



**Sirako v Board of Directors Nairobi City Water and Sewerage Company
& another; County Government of Nairobi & 3 others (Interested Parties)
(Petition E163 of 2021) [2022] KEELRC 1497 (KLR) (23 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1497 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E163 OF 2021**

SC RUTTO, J

JUNE 23, 2022

**IN THE MATTER OF: ARTICLES 1, 2, 3, 4(2), 10, 12 (1)(A), 19, 20, 21, 22, 23, 24, 27, 41(1),
47, 48, 50(1), 73, 75, 156, 162, 165, 232, 258 AND 259 OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF THE WATER ACT, 2016

AND

**IN THE MATTER OF SECTION 12(1) (A) THE EMPLOYMENT AND
LABOUR RELATIONS COURT ACT CAP 24(B) LAWS OF KENYA**

AND

**IN THE MATTER OF: ALLEGED VIOLATION OF THE WATER SERVICES
REGULATORY BOARD CORPORATE GOVERNANCE GUIDELINES FOR THE
WATER SERVICES SECTOR 2018 AND VALUES AND PRINCIPLES OF PUBLIC
SERVICE UNDER ARTICLE 232 OF THE CONSTITUTION OF KENYA 2010.**

AND

**IN THE MATTER OF THE RECRUITMENT FOR THE MANAGING
DIRECTOR OF THE NAIROBI WATER AND SEWERAGE COMPANY**

AND

**IN THE MATTER OF MISMANAGEMENT, ABUSE OF OFFICE AND INCOMPETENCE
OF ENGINEER NAHASHON MIGUNA AS THE MANAGING DIRECTOR
OF NAIROBI CITY WATER AND SANITATION COMPANY LIMITED**

BETWEEN

SIMON KOKOYO SIRAHO PETITIONER



AND

**BOARD OF DIRECTORS NAIROBI CITY WATER AND SEWERAGE
COMPANY 1ST RESPONDENT**

CAREER DIRECTIONS LIMITED 2ND RESPONDENT

AND

COUNTY GOVERNMENT OF NAIROBI INTERESTED PARTY

WATER SERVICES REGULATORY BOARD INTERESTED PARTY

THE HON. ATTORNEY GENERAL INTERESTED PARTY

ENGINEER NAHASHON MUGUNA INTERESTED PARTY

JUDGMENT

1. Mr. Simon Kokoyo Sirako, the Petitioner herein, identifies himself as a public spirited individual, a human rights defender and a constitutional enthusiast eager to uphold the rule of law, defend human rights, promote democratic governance and agitate for sustainable economic development and property in the general population. Consequently, he relies on the provisions of Article 22(2) and 258(2) of the Constitution in bringing the Petition in the capacity he has.
2. The Petition is expressed to be brought under 1, 2, 3, 4(2), 10, 12 (1)(a), 19, 20, 21, 22, 23, 24, 27, 41(1), 47, 48, 50(1), 73, 75, 156, 162, 165, 232, 258 and 259 of the Constitution of Kenya.
3. The gist of the Petition is that the recruitment process and subsequent appointment of the Managing Director of the 1st Respondent was marred with lack of transparency, discrimination and disregard to constitutional and statutory regulations with the aim of achieving a predetermined end aimed to favour the 4th Interested Party.
4. The Petition which is supported by the Affidavit sworn on 22nd October, 2021, by the Petitioner, seeks for the following orders against the Respondents;
 - a. A declaration that the refusal of the 2nd Respondent to interview some of the Applicants as (sic) for the position of the Managing Director of the Nairobi Water and Sewerage Company Limited is a violation of his rights to equal opportunity and freedom from discrimination.
 - b. A declaration that appointments to Managing Director of the Nairobi City Water and Sewerage Company Limited are appointments in the public service and must adhere to Articles 10(2)(c), 27(3) and 232(2)(g)-(i) of the Constitution.
 - c. A declaration that the appointments of the 4th Interested Party by the Respondents was unconstitutional for breach of Articles 2(2), 10(2)(c), 27(3), 232(2)(g)-(i) and 234(2)(a)(ii) of the Constitution and are hence invalid.
 - d. An order quashing the appointment of the 4th Interested Party to the Position of Managing Director of the Nairobi City Water and Sewerage Company Limited.
 - e. An order requiring the 1st Respondent to commence a fresh recruitment process of the position of Managing Director of Nairobi City Water and Sewerage Company Limited.



- f. Costs of the petition.
- g. Any such other orders as this Honourable Court shall deem fit.

