



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. E022 OF 2021

(Before Hon. Lady Justice Maureen Onyango)

REPUBLIC.....APPLICANT

VERSUS

STATE CORPORATIONS' ADVISORY COMMITTEE (SCAC).....1ST RESPONDENT

THE CABINET SECRETARY, MINISTRY OF ICT

INNOVATION AND YOUTH AFFAIRS.....2ND RESPONDENT

KENYA FILM CLASSIFICATION BOARD.....3RD RESPONDENT

AND

CHRISTOPHER WAMBUA.....INTERESTED PARTY

DR. EZEKIEL MUTUA.....EX PARTE APPLICANT

JUDGMENT

1. The Ex Parte Applicant (herein after referred to as the Applicant) was until 25th October 2021, the Chief Executive Officer (CEO) of the 3rd Respondent, a state corporation established under the Films and Stage Plays Act, Cap 222 of the Laws of Kenya.
2. The 1st Respondent is established under Section 26 of the State Corporations Act with functions as set out under Section 27 of the Act.
3. The 2nd Respondent is the Cabinet Secretary, Ministry of ICT, Innovation and Youth Affairs.
4. The Interested Party is the Acting Chief Executive Officer of the 3rd Respondent.
5. By his motion dated 9th August 2021, the Applicant seeks the following orders –

(1) An order of certiorari to remove into this Honourable court and quash the decision and directive by State Corporations Advisory Committee, the 1st Respondent herein contained in its letter dated 30th June 2021, and the letters by the 2nd Respondent dated 2nd August, 2021 and 3rd August, 2021 whose effect is to inter alia;-

- a. Require the 2nd Respondent, to take immediate administrative measures requiring the Ex-Parte Applicant, Dr. Ezekiel Mutua, CEO Kenya Film Classification Board (KFCB) to proceed on terminal leave, pending his retirement on 25th October 2021;*
- b. Appoint an Acting Chief Executive Officer of the Kenya Film Classification Board.*
- c. Direct the Communications Authority to discharge and release Mr. Christopher Wambua, the Director of*

Communications and Public Affairs, from his duties at the Communications Authority.

d. Advertise and/or declare a vacancy and/or calling for any such applications for the filling of the vacancy of the position of Chief Executive Officer of the Kenya Films Classification Board.

(2) An order of prohibition to do issue prohibiting the Respondents and/or prohibiting the Kenya Films Classification Board from implementing the 1st and 2nd Respondents' decisions as contained in their respective letters dated 30th June, 2021; 2nd August, 2021 and 3rd August, 2021 whose effect is to inter alia:-

a. Taking administrative measures requiring the Ex-Parte Applicant, Dr. Ezekiel Mutua, CEO Kenya Film Classification Board (KFCB) to proceed on terminal leave, pending his retirement on 25th October 2021;

b. Appointing Mr. Christopher Wambua, or any such other person, as the Acting Chief Executive Officer of the Kenya Film Classification Board and/ or reporting, assuming and/or discharging the duties of the Chief Executive Officer of the Kenya Film Classification Board;

c. Directing the Communications Authority to discharge and release Mr. Christopher Wambua, the Director of Communications and Public Affairs, from his duties at the Communications Authority.

d. Advertising and/or declaring a vacancy and/or calling for any such applications for the filling of the vacancy of the position of Chief Executive Officer of the Kenya Films Classification Board during the pendency and lifeline of the ex parte Applicant's current contract, which is ending in October and his new 5-year non-renewable contract commencing in October.

(3) Costs of this application be provided for.

6. The grounds in support of the application are that there was procedural impropriety, breach of natural justice unreasonableness and irrationality, improper exercise of discretion, illegality, abuse of power, bad faith, breach of the Applicant's legitimate expectation and lack proportionality in the Respondent's actions and decisions with respect to the renewal of the Applicant's contract.

7. The application is further supported by the affidavit of DR.

EZEKIEL MUTUA, the Applicant, sworn on 5th August 2021 in which he substantially restates the grounds on the face of the application.

8. The 1st Respondents has opposed the motion through the replying affidavit of WANJIKU WAKOGI, the Secretary to the State Corporations Advisory Committee (SCAC) the 1st Respondent herein, sworn on 13th September 2021.

