



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 14 OF 2020

(Formerly Nairobi High Court Judicial Review No. 111 of 2020)

Before Hon. Lady Justice Maureen Onyango

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION

AND

IN THE MATTER OF: SECTIONS 4, 7(2)(b), (f), (j), (m) & (o); 10(1), 11 AND 12 OF THE FAIR ADMINISTRATIVE ACTION ACT, NO. 4 OF 2015

AND

IN THE MATTER OF: SECTIONS 8 AND 9 OF THE LAW REFORM ACT

AND

IN THE MATTER OF: ORDER 53 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF: SECTION 5(3), 27(1)(b) OF THE STATE CORPORATIONS ACT AND THE ATTENDANT KENYA VETERINARY VACCINES PRODUCTION INSTITUTE ORDER, 1990

AND

IN THE MATTER OF: ARTICLES 22, 47, 48, 73 & 159(2), 165 & 232 OF THE CONSTITUTION

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE CABINET SECRETARY, MINISTRY OF AGRICULTURE, LIVESTOCK,

FISHERIES AND COOPERATIVES..... 1ST RESPONDENT

THE PRINCIPAL SECRETARY,

DEPARTMENT OF LIVESTOCK.....2ND RESPONDENT

KENYA VETERINARY VACCINES INSTITUTE..... 3RD RESPONDENT

THE BOARD OF KENYA VETERINARY

VACCINES PRODUCTION INSTITUTE..... 4TH RESPONDENT

DR. JANE WACHIRA.....5TH RESPONDENT

THE ATTORNEY GENERAL.....6TH RESPONDENT

STATE CORPORATIONS ADVISORY COMMITTEE.....7TH RESPONDENT

EX PARTE: UNION OF VETERINARY PRACTITIONERS OF KENYA

JUDGMENT

The ex parte Applicant is a trade union of veterinary practitioners. It has filed this suit against the 1st and 2nd Respondents who are the Cabinet Secretary in the Ministry of Agriculture, Livestock, Fisheries and Co-operatives, and the Principal Secretary, Department of Livestock respectively. The 3rd Respondent is the Kenya Veterinary Vaccine, Production Institute, a wholly owned state parastatal.

The 4th, 5th and 6th Respondents are the Board of the 3rd Respondent, the Chief Executive Officer of the 3rd Respondent and the Attorney General respectively. The 7th Respondent is the State Corporations Advisory Committee established under the State Corporations Act.

The application challenges the legality of the process of renewal of the contract of the 5th Respondent by the 4th Respondent for a second term of three years on grounds that her performance during her first term in office was dismal and that she failed to make an application for renewal of the term on time. The Applicant further avers that the renewal of the terms of the contract of the 5th Respondent was unlawful for failure to comply with the law and procedure in the Constitution, the Statute and MWONGOZO Code of Governance of State Corporations. That the procedure was hurried and opaque to cover up the grave illegalities. The Applicant seeks the following orders against the Respondents: -

1. That an order of CERTIORARI be granted to bring up into the High Court for quashing the decision and Resolution of the Board of Kenya Veterinary Vaccines Production Institute dated 2nd January 2020 recommending the renewal of the appointment of the Dr. Jane Wachira as the Chief Executive Officer of the Kenya Veterinary Vaccines Production Institute.
2. An order of PROHIBITION barring the Cabinet Secretary, Ministry of Agriculture, Livestock, Fisheries & Co-operatives from appointing and gazetting Dr. Jane Wachira as the Chief Executive Officer of the Kenya Veterinary Vaccines Production Institute.
3. An order of MANDAMUS compelling the Board of Kenya Veterinary Vaccines Production Institute to commence afresh a transparent and competitive process of appointing a Chief Executive Officer for the Kenya Veterinary Vaccines Production Institute.
4. That the costs of this application be provided for.

