



**Gichana v Gabriel Nyangweso AG CEO, Chemelil Sugar Co Ltd & 8 others; Auditor General (Interested Party) (Petition 8 of 2022) [2023] KEELRC 1009 (KLR) (3 May 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1009 (KLR)

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

**S RADIDO, J  
MAY 3, 2023**

**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  
CHEMELIL SUGAR CO LTD ..... 3<sup>RD</sup> RESPONDENT  
PUBLIC SERVICE COMMISSION ..... 4<sup>TH</sup> RESPONDENT  
STATE CORPORATIONS ADVISORY COMMITTEE ..... 5<sup>TH</sup> RESPONDENT  
CABINET SECRETARY, MINISTRY OF AGRICULTURE ..... 6<sup>TH</sup> RESPONDENT  
CHAIRMAN, BOARD OF DIRECTORS CHEMELIL SUGAR CO LTD ..... 7<sup>TH</sup> RESPONDENT  
INSPECTOR GENERAL, STATE CORPORATIONS ..... 8<sup>TH</sup> RESPONDENT  
HON ATTORNEY GENERAL ..... 9<sup>TH</sup> RESPONDENT**

**AND**

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

**RULING**

1. In a judgment delivered on 23 January 2023, the Court granted 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.
2. The 1<sup>st</sup> to 3<sup>rd</sup> Respondents were dissatisfied with the orders and on 30 January 2023, they moved the Court seeking orders:
  - i. ...
  - ii. ...
  - iii. That this Honourable Court be pleased to set aside the entire judgment dated 23<sup>rd</sup> January 2023 and the Respondents be granted leave to file their Response to the Petition.
  - iv. That the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents be allowed to adduce evidence by way of documents in opposition to the Petition and that the Petition be heard afresh.
  - v. That the costs of this application be provided for.
3. The grounds advanced in support of the application were that the orders issued by the Court were drastic such that they would lead to the shutdown of Chemelil Sugar Co. Ltd; the failure to respond to the Petition and or file submissions was not deliberate but was due to a mistake on the part of the advocate on record; there was a good defence to the Petition in that the 1<sup>st</sup> Respondent had received a letter instructing him to continue acting as the Chief Executive Officer pending recruitment of a substantive Chief Executive Officer and that it was in the public interest to have all the parties heard.
4. The Petitioner filed a replying affidavit in opposition to the application on 6 February 2023, and therein he contended that the Respondents had failed to file a Response within the time prescribed by the relevant Rules; that the Respondents had not demonstrated how Chemelil Sugar Co. Ltd would be affected if the orders sought were not granted; the Respondents had not demonstrated substantial loss likely to be suffered if the application was not allowed and that the application was bad in law and an afterthought.
5. The 4<sup>th</sup> Respondent filed a replying affidavit sworn by its Chief Executive Officer wherein it was deponed that the Court had indulged the Respondents on 13 October 2022 and allowed them time to respond to the Petition but the directive was not complied with for over 3 months; that the reasons given for the failure to comply were not sufficient; that section 34(3) of the Public Service Commission Act restricted the time a person could act in an office and that the Cabinet Secretary had already been advised to commence the process of complying with the judgment.
6. The Principal Secretary, the Ministry of Agriculture also filed a replying affidavit on 28 February 2023, attesting that the recruitment process for a new Board of Directors had started and an acting Chief Executive Officer had been appointed.



7. The Court took oral arguments on 6 March 2023 and the parties reiterated the assertions made in the affidavits.
8. The Court has considered the record, Motion, affidavits and oral arguments and makes the following determinations.
9. One, the 1<sup>st</sup> to 3<sup>rd</sup> Respondents were served with the Petition and the Motion which accompanied it on 28 October 2021. The service was acknowledged by one Mary, a Secretary to the Chief Executive Officer.
10. Upon service, these Respondents caused the firm of Otieno, Yogo, Ojuro & Co. Advocates to file a Notice of Appointment of Advocates on 2 December 2021.
11. In terms of Rule 15(2)(a) of the [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules, 2013](#), the 1<sup>st</sup> to 3<sup>rd</sup> Respondents should have filed a response to the Petition within 7 days (the other Respondents had 14 days within which to respond. The Respondents also have another window of 14 days to file further affidavits).
12. The Respondents did not comply with the Rule.
13. In the course of time, the High Court transferred the Petition to this Court, and on 6 October 2022, the Court directed that parties appear for directions on 13 October 2022.
14. The 1<sup>st</sup> to 3<sup>rd</sup> Respondents were represented on 13 October 2022.
15. During the said session, the Court ordered all the Respondents to file and serve responses on or before 4 November 2022.
16. The Court also gave directions on the filing and exchange of submissions.
17. The 1<sup>st</sup> to 3<sup>rd</sup> Respondents did not take advantage of the indulgence by the Court to file and serve Responses and submissions.
18. The 1<sup>st</sup> to 3<sup>rd</sup> Respondents had two opportunities (as prescribed under the Rules and upon leave granted by the Court) to file and serve responses to the Petition but they failed to avail themselves twice to show an interest in defending the Petition.
19. In consideration of the above, and the fact that the Court is called upon to exercise a discretionary power, the Court declines to exercise the discretion as prayed.

### **Conclusion and Orders**

20. The Motion filed in Court on 30 January 2023 is dismissed. Costs in the cause.

**Delivered virtually, dated and signed in Kisumu on this 3rd day of May 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**