9. The 2nd Respondent filed the replying affidavit of ESTHER KOIMETT, CBS, Principal Secretary of Broadcasting and Telecommunications in the Ministry of ICT, Innovation and Youth Affairs.

10. The 3rd Respondent jointly with the Interested Party filed the replying affidavit of CHRISTOPHER WAMBUA, the Acting Chief Executive Officer of the Respondent who is also the Interested Party.

11. The Applicant filed a further affidavit sworn by himself on 8th October 2021.

12. The motion was disposed of by way of written submissions.

Background

13. The Applicant was first appointed as Chief Executive Officer of the 3rd Respondent following a competitive process by letter dated 21st October 2015.

14. By letter dated 7th June 2018 the Applicant was issued with

a letter of renewal of contract for three years from 26th October 2018.

15. By his letter date 22nd April 2021 the Applicant applied for Re-Appointment as Chief Executive Officer of the 3rd Respondent.

16. By letter dated 9th July 2021, the 2nd Respondent wrote to the Chairman of the 3rd Respondent pointing out irregularities at the 3rd Respondent which included preventing an officer of the 1st Respondent from attending the Board meeting of 30th June 2021 at which the renewal of the Applicant's contract for a term of five years was one of the agenda items, against government policy on renewal of contracts of CEOs as stipulated in Mwongozo – the Code of Governance of State Corporations and Government Circular Ref: OP/CAB.9/1A which provided that a CEO is ineligible for reappointment for a third term in office.

17. The letter further observed that –

i. That the Board of KFCB knowingly convened to deliberate and make a determination on a matter that is already pre-determined as not feasible;

ii. That the decision to renew the contract of the CEO for a third term is illegal and void ab initio;

iii. Consequently, any decision made relating to renewal of the CEOs contract should not be executed. Any execution of such a decision shall have consequences borne by those responsible for the same individually and collectively.

18. The letter informed the Chairman of the 3rd Respondent that:

“In light of the advisory from SCAC, this office contemplates taking appropriate action on the KFCB Board members found complicit in participating in the above-mentioned irregularities and for preventing the Inspector General State Corporations from carrying out lawful duties. To facilitate a fair process, you are required to: -

i. *Submit the zoom recording and minutes of the meeting held on 30th June, 2021*

ii. *Make a written submission to this office within seven (7) days.*

Further as advised by SCAC, you are required to: -

iii. *Institute measures requiring the CEO of KFCB to proceed on terminal leave, pending his retirement on 25th October, 2021*

iv. *Pursuant to Circular No. OP/CAB 9/1 of 11th March 2020 immediately identify an acting CEO to be appointed.”*

19. By letter dated 14th July 2021, the Chairman of the 3rd Respondent wrote to the Cabinet Secretary, Ministry of ICT, Innovations and Youth Affairs communicating the decision of the Board to renew the appointment of the Applicant as Chief Executive Officer for a further term of five years.

20. By two letters dated 2nd August 2021, one addressed to the Applicant and the other to the Chairperson of the 3rd Respondent, the 2nd Respondent informed them of his decision to appoint the Interested Party as Acting Chief Executive Officer following the failure of the Board of the 3rd Respondent to forward a suitable candidate for consideration for appointment to the said position. It is this letter that aggrieved the Applicant and which led to the institution of this suit.

Legal Framework

21. Section 11C of the Films and Stage Plays Act provides for appointment of Chief Executive Officer as follows –

11C. Appointment and duties of the chief executive officer

(1) There shall be a chief executive officer of the Board who shall be appointed by the Board on such terms and conditions of service as the Minister may approve.

(2) The chief executive officer shall be the accounting officer of the Board and responsible for the day-to-day management of the affairs of the Board, and any other function prescribed under this Act or assigned by the Board.

22. The State Corporation Act provides at Sections 3, 4, 5A, 26, and 27 that –

3. Establishment of state corporations by the President

(1) The President may, by order, establish a state corporation as a body corporate to perform the functions specified in that order.

(2) A state corporation established under this section shall—

(a) have perpetual succession;

(b) in its corporate name be capable of suing and being sued;

(c) subject to this Act, be capable of holding and alienating movable and immovable property.

4. Ministerial responsibility for state corporations

The President shall assign ministerial responsibility for any state corporation and matters relating thereto

to the Vice-President and the several Ministers as the President may by directions in writing determine.

