



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA

PETITION NO. E004 OF 2021

IN THE MATTER OF ARTICLES 10, 19, 20, 21, 22, 23, 232, 258, AND 260 OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF ARTICLE 2(5) (6) AND ARTICLE 159 (2) (d) OF THE CONSTITUTION OF KENYA, 2010

**IN THE MATTER OF ARTICLE 41 (1) OF THE CONSTITUTION AND ARTICLE 23(1) OF THE UNIVERSAL
DECLARATION OF HUMAN RIGHTS**

IN THE MATTER OF ARTICLE 47 (2) AND ARTICLE 159 (2) (d) OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF SECTION 12 OF THE EMPLOYMENT AND LABOUR RELATIONS COURT ACT NO. 20 OF 2011

IN THE MATTER OF THE STATE CORPORATIONS ACT CAP 446 OF THE LAWS OF KENYA

IN THE MATTER OF MWONGOZO (THE CODE OF GOVERNANCE FOR STATE CORPORATIONS)

BETWEEN

JACOB KIMUTAI TORUTT.....PETITIONER

VERSUS

COAST WATER WORKS DEVELOPMENT AGENCY.....1ST RESPONDENT

STATE CORPORATIONS ADVISORY COMMITTEE.....2ND RESPONDENT

AND

COMMISSION FOR HUMAN RIGHTS AND JUSTICE.....INTERESTED PARTY

(Before Hon. Justice Byram Ongaya on Friday 21st May, 2021)

JUDGMENT

The petitioner Jacob Kimutai Torutt filed the petition on 12.04.2021 through Njeru and Company Advocates. He prayed for judgment against the respondents for:

1. A conservatory order staying the decision of the 1st respondent dated 24.03.2021 not to extend the petitioner’s contract and requesting the petitioner to hand over office and proceed on terminal leave.
2. A conservatory order directing that the status quo before the 1st respondent’s letter of 24.03.2021 where the petitioner is the 1st respondent’s Chief Executive Officer (CEO) be maintained.
3. A conservatory order directing the 1st respondent not to advertise the position of the 1st respondent’s CEO until hearing and determination of the petition.
4. A declaration that the petitioner’s renewal of contract by the 1st respondent on 05.05.2020 as CEO for one (1) year term is *ultra vires*, null and void.

5. A declaration that the petitioner's renewal of contract as the 1st respondent's CEO made on 05.05.2020 is for three (3) year term.
6. Costs of the petition.
7. Any other order that the Court deems fit and just to grant in the circumstances.

The petition was based on the annexed petitioner's supporting affidavits and exhibits. The petition was also accompanied with an application by way of the attached notice of motion seeking interlocutory orders. On 15.04.2021 Winnie Namahya Waswa, learned Senior Litigation Counsel, filed a notice of appointment for the Attorney General to act for both respondents (together with Judith Mjeni Leli Advocate, who filed a notice of appointment on 14.04.2021, to act for the 1st respondent). By consent order on 04.05.2021, the interested party was enjoined.

By consent orders on 14.04.2021 parties dispensed with the petitioner's application paving way for filing of submissions on the main petition and with orders that parties to maintain status quo (not to substantively fill the vacancy of CEO in issue) until judgment is delivered in the petition. The parties filed their respective submissions on the petition.

The 1st respondent filed on 23.04.2021 the replying affidavit of Omar Boga, Chairman of the 1st respondent's Board to which the petitioner responded to by filing his further supporting affidavit on 30.04.2021. The Court has considered the affidavits and the background facts to the present dispute as per the petitioner are as follows:

1. The 1st respondent openly and competitively recruited the petitioner and appointed him as its CEO on 05.05.2017 for a term of three (3) years. The letter of appointment was dated 25.04.2017. The contract lapsed on 04.05.2020. Clause 6 of the letter of appointment on renewal of appointment stated, **"Should you wish to be reappointed in the same position, you will be required to make a written request at least six (6) months before the expiry date of this contract."** Further, clause 26 provided, **"You will also be subject to provisions of the Employment Act and to the Corporation's Staff Rules and Regulations as issued and/or amended from time to time."**

