



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**PETITION NO. E012 OF 2020**

**IN THE MATTER OF ARTICLES 1, 2, 10, 19, 20, 21, 27, 47, 50, 162 AND 232 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF SECTIONS 4, 65 AND 66 OF THE WATER ACT NO. 43 OF 2016**

**AND**

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

**AND**

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

**AND**

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

**BETWEEN**

**GEORGE OMONDI**

**PETITIONER**

**v**

**CABINET SECRETARY, MINISTRY OF**

**WATER, SANITATION & IRRIGATION**

**1<sup>st</sup> RESPONDENT**

**ATTORNEY GENERAL**

**2<sup>nd</sup> RESPONDENT**

**BOARD OF LAKE VICTORIA SOUTH WATER**

**WORKS DEVELOPMENT AGENCY**

**3<sup>rd</sup> RESPONDENT**

**AND**

**BOAZ OKOTH AKELLO**

**1<sup>st</sup> INTERESTED PARTY**

**GEORGE ODEDEH**

**2<sup>nd</sup> INTERESTED PARTY**

**LAKE VICTORIA SOUTH WATER WORKS**

**DEVELOPMENT AGENCY**

**3<sup>rd</sup> INTERESTED PARTY**

**JUDGMENT**

1. This Petition is part of a series of Petitions challenging the recruitment process for the Chief Executive Officer for the Lake Victoria South Water Works Development Agency.
2. The other Petitions are Kisumu Petition No. 1 of 2021, *Okiya Omtatah Okoiti v Lake Victoria South Water Works Development Agency & Ors* and Kisumu Petition No. 2 of 2021, *Javas Bigambo v the Board, Lake Victoria South Water Works Development Agency & Ors*.
3. The delivery of the judgment(s) was initially scheduled for 31 March 2021 but was postponed when the parties informed the Court that they wanted to attempt out of court settlement. A composite settlement involving all the parties was not reached.
4. On 7 December 2020, George Omondi (the Petitioner) lodged a Petition with the Court contending that the decision of the Cabinet Secretary, Ministry of Water, Sanitation and Irrigation to appoint Eng. Boaz Okoth Akello (1<sup>st</sup> Interested Party), as the Chief Executive Officer of the Lake Victoria South Water Works Development Agency (the Agency), was *ultra vires*, unlawful, and violated the Constitution.
5. The Petitioner sought the following reliefs:
  - (i) A declaration that the involvement of the 1<sup>st</sup> Respondent and her decision recommending or directing the 3<sup>rd</sup> Respondent to appoint the 1<sup>st</sup> Interested Party as the Chief Executive Officer of the 3<sup>rd</sup> Respondent is *ultra vires* and in violation of Articles 10(2) (c) and 232 of the Constitution.
  - (ii) A declaration that the appointment of Boaz Okoth Akello as the Chief Executive Officer of Lake Victoria South Water Works Development Agency is contrary to the law and is hereby invalidated.
  - (iii) A declaration that the 1<sup>st</sup> and 3<sup>rd</sup> Respondents are bound to observe merit and appoint the first ranked candidate as Chief Executive Officer of Lake Victoria South Water Works Development Agency.
  - (iv) An order of permanent stay of the decision of the 1<sup>st</sup> and 3<sup>rd</sup> Respondent to appoint the 1<sup>st</sup> Interested Party as the Chief Executive Officer of the 3<sup>rd</sup> Respondent.
  - (v) The Respondents do pay the costs of the Petition together with interest thereon.
6. Filed together with the Petition was a Motion under a certificate of urgency seeking interim conservatory orders.
7. When the Motion was placed before the Court, it directed that the Motion and Petition be served and that directions be given on 14 December 2020. The Court did not grant any *ex-parte* interim relief.
8. On 9 December 2020, the Petitioner filed another Motion under a certificate of urgency, renewing the plea for grant of interim conservatory orders.
9. The Court granted interim conservatory orders and directed that this latter Motion be served as well.
10. The Motion was served, and on 14 December 2020, the Court directed that both the Motion and Petition be taken together.
11. The parties were also directed to file and exchange affidavits and submissions.
12. The following were filed:
  - (i) Replying Affidavit by the 2<sup>nd</sup> Interested Party on 14 December 2020.
  - (ii) Response to the Petition by the 1<sup>st</sup> Interested Party on 14 January 2021.
  - (iii) Replying Affidavit by the 1<sup>st</sup> Respondent on 28 January 2021.
  - (iv) Submissions by 3<sup>rd</sup> Respondent and 3<sup>rd</sup> Interested Party on 1 February 2021.
  - (v) Submissions by 1<sup>st</sup> Interested Party on 25 February 2021.
  - (vi) Submissions by the Petitioner on 9 March 2021.
  - (vii) Submissions by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent on 11 March 2021.
13. In his submissions, the Petitioner identified the Issues for determination as:
  - (i) Whether the 1<sup>st</sup> Respondent acted *ultra vires* in appointing the 1<sup>st</sup> Interested Party as the Chief Executive Officer?