The grounds in support of the application are that: -

- a. The 5th Respondent, in an act of forgery dated a letter written on 9th December 2019 as having been written on 24th September 2019, a letter which was tellingly received by the 3rd Respondent on 14th December 2019.
- b. Hurriedly, the Board was called vide a Notice dated 27th December 2019 to sit and consider the renewal of the tenure of the 5th Respondent on 31st December 2019 in order to legitimize an illegality.
- c. The purported renewal of the term of the 5th Respondent as the CEO of the 3rd Respondent is unlawful because:
 - i. The letter seeking renewal was not written six (6) months period prior to the end of term as required by the government circular No. OP/CAB.9/1A dated 23rd November, 2010 titled "procedure for reappointment of service Chief Executive Officers in state corporations."
 - ii. The procedure followed by the Board is contrary to the law and the procedure laid down under the Sections 5(3) & Section 27(1)(c) of the State Corporations Act, as read with the Code of Governance for State Corporations, 2015 (MWONGOZO Charter).
 - iii. Further to b. above there was no discussion of the renewal of the term of the CEO by the board and there was no mention of the renewal in the Notices calling for the Board Meetings the entire of 2019.
 - iv. That in light of the circumstances and the manner in which the board meeting was convened and how the resolution of was passed, the renewal is null and void ab initio.

v. (The renewal process was undertaken and speedily concluded despite grave competence and integrity concerns relating to the 5th Respondent's tenure.

vi. (Because of the hurried manner of attempted renewal, the board forwarded on 2nd January 2020 to the CS of Agriculture the resolution to renew the 5th Respondent's term together with minutes that had not been confirmed contrary to Annex I Rule 8 (c) as read with (e) Code of Governance for State Corporations, 2015 (MWONGOZO Charter) which require resolutions to be confirmed and duly signed before they are records of the Parastatal.

viii. That the actions of the 4th Respondent were clearly meant to hoodwink the 1st & 2nd Respondents to rubberstamp a decision made without due regard to procedure, the rule of law and tenets of justice.

d. The purported renewal is a violation of Article 73, specifically the public trust bestowed on the 4th Respondent owing to disregard of grave and uncontroverted concerns of the lack of competence and the bad track record of the 5th Respondent, violations of the Constitution and nepotism during her tenure as the CEO.

e. The renewal is a violation of Article 232 of the 2010 Constitution & Paragraphs A2, A3 and B5 of the Human Resource Policies and Procedures Manual for the Public Service May, 2016 in so far as they relate to the Principles of Public Service and the principle of merit in recruitment to Public Service.

f. As public participation, transparency and accountability are now constitutionally mandated principles of governance required under Article 10 of the constitution, 2010; the process in question was unlawful because it was not transparent, did not make room for public participation and was shrouded in mystery and it could not allow for any shade of public participation or scrutiny.

g. The 5th Respondent may ANYTIME NOW be gazetted as the CEO of the 3rd Respondent despite previous poor performance and violation of the law and the Constitution & the unlawful *process that is pending approval by the 1st Respondent*.

h. The application herein seeks reliefs in the nature of prerogative writs and ought to be decided upon by the Court as a matter of urgency.

The Application is further supported by the Statutory Statement and a Verifying Affidavit sworn by **DR. MIHESO MULEMBAI** both dated 17th May, 2020 in which he reiterates the grounds on the face of the motion.

1st, 2nd and 6th Respondents' Case

In response to the Application the 1st, 2nd and 6th Respondents filed a replying Affidavit sworn on 10th August 2020 by **PETER GATIRAU MUNYA**, the Cabinet Secretary Ministry of Agriculture, Livestock Fisheries & Co-Operatives in which he avers that the prayer for certiorari quashing the decision and resolution of the Veterinary Vaccines Production Institute and the order of prohibition sought barring the 1st Respondent from appointing and gazetting the 5th Respondent Dr. Jane Wachira as the Chief Executive Officer of the Kenya Veterinary Vaccines Production Institute Board is misleading as the 1st Respondent acted on the advice from the 4th Respondent. The affiant avers that the process of reappointment of the 5th Respondent as the Chief Executive Officer of the Kenya Veterinary Vaccines Production Institute was fair and transparent and in accordance with the provisions of Sections 5(3) and Section 27 of the State Corporations Act as read with the Code of Governance for State Corporations, 2015 (MWONGOZO Charter) and the Government Circular Number OP/CAB/1A of 23rd November, 2010.

The affiant maintains that the grounds of the application are purely speculative, misconstrued, baseless and are mere allegations and that the letter dated 24th September 2019 by the 5th Respondent to the 4th respondent is genuine and not a forgery. He further states that the 4th Respondent had sufficient time to deliberate on the issue of reappointment of the 5th Respondent and the laid down procedure was followed. That there was no violation of Articles 23 and 73 of the Constitution of Kenya 2010 as alleged. The affiant contends that a vacancy for the position of the Chief Executive Officer is only announced if the current holder shows no interest in reappointment. He insists that the Application is based on speculations and private interests and as such seeks that the same be dismissed with costs.

