



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

MISCELLANEOUS APPLICATION NO. 64 OF 2020

(Before Hon. Lady Justice Maureen Onyango)

IN THE MATTER OF: AN APPLICATION FOR LEAVE TO COMMENCE

PROCEEDINGS IN THE NATURE OF JUDICIAL REVIEW

IN THE MATTER OF: ARTICLES 1[1], 2[1-4], 3[1], 10, 22, 24, 27,

23[3][F], 47[1], 48, 50[1], 73[2][A], 129, 132, 236, 258, AND 259[1]

OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF: SECTION 7[3] OF THE STATE

CORPORATIONS ACT 1986; THE WATER ACT, 2016; THE

FAIR ADMINISTRATIVE ACTION ACT, 2015; AND THE

PUBLIC SERVICE COMMISSION ACT, 2017

IN THE MATTER OF: SECTIONS 8 AND 9 OF THE

LAW REFORM ACT CAP 26 LAWS OF KENYA

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

THE CABINET SECRETARY FOR WATER, .

SANITATION AND IRRIGATION.....2ND RESPONDENT

AND

MARY M. KHIMULU [AMB.].....INTERESTED PARTY

OKIYA OMTATAH OKOITI.....EX-PARTE

JUDGMENT

The Ex-parte Applicant, OKIYA OMTATA OKOITI, is a Kenyan citizen. He has filed a motion dated 7th July 2020 against the 1st and 2nd Respondents who are the Attorney General and the Cabinet Secretary for Water, Sanitation and Irrigation. The Interested Party herein is the immediate past Chairperson of the Regional Centre on Groundwater Resources Education, Training and Research in Eastern Africa

(appointed vide Gazette Notice No. 4292 of 3rd May 2020).

Vide a chamber summons application dated 2nd July 2020 the Ex Parte Applicant sought leave to file judicial review application seeking orders to quash the appointment of the Interested Party as Chair of the Water Sector Trust Fund vide Gazette Notice No. 4467 of 29th June 2020 on grounds that it is outright illegal and unlawful. He further sought that the leave so granted operates a stay of the appointment.

Upon hearing the Ex Parte Applicant ex parte, the court granted leave to file the Judicial review application but fixed the application for leave for inter partes hearing on a date to be fixed by the Deputy Registrar. The Ex Parte Applicant was further directed to file the substantive motion within 14 days.

When the application for leave came up for hearing on 15th July 2020, the Respondents and Interested Party had not filed their responses thereto and the court granted orders that the leave operates as stay.

Vide an application dated 24th July 2020 the Interested Party sought the setting aside, review or variation of the orders issued on 16th July 2020.

Vide another application dated 28th July 2020, the Ex Parte Applicant sought the following orders –

1. Spent.

2. That this Court be pleased to cite Mr. Ismail F. Shaiye, the

Water Sector Trust Fund's outgoing Chief Executive Officer, for contempt of Court and consequently punish him according to the law.

3. That until and unless the contempt is purged, this Court be pleased to deny audience to the respondents.

4. That the OCS Capitol Hill Police Station or the OCPD Kilimani, or any other Police Officer with jurisdiction, be ordered to enforce the Stay Orders this Court issued on 15th July 2020.

5. That the costs of this application be provided for.

Upon considering the application ex parte the court made orders as follows –

1. Spent.

2. That the OCS Capitol Hill Police Station is directed to enforce the orders of this court granted on 15th July 2020.

3. That the prayers sought for citing of Mr. Ismail F. Shaiye to be heard on 6th October, 2020.

4. That applicant to serve the Respondents and Contemnor.

The orders effectively compromised the application.

In the substantive motion dated 7th July 2020 the Ex Parte Applicant seeks the following orders against the Respondents and Interested Party:

1. Spent.

2. That an order of certiorari do issue, to bring to this Court for purposes of being quashed, and to be quashed:

a. Gazette Notice No. 4467 of 29th of June 2020, and any actions and/or omissions subsequent thereto.

b. The Water Cabinet Secretary Sicily K. Kariuki's letter dated 24th June 2020, addressed to Board Chairman of the Water Sector Trust Fund, and any actions and/or omissions subsequent thereto.

3. That an order of prohibition do issue, prohibiting the respondents herein, and any other person howsoever acting, from implementing, giving effect to, or enforcing:

a. Gazette Notice No. 4467 of 29th of June 2020, and any actions and/or omissions subsequent thereto.

b. The Water Cabinet Secretary Sicily K. Kariuki's letter dated 24th June 2020, addressed to Board Chairman of the Water Sector Trust Fund, and any actions and/or omissions subsequent thereto.

4. That an order of mandamus do issue, to compel the President to revoke the illegal, irregular, arbitrary, and unlawful appointment

of Mary M. Khimulu as the Chair of the Board of the Water Sector Trust Fund and reinstate Patrick O. Kokonya as the Chairman of the Water Sector Trust Fund and, going forward, to adhere strictly to the Constitution, national legislation and best international practice in the execution of his mandate concerning the Fund.

5. That consequent to the grant of the prayers above, the Court be pleased to issue such further directions and orders as may be necessary to give effect to the foregoing orders, and/or favour the cause of justice.

6. That costs be in the cause.

The grounds in support of the application are that: -

1. Vide **Gazette Notice No. 4467 of 29th of June 2020, which** was published on the same date in **The Kenya Gazette Vol. CXXII-No. 125, H. E. The President**, acting ultra vires the Constitution, national legislation, the principles of natural justice, and the public interest in the rule of law and the good governance of the Fund, purported to remove Patrick O. Kokonya as Chairperson of the Board of Trustees of the Water Sector Trust Fund, and in his place appointed Mary M. Khimulu (Amb.) to serve the remainder of the former's term of office with effect from 30th June 2020.

2. The evidence in the ex-parte applicant's possession and in the public record is that Patrick O. Kokonya was serving the public interest by insisting that the incumbent Chief Executive Officer Ismail F. Shaiye, who has served the maximum two terms of three-years each allowed under the law, vacates office and proceeds on both his annual and terminal leave. Further and in particular:

a) The Chairperson of the Water Sector Trust Fund, Patrick O. Kokonya, vide a letter dated 23rd June 2020, addressed to Mr. Ismail F. Shaiye, and based on the sound advice from the Hon. Attorney General, sent him (Shaiye) on both his annual and terminal leave because he was ineligible for re-appointment for a third term since, come November 2020 he would have served as a CEO for 2 (two) terms of three (3) years each.

b) Mr. Ismail F. Shaiye was appointed by the Board of Trustees of the Water Sector Trust Fund and served a first term in office from 10th November 2014 to 9th November 2017. His contract was renewed by the Board for another term of three years from 10th November 2017 and is due

to expire on 9th November 2020.

c) Annexure 1 to Mwongozo (*The Code of Governance for*

State Corporations), provides that the term of a CEO shall be a three-year term or as otherwise provided under any other law – renewable once subject to performance evaluated by the Board.

d) The Circular *Ref. No. OP/CAB.9/1A* from the then Permanent Secretary/Secretary to the Cabinet and Head of the Public Service (Amb. Francis Muthaura), dated 23rd October 2010, and issued under Section 27(c) of the State Corporations Act, states, in parts, that:

"... the CEO will be required to proceed on terminal leave to pave way for the recruitment and appointment of a new CEO. This is important to ensure a smooth transition."