(ii) Whether the 1<sup>st</sup> Respondent can recommend to the 3<sup>rd</sup> Respondent to appoint the second-ranked candidate to the exclusion of the first ranked candidate to be appointed as the Chief Executive Officer after a competitive interview?

(iii) Whether the appointment of the 1<sup>st</sup> Interested Party as the Chief Executive Officer of the 3<sup>rd</sup> Respondent complies with the values and principles of the public service as enshrined in the Constitution and statute?

(iv) Whether this Honourable Court can enforce the recommendation of the Board of the 3<sup>rd</sup> Respondent for the first ranked candidate to be appointed as the Chief Executive Officer?

(v) What remedies should this Court grant in the circumstances?

(vi) Who bears the costs of the Petition?

14. The Cabinet Secretary and the Attorney-General, on their part, identified the Issues for determination as:

(i) Whether the 2<sup>nd</sup> Respondent has violated Articles 10, 47 and 232 of the Constitution, specifically the values of the rule of law, good governance, integrity, transparency, accountability and appointment in public service based on merit?

(ii) Whether the 2<sup>nd</sup> Respondent has the power to *suo moto* appoint the Chief Executive Officer of the Agency?

(iii) Whether the Petitioner should be awarded costs?

15. The 3<sup>rd</sup> Respondent and 3<sup>rd</sup> Interested Party, however, saw only 1-issue requiring the Court's adjudication:

(i) Whether the recruitment process and approval for the appointment of the 1<sup>st</sup> Interested Party as the Chief Executive Officer by the 1<sup>st</sup> Respondent were above board and within laid down laws and regulations?

16. The 1<sup>st</sup> Interested Party adopted the Issues as proposed by the Petitioner.

17. The 2<sup>nd</sup> Interested Party's submissions were not on record.

#### **Petitioner's case**

18. In challenging the recruitment process, the Petitioner made three broad assertions.

19. The first assertion was that the Cabinet Secretary for Water had absolutely no role in the appointment of the Chief Executive Officer of the Agency.

20. In making the assertion, the Petitioner drew the attention of the Court to item 1.18 of the Mwangozo Code, which reserves to the respective Board(s) of state corporations the mandate to appoint and remove the Chief Executive Officer.

21. Secondly, the Petitioner urged that the decision of the Cabinet Secretary to purport to approve the appointment of the 1<sup>st</sup> Interested Party was an interference with the independence of the Board of the Agency and usurpation of mandate.

22. Lastly, the Petitioner contended that the person appointed as the Chief Executive Officer of the Agency by the Cabinet Secretary (the 1<sup>st</sup> Interested Party) was not the best-ranked applicant.

23. The Petitioner, therefore, asserted that the appointment was not on merit as envisaged by Article 232(1) of the Constitution and Annexure 1 Part D Paragraph 8 of the Mwangozo Code.

#### **The case for the Cabinet Secretary and the Attorney General**

24. The Cabinet Secretary filed a replying affidavit in opposition to the Petition.

25. In the Affidavit, it was deposed that Circulars nos. OP.91AVol17 of 7 February 2008 and OP/AB.9/1 of 9 May 2008 clothed the Cabinet Secretary with the capacity to appoint a Chief Executive Officer of a state corporation from 3 names submitted by the respective Board.

26. The Cabinet Secretary also deposed that she appointed the 1<sup>st</sup> Interested Party after conducting due diligence and that the said person was qualified for the appointment.

27. The Cabinet Secretary and the Attorney-General further contended that since the position of the Chief Executive Officer of the Agency was advertised and all interested applicants responded and were interviewed, the recruitment process met the threshold of fairness and equity as demanded by Article 10 of the Constitution.

28. The submissions of these Respondents mirrored what had been deposed to in the replying Affidavit.

29. On the role of the Cabinet Secretary in the appointment process, it was asserted that Cabinet Secretary had taken into consideration many factors, including national values and principles of governance as required by Articles 10 and 232 of the Constitution.