5A. Exemption

(1) Subject to subsection (2), the President may, by notice in the Gazette, exempt a state corporation, not being a state corporation established under section 3, from any of the provisions of this Act.

(2) Notwithstanding the provisions of subsection (1), an exemption granted under this section shall not be exempt a state corporation from the provisions of sections 5, 10A, 11, 13, 14, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, or 29.

(3) Any state corporation eligible for exemption under this section which, immediately before the commencement of this section, was not subject to the provisions of this Act by virtue of—

(a) the provisions of the written law under which such state corporation is established; or

(b) a declaration in that behalf under paragraph (b)(vii) of section 2 (now repealed),

shall, subject to subsection (2), be deemed to be exempt from the provisions of this Act.

26. Establishment of the Committee

(1) There shall be a Committee to be known as the State Corporations Advisory Committee which shall consist of—

(a) the Permanent Secretary in the Office of the President who shall be the chairman;

(b) the Permanent Secretary to the Treasury;

(c) the Director of Personnel Management;

(d) the Inspector-General (Corporations);

(e) eight other members appointed by the President.

(2) The Committee may co-opt any person for such purpose and for such period as it may determine.

(3) The President shall appoint a public officer to be secretary to the Committee.

(4) Subject to directions by the President, the Committee shall determine its own procedure.

(5) The members and the secretary of the Committee shall be paid out of public funds such remuneration and in such manner as the President may approve.

27. Functions of the Committee

(1) The Committee shall advise on the matters and perform any functions it is required by this Act to perform and in addition shall—

(a) with the assistance of experts where necessary, review and investigate the affairs of state corporations and make such recommendations to the President as it may deem necessary;

(b) in consultation with the Attorney-General and the Treasury, advise the President on the establishment, reorganization or dissolution of state corporations;

(c) where necessary, advise on the appointment, removal or transfer of officers and staff of state corporations, the secondment of public officers to state corporations and the terms and conditions of any appointment, removal, transfer or secondment;

(d) examine any management or consultancy agreement made or proposed to be made by a state corporation with any other party or person and advise thereon;

(e) examine proposals by state corporations to acquire interests in any business or to enter into joint ventures with other bodies or persons or to undertake new business or otherwise expand the scope of the activities and advise thereon.

23. Mwangozo Code of Governance for State Corporations provides at paragraph 1.18 for appointment of Chief Executive Officer as follows –

(1) There shall be a chief executive officer of the Board who shall be appointed by the Board on such terms and conditions of service as the Minister may approve.

(2) The chief executive officer shall be the accounting officer of the Board and responsible for the day-to-day management of the affairs of the Board, and any other function prescribed under this Act or assigned by the Board.

24. Mwangozo provides for tenure of office of the CEO under Addendum Attachment 1 under the title “*Appointment and Performance Management Framework for Boards of State Corporations*”. Under Chief Executive Officer, the tenure of office is –

(i) **Three year term or as otherwise provided under any other written law.**

(ii) Renewable once subject to performance evaluated by the Board.

[Emphasis added]

25. The Human Resource Policy and Procedures Manual of the Kenya Film Classification Board, the 3rd Respondent, provides for appointment of Chief Executive Officer at Section 2.5 under Terms and Conditions of Employment as follows –

2.5.2 *The Chief Executive Officer shall be appointed on a **contract of three (3) years renewable once**, subject to performance.*

[Emphasis added]

Issues for Determination

26. There are two preliminary issues to be disposed off before the substantive motion is considered. These are-

(i) Whether the proceedings against the State Corporations Advisory Committee, the 1st Respondent herein are competent; and

(ii) Whether the affidavit by the Interested Party should be struck out.

27. The substantial issues for determination are –

(i) Whether the Applicant had served one or two terms in office as CEO of the 3rd Respondent;

(ii) Whether the renewal of the contract by the 3rd Respondent was lawful;

(iii) Whether the Applicant was lawfully appointed by the 3rd Respondent;

(iv) Whether the Applicant had legitimate expectation to be appointed for a further term.