"The Board will recruit an acting CEO."

e) Under the Water Act, 2016, the Cabinet Secretary plays NO role in the recruitment and appointment of the CEO for the Fund.

f) Under the law and Government policy, pending the exit of Mr. Ismail F. Shaiye at the expiry of his second and final term on 9th November, 2020, an Acting CEO is supposed to be appointed to whom he hands over and vacates office to proceed on both the three months' terminal leave and the forty (40) accumulated paid annual leave days.

g) The Chairperson of the Board, vide a letter dated 23rd June

2020, appointed Mr. Willis Okello Ombai as Acting CEO of the Water Sector Trust Fund following the proceeding on leave of Mr. Ismail F. Shaiye pending his retirement.

h) The appointment of Mr. Willis Okello Ombai in place of Mr. Ismail F. Shaiye is legal, procedural, and lawful and in compliance with the Government policy. The Government Circular *Ref. No. OP/CAB.9/1A dated 23rd November, 2010 on Procedure for Re-Appointment of Service of Chief Executive Officers in State Corporations* requires outgoing CEOs to proceed on terminal leave to pave the way for the competitive recruitment and appointment of their successors for a smooth transition.

i) Ignoring Government policy, the Water Cabinet Secretary Sicily K. Kariuki, vide a letter dated 24th June 2020, addressed to Board Chairman, intimated wrongly that any resolution made at the special meeting in issue, including the appointment of

an Acting CEO communicated by letter dated 23rd June 2020, was null and void ab initio and had no effect, and that Shaiye remained in office as the Substantive CEO until advised otherwise. The cabinet Secretary also demanded that the Board Chairman provides an explanation why action should not be taken against him for violating the law and the principles of good governance.

j) In a quick follow-up vide Gazette Notice No. 4467 dated 29th June 2020, the President, invoking Section 7(3) of the State Corporations Act, purported to revoke the appointment of Patrick O. Kokonya and replace him with Mary M. Khimulu as the Chairperson of the Board of Trustees of the Water Sector Trust Fund with effect from the 30th June 2020.

3. Because Mr. Patrick O. Kokonya was upholding the law as regards the two term limit imposed on the tenure of CEOs of State corporations, the President and the Cabinet Secretary had no basis in law for firing him. The President, in exercising the powers under Section 7 (3) of the State Corporations Act, to revoke the appointment of a Board member, can only act lawfully and legitimately if his actions are remedial and do not, as in this case, aid and abet the actions of those out to violate the law.

4. The letter dated 24th June 2020 by the Cabinet Secretary Ministry of Water & Sanitation is unlawful in its entirety to the extent that there are no consequences outlined and/or timelines within which the Board Chairman can show cause why

disciplinary actions should NOT be taken against him.

5. To make matters worse, dismissing the Chairman only six days after asking him to show cause why disciplinary actions should NOT be taken against him is an act of very bad faith that is not procedural and it is against the rule of law.

6. In the circumstances, the impugned changes have no basis in law and, therefore, are invalid, null and void ab initio.

7. The applicant also posits that, further to the above, the purported appointment of Mary M. Khimulu is itself outright illegal and unlawful because her earlier reappointment as the Chairperson of the Regional Centre on Groundwater Resources Education, Training and Research in Eastern Africa (Gazette Notice No. 4292 of 3rd May 2020) has not been revoked.

8. Hence, given the above, the illegal, irregular, arbitrary, and unlawful appointment of Mary M. Khimulu as the Chair of the Board of the Water Sector Trust Fund should be revoked by this Court and Patrick O. Kokonya be reinstated.

9. The application faults the President's impugned actions as being dangerous, catastrophic, irregular, unreasonable, illegitimate, unlawful, ultra vires, and, therefore, unconstitutional, null and void ab initio.

10. Section 7(3) of the State Corporations Act limits the President's intervention only to situations where the Board has failed to carry out its functions in the national interest. Further the President's impugned actions also violate several articles of the constitution.

11. The ex-parte applicant is inviting the Court to intervene and quash the President's impugned actions and to compel him to act strictly in accordance with the law.

12. The ex-parte applicant is praying for orders declaring the President's impugned actions to be inconsistent with the Constitution, statute, subsidiary legislation, and best international practice, and, therefore, invalid, null and void ab initio to the extent of the inconsistency.

13. The impugned actions and omissions of the President and the respondents violate the very clear and prescriptive provisions of the law.

14. The ex parte applicant has been impelled to institute these proceedings in the public interest to counter the impugned ultra vires actions of the 1st and 2nd respondents.

15. It will negatively impact upon the legitimate interests of the Kenyan and the regional public, and it will also undermine the interests of the ex-parte applicant and those of other Kenyans, in the benefits of good governance of the Water Sector Trust Fund if the arbitrary, unlawful, invalid, null and void impugned decision of the President and the respondents is not interdicted and then quashed by this Court.

The Application is further supported by the Statutory Statement and a Verifying Affidavit sworn by **OKIYA OMTATA OKOITI** both dated 7th July, 2020 in which he reiterates the grounds on the face of the motion.

1st and 2nd Respondent's Case

In response to the Applications dated 2nd and 7th July 2020 the 1st and 2nd Respondents filed a replying Affidavit sworn on 22nd July 2020 by **JOSEPH WAIRAGU IRUNGU**, the Principal Secretary, Ministry of Water, Sanitation and Irrigation in which he denies the allegations set out in the Application. He avers that His Excellency the President appointed the Interested Party as the Chairperson of Water Sector Trust Fund on 29th June 2020 vide Kenya Gazette Notice **No. 4467 Vol.CXXII125**. That the appointment was in line with Section 7(3) of the State Corporations Act, 1986.

He avers that Patrick O. Kokonya, (the former Chairperson of Water Sector Trust Fund), whose interest the suit is pegged on, is under investigation by the Ethics and Anti-Corruption Commission on allegations of embezzlement of public funds belonging to the Fund; a fact that the applicant has concealed before this court. That given the nature of the investigations against him, the President was within the confines of Section 7(3) of the State Corporations Act and other enabling provisions to appoint a new chairperson.

He avers that the Applicant has not pleaded with clarity how the appointment of the Interested Party contravened the law. He avers that the applicant made a blanket condemnation and/or criticism against the President with regard to illegality and violation of the law vis-à-vis the appointment. That presidential principal powers over appointments in State Corporations are supplemented by the provisions of Section 6(1) of the State Corporations Act which provides that unless the written law under which a state corporation is established or the articles of association of a state corporation otherwise require, a Board shall subject to subsection (4), consist of a chairman appointed by the President who shall be non-executive unless the President otherwise directs.

He avers that there are laid down precedents which require any person challenging the actions of the appointing authority on the basis of violation of the constitution and any other relevant legal provisions to plead the same precisely and with absolute clarity. That under section 115(2) and the First Schedule to the Water Act 2016, which provides that the appointing authority of the Chairperson of the Board of the Fund shall be the President, the appointment is legitimate, legal and constitutional.

He avers that in accordance with Articles 131 and 135 of the Constitution, the President as the Chief Executive Officer of the country is legitimately entitled to control and make appointments in the entire state bureaucracy where the law empowers him to do so. That additionally, public officers appointed by the President work at the pleasure of the President as per the provisions of the Interpretation and General Provisions Act. He avers that it is evident from the application that neither the qualifications of the Interested Party nor the procedure followed in her appointment have been challenged and that the applicant has not pleaded any prejudice likely to be suffered by him or the public at large as a result of the appointment.

