



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT ELDORET

CAUSE NO 54 OF 2019

DAVID KIPCHUMBA KIMOSOP.....CLAIMANT

VERSUS

KERIO VALLEY DEVELOPMENT AUTHORITY.....RESPONDENT

J U D G E M E N T

1. By a statement of claim filed on 31st October, 2019 the claimant averred among others that.

- a) On about April 2012, the Claimant was employed as the Chief Executive Officer of the Respondent for a term of three (3) years and upon lapse of the aforesaid contract in APRIL, 2015 the claimant's contract was extended for a term of three (3) years which contract was to lapse on 22nd April 2018.
- b) By letter dated 7th October, 2017 the Claimant wrote to the Chairman of the Respondent's board of directors and requested the respondents Board of Directors for extension of the claimant's contract for a further period of three (3) years with effect from 23rd, April, 2018.
- c) The aforesaid letter was copied to the Cabinet Secretary, Ministry of Devolution and Planning and the Principal Secretary, State Department of Planning and Statistics.
- d) The claimant's request for extension of the contract was deliberated upon in a meeting of the Respondents' Board held on 15th December 2017 and during the deliberations on the claimants' request, the respondents Board took into account the provisions of the Act, the Code of Governance of state Corporations (Mwongozo), Circular No. OP/CAB.9/1A dated 23rd November 2010 on re-appointment of Chief Executive Officers, the Performance Appraisal Reports for the year 2015/2016 and SCAC evaluation report.
- e) As regards the Claimant's performance, the Respondents Board noted that the board evaluation conducted by SCAC on 23rd May 2017 rated the claimant at 93.1% which is way above the 70 rating as per common practice in other state corporations.
- f) At the aforesaid respondents Board meeting, the Board recommended the extension of the claimant's contract and in doing so, the Board noted that the Act does not limit the number of terms that the managing Director of the Authority can serve and it further indicated that where there is a conflict between the Act and the Code of Governance of State Corporations (*Mwongozo*) in respect to the terms that the Chief Executive Officer should serve, the provisions of the Act prevail.
- g) By a letter dated 18th December 2017, the Chairperson of the respondents Board notified the Cabinet Secretary, Ministry of Devolution and planning that the claimant had made a request for extension of the contract and that the respondents board had deliberated on the aforesaid request and approved the claimants request for extension of the claimants contract; the afore said letter was copied to the chief of staff and head of Public Service.
- h) The claimant avers that by circular No. OP/CAB.9/1A dated 27th February 2018 under reference "**Terms of Service For state Corporations Chief executive officers**", the Head of Public Service notified the Cabinet Secretaries, the attorney general and all Principal Secretaries that "**the Chief Executive Officers of State Corporations are not subject to the general public service policy on mandatory requirement at 60 or 65 years or limit as to number of terms served**" and to date, the aforesaid circular has not been revoked.
- i) On 23rd March 2018, during a meeting of the respondent's board of directors the contents of the circular No. OP/CAB.9/1A dated 27th February 2018 by the head of public service was brought to the attention of the Board and the Respondent's Board agreed to

adhere on the contents of the said Circular.

j) By a letter dated 18th April 2018, the Cabinet Secretary, Ministry of Devolution, Appointed the Claimant as the Respondent's Managing Director for a period of three (3) years effective as from 23rd April 2018 and the said appointment was in accordance with the provisions of the Section 9(1) of the Act and Circular No. OP/CAB.9/1A dated 27th February, 2018.

k) In a meeting of the Respondent's Board held on 4th May, 2018, the respondents Board was notified that the Cabinet Secretary, Devolution and Arid and Semi-Arid Lands had approved the request for the extension of the Claimant's Contract and the respondents' Board concurred with the approval by the Cabinet Secretary and ratified the extension of the claimant's contract for a term of three (3) years.

l) Upon issuance of the claimant's letter of appointment dated 18th April 2018, an employment agreement dated 4th May 2018 was executed by the claimant and the respondent and the terms and conditions of the claimants' employment as the Managing Director and Chief Executive Officer of the Respondent are contained in the aforesaid employment Agreement.

m) The claimant avers that he performed his duties with the Respondent diligently and faithfully throughout his employment however, by letter dated 28th May, 2019, the Chairperson of the respondents board of Directors notified the claimant that the respondent had received correspondence from the Head of Public Service and the Cabinet Secretary, Ministry of East African Community and Regional Development in respect of the extension of the claimant's contract but however, the claimant was not notified of the contents of the aforesaid correspondence.

n) By the aforesaid letter dated 28th May, 2019 the claimant was requested to convene a Special Board Meeting scheduled to take place on 30th May, 2019 to ***"deliberate on the contents of the letters form the Head of Public Service and Cabinet Ministry of East African Community and Regional Development and provide guidance as required."***

o) The claimant avers that the Chairperson of the Respondents' Board asked the claimant not to attend the meeting to be held on 30th May 2019 as the claimants contract of employment would be a subject of discussion during the meeting.

p) The claimant avers that by a letter dated 30th May 2019, the Claimant was notified that he had been terminated with effect from the dated of the letter which was handed over to the Claimant's Secretary on 30th May, 2019.

q) By the aforesaid letter of termination dated 30th May, 2019 the claimant was notified that the Respondent's decision to terminate the claimant's employment was predicated on the **Code of Governance for State Corporations (Mwongozo) which provided that the term of all CEOs of State Corporations is three (3) years, renewable once** and as the claimant had served the respondent for over two terms, the claimant was required to hand over all company assets and documents to the appointed Ag. Managing Director not later than 31st May, 2019.

r) By terminating the claimants contract of employment on the alleged ground that the claimant had exceeded the term limit stipulated under the Code of Governance for state Corporations (Mwongozo), the respondent is guilty of approbating and reprobating since during the Board meeting held on 15th December 2017 whereat the decision to recommend the extension of the claimant's contract was made, the Respondent stated that the applicable law was the Kerio valley Development Authority Act and not the Mwongozo.