30. It was also contended that under Part 1 section A6 of the *Human Resource Policies and Procedures Manual for the Public Service*, a Cabinet Secretary is accountable individually and collectively to the President in the exercise and performance of his or her powers, and the powers included strategic formulation of policy and steering of strategic human resource management and that within this mandate, the Cabinet Secretary could appoint a Chief Executive Officer of a state corporation.

31. While replying to the challenge based on merit, the Cabinet Secretary and the Attorney-General were of the view that ranking could not triumph over other considerations such as regional balance, gender, disability and tribe.

32. Citing *R v National Water Conservation & Pipeline Corporation & 11 Ors* (2015) eKLR, the Respondents urged that there was nothing unlawful in a Board recommending 3 candidates and referring the names to the Cabinet Secretary for an appointment.

### **The case of the Agency and its Board**

33. According to the Agency and its Board, they had carried out a fair, open and competitive recruitment process as contemplated by clauses 1.2(k), 1.18 and 1.3(k) of the Mwongozo Code.

34. The Agency and the Board admitted that it was the role of the Board to appoint and remove the Chief Executive Officer but maintained that the decision to recommend and send 3 names to the Cabinet Secretary was administrative in nature and was informed by section 2(ii) of the Fair Administrative Acts Act, 2015.

### **1<sup>st</sup> Interested Party's position**

35. The 1<sup>st</sup> Interested Party acknowledged that it was the mandate of the Board of the Agency to recruit a Chief Executive Officer for the Agency and that he applied for the position after an advertisement and was interviewed.

36. On the allegation that the Cabinet Secretary had appointed him the Chief Executive Officer, the 1<sup>st</sup> Interested Party deposed that prior to the filing of the Petition, he was not privy to the outcome of the recruitment process as he had not received an appointment letter.

37. This Interested Party was of the view that the Petition was an abuse of the court process and had been brought for ulterior motives as the recruitment process was legal.

### **Evaluation**

38. The parties referred to 2 statutes in making their cases.

39. These are the State Corporations Act and the Water Act, 2016.

40. Apart from the 2 statutes, the Mwongozo Code, Circulars from the office of the President and the Human Resources Policies Manual for the Public Service were cited as empowering the Cabinet Secretary to appoint the Chief Executive Officer of the Agency.

### **Appointment powers under the Water Act**

41. The Agency is established pursuant to powers given to the Cabinet Secretary by section 4 of the Water Act, 2016.

42. However, the section is silent on the person or officeholder with the power to appoint the Chief Executive Officer of a water works development agency.

43. The next relevant provision is section 66 of the Water Act, 2016, which is in the following terms:

66(1) Each water works development agency shall consist of—

- (a) a chairperson, who shall be appointed by the Cabinet Secretary from a county within the basin area;
- (b) four other members who shall be appointed by the Cabinet Secretary from counties within the basin area; and
- (c) the Chief Executive Officer.

44. The provision expressly gives the Cabinet Secretary the power to appoint the Chair of the Agency and 4 other members.

45. Notably, the Cabinet Secretary is not clothed with the express power under the provision to appoint the Chief Executive Officer of a water works development agency.

46. In the Court's view, if there was an intention in section 66 of the Water Act, 2016, to clothe the Cabinet Secretary with the power to appoint the Chief Executive Officer, nothing would have been simpler than to provide as much.

47. The section, the Court holds, does not give the Cabinet Secretary the power to appoint the Chief Executive Officer of the Agency.

#### ***Appointment powers under the State Corporations Act***

48. The Water Act is an act of specific application, and being silent of the appointment process for the Chief Executive Officer, the Court must turn to the law of general application governing the operations of state corporations.

49. The Act is the State Corporations Act.

50. Section 5(3) of the Act provides:

A state corporation may engage and employ such number of staff, including the chief executive, on such terms and conditions of service as the Minister may, in consultation with the Committee, approve.

51. This is the statutory provision which (read with Office of the President Circulars) the Respondents urged gave the Cabinet Secretary a role in appointing the Chief Executive Officer of a state corporation.

52. However, this Court cannot see how the provision donates the power of appointment of the Chief Executive Officer to the Cabinet Secretary.

53. The Court's view of the provision is that the Cabinet Secretary's role is restricted to setting the terms and conditions of service of the Chief Executive Officer once he/she has been appointed, in consultation with the State Corporations Advisory Committee.

54. Further, with the establishment of the Salaries and Remuneration Commission, that role of the State Corporations Advisory Committee in setting the terms and conditions of a Chief Executive Officer, being based on an earlier legal framework may have been rendered legally redundant.