28. The first issue, which has been raised by the 1st Respondent is that it is not a legal entity and cannot be sued in its name. I would agree with the submissions of the Applicant that judicial review proceedings can be brought against any corporate or unincorporate body if that body performs a public duty. This was aptly put by M. J. Anyara Emukule J. in the case of **Republic v Senior Resident Magistrate Mombasa ex parte H L & another [2016] eKLR** when he stated –

*The traditional test for determining whether a body of persons is subject to judicial review is the source of its power, that is, whether the power is derived from statute or prerogative. It is not the sole test however, and it may be helpful not just to look at the source of power, but at the nature of the power. For instance in **R VS. PANEL ON TAKE-OVERS AND MERGERS, ex parte Datafin PLC**, Lloyd LJ at 847 stated the position thus –*

*“Of course, the source of the power will often perhaps usually be decisive. If the source of power is a statute, or subordinate legislation under statute, then clearly the body in question will be subject to judicial review. If at the other end of the scale, the source of power is contractual, as is in the case of private arbitration, then clearly the arbitration is not subject to judicial review. **R v. National Joint Council for the Craft of Dental Technicians (Dispute Committee, ex parte Neate [1953]1QB 704.***

*But in between these extremes there is an area in which it is helpful to look not just at the source of the power but at the nature of the power. If the body in question is exercising public law functions, or if the exercise of its functions have public case law consequences, then that may be sufficient to bring the body within the reach of judicial review. ... the essential distinction, which runs through all the cases to which we referred is between a domestic or private tribunal on the one hand and a body of persons who are under some public duty on the other. Thus, in **R vs. Criminal Injuries Compensation Board, ex parte Lain [1967] 2QB 864**, Lord Parker CJ, after tracing the developments of certiorari from its earliest days said at page 882 –*

“The only constant limits throughout were that the tribunal was performing a public duty. Private domestic tribunals have always been outside the scope of certiorari since their authority is derived solely from contract, that is, from agreement of the parties concerned.”

29. Likewise, Nyamweya J. (as she then was) while determining the issue of whether the Committee of the Senior Counsel has capacity to sue and be sued in the case of **Republic v Committee on Senior Counsel & another Ex parte Allen Waiyaki Gichuhi [2021] eKLR**, held

In essence therefore, a person can sue or be sued in law if they are a natural person, an unincorporated body of persons or a corporate body, and the only difference in bringing suits against natural, corporate and unincorporated persons is in the manner and procedure employed in suing. This is for the reasons that while natural and corporate persons are bestowed with legal capacity so long as certain conditions exist, unincorporated associations do not have a separate legal personality, and the law does not recognize them as legal entities separate from their natural members.

*An exception however exists in the case of statutory bodies, particularly in judicial review, and the unincorporated status of a defendant has not been regarded as a bar to being subject to and defending judicial review proceedings. It was stated in this regard that a statute can confer legal status on an unincorporated association in the case of **Baskins v. United Mine Workers (1921) 150 Ark. 398, 40L, 234 S. W. 464, 465.1**, wherein it was held that in the absence of enabling statute, an unincorporated association cannot sue or be sued in the common or association name, and all the members must be made parties, since such bodies have, in the absence of statute, no legal entity distinct from their members.*

This is mainly for the reason that a statutory body gets its powers and authority from an act of parliament, and is generally established to perform specific functions and make judgments in some area of activity. In this respect, the meaning of a ‘statutory body’ may change depending upon the legislation, but the defining factor is that all statutory bodies are established and operate under the provisions of their own enabling legislation, which sets out the purpose and specific powers of the agency.

*It is notable in this respect that in judicial review, the defining factor that gives capacity to a defendant is whether there are certain statutory and legal powers and duties conferred or imposed on the public body or official by a statute or other law. The different rules as regards capacity to sue and be sued in the case of unincorporated associations were the subject of the decision in the English case of **Aireborough Neighbourhood Development Forum v Leeds City Council [2020] EWHC 45**, wherein it was found that an unincorporated association, which in that case was a neighbourhood forum, had capacity to bring both a judicial review and a statutory challenge against the decision of a public authority. The case confirmed that legal capacity to sue is not a critical requirement in determining a claimant’s capacity to bring a statutory challenge. Instead the claimant must be a person aggrieved, or in the case of judicial review, have standing to challenge. Such a test does not consider legal capacity but instead, focuses on the critical component of sufficient interest in the decision.*