s) The respondent's decision to terminate the Claimant's contract based on the provisions set out in Mwongozo is unlawful since by the Circular No. OP/CAB.9/1A dated 27th February 2018 under reference **"Terms of Service for State Corporations Chief Executive Officers"**, the Head of the public Service had notified the Cabinet Secretaries, the Attorney General and all Principal Secretaries that **" the Chief Executive Officers of State Corporations are not subject to limit as to number of terms served"** and which Circular has not been revoked to -date.

t) The claimant avers that prior to the issuance of the termination letter, the claimant had not been notified of the grounds if any that would justify the Respondent to consider terminating the claimant's employment in -tandem with section 41 of the **Employment Act**, No.11 of 2007.

u) The claimant avers that he was not accorded a chance to show cause why he should not be dismissed form employment by the respondent, thus, the Claimant's dismissal from employment unlawful and unjustified.

2. The respondent on its part pleaded among others that:

a) The contents of paragraph 12 of the Statement of Claim of Claim are admitted only to the extent that by a letter dated 18th April, 2018, the Cabinet Secretary, Ministry of Devolution, appointed the Claimant as the Respondent's Managing Director for period of three (3) years effective as from 23rd April, 2018. The Defendant denies that the appointment was in accordance with the provisions of Circular No. OP/CAB.9/1A dated 27th February, 2018 and puts the Claimant to strict proof thereof.

b) The Respondent admits the contents of paragraph 18 of the Statement of Claim only to the extent that the Claimant was notified of his termination by a letter dated 30th May, 2019.

c) The Respondent denies the contents of paragraph 20 and 21 of the Statement of Claim and puts the Claimant to strict proof thereof. The Respondent states that the recommendation for approval of the Claimant's contract was subject to approval by the Head of Public Service but the same was not obtained. Therefore, the Doctrine of approbating and reprobating is not applicable to the Respondent's action of terminating the Claimant's contract. The Respondent further states that the Claimant's previous appointments were approved by the Head of Public Service.

d) The Respondent states that the termination of the Claimant's contract on 30th May, 2019 by the Respondent's Board was undertaken to rectify an illegality and ensure compliance with the **Kerio Valley Development Authority Act, and the State Corporations Act, CAP 446 and the Code of Governance for State Corporations (Mwongozo)** by the Respondent. The termination was further in pursuance of the directive from the Head of Public Service to the Appointing Authority and thereafter the Respondent's Board of Directors.

e) The Respondent further states in response to the contents of paragraph 20 and 21 of the Statement of Claim as follows;

i) That on 15th December, 2017, during its 122nd meeting, the Respondent's Board of Directors was presented with and approved the Claimant's request for renewal of his contract for a period of three years with effect from 22nd April, 2018 when the Claimant's second term was scheduled to lapse.

ii) Upon consideration, the Respondent's Board of Directors recommended the extension of the Claimant's contract for a period of two (2) years with effect from 22nd April, 2018 and sought approval of the parent Ministry.

iii) The Cabinet Secretary, Ministry of Devolution and Planning vide a letter dated 23rd January, 2018 addressed to the Head of Public Service sought the concurrence of the Head of Public Service for the extension of the Claimant's contract as per the recommendation of the 1st Respondent's Board of Directors.

iv) In response, the Head of Public Service vide a letter dated 19th April, 2018 addressed to the Principal Secretary, Ministry of Planning and Devolution noted that the Claimant had served two terms and was ineligible for further extension of contract as per the provisions of Code of Governance for State Corporations (Mwongozo) and approved the extension of the Claimant's Contract for a period of six months in order to enable the Respondent's Board of Directors initiate the process of recruitment

v) By a letter dated 16th May, 2019, the Cabinet Secretary Ministry of East Africa Community and Regional Development directed the Chairperson of the respondent's Board to comply with the directive from the Head of Public Service issued on 19th April, 2018.

vi) Subsequently, a special meeting of the respondents Board of Directors was convened on 30th May, 2019 during which the Board resolved to terminate the claimants extended contract with effect from 30th May, 2019 in pursuance of the provisions of the Code of Governance for State Corporations (Mwongozo) which provides that the term of office of all Chief Executive Officers is 3 years and may only be renewed once.

vii) Pursuant to the aforesaid resolution of the 34th Special Board Meeting, the Chairperson of the respondent's Board of Directors issued the claimant with a termination letter dated 30th May, 2019.

viii) The respondent states that the renewal of the Claimant's Contract for a period of three years with effect from 23rd April, 2018 was irregular and the subsequent signing of the employment contract dated 4th May, 2018 was done in contravention of the Code of Governance for state Corporations (Mwongozo), is an illegality and is therefore void *ab initio*.

f) The Respondent denies the contents of paragraph 22 of the Statement of Claim and the Claimant is put to strict proof thereof. The respondent states that the Circular letter No. OP/CA.9/1A on terms of Service for State Corporations dated 27th February, 2018 does not take precedence over the application of the provisions of the Code of Governance for State Corporations (Mwongozo) to State Corporation Chief Executive Officers.

g) The Respondent denies the contents of paragraph 23 and 24 of the Statement of Claim and the Claimant is put to strict proof thereof. The Respondent states that the Claimant's employment was not terminated on grounds of misconduct but was undertaken to cure an illegality and ensure compliance with relevant laws and therefore the provisions of **Section 41 of the Employment Act** are not applicable herein.

h) The Respondents denies the contents of paragraph 25 of the Statement of Claim and puts the Claimant to strict proof thereof. The Respondent reiterates that the renewal of the Claimant's Contract for a period of three years with effect from 23rd April, 2018 was irregular and the subsequent signing of the employment contract dated 4th May, 2018 was done in contravention of the Code of Governance for State Corporations (Mwongozo), is an illegality and is therefore void *ab initio* and that any terms contained in the contract of employment dated 18th May, 2018 are unenforceable due to illegality.

i) The Respondent denies the contents of paragraph 29 of the Statement of Claim and the Claimant is put to strict proof thereof. The Respondent states that the purpose of the letter from the Head of Public Service dated 13th May, 2019 was to request the Respondent to comply with the policy direction issued vide a letter dated 19th April, 2018 which granted approval for extension of the Claimant's contract for a period of only six (6) months with effect from 23rd April, 2018. The Claimant's contract period as per

the directive from the Head of Public Service lapsed on or about the 23rd of October, 2018 yet the Claimant continued to serve as the Respondent's Chief Executive Officer as of the date of the letter.

