



**Etemesi v Attorney General & 4 others (Petition E021 of 2024)  
[2024] KEELRC 2535 (KLR) (18 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2535 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E021 OF 2024**

**B ONGAYA, J**

**OCTOBER 18, 2024**

**IN THE MATTER OF THE ENFORCEMENT OF THE BILL OF RIGHTS  
UNDER ARTICLES 10 AND 232 OF THE CONSTITUTION OF KENYA (2010)**

**AND**

**IN THE MATTER OF ARTICLES 1, 2, 3, 10, 19, 20, 21, 22, 23, 27, 28, 29,  
30, 41, 43, 47, 48, 53 AND 232 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE PUBLIC SERVICE COMMISSION ACT**

**AND**

**IN THE MATTER OF THE EMPLOYMENT ACT**

**BETWEEN**

**JOEL ETEMESI ..... PETITIONER**

**AND**

**THE ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**THE CABINET SECRETARY, AGRICULTURE & LIVESTOCK  
DEVELOPMENT ..... 2<sup>ND</sup> RESPONDENT**

**PUBLIC SERVICE COMMISSION ..... 3<sup>RD</sup> RESPONDENT**

**THE NATIONAL BIOSAFETY AUTHORITY ..... 4<sup>TH</sup> RESPONDENT**

**THE CHIEF OF STAFF & HEAD OF PUBLIC SERVICE ..... 5<sup>TH</sup> RESPONDENT**



## JUDGMENT

1. The Petitioner filed the Petition dated 20.02.2024 through the firm of M. Korongo & Co. Advocates, seeking the following prayers:
  - i. An order nullifying the appointment of Archibald Munyi Kithaka.
  - ii. An order directed to the 3<sup>rd</sup> Respondent to advertise the position of the Member of the Board of Directors of the 4<sup>th</sup> Respondent vacant and conduct a proper interview and appoint a person who meets the criteria set out in the Constitution of Kenya and the Public Service Commission Act.
  - iii. Costs.
2. The Petitioner pleaded that the National Biosafety Authority (4<sup>th</sup> Respondent herein) is established under the Biosafety Act, 2009 and is responsible for regulating Genetically Modified Organisms (GMOs) in Kenya. The issue of GMOs is currently a hotly contested and has found its way into the courts. Accordingly, the Board of Directors of the 4<sup>th</sup> Respondent needs to be well balanced to ensure well-reasoned and objective decisions for the welfare of Kenyans.
3. The Petitioner's case was that the 2<sup>nd</sup> Respondent appointed one Mr. Archibald Munyi Kithaka as a member of the Board of Directors of the 4<sup>th</sup> Respondent Authority, through Kenya Gazette Notice No 605 dated 22<sup>nd</sup> January 2024. His case is that the said Board is made up of nine members and that after the impugned appointment was effected, five members will be from the same region, which is more than 50% of the Board of Directors. He reasoned that the appointment does not reflect the face of the Republic of Kenya and further shifts the balance of power in the said Board, thus skewing any decisions that are to be made by the 4<sup>th</sup> Respondent's Board of Directors.
4. The Petitioner's further case is that the Cabinet Secretary (the 2<sup>nd</sup> Respondent herein) being from the same region and tribe as the appointee, there is a likelihood of abuse of powers. Particularising such likelihood of abuse of powers, the Petitioner asserted that the Board will be driving the agenda of one region and tribe within the 4<sup>th</sup> Respondent. Secondly, there will be intimidation of staff of the other regions and tribes within the 4<sup>th</sup> Respondent. Lastly, the Board will be making decisions regarding GMOs, which may impact negatively on Kenyans.
5. It was the Petitioner's averment that the appointment of Mr. Kithaka has resulted in the infringement of Article 10 of the Constitution of Kenya as it does not reflect the national values of the Republic of Kenya. Further, that the appointment does not promote the preamble of the Constitution that provides:

...Proud of our ethnic, cultural and religious diversity, and determined to live in peace and unity as one indivisible sovereign nation: ...