The affiant further avers that:

- a) The averments made on behalf of Patrick O. Kokonya are unsubstantiated and remain the Petitioner's personal assessments/opinions.
- b) The applicant has not demonstrated that the removal of Patrick O. Kokonya and subsequent appointment of the Interested Party herein was triggered/and or prompted by the correspondences between Patrick O. Kokonya and Mr. Ismail F. Shaiye regarding Mr. Shaiye's term so as to taint the President's action with any illegality.
- c) The President's action cannot therefore be faulted and/or revoked based on the applicant's own imagination and speculation not supported by any proof and/or documentation.
- d) The applicant's serious allegations against Mr. Ismail F. Shaiye and failure to join him as a party further waters down the intensity of his evidence and allegations.

Mr. Irungu avers that although the applicant is mandated to litigate in public interest under relevant provisions of the constitution, the stretch and/or perimeter does not permit him to litigate on behalf of one Patrick O. Kokonya who is a legal person and can well express his grievances before this court. He avers that vide a letter dated 25th June 2020, the Interested Party resigned and relinquished her position as the Chairperson of the Regional Centre on Groundwater Resources Education, Training and Research in East Africa, hence the allegations made against her are unsubstantiated.

Mr. Irungu states that the allegations made by the applicant are baseless, distorted and calculated to advance purely partisan interest and that the orders sought are not intended to advance any public interest. That the Applications of 2nd and 7th July 2020 respectively are in bad faith and an abuse of the court process. He urged the court to dismiss with costs the application and suit herein.

Interested Party's case

The Interested Party filed Grounds of Opposition and a Replying Affidavit sworn on 14th July 2020 by **HALIMA ALI**, the Corporation Secretary and the Head of Legal Affairs for the Water Sector Trust Fund in response to the Chamber Summons Application dated 2nd July 2020 and Notice of Motion Application dated 7th July 2020.

The Interested Party opposes the Application on grounds of incompetence stating that the Applications are fatally defective and ought to be struck out with costs. She also reiterated that her appointment by the President is legitimate, legal, and constitutional having been made by the President in accordance with the provisions of *section 115(2) and the First Schedule of the Water Act, 2016* which provides that the appointing authority shall appoint the Chairperson of the Board of the Fund.

Additionally, she states that the President has overarching powers over appointments in State Corporations as provided by the provisions of *the State Corporations Act Cap 446 Laws of Kenya. Section 6(1)(a) of the said Act*. Therefore, the appointment was made within the structures of law as enacted by Parliament to guide the orderly affairs of state corporations. This is in conformity with Article 131 and 135 of the Constitution of Kenya which entitles the President to control and make appointments in the entire state bureaucracy where the law empowers him to do so as the Chief Executive Officer of the Republic of Kenya.

She states that Kenya has a Presidential system of government based on the principle of separation of powers where an elected President has rational, legal and charismatic legitimacy to control the executive bureaucracy through discretionary appointments done at his convenience and in the promotion of public interest. Consequently, she urges the court to apply the rational basis test when interpreting Presidential power

in a manner that promotes a legitimate exercise of such powers in the context of the principle of separation of powers, more so if the result is to promote public interest. Additionally, the doctrine of rationality militates against the grant of the orders sought by the *ex parte* applicant, especially the order regarding the reinstatement of the former Chairperson of the Board of the Fund.

She states that this Court cannot interfere with the exercise of this power because it will be encroaching on the province of the Executive power and a breach of the principle of Separation of Powers. Further, this court has a duty to protect and preserve the law and public institutions from poor leadership, politics and theatrics at the expense of law and order for effective service delivery to the general public. Article 234(2) of the Constitution provides that the Public Service Commission can only appoint persons in offices that it has powers to. It is not responsible for appointment of persons who are appointed to their positions by the President as provided for in legislation.

She concludes that from the foregoing explanation, it is noticeably clear that her appointment as the Chairperson of the Board of the Trust Fund was made lawfully and in the public interest and she therefore prays for the dismissal of the Applications with costs.

A further affidavit was sworn on 25th November 2020 by HALIMA ALI, the Corporation Secretary and the Head of Legal affairs for the Water Sector Trust Fund.

Ex-Parte Applicant's Rejoinder

In response to the Respondents and the Interested Party's Affidavits, the Ex-Parte Applicant filed a supplementary affidavit sworn on 2nd November 2020.

The Ex Parte Applicant's case

The Ex Parte applicant argues that, whereas Section 7(3) of the State Corporations Act 1996 grants power to the President, at any time if he considered it appropriate or necessary to do so, to dismiss a member of a Board and to nominate a replacement for the remainder of the term of the dismissed member, it is not done at his pleasure and in a vacuum. That the President must act reasonably and must have a valid and compelling reason for dismissal of a Board member.

He avers that the allegations of corruption levelled against the Chairman are being investigated by a competent State agency, which has not rendered a verdict, therefore nothing has stripped Mr. Kokonya of his rights under the law. That the Court should take notice of the fact that the letters in issue are dated 15th and 23rd January, 2020 as such, they cannot be the reason for action in June 2020. He avers that it is also dishonest of the deponent not to annex the Chairman's response to the corruption allegations leading to the

investigations.

He maintains that the pleasure doctrine is not applicable in Kenya's public service under the constitution of Kenya, 2010. He avers that the President must comply with the established rules of natural justice; the due process of law. That no public officer can lawfully be punished in a manner contrary to any provision of the Constitution. It was therefore not open for the 2nd Respondent to dismiss the petitioner under a fictitious unchained discretion misconceived on the basis of Section 7(3) of the State Corporations Act.

He submits that his averments that the impugned changes in the office of the Fund Chair were caused by the unlawful and unconstitutional desire to keep Mr. Ismail F. Shaiye in office beyond his two-year term limit. Further, that it would be sub-judice to join Mr. Shaiye to these proceedings since the question regarding his eligibility to serve a third term is the subject matter in **ELRC Petition 97 of 2020, Okiya Omtatah Okiiti v Ismail Fahmy M. Shaiye**.

The Ex parte applicant avers that there is no evidence tendered to demonstrate that the alleged resignation was accepted by the President. Secondly, having been appointed by the President, there is absolutely no way the Interested Party could tender her resignation to the 2nd Respondent, when the Regional Centre on Groundwater Resources Education, Training and Research in Eastern Africa Order, 2015 (Legal Notice No. 252 of 18th December, 2015) under which she was appointed required at Clause 12(1)(a) that she resigns by giving notice in writing to the President.

The Applicant urges the Court to take judicial notice of the fact that the purported resignation to the wrong party was made on 25th June, 2020 and, immediately within three days, she was appointed to be the Fund Chair on 29th June, 2020. There was only one working day between 25th and 29th June, 2020.

The Applicant contests the contents of the Interested Party's Replying Affidavit on grounds that at the time she swore the affidavit the deponent was on study leave from office and, therefore, she was not qualified to conduct any business for or on behalf of the Fund, including swearing the Replying Affidavit.

He avers that the Interested Party is not the Chairperson of the Board of the Fund given the fact that her irregular and unlawful appointment was intercepted and arrested by the stay orders this Court granted on 15th June, 2020.