55. The Court also finds the reliance placed by the Respondents on *R v National Water Corporation & Pipeline Corporation* (supra) to strengthen the argument that it could recommend 3-names to the Cabinet Secretary misplaced.

56. The High Court made an explicit finding in the decision that:

49. It must be remembered that when it comes to the management of state corporations, the buck stops with the Boards. The Board of a state corporation should have the leeway in the appointment of the Chief Executive Officer. ....

57. Therefore, by purporting to send names of 3 persons to the Cabinet Secretary, it is the view of the Court that the Board of the Agency was abdicating its statutory responsibility.

#### ***Appointment powers under the Mwongozo Code***

58. The Petitioner relied on the Mwongozo Code to argue that the power to appoint the Chief Executive Officer of the Agency was squarely within the docket of the Board.

59. Specific reference was made to Annexure 1 Part D Paragraph 8 of the Code, which provides that:

The Board shall be responsible for appointing the CEO through a competitive process.

60. The Respondents did not make any meaningful response to the submissions by the Petitioner on the relevance of the Mwongozo Code to the appointment of Chief Executive Officers.

61. Chapter 1.2 of the Code (Governing Principles) in Governance Practice 1(k) reposes the role of appointment of Chief Executive Officers on the Board on such terms and conditions of service as may have been approved by the relevant government organ.

62. The Court agrees with the Petitioner that the Mwongozo Code does not give the Cabinet Secretary the role of appointing a Chief Executive Officer of a state corporation and, more specifically, a water development works agency.

#### ***Appointment powers under the Office of the President Circulars***

63. The Circulars (issued in 2008) relied on by the Cabinet Secretary in claiming a role in the appointment of the Chief Executive Officer predated the Constitution of Kenya, the Water Act and the Mwongozo Code, 2015.

64. Section 232 of the Constitution now makes it mandatory that fair competition and merit are the basis of appointments and promotions. The Article also recognises that a representation of Kenya's diverse communities is represented in the public service.

65. The parties did not disclose the communities from which the 3-recommended persons come. But diversity must not triumph over fair competition and merit as a matter of course.

66. In the humble view of this Court, whenever the recruiting agency wants to make an appointment based on diversity as a primary consideration, it must justify such a course/decision and not make broad and generalised references to diversity. Facts on the ground should support such a decision.

67. All said the Court is of the view that the Circulars purportedly relied on by the Respondents have been overtaken by time and the current legal framework.

### **Conclusion and Orders**

68. From the foregoing, the Court finds and orders that:

(i) A declaration be and is hereby issued that the involvement of the Cabinet Secretary and her decision recommending or directing the Board of the Lake Victoria South Water Works Development Agency to appoint Eng. Boaz Okoth Akello, as the Chief Executive Officer of the Lake Victoria South Water Works Development Agency, is *ultra vires* the Water Act, the State Corporations Act and the Mwongozo Code.

(ii) A declaration be and is hereby issued that the power to appoint the Chief Executive Officer of the Lake Victoria South Water Works Development Agency is the mandate of the Board of Lake Victoria South Water Works Development Agency.

(iii) A declaration be and is hereby issued that the appointment of Eng. Boaz Okoth Akello, as the Chief Executive Officer of Lake Victoria South Water Works Development Agency, is contrary to the law and is hereby invalidated.

69. The factual and legal issues presented in this Petition were the same in Kisumu Petition No. 1 of 2021, *Okiya Omtatah Okoiti v Lake Victoria South Water Works Development Agency & Ors* and Kisumu Petition No. 2 of 2021, *Javas Bigambo v the Board, Lake Victoria South Water Works Development Agency & Ors*.

70. The Court will, in consideration of the circumstances and because of the doctrine of *issue estoppel*, direct that the judgment herein applies in those Petitions.

71. The litigation(s) was also in the public interest. Each party to bear their own costs.

**DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 26TH DAY OF MAY 2021.**

**RADIDO STEPHEN,**

**MCIARB JUDGE**

### **Appearances**

Petitioner Lugano & Lugano Advocates

For 1<sup>st</sup> and 2<sup>nd</sup> Respondents Janet Langat, Deputy Chief Litigation Counsel

For 3<sup>rd</sup> Respondent Pamphil Matsekhe Oundo Esq. Advocate

For 1<sup>st</sup> Interested Party J.O. Juma & Co. Advocates

For 2<sup>nd</sup> Interested Party Okongo, Wandago & Co. Advocates

For 3<sup>rd</sup> Interested Party Pamphil Matsekhe Oundo Esq. Advocate

Court Assistant Chrispo Aura