Committed to nurturing and protecting the well-being of the individual, the family, communities and the nation:

Recognising the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law: ...
6. The Petitioner further pleaded that the 3<sup>rd</sup> and 5<sup>th</sup> Respondents have refused to exercise their functions and values as provided under Article 232(1) (a), (b) (h) and 232(2) (a) and (b) of the Constitution.



- That the 3<sup>rd</sup> and 5<sup>th</sup> Respondents have also failed to make sure that the Cabinet Secretary adheres to section 36(3) (d) of the Public Service Act. In that regard, the Petitioner urged that the impugned appointment was sanctioned by the Public Service Commission yet it does not reflect high standards of professional ethics; efficient, effective and economical use of resources; and the true representation of Kenya's diverse communities.
7. The Petitioner stated that due to the actions of the Cabinet Secretary on the said appointment, his fundamental rights as a citizen of the Republic of Kenya have been violated by the 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Respondents and that other citizens will also continue to suffer prejudice. He maintained that this Court however has authority to nullify the appointment of Mr. Archibald Munyi Kitheka as vested in it under Article 159 of the Constitution.
  8. In response, the 3<sup>rd</sup> Respondent filed a Replying Affidavit through its Director of Legal Services, Jacqueline Manani Advocate. The Commission's Deputy Secretary/Chief Executive Officer (Corporate Services), Remmy Mulati, swore the affidavit on 29.02.2024.
  9. The 3<sup>rd</sup> Respondent's reply was that whereas Article 234(2)(a)(ii) of the Constitution of Kenya gives power to the Public Service Commission to appoint persons to hold office in the public service, that power is subject to the Constitution and legislation as provided in the said Article. That therefore where legislation gives power to another entity to appoint persons to hold office in the public service, the Commission has no power to appoint such persons. Mr. Mulati noted that in this case, section 6(1)(a), (f) and (g) of the Biosafety Act gives power to the Cabinet Secretary to appoint persons to be members of the National Biosafety Authority in addition to other members who are board members by virtue of the offices they hold as prescribed by the Act. Thus, the Commission does not have power to appoint members of the Board of the 4<sup>th</sup> Respondent.
  10. Mr. Mulati asserted that the Commission is however responsible for promoting national values and principles of public service, and for evaluating and reporting to the President and Parliament the extent to which the values have been complied with in the public service, as provided for under Article 234(2) (c) and (h) of the Constitution. That the exercise of such power by the Commission is also provided for under sections 63 and 64 of the Public Service Commission Act.
  11. Further, the 3<sup>rd</sup> Respondent replied that it is not possible for the Commission to police public entities on their daily activities. That however, the Commission does undertake an annual evaluation of each public entity by requiring that each public entity presents an annual self-evaluation report for verification by the Commission during the annual evaluation and preparation of the Annual Values Report. Mr. Mulati argued that Mr. Kithaka was appointed to the Board of the 4<sup>th</sup> Respondent with effect from 22.01.2024, which was within the financial year 2023/24 and the Commission was yet to evaluate in compliance with the provisions of the Constitution and the Public Service Commission Act.
  12. Mr. Mulati also noted that the National Biosafety Authority Board and staff composition is expected to conform with the provisions of Article 232(1) (g), (h) and (i) of the Constitution. The provisions require appointments to be competitive, meritorious and representative of Kenya's diverse communities in addition to providing adequate and equal opportunities to men and women, members of all ethnic groups and persons with disabilities. Furthermore, that the 2<sup>nd</sup> Respondent is expected to comply with the provisions of section 7(2) of the National Cohesion and Integration Act, which provides that, no public establishment shall have more than one third of its staff from the same ethnic community.
  13. It was averred for the 3<sup>rd</sup> Respondent that where the Commission finds non-compliance in the membership of a Board or composition of staff of a public entity as set out hereinabove, the



Commission makes decisions and recommendations for an authorized officer or appointing authority to remedy such non-compliance within specified timelines.