2. At the end of the three-year term both respondents evaluated the petitioner's performance. On 22.01.2020, the 1st respondent's Chairman Hon. Mustafa completed the relevant evaluation form scoring the claimant at 92% at a score range of 4.38 and his comments were that the petitioner had been diligent, dedicated and honest in his work; and he got work done and had met most of the targets as per performance contract. The Chairman further recommended, **"I recommend that he is given another term of 3 years."** The exhibited petitioner's performance evaluation for 2018/2019 shows that the 1st respondent's Board recommendation was thus, **"The Board resolved to renew the contract for three years."**

3. By the letter dated 15.04.2020 addressed to the Cabinet Secretary, Ministry of Water & Sanitation and Irrigation and signed by the 1st respondent's Chairman Hon. Mustaff Idd, reference was made to the 1st respondent's letter Ref. No. CWWDA/CONF/04/VOL. II where the 1st respondent appears to have made certain decisions. The letter of 15.04.2020 concluded that a positive response was anticipated from the Cabinet Secretary. The petitioner further exhibits the letter Ref. No. CWWDA/CONF/104/VOL.II/142 by the said Chairman addressed to the Cabinet Secretary on appraisal of the petitioner's contract term running into 6 pages concluding with the overall assessment thus, **"The Board with the assistance of SCAC carried out an assessment of the CEO and rated performance of 82%. The Board considered the CEO renewal for one-year renewable Based on the above performance and our letter ref. CWSB/CONF/104/VOL Dated 15th April 2020"**

4. By the letter dated 04.05.2020 addressed to the petitioner by the 1st respondent's Chairman Hon. Mustafa Idd, reference was made to the petitioner's appointment letter dated 12.12.2019 requesting for renewal of his contract by the Board of Directors and it was further conveyed thus, **"This is therefore to inform you that the Board deliberated on your request and resolved to extend your contract by one (1) year with effect from 5th May, 2020 under previous terms and conditions. However, your salary will be reviewed once the HR tools are approved and implemented. All other conditions of employment remain the same."** The contract of extension of appointment was concluded by another letter setting out detailed terms and conditions of service dated the same 04.05.2020. Clause d on duration stated thus, **"The extension of the contract period will be one (1) year starting from 5th May, 2020. The Board may renew your contract subject to performance."** The petitioner accepted the extension of contract by signing on 07.05.2020.

5. By the letter dated 12.12.2020 addressed to the 1st respondent's Chairman of the Board of Directors, the petitioner thanked the Board for the appointment to the position of CEO and then sought a clarification referring to Mwongozo, the Code of Governance for State Corporations issued jointly by the Public Service Commission (PSC) and the State Corporations Advisory Committee (SCAC) in January 2015 which provides thus, **"The Chief Executive Officer shall hold office for a three year term or as otherwise provided under any other written law renewable once subject to performance evaluated by the board."** The petitioner stated that the 1st respondent was a state corporation and in absence of any other law section 17 (5) of the Water Act, 2016 was the provision on his re-appointment and it states, **"The Chief Executive Officer Shall hold office for a term of five years and is eligible for re-appointment for one further term upon exemplary performance."** The petitioner urged that his appointment be regularized to be in line with Mwongozo.

6. By the letter dated 04.02.2021, the petitioner addressed the 1st respondent's Chairman referring to his request for extension dated 12.12.2019 and the subsequent one-year extension from 05.05.2020 to 05.05.2021. He requested for extension for a further two (2) years up to 04.05.2022 in line with the Mwongozo provisions as cited.

7. By the letter dated 24.03.2021 by the 1st respondent's Chairman one Omar Boga, it was conveyed that the Board at its meeting on 24.03.2021 considered the request for extension as per the petitioner's letter of 04.02.2021 and resolved not to extend the contract.

The petitioner was directed to immediately handover to one Engineer Martin Tsuma and to proceed on terminal leave. Terminal dues would be payable subject to clearance with the 1st respondent.

