.
 - d. The petitioner states that he received an email on 27.06.2023 from the 2nd respondent congratulating him on being shortlisted for the position of Chief Executive Officer (CEO) and subsequently inviting him to attend to an interview that was scheduled for 03.07.2023 at the Serena Hotel.
 - e. The petitioner avers that at the interview venue at Serena Hotel he learnt that the interested party had also been shortlisted for the position of CEO. The petitioner faulted the interested party for neither disclosing his interest in the CEO's position nor did he resign from his position as Board Member of the 2nd respondent before expressing interest and applying to fill the position. The petitioner maintained that the actions by the interest party were in blatant abuse of the principles of governance against conflict of interest.
 - f. That the petitioner was later informed vide the 2nd respondent's chairperson's email of 20.07.2023 that his application was unsuccessful. Upon exercising due diligence he (the petitioner) learnt that the interested party's application was successful and his information on the 2nd respondent's website edited to reflect the change from board member to CEO.



the meeting know they have applied. They were allowed to leave meeting. Mr. Mohamed Aden, the Board member was requested to be the secretary and take minutes.” The minutes further show that agenda 6 of the meeting was shortlisting for the post of the Chief Executive Officer. The minutes under that agenda show 46 candidates had applied and per the requirements in the job advert that had been published, the candidates that met all the job requirements included Godrick Arthur; James wafula Wanyama; Nicholas Kanisa; Margaret Nguu, Abdiaziz Maad. It was resolved that the five candidates be shortlisted and to proceed to the next level of selection being the interviews meeting to be held on 04.07.2023.

8. That following the interviews, the 2nd respondent made its decision and appointed the interested party as its CEO, being the most suitable candidate for the position with a deep understanding of the board’s core mandate and a clear vision for the future on the board, for a three - year contract commencing 10.07.2023. That upon his appointment the chairperson of the board communicated the appointment with the Principal Secretary, State Department for Public Service with a copy of the same addressed to the Secretary, State Corporations Advisory Committee and the National Chairperson of the Institute of Human Resource Management.
9. It was stated for the 2nd respondent that no conflict of interest had been demonstrated by the petitioner whether real or perceived. Further, that there is no provision in law barring a board member from applying to fill the position of CEO and that the interested party’s appointment was on merit.
10. The 2nd respondent stated that the amended petition is riddled with half-truths, is misleading, misinterpretation of the law and is only aimed at embarrassing the 2nd respondent and the interested party from performing their duties as mandated by the law.
11. The 2nd respondent urged the Honourable Court to find the amended petition without merit and to dismiss it with costs.
12. The 3rd and 4th respondents filed the replying affidavit of Amos Njoroge Gathecha, Principal Secretary, State Department for Public Service sworn on 04.10.202 and filed through the Hon. Attorney General. Learned Deputy Chief Litigation Counsel, Daniel O. Oure appeared in that regard. It was stated that the appointment of the interested party as the Chief Executive Officer was conducted in a manner as provided under the Constitution of Kenya, the Public Service (Values and Principles) Act, the 2nd respondent’s Human Resource Policy and Manual and all other prevailing laws and that no evidence has been adduced prove the contrary.
13. The 3rd and 4th respondent further stated that the petitioner has not pointed out or demonstrated how the provisions of the Constitution including Articles 10, 19, 20, 21, 22, 27,28,41, 47, 48, 55, 232 and 259 have been violated and in what manner the recruitment exercise was flawed. The 3rd and 4th respondent stated that the recruitment exercise was competitive and transparent. That the overall score sheet generated therefrom indicated the interested party was the most suitable applicant with the highest score on merit per Constitution and law. Further, that no law precluded a Board Member from competitively applying for recruited as a CEO of any parastatal if such conflict of interest was declared - and which the interested party did. Further, the 3rd and 4th respondent argue that the interested party’s appointment did follow all the provisions of section 10 (1) of the Public Service (Values and Principles) Act, 2015 and was based on competition and merit as well as the Human Resource Management Act, 2017. Thus, the petitioner had failed to demonstrate, with reasonable decree, the provisions of the Constitution or any other law violated.
14. The 3rd and 4th respondent urged the Court to find the amended petition without merit and an abuse to the Court process. It was urged that the amended petition was not filed in good faith but for personal



interests which the Court should not allow. They urged the Court to dismiss the amended petition in its entirety with costs.