3. At the hearing the claimant adopted his statement recorded on 30th October, 2019 as his evidence in Chief. According to the claimant he was employed through a competitive process in April, 2012 and served for three years. He gave six months notice to the Board of intention to continue in office. This was approved and he was issued with another three-year contract. This was to end in April, 2018.

4. It was further his evidence that in September, 2017 Kerio Valley Development Authority was still undergoing restructuring and that he was hired to restructure Kerio Valley Development Authority. He was to look at its financial systems and turn it around to make itself sustaining. He had discussions with the Board and indicated he would leave at the end of his second contract but the Board pleaded with him to continue because restructuring and turning around was not complete. He therefore applied for the continuation of his contract for another three years.

5. It was the claimants evidence that the Board deliberated over his application in line with Mwongozo and noted that Kerio Valley Development Authority Act did not set term limits for the Managing Director. The term according to him was contractual and based on performance and further that termination could only be based on these reasons. The Cabinet Secretary therefore granted him another three year contract. In extending his contract the Board made a decision to abide by the circular form Head of Public Service.

6. According to the claimant the term of office for CEOs was contractual subject to performance. The board could extend or terminate the contract based on performance. There was therefore no term limit as per Mwongozo.

7. It was evidence that the Cabinet Secretary extended his contract for three years through a letter dated 18th April, 2018 and copied to the Head of Public Service. He never served the full term of the contract. It was terminated on 30th May, 2019. According to the claimant, he was a member of the Board and its Secretary. He was not in attendance in the meeting of 30th May, 2019. He was not invited and was never asked to make any input in writing. He further stated that he was never given a chance to be heard. He was terminated because of Mwongozo and not for any wrongdoing. There was no issue with his integrity, conduct or performance. In terminating his contract, the Board was implementing the directive from Head of Public Service.

8. The claimant further stated that the Board that dismissed him was not Mwongozo compliant. It had twenty members thirteen of which were independent. The Kerio Valley Development Authority Act fixed a maximum of ten.

9. In cross-examination he stated that he had served two contracts prior to his termination. He further stated that his application for 3rd term was discussed in the meeting of September, 2017. The Board considered Mwongozo, circular from Head of Public Service and Kerio Valley Development Authority Act. The circular of February, 2018 from Head of Public Service was however not considered during the renewal of his contract.

10. Regarding the letter dated 23rd January, 2018 allowing extension of his contracts for six months he stated that the same was addressed to a wrong person who was not the appointing authority. He further stated that he became aware of this letter after his contract had been terminated.

The claimant further stated that the letter from Head of Public Service and Mwongozo had been widely circulated however the circular form Head of Public Service and Mwongozo had not been enacted by Parliament hence were not law. They were just policy documents. Mwongozo was to implemented provided it did not contradict any law.

11. The claimant further stated that his appointment for 2018 was never gazette and that he did not know why it was not gazetted. He further stated that he should have been given an opportunity to be heard and even negotiate an exit clause.

12. Concerning claim for compensation he stated that he sought to be compensated for the balance of his contract. Regarding leave he stated that the respondent as his employer had an obligation to show he went on leave if disputing his claim for leave. Further that they were very few and going leave was not very easy. Leave allowance would instead be paid.

13. The respondent's witness Mr. Andrew Njenga informed the court that he was a Director at Kerio Valley Development Authority and that he recorded a statement on 3rd March, 2020 which he sought to rely on as his evidence in chief. It was his evidence that on 18th December, 2017 the Board deliberated on the renewal of the claimant's contract. The Board considered whether the renewal would be based on Mwongozo or Kerio Valley Development Authority Act. The Board therefore recommended extension for two years. By a letter dated 25th January, 2018 Cabinet Secretary Mwangi Kiunjuri sought concurrence of Mr. Joseph Kinyua Head of Public Service over the extension of the claimants contract. Mr. Kinyua granted extension for six months enable the respondent initiate the process of replacing the claimant.

14. It was his evidence that the letter from Cabinet Secretary, Hon. Eugene Wamalwa extended the claimants contract for three years. The Board subsequently commenced to discuss the directive of the Head of Public Service concerning the extension of the claimants contract for six months. The Board resolved to terminate the claimant's contract in compliance with the directive from Head of Public Service.

15. Concerning the claims by the claimant, it was his evidence that there was no justification for the heads of claim the claimant was making. According to him the claimant's gross pay was Ksh.350,000/= and that salary for CEOs of state corporations fall under PC2 and that the increase of the claimant's salary from Ksh.350,000/= to Ksh.500,000/= was without justification.

16. In cross-examination he stated that the claimant's termination was not out of misconduct or performance but because of Mwongozo and directive from Head of Public Service. He further stated that the previous Board had looked at Mwongozo and Kerio Valley Development

Authority Act. They also looked at the circular from the Head of Public Service and the board noted that there was no conflict between Mwangozo and Kerio Valley Development Authority Act. The previous Board therefore recommended renewal for two years. The new Board however did not look at the Kerio Valley Development Authority Act. They focused more on Mwangozo and never considered the circular dated 27th February, 2018.

17. It was further his evidence that the claimants' performance was at 93% and that the circular dated 27th February, 2018 made no reference to term limits.