3rd, 4th and 5th Respondents' Case

The 3rd, 4th and 5th respondents responded to the motion by a

replying affidavit sworn by **WALTER NYAMWAYA**, the Legal Officer of the 3rd respondent herein on 23rd July, 2020, in which he maintains that the application is incompetent as it violates the provisions of Order 53 Rule 3(1) of the Civil Procedure Rules and sought to have it struck out.

The affiant avers that the application letter for renewal of contract dated 24th September 2019, addressed to the 5th Respondent was received by the Chairman of the Board on the 14th October 2019 and that he is not aware of any forged letter dated 9th December 2019 as claimed by the ex-parte Applicant.

He further avers that subsequent to receiving the letter of renewal; the Board Chairman proceeded to convene a meeting of the Finance and Human Resource Committee on 31st December 2019 in which the board deliberated on the renewal of the 5th Respondent's term among

other things and that there is no impending gazette notice on the renewal of the 5th Respondent's contract.

He further contended that the said renewal did not violate the provisions of Circular Number OP/CAB.9/1A on the grounds that; the request for renewal of contract was received 5 months to the expiry of the term, the circular does not prohibit the 3rd respondent from conducting a performance appraisal of the 5th Respondent, the Board is required to undertake an evaluation of the CEO's performance and recommend renewal or non-renewal of the term based on the performance evaluation and the circular states that the position of the CEO shall be declared vacant only when the Board has no intention to renew the appointment of the incumbent for a further term.

The affiant states that the 4th Respondent undertook the evaluation of the current CEO, the 5th Respondent and recommended her reappointment based on her exceptional performance. The evaluation was done by the State Corporations Advisory Committee who is the 7th Respondent herein.

The affiant avers that the applicant has failed to demonstrate how sections 5(3) and 27(1)(c) of the Civil Procedure Rules, 2010 were violated by the 3rd, 4th and 5th respondents.

He states that the allegation that the 5th Respondent is a poor performer is threadbare as the 7th Respondent's report as well as the audited accounts all reflect that the 5th respondent was a performer. The affiant further states that he is not aware of any matter touching on the integrity of the 5th Respondent.

He further states that the applicant failed to show how its members will be affected by the renewal of the contract of the 5th Respondent.

The affiant also avers that the allegation that the 3rd respondent received government grants annually at reducing costs to farmers is untrue. That the true position is that the 3rd respondent requested for funds from the government to modernize the plant and equipment with the aim of achieving good manufacturing practices and ISO certification. He further contends that there has been no loss of the government grant to the 3rd respondent.

The affiant maintains that the 5th Respondent has ensured high sales and that the acquisition of legal services was regularly sourced.

The affiant further states that he is not aware of any letters allegedly sent to the Ombudsman seeking supply of information.

He prays that the application be dismissed with costs.

Rejoinder by the Applicant

In response to the Replying Affidavits by the respondents, the applicant filed a supplementary affidavit sworn on the 20th October 2020 by Dr. Miheso Mulembani the Secretary General of the Ex Parte Applicant. The affiant reiterates that the appointment of the 5th Respondent was unprocedural as the process was hurried and it was not possible for persons affected including the exparte applicant to participate in the process and share their views. He further contends that the requirements under order 53(1) were complied with as leave was granted on 3rd June 2020 by Odera J. (sic) and the motion was filed on 19th June 2020 within the requisite timelines. He further states that the averments in the respondents replying affidavits are meant to divert the attention of the court to irrelevant considerations which do not go to the heart of the renewal of the contract of the Chief Executive Officer.

Parties disposed of the application by way of written submissions.

Ex-parte Applicants submissions

The Ex-parte applicant submits that the application for renewal of contract for the 5th Respondent was allegedly vide a letter dated 24th September, 2019 which did not conform to the circular that requires renewal requests to be made 6 months prior to the end of the tenure.

It further submits that Memo forwarding the request to the relevant committee was written on 11th December 2020 after the meeting on 10th Dec 2019. It submits that the letter is purported to have been received by the chairman of the board on 14th October, 2019. He submits the meeting held on the 18th October did not discuss this reappointment. He further submits that the minutes of 10th December 2019 where this matter first arose have been omitted by the 3rd respondent and the first meeting that discussed the reappointment was that of 31st Dec 2019.

