



**Gichana v Nyangweso Ag CEO, Chemelil Sugar Co Ltd & 7 others; Auditor General (Interested Party) (Petition 8 of 2022) [2023] KEELRC 42 (KLR) (23 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 42 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
PETITION 8 OF 2022**

**S RADIDO, J**

**JANUARY 23, 2023**

**IN THE MATTER OF APPLICATION UNDER ARTICLES  
10, 22, 23, 27 AND 47 OF THE CONSTITUTION OF  
KENYA, 2010**

**AND**

**IN THE MATTER OF THE PUBLIC SERVICE COMMISSION (PSC) AND STATE  
CORPORATIONS ADVISORY COMMITTEE'S RECOMMENDATIONS AS CONTAINED  
IN THE MWONGOZO CODE OF CONDUCT FOR STATE CORPORATIONS**

**AND**

**IN THE MATTER OF THE DETERMINATION OF THE  
QUESTION OF HOW LONG AN ACTING CEO OF A  
PARASTATAL REMAINS ACTING MD AND WHAT HAPPENS IN THE  
EVENT THE BOARD DOES NOT WANT TO RENEW HIS CONTRACT**

**AND**

**IN THE MATTER OF IRREGULAR APPOINTMENT  
AND CONTINUED NON- APPOINTMENT OF THE  
CURRENT CEO, CHEMELIL SUGAR COMPANY  
LTD CONTRARY TO THE MWONGOZO CODE OF  
CONDUCT AND ETHICS AND MEMORANDUM AND ARTICLES OF ASSOCIATION**

**AND**

**IN THE MATTER OF IRREGULAR HOLDING ONTO DUTY OF  
RETIRED AND IN THE MATTER OF POOR PERFORMANCE OF  
CHEMELIL DUE TO REPUTATION BY CEO AND THE BOARD**

**AND**

**IN THE MATTER OF FINANCE DIRECTOR, CHEMELIL  
SUGAR COMPANY LTD, CONTRARY TO THE**



**MWONGOZO CODE OF CONDUCT AND ETHICS OF PARASTATAL STAFF**

**AND**

**IN THE MATTER OF RUNNING OF CHEMELIL SUGAR COMPANY  
LIMITED BY THE CURRENT AG CEO AND BOARD CURRENTLY  
IN PLACE CONTRARY TO THE SPIRIT AND LETTER OF THE  
MWONGOZO CODE OF CONDUCT AND ETHICS FOR PARASTATAL STAFF**

**AND**

**IN THE MATTER OF NON-RENEWED TERMS AND NON-GAZETTEMENT OF THE  
CURRENT ACTING CEO GABRIEL NYANGWESO, CHEMELIL SUGAR COMPANY LTD**

**AND**

**IN THE MATTER OF FAILURE BY THE INSPECTOR GENERAL  
CORPORATIONS TO DECLARE CHEMELIL SUGAR COMPANY  
LTD INSOLVENT FOR ITS INABILITY TO PAY DEBTORS**

**AND**

**IN THE MATTER OF APPLICATION AND ADHERENCE TO THE MWONGOZO  
CODE OF CONDUCT AND ETHICS FOR PARASTATAL STAFF AND THE  
APPLICATION OF ARTICLES 10, 27 AND 47 OF THE CONSTITUTION**

**BETWEEN**

**CALEB GICHANA ..... PETITIONER**

**AND**

**GABRIEL NYANGWESO AG CEO, CHEMELIL SUGAR CO  
LTD ..... 1<sup>ST</sup> RESPONDENT**

**EMMANUEL OBETCH NGARA, HEAD OF FINANCE (DIRECTOR)  
CHEMELIL SUGAR CO LTD ..... 2<sup>ND</sup> RESPONDENT**

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

**STATE CORPORATIONS ADVISORY COMMITTEE ..... 4<sup>TH</sup> RESPONDENT**

**CABINET SECRETARY, MINISTRY OF AGRICULTURE ..... 5<sup>TH</sup> RESPONDENT**

**CHAIRMAN, BOARD OF DIRECTORS CHEMELIL SUGAR CO  
LTD ..... 6<sup>TH</sup> RESPONDENT**

**INSPECTOR GENERAL, STATE CORPORATIONS ..... 7<sup>TH</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 8<sup>TH</sup> RESPONDENT**

**AND**

**AUDITOR GENERAL ..... INTERESTED PARTY**



## **The continued stay in office as the Acting Chief Executive Officer of Chemilil Sugar Company declared unconstitutional for violating the Constitution and the Mwongozo Code**

