



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

PETITION NO.145 OF 2018

ERNEST MOTURI OGWORA.....PETITIONER

VERSUS

NATIONAL CEREALS & PRODUCE BOARD.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

JUDGEMENT

The petitioner is seeking the following orders;

- a) *A declaration that the respondent's actions in failing, ignoring, neglecting and/or refusing to grant the petitioner's deserved appointment or promotion in his employment is discriminatory, unconstitutional and contrary to law.*
- b) *A declaration that the petitioner qualified and ought to have been promoted by the respondent to the position of General Manager, Warehousing and Operations in May, 2010.*
- c) *A declaration that the petitioner qualified and ought to have been promoted by the respondent to the position of acting Managing Director in August 2013.*
- d) *A declaration that the petitioner qualified and ought to have been promoted by the respondent to the position of General Manager in the 2013 recruitment.*
- e) *A declaration that the petitioner qualified and ought to have been appointed by the respondent to the position of acting Managing Director in May, 2018.*
- f) *The respondent be ordered to appoint the petitioner in terms of the prayers above.*
- g) *General damages for unfair treatment and discrimination.*
- h) *A permanent injunction restraining the respondents herein from appointing any one to the position of Managing Director as a result of the recruitment process advertised on 19th June 2018.*
- i) *A mandatory injunction compelling the respondents herein to appoint the applicant to the position of Managing Director.*
- j) *Costs of the petition.*

Petition

The petition is that the petitioner was employed by the respondent, a corporation established by National Cereals and Produce Board Act.

In 2009/2010 the position of General Manager, Marketing and Operations fell vacant. It has all along been the practice that when such a position falls vacant someone is appointed in an acting capacity. Being the most qualified and senior employee, the Petitioner had legitimate expectation of being appointed. The appointment did not happen. All other positions in the structure were filled.

On 24th February 2010, the National Cereals and Produce Board placed an advertisement that announced vacancies among them being General Manager Warehousing and Operations, General Manager, Trading Commercial Products, and General Manager, Research and Development/Commodity Exchange to be recruited by Deloitte, a consulting firm. The Petitioner applied for the three General Manager positions and passed the first interview for all of them. He was subsequently invited for the second round of interviews that was conducted in May 2010 by a panel comprising among others, Board of Directors. He got information that he was recommended to take the position of General Manager, Warehousing and Operations but was not appointee like others who got interviewed and were appointed which was discriminatory.

In June 2010, staff who had been suspended (on suspicion of being involved in the maize scandal of 2009) and included the then Managing Director, Prof. Gideon Kirwa Misoi reported back on duty. The on-going recruitment with the target of the recruited staff reporting on duty as from 1st July 2010 was placed on abeyance.

The petition is also that, as the petitioner waited for his appointment letter he was not placed in an acting capacity in the position of General Manager that was vacant but was assigned some of the duties that were hitherto for the General Manager. This started to solidify the feeling and view of discriminatory actions for the reasons that;

a) The term of the then Managing Director, Prof. Gideon Kirwa Misoi, was scheduled to end in August 2013. Three staffs namely: Mr. Frank Kanja Muchina, Mr. James Cheruiyot Boit and Mr. Cornel Kiprotich Ngelechey were promoted to the same rank as the Petitioner with effect from 1st May 2013.

b) When, Prof. Gideon Kirwa Misoi retired, one of the three staffs that were promoted three months earlier, Mr. Cornel Kiprotich Ngelechey, was appointed as acting Managing Director. The appointment ignored all the norms of fairness and objectivity. Merit was not considered at all. Had the process not been discriminative, past performance and seniority would have carried the day. This would have resulted in the Petitioner being appointed the acting Managing Director. The discriminative and unprofessional considerations took precedence.

A vacancy of Managing Director for NCPB was advertised and the shortlisted candidates invited for interviews that were being conducted by Manpower Consulting as from 23rd September 2013. The Petitioner was invited for the first interview. Mr. Cornel Kiprotich Ngelechey, who had been appointed, acting Managing Director, was not invited for the first interview on allegations of not meeting the qualifications for the job. This served to confirm the suspicion of discrimination as the Petitioner had been bypassed in the appointment of the acting Managing Director through well planned discriminatory manoeuvres meant to side-line him.