Responses

5. The Petition was opposed by both Respondents and the 3rd Interested Party. The 1st Respondent opposed the Petition through the Affidavit sworn on 15th November, 2021, by Ms. Beryl Okumu, who identifies herself as its Chairperson. She avers in the Affidavit that the 2nd Respondent was engaged after a competitive bidding process and that the recruitment of the 4th Interested Party was procedural, lawful and above board. Ms. Okumu further averred that the allegations of mismanagement and corruption during the tenure of the 4th Interested Party are unsubstantiated allegations.
6. The 2nd Respondent defended the Petition through the Affidavit sworn on 11th November, 2021 by Mr. Eric Mugo, who identifies himself as the Senior Legal Officer of the 2nd Respondent. He avers that the recruitment process of the 1st Respondent's Managing Director was fair, transparent and competitive and that no constitutional or statutory provision was violated.
7. The 3rd Interested Party filed Grounds of Opposition in response to the Petition, on the basis that the Petitioner had failed to demonstrate with precision how his fundamental rights and freedoms under the *Constitution* had been violated or are threatened contrary to Article 22(1) of the *Constitution* and the holding in the decision of *Mumo Matemba v Trusted Society of Human Rights Alliance* (2013) eKLR and *Annarita Karimi Njeru* (1979) KLR, 154. That further, there was no material before the Court to show how the 4th Interested Party has mismanaged his office.
8. The 1st Interested Party responded to the Petition through its Notice of Preliminary Objection through which it stated that the Petitioner has no locus standi to institute the Petition and that the same does not disclose any cause of action against it.
9. Upon receiving the responses to the Petition, the Petitioner filed a Further Affidavit wherein he averred that the 1st Respondent did not publish the vacancy for the position of the Managing Director. That the Petitioner (sic) had been informed that he had been selected as among those who were to be interviewed for the job vacancy but was not informed of what transpired thereafter.
10. The 2nd and the 4th Interested Party did not file any responses to the Petition.

Petitioner's case

11. The Petitioner avers that on 9th March, 2020, the 1st Respondent's Board engaged the firm of Career Directions Limited, the 2nd Respondent herein, to undertake the recruitment process for the position of Managing Director. That the 2nd Respondent invited applications from interested applicants. That one such applicant, was Engineer Daniel Ng'ang'a who was informed by the 2nd Respondent through a short message service (SMS) that they were planning to interview him for the position of Managing Director but he was never invited for the said interview as earlier communicated to him.
12. That upon enquiry, he was informed that the 2nd Respondents had already concluded the interviews and had recommended the names of three applicants including the 4th Interested Party, to the 1st Respondent for consideration.
13. The Petitioner alleges that the refusal/neglect by the 2nd Respondent to interview some applicants is a clear manifest of discrimination and a flout of the provisions on the principles of public service.



14. It is the Petitioner's case that the process of appointment was marred with lack of transparency, discrimination and disregard of constitutional and statutory regulations.
15. The Petitioner further avers that during the tenure of the 4th Interested Party as the acting Managing Director of the 1st Respondent, there were complaints of mismanagement and corruption of which information enjoys public notoriety.
16. The Petitioner further averred that he had legitimate expectation to question the impugned process of appointment and also to be given the criteria which was used by the 2nd Respondent in arriving at the three candidates, and refusing to interview some applicants. That further, he had legitimate expectation to access information with respect to the list of applicants, scores of each applicant, the date when the review and evaluation and interviews of the applicants was done and any special consideration on the appointment by dint of the provisions of Article 35 of the Constitution of Kenya 2010.
17. That out of the said mischief, and violation of the regulations, statutory and constitutional requirement, the 4th Interested Party was appointed as Managing Director of Nairobi City Water and Sewerage Company but has mismanaged the company abused his office and aided/allowed for the pollution of Nairobi River through mismanagement of the disposal of affluent through the sewerage system into the river and is currently causing immense suffering, disease and deaths for the water consumers downstream.
18. That the 4th Interested party is not only incompetent but has abused his powers as Managing Director and caused pollution of the river and unless stopped by this Honourable Court, the pollution downstream shall be condemned to disease and deaths which are otherwise avoidable if a competent person of integrity is installed at the helm of Nairobi City Water and Sewerage Company.
19. The Petitioner averred that the continuous occupation of the position of Managing Director by the 4th Interested Party poses a threat to further violation of Articles 27, 41 and 232 of the Constitution of the Republic of Kenya as well as the Water Act 2016.

