



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO E025 OF 2022

OKINDA OMONDI.....PETITIONER

VERSUS

THE CABINET SECRETARY,

MINISTRY OF SPORTS, CULTURE AND HERITAGE.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

AND

THE CABINET SECRETARY,

NATIONAL TREASURY AND PLANNING.....1ST INTERESTED PARTY

PUBLIC SERVICE COMMISSION.....2ND INTERESTED PARTY

SPORTS, ARTS & SOCIAL DEVELOPMENT FUND.....3RD INTERESTED PARTY

SPORTS, ARTS & SOCIAL DEVELOPMENT FUND

OVERSIGHT BOARD.....4TH INTERESTED PARTY

RULING

1. What falls for determination is the Notice of Motion dated 10th February 2022 by which the Petitioner seeks a conservatory order restraining and/or prohibiting the Respondents from proceeding with any processes under the vacancy notice titled “Chief Executive Officer: Grade SASDF1” published in the Daily Nation Newspaper of 17th January 2022 and on the 1st Respondent’s Website.
2. The Petitioner further seeks an order staying/suspending the said vacancy notice.
3. The Motion is supported by the Petitioner’s own affidavit and is based on the following grounds:
 - a) The 1st Respondent has purported to publish a vacancy in the position of Chief Executive Officer (CEO) of the 3rd Interested Party (the Fund) vide a newspaper publication of 17th February 2022 (the advertisement);
 - b) The advertisement is contrary to the Constitution and the law and should be halted immediately and any processes undertaken pursuant to the impugned advertisement quashed;
 - c) The 1st Respondent has no authority to declare vacancy or invite candidates to apply for the position of CEO of the Fund as this is an exclusive responsibility of the 4th Interested Party (the Board) in consultation with the 2nd Interested Party (the Commission) as is provided under Rule 1.2 and 1.18 of the Mwingozo Code of Governance for State Corporations (Mwingozo Code) and Clauses B.3 and B.4 of the Human Resource Policies and Procedures Manual for the Public Service;

- d) Vide the Executive Order Number 7 of 25th March 2015, all state parastatals were directed to implement the Mwongozo Code;
- e) Under Rule 1.2 and 1.18 of the Mwongozo Code, it is the Board in consultation with the Commission that is mandated to appoint the CEO of state corporations, parastatals and semi-autonomous government agencies;
- f) Therefore, it is the Board which is mandated by law to declare vacancies and invite applications for the position of CEO of the Fund and the 1st Respondent acted contrary to and in violation of the law by purporting to cause the publication of the advertisement;
- g) The impugned advertisement equally violates several provisions of the law; it is contrary to the Constitution and the law as the 1st Respondent has purported to assume powers of singularly and unilaterally altering and varying the qualifications for appointment to the position CEO of the Fund in contravention of Article 94(5) of the Constitution which recognises only Parliament as having powers to make provisions having the force of law in Kenya;
- h) As the Public Finance Management (Sports, Arts and Social Development Fund) Regulations, 2018 which establish the office of the CEO do not set the qualifications for the CEO of the Fund, it is the qualifications set out in the Mwongozo Code that apply as the Mwongozo Code is issued jointly by the Commission and the State Corporations Advisory Committee (SCAC) under the President's Executive Order pursuant to Sections 7 and 30 of the State Corporations Act;
- i) The 1st Respondent singularly and unilaterally varied the requirements for the position of CEO of the Fund, thus locking out persons who are qualified under the statutory requirements;
- j) The 1st Respondent had no powers to alter the minimum requirements for appointment as enhanced qualifications can only be an added advantage to be considered during interview, among other unique qualifications of each of the candidates. It cannot be used as criteria to lock out persons who are otherwise qualified for the position, from applying or from being shortlisted and given an opportunity to compete for the advertised position;
- k) To allow the process initiated and commenced in a flawed, illegal and unconstitutional manner is to countenance an illegality, which the Court should abhor;
- l) The established contravention of the Constitution and the law evidence a *prima facie* case warranting stay of any further processes pursuant to the impugned advertisement;
- m) The Court has jurisdiction under Rule 17 of the Employment and Labour Relations Court (Procedure) Rules, 2016 to issue *ex parte* conservatory orders to sustain the substance of the Petition;
- n) Unless the conservatory orders are granted, the Petition will be moot as what is sought to be prevented will have occurred and persons who are eligible to apply for the position and have been disadvantaged by the lack of online application option and unilaterally altered qualifications would be locked out;
- o) Further, the Petitioner has a case which discloses serious and arguable constitutional issues to be tried. If the advertisement is not stayed and the application window closes, there would be a countenance of illegalities and violation of the Constitution, which will proceed on the basis of the impugned advertisement;
- p) It is in the interest of justice that the application be certified urgent and the orders sought be granted in the interim.