18. Regarding appointment it was his evidence that the Cabinet Secretary appoints the CEO of Kerio Valley Development Authority in concurrence with Head of Public Service. The claimants contract commenced on 23rd April, 2018 and was subject to three months' notice of termination however the same was terminated immediately. This was in order to comply with the directive of the Head of Public Service.

19. Regarding the meeting of the Board, he stated that the claimant was called for the meeting but due to conflict of interest he was asked to step put when the matter was being deliberated.

20. In his summing up submissions on behalf of the claimant Mr. Katwa Kigen submitted among others that there was no lawful termination of the claimant's contract since the board that met and resolved to terminate the claimant's contract allegedly on account of Mwangozo guidelines was not properly constituted under the selfsame Mwangozo since it had thirteen independent Board members instead of ten as provided for in the Kerio Valley Development Authority Act. There was therefore no enforcement resolution made on 30th May, 2019 upon which the claimant's contract could be terminated. Further, circular from Head of Public Service stated that MD/CEO's of state corporations had no term and age limit.

21. Counsel further submitted that the treatment accorded to the claimant amounted to discrimination against him as it sought to subject him on Mwangozo which the Board never applied to itself.

22. On the issue of termination, counsel submitted that the fixed term contract was terminated at no fault of the claimant and the respondent confirmed this position that terminating the same was only to regularize alleged illegality due to Mwangozo.

23. Mr. Katwa submitted that the Board that gave the claimant a renewed contract on 4th May, 2018 was properly constituted under Kerio Valley Development Authority Act, comprising of thirteen members, six being independent directors. However, the Board who according to counsel was hastily constituted to terminate the claimants contract comprised twenty members, thirteen of which were independent directors contrary to Section 4(h) of Kerio Valley Development Authority Act which requires only ten independent directors. The Board according to counsel was convened following the instructions of from Head of Public Service and was to make a predetermined conclusion to terminate the claimant's contract.

24. In support of the submission on illegality of the Board, counsel urged the court to rely on the case of **Hosea Sitienei -v-University of Eldoret & 2 others [2018] eKLR (CoA).**

25. On the issue whether the claimant was given a hearing before termination counsel submitted that the contract was terminated on 30th May, 2019 without the claimant being afforded an opportunity to be heard. No notice and or invitation was given to him and that the respondent was entertaining the thought of terminating his three year contract after one year of excellent performance. The termination was therefore in clear breach of Section 41 of the employment Act. In supporting this submission, the court relied on the case of **Stephen Mbugua Chege -v- Nairobi City Water & Sewerage Company [2017] eKLR** and **Pashito Holdings Ltd & other [1997] eKLR** among others.

26. Concerning the question whether the claimant was engaged and contracted through the Cabinet Secretary's letter and employment contract within statutory provisions including Kerio Valley Development Authority Act, Mr. Katwa submitted that the claimant was properly and lawfully appointed as the Managing Director of Kerio Valley Development Authority and Secretary to the Board following the Board's recommendation to the Cabinet Secretary Devolution and Planning who was then the appointing authority. And that he appointed the claimant for a period of three years. Subsequently the Kerio Valley Development Authority Board adopted the appointment and executed the contract dated 4th May, 2018.

27. According to counsel the claimants contract was a fixed term contract which was set to lapse on 4th May, 2021. The claimant had reasonable expectation of continuing to work for the respondent up to the lapse of his contract.

28. To support this submission counsel further relied on the earlier case of **Stephen Mbugua Chege -v- Nairobi City Water and Sewerage Company.**

29. Regarding whether the Head of Public Service could direct the Cabinet Secretary and the Board to appoint or dismiss the claimant, counsel submitted that section 9 of the Kerio Valley Development Authority Act provided that there shall be an officer of the Authority known as the Managing Director who shall be appointed by the Minister and who shall be responsible for the execution of the policy of the Authority and for the control and management of its day to day business. The letter by the Head of Public Service initiating the termination of the claimant's contract therefore lacked legal basis since the appointing authority was the Cabinet Secretary. Further that the letter dated 23rd January, 2018 from the Cabinet Secretary Devolution and Planning addressed to Head of Public Service was due to circular dated 29th November, 2017 Ref OP CAB.26/41 on need of clearance form Head of Public Service on fresh commitments during transition period as the new Cabinet was yet to be formed. This letter was replied to on 19th April, 2018 when substantive Cabinet had been appointed and in office thus rendering the instructions given during the transition irrelevant.

30. Counsel further submitted that the letter from Head of Public Service dated 19th April, 2018 was addressed to Principal Secretary, National Treasury and Planning and not the appropriate Cabinet Secretary Devolution and ASAL who was the appointing authority. Further that there was no term limits for the chief executive officers unless it was provided for in the Kerio Valley Development Authority Act hence it would be improper to introduce term limit without an amendment to the Act. In support of this submission, Counsel relied on the case of **Henry Nyabuto Ondieki -v- Charles Apundo Owelle & 2 others [2017] eKLR**

31. Mr. Katwa further submitted that the Board of Directors, the Cabinet Secretary and the Head of Public Service approbated and then reprobated in acting on one hand by giving a detailed and reasoned decision to extend claimant's contract on one hand on 4th May, 2018 while a subsequent Board on 30th May, 2019 terminated the contract without the intervention of any factors to warrant change of initial position as to the claimant's contract. In supporting of this submission, counsel relied on the case of **Paul Njaga Kihara -v- Chase Bank (K) Ltd & Another [2018] eKLR**

32. On the issue whether the claimant was discriminated against, counsel submitted that the treatment accorded the claimant amounted to discrimination as it sought to subject him to governance of Mwongozo which the Board never applied to itself. The treatment according to counsel amounted to double standards and discrimination. Counsel further submitted that the respondent admitted in the court proceedings and bound itself to the position that its establishing statute overrode Mwongozo code hence could not depart from the said position for its own convenience.