8. The petitioner's further case is as follows. The renewal was for one year instead of 3 years as per Mwongozo and as a Kenyan his entitlement to equal protection and benefit of the law per Article 27(1) and (2) of the Constitution of Kenya, 2010 had been violated. Further, his right to fair labour practices per Article 41 of the Constitution had thereby been violated. Further, when he sought a clarification by his letter dated 12.12.2020 he received no reply and his right to be given reasons to protect his rights in view of the adverse one-year renewal was thereby violated as enshrined in Article 47(2) of the Constitution. Further, he stated that the rules of natural justice were also violated when no explanation was given after request for clarification in the letter dated 12.12.2020. The petitioner pleads that he has been removed from office in a procedure contrary to law and in violation of Article 236 (a) and (b) on protection of public officers from victimization for lawful performance of duty and removal only with due process.

9. It is further urged for the petitioner that his right to human dignity under Article 28 of the Constitution has been violated. The petitioner invokes Article 1 of the Universal Declaration of Human Rights thus, "**All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.**" It is urged that it defeated human dignity when the petitioner was required to leave office, handover, and go on terminal leave despite his exemplary service. Further his legitimate expectation to a three (3) years renewal per Mwongozo was thereby breached.

10. It is urged that the 2nd respondent is guilty of dereliction of duty because it failed to advise the 1st respondent of the petitioner's entitlement to a renewal of contract for 3 years as per Mwongozo.

For the respondents, the replying affidavit states as follows:

1. It is admitted that the claimant successfully served the first term and was given one-year renewal as pleaded and urged for the petitioner.
2. The letter for renewal addressed to the parent Ministry clearly requested for a one-year renewal. The exhibited minutes of the 1st respondent's special board meeting held on 13.03.2020 at minute No. 124/03/2020 shows that the special board noted that the petitioner's contract of service was coming to an end on 04.05.2020 and it was resolved that the Chairman writes a letter to the Cabinet Secretary recommending renewal of the petitioner's contract as CEO of the 1st respondent for one year. The petitioner signed the minutes in his capacity as CEO on 31.05.2020.
3. By the letter dated 24.04.2020, the Cabinet Secretary wrote to the 1st respondent's Chairman in part thus, "**Having perused the contents of the report, the undersigned accedes to the resolution of the Board for an extension of the term of the current CEO by one year and not the 3 years as per your earlier evaluation report forwarded vide a letter dated 13th March 2020. You are hereby directed to ensure that the recruitment of a new CEO is done within six months of one year extension.**" The contents of the letter were conveyed to the petitioner prompting the petitioner to prepare progress reports per the letter by the Cabinet Secretary.
4. The first schedule to the Water Act, 2016 provides that the Chief Executive shall hold office for such term not exceeding three years as may be specified in the instrument of appointment and such members shall be eligible for reappointment for one further term. The CEO is an ex officio member of the Board and falls under the ambit of the cited provision.
5. The petitioner voluntarily signed the contract for renewal of his service for one year.
6. The respondents deny that the petitioner's rights were violated as alleged or at all.

The Court has considered all the material on record and the parties' respective submissions. The Court makes findings as follows.

The **1st and main issue** for determination is whether the petitioner was entitled to renewal of the contract of service for a term of three years as alleged.

The parties are in agreement that the policy applicable is stated in Mwongozo. The relevant provision in Mwongozo on tenure of a CEO of a state corporation like the 1st respondent states:

- a. Three-year term or as otherwise provided under any other written law.
- b. Renewable once subject to performance evaluated by the Board.

The Court has considered the Mwongozo's provisions on the tenure of the CEO and finds that whereas it is clear that the initial tenure is for a term of three-years subject to an otherwise statutory provision, the said Mwongozo does not state that the renewal must be for a tenure of three years. Is there a statutory provision that the renewal of the petitioner's contract of service must be for a further term of three years?