*The petition sought a declaration that the 1st and 2nd respondents continued stay in office in the service of the Chemilil Sugar Company without a proper appointment through Kenya Gazette Notices was unconstitutional. The court issued a declaration that the 1st and the 2nd respondents continued stay in office in the service of the Company was unlawful and unconstitutional for violating articles 10 and 232 of the Constitution and the Mwongozo Code and were, therefore, invalid.*

Reported by Kakai Toili

**Labour Law** – employment – employment in State corporations - what was the effect of appointing employees in a State corporation contrary to the Mwongozo Code of Governance for State Corporations – Constitution of Kenya, 2010, articles 10 and 232.

### **Brief facts**

The petitioner contended that the appointment of the 1<sup>st</sup> respondent as acting Chief Executive Officer of Chemelil Sugar Company (the Company) was unlawful because he had not been recruited under a competitive process as contemplated by the Mwongozo Code of Governance for State Corporations (the Mwongozo Code). The petitioner also alleged that the Cabinet Secretary, Agriculture (the 5<sup>th</sup> respondent), Principal Secretary and Inspector General of State Corporations had failed in their duties with respect to the company.

The petitioner thus sought for among other orders; a declaration that the 1<sup>st</sup> respondent, the retired Head of Finance (the 2<sup>nd</sup> respondent), continued stay in office in the service of the Company without a proper appointment through Kenya Gazette Notices were unconstitutional and therefore invalid.

### **Issues**

What was the effect of appointing employees in a State corporation contrary to the Mwongozo Code of Governance for State Corporations.

### **Held**

1. There were public institutions which had been established to investigate, audit and prosecute allegations of corruption or misconduct in public office. Such bodies included the National Police Service, the Auditor General, the Ethics and Anti-Corruption Commission and the Director of Public Prosecutions. It would, therefore, not be within the province of the court to grant orders set out in paragraphs 5(iii), (v), (vi), (vii.), and (viii).
2. The petitioner did not prove that the respondents had illegally promoted any senior managers nor disclosed the identities of such managers in the body of the petition or in the prayers sought. The court was, therefore, unable to make a blanket or at large order as prayed.
3. The acting chief executive officer since 2017, was in office unlawfully and contrary to the Mwongozo Code. The 2<sup>nd</sup> respondent had been serving unlawfully and contrary to the provisions of the Mwongozo Code.
4. The 5<sup>th</sup> respondent was guilty of dereliction of duty for failing to constitute a Board for the Company.

*Petition partly allowed.*

### **Orders**

- i. *A declaration was issued that the 1<sup>st</sup> respondent and the 2<sup>nd</sup> respondent, continued stay in office in the service of the Company was unlawful and unconstitutional for violating articles 10 and 232 of the Constitution and the Mwongozo Code and were, therefore, invalid.*
- ii. *An order was issued directing the 5<sup>th</sup> respondent to appoint or advertise for the recruitment of the Board of Directors for Chemelil Sugar Company Ltd.*



- iii. *An order was issued directing the 5<sup>th</sup> respondent to cause to be advertised for the recruitment of a new chief executive officer for the company.*
- iv. *No order on costs.*

### **Citations**

#### **Statutes**

Constitution of Kenya articles 10; 162; 232; 234(2)(c),(d),(e), (h), (i)(d) 249(1)(b) (c) ; 252(1)(a); Chapter 6- (Interpreted)

Evidence Act (cap 80) In general - (Cited)

Public Officers Ethics Act (cap 185 B) In general- (Cited)

Public Service Value Act (185A) In general- (Cited)

#### **Advocates**

*1st -3rd Respondents* for 1st -3rd Respondents

*Ms Wangeci Gichangi, Principal Legal Counsel, Public Service Commission* for 4th Respondent