33. Mr. Katwa also submitted that the claimant was subjected to discrimination and denied annual increment and reward as per the contracts. The contract provided salary increment and salary awards annually based on performance. However, despite the claimant performing exceptionally well as per the Board's annual ratings for over 6.5 years no salary increment or awards were ever given to him despite the numerous promises. The claimant was only given a letter of appreciation and commendation.

34. The claimant therefore urges the court that he was rightly entitled to compensation and damages for the previous 6.5 years and salary increment which was not awarded to him despite several promises by the Board. On this account, claimant contended that for fairness and equity the appropriate increment percentage based on the performance ought to be 10% annual increment which worked out to the sum of Ksh.12,608,313 for the 6 ½ years he served the respondent. The claimant further urged the court to award him salary and benefits for the unexpired period of the contract which he has vehemently argued was wrongfully terminated. In this regard the claimant sought the sum of Ksh.98,080,638/= as compensation.

35. On the issue of leave, the claimant's counsel submitted that most senior staff including him were multi-tasking because the respondent had limited highly skilled staff and managers hence it was very difficult to take leave and that during the implementation of Voluntary Early Retirement in 2018 the issue was addressed by the Board and all staff who had outstanding leave days were compensated. The claim for accrued leave days was therefore justified and the Board would have no reason to discriminate against the claimant.

36. The respondent's counsel, Mr. Nyamodi on his part submitted that a party was bound by their pleadings therefore any evidence tendered by a party that was not specifically pleaded was not to be considered by the court. In this regard counsel relied on the Supreme Court decision in **Raila Amollo Odinga & Another -v- IEBC & 2 others [2017] eKLR** and **IEBC & Anor-v- Stephen Mutinda Mule & 3 others [2014] eKLR**

37. According to counsel, the claimant did not specifically raise any allegation of discrimination on the grounds of alleged denial of annual salary increment and rewards in his amended statement of claim dated 30th March, 2020. However, the claimant introduced the allegation of discrimination on grounds of alleged denial of annual salary increment and rewards in his submissions.

38. Counsel further submitted that an issue only arises when a material postulation of fact or law was affirmed by one party and denied by the other. The respondent was not alive to the allegation that the claimant was discriminated on grounds of denial of annual salary increment and rewards and thus could not deny the said allegation and avail evidence to the contrary before the court. Counsel therefore submitted that the allegation of discrimination was not properly on record and as such the court does not have jurisdiction to consider it.

39. Mr. Nyamodi further submitted that it was a general principle of law that evidence could not be introduced in a case through oral or written submissions. To this end counsel relied on the case of **Peter Adams Ludavaa -v- HFC Ltd [2021] eKLR**. According to counsel, the claimant in his submissions dated 8th July, 2021 sought to introduce a letter dated 31st July, 2012 from the Ministry of Regional Development allegedly addressed to Ms. Joyce Emanikor, Chairperson, KVDA as evidence in support of the allegation for incentives. Further, counsel attached the said letter to the submissions.

40. Concerning whether the provisions of Section 41 of the Employment Act were applicable, counsel submitted that it was not in dispute that the respondent in its 34th special Board meeting held on 30th May, 2019 resolved to terminate the claimant's employment based on the premises of Mwongozo which provided that the term of all CEO's of state corporations was three years, renewable once. Counsel therefore submitted that the termination of the claimant's employment was not on the grounds of misconduct, poor performance or physical incapacity and as such the provisions of Section 41 of the employment Act were not applicable in the present case.

41. On the question whether the termination of the claimant's service was fair and lawful, counsel submitted that KVDA Act makes provisions for appointment of the Managing Director/CEO. The Act is however silent on the appointment procedure and terms of service of the Managing Director. However, section 5 of the State Corporations Act granted a State Corporation general powers that were necessary for its functions and that the President under the Act, had powers to make regulations generally for the better carrying into effect of the provisions of the Act.

42. Mr. Nyamodi therefore submitted that the statutory basis for Mwongozo was traceable back to Section 30 of the State Corporations Act. In support of the submission counsel relied on the case of **Ben Chikamai & another v- Peter Macithi Muigai & 2 others [2020] eKLR**. He further submitted that section 7 of the state corporations Act granted the President power to give directives to and remove Boards of State

Corporations. Pursuant to the provisions of Section 7, the President directed all Boards of State Corporation to implement the provisions of Mwongozo except as otherwise provided by any written law vide Executive Order No. 7 dated 25th March, 2015. To this end counsel relied on the casing **Republic -v-CAK ex parte ICTAK [2021] eKLR**. In that regard, the claimant's averment that Mwongozo did not have any force in law on grounds that it was not an Act of Parliament did not lie.

43. Mr. Nyamodi further submitted that Mwongozo provided that the tenure of CEO's of state corporations was a three year term or as otherwise provided under any written law and renewable once subject to performance evaluated by the Board. It was not in issue that the claimant had served his first term as the CEO for three years from April, 2012 to April, 2015. This was renewed for a further term of three years from April, 2015 to 22nd April, 2018. Counsel therefore submitted that any contract entered into between the claimant and the respondent after the lapse of his second term on 22nd April, 2018 was contrary to Mwongozo and was thus null and void.

44. On the issue of illegality of the Board that terminated the claimants service, counsel submitted that from the Minutes of the meeting held on 30th May, 2019 which the claimant was cross-examined on, there were 15 attendees including the Chairperson of the Board and 10 independent board Members. The Board according to counsel was therefore not improperly constituted. The applicable law concerning the membership of the Board of the respondent was the KVDA Act. Thus the claimant's averment that the respondent's Board was not compliant with Mwongozo held no ground.

45. On whether the claimant was entitled to the relief's sought, Mr. Nyamodi submitted that the respondent had demonstrated that the termination of the claimant's employment was undertaken to cure an illegality and ensure compliance with the provisions of KVDA Act, the State Corporations Act and Mwongozo. The claimant had not demonstrated how the respondent violated article 21 and 41 of the Constitution and section 41 of the Employment Act in terminating his employment. In support of this submission, counsel relied on the case of **Irene C. Rotich -v- County Government of Bomet [2018] eKLR**

46. Having endeavored to summarise the pleadings, evidence and closing submissions as above, this court isolates four issues for determination.

