



Ochieng v State Corporations Advisory Committee & 3 others (Petition E030 of 2019) [2024] KEELRC 928 (KLR) (17 April 2024) (Ruling)

Neutral citation: [2024] KEELRC 928 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E030 OF 2019**

B ONGAYA, J

APRIL 17, 2024

IN THE MATTER OF ARTICLE 1, 2(1) (2) (4), 3(1), 22(1) & 2(B) (C), 23(3) (A) (B) (C), 50 (1), 159 (1) & 258 (1) (2) (B) (C), 50(1), 159(1) & 258(1) (2) (B) (C)

**IN THE MATTER OF CONTRAVENTION AND VIOLATIONS OF
ARTICLE 10, 27, 41, 47, 50 OF THE CONSTITUTION OF KENYA**

IN THE MATTER OF THE STATE CORPORATIONS ACT CAP 446

IN THE MATTER OF FAIR ADMINISTRATION ACTIONS ACT, 2015

IN THE MATTER OF SECTION 5 OF EMPLOYMENT ACT, 2007

IN THE MATTER OF PUBLIC SERVICE CODE OF REGULATIONS, 2006

IN THE MATTER OF PUBLIC SERVICE (VALUES & PRINCIPLES) ACT 1A OF 2015

**IN THE MATTER OF THE CODE OF CONDUCT
OF GOVERNANCE OF STATE CORPORATIONS**

BETWEEN

PHILIP OMONDI OCHIENG PETITIONER

AND

STATE CORPORATIONS ADVISORY COMMITTEE 1ST RESPONDENT

SOUTH NYANZA SUGAR COMPANY LIMITED 2ND RESPONDENT

SOUTH NYANZA SUGAR COMPANY LIMITED 3RD RESPONDENT

AND

ZAKAYO GOMBE INTERESTED PARTY



RULING

1. The petitioner states that he is a Kenyan citizen and is among the approximately 250, 000 citizens who depend on the sugar industry for their livelihood and that of their families and dependants.
2. The petitioner filed an application by the notice of motion dated 08.03.2024 through Nying'uro & Associates Advocates. The application was under Articles 1, 2(1) (2) (4), 3(1), 22(1) & 2(b) (c) 23(3) (a) (b) (c), 50 (1), 159 (1) & 258 (1) (2) (b) (c) of the Constitution; Rule 3, 4, 10, 13, 19 and 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedom) Practice and Procedure Rules of 2013; Rule 7(2) of the Employment and Labour Relations Court (Procedure) Rules, 2016; and , sections 3, 4, 6, 7, 8, 9, 11, 12, of the Fair Administrative Action Act of 2015. The petitioner prayed for orders:
 - a.(spent).
 - b.(spent).
 - c. That pending the hearing and determination of the petition there be and is hereby issued a conservatory order suspending the implementation of undated report titled “Revitalizing The Department Of Agriculture” by the 1st, 2nd, and 3rd respondents whether acting jointly or severally by themselves, their servants, agents, representatives, employees or any person whatsoever.
 - d. That the Honourable Court be pleased to grant such other or further relief as it may deem fit in the circumstances.
 - e. That the costs of the application to be provided for.
3. The application was based upon the petitioner’s supporting affidavit and upon the following grounds:
 - a. The sugar industry contributes an average of 15% of Kenya’s Agricultural GDP. The sector consists of more than 250,000 smallholder farmers supplying over 92% of the sugarcane processed by sugar companies while 8% is supplied by sugar firm-owned nucleus plantations.
 - b. The 1st respondent has failed to perform its functions per section 27 (c) of the State Corporations Act by failing to advise or misadvising the 2nd and 3rd respondents on appointment, removal, or transfer of officers and staff of state corporations, , the secondment of public officers to state corporations, and, the terms and conditions of any appointment, removal, transfer or secondment.
 - c. The 2nd respondent also known as Sony Sugar is a state corporation registered under the Companies Act Cap 486 as a public limited company It grows sugarcane, manufactures and sells sugar and related products. The 3rd respondent board is established under section 6 of the State Corporations Act. The Committees of the Board of Directors of the 2nd respondent are established per section 9 of the Act and Article 3.0 of the 2nd respondent’s Director’s Charter to deal with matters from time to time as the board may specify. The 3rd respondent established the Finance Committee, Board Audit Committee, General Purpose Committee, and, operations Committee per Articles 3.2; 3.3; 3.4; and 3.5 of the Board of Directors’ Charter respectively and to handle specified issues.



