



**Mboya v Pharmacy and Poisons Board & 3 others (Petition E030 of 2023)
[2023] KEELRC 3307 (KLR) (20 December 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3307 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E030 OF 2023**

B ONGAYA, J

DECEMBER 20, 2023

IN THE MATTER OF: ARTICLES 2,19, 20 (1-4), 21(1) & 3,22(1) &(2)(B)&(C), 23(1) &(3), 27, 28,41(1)&(2)(B), 47, 48,50(1), 73, 75, 159,162(2)(A), 165(3)(B), 232, 258(1)&(2)(B)&(C) AND 259(1) OF THE CONSTITUTION OF KENYA IN THE MATTER OF: THE EMPLOYMENT ACT, 2007IN THE MATTER OF PHARMACY AND POISONS ACT, CHAPTER 244 OF THE LAWS OF KENYA IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS PRACTICE AND PROCEDURE RULES)IN THE MATTER OF CONTRAVENTION OF NATIONAL VALUES AND PRINCIPLES OF GOVERNANCE UNDER ARTICLE 10, THE PRINCIPLES OF LEADERSHIP AND INTEGRITY UNDER ARTICLE 73, AND THE VALUES AND PRINCIPLES OF PUBLIC SERVICE UNDER ARTICLE 232 OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

APOLLO MBOYA PETITIONER

AND

PHARMACY AND POISONS BOARD 1ST RESPONDENT

PRINCIPAL SECRETARY MINISTRY OF HEALTH (STATE DEPARTMENT FOR PUBLIC HEALTH & PROFESSIONAL STANDARDS) ... 2ND RESPONDENT

DR. FRED MOIN SIYOI 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

JUDGMENT

1. The petitioner filed the petition on February 18, 2023 in person and also being an Advocate styled as Apollo & Company Advocates. The petitioner prayed for:



- a. A declaration be and hereby issued that the action of the 2nd respondent to renew the term of the 3rd respondent as the CEO/secretary of the 1st respondent through the press release dated 20.01.2023 was in excess of the powers and violated the provisions of the *Pharmacy and Poisons Act*, cap 244 and amounted to abuse of office.
 - b. A declaration be and is hereby issue that the action of the 2nd respondent to renew the term of the 3rd respondent as the CEO/secretary of the 1st respondent through the press release dated 20.01.2023 violated national values and principles of governance under Article 10, the principles of leadership and integrity under article 73, and the values and principles of public service under article 232 of the *Constitution of Kenya*, 2010.
 - c. An order of certiorari be and hereby issued removing into this court and quashing the decision of the 2nd respondent to renew the term of the 3rd respondent as the CEO/secretary of the 1st respondent through the press release dated January 20, 2023.
 - d. Any other relief and/or orders the Honourable Court deems appropriate, just and fit to grant.
 - e. The costs of the petition be provided
2. The petition was based upon the petitioner’s supporting affidavit and exhibits thereto filed together with the petition and sworn on February 17, 2023. The petitioner’s case is as follows:
- a. The *Pharmacy and Poisons Act*, cap 244 under section 5 provides that there shall be a registrar of the board who shall be the chief executive officer (CEO) of the board competitively recruited and appointed by the board upon such terms and conditions of service determined by the board upon the advice of the Salaries and Remuneration Commission.
 - b. The mwongozo code of governance for state corporations, under clause 1.2 provides as a role of the board, “hire the CEO on such terms and conditions of service as may be approved by the relevant government organs”.
 - c. The procedure for appointment of CEOs is spelt out under the circular OP/CAB.9/21/2A/LII/43 dated November 23, 2004 on “Guidelines on Terms and Conditions of Sservice for State Corporations – Chief Executive Officers, Chairmen and Board members, Management Staff, Unionisable Staff”. The circular under clause 15 provides that CEOs recruitment should be competitive and transparent based on a verifiable recruitment procedure approved by the board.
 - d. The 3rd respondent was an acting CEO of the 1st respondent courtesy of the consent dated October 19, 2020 in ELRC Petition no. 186 of 2019 *Dr Fred Siyoi v The Pharmacy & Poisons Board of Kenya* and has never been substantively appointed in the said position.
 - e. That in ELRC Pet No. 186 of 2019 *Dr. Fred Siyoi v The Pharmacy & Poisons Board of Kenya* Dr. Fred Moin Siyoi consented that owing to the lapse of the term of the 1st respondent board members on 03.03.2020 the substantive question relating to the chief executive officer/ registrar of the 1st respondent, shall be considered by the incoming board.
 - f. That in the ruling of Machakos High court Constitutional petition No. 2 of 2019 *Dr Fred Moin Siyoi*, reverted to the position of acting CEO of the pharmacy and poisons board unless his appointment in the said acting position was revoked.
 - g. The CEO wishing to be re-appointed indicated interest by writing to the board at least six months before expiry of his/her term.