1st Respondent's case

20. It is the 1st Respondent's case that the process of recruiting the 4th Interested Party as the Managing Director was lawful, procedural and above board. That the 4th Interested Party was not involved in the process of selection of the 2nd Respondent. That further, there was no requirement that all those who rendered their applications to the 2nd Respondent, would be interviewed. That the 2nd Respondent shortlisted and availed the following persons to the 1st Respondent for further consideration for appointment as Managing Director:-
 - i. Arthur Omolo;
 - ii. Dickson Njiru;
 - iii. Engineer George Mungai;
 - iv. Nahashon Muguna (4th Interested Party);
 - v. Patrick Mwangi; and
 - vi. Engineer Festus Ngeno.
21. That the 2nd Respondent informed the 1st Respeondnt that a total of 27 persons had applied for the position and the foregoing six, had met the requirements.



22. That Engineer Daniel Ng'ang'a had not met the requirements for appointment hence was not invited for interview for the position of Managing Director. That there is no requirement for public participation in the recruitment process of a Managing Director. That there is also no requirement that the names of the shortlisted candidates should be published. That the allegations of mismanagement and corruption during the tenure of the 4th Interested Party as the Managing Director are unsubstantiated. That the petitioner had never requested for information pertaining the recruitment exercise. That the petitioner had not tendered any evidence that any candidate who applied and was not shortlisted, had met the requirements for recruitment.

2nd respondent's case

23. It is the 2nd Respondent's case that the recruitment process of the 1st Respondent's Managing Director was fair, transparent and competitive. That it received a total of 27 applications and commenced the process of shortlisting. That in line with its terms of reference, the 2nd Respondent forwarded to the 1st Respondent an interim report summarizing the total number of persons who were qualified for the advertised slot.
24. That on 23rd April, 2020, after it conducted the interviews, the 2nd Respondent forwarded to the 1st Respondent its final report recommending the appointment of the 4th Interested Party as the Managing Director, having emerged as the most successful candidate. That Engineer Daniel Ng'ang'a failed to submit all the necessary documents sought in furtherance of chapter six of the Constitution.

3rd Interested Party's case

25. It is the 3rd Interested Party's case that the Petition has not been pleaded with precision and that the Petitioner wants the Court to micromanage the human resource function of the 1st Respondent. That the allegations by the Petitioner are not substantiated by evidence.

Disposal of the Petition

26. On 19th January, 2022, the parties agreed to bypass the Application that had been filed contemporaneously with the Petition. Therefore, the Court was only called to determine the Petition. It is subsequent to this direction that the 1st and the 2nd Respondent asked the Court to adopt their respective responses to the Application as answers to the Petition. The Court further directed that the Petition be canvassed by written submissions. Further it was the Court's direction that the 1st Interested Party's preliminary objection was to be dispensed together with the Petition.

Petitioner's Submissions

27. The Petitioner submitted that the 1st Respondent did not undertake public participation in the recruitment by the 2nd Respondent. On this score, it cited the case of Nairobi Metropolitan PSV Saccos & 25 others v County of Nairobi Government & 3 others Petition No 486 of 2013 and Doctors for Life International v Speaker of the National Assembly and others (CCT 12/05) 2006 ZACC 11. That further, the recruitment process by the 2nd Respondent was unconstitutional. The case of David Kariuki Muigua v Attorney General & another, Petition No 161 of 2011 was cited in support.
28. The 1st Respondent submitted that there is no exclusive requirement of public participation in the recruitment process of the Managing Director. It was further submitted that the allegations of mismanagement and corruption by the 4th Interested Party had not been substantiated. It further submitted that the preferred candidate, met the threshold on integrity. The case of Republic v Nzoia Sugar Company & another ex parte Jack Mukhongo Munialo (2017) was cited in support.



29. The 2nd Respondent submitted that the issue of public participation is a new issue that was not raised in the Petition. That the recruitment process applicable, was the one outlined in the 1st Respondent's Memorandum of Association. That the recruitment process did not fall short of the constitutional threshold as alleged by the Petitioner.
30. The 3rd Interested Party submitted that the Petitioner had failed to establish with precision how his fundamental rights and freedoms under the Constitution had been violated or threatened to be violated. It sought to rely on the case of David Mathu Kimingi v SMEC International PTY limited (2021) eKLR. It was further submitted that the Petition was contrary to the rule of ripeness as there was no material before the Court to show how the 4th Interested Party had mismanaged his office and aided the pollution of Nairobi river. In further submission, the 3rd Interested Party submitted that it was contrary to the law to require it to micro manage the human resource functions of the 1st Respondent. Finally, it submitted that it was not properly joined in the suit.