The applicant submits that the request for renewal was out of time and violated the provisions of the circular dated 23rd November 2010 issued by the Head of Public Service. He relied in the case of **Peter Macithi Muigai v Cabinet Secretary of Industrial and Enterprise Development & 4 others (2016)** where Ndolo J. stated in Paragraph 34 as follows: -

“My reading of circular dated 23rd November 2010 is that a Chief Executive Officer wishing to apply for renewal of a contract must write their request at least six months before expiry of the contract.”

The exparte applicant submits that the rationale of the circular is to ensure the parastatals that control enormous resources have enough time to consider the performance of the Chief Executive Officer before determining whether to renew their contract and also to facilitate compliance with the law by opening the process to public participation. However the instant case did not provide for such public

participation.

The ex-parte applicant relied in the case of **Republic v President & 7 others Exparte Wilfrida Itolondo & 4 others (2014) eKLR** Odunga J. stated: -

“The court in its exercise of its judicial review jurisdiction is not concerned with the merits of the decision in question but only concerned with the process with which the decision was arrived at...”

The Ex-parte applicant submits that the process that led to the renewal of the term of the 5th Respondent was unlawful.

The applicant further submits that the circular dated 23rd November 2010 as read with the MWONGOZO Charter and the State Corporations Act form the legal framework that must guide the process of reappointment of the CEO. The applicant relied in the case of **Peter Macithi Mungai v Cabinet Secretary for Environment, Natural Resources & Regional Development Authorities & 3 others (2018) eKLR** where Wasilwa J. stated:-

“By not adhering to the provisions of MWONGOZO when the 1st and 2nd Respondents re-appointed the 4th Respondent as Chief Executive Officer KEFRI they acted in contravention of the law. Article 10 of the constitution on competitive recruitment was not adhered to.”

The applicant further submits that the minutes of the meeting of the Finance and Human Resource Committee of the Board held on 31st December 2019 are unlawful and cannot be relied as they do not identify the persons who made the recommendations and evaluations, the minutes have not been confirmed by any subsequent meeting, the minutes have only been signed by the chairperson and no other person confirming them and the reappointment of the Chief Executive Officer was part of the agenda yet it was a serious matter.

The ex-parte applicant submits that it is an established principal of law that the decision of a public body is irrational or unreasonable in the sense of being a decision, which no public body acting reasonably would have made. He submits that any administrative decision that does not take into consideration all relevant factors becomes irrational therefore liable to the judicial review orders as per **Associated Provincial Picture Houses V Wednesbury Corporation (1948) 1KB**.

The ex-parte applicant submits that the renewal of the tenure of the CEO has been marred with blunders and shortcomings.

It further submits that the process that led to the renewal of the contract of the 5th respondent violated Articles 10, 47, 73 and 233 of the constitution of Kenya 2010. It relied in the case of **Wambua Maithya v Pharmacy and poisons board Pharmaceutical Society of Kenya & 2 others (interested Parties) 2019 eKLR** and **David Kariuki Muigai v Attorney General & another (2012) eKLR**.

The Applicant urges the court to allow the judicial review application as prayed.

1st, 2nd, 6th and 7th Respondents Submissions

The 1st, 2nd, 6th and 7th Respondents submit that the 4th respondent followed the due procedure in considering the 5th respondent's application irrespective of the date it was received. It submits that the applicability of the Government circular of 2010 was defeated by establishment of MWONGOZO charter of 2015 which makes no provision requiring a serving CEO to tender application for reappointment 6 months prior to expiry of existing term. They relied on the case of **Ben Chikamai & Another v Peter Macithi Muigai & 2 other (2020) Civil Appeal No. 313 of 2020** where the court observed: -

“Besides the argument by the appellants that the 1st appellants reappointment was in line with the government circular reference no. OP/CAB.9/1A dated 23rd November 2010 is not tenable as executive order No. 7 dated 28th April 2015 implementing MWONGOZO was intended to override the provisions of the former circular as far as appointment and reappointment of Chief Executive officer of KEFRI was concerned and it is therefore incumbent upon the concerned parties to forthwith implement the said provision.”

The 1st, 2nd, 6th and 7th respondents submit that the 5th respondent was eligible for reappointment as she had only held the office for a period of one term and her performance was assessed by the 4th Respondent and the 7th respondent, the State Corporations Advisory Committee.