47. First whether the respondent's Board of Directors had power or authority to recommend the extension of the claimant's contract after the claimant had served two consecutive three year terms and related to this, whether the Cabinet Secretary, Devolution had authority to make the appointment for a further three years commencing 18th April, 2018.

48. Second, whether the Head of Public Service Board had power to direct the Respondents Board to terminate the claimant's service in compliance with Mwongozo.

Thirdly, whether the Board was bound to hear the claimant prior to terminating his service. And finally, should the claimant be successful, what would be the appropriate orders to make?

49. Section 9(1) of the KVDA Act makes provision for the appointment of the managing director by the Minister concerned. The managing Director shall be responsible for the execution of the policy of the Authority and for the control and management of its day to day business.

50. The claimant herein was initially appointed on 23rd April, 2012, for a term of three years terminating in April, 2015. This contract was renewed for a further term of three years commencing on 22nd April 2015 and was scheduled to end on 22nd April, 2018.

51. It was common ground that six months prior to the expiry of the claimants contract, as stipulated therein, he vide a letter dated 7th October, 2017 applied to the respondent's board seeking extension of his contract for a further period of three years.

52. The board received the claimant's application and at its 122nd meeting held on 15th December, 2017 deliberated on the request and at minute number BOD MIN. 101/10/2017 observed as follows:

A. RENEWAL OF MANAGING DIRECTOR'S CONTRACT.

The Board was presented with a report on the Managing Directors' request for renewal of contract for a period of 3 years with effect from 22nd April 2018 since the current contract is coming to an end on 22nd April 2018.

The Board noted that the MD submitted his application dated 7/10/2017, which is within six (6) months prior to expiry of the current contract as per the terms of the contract. Various circulars and guidelines on reappointment of the CEO of the state Corporations like Circular No. OP/CAB.9/1A dated 23rd November, 2010 on appointment of CEOs, Mwongozo Code of Conduct, Performance Appraisal Reports for the year 2015/2016 and SCAC evaluation report were used to guide the decision.

The board debated on two possibilities of either renewal or extension of the MD's contract. According to KVDA Act, the contract for engagement of the Managing Director is open while in Mwongozo Code of Contract the tenure of the CEO is: -

(i) Three year term or as provided by any other written law

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

The Board was at a loss whether to follow Mwongozo or the KVDA Act. However, according to the Presidential Directive, where Mwongozo and the existing Act are in conflict, the existing Act prevails.

the Board considered the possibility of extension of the contract. To support the extension, the Board took into account the following issues:-

- The Arror/Kimwarer multipurpose projects are at critical state of take-off and require continuity. The Authority may be exposed to risk if there is change in leadership.
- Implementation of Voluntary Early Retirement (VER) programme with budget of Ksh.309 million, given by National Treasury is ongoing and sensitive. It requires smooth implementation. Change of leadership may disrupt the process and cause the organization to continue experiencing systematic challenges due to delays.
- The Authority is just at the take-off/turnaround stage in terms of good performance due to the current leadership which has created a sound financial stability. this includes successful construction and completion of KVDA Southern Wing. This performance path requires a robust leadership to be sustained.
- The Authority's three (3) Chief Managers and four (4) Board Directors terms is expiring in April 2018, the four include the Chairman and Vice Chairman of the Board. The exit of the MD at the same time may leave a leadership Vacuum which will affect both stakeholder confidence and project implementation.
- The CEO has excellent networking mobilization, strategic focus and lobbying skills which made the Authority to mobilize and access funds to the tune of Ksh. 98 billion for implementation of mega projects such as multipurpose projects and VER.
- Due to his relentless efforts, the Authority achieved "very good" results during FY 2014/2015 [3.02], FY 2015/2016 [2.71], AND FY 2016/2017 [2.79] despite financial challenges where the Authority's funding receipts was educed much below the estimated budges.
- Board Evaluation conducted by SCAC on 23/5/2017 rated the CEO at 93.1% 94.65310 which is way above the 70% rating as per common practice in other state corporations and also trend with KVDA.

On the basis of the above interests of the Authority and the CEO's competencies, and to allow continuity of the performance especially considering the ongoing restructuring and rationalization, implementation of the multipurpose projects being at a critical state, the Board recommended the extension of the MD/CEO's contract for a period of two (2) years with effect from 22/4/2018.

53. The above deliberations and resolution by the Board were communicated to the Cabinet Secretary concerned for concurrence and necessary appointment. This was done through a letter dated 18th April, 2018 when the Cabinet Secretary concerned responded and approved the renewal of the claimants contract for a further term of three years instead of the two years requested for. The respondent's Board therefore proceeded and authorized the renewal of the claimants contracts and proceeded to issue him with a contract dated 4th May, 2018.

54. By a letter dated 8th May, 2018 addressed to the Cabinet Secretary concerned Honourable Eugene Wamalwa, the Head of Public Service responded to the request for concurrence from Cabinet Secretary Wamalwa when he received a draft gazette notice for renewal of the claimant's contract. In the letter the Head of Public Service noted that the claimant had already served two three-year terms as the CEO of the respondent in line with Mwongozo and Government's policy. The HoPs therefore noted that the extension for four years sought by the CS would not only contradict the edict by the President on Mwongozo but result in legal contest noting that the issue of Chief Executive Officer's terms was already an outstanding contestation in various legal proceedings.