On 25th November 2014, the Petitioner was removed from the position of Operations Manager and was re-designated Manager Services Marketing. The reason given by the Managing Director, Mr. Newton Terer, was that it was desirable to have a member of a particular community in a powerful department. This was informed by the fact that staff changes around that time had adversely affected the members of that community.

On 3rd August 2015, the Managing Director, Mr. Newton Terer released a circular ref: NCPB 13/1/VOL.XXI/15 which in essence removed all responsibilities from the Services Marketing Department in which the Petitioner was the head of department, leaving the Petitioner with virtually no work.

On 24th March 2016 the Petitioner was again re-designated and re-deployed as Research and Business Development Manager. This was cancelled on 22nd April 2016 and he was re-designated as the Marketing Manager in May 2016 and by a letter dated 3rd August 2016 the petitioner was returned back to the position of Marketing Services Manager. These changes were done hurriedly to embarrass the petitioner as the Board had scheduled for a meeting on 4th August, 2016 where he was required to make a presentation. The Petitioner was compelled to write on 6th August 2016 to the Chairman of the Board, Col. (Rtd) Geoffrey Kingangi seeking his protection against the unwarranted harassment.

On 28th, November 2016, the Petitioner got another letter re-designating him as Manager, Monitoring and Evaluation with immediate effect with an attached job description that indicated that he should be reporting to the General Manager, Enterprise Development, a position that did not exist and he as the only staff in the department.

In a period of 24 months the Petitioner was moved/re-designated five times. These shifts were largely malicious, ill-intentioned and discriminatory as no other head of department has ever been subjected to such. The circus of movements was also clearly meant to derail his advancement.

In April 2018, the Respondent made an internal advertisement for internal recruitment of staff to fill various positions including that of General Manager, Finance and various heads of departments. The qualifications and experience required were clearly tailor made to benefit specific individuals. The Respondent chose to bypass or not include the position of General Manager, Marketing and Operations on the knowledge the petitioner was the only one who was qualified for this position. This was a manifestation of the discrimination and bias towards the petitioner.

Following the abrupt resignation, in May 2018, of the Managing Director, Mr. Newton Terer, the Board of Directors disregarded all the existing staff and shopped for, Mr. Albin Ruto Sang from the Ministry to serve as acting Managing Director. The reason for this being that had merit, seniority and such standard criterion been considered, then it is the Petitioner who would have been appointed acting Managing Director. There was discrimination.

On the two occasions of 2013 and 2018 when the position of the Managing Director for National Cereals and Produce Board fell vacant, the Petitioner was cleared and invited for the interviews. This being an affirmation that he met the qualifications for occupying the office of Managing Director but was not considered for appointed in an acting capacity. There was discrimination.

The petition is also that when positions in the organizational structure fall vacant, they are filled at least in an acting capacity save for the position of General Manager, Marketing and Operations for which the Petitioner is professionally qualified. That this omission was deliberate and discriminatory meant to disadvantage him. There was a legitimate expectation and taking into cognizance that the Petitioner attended and passed the interviews for General Manager in 2010 the Respondent ought to have appointed him in an acting capacity pending the inordinately prolonged period of issuing the appointment letters to conclude the recruitment exercise.

As a consequence of the discrimination that has led to curtailment of the Petitioner's advancement, he has stagnated to a level that for over three years he has not been receiving even the annual increment.

The petition is that the petitioner's rights were violated with regard to fair administrative action when the respondent side-lined him in employment opportunities, and further, by adopting employment practices that are a blatant violation of the Employment Act, as well as the National Cereals and Produce Board Human resource policies.

The Respondents treated the Petitioner in a discriminatory manner by denying him opportunities that he is well qualified for and hiring outsiders that are not qualified. In giving the qualifications of the General Manager-Marketing and Operations, the Respondents clearly deviated from the known qualifications of the former holders of the office. The most immediate was an engineer and the longest serving was an agriculturist. Both had no training in marketing which the petitioner has in addition.