Preliminary Objection by the 1st Interested Party

31. The 1st Interested Party raised a preliminary objection premised on grounds that; the Petitioner lacked the locus standi to institute the Petition; the Petition was not signed by the Petitioner personally but by his Advocate; that there was no cause of action disclosed against it; and the Petition is an abuse of the court process as it seeks to enforce the provisions of the Constitution while pursuing a selfish and personal vendetta.
32. As stated herein, the Court directed on 26th January, 2022, that the Objection will be disposed off together with the Petition. Be that as it may, the 1st Interested Party did not canvass its objection. Similarly, the other parties seemed to ignore the objection and only canvassed the Petition. It is therefore apparent that the 1st Interested Party abandoned its objection at the last minute. This is akin to filing a suit in Court and failing to prosecute the same. Accordingly, the same is hereby struck out and I move to determine the Petition.

Analysis and Determination

33. The issues for determination are: -
 - a) Whether the Petitioner has pleaded his case with a reasonable degree of precision?
 - b) Whether the recruitment process of the 4th Interested Party as the Managing Director of the 1st Respondent was in accordance with the Constitution and the law?
 - c) Is the Petitioner entitled to the remedies sought?

Whether the Petitioner has pleaded his case with a reasonable degree of precision?

34. This issue was raised by the 3rd Interested Party in its Grounds of Opposition. It stated that the Petitioner had not demonstrated with precision how his fundamental rights and freedoms have been violated or threatened to be violated. That the petition fails the test hence is fatally defective and should be dismissed in limine. It is notable that the Petitioner did not respond to this pertinent issue, either in its Further Affidavit or through its written submissions.



35. It is trite that any alleged violation or threatened violation of a constitutional right must be pleaded with a reasonable degree of precision. This principle was established in *Anarita Karimi Njeru v Attorney General* [1979] KLR 154 in the following manner: -

“We would however again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with reasonable degree of precision that of which he complains, the provision said to be infringed.”

36. This principle was reaffirmed by the Court of Appeal in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR, as follows: -

“(43) The petition before the High Court referred to Articles 1, 2, 3, 4, 10, 19, 20 and 73 of the Constitution in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements. For example, in paragraph 2 of the petition, the 1st respondent averred that the appointing organs ignored concerns touching on the integrity of the appellant. No particulars were enumerated. Further, paragraph 4 of the petition alleged that the Government of Kenya had overthrown the Constitution, again, without any particulars. At paragraph 5 of the amended petition, it was alleged that the respondents have no respect for the spirit of the Constitution and the rule of law, without any particulars.

(44) We wish to reaffirm the principle holding on this question in *Anarita Karimi Njeru* (supra). In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1st respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court referred to. In view of the substantive nature of these shortcomings, it was not enough for the superior court below to lament that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting,” without requiring remedy by the 1st respondent.”

37. The Court went ahead in the *Mumo Matemu case* (supra) to underscore the need for precision in pleadings as it allows parties and the Court to know the issues in controversy. The Court went head to state that pleadings are a tenet of substantive justice, as they give fair notice to the other party.

38. The instant Petition has identified a number of provisions of the Constitution, as being germane. It is however notable that the alleged violations by the Respondents have not been specifically identified against the relevant constitutional provision.

39. Be that as it may, and as the learned Judges of the Court of Appeal in the *Mumo Matemu case* (supra) reckoned: -

“(41) We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands



neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.”

40. I agree with the expressions above. What is important in my view is not the manner and form in which the constitutional rights violation is framed and presented. Rather, the specific rights alleged to have been infringed and the particulars as to how these rights were alleged to be infringed must be identifiable from the pleadings.
41. The Petitioner has given details in the body of the Petition as to the alleged violations by the Respondents. The thread that runs through the body of the Petition is the manner in which the recruitment process of the Managing Director of the 1st Respondent was undertaken vis a vis the relevant constitutional provisions. In this regard, the Petitioner appears to have singled out Articles 10, 232 and 73(2) of the *Constitution*.
42. The aforesaid provisions when read in context with the Petition as a whole, it is easy to discern the rights complained of by the Petitioner and the alleged manner in which the rights were allegedly infringed. In my view that would be sufficient to constitute a reasonable degree of precision.
43. It is therefore my finding that the Petition demonstrated with a reasonable degree of precision the constitutional rights alleged to have been violated by the Respondents.

