



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NUMBER 173 OF 2019

BETWEEN

UNION OF KENYA CIVIL SERVANTS.....PETITIONER

VERSUS

CABINET SECRETARY, EAST AFRICA COMMUNITY AND REGIONAL DEVELOPMENT...1ST RESPONDENT

PUBLIC SERVICE COMMISSION.....2ND RESPONDENT

THE DIRECTOR, DEPARTMENT OF CIVIL REGISTRATION.....3RD RESPONDENT

STEPHEN GITHAIGA RUIMUKU.....4TH RESPONDENT/APPLICANT

THE HON. ATTORNEY- GENERAL.....5TH RESPONDENT

AND

TANA & ATHI RIVERS DEVELOPMENT AUTHORITY.....INTERESTED PARTY

RULING

1. This Ruling relates to an Application brought by the 4th Respondent, dated 2nd December 2020.
2. Judgment was delivered against the 4th Respondent, on 25th September 2020.
3. The Court agreed with the Petitioner in its Judgment, that the appointment of the 4th Respondent by the 1st Respondent on 9th April 2018, as the Managing Director and Chief Executive Officer of the Interested Party, was unlawful and consequently, null and void.
4. The Court ordered also, that the Interested Party immediately commences the recruitment of a Managing Director as mandated in law.
5. The 4th Respondent applies for an order of stay of execution pending Appeal, specifically against the second order, directing the Interested Party to recruit a Managing Director.
6. The 4th Respondent relies on his Affidavit sworn on 3rd December 2020. He narrates his employment history with the Interested Party from 1984 when he was first recruited as a Financial Analyst, to the year 2020 when he served as the Managing Director on a 4-year contract. He states that he had always been recruited competitively and based on merit. He was first appointed Managing Director, for a period of 3 years effective from April 2015. He was reappointed for a period of 4 years, beginning 9th April 2018. This second contract was ended prematurely by the Judgment of the Court.
7. He states that the Judgment against him was clearly erroneous, and made without appreciation of all material facts. Recruitment of a new Managing Director, which has already been advertised, would defeat the substratum of the Intended Appeal.
8. 1st, 2nd, 3rd and 5th Respondents oppose the Application, relying on the Affidavit of Dr. Margaret W. Mwakima, Principal Secretary in the

Ministry headed by the 1st Respondent.

9. She states that the 4th Respondent was suspended following the recommendations of the Ethics and Anti-Corruption Commission [EACC]. Investigations established through forensic proof, that the 4th Respondent altered the date of his birth, in the Immigration Passport Application Forms, from 1953 to 1958. The 4th Respondent was suspended on 16th September 2020, and an Acting Managing Director, Emilio Mugo appointed. Mwakima confirms in her Affidavit that the Court subsequently made a Judgment, finding the 4th Respondent lacked integrity and was unsuitable to continue holding office. The Interested Party was ordered to recruit a new Managing Director. The Interested Party advertised for the position and has engaged the 2nd Respondent on provision of a suitable Human Resource Consultant to guide the process. Mwakima states that the Court is *functus officio*. There is no evidence that an Appeal has been lodged.

10. The Petitioner relies on the Affidavit of Jerry S. Ole Kina, 1st Deputy Secretary General, sworn on 26th January 2021. His position is that there is no valid Notice of Appeal filed. Typed proceedings have been in the file from as early as July 2020. The Court has no jurisdiction to stay execution of Judgment. The 4th Respondent was suspended on 15th September 2020. EACC recommended his suspension on 10th September 2020. The 4th Respondent must first deal with his suspension, before seeking stay of execution. There is currently an Acting Managing Director. The 4th Respondent should not hold the Interested Party at ransom.

11. It was directed by the Court on 12th March 2021, that the Application by the 4th Respondent, dated 2nd December 2020, is heard and determined on the strength of the record.

The Court Finds: -

12. The Employment and Labour Relations Court, Nairobi, as of the date the 4th Respondent filed his Application, 4th December 2020, did not have any proceedings pending to be typed, for purposes of lodging Appeals to the Court of Appeal. This is a fact which can be verified with the Registrar of the Court. Parties cannot therefore allege that they have been held back in filing of Appeals, by lack of typed and certified proceedings. Our Secretaries have done their work, for which they must be commended.

13. Judgment was delivered, dated, signed and ready for collection on 25th September 2020. There is a typed copy on record. Proceedings, running to the last date when the date for delivery of Judgment was given, were typed, certified and ready for collection by 29th July 2020.

14. Why would the 4th Respondent state, at paragraph 5 of his Notice of Motion, that he is waiting to be provided with typed proceedings to file his Record of Appeal? This statement was made in December 2020, while proceedings were ready and certified in July 2020. Obviously, the 4th Respondent is wrong in apportioning blame for not having lodged his Appeal, on this Court.

15. The Application appears to have been prompted by the advertisement placed in the Daily Nation on 19th November 2020, calling for applications to the position of Interested Party's Managing Director.

16. The 4th Respondent has not disclosed what his Grounds of Appeal are. There is no Draft Memorandum of Appeal attached to his Affidavit, to enable this Court have a view on the arguability of his Appeal. A Notice of Appeal does not assist this Court in assessing whether there is an arguable Appeal with good prospects of success. There were very strong reasons why the Trial Court agreed with the Petitioner, by declaring the 4th Respondent unsuitable to continue holding the position of Managing Director. There were investigations carried out by the EACC, confirming through forensic examination, that the 4th Respondent altered his date of birth. EACC recommended his suspension. The Interested Party's Board acted on this recommendation. The other Respondents did not challenge the findings and recommendations. The Court agreed with the Petitioner. An Acting Managing Director has been appointed. Recruitment process was put in motion.

17. The 4th Respondent appears to say nothing in his Application, about the alteration of his date of birth, simply criticizing the Judgment for being erroneous and made without consideration and appreciation of all material facts. What are the material facts contradicting the finding that he altered his date of birth? The 4th Respondent says nothing about the EACC, its findings and recommendations. He focuses in his Affidavit on his credentials, experience and past appointment by the 1st Respondent through merit. He completely ignores the finding that he altered his date of birth, and does not make the slightest attempt, in his Affidavit, at disengaging himself from the grip of this adverse finding.

18. The Court does not think the Application by the 4th Respondent has any merit. The Court would be undermining the work of the EACC, the Respondents, the Interested Party by acceding to the Application.

19. It is important that the Interested Party is able to discharge its mandate fully, under a substantive Managing Director. It is also open to the 4th Respondent to seek stay of execution at the Court of Appeal, proceedings of this Court having been available from July 2020.

IT IS ORDERED: -

a. The Application filed by the 4th Respondent, dated 2nd December 2020 is declined.

b. Costs to the other Respondents, the Petitioner, and the Interested Party.

DATED, SIGNED AND RELEASED TO THE PARTIES AT NAIROBI, UNDER MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 11TH DAY OF JUNE 2021.

JAMES RIKA

JUDGE