



REPUBLIC OF KENYA



**KENYA LAW**  
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**Sidigu v Kolum & 5 others (Petition E034 of 2023)  
[2024] KEELRC 157 (KLR) (7 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 157 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
PETITION E034 OF 2023**

**S RADIDO, J**

**FEBRUARY 7, 2024**

**IN THE MATTER OF CONTRAVENTION OF THE CONSTITUTION  
OF KENYA CONTRARY TO ARTICLES 10, 19, 20, 22, 23, 27,  
47, 50, 73 AND 159 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE EMPLOYMENT ACT**

**AND**

**IN THE MATTER OF CHEMELIL SUGAR COMPANY LTD**

**AND**

**IN THE MATTER OF PROCEDURAL RECRUITMENT  
OF CEO/MD CHEMELIL SUGAR COMPANY LTD**

**AND**

**IN THE MATTER OF ENFORCEMENT OF  
FUNDAMENTAL RIGHTS AND FREEDOMS, NATURAL  
JUSTICE, TRANSPARENCY AND FAIR LABOUR PRACTICES IN KENYA**

**AND**

**IN THE MATTER OF QUESTIONING THE APPLICATION OF CEO,  
CHEMELIL SUGAR COMPANY LTD BY CHAIRMAN  
OF THE BOARD ENGINEER JOHN NYAMBOK**

**AND**

**CONCURRENCE LETTER FROM THE CHIEF  
OF STAFF AND HEAD OF THE PUBLIC SERVICE**

**AND**



**THAT OF CABINET SECRETARY FOR AGRICULTURE, BMITHIKA  
LINTURI RESPECTIVELY FORBCONTRAVENING THE  
LABOUR LAWS AND CONSTITUTIONAL PROVISION**

**BETWEEN**

**MICHAEL SIDIGU ..... PETITIONER**

**AND**

**MOSES KIPROP KOLUM ..... 1<sup>ST</sup> RESPONDENT**

**HON ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**CHEMELIL SUGAR CO LTD ..... 3<sup>RD</sup> RESPONDENT**

**CHAIRMAN, BOARD OF DIRECTORS, CHEMELIL SUGAR CO  
LTD ..... 4<sup>TH</sup> RESPONDENT**

**HON MITHIKA KINTURI, CS AGRICULTURE ..... 5<sup>TH</sup> RESPONDENT**

**PUBLIC SERVICE COMMISSION ..... 6<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. The Board of Directors Chemelil Sugar Co Ltd advertised for the position of Managing Director on 12 September 2023, and the closing date for applications was 3 October 2023.
2. Part of the eligibility qualifications were:  
Previous work experience required and age
  - i. At least 15 years' experience in a supply chain manufacturing of fast-moving consumer goods with 5 years which should be in a senior managerial position.
  - ii. The candidate should not be more than 56 years of age.
  - iii. Experience in the sugar industry is an added advantage
3. Moses Kiprop Kolum (the 1<sup>st</sup> Respondent) was one of the applicants and he emerged as the highest scorer at the interviews. The Board sent his name and those of 2 candidates to the Cabinet Secretary, Agriculture, recommending he appoint one from the list.
4. It appears that the Cabinet Secretary gave approval for on 22 December 2023, the Board issued a contract of employment to the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent signed the contract on 27 December 2023.
5. Michael Sidigu (the Petitioner) then moved to Court on 29 December 2023, to challenge the appointment on the grounds that it was contrary to Articles 10, 73, and 232 of *the Constitution*, the Human Resources Manual of Chemelil Sugar Co Ltd, and the qualifications set out in the advertisement.
6. Upon perusal of the Petition and Motion, the Court issued an order injunctiong the 1<sup>st</sup> Respondent from assuming or holding office pending further directions.