The rationale for the different treatment of unincorporated associations in public and private law was explained as follows in paragraph 29 of the said decision:

“...there is a critical distinction between private and public law litigation. In private law the individual has to be able to show that they have a legal right which has been infringed, therefore it is fundamental that they have legal capacity to sue. In contrast the critical question in judicial review or statutory challenge is whether the claimant is a person aggrieved or has standing to challenge, which is not a test of legal capacity but rather one of sufficient interest in the decision...The claim is ‘invoking the powers of the court to exercise its supervisory jurisdiction...to quash curb or correct decisions of bodies subject to public law. The personal rights of individual Applicants...may never be in play.”

*Likewise, in **R v Traffic Commissioners of the North Western Traffic Area ex p Brake [1996] COD 248** Turner J. considered an Applicant in judicial review to be invoking the powers of the court to exercise its supervisory jurisdiction to quash, curb or correct decisions of bodies subject to public law, and held as follows:*

“In the case of a private law action, it is fundamental that a private law right has been violated. Private law rights can only be enjoyed by those who possess the characteristics of a legal person. Similarly, it is necessary, in such a case, that, the defendant who is asserted to have infringed that legal right, has the characteristics of a legal person. The situation in public law cases may be different. For a case to lie in public law... Thus, it will not be in every case that an individual Applicant need assert that any right of his has been infringed, rather it is that by the unlawful manner in which a body amenable to public law has reached its decision, or the unlawfulness of the decision itself, they have been directly or indirectly affected by that decision...”

Since judicial review is a special supervisory jurisdiction which is different from both ordinary adversarial litigation between private parties and appeal rehearing on the merits, the question that determines the capacity of a defendant is whether there is some

recognisable public law wrong that has been committed. A defendant in judicial review proceedings therefore, is the public body or public office holder which made the decision under challenge (or failed to make a decision where that failure is challenged), or where the public body or official has legal responsibility for **the relevant matter**.

30. As the two cases demonstrate, judicial review proceedings can be brought against an unincorporated body where such body is invested with powers and authority under an Act of Parliament to perform specific functions or make decisions that affect the Applicant or the interests that the Applicant represents. In the instant case the 1st Respondent is a creature of the State Corporations Act with functions powers. The 1st Respondent indeed made decisions against the Respondent that are the subject of the suit herein. I find that the 3rd Respondent is properly sued herein.

31. With regard to the second preliminary issue, the Applicant in a rejoinder to the 3rd Respondent's Replying Affidavit sworn by Mr. Christopher Wambua, the Interested Party, prays that this Court do make a finding that the deponent of the said affidavit lacks capacity to aver on behalf of the 3rd Respondent and that his said Affidavit should be struck out for lack of capacity and/or containing matters that are **false and hence committing perjury**.

32. The impugned paragraphs of the Interested Party's replying affidavit sworn on 15th September 2021 state as follows –

21. THAT while responding to the position arrived at by the Board, the Cabinet Secretary of the Parent Ministry took a contrary view to the Board's position, and directed that the Ex Parte Applicant ought to proceed on terminal leave pending his retirement on or about October 25, 2021. In view of the fact that recruitment of a substantive/ successor Chief Executive Officer was yet to commence, the Cabinet Secretary (2nd Respondent) exercised lawful authority by appointing the interested party herein as the acting Chief Executive Officer pending recruitment of a suitable candidate.

22. THAT it is the Board's position that the position advanced by the Cabinet Secretary, Ministry of ICT, Innovation, and Youth Affairs, the 2nd Respondent herein, is the proper position under Law for the following reasons:

a. The terms of Employment of the Ex Parte Applicant as stipulated in the Board's Human Resource Policy and Procedures Manual, 2018 limit the tenure of the Chief Executive Officer of the Board to a contract of three (3) years renewable once, subject to review of performance by the Board;

b. Government policy through the Code of Governance of State Corporation (Mwongozo Code) directs that the tenure of a Chief Executive Officer of a State Corporation is limited to a Contract of three (3) Years, renewable once subject to review of performance by the relevant Board. The Kenya Film Classification Board is a statutory body exercising regulatory functions as stipulated under the provisions of the Film and Stage Plays Act, Chapter 222, Laws of Kenya. As such, provisions of the Mwongozo Code are applicable to the Board;

