



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**PETITION NO. 1 OF 2022**

**(Originally Nakuru ELRC Petition No. E020 of 2021)**

**IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI, MANDAMUS & PROHIBITION**

**AND**

**IN THE MATTER OF ARTICLES 1, 10, 19, 22, 23, 47, 50(1), 67, 162, 232 & 266(5) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT, 2015**

**AND**

**IN THE MATTER OF THE PUBLIC OFFICERS ETHICS ACT – CAP 183 AND THE PUBLIC OFFICERS CODE OF ETHICS**

**AND**

**IN THE MATTER OF SECTIONS 2, 34(5)(B) PUBLIC SERVICE COMMISSION ACT, 2017 & REGULATION 36 OF THE PUBLIC SERVICE COMMISSION REGULATIONS, 2020**

**AND**

**IN THE MATTER OF SECTIONS 65 & 66 OF THE WATER ACT, NO. 43 OF 2016**

**AND**

**IN THE MATTER OF SECTION 27 OF THE STATE CORPORATIONS ACT, CAP. 446**

**AND**

**IN THE MATTER OF THE MWONGOZO CODE OF GOVERNANCE FOR STATE CORPORATIONS**

**AND**

**IN THE MATTER OF APPOINTMENT OF THE CHIEF EXECUTIVE OFFICER OF LAKE VICTORIA SOUTH WATER WORKS DEVELOPMENT AGENCY**

**BETWEEN**

**MICHAEL NANDELA SHIKHATI.....PETITIONER**

**VERSUS**

**CABINET SECRETARY, MINISTRY OF**

**WATER, SANITATION & IRRIGATION.....1<sup>st</sup> RESPONDENT**

**BOARD OF LAKE VICTORIA SOUTH**

**WATER WORKS DEVELOPMENT AGENCY.....2<sup>nd</sup> RESPONDENT**

**HON ATTORNEY GENERAL.....3<sup>rd</sup> RESPONDENT**

**AND**

**LAKE VICTORIA SOUTH WATER**

**WORKS DEVELOPMENT AGENCY.....1<sup>st</sup> INTERESTED PARTY**

**CHRISPINE O. JUMA.....2<sup>nd</sup> INTERESTED PARTY**

**JUDGMENT**

1. Michael Nandela Shikhathi (the Petitioner) sued the Cabinet Secretary, the Ministry of Water (the Cabinet Secretary), the Board of Lake Victoria South Water Works Development Agency (the Board) and the Hon Attorney General before the Court sitting in Nakuru, contending that the appointment of Chrispine O. Juma (the 2<sup>nd</sup> Interested Party) by the Cabinet Secretary as acting Chief Executive Officer of the Lake Victoria South Water Works Development Agency (the Agency) and the ratification of the decision by the Board was contrary to the judgment of the Court in Kisumu Petition No. E012 of 2021, *George Omondi v Cabinet Secretary, Ministry of Water, Sanitation & Irrigation & 5 Ors.*

2. The Petitioner also asserted that the decision of the Cabinet Secretary was *ultra vires*.

3. The Petitioner sought orders:

(a) An order of certiorari to remove to the High Court and quash the decision of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents vide letters dated 3<sup>rd</sup> June 2021 and 21<sup>st</sup> June 2021 and any other *ultra vires* decision, order and/or directive of the 1<sup>st</sup> Respondent to the 2<sup>nd</sup> Respondent and/or any other *ultra vires* acts and/or omissions of the 2<sup>nd</sup> Respondent.

(b) THAT the Hon Cicily Kariuki being the Cabinet Secretary of the Ministry of Water, Sanitation, and Irrigation, the 1<sup>st</sup> Respondent herein, be held personally liable for disobeying court orders as issued in Kisumu ELRC Constitutional Petition No. E012 of 2021, *George Omondi v Cabinet Secretary, Ministry of Water, Sanitation and Irrigation & 5 Ors* and she be committed to civil jail and/or the appropriate punishment be meted out.

(c) THAT an order of certiorari to remove to the High Court and quash the decision of the 2<sup>nd</sup> Respondent to nullify, cancel and/or quash the recruitment exercise for the position of CEO of the 1<sup>st</sup> Interested Party and further quash its decision vide the newspaper advertisement on 2<sup>nd</sup> July 2021 to re-advertise the position of Chief Executive Officer of the 1<sup>st</sup> Interested Party and declare it illegal, null and void, and in breach of the principles of legitimate expectation.

(d) THAT this Honourable Court be pleased to issue an order of mandamus to compel the 2<sup>nd</sup> Respondent to within 7 days of the conclusion of this Petition to declare and/or gazette the name of the Interested Party's Chief Executive Officer from amongst the list of the three successful candidates.

(e) THAT this Honourable Court be pleased to issue an order of prohibition against the 1<sup>st</sup> Respondent from directing, interfering and/or in any other way dealing with the mandate of the 2<sup>nd</sup> Respondent in respect to the recruitment and/or appointment of the Chief Executive officer of the 1<sup>st</sup> Interested Party that is contrary to the laid down provisions of the law and enabling guidelines.