The Respondents adopted unfair labour practices. They denied the Petitioner employment opportunities that he is qualified for and gave them to less qualified individuals. In addition, they kept re-designating him to head different departments, a record five times, within a span of two years, without lawful cause, and with intentions to side-line him and curtail his career advancement.

The petition is supported by a **Supporting Affidavit** and the witness statement of the petitioner.

The petitioner also testified that he was employed by the respondent in March, 1992 as a management trainee, then as a silo manager, area (Regional) manager, head of services marketing, head of operations and head of monitoring and evaluation. Between 1992 and 2000 the petitioner moved from Job group J to P an average of 20 months in each job group and on merit and performance.

The petitioner also testified that he had a clean work record. He fought corruption and that could be the cause of his problems. This is against article 236(a) of the constitution which prohibits discrimination against a public officer for undertaking his duties.

The petitioner also testified that he graduated with BSc. Agricultural Engineering in 1990 and in 2004 he graduated in Masters of Business Administration (MBA) and registered for PhD in Marketing, full member of Marketing Society and the last time he was promoted was mid-2007.

In 2009/2020 the position of general manager, Marketing and Operations became vacant following the early retirement of Robert Langat. It was the practice that when such positions fall vacant an acting person is appointed. Being the most qualified and senior employee, the petitioner had expected to be appointed but this was not done but charged with performance of duties hitherto of the general manager and all other positions in the structure were filled. This was clear discrimination.

On 24th February, 2010 the respondent through consultant, Delloite and Touché consulting Limited placed an advertisement that announced vacancies and among them were general manager, warehousing and operations, general manager trading commercial products, and general manager research and development/ commodity exchange. The claimant applied for the 3 general manager interviews and passed the same as conducted by Delloite and subsequently he was invited to the second round in May/June 2010 by a panel of board of the respondent. He got information that he passed but since he could only get one position he was recommended for general manager Warehousing and Operations where he scored 82% the second had 60% and third 54% as the respondent was ordered to supply the results of the interview.

For the position of general manager Trading Commodities the petitioner scored 70% and general manager Research Development/Commodity Exchange he scored 73%. The pass mark for recruitment per respondent HR policy 2.10(3) stipulates that the members of the interview panel to recommend the best rated candidate for appointment provided they attain a score of at least 65%. The process is repeated if no one scores at minimum, item 2.10(3) of the HR policy.

The petitioner also testified that he was the only staff of the respondent who passed the interviews for general manager and was qualified and recommended for appointment. In June, 2010 staff who had been suspended on suspicion of being involved in the maize scandal of 2009 that included the then the managing director Prof. Gideon Kirwa Misoi, reported back on duty and the recruitment that was on-going with the target of recruited staff reporting on duty from 1st July, 2010 was placed in abeyance.

There was no further communication issued on the fate of the recruitment exercise despite the Petitioner asking on a number of occasions. The access to information states that in item 5(a) (vii) (d) provides to any person the reason for any decision taken by it in relation to that person. The respondent's HR policy item 2.105) states an unsuccessful candidate be informed in writing of their inability to get the job immediately the vacancies filled. This underlines the fact that communication is provided to all participants but the respondent contravened its policy and failed to communicate the fate of the claimant's appointment. Even the interviews flowing from the advert of 19th June, 2018 have never been formerly communicated if they were completed. This is discriminatory and malicious.

The petitioner also testified that despite passing his interview no appointment letter was issued and there was no consideration of placing him in an acting capacity in general manager position that was vacant. He was assigned all the duties that were hitherto for the general manager even as other staff were given acting appointments for vacant positions. This crystallised the feeling and view of discriminatory actions.

The term of the then director Prof. Misoi was scheduled to end in August, 2013 and 3 staff, Frank Kanja Muchina, James Cheruiyot Boit, and

Cornel Kiprotich Ngelechey were promoted to the same rank as the petitioner from 1st May, 2013. He had been due for promotion in 2010 but his case was not considered and when the managing director retired, one of the promoted staff Mr Ngelechey was appointed as acting managing director which ignored all norms of fairness and objectivity. There was no merit and had the process not been discriminative, past performance and seniority should have applied and the petitioner appointed acting managing director. Discriminative and unprofessional appointment took over.