4. The 1st Respondent opposes the Petitioner's Notice of Motion by a replying affidavit sworn by the Principal Secretary in charge of the State Department for Sports at the Ministry of Sports and Heritage, Joe Okudo, CBS on 11th March 2022.
5. The Principal Secretary states that in advertising the position of the CEO, Sports, Arts and Social Development Fund, the 1st Respondent has not in any way breached the Constitution or the law.
6. The Principal Secretary depones that the Sports, Arts and Social Development Fund is not categorised as a state corporation. He states that the Fund is established vide Legal Notice No 194, pursuant to the Public Finance Management (Sports, Arts and Social Development Fund) Regulations, 2018 under Section 24 of the Public Finance Management Act, 2012 with the mandate of providing funding to support the development and promotion of sports and arts and the promotion of social development, including universal health care.
7. The Principal Secretary refers to Regulation 11 of the Public Finance Management (Sports, Arts and Social Development Fund) Regulations, 2018 which provides for the Administrator of the Fund and Regulation 12 which provides for the Secretariat, including the Chief Executive Officer and other staff.
8. He draws attention to Regulation 12(2) which provides that the Chief Executive Officer and other staff of the secretariat shall be appointed competitively in consultation with the Public Service Commission.
9. The Principal Secretary contends that the Sports, Arts and Social Development Fund is not a body corporate with perpetual succession and a common seal. He takes the view that the Fund cannot use its name or perform its functions as a body corporate.
10. The Principal Secretary further contends that employees of the Sports, Arts and Social Development Fund, including the Chief Executive

Officer, are public officers and the Cabinet Secretary is the authorised officer in charge of all staff in the Ministry.

11. The Principal Secretary asserts that the Cabinet Secretary placed the advertisement for the vacant position of the CEO, in strict compliance with the HR instruments and Article 232 of the Constitution, which mandates public institutions to make all appointments and promotions on the basis of fair competition and merit.

12. The position of the 1st Respondent is that the Petitioner has not demonstrated a *prima facie* case, with any likelihood of success to warrant the orders sought.

13. On its part, the 2nd Interested Party filed a replying affidavit sworn by its Secretary/Chief Executive Officer, Dr. Simon K. Rotich, CBS on 15th March 2022.

14. Dr. Rotich states that the Sports, Arts and Social Development Fund is established under Regulation 3 of the Public Finance Management (Sports, Arts and Social Development Fund) Regulations, 2018 (the Sports Fund Regulations, 2018).

15. He makes reference to Regulation 8 which establishes the Sports, Arts and Social Development Fund Oversight Board and Regulation 10 which sets out the functions of the Board.

16. Dr. Rotich further refers to Regulation 12 which establishes the Secretariat. He cites Regulation 12(2) which states:

(2) The Chief Executive Officer and other staff of the secretariat shall be appointed competitively in consultation with the Public Service Commission.

17. Dr. Rotich takes the view that by dint of Regulation 12 of the Sports Fund Regulations, the mandate of the Public Service Commission under the Constitution, the Public Service Commission Act and the attendant Regulations has been invoked in the recruitment process for the position of the CEO of the Fund, which office is a public office for all intents and purposes.

18. Dr. Rotich avers that the recruitment of the CEO of the Fund and other staff of the secretariat should be done by the Board in consultation with the Public Service Commission as envisaged by Regulation 12(2) of the Sports Fund Regulations.