He states that he is aware that vide Government Circular Ref. No. OP/SCAC.9/73A (48) of 4th May, 2020, on Letters of Appointment for Chairpersons and Board Members of State Corporations, Joseph K. Kinyua, Chief of Staff and Head of the Public Service, gave the following important policy directions, among others:

“Mwongozo requires that each Board Member should be formally appointed to the Board through a Gazette Notice and thereafter

issued with an appointment letter....

i) All appointments of Chairpersons will be done by H. E. The President and appointment letters issued from this Office.”

Subject to the above, the applicant avers that the appointment of a Chair or member of the Board is in two stages: gazettelement and the issuance of a letter of appointment. Whereas gazettelement had taken place, no letter of appointment from the President had been issued to the Interested Party by the time the Court intercepted the process. So the impugned appointment was not complete.

Further, he avers that the Interested Party’s purported resignation (or stepping down) as the Chairperson of the Board of Directors of the Regional Centre on Groundwater (UNESCO CAT. 2 Centre) vide her letter to the 2nd Respondent dated 25th June 2020, was invalid and of no effect in law since the 2nd Respondent was not her appointing authority.

The Applicant avers that as per Clause 12(1)(a) of the Regional Centre on Groundwater Resources Education, Training and Research in Eastern Africa Order, 2015 (Legal Notice No. 252 of 18th December, 2015), the Chairperson resigns by giving notice in writing to the President. It is a member who resigns by notifying the Cabinet Secretary.

He adds that the President of the Republic does not act through Gazette Notices; rather, under Article 135 of the Constitution, a decision of the President in the performance of any function of his under the Constitution shall be in writing and shall bear the seal and signature of the President.

The Applicant avers that Mr. Patrick O. Kokonya was never removed from office and is still the Fund Chair. That his irregular, unlawful and unconstitutional removal was arrested by the stay orders this Court issued herein, restoring the status quo ante. In addition, no findings of corruption have been established against him by the Ethics and Anti-Corruption Commission to warrant his removal from office. In conclusion, the applicant avers that his substantive motion is merited and therefore seeks that the orders prayed be granted.

With respect to the Interested Party’s grounds of opposition, the Ex Parte Applicant avers that the pleasure doctrine is not applicable to Kenya’s public service under the Constitution of Kenya and that the doctrine of the separation of powers does not oust the supervisory jurisdiction of this Court to ensure that the Legislature and the Executive execute their mandates in compliance with the Constitution and other laws of the land. Additionally, the appointment of the Fund Chair does not fall under the ambit of Articles 234(3) and (4) of the Constitution, where the mandate of the Public Service Commission is ousted. He therefore prays for the dismissal of the grounds of opposition.

The Applicant, in response to the Interested Party’s claims that the stay orders did not have the effect of reinstating Mr. Kokonya as the Fund Chair, avers that the said orders were not issued in vain. That the orders stopped the impugned removal of Mr. Kokonya from office.

He avers that Mr. Kokonya had not been removed from office when the orders were issued, and to date he has not been removed from office. He has only been denied access to his office. Therefore, the irregular, illegal and unlawful process of removing Mr. Kokonya from office and replacing him with the Interested Party was arrested in its tracks by the Court before it had been completed.

In addition, the Applicant states that Gazette Notice No. 4467 of 29th of June 2020 (on the appointment of Mary M. Khimulu as the Board Chairman of the Water Sector Trust Fund and revocation of the appointment of Patrick O. Kokonya), is of no effect in law where the President has not made a decision to fire Mr. Kokonya in writing as required by Article 135 of the Constitution. In conclusion, he submits that because the removal was arrested before it could be effected, the stay orders restored the status quo ante.

The Ex Parte Applicant submits that the Application falls under public interest litigation. He relied on the case of **Kenya Anti-Corruption Commission v Deepak Chamanlal Kamani & 4 Others (2014) eKLR** where the court held that a public interest matter is one in which the whole society has a stake or affects the legal rights or liability of the public at large.

He submitted that the motion is filed in good faith pursuant to Article

3(1) of the Constitution to respect, uphold and defend the constitution. That the motion meets the tests of bona fide public interest litigation and the applicant has a reputation of being a renowned crusader for constitutionalism, good governance and probity in public affairs management. He submits that the facts relied upon in the motion are prima facie true and that the respondents have violated clear provisions of the constitution and statutes, which this court should redress by upholding and enforcing the law.

The ex parte applicant submits that he is vested with standing to move this court vide Articles 22 and 258 of the Constitution where the doctrine of public interest litigation is highlighted and vests every person, including the ex parte applicant with locus standi to institute proceedings for the protection of rights and fundamental freedoms. He relied on the case of **Timothy Otuya Afubwa & Another v County Government of Trans Nzoia & 3 others (2016) eKLR** where the court held that nobody would be locked out of the mercy of the seat of justice when his interest or those of the public are threatened. This position was upheld in the decision of **Harrison Kinyanjui v Attorney General & Another (2016) eKLR**.

In the case of **Mumo Matemu v Trusted Society of Human Rights Alliance and 5 others [2013] eKLR**, supreme court held that Articles 22 and 258 have enlarged the scope of locus standi and empowered every person whether corporate or non-corporate to move the courts

contesting any contravention of the Bill of Rights and the Constitution in general.

The Ex Parte Applicant submitted that this court has jurisdiction to hear and determine the matter given that the dispute has arisen out of an employment relationship and also concerns Article 41(1) of the Constitution. He placed reliance on Article 162 (2) and 165(5)(b) of the constitution which grants this court its exclusive jurisdiction in employment matters. Further he relied on Article 47 of the Constitution which anchors the right to fair administrative action and liberate judicial review proceedings from the shackles of common law.

He relied on the case of **Nick Githinji Ndichu v Kiambu County Assembly and Another (2014) eKLR** where Nduma J. held that the law is not concerned with the method of acquiring an employment or whether the person was appointed or elected. What matters is the person has an oral or written contract of service and has been receiving a wage/salary for the services rendered.

The ex parte applicant submitted that the stay orders issued on 16th July 2020, should not be set aside, reviewed or varied. He relied on the case of **Gitaru Peter Munya v Dickson Mwenda Kithinji & 2 Others (2014) eKLR** where the Supreme Court highlighted the scope of a conservatory order. He submitted that the court had complied with the threshold laid down in the above case as the stay orders had the effect of restoring the status quo ante by arresting both the purported removal of Mr. Kokonya as the Fund Chair and the appointment of the Interested Party to replace him. He clarified that the orders did not reinstate Mr. Kokonya as he had not been removed from office and both his removal and replacement were blocked by this court.

He submitted that the Interested Party's Application did not meet the threshold in case law for setting aside, reviewing or varying ex-parte orders. He relied on the case of **Pius Wanjala v Cleopa Mailu & 4 others (2016) eKLR** where the court held that it can set aside ex parte orders obtained in judicial review proceedings in instances of non-disclosure of material facts, concealment of material particulars/documents, misrepresentation, and where the application for leave/permission/order granted is an abuse of the process of Court. That none of these factors is pleaded by the Interested Party as grounds in support of its application.

The Ex Parte Applicant argued that setting aside, reviewing or varying the stay orders would automatically prejudice these proceedings by allowing the respondents to conclude both the processes of removing Mr. Kokonya as the Fund Chair, and replacing him with the Interested Party and would defeat the purpose for which this case was instituted and the judicial review application will become an academic exercise and/or exercise in futility. He also stated that the Interested Party had not demonstrated that the orders issued were obtained by fraud, non-disclosure or an abuse of the court process.