c. The arrangement of secondment within the Public Service (as stipulated under Law and Policy) is intended or designed to enable the transfer of skills (within public or civil service) while at the same time preserving pension rights of the seconded Employee. It does not affect the employment status or entitlements of the employee within the host organisation. For the avoidance of doubt, the seconded employee is still considered a substantive employee of the Host Organisation;

d. As such, the status of the Ex Parte Applicant as the substantive Chief Executive Officer of the Board was never affected by the fact that he was still under secondment during the pendency of the first term between October 26, 2015 and October 25, 2018;

e. Consequently, where the Ex Parte Applicant has served two three Year terms (between October 26 2015 to October 25, 2021), he cannot be entitled to a further renewal of appointment. This would be contrary to his terms of Employment under the Boards Human Resource Policies as well as Government Policy; and

f. The Cabinet Secretary lawfully exercised his discretion under the Films and Stage Plays Act.

23. THAT in a bid to realign to the proper position under Law, the Board has since complied with the directives of the Cabinet Secretary, Ministry of ICT, Innovation, and Youth Affairs, the 2nd Respondent herein. The Interested Party has taken up the role of acting Chief Executive Officer of the Board, and the Ex Parte Applicant sent on terminal leave pending his retirement on October 25, 2021.

24. THAT the Board concedes to having acted beyond its powers, and without taking proper legal advice on the subject. In view of this, the Ex Parte Applicant cannot rely on this misstep to justify his re- appointment for a third term, which would be un-procedural and unlawful.

33. The Applicant avers that –

i. The Board has not sat, deliberated on and made a resolution purportedly conceding to the 2nd Respondent's position that it acted beyond its powers.

ii. As earlier stated, the power to appoint the Chief Executive Officer for Kenya film Classification Board is bestowed upon the Board pursuant to Section 11C of the Act.

iii. There is no other person and/or authority other than the Board that is empowered to appoint the Chief Executive Officer for Kenya film Classification Board and as such the averments is not only false but also misleading.

iv. In the premises I urge this Honourable Court to strike out the said false and offending paragraphs and/or the said Replying Affidavit in its entirety.

34. These averments refer to facts that are not in the knowledge of the Court. The facts require proof by evidence that is not before the Court.

35. Further, perjury is a criminal offence that carries criminal penalties. The Court cannot without hearing the parties, reach a determination that the Interested Party is guilty of the perjury. It is only after such a finding is made by the Court that the prayers sought by the Applicant would be capable of being granted. For now, this remains a moot issue that the Court is incapable of making a determination on.

36. On whether the Interested Party had capacity to swear the affidavit on behalf of the 3rd Respondent, it is my view that as a party and as a member of the Board in his capacity as Acting Chief Executive Officer, he had capacity to swear the affidavit on his behalf and on behalf of the 3rd Respondent.

37. The other issues raised by the Applicant being whether the Applicant was lawfully appointed by the 3rd Respondent, whether the appointment was procedural and whether he had legitimate expectation to be appointed for a further term will only arise should the Court find in favour of the Applicant that he was properly appointed for the term commencing 26th October 2021.

38. It is the assertion of the Applicant that he is the substantive CEO of Kenya Film Classification Board, the 3rd Respondent, following his appointment by the Board on 26th October 2021 and he has a reside non-renewable contract of five (5) years effective 26th October 2021.

39. It is not contested that the Applicant was first appointed as CEO of the 3rd Respondent by letter dated 21st October 2015. The first paragraph of the letter reads –

“Following satisfactory proof of medical fitness and your successful interview for the position of Chief Executive Officer, Kenya Film Classification Board, the Board is prepared to engage you in the services of Chief Executive Officer on the following terms and conditions.”

40. The letter gives the duration of the contract as three (3) years at paragraph 5 thereof. Paragraph 6 of the letter reads:

6. RENEWAL OF APPOINTMENT

*Should you wish to be **re-appointed** in the same position, you will be required to make a written request at least six (6) months before the expiry date of this contract.*

[Emphasis added]

41. In a letter dated 9th December 2015, the Public Service Commission wrote to the Cabinet Secretary, Ministry of Information thus –

“Ref. No. PSC/ HRM/40

9th December, 2015

The Cabinet Secretary

Ministry of Information, Communications and Technology

NAIROBI

SECONDMENT

Ref. No. EST/2007132361(74) of 12.11.2015

This is to convey the decision of the Public Service Commission that Mr. Exekiel Mutua Nyithya, P/No. 2007132361, Information Secretary (Job Group T) in your Ministry, be seconded to the Kenya Film. Classification Board, for an initial period of Three (3) years w.e.f. 21.10.2015 following appointment as Chief Executive Officer.

