



**Ouma v Cabinet Secretary, Agriculture & another; Dima & 2 others (Interested Parties)  
(Petition E003 of 2024) [2024] KEELRC 880 (KLR) (24 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 880 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
PETITION E003 OF 2024**

**S RADIDO, J**

**APRIL 24, 2024**

**IN THE MATTER OF: ARTICLES 3(1), 22(L) & (2)(C), 48, 50(1),  
159(1) AND 258(1) OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF: THE ALLEGED CONTRAVENTION AND VIOLATION OF ARTICLES  
1(1), 2(L-4),3(1), 10, 21,73,75, 29, 131(2XA), 153(4), AND 232 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF: THE ALLEGED VIOLATION OF RIGHTS AND FUNDAMENTAL  
FREEDOMS UNDER ARTICLES 27, 41(1) AND 47 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF: THE ALLEGED ABUSE OF EXECUTIVE POWERS IN THE  
IRREGULAR APPOINTMENT BY THE CABINET SECRETARY OF THE MANAGING  
DIRECTOR OF SOUTH NYANZA SUGAR COMPANY LIMITED, A STATE CORPORATION**

**AND**

**IN THE MATTER OF: ALLEGED CONFLICT OF INTEREST IN THE APPOINTMENT  
AND OF THE VIOLATION OF THE PRINCIPLE OF LEGITIMATE EXPECTATION  
ON THE PART OF AN APPOINTING AUTHORITY TO OBSERVE THE  
REQUIREMENTS OF CHAPTER 6 IN MAKING PUBLIC APPOINTMENTS.**

**BETWEEN**

**BENARD OCHIENG OUMA ..... PETITIONER**

**AND**

**CABINET SECRETARY, AGRICULTURE ..... 1<sup>ST</sup> RESPONDENT**

**BOARD OF DIRECTORS, SOUTH NYANZA SUGAR CO**

**LTD ..... 2<sup>ND</sup> RESPONDENT**



**AND**

**MARTIN OGOLLA DIMA ..... INTERESTED PARTY**  
**SAMSON ALITON OKELLO ..... INTERESTED PARTY**  
**KENNEDY RO RIAGA ..... INTERESTED PARTY**

**JUDGMENT**

1. Bernard Ochieng Ouma (the Petitioner) lodged a Petition with this Court on 31 January 2024, alleging that the recruitment process for the Managing Director of South Nyanza Sugar Co Ltd (the company) by the Respondents was contrary to the values and principles set out in Articles 10 and 232 of the Constitution; and Mwongozo Code; was unlawful because the Cabinet Secretary, Agriculture had usurped the power of the Board of the Company; the State Corporations Advisory Committee was not involved in the process; one of the applicants, the 1<sup>st</sup> Interested Party had integrity questions; the recruitment process was tainted with nepotism and corruption; the Board had not conducted background checks on the Interested Parties; conflict of interest between the Chair of the Board and 1<sup>st</sup> Interested Party; the 1<sup>st</sup> Interested Party did not meet the qualification of having worked in the sugar sector; the scores had been manipulated during the interviews; failure to involve the County Government of Migori despite agriculture being a devolved function; and that the process was not transparent.
2. Filed together with the Petition was a Motion under a certificate of urgency.
3. When the Motion was placed before the Court on the same day, it directed that the Respondents and Interested Parties be served. The Court also issued a conservatory order restraining the Respondents from appointing any of the Interested Parties as the Chief Executive Officer of the company.
4. The Court set 15 February 2024 for the giving of further directions.
5. Martin Ogolla Dima (the 1<sup>st</sup> Interested Party) filed a replying affidavit in opposition to the Motion and Petition on 14 February 2024.
6. The Cabinet Secretary, Agriculture filed a replying affidavit on his behalf and that of the State Corporations Advisory Committee on 15 February 2024.
7. The Chairman of the Board of the Company filed a replying affidavit on 25 February 2024. A similar affidavit was filed on 26 February 2024, and a further affidavit on 27 February 2024.
8. On 26 February 2024, the Hon Attorney General wrote to the Court to explain the filing of the myriad affidavits (the Court only realised this state of affairs when it embarked on the preparation of this judgment). The mix-up led to the postponement of the judgment from 20 March 2024 to today.
9. The Petitioner filed a supplementary affidavit on 8 March 2024 (and submissions on 11 March 2024).
10. The Petitioner identified the Issues for determination as:
  - i. Whether there was fairness, discrimination, and public participation in the process of advertising, shortlisting, interviewing, and ranking of candidates for appointments of Managing Director Sony Sugar Company?