In furtherance to the above, the applicant wants Mr. Ismail Shaiye, the outgoing CEO of the fund to be cited for contempt of this court by blocking Mr. Kokonya from accessing his office as Fund Chair. He reiterated the position in the Application dated 28th July 2020.

As for whether the pleasure doctrine is applicable in Kenya's public service under the 2010 Constitution, the ex parte applicant submitted that this was practice in Kenya since independence and was provided for under sections 24 and 25 of the repealed constitution. This was where the President or the line minister had the power under the State Corporations Act or to handpick and appoint persons to boards of State corporations. That no guidelines existed for such appointments in terms of qualifications and relevant experience. The process was therefore subjected to executive fiat, leaving room for political affiliation, nepotism, tribalism and other improper motives or corrupt practices as criteria for appointment to the board.

It is in this context that the framers of the Constitution of Kenya, 2010 went out of their way at articles 10, 27, 47, 73 and 232 of the Constitution to enshrine the procedure which ensures that appointment to public offices, including of board members of State corporations, is competitive, merit based, inclusive, transparent, accountable and open to public participation, to allow only those who are competent to join the public service. Further the Ex parte applicant submitted that to ensure that there is no lacuna in law, Section 7(1) of the Sixth Schedule to the Constitution decrees that all law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.

He argued that the motion condemns the purported decision by the President to apply section 7(3) of the State Corporations Act, whose date of commencement was 1st November, 1986, in contemptuous disregard of articles 1(1), 2, 3(1), 10, 24, 27, 47, 73, 129, 131(2)(a), 135, 232, 234, and 236 and section 7(1) of the Sixth Schedule to the Constitution and the statutes that operationalize them. He also argued that the respondents and the Interested Party have pleaded wrongly that the President's actions cannot be faulted because the pleasure doctrine does not apply to Kenya's public service.

In support of this, he relied on the case of **Richard Bwogo Birir v Narok County Government & 2 others [2014] eKLR** where Ongaya J held that no public or state officer is a servant of the other but all are servants of the people. The court found that the pleasure doctrine for removal from a state or public office has been replaced with the doctrine of due process of law with Article 236 being particularly clear on the demise of the pleasure doctrine in Kenya's public or state service.

In view of the above, the ex parte applicant submitted that the powers the Cabinet Secretary purports to have to appoint the Interested Party into the public offices in issue on the whim, under the pleasure doctrine, and contrary to provisions of the Constitution and national legislation, are untenable under the Constitution of Kenya 2010.

On Halima Ali's Replying affidavit dated 14th July 2020, the ex parte applicant submitted that being on study leave in the United Kingdom from 1st October 2019 to 1st October, 2020, Halima Ali was not competent to swear the Interested Party's Replying Affidavit. Additionally, he submitted that the affiant had no business purporting to swear an affidavit on behalf of the Interested Party, MARY M. KHMULU (AMB.), who was sued in her personal capacity. In the circumstances, he submitted that Halima Ali was **NOT** competent to swear the affidavit dated 14th July, 2020 and the same should be struck out of these pleadings.

On whether the President had acted ultra vires in changing the Chairperson of the fund, the ex parte applicant submitted that the President had not given Mr. Kokonya a chance to defend himself against any allegations that his actions had resulted in what a reasonable person could

construe as the **“Board has failed to carry out its functions in the national interest.”** Additionally, nothing had been presented before this court to demonstrate that the Board of the Fund failed to carry out its functions in the national interest.

He submitted that appointment by the President was ultra vires his powers to the extent that he exercised those powers for collateral purpose by reneging thereon without adequate justification, that power that has been exercised arbitrarily is a power that has been abused. That the position in question being a public office, the President ought to have been guided by the decision of **Mumbi Ngugi J in Benson Riitho Mureithi v J. W. Wakhungu & 2 others [2014] eKLR**. The court held as follows:-

“What does the Constitution require with regard to appointments to public office? As already observed, public officers must be appointed on the basis of the criteria set out in Chapter 6. They must also, in addition, be appointed in accordance with the national values and principles set out in Article 10 ...

... It may seem that the Constitution has imposed an irksome and onerous burden on those responsible for making public appointments by requiring that they make the appointments on the basis of clear constitutional criteria; that they allow for public participation; and that those they appoint meet certain integrity and competence standards.”

He urged this Court to be guided by the decision of **Padfield v Minister of Agriculture and Fisheries [1968] HL**, which is quoted in **Republic v Judicial Commission of Inquiry into Goldenberg Affair [2007] 2 EA 392** and proceed to find and hold that the nomination and/or the appointment of the Interested Party was irregular, fell short of the relevant laws and is therefore null and void ab initio.

The ex-parte applicant submitted that the purported appointment of the Interested Party was not in compliance with express provisions of the Constitution as well as Section 7(3) of the State Corporations Act as read with Mwongozo. And for this reason and other reasons advanced in these submissions and elsewhere in the ex parte applicant’s submissions, he urged this Court to quash Gazette Notice 4467 of 29th of June 2020, and allow Mr. Kokonya to continue in his position as the Chairperson of the Water Sector

Fund.

On whether the 2nd Respondent acted ultra vires by writing to the Fund Chair her letter of 24th June 2020, the ex-parte applicant submitted that while it was copied to several state officers, the State Corporations Advisory Committee and the Inspector General (Corporations) were not copied. This is despite the provisions of the State Corporations Act under Sections 27(1)(a) granting the Committee mandate to review and investigate the affairs of state corporations and make such recommendations to the President as it may deem necessary. The Inspector General’s mandate under section 18 of the Act is to advise the Government on all matters affecting the effective running of state corporations and to report periodically to the minister on management practices within any state corporation.

The ex parte applicant submitted that under the law, the information documented vide a letter dated 17th June 2020 ought to have been handed over to the State organs mandated to investigate it. Further, he added that Mr. Kokonya ought to have been given an opportunity to defend himself against the allegations levelled against him and at the very least he was entitled to a fair hearing before a court or an independent and impartial tribunal under Article 50(1) of the Constitution. He was also deprived of his rights under Article 50(2)(a), (b) and (c) of the Constitution.

The ex parte applicant pointed out that the 2nd Respondent plays no role in the appointment of the Fund CEO. This is as per the provisions of Section 118(1) of the Water Act which states:

The Fund shall have Chief Executive Officer who shall be appointed by the Board of Trustees on such terms and conditions of service as the Cabinet Secretary responsible for matters relating to public service on the advice of the Salaries and Remuneration Regulatory Authority may determine.

He therefore submitted that in this instance, the 2nd Respondent did in fact act ultra vires by writing to the Fund Chair her letter of 24th June 2020 and sought the court’s indulgence in quashing the same.

Regarding the issue whether the investigations by EACC would warrant the removal of the chair, the ex parte applicant submitted that no law has been invoked to demonstrate that one can be dismissed from office for simply being under investigation by the EACC. He argued that on lodging of complaints and investigations, **Section 42(7) of the Leadership and Integrity Act, No. 19 of 2012** (as read with Section 52(2) of the Act) provides:

(7) Subject to the Constitution and any regulations for the enforcement of the Code made under this Act, a State officer may be suspended from office pending the investigation and determination of allegations made against that State officer where such suspension is considered necessary.