The petitioner invokes section 17(5) of the Water Act, 2016 which provides that the CEO of the Water Resources Authority shall hold office for a term of five years and is eligible for re-appointment for one further term upon exemplary performance. The respondents invoke section 14 (4) of the same Act to urge that the 1st schedule of the Act applied. Whereas the Court will later herein find that the schedule applies to

the appointment of the 1st respondent's board Chairperson and members but not the CEO, the Court holds that the sections of the Act as cited for the parties specifically apply to the Water Resources Authority. The 1st respondent has not been demonstrated to be the Water Resources Authority and is therefore not subject to the cited provisions of the Act. The Court finds that the petitioner and the respondents were obviously misconceived in citing the sections and the Court returns that the sections have not been established as applying to the present dispute involving the 1st respondent, a water works development agency.

The Court has considered the Water Act, 2016. Under section 65(1) of the Act, the Cabinet Secretary may by notice in the Gazette establish one or more waterworks development agencies and define the geographical area of jurisdiction of each such agency. Such agencies are a body corporate per section 65(2) of the Act. Section 66 (1) of the Act provides that each water works development agency shall consist of a Chairperson and four other members from counties within the basin area and, the CEO. Section 66(2) thereof states that the First Schedule has effect with respect to the membership and procedure of the water works development agencies. The Court finds that as submitted for the respondent, the 1st respondent is a state corporation established by Gazette Notice No. 59 of 26.04.2019 and is bound by the First Schedule. The issue is whether the provisions of the Schedule apply to renewal of the petitioner's contract of service as the 1st respondent's CEO

Paragraph 1(1) (c) provides that the Schedule applies to the board of the water works development agencies and the 1st respondent being such agency, the Schedule would apply to appropriate matters as provided in the Schedule. Paragraph 3(1) of the Schedule provides that a member shall hold office for such term not exceeding three years as may be specified in the instrument of appointment. Paragraph 3 (2) provides that a member shall be eligible for re-appointment for one further term. Paragraph 1(2) defines member to mean a member of a board, tribunal or committee.

The Court has considered the provisions of the Act and it is clear that the marginal note to section 66 is “**Boards of the water works development agencies**” but the body or substance of section 66(1) states that each water works development agency shall consist of a chairperson and four other members from counties within the basin area and, the CEO – and the Court finds that the section makes a clear distinction of chairperson, member, and CEO and further, the Court holds that CEO is distinct from member. The provisions of the cited Paragraphs of the First Schedule provide for appointment of members and in particular, the Court finds that Paragraph 3 on appointment of members of the Board do not therefore apply to appointment of the CEO. The Court further finds that in any event the said Paragraph 3 does not fix the tenure of a member as three years but fixes the tenure to any period not exceeding three years – so that even if the Paragraph applied but, which the Court has found not to apply to the CEO, it would not be a basis to justify a renewal of the petitioner's tenure for three years because the Paragraph does not provide as such. In that regard, the Court upholds the submissions for the petitioner that in **Ben Chikamai & Another –Versus- Peter Muchai & 2 Others [2020]eKLR**, the Court of Appeal (Ouko, P, W.Karanja & Kantai, JJ.A) it was held that the appointment of a CEO is distinct from appointment of other board members and, “**....At any rate, the CEO is an employee and is only a member of the Board by virtue of office.**”

The Court finds that in absence of an established otherwise statutory provision that the renewal must have been for three years, the renewal in issue was governed by the terms and conditions of the contract of service between the parties and the general provisions in Mwongozo. The Court has already found that the provisions in Mwongozo do not state that the renewal must be for a further tenure of three years. The Court further finds that the petitioner has not established any term and condition of the contract of service that was breached in the manner his contract was renewed for one year. The evidence is that the 1st respondent's Board and the Cabinet Secretary considered the issue of renewal and resolved to grant the petitioner a one-year renewal within which the 1st respondent would initiate the recruitment of a new CEO. The Court finds that the petitioner was well aware of the decisions made and he signed the relevant minutes in that regard as the CEO.

To answer the 1st issue and main issue for determination, the Court returns that the petitioner has not established statutory, policy or contractual provision that entitled him to a renewal of the contract of service for a further term of three years and he was therefore not so entitled as was alleged and claimed.