(f) THAT a declaration and/or an order do issue that members of the 2<sup>nd</sup> Respondent being public officers be and are hereby held personally and individually liable for all the expenses incurred in respect of the cancelled and/or nullified recruitment exercise for the position of C.E.O. of the 1<sup>st</sup> Interested Party and in participating and/or engaging in the misappropriation, misuse and/or wastage of public funds.

(g) THAT a declaration and/or an order of certiorari do issue, to move into this Honourable Court and quash the decision of the 1<sup>st</sup> Respondent in the appointment of CHRISPINE O. JUMA – the 2<sup>nd</sup> Interested Party as the acting C.E.O. of the 1<sup>st</sup> Interested Party without due regard to the circular of the Head of Public Service as regards the appointment of acting C.E.OS of state corporations is unconstitutional, illegal, null and void ab initio and thus set it aside in its entirety.

(h) THAT a declaration and/or an order do issue that the 2<sup>nd</sup> Interested Party be held personally and/or individually liable for all expenditures and/or expenses incurred pursuant to his illegal appointment whilst in the exercise of his duty, role and/or mandate pursuant to the impugned appointment as the same amounts to participating and/or engaging in the misappropriation, misuse and/or wastage of public funds.

(i) THAT costs of this Petition be borne by the Respondents.

(j) Any other and/or further relief that this Honourable Court may deem just, fit and expedient to grant.

4. Filed with the Petition was a Motion under a certificate of urgency seeking interim injunctive orders.

5. On 23 September 2021, the Court directed that the Petition proceeds to a hearing by way of written submissions. The parties were directed to file and exchange submissions.

6. The Board and the Agency caused a replying affidavit sworn by its Chair to be filed on 23 September 2021 while the Cabinet Secretary caused a replying affidavit to be sworn and filed by the Principal Secretary, Ministry of Water on 27 September 2021.

7. The Petitioner filed his submissions and supplementary submissions on 11 November 2021.

8. The Petitioner identified the following Issues for adjudication:

(i) Whether the 1<sup>st</sup> Respondent is acting ultra vires in interfering with the mandate of the 2<sup>nd</sup> Respondent in the appointment and/or recruitment of the C.E.O. of the 1<sup>st</sup> Interested Party and it has the legal mandate to appoint the 2<sup>nd</sup> Interested Party as the acting C.E.O. of the 1<sup>st</sup> Interested Party?

(ii) Whether the 2<sup>nd</sup> Respondent was procedurally appointed as the 1<sup>st</sup> Interested Party's C.E.O. as per the Mwongozo Code of Governance for state corporations?

(iii) Whether the 2<sup>nd</sup> Respondent in delaying and/or failure to execute its mandate is acting contrary to the provisions of the Constitution, the State Corporations Act, the Mwongozo Guidelines and State Corporations Advisory Committee Guidelines.

(iv) Whether the 2<sup>nd</sup> Respondent in nullifying, cancelling and/or setting aside the recruitment exercise usurped their role, mandate and/or authority.

(v) Whether members of the 2<sup>nd</sup> Respondent ought to be held personally and/or individually responsible for the public resources expended in the nullified recruitment exercise for the position of C.E.O. of the 1<sup>st</sup> Interested Party?

(vi) Whether the 1<sup>st</sup> Respondent is in contempt of court orders issued in Kisumu ELRC Petition No. E012 of 2021, George Omondi v the Cabinet Secretary, Ministry of Water, Sanitation & Irrigation & 5 Ors.

(vii) Whether the 2<sup>nd</sup> Interested Party was validly and procedurally appointed as acting C.E.O. of the 2<sup>nd</sup> Respondent?

(viii) Who bears the costs of this Petition?

9. The Board and the Agency, on their part filed their submissions on 21 October 2021 and they set out the following Issues for determination:

(i) Whether the 2<sup>nd</sup> Respondent usurped its role, mandate and/or authority in cancelling and/or setting aside the recruitment exercise of the Chief Executive Officer?

(ii) Whether the 2<sup>nd</sup> Respondent acted in contempt of any court order while executing its constitutional and statutory mandate?

10. When the parties appeared in Court on 2 December 2021 to confirm the filing of submissions, the parties confirmed as much, and the Court scheduled delivery of judgment to 18 January 2022.

11. However, on 18 January 2022, the Court sitting in Nakuru declined jurisdiction and directed that the Petition be transferred to Kisumu.

12. When the parties appeared before this Court on 1 February 2022, it reserved judgment to today.

13. The Court has considered the Petition, affidavits, and submissions.

#### **Lawfulness of the appointment of 2<sup>nd</sup> Interested Party to act as Chief Executive Officer**

14. On or 2 August 2019, the Cabinet Secretary deployed Eng. George J.O. Odede to the Agency to serve as acting Chief Executive Officer. At the time of deployment, Eng. Odede was serving as the Chief Technical Manager with Lake Victoria North Water Works Development Agency.