The 1st, 2nd, 6th and 7th respondents submit that the reappointment of the 5th Respondent cannot be treated as new appointment which must be competitive and open to the public relying on the decision in the **Republic v Cabinet Secretary for Education Science & Technology & 3 others, Judicial Review Case No. 280 of 2014**.

They submit that for reappointments for a further term, the body responsible assesses the person and makes a decision whether to reappoint the incumbent or open the position for competition.

They further relied on the decision in **Henry Nyabuto Ondieko v Charles Aupudo Owelle & 2 Others (2017) eKLR** where the Judge held that: -

“setting aside a reappointment that had complied with the dictates of MWONGOZO would undermine the underpins of running public institutions ...”

They further submit that reappointment of the 5th Respondent was legal and presumed to have been done legally. They submit that an administrative action is deemed to be done within the law unless the contrary is proved. They submit that the applicant has failed to adduce evidence to the contrary and as such the court has no reason to interfere with the reappointment, relying on in the case of **Odinga v IEBC & 3 others Supreme court of Kenya, Election Petition No. 5 of 2013**.

The 1st, 2nd, 6th and 7th respondents submit that the orders of Certiorari and Mandamus sought by the applicant are baseless and obsolete as the actions of the 4th Respondent were carried out within the confines of the law and procedures as provided under State Corporations Act CAP 446 as read with MWONGOZO Charter 2015.

They further submit that the order for Prohibition has been overtaken by events as the 1st respondent has discharged his mandate to appoint and gazette the 5th Respondent according to the dictates of the law. They submit that the application lacks merit and should be dismissed with costs to the respondents.

Submissions by the 3rd, 4th and 5th Respondents

Counsel for 3rd, 4th and 5th respondents submits that the application is defective and incompetent as it violates the provisions of Order 53 Rule 3(1) of the Civil Procedure Rules. That leave having been granted on 3rd June 2020 the Notice of Motion ought to have been filed on or before 24th June 2020. That the application having been filed on 25th June 2020 is incompetent and should be struck out without going into the merits as failure to comply within 21 days goes to the substance of the rule and is not a mere technicality.

He relies on the **C.A No.6 1995 Wilson Osolo v Ojiambo & The A.G (1996)** where court of appeal stated that: -

“It is mandatory requirement of Order 53 rule 3(1) of the Civil Procedure Rules that the notice of motion must be filed within 21 days of grant of such leave. The court held that there was no proper application before the court”

He also relied on the case of **JR 7 of 2014 R. v Minister of Lands & Settlement (2016) eKLR** where the Court held that: -

“The notice of motion had been filed a day after expiry of 21 days Justice Olao held that a notice of motion filed outside 21 days is not proper. He stated that “No doubt rejecting an application for being late by a day may sound harsh but rules were made for a purpose and must be adhered to. He was not persuaded that Article 159(2) d of the constitution would come to the aid of the applicant bearing in mind that Judicial Review jurisdiction is a special jurisdiction he cited the case of Wilson Osolo he said that he had no discretion in the matter and struck out the notice of motion with costs.”

The 3rd, 4th and 5th respondents submit that the Notice of motion is baseless and devoid of any merit and that the same is merely witch hunting the respondents with unsubstantiated allegations and lacks consistency.

They submit that the applicant seeks to rely on allegations without demonstrating their existence thus lacks clean hands.

They submit that there was no noncompliance or unlawful approval of the renewal of the 5th Respondent’s term and that due process was followed. That an order of certiorari is unmerited. The respondent submits that MWONGOZO Code of Governance for State Corporations para 1.12(6) provides that reappointment for a subsequent term for any board member or CEO shall be based on favourable evaluation. They submit that the only exception to the executive order is any written law. They submit that the circular of 2010 is only a directive and not a written law and its application became redundant when the executive order of 2015 was issued. They cited **Civil Appeal No. 33 of 208 Ben Chikimai & Another v Peter Mungai & Others (2020)** where the court stated the government circular No. OP/CAB9/1A dated 23rd November 2010 is not tenable as Executive Order No. 7 implementing MWONGOZO was intended to override its provisions as far as appointment or reappointment of CEO for State Corporations was concerned.