Whether the recruitment process of the 4th Interested Party as the Managing Director of the 1st Respondent was in accordance with the *Constitution* and the law?

44. The Petitioner has stated that the appointment of the 4th Interested Party was marred with lack of transparency, discrimination and disregard of constitutional and statutory regulations with the aim of achieving a predetermined and aimed to favour the 4th Interested Party.
45. First, the Petitioner cited the 2nd Respondent for discrimination in that it chose to interview some applicants and refused and or neglected to interview others. A case in point was Eng. Daniel Ng’ang’a. To this end, the Petitioner presented evidence in the form of a screen shot message allegedly sent by the 2nd Respondent to the said applicant. It reads thus: -

“ Good morning, I hope this finds you well. This follows your application for the post of MD Nairobi County Water & Sewerage Company. We are in the process of planning interviews which may be through video calls. Pls advise on your current location for the next 1 week.”

46. It is not in doubt from the reproduced message, that the said applicant was not expressly notified that he had qualified for the shortlist and was being invited for an interview. As it is, the message does not come out as an invitation for an interview. Indeed, from the message, it is not clear whether the shortlisting process had been concluded or was about to conclude. In my view, the message is too grey to be assigned a specific interpretation. As it is, it can be interpreted either way by either party. Therefore, the message cannot be used by the Petitioner to make a case that the said Engineer Daniel Ng’ang’a was discriminated upon by not being interviewed. Afterall, it is uncommon during any recruitment process to have all applicants interviewed for a specific position. That is the essence of a longlist and shortlist.
47. It was further alleged by the Petitioner that during the tenure of the 4th Interested Party, as the acting Managing Director of the 1st Respondent, there were complaints of mismanagement and corruption.



48. To this end, the Petitioner identified a number of issues which in its view, rendered the 4th Interested Party unsuitable for appointment. For instance, it was alleged that the 4th Interested Party has exhibited tendency of violating court orders. ELRC CBA No 34 of 2020 was cited for illustration. On this issue, the 1st Respondent stated that there was no enforceable order by the Court as it declined to register the collective bargaining agreement.
49. It is notable that the copy of the Judgment produced by the Petitioner in support of this issue is in respect High Court JR No 453 of 2018, which had no correlation to the particulars provided by the Petitioner. This was therefore not a suitable enough to prove the allegation against the 4th Interested Party.
50. The 4th Interested Party was also cited by the Petitioner as having failed to comply with basic and regulatory requirements of Water Services Regulatory Board (WASREB). A letter dated 13th March, 2020 was produced to support the Petitioner's assertion. In answer to this, the 1st Respondent stated that it responded to the said letter. Beyond these allegations, there was no evidence as the matter was resolved and whether the 4th Interested Party was mentioned adversely. The said letter on its own, cannot be sufficient evidence to cite the 4th Interested Party for incompetence and unsuitability to hold office.
51. The rest of the allegations regarding the 4th Interested Party's unsuitability have not been substantiated by the Petitioner by concrete evidence presented in any form or manner. Besides, it is contested by the 1st Respondent that the 4th Interested Party was not in office when some of the issues alleged occurred. It bears to note that this assertion was not controverted by the Petitioner.
52. As was held by the Court of Appeal in the *Mumo Matemu case* (*supra*): -
- “(79) The determination of unsuitability or unfitness of a person to hold State or Public Office on grounds of lack of integrity is a factual issue dependent upon an evaluation of material evidence. When presented as a constitutional challenge, the evidentiary standard is on a balance of probabilities. This standard is heightened, given its implications on due process, fairness and equal protection. An approach in this regard is to undertake what the High Court called “an intensely fact-based enquiry.”
53. The evidentiary material presented before me, do not buttress the Petitioner's claim that during the 4th Interested Party's tenure in an acting capacity, there were complaints of mismanagement and corruption, hence he is unsuitable to hold the position of Managing Director of the 1st Respondent.
54. As such, it is not possible to determine the Petitioner's allegations in that regard, hence I dismiss the same.
55. The final aspect on this issue is public participation. The Petitioner states that the Respondents did not publish the names of the shortlisted candidates hence the process was undertaken in secrecy and public views on the suitability of the names were neither undertaken nor considered while conducting the interviews. In response to this issue, the 1st Respondent contended that there was no requirement for public participation in the recruitment process of a managing director and that further, there was no requirement that the names of the shortlisted candidates should be published.
56. The principle of public participation is founded on the provisions of Article 10(2) and 232(1) (d) of the *Constitution*. It is notable that the aforesaid constitutional provisions are couched in a blanket manner. Article 10 (2) identifies “participation of the people” as one of the national values and



principles of governance. Similarly, Article 232 (1) (d) recognizes “involvement of the people in the process of policy making” among the values and principles of public service.