14. Mr. Mulati concluded that the prayers sought against the 3<sup>rd</sup> Respondent Commission cannot therefore issue as it does not have power to appoint persons to be members of the Board of the 4<sup>th</sup> Respondent, and cannot therefore have power to nullify the appointment of Mr. Archibald Munyi Kithaka and subsequently undertake a competitive recruitment process. He stated that the Commission has been wrongly sued and that the Petition against it should thus be dismissed with costs to the 3<sup>rd</sup> Respondent.
15. The 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents filed their Replying Affidavit, sworn by Franklin Mithika Linturi on 12.03.2024, through the Office of the Attorney General – and learned Chief Litigation Counsel Mr. Oscar Eredi and Litigation Counsel, Mr. Odukenya Wycliffe appeared in that behalf.
16. Mr. Linturi, the then Cabinet Secretary of the Ministry of Agriculture and Livestock Development, asserted that the appointment of Mr. Kithaka is his second and last term having served his first term between August 2020 and August 2023. He averred that his power to make the impugned appointment is derived from the *Biosafety Act*, 2009 and that the Petition herein therefore lacks merit and is based on misinformation and ignorance of the law. He contended that Mr. Kithaka is a Kenyan lawyer by profession and thus qualified to be appointed to the Board of the 4<sup>th</sup> Respondent.
17. Mr. Linturi denied that GMOs is currently a contested issue and noted that even if it were, there are duly constituted institutions to address the same, including the Board of Directors of the 4<sup>th</sup> Respondent herein.
18. In response to the dispositions that five members of the Board of Directors of the 4<sup>th</sup> Respondent are from the same region, Mr. Linturi denied that Mr. Archibald Kithaka is from the same tribe as the 2<sup>nd</sup> Respondent. He further noted that the Board's CEO and Ex-officio Board member (Dr. Roy Mugiira) was competitively recruited by the Board based on his professional qualifications and competence, and is therefore, not an appointee of the 2<sup>nd</sup> Respondent. While admitting that Dr. Gilbert Muthee Mwoga is from the same region as the 2<sup>nd</sup> Respondent, he asserted that Dr. Mwoga is an alternate member of the Board representing the Principal Secretary in State Department of Agriculture and is thus not an appointee of the 2<sup>nd</sup> Respondent.
19. The 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents' case is that the appointment of independent members of Boards of Directors of State Corporations is not a competitive process requiring public advertisement, participation and interview. Further, Mr. Linturi stated that the Public Service Commission has no role in the appointment of the Board of Directors of the 4<sup>th</sup> Respondent, which is a preserve of the 2<sup>nd</sup> Respondent.
20. The 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents averred that the Honourable Court lacks jurisdiction to determine violation of fundamental rights and freedoms in the Bill of Rights in the *Constitution* of Kenya, except where such violation is concerned with employment or labour relations. They argued that the contention in this case about the appointment of directors is not an employment issue as directors of companies or state corporations are not employees of the company. That therefore, any dispute concerning the appointment of directors is outside the scope and jurisdiction of the ELRC as set out in section 12 of the *Employment and Labour Relations Court Act*. The Respondents therefore urged this Court to decline to grant the orders sought by the Petitioner and to dismiss the Petition herein with costs to the Respondents.