7. When served, the Respondents filed separate applications asking the Court to review and/or set aside the injunctive orders.
8. The 1<sup>st</sup> Respondent also filed a replying affidavit on 10 January 2024.
9. The parties addressed the Court on the 2 applications on record on 23 January 2024, as a consequence of which the Court directed that the applications be deemed to be responses to the initial Motion and Petition.
10. The Court also directed the Respondents to file and serve its responses to the Petition and initial Motion and the filing and exchange of submissions.
11. The following were filed:
  - i. Replying Affidavit by Chair of the Board on 23 January 2024.
  - ii. Grounds of Opposition by the Public Service Commission on 26 January 2024.
  - iii. Submissions by the Petitioner on 1 February 2024.
  - iv. Grounds of Opposition by the Honourable Attorney General on 2 February 2024.
  - v. Submissions by 3<sup>rd</sup> and 4<sup>th</sup> Respondents on 6 February 2024.

#### **The Petitioner's assertions**

12. The particulars outlined by the Petitioner were that the 1<sup>st</sup> Respondent was 58 years old at the time of appointment whilst the advertisement had set an age limit of 56 years; had no experience in the sugar industry; was on terminal leave having retired from Agro Chemical Industries and that there was no legal requirement to seek the concurrence of the Head of Public Service before appointing the Chief Executive.

#### **Contentions by 1<sup>st</sup> Respondent**

13. The 1<sup>st</sup> Respondent challenged the case advanced by the Petitioner on the primary grounds that leave had not been obtained before institution of the action; the Petition did not meet the threshold for a Constitutional Petition; he had already assumed office by the time the Petition was filed and had commenced performing his duties and thus the application had been overtaken by circumstances; the appointment was preceded by a competitive recruitment process; he had the requisite qualifications and that there was no evidence of interference by the Head of the Public Service in the recruitment process.

#### **Case for the Honourable Attorney General and Cabinet Secretary**

14. The case for these 2 Respondents was evinced through Grounds of Opposition. The main grounds were that the Petitioner had concealed material facts that if disclosed would have rendered the Petition stale and that the Petition was incompetent and an abuse of the court.

#### **The Case for the Board and the Company**

15. The Board and the company opposed the grant of the reliefs sought by the Petitioner on the grounds of non-disclosure of material fact that the 1<sup>st</sup> Respondent had already assumed office on 27 December 2023, before the time the Court was moved; the question of age was a mere guide and was not a



mandatory requirement, there was no evidence placed before the Court on the 1<sup>st</sup> Respondent's age; the 1<sup>st</sup> Respondent emerged the best candidate and that the recruitment was based on the law and merit.

### **Public Service Commission**

16. On its part, the Public Service Commission filed Grounds of Opposition alleging material non-disclosure on the part of the Petitioner, and asserting that the Petition did not meet the standard of pleading with specificity and that in any case the recruitment and appointment of the 1<sup>st</sup> Respondent met the legal threshold of merit, competitiveness.

### **Evaluation**

#### **Competence of the Petition**

17. Some of the Respondents challenged the competence of the Petition on the grounds that it was not pleaded with the specificity expected of a Constitutional Petition.
18. The Petitioner is a lay person and no one of the Respondents suggested that he was trained in the law.
19. In the Petition, he pleaded that the process leading to the appointment of the 1<sup>st</sup> Respondent did not meet the legal beacons outlined in Articles 10, 73 and 232 of *the Constitution*.
20. These normative provisions detail the national values and principles of governance, responsibilities of leadership and integrity and the values and principles of the public service.
21. Article 22(3)(b) of *the Constitution* has opened the door for every person to approach the Court even on the basis of informal documentation (epistolary jurisdiction of the Court).
22. The Respondents have not argued that they did not understand the case to meet, which was that the appointment of the 1<sup>st</sup> Respondent did not comply with the constitutional threshold.
23. The Respondents further complained that the Petitioner had not secured leave before moving the Court during vacation.
24. The failure to seek leave cannot be determinative of a substantive suit as opposed to an application.
25. In the instant case, the Court did not admit the Petitioner's application to a hearing during vacation and the question of leave is not relevant or material at this stage.
26. The Court rejects the objections on competency.