- h. The appointment of the chairperson and members of the 1st respondent board was revoked vide gazette notices no. 630 and 636 all dated January 19, 2023.
 - i. Dr. Josephine Mburu the Principal Secretary Ministry of Health (State Department for Public Health & Professional Standards) usurped the powers and mandate of the Pharmacy and Poisons Board by renewing the term of the CEO/secretary of the board through a press release dated 20.01.2023.
 - j. The 3rd respondent does not have any contract for the position of CEO/Secretary pharmacy and poisons board capable of being renewed as he was never appointed substantively and even if there was one, it is the mandate of the Board of the Pharmacy and Poisons Board to renew.
 - k. The petitioner contends that the action of the principal Secretary Ministry of Health (State Department for Public Health & Professional Standards) is in violation of the *Pharmacy and Poisons Act* cap 244, section 5, the *Mwongozo Code of Governance* for state corporations clause 1.2, the Circular OP/CAB.9/21/2A/LII/43 dated November 23, 2004
 - l. That unless the court intervenes the 2nd and 3rd respondent will continue to violate the law and policies of good governance.
3. The 3rd respondent filed his replying affidavit sworn on November 13, 2023 and drawn by Chimei & Malenya Co. Advocates. It was stated and urged as follows:
- a. The impugned press release of January 20, 2023 has been overtaken by events.
 - b. The 3rd respondent's appointment as the 1st respondents acting CEO for a period of 6 months from February 28, 2023 to August 28, 2023 was done by the Board.
 - c. The Court in ELRC Petition E077 of 2023 *Dr. Magare Gikenya v CS Health & others* delivered a ruling on June 22, 2023 which affirmed his acting position as CEO/Registrar.
 - d. He was subsequently re-appointed by the board as the substantive CEO/registrar of the 1st respondent.
 - e. The appointments of the 3rd respondent both acting and the substantive appointment as CEO/Registrar of the 1st respondent was done by the board of the 1st respondent in accordance with section 5 of the *Pharmacy and Poisons Act* and not by the 2nd respondent.
4. The 1st respondent filed the Replying Affidavit of Kibet Kisorio Head Legal services at the Pharmacy and Poisons Board, sworn on November 14, 2023 and through G&A Advocates LLP. It was argued and stated thus:
- a. The 3rd respondent had been acting CEO/registrar of the board since March 17, 2017. The board advertised for a vacancy in the position of the CEO/Registrar on January 25, 2019 which was challenged in Machakos petition no. 2 of 2019.
 - b. On February 27, 2019 the 3rd respondent was appointed as the CEO/Registrar of the board for a period of 4 years. As per the letter of appointment the 3rd respondent was eligible for reappointment for a further term of four years subject to successful performance.
 - c. The court in the Wambua Maithya case delivered its judgment on 26.09.2019 and quashed the board's decision in the daily newspapers of 25.01.2019 of advertisement for the vacant position of registrar/CEO of the Pharmacy and Poisons Board; and any other consequent attendant



process or decision including final appointment of registrar/CEO of the pharmacy and poisons board.