The person who was appointed acting managing director, the outgoing managing director and the then Cabinet Secretary of Agriculture all hail from the same community. The action consolidated the undisguised discrimination. The respondent was ordered to supply board minutes and documents that appointed Mr Ngelechey acting managing director.

A vacancy in the office of managing director in the respondent was advertised and shortlisted candidates invited to the interviews conducted by Manpower Consulting as from 23rd September, 2013. The petitioner was invited for the first interview and the person; Ngelechey who had been appointed acting managing director was apparently not invited for the first interview on allegations of not meeting the qualifications for the job. This confirmed discrimination as the petitioner had been bypassed in the appointment of the acting managing director through well planned discriminatory manoeuvres meant to side-line him. According to the Public Service Commission Act, acting appointments should be made by the lawful appointing authority and subject to the prescribed regulations and procedures which apply to appointments. A person should not be appointed to hold a public position in an acting capacity unless the person satisfies all the appointment qualifications for holding such office. An officer can only be appointed on an acting capacity for a period of 30 days but not exceeding 6 months pursuant to section 34 of Public Service Commission Act.

The petitioner was denied promotion opportunities; he was tossed from heading one department to another. On 25th November, 2014 he was removed from Operations manager and redesignated to manager services marketing and brought in his former deputy Simon Kamau Nguturi as acting operations manager and he was then regional manager northern Embu.

On 3rd August, 2015 the managing director Newton Terer released a circular which removed all duties from the services from the marketing department in which the petitioner was the head of department and this meant the petitioner had no work.

On 24th March, 2016 the petitioner was re-designated and redeployed as research and business development manager and this was cancelled on 2nd April, 2016. He was re-designated as the marketing manager in May, 2016.

On 3rd August, 2016 the petitioner was issued with letter that he was to revert back to marketing services manager with immediate effect. The reversion was embarrassing following a meeting of 3rd August, 2016 that discussed presentation with the Board at a retreat that was to be held on 4th August, 2016. The meeting had a motive to harass and bully the petitioner.

The petitioner also testified that he surmised his removal from marketing manager was because he was an obstacle to bribery in maize sales that was on-going. He had directed all maize buyers to transact purchases from the depot where the maize was and not from the head office. This did not go down well as it curtailed opportunities for bribes by senior officers at the head office. The petitioner was compelled to write on 6th August, 2016 to the board chair, Geoffrey Kingangi seeking for his protection against the unwarranted harassment.

On 28th November, 2016 the petitioner was issued with a letter re-designating him to the post of manager, monitoring and evaluation. The job description was for him to report to general manager enterprise development. There was no such position of general manager enterprise development at the respondent and this technically left the petitioner hanging.

In 24 months the petitioner had been moved 5 times.

The shifts were with malice and discriminatory. No other head of department had been subjected to such.

This was meant to derail the petitioner from advancement. According to the HR policy section 7.7 on resignation, where an employee is re-designated from one cadre to another, the same should be continuous to avoid loss of seniority. The person serving in the previous grade is considered as qualifying period for promotion to the new cadre. All cases of re-designation are handled in accordance with the provisions of various career progression guidelines. In selecting employees for re-designation, the criteria is;

- a) Levels at any cadres subject to the officer meeting the requisite qualifications, experience, skills and competencies and shall take effect from the date the decision is made;
- b) Suitability interviews for the officers who are moving from one cadre to another;
- c) Suitability interview shall not apply for posts which fall within the same job family;
- d) Is limited to positions in the first two entry levels in any cadre;
- e) An officer who is due for promotion shall first be considered for promotion before the request for resignation is processed;
- f) Re-designation with continuous service is only allowed only for technical cadres whose job specification are similar for both graduate and non-graduate officers;
- g) Re-designation should not disadvantage any employee already serving in the relevant cadre and

h) Is subject to existent of vacancies.

The petitioner also testified that under the HR policy with regard to an officer being considered for promotion in his case were discriminative and applied 5 times as he was due for promotion on merit in 2010 as per the respondent's career progression.

The qualification for promotion was reinforced but having passed interview for promotion in 2010. The discriminative nature of not following the career progression guidelines in the petitioner's case where he was eligible to move from one job group to another after 3 years resulted in his stagnation since the last promotion in the year 2007.