On its part, **Section 62(1) of Anti-Corruption and Economic Crimes Act, No. 3 of 2003 (ACECA)**, on Suspension, if charged with corruption or economic crime, provides that:

(1) A public officer who is charged with corruption or economic crime shall be suspended, at half pay, with effect from the date of the charge until the conclusion of the case: Provided that the case shall be determined within twenty-four months.

He submitted that in recent decisions upheld by the Court of Appeal and in line with Section 62(1) of ACECA, the High Court had barred several Governors who were facing corruption charges from accessing office. The Courts were very clear that the barring orders were constructive measures that did not amount to removal from office. As a result, he argued that the mere fact that Mr. Kokonya is under

investigation by the EACC cannot be a basis for his removal. He posed the question: what happens in the event the EACC clear him of any wrong doing?

On whether the court should grant the Orders sought in the motion, the ex parte applicant relied on the case of **Republic v Kenya National Examinations Council ex parte Geoffrey Githinji and 9 Others Civil Appeal No. 266 of 1996** where it was held:

“The remedies of certiorari and prohibition are tools that this court uses to supervise public bodies and inferior tribunals to ensure that they do not make decisions or undertake activities which are ultra vires their statutory mandate or which are irrational or otherwise illegal. They are meant to keep public authorities in check to prevent them from abusing their statutory powers or subjecting citizens to unfair treatment.”

He submitted that he had demonstrated that, by issuing Gazette Notice No. 4467 of 29th June, 2020, the President abused the public authority and/or powers delegated to him by the Constitution and Section 7(3) of the State Corporations Act. Therefore, this Court should intervene and bring to an end such abuse of power.

He added that if they are not prohibited, the Respondents are likely to conclude the irregular, unlawful and unconstitutional acts they had started vide the Gazette Notice No. 4467 of 29th June 2020. He stated that he is apprehensive that unless an Order of Prohibition is granted the Interested Party is likely to hold two public offices contrary to the express provisions of the law.

The ex parte applicant submitted that he appreciates that, in matters of discretion mandamus can only compel the performance of a duty but it cannot direct the manner in which the mandate is to be executed. He submitted that there is however, an exception to this rule as was pointed out by Panganiban J. in the Philippines case of **First Philippine Holdings Corporation v Sandiganbayan, 253 SCRA 30, February 1, 1996** that:

“Ordinarily, mandamus will not prosper to compel a discretionary act. But where there is gross abuse of discretion, manifest injustice or palpable excess of authority’ equivalent to a denial of a settled right which petitioner is entitled, and there is no other plain, speedy and adequate remedy, the writ shall issue.”

On the final issue on whether he should have costs of the proceedings, the ex parte applicant submitted that the application was filed in the public interest against a public body acting ultra vires and leaving the Ex Parte Applicant with no option but to file the present motion. Hence, the petitioner is entitled to costs where successful, given the fact that he has spent a lot of personal resources prosecuting this case. He stated that he relied on the principle of award of costs in constitutional litigation between a private party and the State being that a private party who is successful should have costs paid by the State, and if unsuccessful, each party should bear their own costs. Such a position was held by the Court in **Kenya Human Rights Commission v Communications Authority of Kenya & 4 Others [2018] eKLR**.

In conclusion, the Ex parte applicant submitted that he has proved both his main motion for judicial review orders, and his application to cite Mr. Shaiye for contempt of Court. The two motions tilt in favour of the public interest in constitutionalism and the rule of law, and both should be allowed as prayed. He added that Interested Party’s application dated 24th July 2020 seeking to set aside, vary or review the Orders issued on 16th July 2020 is destitute of merit and should be dismissed with costs.

1st and 2nd Respondents’ Submissions

The Respondents submitted that the appointment of the Interested Party was within the confines of the Section 6(1)(a) and 7(3) of State Corporation Act, Section 115 (2) of the First Schedule of the Water Act and the Articles 131 and 135 Constitution, 2010. They submitted that based on these sections, the action of the President was informed by the law.

Reliance was placed on the case **Katiba Institute v Attorney General & 6 Others (2018) eKLR** where Mwita J. stated that where the Constitution has conferred discretion, the court will only interfere with said discretion if it is not exercised properly. They further relied on the case of **Okiya Omtata Okioti v Attorney General & 2 Others; Francis K. Muthaura (AMB) & 5 Others (Interested Parties) (2019) eKLR** where the court made an order declaring that normal appointments not being pursuant to Section 7(3) of the State Corporations Act, made under Section 6(2)(a) and (e) respectively of the Kenya Revenue Act shall comply with the criteria for appointment as prescribed in Articles 232, 73 and 10 of the Constitution. Based on this, the Respondents submitted that the appointment was made by the President in exercising his discretionary authority as anchored in Articles 131 and 135 of the Constitution and as a result was not subject to compliance with the criteria for appointment as prescribed in Articles 232, 73 and 10 of the Constitution.

On whether there was justification for the President to revoke the appointment of Patrick Kakonya, the Respondents submitted that the suspension was as a result of the EACC investigations. They further relied on Section 51 of the Interpretation and General Provisions Act, the President who is the appointing authority has the discretionary powers of dismissal from the position.

Regarding the validity of the Cabinet Secretary’s letter dated 24th June 2020, the Respondents submitted that the letter never removed the former chairperson of the Board as misinterpreted by the ex-parte Applicant, rather it only communicated the decision of the president. They relied on the **Okiya Omtata Okioti v Attorney General case (supra)** where the court held that in public service or other institutions generally, the decision of a top operative may be conveyed by a subordinate. Such conveyed decision is and remains valid for all purposes and intents.

On whether the applicant’s application raises any constitutional issues, the Respondents submitted that the ex parte applicant has not demonstrated that there was a failure to comply with the law on the part of the president. That the alleged violated rights are framed in general terms and fails to bring the specific actions or inactions. Therefore, this failure ought not be interpreted to the detriment of the respondent. They relied on the case of **Francis James Ndegwa v Tetu Dairy Co-operative Society Limited (2016) eKLR** where the court

quoted the huddling of Lord Diplock in the case of **Harrison v Attorney General of Trinidad and Tobago (1980) AC 265**. The court held that –

“... the mere allegation that a human right fundamental freedom has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court ...”

The Respondents relied on the Court of Appeal case of **James Mukuha Gichane v National Hospital Insurance Fund and 3 Others (2017) eKLR** where the court dismissed a suit on grounds that allegations of breach of fundamental rights were contrived and bereft of evidence to support them. The Respondents submitted that based on this case, the ex-parte applicant cannot challenge the removal of Mr. Kakoya on grounds of violation of his fundamental rights, this being a contractual matter and secondly that the application, as outlined lacks evidence of breach of any fundamental rights.

On whether the Applicant has satisfied the burden of proof, the Respondents submitted that the burden lies on the applicant to prove that the actions of the Respondent were in violation of the law. They relied on the provisions of Sections 108 and 109 of the Evidence Act. To cement this argument, they relied on the case of **Susan Mumbi v Fefala Grebedhin (Nairobi HCCC No. 332 of 1993)** where the court held that the position in civil cases is that whoever alleges has to prove.

The Respondents submitted that the ex-parte application lacks merit as the alleged violation of fundamental rights have not been proved and that the application is frivolous and should be dismissed with cost. They relied on the case of **Caltex Oil (Kenya) Limited v Rono Limited (2016) eKLR**. They concluded that the Interested Party was procedurally appointed and that the applicant is not well seized before the court, does not disclose any constitutional issue and no rights of the applicant have been violated by the respondent. Therefore, the ex parte applicant is not entitled to any prayers sought in the petition.