57. As it is, there is no legislative framework that operationalizes the provisions of Article 10 and 232 of the *Constitution* as regards public participation. It is not in doubt that the issues that may be subject to public participation are diverse. The pertinent question thus is, whether there is a requirement for the 1st Respondent to subject the recruitment exercise of its Managing Director to public participation?
58. On this issue, I will align myself to the holding by Rika J in *Commission for Human Rights & Justice v Board of Directors, Kenya Ports Authority & 2 others; Dock Workers Union (Interested Party)* [2020] eKLR, where he posed the following question:

“Should the process of appointment of the Managing Director of the KPA, be equated to the process of making legislation or regulations in public entities...Should the level of public participation be the same, in appointment of the Managing Director of a State Corporation”
Should the Respondents exhort Kenyans to participate in the process of appointment of the Managing Director?”

59. The learned Judge proceeded to make the following finding which I fully concur with: -

“In the respectful view of this Court, appointment of the Managing Director, KPA, is a highly specialized undertaking, which is best discharged by the technocrats comprising the Board, assisted by human resource expert committees as the Board deems fit to appoint. The existing law governing the process of appointment of the Managing Director KPA, leans in favour of technocratic decision-making. Democratic decision-making, involving full-blown public participation may be suitable in the processes of legislation and related political processes, such as the Makueni County Experiment and the BBI, subject matter of Dr. Mutunga’s case studies. But technocratic decision-making suits the appointment of CEOs of State Corporations. Even as we promote democratic [people-centric] decision-making processes, we must at the same time promote technocracy, giving some space to those with the skills and expertise to lead the processes, and trusting them to provide technical solutions to society’s problems. The Board and the Committees involved in the process are in the view of the Court, well -equipped to give the Country a rational outcome...It need not totally open itself up, to the scrutiny of every person. The public is aided by public watchdogs – DCI, EACC, CRB, KRA and HELB – in assessing the antecedents of the applicants.”

60. Further, I note that the recruitment process of the Managing Director to the 1st Respondent is guided by clause 70 of its Articles of Association. The said clause provides for the manner in which the recruitment of the Managing Director is undertaken and the requisite qualifications. Under the said clause 70, the appointment is to be undertaken through a reputable consultancy firm.
61. It is not contested that the vacancy of the Managing Director was advertised on 9th March, 2020 in a national newspaper. The advertisement was undertaken by the 2nd Respondent.
62. The 1st Respondent appears to have adhered to this process as required in its Articles of Association. The Court was not presented with any legislative framework besides the Articles of Association, that stipulates the requirements for appointment of the 1st Respondent’s Managing Director.



63. In Commission for Human Rights & Justice v Board of Directors, Kenya Ports Authority & 2 others; Dock Workers Union (Interested Party) [*supra*] the learned Judge observed as follows: -

“ 68. In the Petition filed herein, it is clear to the Court that the Respondents have, employing the legal framework and instruments of governance at their disposal, adequately satisfied the requirement for public participation.....The Respondents have balanced the requirement for public participation, against the legally-mandated requirement for a technocratic recruitment process.”

64. In the instant case, the 1st Respondent applied the recruitment process stipulated in its Articles of Association hence cannot be faulted. Apparently, this process is replicated under the WASREB Corporate Governance Guidelines for Water Services Sector, 2018.

65. In light thereof, I am not persuaded that the process at hand, mandated the 1st Respondent to undertake public participation by inviting public views on the issue, being an exercise that was technocratic in nature and having complied with the relevant instruments. Further, there are adequate checks and balances inbuilt in the WASREB Corporate Governance Guidelines for Water Services Sector, 2018, to ensure that such requirement is undertaken procedurally.

Orders

66. Against this background, it is my finding that the Petition is not meritorious and is dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF JUNE 2022.

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STELLA RUTTO

JUDGE

Appearance:

For the Petitioner Mr. Kiroko

For the 1st Respondent and 4th Interested Party Mr. Chege

For the 2nd Respondent Mr. Omondi

For the 3rd Interested Party Ms. Mwangi

For the 1st Interested Party Kwengu Advocates

For the 2nd Interested Party No appearance

Court assistant Barille Sora

Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of



Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