55. In the letter dated 8th May, 2018, from Head of Public Service, reference is made to letter no OP/CAB.9/2A dated 19th April, 2018 in which the Head of Public Service extensively considered the request for extension of the claimant's term at KVDA and the reasons advanced by the Board to justify the extension and that he was not convinced that they justified the extension for the period requested. The Head of Public Service however, approved extension for a period of six months in order to facilitate the initiation of the process of recruitment of a substantive CEO. It is instructive to note that this letter was addressed to one Dr. Julius Muia, Principal Secretary Planning, National Treasury, and copied to Cabinet Secretary National Treasury. There is no evidence that it was availed to or brought to the attention of the Cabinet Secretary Hon. Wamalwa who was for the purposes of the respondent, the appointing authority for the position of CEO/MD. It is therefore reasonable to assume that when Cabinet Secretary Wamalwa was approving the Board's request through his letter dated 18th April, 2018, he had no knowledge of the letter dated 19th April, 2018. Naturally because this letter to the Board was written a day before the letter from Head of Public Service and in any event not addressed to him. The rejection or lack of concurrence from Head of Public service could only be assumed to have come to the attention of Cabinet Secretary Wamalwa on or subsequent to 8th May, 2018 when Head of Public Service noted that he had submitted a draft gazette notice for renewal of contract for the claimant.

This far, and to answer the question whether the respondent's Board had power or authority to recommend the extension of the claimant's contract after he had served two consecutive three year terms, the court would answer the question in the affirmative. The Board in its deliberations at its 122nd Board meeting held on 15th December, 2017 extensively deliberated on the issue taking into account the KVDA Act, various circulars and guidelines on reappointment CEOs of State Corporation like circular No. OP/CAB.9/1A dated 23rd November, 2010 Mwongozo code of conduct, performance appraisal reports for the year 2015/2016 and SCAC evaluation reports to guide their decision and recommendation to the appointing authority who is the Cabinet Secretary concerned. In this case Honourable Eugene Wamalwa.

The appointment was however recalled on the instructions of the Head of Public Service who was of the strong view that it contravened Mwongozo code of conduct which stipulated that the term of office for a CEO of a state corporation is three years or as otherwise provided under any other written law and renewable once subject to performance evaluation by the Board.

56. Section 9(1) of the KVDA Act provides for the appointment of the MD/CEO of the respondent but does not make provision for the length of the tenure of the MD/CEO. This implies the stipulations in Mwongozo regarding length of tenure should apply. As submitted by counsel for the respondent relying on the case of **Ben Chikamai & Another -v- Peter Macithi Muigai & 2 others**, the statutory basis of the Mwongozo is traceable to State Corporations Act, at Section 3 thereof, which mandates the President to formulate regulations with a view of the optimum operations of state Corporations. Additionally, section 7 grants the president power to give directives to and remove Boards of state Corporations. These statutory provisions informed the **Executive order No. 7** dated 25th March, 2015 which directed Boards of State Corporation to implement forthwith the provisions of Mwongozo except as otherwise provided for by any written law.

57. Against the background of the Presidential directive contained in the **Executive Order number 7** referred to above, it is curious note that by the letter dated **27 February, 2018 Ref. No. OP/CAB.9/1A**, concerning the terms of service for State Corporations Chief Executive Officers, the Head of Public Service stated in material part as follows:

Terms of service for state corporation's chief executive officers

“The Government has noted a lack of clarity on terms of service for Chief Executive Officers of State Corporations and concerns at service period, which has in some instances led to litigation.

The appointment of Chief Executive Officers in State Corporations is guided by the general provisions of Section 5(3) of the State Corporations Act Cap. 446, the specific Act of Parliament, under which individual State Corporations are established, the Article of Association for State Corporations established under the Companies Act Cap. 446 and the Regulations on the appointment of Board of directors for public listed state Corporations issued under Capital Markets Authority Cap. 485A. Section 6(2) of the Act provides that the Chief Executive Officer shall be appointed for a renewable period of five (5) years or shorter period as may be specified in the notice of appointment.

For avoidance of doubt, the Terms of Service for state corporation Chief Executive Officers is contractual and renewable based on performance and business requirements. They are not subject to the general public service policy on mandatory retirement at 60 or 65 years or limit as to number of terms served”. (underlining supplied)

What this implies therefore is that whereas Mwongozo remain the governing instrument in the running of State Corporations generally, it remains a policy document which whenever circumstances demand and are justifiable, can be deviated from.

58. This court in the case of **Okuya Omtatah -v-Kenya Revenue Authority Board of Directors & 2 others [2018]eKLR** observed as follows concerning Mwongozo:

“From the foregoing, it is reasonably deducible that the Cabinet Secretary Finance has control over performance and strategic direction of KRA including recruitment and retention of staff in certain key positions in order to realize its functions set out under section 5 of the Act. In the context of the above, Mwongozo and the circulars relied on by the petitioner to question the constitutionality and legal validity of the interested party's contract are policy documents issued by Government from time. Their intention in most cases is to harmonize or in certain cases explain departure or variation of any existing policy. They however cannot be used to bar or prevent a strategic decision of the Government...Whereas the running of Government should be on a clear and predictable policy, it ought however to be noted that policy influences but does not bind the Government in executing its duties especially where such exercise of duty is accompanied by reasonable explanation and is carried out in a way that does not in the face of it, violate the law or the constitution. In the contrary case, the court would have reason to interfere.”

59. The respondent's Board endeavored to justify the need to reappoint the claimant for a further two years to Cabinet Secretary and the Cabinet Secretary was persuaded by the justifications put forward hence made the appointment as the appointing authority as per the provisions of Section 9(1) of the KVDA Act.

60. Whilst it could be a silent policy that Cabinet Secretaries designated as appointing authorities for heads of State Corporations must first seek concurrence of the Head of Public Service, this was not alleged anywhere by the respondent. Further the purported intervention by the Head of Public Service came late after the respondent had bound itself by entering into a contract with the respondent.

61. Assuming that the claimant's appointment was in conflict with Mwongozo, the Court is of the view that there existed sufficient material as observed above that operated in the mind of the respondent's Board as well as the Cabinet Secretary when making the appointment. The material was sufficient enough to reasonably lure any reasonable person placed in the respondent's Board's position to arrive at the conclusion they did.