#### **Material non-disclosure**

27. The Respondents also assailed the case by the Petitioner on the basis that he had failed to disclose that by the time he was moving to Court the factual matrix had changed in that the 1<sup>st</sup> Respondent had already taken office.
28. Apart from making the challenge, the Respondents did not indicate whether the assumption of office by the 1<sup>st</sup> Respondent was a public affair that should have been known to the general populace. It was not even revealed whether it was publicised or how and where such publication was made.
29. The Court is therefore unable to fault the Petitioner for material non-disclosure.

Fair competition and equal opportunities for appointment



30. It is not in dispute that among the considerations the Board set out for prospective applicants for the position of Managing Director was age. The vacancy announcement had an upper age limit of 56 years.
31. The 1<sup>st</sup> Respondent who was eventually appointed was (is) above the age set by the Board. It is telling that the Respondents did not take the Petitioner's assertions on the 1<sup>st</sup> Respondent's age head-on considering that his records from a former employer indicated that he was born on 2 January 1963, and those placed before the Court show he was born in 1965 (identity card obtained in May 2023).
32. Chapter 13 of *the Constitution* has set the beacon for the values and principles which should imbue the public service including recruitment and appointment.
33. In this regard, Article 232(1)(g) of *the Constitution* expects adherence by recruiting public bodies with the values and principles of fair competition and merit as the basis of an appointment to a public office, while Article 232(1)(i) provides for affording adequate and equal opportunities to all persons in appointment to public office.
34. The values and principles are given content and context in the *Public Service (Values and Principles) Act* and more so section 10.
35. By setting out an upper age limit of 56 years and then disregarding it, the Board was locking out other persons who would have otherwise been interested in applying for the position advertised.
36. The effect of the Board setting the qualification and disregarding it was that it did not afford equal opportunities to persons similarly situated with the 1<sup>st</sup> Respondent.
37. It made a false representation to the public and those who would have been interested to respond to the vacancy announcement that it would only consider those under 56 years old while it ended up appointing a person who was above the publicly declared age threshold.
38. The misrepresentation by the Respondents was antithetical to the national values and principles of the public service of fair competition and granting equal opportunities for appointment to a public office. Such a course taken by the Respondents could not have been in tandem with the edict to respect, uphold and advance the purposes of *the Constitution*.
39. In the Court's view, the outcome of such a process cannot be said to meet the test of fair competition and equal opportunities for appointment to a public office and should not be left to stand.

### **Conclusion and Orders**

40. Flowing from the above, the Court issues the following orders:
  - i. A declaration is hereby issued that the recruitment process leading to the appointment of Moses Kiprop Kolum as the Managing Director of Chemelil Sugar Co Ltd did not meet the threshold of the public service values and principles of fair competition and affording equal opportunities for appointment to a public office.
  - ii. An order of judicial review in the nature of certiorari is hereby issued to quash the appointment of Moses Kiprop Kolum as the Managing Director of Chemelil Sugar Co Ltd.
41. The Petition was in the public interest. Each party to bear own costs.

**DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 7<sup>TH</sup> DAY OF FEBRUARY 2024.**

**RADIDO STEPHEN, MCIArb**



## **JUDGE**

### **Appearances**

Petitioner in person

For 1<sup>st</sup> Respondent Olel, Onyango, Ingutiah Advocates, LLP

For 3<sup>rd</sup> and 4<sup>th</sup> Respondents Otieno, Yogo, Ojuro & Co. Advocates

For 2<sup>nd</sup> and 5<sup>th</sup> Respondents Mr Felix Kajo, Senior Litigation Counsel, Office of the Hon Attorney General

For 6<sup>th</sup> Respondent Michael Maurice Ogosso, Principal Legal Counsel, Public Service Commission

Court Assistant Chemwolo