19. He adds that in the process of recruitment for the position of CEO of the Fund and other secretariat staff as envisaged under Regulation 12, the mandate of the Public Service Commission pursuant to Article 234(2)(a)(ii), (g) of the Constitution as read with Sections 36 and 37 of the Public Service Commission Act, 2017 and the Public Service Commission Regulations, 2020 must be fully complied with.

20. Relying on Section 36 of the Public Service Commission Act, 2017 as read with Regulation 13 of the Public Service Commission Regulations, 2020, Dr. Rotich pursues the argument that since no minimum qualifications have been set in the Sports Fund Regulations for the position of the CEO of the Fund, then it is the Sports Fund Board in consultation with the Public Service Commission that ought to set the applicable minimum qualifications.

21. Dr. Rotich takes the view that pursuant to Regulation 13 of the Public Service Commission Regulations, 2020 as read with Regulation 12(2) of the Sports Fund Regulations, 2018, the Sports Fund Board ought to have first declared the vacant position to the Public Service Commission.

22. He concludes that the subject advertisement has not complied with Section 36 of the Public Service Commission Act, Regulation 13 of the Public Service Commission Regulations, 2020, Regulation 12(2) of the Sports Fund Regulations, 2018 and Section B.4 of the Human Resource Policies and Procedures Manual for the Public Service.

23. He points out that the Public Service Commission was never consulted in any manner by the Board of the Fund or by any other authorised person before advertisement of the vacancy for the said position of CEO of the Fund.

24. The orders sought by the Petitioner in the present Motion fall within the province of injunctions. The conditions upon which such an order may be granted were settled in ***Giella v Cassman Brown & Co Ltd (1973) E.A*** as follows:

- a) That the applicant has demonstrated a *prima facie* case with a probability of success;
- b) That the applicant has shown that if the order is not granted, they will suffer irreparable injury which would not adequately be compensated by an award of damages;
- c) If the court is in doubt, it will decide the application on the balance of convenience.

25. The first question to ask is whether the Petitioner has laid before the Court a *prima facie* case. In its decision in ***Mrao v First American Bank of Kenya & 2 others [2003] eKLR*** the Court of Appeal defined a *prima facie* case as:

“...a case which on the material presented the court or tribunal properly directing itself will conclude that there exists a right which has been infringed by the opposite party as to call for an explanation or a rebuttal from the latter.”

26. The Petitioner’s complaint is that by placing a public advertisement for the position of Chief Executive Officer of the 3rd Interested Party,

the 1st Respondent has violated the Constitution, the law and applicable regulations. A major issue raised by both the Petitioner and the 2nd Interested Party, the Public Service Commission, is that in advertising the subject position, the 1st Respondent did not consult the Commission, as required by Regulation 12(2) of the Public Finance Management (Sports, Arts and Social Development Fund) Regulations, 2018. The said provision states:

(2) The Chief Executive Officer and other staff of the secretariat shall be appointed competitively in consultation with the Public Service Commission.

27. The 1st Respondent did not adduce any evidence to show compliance with this express provision and for that reason alone, I find and hold that the Petitioner has demonstrated a prima facie case as defined in law. The first condition set in ***Giella v Cassman Brown*** (supra) has therefore been satisfied.

28. Regarding the second condition on irreparable injury I will say this; if the impugned recruitment is allowed to continue and to conclude, the subject matter of the dispute will dissipate and third party rights will have accrued. This would make a reversal or restitution almost impossible. The second condition has thus also been satisfied.

29. In light of the foregoing findings, there is no need for the Court to resort to the third condition.

30. In the result, the Petitioner's Notice of Motion dated 10th February 2022 succeeds with the result that the Respondents are restrained from proceeding with any processes under the vacancy notice titled "Chief Executive Officer: Grade SASDF1" published in the Daily Nation Newspaper of 17th January 2022 and on the 1st Respondent's Website.

31. The said vacancy notice stands suspended until further orders of this Court.

32. The costs of this Motion will be in the Petition.

33. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OF APRIL 2022

LINNET NDOLO

JUDGE

Appearance:

Mr. Otieno for the Petitioner

Mr. Oure for the 1st & 2nd Respondents and 3rd & 4th Interested Parties

Mr. Ogosso for the 2nd Interested Party