The respondent urges the court to find that MWONGOZO being a latter guideline was applicable and binding on the 3rd Respondent on the reappointment of the 5th Respondent and was followed. They submit that MWONGOZO does not provide any period for request for renewal prior to expiry of contract term. They further submit that the meetings and the minutes complied with the provisions of MWONGOZO and are legitimate. They submit that due process was followed and there was no contravention of any law citing the decision of Ndolo J. in **Peter Macithi Muigai v CS for Industrialization and Enterprises Development & 4 Others (2016) eKLR**, where the court found that application for renewal of contract was properly before the court notwithstanding the date of receipt. The court further held that renewal did not require a competitive process.

They submit that the order of prohibition sought is overtaken by events as renewal was done and there is no evidence of intention to gazette the renewal as it is not a legal requirement. They further submit that the order for *mandamus* must also fail as the position is not vacant for competitive filling. They urge the court to dismiss the application with costs.

Determination

Judicial review is defined in **Blacks Law Dictionary 10th Edition** as “a court’s power to review the actions of other branches or levels of government, especially the court’s power to invalidate legislative and executive actions as being unconstitutional.”

A judicial review proceeding is meant to check how a public body exercises its public authority. Therefore, every judicial review application must be aimed at a public body. The public entity mentioned as a Respondent in any judicial review application must be a body corporate

capable of being sued and can sue in its own name. A public authority does not act on its own but through agents and/or employees. This does not make the agents or employees personally liable in a judicial review application.

Issues for Determination

1. Whether the Notice of Motion meets the provisions of Order 53 rule 3(1) of the Civil Procedure Rules

According to the court record, on 3rd June, 2020 the court granted

leave to the Ex-parte applicant to file Judicial review application within 21 days. The substantive application by way of a Notice of Motion was filed on the 25th June 2020, which is 22 days after the issuance of the orders.

The Applicant vide the supplementary affidavit of DR. DAVID MIHESO MELEMBANI sworn on 20th October 2020 however insists that the motion was filed on 19th June 2020 and therefore complied with timelines.

The main motion is dated 25th June 2020 as per record. Dr. Mulembani did not exhibit any other application dated 19th June 2020 and none is on record. The orders of the Court made on 3rd June 2020 are very explicit: that *“the applicant is directed to file and serve the application within 21 days. Mention for directions on 30th June 2020.”*

Under Order 53(3) an applicant is required to file the motion within 21 days. Order 53 Rule 3 of the Civil Procedure Rules provides that: -

[Order 53, Rule 3.] Application to be by notice of motion.

1. When leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within twenty-one days by notice of motion to the High Court, and there shall, unless the judge granting leave has otherwise directed, be at least eight clear days between the service of the notice of motion and the day named therein for the hearing.

2. The notice shall be served on all persons directly affected, and where it relates to any proceedings in or before a court, and the object is either to compel the court or an officer thereof to do any action in relation to the proceedings or to quash them or any order made therein, the notice of motion shall be served on the presiding officer of the court and on all parties to the proceedings.

3. An affidavit giving the names and addresses of, and the place and date of service on, all persons who have been served with the notice of motion shall be filed before the notice is set down for hearing, and, if any person who ought to be served under the provisions of this rule has not been served, the affidavit shall state that fact and the reason why service has not been effected, and the affidavit shall be before the High Court on the hearing of the motion.

4. If on the hearing of the motion the High Court is of the opinion that any person who ought to have been served therewith has not been served, whether or not he is a person who ought to have been served under the foregoing provisions of this rule, the High Court may adjourn the hearing, in order that the notice may be served on that person, upon such terms (if any) as the court may direct.

In the case of the **C.A No. 6 1995 Wilson Osolo v Ojiambo & The A.G (996)** Court of Appeal stated that it is mandatory requirement of Order 53 Rule 3(1) of the Civil Procedure Rules that the notice of motion must be filed within 21 days of grant of such leave. The court held that there was no proper application before the court.

In the case of **JR 7 of 2014 R. v Minister of Lands & Settlement (2016) eKLR** where the Court held that the notice of motion had been filed a day after expiry of 21 days Justice Olao held that a notice of motion filed outside 21 days is not proper. He stated that “No doubt rejecting an application for being late by a day may sound harsh but rules were made for a purpose and must be adhered to. He was not persuaded that Article 159(2) d of the constitution would come to the aid of the applicant bearing in mind that Judicial Review jurisdiction is a special jurisdiction he cited the case of Wilson Osolo he said that he had no discretion in the matter and struck out the notice of motion with costs.