15. The interested party also filed his replying affidavit in opposition to the amended petition sworn on 13.09.2023 and filed through Agutu & Company Advocate. He stated that the 2nd respondent followed due process during the recruitment exercise. That the 2nd respondent conducted a competitive, fair and transparent recruitment process in strict compliance with the provisions of Articles 10, 73 and 232 of the Constitution of Kenya. His case was that he indeed passed the suitability test for appointment to the 2nd respondent to serve in the capacity of its CEO. Mr. That on 24.06.2023 the 2nd respondent held a meeting in which he, (Mr. Ogamba) and Margaret Nguu, the then acting Chief Executive Officer declared their conflict of interest indicating to the board that he had applied for the position of CEO upon which they were allowed to leave the meeting before the board commenced its deliberations on the recruitment. He argued that his appointment was upon merit. The interested party urged the Court to find the amended petition without merit and to dismiss it.
16. Parties thereafter filed and exchanged their written submissions. The Court has considered all the material on record and returns as follows.
17. To answer the 1st issue, the Court finds that the interested party is guilty of conflict of interest in the process leading to his recruitment, selection and appointment as the Chief Executive Officer of the 2nd respondent. At all material times, he was a Board member for the second respondent. He participated in declaration of the vacancy in the office of the Chief Executive Officer. He participated in drawing or approving the indent for advertisement. It is not shown that he had nothing to do with processing of the long list of participants and it was at the board meeting for shortlisting held on 24.06.2023 that he purported to declare a conflict of interest. To confirm that he had participated until 24.06.2023, the replying affidavit for the 2nd respondent confirms that the exhibited 2nd respondent's Human Resource Policy and Procedures Manual, First Edition 2021, applied. Clause 2.17.2 of the Manual states that the CEO declares the vacancy to the Board. That was done at the time the interested party was a sitting Board Member. The Court finds that the role as Board member was invariably inconsistent with the interested party's interest in the vacancy of the Chief Executive Officer as he had unfair insider information and until the shortlisting stage, he had participated in the recruitment process. It is not that he declared interest immediately the vacancy was declared to the Board. In fact, the evidence is that he remained a Board member throughout the period of recruitment, selection, interview, and appointment on 04.07.2023 because he resigned from the Board membership effective 10.07.2023. The appointment letter dated 04.07.2023 states thus, "Following your application and subsequent interview with the Board of Directors, I am pleased to convey its decision to appoint you as Chief Executive Officer on the following terms and conditions:..." At paragraph 21 of the replying affidavit of CS Sharon Kisire it is confirmed thus, "21. That based on the 2nd Respondent's comprehensive assessment, it reached consensus on the most suitable candidate for the position of a CEO who demonstrated exceptional leadership abilities, a deep understanding of the board's core mandate and a clear vision for the future on the Board." The minutes of the Board meeting at which the Board resolved to appoint the interested party were not exhibited at all. In view of the quoted assertion, it should be obvious that the interested party was part of the Board that appointed him as Chief Executive Officer. To confirm that the interested party attended the interview manifestly as a board member and not effectively as a candidate, Amos Njoroge Gathecha at paragraph 16 of his replying affidavit sworn on 04.10.2023 puts unequivocal communication thus, "16. That, after the competitive and transparent interview conducted by all Board members, the overall score sheet was generated showing the interested party as the most suitable applicant with the highest marks obtained



during the interview.” Thus, it is “all Board members” including the interested party, by that assertion, who conducted the interviews.