21. Parties filed their submissions except the 3<sup>rd</sup> respondent which opted to rely on the replying affidavit. The Court has considered the parties' respective cases, material on record and the submissions. The Court returns as follows.
22. To answer the 1<sup>st</sup> issue the Court returns that it has jurisdiction to hear and determine the petition. It is submitted for the Attorney General that the Court lacks jurisdiction because there exist no employment relationship. However, as submitted for the petitioner, the dispute is about employment of a board member to a state corporation. The Court finds that as submitted for the petitioner, such appointment amounted to employment as a public officer as was held in *Rogers Mogaka Mogusu v George Onyango Oloo & 2 others* (2015) eKLR. Lenaola J (as he then was and now Supreme Court Judge) held that the 1<sup>st</sup> Respondent, upon appointment as Chairman of Lake Basin Development Authority, a state corporation, he thereby became a public officer within the definition Article 260 of the *Constitution*.
23. The Court considered the jurisdictional issue upon the same grounds as urged in the instant petition in the case of *Rukaria v Attorney General; Debasso & another (Interested Parties)* (Petition 2 of 2023) [2023] KEELRC 2824 (KLR) (10 November 2023) (Judgment). In that case the Court held, "13.Examining the two cited decisions by the Court of Appeal, it appears to the Court that the overriding consideration in State Corporations is that the board members are public officers, regulated by public service laws, policies and practices; rather than, any other instrument such as in directorships under the *Companies Act* and who are governed by the company's memorandum and articles of association with the *Companies Act* conferring jurisdiction to the High Court in event of disputes about appointment and removal of such company directors.
- 14.In making that finding the Court has as well considered the opinion in *Okiya Omtatah Okoiti v The National Executive of the Republic and 6 others* [2019]eKLR, thus, "The Court has also held that in the public service under the *Constitution* of Kenya 2010, there are no masters and servants so that in public service in the new Republic, the test of master – servant does not obtain towards establishing existence of employment. In *Paul Nyadewo Onyango v Parliamentary Service Commission and another* [2018] eKLR the Court stated, "In the present case, the Court will not therefore place emphasis on the relationships between individual public or state officers. None was a servant or master of the other. What is paramount, in the opinion of the Court, is that the officers interrelate and work together within the lawful prescription of the standards of a good public service delivery. They have no private treaties binding one officer to the other but only the constitutional, statutory and lawful policies or practices that are applicable to the public service and incorporated in the individual officer's contract of service."
24. The 2<sup>nd</sup> issue for determination is whether the 2<sup>nd</sup> respondent had the relevant authority to reappoint Mr. Archibald Kithaka as a member of the 4<sup>th</sup> respondent's board. The petitioner states that the 2<sup>nd</sup> respondent lacked authority to so appoint because the President by Executive Order No 1 of 2023 dated January 2023 had transferred the controlling Ministry of the 4<sup>th</sup> respondent to the 2<sup>nd</sup> respondent but there was no regularizing of that transfer (previously vested in Cabinet Secretary for Science and Technology). Further, section 2 of the *Biosafety Act*, 2009 defines "Minister" to mean the Minister for the time being responsible for matters relating to science and technology. Article 132(3) (c) of the *Constitution* provides that the President shall by a decision published in the Gazette, assign responsibility for the implementation and administration of any Act of Parliament to a Cabinet Secretary, to the extent not inconsistent with any Act of Parliament. The petitioner submits that the reassignment of the 4<sup>th</sup> respondent to the 2<sup>nd</sup> respondent was not regularised by a gazette notice and that it was not consistent with the statutory assignment of the role to the Cabinet Secretary responsible for science and technology per section 2 of the *Biosafety Act*, 2009.