- d. The interested party has acted as the Head of Agriculture in the respondent state corporation and effective sometimes in 2016. Per 2nd respondent's management structure, the position of Head of Agriculture is Group SE-2 being a grade below that of SE-1 held by the Chief Executive Officer or the Managing Director.
 - e. On 29.01.2024 the 3rd respondent's Operations Committee purportedly acting for 1st and 2nd respondents and without any powers, rationale or justification prepared a report that was undated and titled "Revitalizing the Department of Agriculture" with a raft of drastic proposals and recommendations for designations, demotions and transfers of Senior employees of the 2nd respondent state corporation affecting 10 employees. The interested party whose current position is Head of Agriculture was proposed to be re-designated Research Development Manager. It is alleged that Morris Ng'ielia is currently one grade below Peter Oguna and Patrick Buluma who have been promoted two levels higher to position of Head of Agriculture (but the Court observes the proposed designations as listed for the petitioner shows at No. 5 that only Boniface Odhiambo currently Quality Assurance Officer) is proposed to re-designate as Head of Agriculture).
 - f. The proposals are without notice or internal advertisement and amounts to unfairly demoting the interested party from Acting Head of Agriculture to Research and Development Manager.
 - g. The Committee's Chairman and not any other member signed the impugned report.
 - h. The promotions are in breach of the clause E.27 of the Public Service Code of Regulations 2006 that in selection of candidates for promotion regard be given to merit and ability as reflected in work performance and results as well as seniority, experience and official qualifications. The interested party and affected senior officers were not subjected to a performance appraisal to test ability and merit reflected in respective work performance. The prescribed factors have not been considered at all. Section 10 of the [*Public Service \(Values and Principles\) Act*](#) 1A of 2015 states that in public service officers are appointed and promoted based on fair competition and merit. The respondents have also breached the cited provisions of the [*Fair Administrative Action Act*](#) and Article 47 of [*the Constitution*](#). The applicant and other senior officers have been denied the right to fair labour practices per Article 41 of [*the Constitution*](#) on right to reasonable working conditions.
4. The 2nd and 3rd respondents filed the replying affidavit of Hon. Jared O. Opiyo, Chairperson of the 3rd respondent sworn on 05.04.2024 and filed through the Hon. Attorney General. It was stated and urged as follows:
- a. The petitioner is not a farmer in the Sony Sugar Belt and no contract book has been exhibited in that regard.
 - b. The 3rd respondent undertook internal transfers and the Operations Committee did not propose or recommend transfers or redesignation as alleged.
 - c. The 2nd respondent has had dismal performance due to lack of raw materials. On 12.02.2024, the 3rd respondent wrote to the parent Ministry seeking permission to hold a special board meeting to address prevailing challenges. The Ministry granted permission by letter dated 15.02.2024. The Ministry authorised the 3rd respondent to review and structure human capital in the Agriculture Department to resolve issue of unavailability of raw materials; and, to review the re-organization of the 2nd respondent's strategies and operations within the Company as per 3rd respondent's mandate.



- d. The 3rd respondent met on 22nd and 23rd February 2024 and made decisions per minutes. The 3rd respondent and not the alleged Committee made the changes. The Board resolutions were in good faith. The interested party was not targeted. The internal transfers and re-designations were within the 3rd respondent's authority to make.
 - e. The petitioner lacks standing because he was not affected by the decisions of the 3rd respondent. The interested party did not ask the petitioner to pursue issues on his behalf.
 - f. The 2nd and 3rd interested parties have a human resource manual that provides for grievance management or dispute resolution and no grievance had been received from the petitioner. The petition is therefore an abuse of court process.
 - g. No evidence is on record to show that the interested party was treated unfairly or discriminated against.
 - h. The petitioner has failed to show the alleged statutory and constitutional violations. No prima facie case has been established in that regard.
5. Mr. Oure, learned Deputy Chief State Counsel made oral submissions for the 2nd and 3rd respondents while Mr. Omari and Mr. Mabeya Advocates submitted for the applicant. The Court has considered the issues in the application and returns as follows:
- a. A conservatory order seeks to preserve state of affairs in the public interest by ensuring the foundations of the dispute are not rendered nugatory or overtaken. The prayer in the application is to suspend implementation of the undated report as prayed for the applicant. The impugned report is said for the applicant to be a proposal. It is work in progress as far as the applicant's case goes. For the 2nd and 3rd respondent it has been shown that the 3rd respondent's board made the internal transfers and redesignation. The Court considers that the prayer even if granted will serve no purpose as the 3rd respondent has shown it already made the review and restructure of human capital in Agriculture Department. The impugned report by way of a proposal appears to the Court to have been overtaken.
 - b. The applicant styled himself as acting in the public interest while actually acting in relation to the interested party's personal contract of service. The public interest has not been established. The interested party and other affected employees have not challenged the decisions and there is no reason to doubt the 2nd and 3rd respondents' account of the difficult challenges leading to re-organization of human capital.
 - c. In the circumstances, the alleged breach of cited statutory provisions and constitutional provisions have not been established. The claims are with respect to the employees including the interested party who despite service has not filed an affidavit to support and demonstrate the allegations. AS urged for 2nd and 3rd respondents they were indeed empty allegations. The employees have not been shown to have filed administrative reviews or appeals to show dissatisfaction.
 - d. The interested party's alleged long acting for 8 years as Head of Agriculture has been devoid of evidence of his substantive position prior and throughout the acting. In absence of such evidence, it is not possible to find that the internal restructuring disadvantaged him.
 - e. The applicant has therefore failed to establish the threshold for grant of a temporary conservatory order as prayed or to justify the exercise of the Court's rare jurisdiction of interfering with an employer's exercise of human resource powers and functions.



In conclusion, the application is hereby dismissed with costs in the cause and the parties to consider compromising the application or taking steps for expeditious determination of the petition.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS WEDNESDAY 17TH APRIL 2024.

BYRAM ONGAYA

PRINCIPAL JUDGE