18. In making the finding, the Court has considered section 12 of the *Public Officer Ethics Act*, 2003 on conflict of interest. The Section provides as follows:

- “ 12. A public officer shall use his best to efforts to avoid being in a position in which
 - (1) his personal interests conflict with his official duties.
 - (2) Without limiting the generality of subsection (1), a public officer shall not hold shares or have any other interest in a corporation, partnership of other body, directly or through another person, if holding those shares or having that interest would result in the public officer’s personal interests conflicting with his official duties.
 - (3) A public officer whose personal interests conflict with his official duties shall-
 - (a) declare the personal interests to his superior or other appropriate body and comply with any directions to avoid the conflict; and (b) refrain from participating in any deliberations with respect to the matter.
 - (4) Notwithstanding any directions to the contrary under subsection (3)(a), a public officer shall not award a contract, or influence the award of a contract, to- (a) himself; (b) a spouse or relative; (c) a business associate; or (d) a corporation, partnership or other body in which the officer has an interest.
 - (5) The regulations may govern when the personal interests of a public officer conflict with his official duties for the purposes of this section.
 - (6) In this section, “personal interest” includes the interest of a spouse, relative or business associate.”

19. By that provision, it appears to the Court that the interested party being a Board member ought to have avoided the conflict of interest by not participating as a candidate. He already had the insider information about the vacancy and the purported declaration of conflict of interest did not in any event mitigate the situation as to make him a proper candidate as to make his appointment free from the apparent conflict of official and private interest involved.

20. The respondents have not rebutted the petitioner’s case that on 30.04.2023 when the three-year renewable term of the 2nd respondent’s Chief Executive Officer came to an end, the Board constituted its Human Resource, Strategy & Finance Committee to review the outgoing CEO’s performance and, the interested party was the chairperson of the said committee. Again, on 31.04.2023 upon conclusion of the review, the interested party voted on the Board’s resolution that the outgoing CEO would not reapply or get renewal of the contract. The Court upholds the petitioner’s case that all along, the interested party had not declared his interest and his subsequent appointment was impaired by the conflict of interest rooted in his participation in declaration of the vacancy and all steps until he purported to declare interest at the shortlisting stage. The Court returns that the petitioner has established violation of Article 10 on values and principles of governance; Article 73 on selection on the basis of of personal integrity, competence, and suitability; and, Article 232(1) (g) on public service values and principles especially accountability for administrative acts; transparency and provision to the public of timely, accurate information; and, fair competition and merit as the basis of appointment and, promotions. Further, as a candidate in the impugned recruitment and appoint process, the



petitioner has established that he was not given a fair chance and his right to fair labour practices under Article 41 of the Constitution were violated.

21. To answer the 2nd issue, the petitioner has established that there was conflict of interest and further, the constitutional values and principles of recruitment, selection and appointment were not adhered to. The petitioner has established that the recruitment and selection as well as appointment of the interested party was opaque and the set tests and safeguards had not been met at all. The 2nd or 3rd respondent has not exhibited the relevant Board decisions or minutes for declaration of vacancy; advertisement; receipt of applications; longlist and its analysis; analysis on shortlisting; interview scorecards; interview results analysis; and, how the interested party was evaluated as the best and most suited candidate. It is therefore difficult to tell whatever considerations that may have been made by the Board, in arriving at the interested party as the best and most suited candidate. While alleging meritorious and competitive appointment in that regard, the 2nd and 3rd respondents have not shown by evidence that indeed merit, transparency and genuine competition took place.
22. Thus in Chama Cha Mawakili (CCM) v Chairperson Independent Electoral and Boundaries Commission & 2 others [2020]eKLR the Court held, “...The Court holds that an objective and predetermined score sheet taking into account the qualifications in section 10(2) of the IEBC Act was crucial and mandatory. Similarly, the Court holds that it was mandatory to have an objective and predetermined score sheet for the interview process or other method invoked to recruit and select the most suitable candidate on headings contemplated in Articles 232(1) (g), (h) and (i) and Article 73(2) (a) of the Constitution and section 10(2) of the IEBC Act so as to demonstrate fairness and transparency and other values and principles in Articles 10, 232, and 73 of the Constitution. The score sheet must be completed for the candidates who have the basic prescribed qualifications at the shortlisting stage and then for each candidate progressing to the subsequent steps such as oral or written interviews. The Court holds that the 2nd respondent enjoys the discretion on the weight of scoring under any such headings in the score sheet but must show it was predetermined and objectively applied to all applicants. It is that individual scores are held in confidence to be disclosed to the concerned individual as he or she may request – but the score sheets and the related documentation guiding the process must be available for ascertaining the compliance in the recruitment process. In absence of such documentation of scores upon predetermined and objective criteria, the Court returns that it is difficult to make a finding of a recruitment, selection and appointment process that is consistent with the relevant statutory and constitutional provisions. The Court therefore returns that taking the material on record into account, it cannot be said that the recruitment, selection, and appointment process as challenged is continuing in accordance with the law.” The holding applies to the instant case and the petitioner has established that the constitutional and statutory safeguards were violated or not complied with.
23. The Court has considered the submissions made for the 3rd and 4th respondent that due steps in the recruitment process were followed. Nevertheless, the Court has found that the steps were vacuous in substance. No evidence has been shown to establish application of the constitutional and statutory safeguards throughout the impugned recruitment and appointment process.
24. To answer the 3rd issue, the Court returns that the petitioner has established the violation of the relevant provisions in the Bill of Rights and the other constitutional provisions as was alleged.
25. The 4th issue is on remedies. The petitioner has established the remedies as prayed for except the prayer for an order barring the 1st, 3rd and 4th respondents from extending the term of the board members of the 2nd respondent expiring in August 2023. First, the prayer appears to have been overtaken by effluxion of expiration of their tenure and second, the constitutional violations were against the 2nd respondent’s