25. For the Attorney General it was submitted that even if there was no gazette on the reassignment, the 2<sup>nd</sup> respondent was guided and protected by provisions of section 7(1) of the sixth schedule of the Constitution to construe the Biosafety Act with necessary alterations, adaptations, qualifications and exceptions for better carrying out of the Act.
26. The Court has considered the rival submissions. The parties mutually agree that the President issued Executive Order No 1 of 2023 of January 2023 had transferred the controlling Ministry of the 4<sup>th</sup> respondent to the 2<sup>nd</sup> respondent. There is no dispute that the President issued Executive Order No 1 of 2023. By so doing, the Court finds that the President effectively made the decision to assign the 4<sup>th</sup> respondent to the 2<sup>nd</sup> respondent. Thus, Article 135 of the Constitution on decisions by the President states, “135. A decision of the President in the performance of any function of the President under this Constitution shall be in writing and shall bear the seal and signature of the President.” It is not urged that the President failed to duly make the decision to reassign per provisions of Article 135. The Court finds that the failure to gazette Executive Order No 1 of 2023 did not by itself impair the reassignment. The gazette notice would serve to inform the public and would amount to a prima facie evidence of the reassignment but not, by itself, the decision to reassign. Thus, even when gazetted, it may be rebutted once it is shown the President’s decision in terms of Article 135 was not made, if it had not been made. In other words, the gazette notice notifies of a decision already made by the President per Article 135, and which, in the instant case, the parties are not in dispute that the President indeed made the reassignment per Executive Order No 1 of 2023. Persuasively, the Interpretation and General provisions Act states, “69. The production of a copy of the Gazette containing a written law or a notice, or of a copy of a written law or a notice, purporting to be printed by the Government Printer, shall be prima facie evidence in all courts and for all purposes whatsoever of the due making and tenor of the written law or notice.”
27. Further, Section 2 of the Interpretation and General Provisions Act Cap 2 provides: “the Minister” means the Minister for the time being responsible for the matter in question, or the President where executive authority for the matter in question is retained by him, or the Attorney-General where executive authority for the matter in question has been conferred on him. It appears that once the President assigned the 4<sup>th</sup> respondent to the 2<sup>nd</sup> respondent, the 2<sup>nd</sup> respondent became the Cabinet Secretary responsible for the 4<sup>th</sup> respondent.
28. The Court returns that the 2<sup>nd</sup> respondent had the necessary statutory authority to make the appointment of the 4<sup>th</sup> respondent’s Board member in terms of section 6(1) (a), (f), and (g) of the Biodiversity Act in addition to members of the Board by virtue of their holding the prescribed public office.
29. To answer the 3<sup>rd</sup> issue the Court returns that as urged for the respondents, the power of the 3<sup>rd</sup> respondent to make appointments may be vested in other persons or authority. In the instant case, the Biodiversity Act 2009 vested in the 2<sup>nd</sup> respondent the authority or power to make the impugned reappointment. Thus, Article 234(2)(a)(ii) of the Constitution gives power to the Public Service Commission to appoint persons to hold office in the public service and that power is subject to the Constitution and legislation as provided in the said Article. The 3<sup>rd</sup> respondent is therefore not vested with the power or authority to make the impugned reappointment.
30. To answer the 4<sup>th</sup> issue, while the appointments to the 4<sup>th</sup> respondent’s Board by the Cabinet Minister are chained by provisions of Article 232 on values and principles of public service, Article 73 (2) (a) on selection on the basis of personal integrity, competence and suitability, and such other constitutional standards as meet the values and principles of governance in Article 10 of the Constitution, in the



instant case, the Court finds that the following bars exist as against interfering with the impugned reappointment, thus:

- a. The impugned decision was a reappointment, albeit belatedly, after the lapsing of 6 months from end of the out-going tenure. Nothing is said of the initial appointment. Accordingly, it is difficult to find that the reappointment was against the principle of competitive selection.
- b. The petitioner was misconceived that the power to appoint vested in the 3<sup>rd</sup> respondent but the Court has found that it constitutionally and by statute properly vested in the 2<sup>nd</sup> respondent.
- c. The petitioner says that the reappointment offended inclusion of all regions or ethnicities. The petitioner while listing the Board members has failed to provide evidence showing their respective communities or regions or ethnicity. Further, it is also clear that some of the board members are by virtue of their holding other public office as prescribed in the Act.
- d. The 3<sup>rd</sup> respondent has confirmed that in exercise of its constitutional mandate it is charged with auditing and reporting on the compliance with Article 232 values and principles and making compliance recommendations as may be appropriate. It appears to the Court that in absence of evidence of non-compliance on the part of the petitioner or such compliance recommendation on the part of the 3<sup>rd</sup> respondent, there would be no basis for the Court's intervention.

31. The Court returns that the petitioner has failed to establish a case for granting of reliefs as prayed for. The Court has considered all circumstances of the case including that the 3<sup>rd</sup> respondent had not yet reported on the grievance at hand and each party to bear own costs of the proceedings.

In conclusion the petition is hereby dismissed with orders each party to bear own costs of the petition.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 18TH OCTOBER 2024.**

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

