



Okoiti v Board, Export Processing Zones Authority & 3 others; Otieno (Interested Party) (Petition E133 of 2021) [2023] KEELRC 492 (KLR) (28 February 2023) (Ruling)

Neutral citation: [2023] KEELRC 492 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E133 OF 2021**

J RIKA, J

FEBRUARY 28, 2023

BETWEEN

OKIYA OMTATA OKOITI PETITIONER

AND

BOARD, EXPORT PROCESSING ZONES AUTHORITY 1ST RESPONDENT

**CABINET SECRETARY INDUSTRIALIZATION, TRADE, AND ENTERPRISE
DEVELOPMENT 2ND RESPONDENT**

HON. ATTORNEY-GENERAL 3RD RESPONDENT

HENRY OBINO 4TH RESPONDENT

AND

EZEKIEL OWUOR OTIENO INTERESTED PARTY

RULING

1. The Court delivered Judgment in this Petition, on July 29, 2022. The following Orders were granted: -
 - a. It is declared that the reappointment of the 4th Respondent, Henry Obino as the Acting CEO of the EPZ Authority is invalid, null and void ab initio.
 - b. It is declared that the Cabinet Secretary cannot overrule the Board on appointment of the CEO of the EPZ Authority.
 - c. That the Cabinet Secretary's letter ref. MOI/CS.1/30 vol. 111 / [13] dated August 11, 2021, purporting to reappoint Henry Obino to the position of Acting CEO for a further period of 3 months, with effect from August 13, 2021 is hereby quashed.



- d. That the Cabinet Secretary shall immediately gazette the appointment of the Interested Party, Ezekiel Owuor Otieno, as the new Substantive CEO of the EPZ Authority.
 - e. No order on the costs.
2. The 1st Respondent filed an Application for Review of Judgment, and Stay of Execution of Judgment, dated August 1, 2022, citing Rule 33 of the *E&LRC [Procedure] Rules, 2016*. The Application is founded on the Affidavit of Winnie Sang, Acting Corporate Secretary and Manager Legal Services, sworn on August 1, 2022.
 3. Sang states that the Board Meetings, where the appointment of the Interested Party was made, were not sanctioned; the nominating Directors were conflicted; recruitment criteria and conditions were varied midway; and the nominees including the Interested Party, did not meet the set standards for appointment. She states further that an audit report dated August 13, 2021, revealed massive irregularities. The Board did not in any event recommend the Interested Party as the sole candidate. The Replying Affidavit of the Late Board Chairman Paul Gicheru, sworn on August 30, 2021, did not address the audit report of August 13, 2021.
 4. The Application is opposed through the Affidavit of the Interested Party, who was the beneficiary of the Judgment sought to be reviewed, sworn on 19th August 2022. He states that the Application, has not met the requirements of Rule 33 of this Court's *[Procedure] Rules, 2016*, to warrant review. The 1st Respondent had the audit report before the Petition was filed. It did not produce the report before, or during, the hearing of the Petition. It instead filed an Application dated July 21, 2022, 8 days before the date of the Judgment, seeking to introduce the report. The Chairman of the 1st Respondent did not mention the report, in his Replying Affidavit, sworn on August 30, 2021. The 2nd Respondent, who commissioned the report, did not produce the same before the Court. The Court in any event, found in its Judgment that the 2nd Respondent was out of order in commissioning the audit. The Chairman, in his Replying Affidavit at paragraph 15, confirmed that the Interested Party was recommended for appointment as the CEO of the EPZA. The letter communicating the recommendation, from the 1st Respondent to the 2nd Respondent, is dated August 4, 2021. On stay of execution, the Interested Party states that there is no Appeal filed against the Judgment, and orders of stay cannot issue in a vacuum.
 5. The record indicates the 2nd, 3rd and 4th Respondents did not participate in the Application for Review. This was confirmed by Learned State Counsel Mr. Mulili for the said Parties, when the Application came up for mention on December 14, 2022. The Petitioner and the 1st Respondent confirmed filing and exchange of their Submissions on the said date, December 14, 2022, and were advised Ruling would be delivered on notice.

The Court Finds:-

6. The 1st Respondent has not satisfied the requirements of Rule 33 of the E&LRC [Procedure] Rules, 2016, in seeking to invoke the review jurisdiction of this Court.
7. Parties confirmed to have filed their Submissions with regard to the Petition, on March 29, 2022, when they sought a date for Judgment.
8. The Court scheduled Judgment for delivery on July 29, 2022.
9. The 1st Respondent through another Law Firm, rather than Adrian Kamotho Njenga & Company Advocates who continues to be on record for the Respondent, irregularly filed an Application dated July 21, 2022, asking the Court to defer its Judgment, which was scheduled for delivery on July 29, 2022, 7 days away, ostensibly to allow the 1st Respondent adduce further evidence. The Application



was filed in a skeleton file, because the main file was in the hands of the Judge, with judgment-writing underway, ready for delivery 7 days later.

10. Evidence sought to be adduced was in the form of an audit report commissioned by the 2nd Respondent, intended to show that there were anomalies in recruitment of the CEO.
11. The Judgment addresses the audit process at paragraph 35. It was the view of the Court that there is no law, authorizing Cabinet Secretaries to audit State Corporations, and that investigations if any, ought to have been carried out by Inspector-General of State Corporations under Section 18 of the *State Corporations Act*, upon request of the State Corporations Advisory Committee or the Controller and Auditor-General.
12. It is correctly submitted by the Interested Party that in any event, the report was in existence at the time Parties concluded their pleading and hearing. Neither the 1st Respondent, nor the 2nd Respondent produced the report, whatever its worth. It is a document which could have with reasonable diligence, been produced before the hearing and judgment, and not sought to be sneaked in through a curiously created skeleton file, 7 days before the date of Judgment.
13. The Court does not think that the report would have altered its view on the role of the 2nd Respondent, to commission audit of a State Corporation.
14. The Court was satisfied, as it is today, that the recruitment of the Interested Party as the CEO EPZA, was carried out in accordance with the law. The Board which gave the recommendation was quorate, with 12 out of 13 members present. There was nothing to suggest any member was conflicted. No conflict of interest against any member, is disclosed by the 1st Respondent. The Interested Party was scored the highest by the Board, at 85.5% while his closest challengers Orumoi Taju Jonah Muzee, and Adan Mohammed Noor, scored 73.4% and 72.18% respectively.
15. The Court observed that the EPZA has been without a substantive CEO from 2018, which can be attributed to vested interests. The Court does not see why the Interested Party should be denied the job, having applied for the job, having been shortlisted, interviewed and emerged at the top. He was competitively recruited, and meritocracy in public service, under Article 232 of *the Constitution*, demands that the job is given to him. If he is no longer interested in serving as the CEO EPZA, only he can communicate his lack of interest to the Respondents. The Court cannot undo its Judgment, or undo the appointment of the Interested Party as the CEO, EPZA. His legitimate and reasonable expectation, is to serve as the CEO of the EPZA. This has anchorage under Articles 41 and 232 of *the Constitution*.

It is ordered:-

- a. The Application dated August 1, 2022, filed by the 1st Respondent is declined.
- b. For avoidance of doubt, the Application filed by the 1st Respondent irregularly, through a skeleton file, dated July 21, 2022, is expunged from the record and any consequential orders issued therein, set aside.
- c. Parties shall comply in full, with the Judgment on record.
- d. No order on the costs in both applications.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 28TH DAY OF FEBRUARY, 2023.

JAMES RIKA



JUDGE