62. The foregoing sufficiently addresses the first and second questions framed by the Court save to emphasize that the Head of Public Service in view of what has been observed above, had no power to direct the respondent's Board to terminate the claimant's contract for breach of Mwongozo while circular dated 27th February, 2018 stating in part that CEO's of State Corporations were not subject to the general public service policy as to number of terms served, was still valid and had not been varied or recalled. Further, the circular was issued after **Executive Order 7 dated 25th March, 2015** which directed Boards of State Corporations to forthwith implement Mwongozo.

63. On the question whether the Board was bound to hear the claimant before terminating his contract the answer would be in the affirmative as well.

64. Section 41(2) of the Employment Act makes it mandatory that before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) of the Act, an employer must hear and consider any presentation which the employee may

make.

65. The respondent contended that the termination was not on account of misconduct but to regularize an illegality. Whereas this may have been so, nothing in law states that in such a case an employee should not be afforded due process. The claimant had executed a contract of employment with the respondent albeit later recanted by the respondent on instructions of the Head of Public Service. He however had a right to harbor a legitimate expectation that his contract would run to full term unless issues internal to the contract demanded an early separation. The claimant therefore had a right under section 41(2) of the Employment Act to be heard on the issue of termination of his contract. In this context, any *actus interveniens* such as the directive from Head of Public Service that his contract ends immediately for being inconsistent with Mwongozo, ought therefore to have involved the claimant and his views considered before the decision to terminate him was reached even if as it were, his fate was *fait accompli*.

66. In any event the respondent being a public body is bound by Fair Administrative Actions Act.

67. Section 4 of the Fair Administrative Action provides in material part as follows:

4. (1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.
- (2) Every person has the right to be given written reasons for any administrative action that is taken against him.
- (3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-
 - (a) prior and adequate notice of the nature and reasons for the proposed administrative action;
 - (b) an opportunity to be heard and to make representations in that regard;
 - (c) notice of a right to a review or internal appeal

68. Having observed as above, the final question would be the on appropriate orders to make in the circumstances.

69. The claimant alleged that he was denied annual increment and reward as per his contract. According to him the contract provided for salary increment and reward annually based on performance. However, despite performing exceptionally well as per the Board's ratings for over 6.5 years, he got no salary increment or rewards despite numerous promises.

70. The court in the above regard notes that the issue before it concerned the termination of the claimant's third three year contract issued on 4th May, 2018.

71. The two previous contracts were not the subject of the present suit. The claimant served and completed the two contracts without raising any issue and in any event alleged that upon the expiry of his second contract, he wanted to leave but the respondent's Board pleaded with him to stay on due to his excellent performance and that the delicate stage the reforms he had brought to the respondent were and which militated against his exit.

72. At the senior level the claimant was, it would be in bad faith to raise at this stage, issues which he had every opportunity to raise during his two previous contracts and if not satisfied, he had a choice to either decline a renewal or make them a condition for renewal and if not agreeable exit and for breach of contract. In any event some of the issues raised by the claimant touching on his two previous contracts are significantly statute barred by virtue of section 90 of the Employment Act.

73. The claimant further sought from the court payment of salary and benefits including gratuity, club membership, utilities, medical expenses, security and domestic workers for the remainder of his contract which was prematurely terminated.

74. Clause 4 of the claimant's contract provided that it could be terminated by either party giving the other, three months' notice in writing of the desire to terminate the contract provided that the employee shall upon termination by the employer be paid his full salary and other emoluments for the remainder of the term of the contract not served. Clause 6 further provided that the claimant was entitled to a fully furnished house with all attendant utilities and security services fully paid or house allowance in lieu. The contract further provided for the payment of leave allowance at Ksh. 50,000/= per year. The respondent would further be reimburse the claimant entrance fees and annual subscription of one sports or social club of his choice. Regarding a vehicle the contract provided that he would be provided with one while on duty except while on annual leave or mileage allowance in lieu thereof. Regarding medical expenses, the contract provided that the respondent would cover all the medical expenses for the claimant, his spouse, and five children up to the age of twenty four years.

75. Regarding gratuity, the contract provided that the claimant would be paid gratuity equal to 31% of the total consolidated basic salary paid during the contract period or any period served.

76. The claims for club membership, telephone allowance, utilities, security guards and refund of medical expenses were in the nature of special damages therefore ought to have been specifically pleaded and strictly proved. No evidence was produced during the trial to support these claims and that the claimant actually incurred these expenses. These claims are therefore disallowed.

77. In any event these expenses were reimbursable hence could only be refunded once the claimant incurred them. It would therefore be difficult to project how much the claimant would have incurred for the rest of the contract.

78. Concerning house allowance, the contract stipulated that the claimant would be provided with a fully furnished house or paid a house allowance in lieu. The contract was not clear on the amount of the allowance hence the industry practice would put the same at 15% of the basic salary.

79. In conclusion the court hereby awards the claimant as follows:

	<u>Ksh.</u>
a) Three months' salary in lieu of notice.	1,500,000
b) Salary for the remainder of the contract (23 months)	11,500,000
c) House allowance @ 15% Basic Salary for 23 months	1,725,000
d) Gratuity at 31% consolidated basic Salary for 3 years	5,580,000
e) Leave allowance for two years @Ksh. 50,000 per year	100,000
f) Six month's salary as compensation for unfair termination	<u>3,000,000</u>
	<u>23,405,000</u>

g) The award shall be subject to taxes and statutory deductions and any terminal benefits that may have been paid to the claimant upon termination of his contract.

h) The respondent is hereby ordered to issue the claimant with a certificate of service.

i) The Claimant shall further have costs of the suit.

It is so ordered

Dated and delivered at Eldoret this 4th day of February, 2022

Abuodha Nelson Jorum

Judge