To answer the 2nd issue for determination, in view of the findings on the 1st and main issue for determination, the Court returns that the petitioner has failed to establish the alleged violations of human rights and further failed to establish the basis of the alleged legitimate expectation that the renewal ought to have been for three years. The Court finds for the petitioner that by the letter dated 13.03.2020 the 1st respondent recommended to the Cabinet Secretary that the petitioner's contract of service is renewed for a further 3 years and as admitted and submitted for the petitioner, by the letter dated 24.04.2020, the Cabinet Secretary acceded to a renewal for only one year and not three years. The petitioner has not faulted the consultations between the 1st respondent's board and the Cabinet Secretary and then the Cabinet Secretary's decision that the renewal contract in that regard be for a year - and as was voluntarily concluded between the parties. Thus there is no established basis for the alleged claims of breach of alleged legitimate expectation that renewal would be for three years.

It was submitted for the respondents that the doctrine of waiver applied. The respondents cited **Banning –Versus-Wright (1972) 2 All ER 987 at 998** where the House of Lords stated, “**The primary meaning of the word waiver in legal parlance is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted. A person who is entitled to a stipulation in a contract or a statutory provision may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist. Waivers are not always in writing. Sometimes a person's actions can be interpreted as a waiver – waiver by conduct.**”

The Court has considered that indeed the petitioner voluntarily signed the renewal contract for one year and signed minutes at which it was resolved that the renewal would be for a year. However, the Court finds that the doctrine of waiver does not begin to arise or apply in the instant case because the Court has found that there is no established contractual, policy or statutory provision entitling the petitioner to a renewal of contract for a term of three years and thus, in the circumstances, no waiver in that regard could conceivably be invoked.

To answer the 3rd issue for determination and in view of the Court's findings on the 1st and 2nd issue for determination, the Court finds that the claims and allegations for the violation of rights by the petitioner have collapsed as unjustified and the prayers in that regard will be declined.

The Court has considered the submissions by the interested party. It was submitted that the petitioner was guilty of material non-disclosure of alleged misconducts while in the service of the 1st respondent so that the entire petition had no legs to stand on and therefore it must fail. The interested party submitted that the petitioner's service with the respondent had been characterised by acts of corruption and pilferage of public funds at the detriment of citizens whose trust had thereby been breached. In answer, it was submitted for the petitioner that the interested party went beyond its role in the petition by introducing its own case that was not the dispute between the parties. The petitioner relied on **Raila Amolo Odinga & Another –Versus- Independent Electoral and Boundaries Commission & 3 Others [2017] eKLR** (Maraga, CJ & P, Mwilu, DCJ & V-P, Ibrahim, Ojwang, Wanjala, Njoki & Lenaola, SCJJ) where it was held, “**11. We note, in the instant matter, that the applicant seeks joinder, even as his application introduces new parties to a cause already resting before the Court; and he, at the same time, excludes some of the current parties. The applicant, in essence, is introducing new facts and issues that were not before the Court. It follows that he is not in a position to advance any submissions that will be helpful to the Court, as it resolves the main question in hand. He is, in effect, introducing a new petition, and pre-empting the duly-lodged cause of the parties in the main proceedings. This cannot be allowed. Moreover, we are also not convinced that the applicant would suffer any prejudice, if his intervention is denied. Accordingly, we dismiss the application.**” The Court finds that indeed, the interested party's affidavit and submissions walked outside the actual dispute between the petitioner and the respondents and the interested party purported to introduce a new cause of action based upon the alleged petitioner's misconduct. While the interested party was enjoined upon the petitioner's and respondents' consent towards expeditious determination of the petition, the Court returns that as submitted for the petitioner, the interested party purported to advance a wholly new cause of action. The Court finds the same to amount to an abuse of court process.

The Court has considered all the circumstances of the case and considers that each party will bear own costs of the petition.

In conclusion, the petition dated and filed herein on 12.04.2021 is hereby dismissed with orders each party to bear own costs of the petition.

Signed, dated and delivered by video-link and in court at Mombasa this Friday 21st May, 2021.

BYRAM ONGAYA

JUDGE