The net result was that he remained at the last bar of his job group and no routine annual increment since the last of 1st July, 2015 and 5 years of stagnation.

On 17th May, 2018 the managing director, Terer resigned, but the board ignored all staff and got Albin Ruto Sang from the Ministry to serve as acting managing director. Had merit, seniority and standard criterion applied then the petitioner should have been appointed managing director and there was discrimination.

In 2013 and 2018 when the position of managing director fell vacant, the petitioner was cleared for the interview. He met the qualifications for office of managing director but not considered as the acting manager which was discriminatory.

When positions fell vacant, save for general manager, Marketing and Operations for which the petitioner was professionally qualified were filled. This was deliberate and discriminatory. There was legitimate expectation for appointment in acting capacity pending the delay in issuance of appointment letters pending the prolonged recruitment exercise.

On 29th March, 2018 various senior management positions were advertised via internal advert including the positions of general manager, Finance but the position of general manager, Marketing and Operations which was vacant too and was core of operations of the respondent was missing. The petitioner had done interview in 2010 and passed and took it his appointment letter should have issued and not be subject to advertisement. The respondent found itself in a maize purchase scandal by May, 2018 and on 19th June, 2018 the respondent advertised and of the 6 positions advertised including the managing director and general manager marketing and operations. The petitioner applied for both positions. The closing date was 30th June, 2018 and applications were received in a manner designed to allow for manipulations after the closing date. The time given was 11 days contrary to Public Service Commission HR policy section B.4(1) which requires for an advertisement all vacant positions so as to reach the widest reach and allow for 21 days before closing advertisement. The short period was meant to disadvantage interested candidates. The long wait to November, 2018 when the applicants were assessed confirm the assertion.

The requirement for general manager, marketing and operations were changed with intent to bar the claimant;

- The nomenclature of the position was clandestinely changed from bearing 'warehousing' to 'operations' but forgot to align the positions that fall under the division such as manager housing and logistics which could have retained its usual nomenclature of operations;
- The employment file did not have membership certificate of MSCK because it was not required and as such when consorting the requirements the respondent thought this would eliminate him but the application form had such current certificate;
- Respondent's career guidelines section 5.3.11.1 requirements for general manager a person to be considered for appointment for the same if one possesses a relevant master's degree and professional qualifications and full member of a professional group and has served in similar capacity for 3 years. 6th and 17th December, 2017 letters from board the minimum was 12 years with 5 being head of the department and contrary to the guidelines even though the petitioner still met the criteria set;
- 6th December, 2018 letter had been meant to block off the petitioner but he had worked in different areas. There was distortion of facts. The person appointed for general manager, marketing and Operations one John Mbaya Matiri is severely deficient in the requirements that were stated and his highest qualifications is personal relationship with the board chair, Mutea Iringo and hailing from the same location.

The petitioner also testified that there was direct discrimination against him by the respondent. John K Ngetich was appointed the corporate secretary in November, 2019 despite not being qualified, competent, experienced or certified as public secretary. Official policy was ignored for partisan interests and discrimination.

To demonstrate there was discrimination, in the invitation for interview the gross salary was indicated at ksh.342, 000 and Ksh.540, 000 but the person employed is paid ksh.723, 140 gross with basic pay being Ksh.543, 140 and allowances at ksh.100, 000, house allowance Ksh.80, 000 which is discriminatory as the salary indicated to the petitioner was lower. The changed figures in salary were not open to the candidates at the interview.

The qualifications for the position required that one must be a member of the Marketing Society of Kenya, which qualifications the petitioner possessed since 2004 and the one who was recruited was BSc. Horticulture degree holder with no record of marketing. The recruitment was predetermined to remove the petitioner.

The court issued orders barring the recruitment of the general manager marketing and operations but the respondent moved and backdated documents to show that the process had completed and overtaken by events which is illegal.

The petitioner also testified that upon filing the instant petition, he continued to face discrimination and retaliatory actions by the respondent when the board discussed the matter 12th April, 2019 and resolved that he be isolated for appraisal and forced leave contrary to article 236(a) of the constitution which prohibit the victimisation of a public officer while performing his duties.