*Ms Essendi, Principal Litigation Counsel* for 5th to 8th Respondents

*Ms Essendi, Principal Litigation Counsel* for Interested Party

## **JUDGMENT**

1. The petition herein is not only incoherent but verbose.
2. Caleb Gichana (the petitioner) lodged a petition with the High Court contending that the appointment of Gabriel Nyangweso (the 1<sup>st</sup> respondent) in 2017 as acting Chief Executive Officer of Chemelil Sugar Company (the company) was unlawful because he had not been recruited under a competitive process as contemplated by the Mwongozo Code of Governance for State Corporations.
3. The Petitioner also contended that the 1<sup>st</sup> respondent was incompetent and had run down the company through malpractices and irregularities, including nepotism.
4. Apart from complaints against the 1<sup>st</sup> respondent, the petitioner also alleged that the Cabinet Secretary, Agriculture, Principal Secretary, and Inspector General of State Corporations had failed in their duties with respect to the company.
5. The petitioner sought orders:
  - i. An order be made quashing all new appointments and promotions of senior managers made contrary to the Mwongozo code of conduct and ethics and public service commission's regulations, policies and rules without a Kenya gazette notice as required by the law.
  - ii. A declaration that the acting CEO of Chemelil Sugar Company Ltd, the retired Head of Finance, continued stay in office in the service of the said state corporation without a proper appointment through Kenya gazette notices are unconstitutional for violating articles 10 and 232 of the Constitution and are, therefore, invalid.
  - iii. A declaration that the acting CEO, Gabriel Nyangweso, Immanuel Ngara, Head of Finance and all other senior managers of Chemelil Sugar Company Ltd be surcharged what they have been earning over and above the normal salaries and allowances due to the illegal promotions and appointments.



- iv. An order directing the Cabinet Secretary, Ministry of Agriculture, to advertise for the recruitment of a new CEO and Board of Directors for Chemelil Sugar Company Ltd within a period the Honourable court shall deem fit and appropriate in the circumstances of this case.
  - v. That an order be issued directing and/or recommendation be given to the relevant bodies to take necessary disciplinary action against those officers of Chemelil Sugar Company Ltd who may be found to have embezzled, misappropriated and or been overpaid government funds irregularly and illegally within a time frame given by this court during the years 2018/2019, 2019/20 and 2020/21 financial years for this court and the public to be satisfied that the company is worth continued funding by the state.
  - vi. A declaration that those people found to have flouted public procurement laws, public finance management, abused public office, and mismanaged government properties be arrested and charged for the relevant crimes they may have committed to plant sense and sanity into state corporations.
  - vii. An order directing the acting Chief Executive Officer Gabriel Nyangweso and the retired Head of Finance who are still illegally in office, be surcharged the salaries and allowances they have taken from the company irregularly and illegally as they were in office contrary to the law.
  - viii. An order that all those found to have embezzled public funds and run down Chemelil Sugar Company either as MD, former MD, Manager and or board of directors unfit to hold public office as well as run or elective positions in Kenya and are guilty under chapter 6 of the Constitution of Kenya.
6. On 2 December 2021, the 1<sup>st</sup> to 3<sup>rd</sup> respondents objected to the jurisdiction of the High Court in light of article 162 of the Constitution.
7. The Honourable Attorney General filed grounds of opposition to the petition on February 18, 2022 on behalf of the 4<sup>th</sup> to 8<sup>th</sup> respondents and the interested party.
8. In the grounds, the Honourable Attorney General contended:
- i. That the petition before the court is premature, incompetent, frivolous, vexatious, unknown in law and devoid of merit.
  - ii. That the petition does not raise any cause of action against the 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> respondents herein.
  - iii. That the power to appoint a CEO is vested in the Board of Management as per the provision of clauses 1.2 and 1.18 of the Mwongozo Code of Governance for State Corporations.
  - iv. That the petitioner's case is largely incoherent, misconceived and misplaced, as the petitioner has not sufficiently put forward any merited arguments.
  - v. That the affidavits sworn in support of this application are equally incoherent, unconscionable and devoid of any factual nor legal issues for determination.
  - vi. That the petition is misconceived, incompetent and bad in law and the orders sought by the petitioners are not tenable against the respondents.
  - vii. That the entire petition is premised on hearsay and inadmissible evidence contrary to the express provisions of the Evidence Act, cap 80 of the Laws of Kenya.
  - viii. That the petition/application lacks merit and should be dismissed with costs.