- ii. Whether the recruitment process leading to the appointment of the Managing Director Sony Sugar Company adhered to the gender balance rule?
  - iii. Whether the Cabinet Secretary has a role to appointment (sic) of state corporation?
  - iv. Whether the Petitioner is entitled to orders sought?
11. The Honourable Attorney General filed submissions on 8 March 2024.
  12. The Honourable Attorney General set out 2 Issues for adjudication:
    - i. Whether the recruitment process was conducted illegally and unlawfully?
    - ii. Whether the Petitioner is entitled to the reliefs sought?
  13. The 1<sup>st</sup> Interested Party and the 2<sup>nd</sup> Respondent filed their submissions on 8 March 2024.
  14. The 2<sup>nd</sup> Interested Party filed his replying affidavit and submissions on 10 March 2024, and he outlined the Issues in contention as:
    - i. Whether the recruitment process of the Chief Executive Officer, Sony Sugar Company Ltd by the 2<sup>nd</sup> Respondent was conducted in compliance with relevant laws?
    - ii. Whether the decision of the 2<sup>nd</sup> Respondent to forward the names of the Interested Party to the 1<sup>st</sup> Respondent for approval and/or appointment was legal?
  15. The Court has considered the Petition, Motion, affidavits and submissions and will examine the Issues as identified in the parties' respective submissions. For clarity, the Court's examination will primarily follow the facts and law as outlined in the submissions.

### **Public participation**

16. The Petitioner asserted that the recruitment process did not adhere to the national values and principles of public participation as contemplated by Articles 10 and 232 of the *Constitution* because, after the advertisement, the Board did not publicise the names of the applicants and shortlisted candidates to enable the public present any memoranda on the applicants.
17. The Petitioner further asserted that the interviews were held in secrecy to advance the interests of the Chair of the Board, the 2<sup>nd</sup> Respondent.
18. The Petitioner drew the attention of the Court to scores of authorities on public participation including *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) & 6 Ors* (2017) eKLR and *Legal Advice Centre & 2 Ors v County Government of Mombasa & 4 Ors* (2018) eKLR, which are from the Court of Appeal.
19. In the IEBC authority, the Court of Appeal stated:

In our view, analysis of the jurisprudence from the Supreme Court leads us to the clear conclusion that Article 10(2) of the *Constitution* is justiciable and enforceable immediately. For avoidance of doubt, we find and hold that the values espoused in Article 10(2) are neither aspirational nor progressive; they are immediate, enforceable and justiciable. The values are not directive principles. Kenyans did not promulgate the 2010 *Constitution* in order to have devolution, good governance, democracy, rule of law and participation of the people to be realised in a progressive manner in some time in the future; it could never have been



the intention of Kenyans to have good governance, transparency and accountability to be realised and enforced gradually.....

Our view on this matter is reinforced by Article 259(1)(a) which enjoins all persons to interpret the Constitution in a manner that promotes its values and principles. Consequently, in this appeal, we make a firm determination that Article 10(2) of the Constitution is justiciable and enforceable and violation of the Article can found a cause of action either on its own or in conjunction with other Constitutional Articles or Statutes as appropriate.

20. In the Legal Advice Centre judgment, the Court of Appeal held:

The purpose of permitting public participation in the law-making process is to afford the public the opportunity to influence the decision of the law-makers. This requires the law-makers to consider the representations made and thereafter make an informed decision. Law-makers must provide opportunities for the public to be involved in meaningful ways, to listen to their concerns, values, and preferences, and to consider these in shaping their decisions and policies. Were it to be otherwise, the duty to facilitate public participation would have no meaning.

21. In the 2<sup>nd</sup> Respondent's replying affidavit, it was deponed that the vacancy for the position of Chief Executive Officer was advertised on the company's website and a daily newspaper of national circulation. It was also deponed that the list of the applicants and those shortlisted was published on the company's website and the same was available to the public. These assertions were repeated in the submissions.

22. The affiant further deponed that the interviews were held in a public space.

23. The Respondents also urged in their submissions that there is no specific constitutional, legislative, or policy standard of what constitutes transparency, public participation.

24. The authorities and decisions relied on by the Petitioner correctly set out the doctrinal or philosophical underpinnings of the requirement for public participation but do not set the contours of the values and principles of public participation in a recruitment exercise within the public service. The Petitioner did not draw the attention of the Court to any single decision or authority where the question of public participation in a public recruitment process was under challenge.

25. However, the question of the extent of public participation in the recruitment process within the public sphere has been the subject of previous Court decisions.

26. In Benson Riitho Mureithi v J.W. Wakhungu & 2 Ors (2014) eKLR, the Court observed as follows:

It may seem that the Constitution has imposed an irksome and onerous burden on those responsible for making public appointments by requiring that they make the appointments on the basis of clear constitutional criteria; that they allow for public participation; and that those they appoint meet certain integrity and competence standards. This burden, however, is justified by our history and experience, which led the people of Kenya to include an entire chapter on leadership and integrity in the Constitution.



27. In *Consumer Federation of Kenya (COFEK) v Attorney General & 2 Ors* (2012) eKLR, the Court stated:

On one part, the public is entitled to know who has been shortlisted. The public participates by being able to send any reports or objections on any of the persons who have been selected. Those who have not been shortlisted are given an opportunity to make inquiries as to why they have not been shortlisted.