Please take the necessary action accordingly.

SIGNED

Alice A. Otwala (Mrs.), CBS

SECRETARY/CEO

PUBLIC SERVICE COMMISSION”

42. By letter dated 14th May 2018, the Applicant sought the renewal of his contract. The letter reads –

“KFCB/2015066 (9) 14th May, 2018

The Acting Chairman

Kenya Film Classification Board

P.O. BOX 44226 – 00100

NAIROBI

Dear Chair

RENEWAL OF CONTRACT

Reference is made to my employment contract letter Ref. MOSCA 12/2 (C) Vol. I dated 21st October, 2015.

Pursuant to the guidelines on Terms and Conditions of Service

for State Corporations Ref. No. OP/CAB.9/21/2A/LII/43 of 23rd November, 2004, I write to express my interest to continue serving the Board as the Chief Executive Officer and request the Board to renew my contract.

I thank you and your Board for your continued support and look forward to your positive and timely response.

Yours Sincerely

SIGNED

Dr. Ezekiel Mutua, MBS

CHIEF EXECUTIVE OFFICER”

43. By letter dated 7th June 2018, the 3rd Respondent, renewed the contract of the Applicant. The letter is reproduced below: –

“KFCB/2015066 (11) 7th June 2018

Dr. Ezekiel Mutua, MBS

Chief Executive Officer

Kenya Film Classification Board

NAIROBI

Dear

RENEWAL OF CONTRACT

I refer to your letter dated 14th May, 2018 Ref No: KFCB/ 2015066 (9) in respect to the above matter.

In view of your stellar performance that has seen the Board

achieve its Strategic goals and in line with Section 11 (C) of the Film and Stage Plays Acts and Section 5(3) of the State Corporations Act your contract is hereby renewed for a further period of 3 years with effect from 26th October, 2018.

Please note that your current terms of service shall prevail.

Yours

SIGNED

Ms. Gathoni Kungu

Ag. CHAIRPERSON”

44. By letter dated 22nd April 2021, the Applicant applied for re-appointment. In the first three paragraphs he states –

“RE: REQUEST FOR RE-APPOINTMENT

As you are aware Sir, my contract as the Chief Executive Officer of the Kenya Film Classification Board ends on the 26th October, 2021.

Pursuant to Section 11(C) of the Films and Stage Plays Act Cap 222 that gives the Board the power to determine the terms and conditions of service of the Chief Executive Officer and in line with Clause 6 of my Employment Contract that requires me to notify the Board six months to the expiry of my contract, of my desire to be re-appointed, I hereby with profound humility, request for your kind consideration for my re-appointment as Chief Executive Officer of the Kenya Film Classification Board.

Mr. Chairman, as you are well aware, for the past five and a half years that I have been the Chief Executive Officer of the Board, I have steered the Board to great heights of success and by God's grace and with your support, that of the Directors and the management and staff of Kenya Film Classification Board, we have been able to raise the profile of the Board to national and international stature.”

45. By letter dated 14th July 2021, the Applicant was appointed for a further non-renewable term of five years. The letter reads: –

KFCB/HQS/CON/123(47) 14th July 2021

Mr. Joe Mucheru, EGH

Cabinet Secretary

Ministry of ICT, Innovations & Youth Affairs

Teleposta Towers

NAIROBI

RE: RE-APPOINTMENT OF DR. EZEKIEL MUTUA, MBS, AS CHIEF EXECUTIVE OFFICER

I make reference to the above matter and attached documents.

This is to inform you that pursuant to Section 11(C) of the

Films and Stage Plays Act Cap 222, the Board of Directors of the Kenya Film Classification Board at its Full Board meeting of 30th June 2021, resolved to re-appoint Dr. Ezekiel Mutua, MBS as the CEO of the Kenya Film Classification Board for a further non-renewable term of five years.