In the case of **Wilson Osola (supra)**, the Court of Appeal stated that courts have jurisdiction to extend the time for filing the main judicial review motion should application for extension be made by the Applicant. In this case, no such application has been made. The Applicant does even acknowledge that it filed the application out of time.

The motion filed by the Applicant on 25th June 2020 is therefore incompetent.

2. Whether the 4th Respondent followed due process in renewing the contract of the 5th Respondent

The applicant contends that the renewal of the term of the 5th Respondent on 31st December 2019 was an illegality. The applicant relies on government circular No. OP/CAB.9/1A dated 23rd November 2010. The circular provides that a CEO seeking renewal of a contract should apply six months prior to the end of the contract term.

The respondents state that MWONGOZO Code of Governance for State Corporations was implemented by Executive order No. 7/2015 issued by the President to provide direction for effective governance and oversight of state corporations. Paragraph 1.12(6) of

MWONGOZO Code provides that reappointment for a subsequent term for any board member or CEO shall be based on favourable evaluation. The respondents state that MWONGOZO Code does not have a time limit as to when a Board member or CEO should submit their request for renewal of contract.

The MWONGOZO Code was issued under a Presidential Executive Order No. 7 of 28th April 2015. The circular relied upon by the Applicant is dated 23rd November 2010 and is by the Head of Public Service.

MWONGOZO Code gave fresh directions on management and governance of State Corporations. It provides for renewal of the contract of a CEO by the Board once subject to performance evaluated by the Board. MWONGOZO Code does not set any other condition for renewal of the term of the CEO of a state corporation.

As was held by the Court of Appeal in the case of **Ben Chikamai & Another (supra)**, MWONGOZO was intended to override the provisions of the former circular as far as appointment and reappointment of CEOs of state corporations are concerned.

I thus find that there was no procedural irregularity in the renewal of the contract of the 5th Respondent.

The Respondents have raised issues about the performance of the 5th Respondent during her first term in office. Judicial review is not concerned with merit, but procedure. As was stated by Odunga J. in **Republic v President & 7 others Ex parte Wilfrida Itolondo & 4 Others (supra)** where he stated thus: -

“As already stated hereinabove this Court in the exercise of its judicial review jurisdiction is not concerned with the merits of the decision in question but only concerned with the process with which the decision was arrived at. The Respondents’ position is that in renewing the 1st Interested Party’s term one of the factors which was taken into account was the 1st Interested Party’s commitment and exemplary performance during her first term. Whether or not that view was in fact correct is not for this court to examine.

Whether or not the assessment of the performance of the 4th Respondent 5th Respondent was flawed is not for this court to determine in a judicial review application. The merits of the decision is not within the province of the application before the court.

What the court is concerned with is the validity of the process of the appointment. Under MWONGOZO Code and the State Corporations Act, the 4th Respondent complied with the procedure for reappointment of CEO.

3. Whether the applicant is entitled to the orders sought

The applicant sought for orders of **Certiorari** to quash the decision and resolution of the Kenya Veterinary Vaccines Production Board recommending the renewal of the appointment of the 5th Respondent as the CEO of the Kenya veterinary vaccines production institute.

It also sought for order of **Prohibition** barring the cabinet secretary Ministry of Agriculture Livestock, fisheries & cooperatives from appointing and Gazetting the 5th Respondent as the CEO of the Kenya Veterinary Vaccines Production Institute.

Thirdly, it sought for an order **Mandamus** compelling the Board of Kenya Veterinary Vaccines Production Institute to commence afresh a fresh transparent and competitive process of appointing a Chief Executive Officer of the Kenya Veterinary Vaccines Production Institute.

Having found that there was no procedural irregularity in the appointment of the 5th Respondent by the 1st and 4th Respondents, the prayer for *certiorari* must fail.

The prayer for prohibition fails because the act intended to be stopped had already happened at the time of commencement of the proceedings herein.

The prayer for *mandamus* having been anchored on the success of the prayer for orders of *certiorari* must also fail.

The upshot is that the entire application fails and is dismissed. In view of the nature of the application, which is in the realms of public interest litigation, there shall be no orders for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 9TH DAY OF APRIL 2021

MAUREEN ONYANGO

JUDGE

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 has 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.

MAUREEN ONYANGO

JUDGE