- d. The same court in the ruling delivered on June 17, 2020 clarified that Dr. Fred Siyoi reverted to his position as the acting CEO of the board.
 - e. An application to review, vary and/or set aside the ruling delivered on 17.06.2020 was dismissed by the court on February 22, 2021.
 - f. Vide a letter dated October 4, 2019 the board terminated the 3rd respondent's contract a decision that was challenged in Nairobi ELRC petition no. 186 of 2019 Dr. Fred Siyoi v Pharmacy and Poisons Board. The court gave an order on October 27, 2020 stating that 'for the avoidance of doubt the prevailing *status quo* is that the petitioner is serving as the chief executive officer/registrar of the respondent'. This order of the court has not been challenged and therefore remains in force.
 - g. The 3rd respondent was a substantive employee of the board by virtue of the order dated October 27, 2020.
 - h. The 3rd respondent expressed his interest to be re-appointed on 25.08.2022 as his contract was bound to expire on February 27, 2023. The board responded to this request vide a letter dated 13.01.2023 where it declined his request for renewal of his term.
 - i. On 20.01.2023 the chairperson of the board received a request from the 3rd respondent for consideration of the decision of the previous board given on 13.01.2023 that declined the 3rd respondent's request for renewal of the contract and the appeal dated 16.01.2023.
 - j. Owing to the limited time the new board required to consider the 3rd respondent's request for re-appointment, the board in the meeting held on February 27, 2023 resolved to extend for 6 months the contract term with effect from February 28, 2023.
 - k. On 19.05.2023 after undertaking a comprehensive performance evaluation of the CEO the board resolved to re-appoint the 3rd respondent for a period of four years effective from February 28, 2023.
 - l. The 1st respondent maintains that the appointment of the 3rd respondent as the CEO/registrar of the board was done by a lawful appointing authority in accordance with sections 4 and 5 of the *Pharmacy And Poisons Act*.
5. Final submissions were filed for the parties. The Court has considered all the material on record. The Court returns as follows.
 6. To answer the 1st issue, while the respondents urge that the impugned action of the 2nd respondent to renew the term of the 3rd respondent as the CEO/secretary of the 1st respondent through the press release dated January 20, 2023 has since been overtaken, the Court as well finds that the press release did not show that the Principal Secretary by herself had renewed the CEO's contract of service. The Court has considered the impugned press release of January 20, 2023. It stated as follows:

“Press Release

For Immediate Release

The Ministry of Health's attention has been drawn to erroneous communication by various media houses that Dr. Jacinta Wasike had been appointed as acting CEO of the Pharmacy and Poisons Board.



The Ministry wishes to clarify that no such has been made. The Ministry confirms that the contract of the incumbent CEO, Dr. Fred Siyoi has been renewed for a second term to facilitate continuity in the delivery of the country's bid to attain international standards in the regulation of health products and technologies.

We hope the media will withdraw the erroneous reportage.

Thank you.

Signed

Dr. Josephine Mburu., Ph.D.,

Principal Secretary”

The Court finds that the press release was not an instrument appointing Dr. Fred Siyoi as CEO substantively or to act by the Principal Secretary, but it was effectively a conveyance by the Principal Secretary that the contract of the incumbent CEO, Dr. Fred Siyoi has been renewed for a second term. It did not state that the renewal had essentially been carried out by the Principal Secretary. The Court finds that there is no material before the Court to show that the Principal Secretary, the 2nd respondent by that press release or other instrument had renewed the contract of service of the 3rd respondent as CEO. It appears to the Court while the Principal Secretary would not have authority to renew the contract of the 3rd respondent and the petitioner's case and submissions as to applicable provisions of the Constitution, statutes and policies are upheld, in fact, the 2nd respondent has not been shown to have so renewed the contract of the 3rd respondent.

7. To answer the 2nd issue, the Court returns that in absence of the 2nd respondent's decision renewing the term of the 3rd respondent as CEO/Secretary of the 1st respondent the orders as prayed for will not issue.
8. To answer the 3rd issue, the Court finds that as per the matters set out in the replying affidavits, after the impugned press release of January 20, 2023 numerous actions and decisions have been made as elaborated for the respondents consequence of which, the respondent's assertion that circumstances surrounding that press release have since been overtaken is an irresistible finding by the Court.
9. The Court has considered that by the instant petition the respondents have come out to set the record and clarify decisions made about the office of the Registrar and Chief Executive Officer of the Pharmacy and Poisons Board and which disclosure was in the public interest. Accordingly, the petition will be determined with orders each party to bear own costs of the petition.

In conclusion, the petition is hereby determined in terms of the findings in this Judgment with orders each party to bear own costs of the petition.

Signed, dated and delivered by video-link and in court at Nairobi this Wednesday 20th December, 2023.

BYRAM ONGAYA

PRINCIPAL JUDGE

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