Finally, even the persons selected are still advertised giving an opportunity to participate in the process. It is by reason of the advertisement of the person so nominated, that Kenyans can also participate in the process by launching a challenge to the process of appointment.

28. In the instant case, the 2<sup>nd</sup> Respondent deponed in his affidavit that the names of all the candidates and those who were shortlisted were published in the company's website and were thus available to the public.

29. The Petitioner did not controvert this assertion in his further affidavit. Nor did he argue in his submissions that the publication of the names of the shortlisted candidates on the website and not a newspaper of national circulation did not meet the threshold of public participation.

30. Although the Court does not have before it statistics on the reach of social media and new media, the reach of information published through such media or an organisation's official website cannot be gainsaid.

31. Consequently, the Court finds that the recruitment exercise did not violate the threshold for public participation.

#### **Violation or failure to consider the gender equation/discrimination on the grounds of gender**

32. The Petitioner made reference to Article 27 of the *Constitution* to contend that women have the right to equal treatment including equal opportunities in political, economic, cultural, and social spheres to argue that the advertisement for the Chief Executive Officer did not promote the national values and principles in that out of the 32 applicants, only one was a lady and the Board did not bother to re-advertise and encourage qualified women to apply.

33. As part of the argument, the Petitioner asserted that some of the panelists did not score the lady applicant.

34. The vacancy for the position of Chief Executive Officer was published in a daily newspaper and on the company's website and only one lady applied. The lady was one of the candidates who made the shortlist.

35. In the circumstances, the Court is not convinced by the Petitioner's arguments that the process violated the gender balance rule or that it did not adhere to the values and principles governing the public service. The Respondents could not reasonably be expected to compel eligible members of the female gender to apply for the position.

#### **Manipulation of interview scores**

36. The Petitioner also contended that some 6 applicants including the lady applicant were not scored by one of the panelists.

37. It is not in dispute that not all the panelists scored the applicants. The 2<sup>nd</sup> Respondent stated in his affidavit that the interviews took two days and that one of the panelists attended only on the first day



of the interview. The affidavit did not disclose the identity of the panelist or tender an explanation for the absence. Some explanation should have been tendered.

38. It would not be unprecedented for a panelist to miss out during an interview. But to invalidate the outcome of an interview on the ground of the absence of a panelist, the Court ought to look at whether the remaining panelists formed a quorum.
39. The Board here had a membership of 9 and 8 participated in the interviews on day two. The 8 formed a quorum.
40. In terms of scoring, it is the Court's view that it is the averages of the participating and scoring panelists that would matter and count.
41. The Respondents used the scores of the 8 participating panelists to average the scores on day 2.
42. The Court, therefore, finds that the allegation of the manipulation of the scores was not proved.

### **Role of Cabinet Secretary in the appointment process**

43. The Petitioner contended that the final authority in the appointment of a Chief Executive Officer of a state corporation, was the Board and not the Cabinet Secretary.
44. The Petitioner, therefore, challenged the decision of the Board to write to the Cabinet Secretary, Agriculture on 27 January 2024 indicating the top 3 applicants and seeking consideration and advice on possible appointment.
45. The Respondents admitted in their submissions that the Cabinet Secretary had no power to hire or fire the Chief Executive Officer.
46. It cannot be gainsaid and the Respondents did not deny that South Nyanza Sugar Co Ltd is a state corporation.
47. Under section 5(3) of the *State Corporations Act*, it is the sole responsibility of the Board to engage and employ staff including a Chief Executive Officer.
48. The role of the Cabinet Secretary under the provision mentioned above is to set the terms and conditions of service of the staff and Chief Executive Officer. This role of the Cabinet Secretary under the said provision which was revised in 2012 should be read within the context of the the establishment and functions of the Salaries and Remuneration Commission and the enhanced role of the Public Service Commission.
49. Be that as it may, the tenor of the State Corporations Act does not envisage a role for the Cabinet Secretary in the appointment of the Chief Executive Officer of a state corporation.
50. The Board was consequently abdicating or attempting to cede its statutory role in seeking the Cabinet Secretary's advice and/or consultation in the appointment of the Chief Executive Officer.

### **Role of State Corporations Advisory Committee**

51. Despite the Petitioner asserting that it was imperative that the Inspector of State Corporations or a representative of the State Corporations Advisory Committee should have sat through the recruitment process did not disclose which policy or regulatory framework required such participation and this ground fails.



## **Conclusion and Orders**

52. Flowing from the above, the Court finds that the Petitioner did not prove his case to the required standard and the Petition is dismissed with no order on costs since it was brought in the public interest.

**DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 24<sup>TH</sup> DAY OF APRIL 2024.**

**RADIDO STEPHEN, MCIARB**

**JUDGE**

Appearances

For Petitioner Omondi Abande & Co. Advocates

For Respondents Hon Attorney General

For 1<sup>st</sup> Interested Party Bruce Odeny & Co. Advocates

For 2<sup>nd</sup> Interested Parties Okoyo Omondi & Co. Advocates

3<sup>rd</sup> Interested Party did not participate

Court Assistant Chemwolo