board and not individual members except the interested party who has had a chance to defend himself. The individual board members to be affected by the barring order, the related declaration as prayed for, have not been heard, and the order will not issue. The petitioner has succeeded and the 2nd respondent will pay the petitioner's costs while the other parties will bear own costs of the proceedings.

In conclusion, the petition as amended is hereby determined for the petitioner against the respondents for:

- a) The declaration that the 2nd respondent's appointment of the interested party as the 2nd respondent's Chief Executive Officer (CEO) is illegal, unconstitutional, null and void for the interested party's failure to disclose conflict of interest (or belated disclosure) in the process running up to his appointment under Article 10, 73 and Article 232 (1) (g) of the Constitution of Kenya, 2010.
- b) The declaration that the 2nd respondent's appointment of the interested party as its Chief Executive Officer (CEO) was without the consideration of the fact he was a board member who had taken part of critical processes leading to creation of the vacancy of the CEO and his subsequent appointment before firstly resigning and declaring conflict of interest thus violating the principles of national values and principles of governance and those of public service as set out under Article 10 and Article 232 of the Constitution.
- c) The Judicial Review Order of *Mandamus* hereby issued compelling the 2nd respondent to terminate the appointment of the interested party as its Chief Executive Officer for his appointment's failure to match up to the standards of public appointments as set out under Article 73, expectations, under Articles 10 and 232, of the Constitution of Kenya.
- d) The Judicial Review Order of Prohibition against the 2nd respondent from appointing any member of its board into the position of its Chief Executive Officer especially those whom participated in the recruitment process and failed to declare conflict of interest.
- e) The Judicial Review Order of *Certiorari* hereby issued bringing to the Court for purposes of quashing and to quash the interested party's letter of appointment dated 4th July, 2023 and the appointment as the Chief Executive Officer, Human Resource Management Professionals Examination Board (HRMPEB).
- f) The Judicial Review Order of *Mandamus* compelling the 2nd respondent to conduct the recruitment of Chief Executive Officer, Human Resource Management Professionals Examination Board (HRMPEB) in a competitive manner that is adherent to the principles of governance, Values of Public Service, Mwongozo as well as ethics and integrity as stipulated under Chapter 6 of the Constitution of Kenya, 2010.
- g) The 2nd respondent to pay the petitioner's costs of the petition and other parties to bear own costs of the proceedings.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 16TH FEBRUARY 2024.

BYRAM ONGAYA

PRINCIPAL JUDGE