15. On 3 June 2021, the Cabinet Secretary wrote to Eng. George J.O. Odede, who was then the acting Chief Executive Officer of the Agency, instructing him to return to his substantive position of Chief Manager, Technical Services with Lake Victoria North Water Works Development Agency (section 152(3) of the Water Act, 2016 and Legal Notice No. 27 of 2019 were cited).

16. On the same day, the Cabinet Secretary notified the 2<sup>nd</sup> Interested Party that he was being deployed to the Agency as acting Chief Executive Officer for a period of 6-months, pending the recruitment of a substantive Chief Executive Officer.

17. Upon the deployment, the Board entered into a Short-Term Employment contract with the 2<sup>nd</sup> Interested Party on 1 July 2021 to serve as an acting Chief Executive Officer.

18. The Board thereafter caused an advertisement for the position of the Chief Executive Officer to be published on 2 July 2021, and this prompted the Petitioner to move the Court on 15 July 2021.

19. The power to appoint the Chief Executive Officer of a state corporation is vested in the Board by section 5(3) of the State Corporations Act.

20. Since the power to appoint a Chief Executive Officer is bestowed upon the Board, then *ipso facto*, the power to appoint a person to act in the office is reserved for the Board.

21. The Board entered into a Short-Term Employment contract with the 2<sup>nd</sup> Interested Party to act as the Chief Executive Officer of the Agency on 1 July 2021.

22. The appointment was preceded by a letter dated 3 June 2021 through which the Cabinet Secretary was notifying the 2<sup>nd</sup> Interested Party that he was being deployed to the Agency.

23. The letter indicates that the 2<sup>nd</sup> Interested Party was serving as the Director of National Water Resources with the Ministry of Water, Sanitation & Irrigation.

24. The letter by the Cabinet Secretary though not elegantly drafted was just to signify the 2<sup>nd</sup> Interested Party's formal release/secondment from his duties at the Ministry to the Agency and it was not *ultra vires* the Cabinet Secretary's statutory powers.

25. Since the 2<sup>nd</sup> Interested Party was an officer under the Cabinet Secretary and was being seconded to the Agency, the Court finds nothing unlawful in the letter releasing him to the Agency, and more so because the Board exercised its recruitment and appointment power to enter into a contract with him (2<sup>nd</sup> Interested Party).

#### **Recruitment of a new Chief Executive officer**

26. The Petitioner challenged the attempt by the Board to recruit a new Chief Executive Officer signalled through an advertisement in the Daily Nation newspaper of 2 July 2021.

27. According to the Petitioner, the attempt at recruitment was contrary to the judgment of the Court in Kisumu Petition No. E012 of 2021, *George Omondi v Cabinet Secretary, Ministry of Water, Sanitation & Irrigation & 5 Ors.*

28. Apart from issuing declarations in the aforesaid judgment, the Court did not issue any order requiring the Board to do or cease from doing anything in respect to the position of Chief Executive Officer.

29. The Court merely affirmed the power of the Board to appoint the Chief Executive Officer and the lack of such power being possessed by the Cabinet Secretary.

30. The Court cannot, therefore, find the recruitment process commenced through the advertisement of 2 July 2021 itself to be unlawful.

#### **Contempt of Court**

31. The Petitioner also made a plea to the Court to find the Cabinet Secretary guilty of contempt of court for acting contrary to the findings of the Court in Kisumu Petition No. E012 of 2021, *George Omondi v Cabinet Secretary, Ministry of Water, Sanitation & Irrigation & 5 Ors.*

32. In the Court's view, it is not open to it to make a finding of contempt with the attendant risk of imposition of a fine or imprisonment as pleaded by the Petitioner in this instant Petition.

33. Any contempt proceedings should have been initiated in the suit where the orders alleged to have been disobeyed were made, otherwise the Court runs the risk of opening the floodgates to unending fresh proceedings alleging contempt to parties who were not parties to the initial litigation.

#### **Personal or individual liability**

34. For a public officer to be indicted with personal liability for actions or decisions taken in the course of official duty, the party asserting the application should demonstrate bad faith or malice in the impugned decision or action.

35. The Petitioner herein did not prove any bad faith or malice on the part of the Respondents or Interested Parties to enable the Court to condemn them with expenses incurred in the course of appointment of an acting or recruitment process of the Chief Executive Officer of the

Agency.

36. Before concluding, the Court regrets that the judgment could not be delivered as early scheduled because some of the pleadings were not in the file.

**Conclusion and Orders**

37. From the foregoing, the Court finds no merit in the Petition and it is dismissed with costs to the Respondents and Interested Parties.

**Delivered through Microsoft teams, dated and signed in Kisumu on this 26<sup>th</sup> day of April 2022.**

**Radido Stephen, MCI Arb**

**Judge**

**Appearances**

For Petitioner MOM & Co Advocates

For 1<sup>st</sup> /3<sup>rd</sup> Respondents Winnie Jebet Cheruiyot, Principal State Counsel

For 2<sup>nd</sup> Respondent/1<sup>st</sup> Interested Party Pamphil Matsekhe Oundo, Legal Officer

Court Assistant Chrispo Aura