The Board's decision was guided by Dr. Mutua's outstanding performance, the Board's post COVID-19 Business Continuity Plan and our intention to maintain the stability of the Board, considering that the terms of the Chairman and five Board members expire in quick succession between July and October 2021.

It should be noted that Dr. Mutua served the Board on secondment from 2015 to 2018 and that his substantive appointment as a full time employee of the Board was from October 2018 following the completion of the de-linking of services of staff seconded from the Ministry to the Board.

Dr. Mutua, who was hitherto an employee of the Ministry of

ICT also delinked from the Ministry vide letter Ref. KFCB/PERS/2015066 dated 24th April, 2019 and elected to transfer his pensionable services to the Board. The Board, at its meeting of 23rd April, 2019 (Minutes attached) resolved to absorb Dr. Mutua's pensionable services together with 37 other members of staff. This created a legitimate expectation for the Board's consideration of his reappointment.

Please find attached a detailed report on this matter and the minutes of the Board meeting of 30th June 2021.

Yours

SIGNED

Bishop (Emeritus) Jackson Kosgei

Ag. CHAIRPERSON”

46. It is the Applicant’s position that his first term as CEO of the 3rd Respondent was on secondment and therefore it does not count as a first term. That his letter dated 14th July 2021 was the second and final term. That he was lawfully appointed by the 3rd Respondent which has the mandate under the law to appoint the CEO.

47. It is not contested by the Applicant that he was first appointed to the position of CEO after he applied for the position pursuant to an advertisement in the Daily Nation which he responded to and attended interviews before emerging one of the best candidate pursuant to which he was appointed as CEO by letter dated 31st October 2015.

48. The 2nd Respondent through the replying affidavit of ESTHER KOIMET, the Principal Secretary, explains the purport of secondment at paragraphs 11 and 12 of her affidavit as follows –

11. THAT a letter informing the exparte Applicant of this secondment was addressed to him on the 26th January 2016 by the Principal Secretary of Broadcasting and Telecommunications. The purpose for the secondment was for the Applicant to retain his pension status and nothing more. It does not affect the employment status or entitlements of the Applicant within the host organisation (KFCB). For the avoidance of doubt, the seconded employee is still considered a substantive employee of the Host Organisation in this case KFCB.

12. THAT the secondment had no bearing on the engagement of the exparte Applicant with KFCB. The relationship of the exparte Applicant with KFCB was governed by the letter of appointment of 21st October, 2015 and therefore Applicant’s attempt to refer to other extrinsic documents is misconceived and malicious.

49. Based on the letters of appointment and renewal of the Applicant’s contracts, there is no doubt that the Applicant was substantively appointed by the 3rd Respondent for a first term as CEO on 21st October 2015. He applied for a renewal and was offered a “renewal of contract”. All the letters referred to above are explicit that the renewal of contract was made pursuant to Section 11C of the Film and Stage Plays Act and Section 5(3) of the State Corporations Act.

50. It is worth noting that the renewal of the contract by letter dated 14th July 2021 which was a renewal for five years, is in contravention of Section 2.5.2 of the 3rd Respondent’s Human Resources Policy Manual which provides for the term of the CEO to be three years renewable once subject to performance.

51. I find that the Applicant had already served two terms of three years each as CEO of the 3rd Respondent and was thus not eligible for a further renewal as this would be in violation of the 3rd Respondent’s own Human Resource Policy and Procedures Manual, “Mwongozo” and Government Policy on renewal of terms of office for CEOs to the effect that a CEO can only serve two terms in office.

52. The renewal of the Applicant’s contract having been in excess of the powers of the 3rd Respondent, was null and void *ab initio*.

53. The renewal was further in contravention of Section 11C of the Films and Stage Plays Act and Section 5(3) of the State Corporations Act both of which respectively provide that the terms and conditions of service of the CEO are to be approved by the Minister and the 1st Respondent.

54. Having found that the letter dated 14th July 2021 was null and void, there is no basis for grant of the orders of certiorari or prohibition in terms of the prayers sought in the notice of motion application dated 9th August 2020.

55. The application is therefore without merit and is accordingly dismissed with an order that each party bears its costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 31ST DAY OF JANUARY 2022

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered

through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE