



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. E088 OF 2021

IN THE MATTER OF ARTICLES 3(1) 22, 23, 48, 50(1) AND 258 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED VIOLATION OF ARTICLES 4(2), 10(2) (a), 27(1)

AND 2 & 3), AND 47(1) 73(1) 232(1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE ALLEGED VIOLATION OF THE MWONGOZO (THE CODE OF GOVERNANCE

FOR STATE CORPORATIONS); THE HUMAN RESOURCES POLICIES AND PROCEDURES MANUAL

FOR WATER SECTOR TRUST FUND; AND THE PROCEDURE FOR RE-APPOINTMENT OF

SERVICE CHIEF EXECUTIVE OFFICERS IN STATE CORPORATIONS

AND

IN THE MATTER OF THE CONSTITUTIONAL AND LEGAL VALIDITY OF THE

CHIEF EXECUTIVE OFFICER OF WATER SECTOR TRUST FUND SERVING

FOR A THIRD THREE-YEAR TERM

BETWEEN

ROSELYNE OKUMBE.....PETITIONER

VERSUS

THE BOARD OF TRUSTEES, WATER SECTOR TRUST FUND.....1ST RESPONDENT

THE CABINET SECRETARY,

MINISTRY OF WATER, SANITATION AND IRRIGATION.....2ND RESPONDENT

AND

ISMAIL FAHMY M. SHAIYE.....1ST INTERESTED PARTY

STATE CORPORATION ADVISORY COMMITTEE.....2ND INTERESTED PARTY

RULING

1. The applicant in the application dated 25th November, 2020 and amended on 4th January, 2021 prays for an order in the following terms:-
 - (a) Spent
 - (b) **THAT** pending the hearing and determination of this petition, this Honourable Court be pleased to issue a temporary order of prohibition, prohibiting the Respondents or any other party howsoever acting, from re-appointing the 1st Interested party as the Chief Executive Officer of the Water Sector Trust Fund.
 - (c) **THAT** pending the hearing and determination of this Petition, this Honourable Court be pleased to issue an interim order compelling the 1st Respondent to commence the process of competitively recruiting and appointing a substantive Chief Executive Officer in accordance with the law and simultaneously appoint a suitable person in acting capacity for a maximum period of 6 months.
 - (d) **THAT** pending the hearing and determination of this petition, this Honourable Court be pleased to issue an interim order barring the 1st interested party from holding himself out as the Chief Executive officer to, performing any functions for, accessing the offices of or meddling in any way whatsoever, in the affairs of the Respondent.
 - (e) **THAT** pending the hearing and determination of this application and/or petition, this Honourable Court be pleased to issue an order quashing the decision of the 2nd and 3rd Respondents communicated through a letter dated 12th November, 2020 recommending the extension of the 1st interest party and asking for the concurrence of the Head of Public Service.
 - (f) **THAT** the costs of this Application be borne by the Respondents.
 - (g) Such other, further, alternative, incidental and/or appropriate relief(s) as the Honourable Court may deem just and expedient.
2. The application is premised on the grounds set out on the face of the notice of motion the nub of which is that the 1st Interested party was employed as the Chief Executive Officer of the 1st respondent on 10th November, 2014 for a term of 3 years renewable once subject to performance evaluation by the board. That his term expired and was renewed for a final term on 10th November, 2017 which term came to an end on 9th November, 2020.
3. **THAT** the 3rd respondent issued a Legal Opinion dated 28th April, 2020 that the 1st interested party was ineligible for re-appointment as he had already served the maximum term limit allowed under the law.
4. **THAT** a recruitment process to fill the position ought to be commenced and the respondent separate with the 1st interested party and appoint a different person in acting capacity pending the competitive recruitment of a replacement (**Chief Executive Officer**)
5. **THAT** the 1st interested party has instead continued to remain in acting capacity unlawfully.
6. **THAT** the 2nd respondent on 12th November, 2020 wrote to the Head of Public Service informing him that it had held a meeting with the 3rd respondent and had resolved to re-appoint the 1st interested party for a further term of 3 years beginning 10th April, 2020.
7. That any such extension of term is unlawful and unfair and the Court issues interim orders to stop that illegal process pending the hearing and determination of the petition.
8. The Supporting Affidavit sworn to by **Florence Kanyua Lichoro** dated 25th November, 2020 is duly signed and commissioned and reiterates the grounds aforesaid.
9. 1st interested party filed grounds of opposition dated 8th December, 2020 stating that the application is incompetent, bad in law and incurably defective as the issues raised and the orders sought in the application are *res-judicata*, the same having been directly and substantially in issue in **Nairobi ELRC Cause No. 98 of 2020 - Okiya Omtatah Okiiti –vs- Ismael Fahmy M. Shaiye & Another** wherein the Court dismissed a similar application dated 26th January, 2020 vide a ruling dated 16th October, 2020.
10. That the application has been overtaken by events and rendered moot; the 1st interested party having been reappointed as the Chief Executive Officer of the 1st respondent vide a letter dated 13th July, 2020.
11. That no actionable Legal grounds are raised in the application but mere internal administrative complaints of a speculative nature. That the application be struck out at the outset.
12. The 1st respondent filed a replying affidavit by **Halima Ali**, the Corporate Secretary of Water Sector Trust Fund in which she objects to the supporting affidavit of Roselyne Okumbe for offending Rule 9 of the Oaths and Statutory Declarations rules read with Rule 11 (2) of the Constitution of Kenya (**Protections of Rights and Fundamental Freedoms**) Practice and Procedure Rules, 2013 for failing to seal the exhibits under the seal of a commissioner of oaths. Therefore the evidence alluded to at paragraph 21 of the Supporting Affidavit are not admissible but also the entire affidavit is bad in law and it be expunged thus making the application and the petition incompetent.
13. She deposes that the 1st interested party served as the Chief Executive Officer of Water Services Trust Fund established under the

repealed Water Act, 2002 for an initial term of three (3) years.

14. That the Water Act, 2016 repealed the Water Act, 2002 which was enacted on the eve of the expiry of the 1st Interested Party's contract of Employment and established Water Sector Trust Fund, which is the current employer of the 1st interested party. That the Water Act, 2016 came into operation on 21st April, 2017. The contract of the 1st interested party was renewed to serve the new outfit with effect from 10th November, 2017. That the new outfit and its mandate is completely different from the earlier one under 2002, Act.

15. That therefore, the 1st interested party has served only one, term of 3 years in the new Water Sector Trust Fund, 2016. That it is false that the 1st interested party has served for two terms of 3 years as Chief Executive officer of Water Sector Trust Fund, 2016.

16. That by a letter dated 23rd June, 2020, one Patrick O. Kokonya wrote to the 1st interested party and unilaterally sent him on terminal leave pending expiry of his term of contract and directed the respondent to promptly hand over his office to Mr. Willis Okello Ombai. On the same day, the Chairperson, Mr. Kokonya appointed Mr. Willis Okello Ombai as the acting Chief Executive Officer of the Fund.

17. That the Chairperson purported to follow Legal advice dated 28th April, 2020 by Solicitor General and a subsequent resolution of a special meeting made by the 1st respondent held on 23rd June, 2020. The deponent states that no such meeting took place. That the Advisory by the Solicitor General was also not properly sought by the Fund. That majority of the members of the 1st respondent wrote a letter dated 24th June, 2020 addressed to the 2nd respondent, the Cabinet Secretary, Ministry of Works, Sanitation and Irrigation protesting the unilateral and unlawful constructive renewal of the 1st interested party by the then chairperson without involving the other members of the Board.

18. That the Cabinet Secretary, declared the purported resolution by a special meeting held on 3rd November, 2020 null and void by a letter dated 24th June, 2020. That Mr. Patrick Kokonya is now under investigation by Ethics and Anti-corruption Commission on allegation of embezzlement of public Funds through irregular payments of mileage claims.

19. That there was bad blood between the Chief Executive Officer and the Chairperson due to these investigations initiated by the 1st interested party. That the appointment of Mr. Kokonya as Chairperson of the fund has since been revoked.

20. That the Chairperson filed through Okiya Omtatah Okoiti **ELRC Judicial Review No. 64 of 2020, - Okiya Omtatah Okoiti -vs- The Hon. Attorney General and 2 Others** challenging the appointment of Chairperson of the 1st respondent Mrs Mary M. Khimulu by his Excellency, the president through Gazette Notice No. 4467. That on 29th June, 2020, Mr. Okiya Omtatah Okoiti also filed **Employment and Labour Relations Court Petition No. 97 of 2020** together with an application seeking similar orders to the instant suit. The Court delivered its Ruling on 16th October, 2020 dismissing the Applicant's application dated 26th June, 2020.

21. That the petitioner herein like others before her, are clearly litigating on behalf of a third party, Mr. Patrick O. Kokonya, who is aggrieved by the revocation of his appointment by the President and the same is not a public interest litigation intended to uphold and protect the Constitution and therefore an abuse of the Court process and ought to be dismissed with costs.

22. That the interim conservatory orders sought have been overtaken by events since the 1st respondent has faithfully renewed the 1st interested party's contract of Employment for a further term of three years with effect from 10th November, 2020. The contract is duly annexed.

23. That the application be dismissed with costs.

Determination

24. The parties have filed written submissions and the issues for determination are:-

(i) Whether the applicant has satisfied the requirements for issuance of conservatory order sought in this matter.

(ii) Whether the matter has been overtaken by events and or is res-judicata.

25. The Court is satisfied that the 1st respondent was established under the Water Act, 2016. That the Applicant could not have possibly served two terms of three (3) years as the Chief Executive Officer of the new Water Sector Trust Fund established with effect from 21st April, 2017.

26. The applicant has firstly therefore failed to establish a *prima facie* case with probability of success to warrant grant of Conservatory Orders sought in public space, in terms of the Supreme Court Decision in **Gatirau Peter Munya -vs- Dickson Mwenda Kithinji & 2 Others [2014] eKLR** as follows: -

“86 “Conservatory Orders” bear a more decided public law connotation for these are orders to facilitate ordered functioning within Public agencies as well as to uphold the adjudicatory authority, of the Court in the public interest. Conservatory Orders, therefore are not, unlike interlocutory injunctions, linked to such private – party issues as “the prospects of irreparable harm” occurring during the pendency of a case or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders consequently should be granted on the inherent merit of a case bearing in mind the public interest, the Constitutional values and the proportionate magnitude and priority levels attributable to the relevant causes.”

27. Furthermore, it is apparently clear that the orders sought to stop the recruitment process have been overtaken by events because the 1st interested party was appointed as Chief Executive officer of the fund for a further term of three years with effect from 10th November, 2020. The issue as to whether the appointment is lawful or not may only be resolved upon hearing of the petition on merits and no interim orders may issue to revoke the appointment already made.

28. The Court has also considered the ruling by Hon. Byram Ongaya, dated 16th October, 2020 in Petition No. 97 of 2020 *between Okiya Omtatah Okoiti –vs- Ismail Fahmy M. Shaiye* - respondent and the *Board of Trustees, Water Sector Trust Fund intended interested party.*

29. The interim orders sought in that matter were aimed at stopping the respondent Ismail Fahmy M. Shaiye, the current interested party from acting in the position of Chief Executive Officer of Water Sector Trust Fund, the 1st respondent in the present suit.

29. The Court is satisfied that the application and the suit in Petition No. 97 of 2020 dealt with substantially the same subject matter as the present application and the parties litigating in that suit were the same except the petitioner who brought the suit as a public interest suit.

30. The Court dismissed the interlocutory application in Petition No. 97 of 2020 which issues are being litigated in the present application. The Court is therefore satisfied also, in addition the matter having been overtaken by events, the issues raised in this application are also *res-judicata*.

31. Accordingly, the application is dismissed with costs.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 17TH DAY OF MARCH, 2022.

MATHEWS N. NDUMA

JUDGE

APPEARANCES

M/S ODUK FOR THE PETITIONER/APPLICANT

M/S CHESYNA FOR 2ND RESPONDENT

MR. MOHAMMED FOR 1ST RESPONDENT

MR. ANYONA FOR 1ST INTERESTED PARTY

MR. EKALE – COURT ASSISTANT