Interested Party’s Submissions

The Interested Party submitted that the appointment by the President is legitimate and lawful in accordance with sections 115(2) and the first Schedule of the Water Act; Section 6(1)(a) and 7(3) of the State Corporations Act. It was submitted that a keen interpretation of Section 7(3) of the State Corporations Act clearly chains the exercise of Presidential powers thereunder by stating –

“...the President may, if at any time it appears to him that a Board has failed to carry out its functions in the national interest...”

She submitted that it is imperative that the reason for revocation of the appointment of the chairperson or member of the board under the section must be the statutory reason, namely failure to carry out functions in the national interest. Therefore, she indicated that the ex-parte Applicant has not provided evidence before this Court to show that in revoking the appointment in issue, the statutory test or circumstance had not accrued.

Moreover, it was submitted that the President's appointment under Section 7(3) of the State Corporations Act is also within the provisions of Article 47 on fair administrative action and Article 236 on protection of public officers from being victimized or discriminated against for having performed the functions of office in accordance with the Constitution or any other law; or dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law.

The Interested Party stated that Section 7(3) of the State Corporations Act is an exception to the general provisions on appointment and removal or dismissal in the public service and relied on the legal doctrine of *lex specialis derogate legi generali*, which connotes that the law governing specific subject matters overrides a law which only governs general matters. Further, Section 7(3) of the State Corporations Act, is a discretionary/enabling provision giving the President a discretionary mandate and has never been declared unconstitutional hence the President was guided by the said law when he made the appointment.

The Interested Party relied on the provisions of Mwongozo, the Code of Governance for State Corporations 2015 which provides that –

e) The appointing authority shall ensure that any person

appointed to the Board of a state corporation satisfies the fit and proper requirements.

g) ...

h) The chairpersons of all state corporations shall be appointed by the President and shall at minimum possess the qualifications, skills and experience set out in Attachment 1.

She made reference to the **Okiya Omtata Okoiti v Attorney General case (supra)** where the court held that:

“The Court has already found that appointments pursuant to section 7(3) of the State Corporations Act such as the appointments in the present petition are on urgency basis and the section is invoked where a board of a state corporation has failed to carry out its functions in the national interest and in that case the Court finds that it exists as a remedial or emergency temporary measure rather than the norm ...”

The Interested Party submitted that the President was under a duty to uphold the Constitutional and statutory provisions relating to her appointment. She submitted that she was qualified and suitable for the position and the ex-Parte applicant has not mentioned or pleaded

otherwise. Principles of good governance dictate that positions should only be filled by people qualified to hold them.

Additionally, it was argued that gazette notice (like the one in issue) is public information published to notify the public the matters contained in the gazette notice and as was held in **Hassan Ali Joho v Suleiman Said Shahbai and 2 Others [2014] eKLR**, and in **Mumo Matemu v Trusted Society of Human Rights Alliance & 50others [2014] eKLR**, the gazette notice serves as a notification to the public and does not constitute the instrument of the decision as notified in the gazette notice. Therefore, she submitted that the impugned gazette notice herein does not constitute the President's instrument for appointment of the Interested Party and essentially this means that there is no material before the Court to be considered by the Court towards a finding on whether such instrument of appointment complied or failed to comply with the Constitution more so Article 132(4) and 135 of the Constitution.

The Interested Party submitted that status quo in this case is that the appointment has already taken effect and there being no other material on the instrument of appointment in issue, the logical and reasonable presumption on a balance of probabilities is that the instrument of the Chairperson's appointment must have complied with the Constitution.

While referring to the provisions of Section 118(1) of the Water Act, the Interested Party submitted that the Cabinet Secretary has a role to play in the appointment of the Chief Executive Officer contrary to what the ex-Parte Applicant is asserting. Therefore, the Cabinet Secretary's letter dated 24th June 2020 is well within the law and should not be quashed.

It was submitted that the Interested Party's appointment was lawful because it is a temporary and remedial appointment by the President under Section 7(3) of the State Corporations Act. It is therefore not unconstitutional for want of advertisement and competitive recruitment and selection as making of such remedial appointments is clearly vested in the President's discretion by the statute.

On the pleasure doctrine, the Interested Party submitted that the officers appointed by the President, work at the pleasure of the President because he is the appointing authority. According to the Interpretation and General Provisions Act, the power to appoint includes power to dismiss. Moreover, the pleasure doctrine is a well-known constitutional law principle in Kenya and the President invoked Section 7(3) of the State Corporations Act in line with this doctrine. Therefore, issuing an order to compel the President to revoke the alleged illegal, irregular, arbitrary and unlawful appointment of Mary M. Khimulu as the Chair of the Board of the Water Sector Trust Fund and reinstate Patrick O. Kokonya as chairman of the Water Sector Trust Fund and going forward is misplaced.

The Interested Party submitted on the principle of separation of powers stating that the appointment of the Interested Party as the Chairperson was made in public interest to ensure good governance in the Trust Fund. Therefore, the Court cannot interfere with such because it will be encroaching on the province of the Executive power and a breach of the principle of Separation of Powers. She added that this Court has a duty to protect and preserve the law, and the public institutions from poor leadership, politics and theatrics at the expense of law and order for effective service delivery to the general public.

The Interested Party submitted on the rationality test as a judicial standard fashioned specifically to accommodate the doctrine of separation of powers, and its application must generally reflect that understanding. Given that the former Chairperson, Patrick O. Kokoya is facing investigations by the EACC for embezzlement of public funds, the most rational and reasonable action for the president was to revoke his appointment and replace him with a suitable person. This was done in a bid to promote the principles of good corporate governance.

Regarding the affidavit sworn by Halima Ali, the Interested Party submitted that she was indeed the duly authorized officer to represent and conduct business on behalf of the Trust Fund in all its legal matters as its Legal Officer/Corporation Secretary. In addition, the Interested Party submits that whilst the affiant had been granted study leave, she had been recalled by the management and continued discharging her duties with effect from 23rd April 2020. Therefore, at the time this suit was filed, the legal officer had already resumed her duties and was fully aware of the facts of this case.

It was further submitted that Mary. M. Khimulu was not sued in her personal capacity but in her capacity as the chairperson of the Water Sector Trust Fund. The ex-parte Applicant is challenging her appointment as the Chairperson of the Trust Fund, an issue affecting the entire Trust Fund. On this basis, the legal officer had the authority to swear the Affidavit on her behalf.

Regarding her resignation from her position as the Chairperson of the Regional Centre on Groundwater before taking her position as the chairperson of the Trust Fund, the Interested Party submitted that her resignation dated 25th June 2020 was addressed to the Cabinet Secretary, Water, Sanitation, and Irrigation. She submitted that this was properly addressed given that the Cabinet Secretary is the authorized agent of the President and all communication needs to go through her. Therefore, protocol dictates that it is the Cabinet Secretary who then relays the resignation of the Interested Party to the President.

It was added that the Ex-Parte Applicant is attempting to redraft his case, a tactic he is using to delay the determination of this matter. This court was therefore urged to disregard the ex parte Applicant's averments because they are baseless and to dismiss the substantive application on grounds of lack of merit and failure to prove procedural impropriety.