9. The grounds prompted the petitioner to file what he called preliminary objection against the grounds of opposition on March 2, 2022.
10. The High Court considered the objection, and on June 27, 2022, it transferred the petition to this court.
11. When the petition was placed before this court on October 6, 2022 and October 13, 2022, it directed the parties to file and exchange further pleadings and submissions ahead of judgment today.
12. The Public Service Commission filed a replying affidavit to the petition on November 21, 2022.
13. In the affidavit, the Chief Executive of the Commission deposed that despite exercising its mandate under articles 249(1)(b) and (c); 234(2)(c),(d),(e), (h), (i) and (j); 252(1)(a) and (d) of the Constitution, the Board and Management of Chemelil Sugar Company Ltd had declined to cooperate with it.
14. None of the parties filed submissions as directed.
15. The court has already alluded to the incoherence of the petition as drafted, but it has considered the material placed before it and has discerned the following facts from the affidavits.
  - i. The 1<sup>st</sup> and 2<sup>nd</sup> respondents' appointment as acting Chief Executive Officer and Head of Finance contravened the provisions of the Constitution, Public Officers Ethics Act, Public Service Value Act and the Mwongozo Code as they were not done through a competitive process.
  - ii. The 1<sup>st</sup> respondent has acted as the Chief Executive Officer since 2017 contrary to the Mwongozo Code and a Circular No. 10 of 2010 dated November 23, 2010 from the Head of the Public Service on renewal of contracts of Chief Executive Officers of State Corporations (Circular exhibited).
  - iii. The 1<sup>st</sup> respondent ignored a recommendation from the Ethics and Anti-Corruption Commission to initiate disciplinary action against an employee Linda Kiplagat who was involved in corrupt activities (Memo dated April 18, 2018 exhibited).
  - iv. The Board has never evaluated the performance of the staff and directors.
  - v. The Board and Management of the company have not operated in a transparent manner.
  - vi. The assets of the company have been vandalised or sold irregularly.
  - vii. The Cabinet Secretary, Ministry of Agriculture, is guilty of dereliction of duty for not constituting a Board for Chemelil Sugar Company Ltd.
16. The respondents did not file any affidavits to rebut or controvert the factual assertions by the petitioner.
17. The court has considered this scenario, the affidavit by the Chief Executive Officer of the Public Service Commission, and the reliefs sought by the petitioner and, therefore, makes the following findings.
18. One, there are public institutions which have been established to investigate, audit and prosecute allegations of corruption or misconduct in public office.
19. Such bodies include the National Police Service, the Auditor General, the Ethics and Anti-Corruption Commission and the Director of Public Prosecutions.
20. It would, therefore, not be within the province of the court to grant orders set out in paragraphs 5(iii), (v), (vi), (vii), and (viii) herein above.



21. Two, the petitioner did not prove that the respondents had illegally promoted any senior managers nor disclosed the identities of such managers in the body of the Petition or in the prayers sought.
22. The court is, therefore, unable to make a blanket or at large order as prayed in prayer 5(i) herein above.
23. Three, Gabriel Nyangweso, the acting Chief Executive Officer since 2017, is in office unlawfully and contrary to the Mwongozo Code.
24. Four, Emmanuel Obetch Ngara, Head of Finance has been serving unlawfully and contrary to the provisions of the Mwongozo Code of Governance for State Corporations.
25. Last, the Cabinet Secretary, Ministry of Agriculture is guilty of dereliction of duty for failing to constitute a Board for Chemelil Sugar Company Ltd.
26. It was reckless of the respondents and more so the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents to opt not to participate in the substantive hearing of the petition by failing to file appropriate affidavits.

### **Conclusion and Orders**

27. Arising from the above the court issues the following orders.
  - i. A declaration be and is hereby issued that Gabriel Nyangweso, the acting CEO of Chemelil Sugar Company Ltd and Emmanuel Obetch Ngara, the retired Head of Finance, continued stay in office in the service of the Chemelil Sugar Company Ltd is unlawful and unconstitutional for violating articles 10 and 232 of the Constitution and the Mwongozo Code of Governance and are, therefore, invalid.
  - ii. An order be and is hereby issued directing the Cabinet Secretary, Ministry of Agriculture to appoint or advertise for the recruitment of the Board of Directors for Chemelil Sugar Company Ltd forthwith.
  - iii. An order be and is hereby issued directing the Cabinet Secretary, Ministry of Agriculture to cause to be advertised for the recruitment of a new Chief Executive Officer for Chemelil Sugar Company Ltd.
28. The petition was in the public interest. No order on costs.

**DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 23<sup>RD</sup> DAY OF JANUARY 2023.**

**Radido Stephen, MCI Arb**

**Judge**

**Appearances**

Petitioner in person

For 1<sup>st</sup> -3<sup>rd</sup> Respondents Otieno, Yogo, Ojuro & Co. Advocates

For 4<sup>th</sup> Respondent Ms Wangeci Gichangi, Principal Legal Counsel, Public Service Commission

For 5<sup>th</sup> to 8<sup>th</sup> Respondents Ms Essendi, Principal Litigation Counsel

For Interested Party Ms Essendi, Principal Litigation Counsel

Court Assistant Chrispo Aura

5| 17 Page Kisumu Petition No. 8 of 2022