Analysis and determination

I have considered the pleadings and submissions of parties. The issues arising for determination are: -

- (i) Whether Ismail Shaiye is in contempt of this court's orders,

(ii) Whether the Replying affidavit of Halima Ali sworn on 14th July 2020 ought to be struck out,

(iii) Whether the appointment of the Interested Party as Chairperson of Water Sector Trust Fund was illegal and unlawful for being ultra vires,

(iv) Whether public officers appointed by the President work at the pleasure of the President, and

(v) Whether the Petitioner is entitled to the orders sought.

Whether Ismail Shaiye is in contempt of this court's orders

The Ex Parte Applicant by application dated 28th July 2020 sought to cite Ismail Shaiye, the CEO of the Water Sector Trust Fund for contempt of Court. The said Ismail Shaiye is not a party to this suit. There is no evidence that he was served with the application and required to respond to the application. I have not seen any affidavit of service in respect of service upon the alleged contemnor who did not take part in these proceedings.

Be that as it may, the allegations against Mr. Shaiye are that he declined to let Mr. Kokonya access his office as Fund Chair. The Affidavit of Mr. Kokonya in support of the application does not show that he served Mr. Shaiye with the Court orders. To succeed in an application for contempt an applicant must prove that the alleged contemnor was aware about the orders and deliberately disobeyed the orders. The Ex Parte Applicant has not proved even the very basic requirement of service of the orders of this court alleged to have been disobeyed upon the alleged contemnor. I find no proof of contempt by the said Ismail Shaiye.

Replying affidavit of Halima Ali sworn on 14th July 2020

The Ex Parte Applicant submits that Halima Ali, the Company secretary of the Water Sector Trust Fund who swore the affidavit in support of Interested Party's Replying Affidavit should be struck out as she was out of the Country on Study leave in UK at the time of swearing the affidavit. The said Halima has adduced in her further affidavit of 25th November 2020 an email communication by the Funds then Chair, Mr. Kokonya informing the Board of Trustees that she was back on duty due to COVID 19 pandemic outbreak. This is sufficient proof that she was in the country and swore the affidavit.

It is further the Ex Parte Applicant's averment that the said Halima Ali could not swear the affidavit on behalf of the Interested Party who had been sued in her personal capacity. As submitted by the Interested Party and Respondents, the Interested Party has been sued in her official capacity as the instant application only contests her appointment by the President. I therefore find nothing wrong with the Company Secretary swearing an affidavit on her behalf. None of the matters sworn in the affidavit are outside the personal knowledge of the said Halima Ali. I thus find no valid reason to strike out the affidavit sworn by Halima Ali on behalf of the Interested Party.

Appointment of Interested Party

The Ex parte Applicant has raised multiple grounds in respect of the legality of the appointment of the Interested Party. First, that the removal of the immediate past Chairman of the Water Sector Trust Fund Patrick O. Kokonya was unlawful as he was punished for sending the Fund's CEO Ismail F. Shaiye on terminal leave following expiry of his two terms in office which rendered him ineligible for recruitment for a third term, but which the Cabinet Secretary reversed; secondly, that the appointment of the Interested Party is illegal and unlawful because her reappointment as the Chairperson of the Regional Centre on Groundwater Resources Education, Training Research in Eastern Africa vide Gazette Notice No. 4292 of 3rd May 2020 had not been revoked.

The appointment of the Interested Party was made under Section 7(3) of the State Corporations Act which provides –

(3) Notwithstanding the provisions of any other written law or the articles of association establishing and governing a Board, the President may, if at any time it appears to him that a Board has failed to carry out its functions in the national interest, revoke the appointment of any member of the Board and may himself nominate a new member for the remainder of the period of office of that member or he may constitute a new Board for such period as he shall, in consultation with the Committee, determine.

The Section permits the President to remove and replace any member of the Board of a State Corporation. In view of the fact that Mr. Kokonya has not been made an Interested Party herein and has not, to the knowledge of the court based on the evidence before it, contested his removal, the Court must not be tempted to speculate on the reasons for his removal under Section 7(3) of the State Corporations Act and whether or not the removal was valid and lawful or otherwise. The averments by both the Ex Parte Applicant and the Respondents about the reasons for the removal of Mr. Kokonya remain just that, allegations.

It is however material to consider here, whether the pleasure doctrine as alleged by the Respondents is applicable in appointments by the President. Article 10(2) which binds state organs, sets out national values and principles of governance as follows –

(2) The national values and principles of governance include –

(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized;

(c) good governance, integrity, transparency and accountability; and

(d) sustainable development

Similarly Article 232(1) sets out the values and principles of public service as follows –

232. Values and principles of public service

(1) The values and principles of public service include—

(a) high standards of professional ethics;

(b) efficient, effective and economic use of resources;

(c) responsive, prompt, effective, impartial and equitable provision of services;

(d) involvement of the people in the process of policy making;

(e) accountability for administrative acts;

(f) transparency and provision to the public of timely, accurate information;

(g) subject to paragraphs (h) and (i), fair competition and merit as the basis of appointments and promotions;

(h) representation of Kenya’s diverse communities; and

(i) affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service, of—

(i) men and women;

(ii) the members of all ethnic groups; and

(iii) persons with disabilities.

These values are expressed to be binding on all state organs, state offices and public offices as well as all other persons when interpreting the Constitution or any law or when making or implementing public policy decisions.

The President, being a public officer by definition under Article 260 of the Constitution, is bound by the national values and principles under Article 10 of the Constitution as well as the values and principles of governance Article 232. Thus in making appointments and or removing any person from office, the President is bound by the values and principles under both Article 10 and Article 232. Articles 10 and 232 do not and cannot accommodate the pleasure doctrine.

The same issue arose in the case of **County Government of Nyeri & Another v Cecilia Wangechi Ndungu (2015) eKLR** the Court of Appeal held that the pleasure doctrine is not absolute but qualified to the extent that it is necessary, appropriate and reasonable.

Section 7(3) of the State Corporations Act is however an exception as was stated in the case of **Okiya Omtata Okoiti v Attorney General case (supra)** where the court held that:

“The Court has already found that appointments pursuant to section 7(3) of the State Corporations Act such as the appointments in the present petition are on urgency basis and the section is invoked where a board of a state corporation has failed to carry out its functions in the national interest and in that case the Court finds that it exists as a remedial or emergency temporary measure rather than the norm ...”

However, as I have stated above, Mr. Kokonya’s removal is only a side issue here, the issue being whether the appointment of the Interested Party was lawful.

The Interested Party has produced a resignation letter dated 25th June 2020 addressed to the Cabinet Secretary, proof that she resigned from the position of Chairperson, Groundwater Resources Education, Training and Research Centre. She was therefore eligible for appointment as Chairpersons, Water Sector Trust Fund on 30th June 2020 when she was appointed.

Mwongozo provides that one cannot be a Chairperson of more than one state corporation. Mwongozo further provides that Chairpersons of State Corporations shall be appointed by the President.

In view of the fact that the appointment of the Interested Party was made under Section 7(3) of the State Corporations Act and that she was eligible for the appointment, I find no violation of the Constitution or any legislation or procedure in the appointment of the Interested Party.

For these reasons, I find that the Ex Parte Applicant has not met the threshold for grant of the orders sought with the result that the motion dated 7th July 2020 is dismissed. In view of the fact that the motion was filed in public interest, I make no orders for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 28TH DAY OF MAY 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