The petitioner was then issued with letter dated 21st November, 2019 referenced *officer re-allocation* that sought to communicate relocation to pave way for refurbishment of the boardroom and which was to be completed by 27th November, 2019 but upon removal another staff member was allocated the office. There was nothing to do with refurbishment but harassment.

On 3rd August, 2020 the petitioner was served with letter of retirement following abolition of office. The letter had contradictions and inconsistencies that were clear from the start. What was clear was that the intentions were malicious and retaliatory following the filing of the petition herein that was scheduled for full hearing on 24th September, 2020.

On 4th September, 2020 the petitioner wrote to the managing director, Joseph Kimote seeking an explanation with regard to the letter of retirement and the indication that there was merging of roles with corporate planning function and a hint of redundancy without due process and a misapplication of the retirement age under the 50-year rule that applies to a staff making request for this to apply. There was no response to his letter.

On 5th August, 2020 when the petitioner reported to the office he was barred by guard at the gate. This harassment was repeated on 17th and 24th August, 2020 without any formal communication and forcing him to make application to court seeking to quash the letter of retirement which was issued and served upon the respondent on 12th August, 2020. The guards at the gate, however, stopped service but the staff at security department, Paul Pudo accepted the Court Order.

While the board on 30th July, 2020 purported to abolish the office of manager, monitoring and evaluation, it created other offices in the expanded mandate communicated by the Head of Public Service letter dated 19th March, 2020, creation of two operational divisions of National Food Reserve and Trading and which offices were relevant to the petitioner's experience and training. It was therefore with malice to retire or abolish his office. There was history of discrimination based on conscience and ethnicity on the grounds of corruption cartels within the respondent and agricultural sector. The ethnic considerations followed that it has been impossible for decades for someone from other ethnic extract to occupy the position of managing director at the respondent.

The petitioner also testified that he sought for documents and records through the court from the respondent and which have not been issued.

Response

In response, the respondent filed the Replying Affidavit of David Wafula Wekesa-Lazaro, the director and member of the 1st respondent board of directors and on the grounds that the three positions of general manager warehousing and operations, general manager trading commercial products and general manager research and development/commodity exchange in the year 2010 applied for by the petitioner were not conducted to the end and there was no board resolution for appointment to any of the positions. The appointments including acting appointment to the office of the managing director are a preserve of the board of directors in consultation with the Ministry of Agriculture. The quantities and qualifications were at the time determined by the then board and Ministry of Agriculture before the appointment of Cornel Kiprotich Ng'elechey as the acting managing director therefore there was no discrimination against the petitioner.

Mr Ng'elechey performed very well in his capacity as acting managing director for a period of about one year before the appointment of the new managing director.

However he did not complain that he was discriminated against.

The response is also that the Permanent Secretary of the Ministry in his discretion decided to have Albin Ruto Sang seconded from the Ministry to serve as the acting managing director until the position was substantively filled notwithstanding that the petitioner and other general managers of the respondent were not eligible to be considered and none of them except the petitioner complained.

The petitioner only submitted applications for the position of managing director and general manager, marketing and operations and he did not meet the requirements advertised for the same and was not invited at the interview. The other candidates who met the requirements were shortlisted and interviewed accordingly.

The petitioner wrote to the chairman of the board seeking clarification on why he was not shortlisted for the positions applied for and there was a response made. The exercise of interviewing the candidates for the positions of General manger, marketing and operations proceeded and a candidate Mr John Matiri was appointed. The recruitment committee found that the petitioner met the basic requirements for the position of managing director but he did not attain the required pass mark to proceed to the next stage. The petitioner was given a chance to compete on equal terms with all other candidates.

The reply is also that the petitioner demonstrates a sense of entitlement which if allowed would infringe on the constitutional rights of other candidates by giving him preferential treatment and if the respondent is to allow the employee to direct on what should be done this would lead to industrial chaos and inhibit the board of directors and management from carrying its mandate.

The parties filed extensive written submissions.

The petitioner submitted that there was discrimination against him in total disregard of Article 27 of the Constitution which states that every person is equal before the law and has the right to equal protection and equal benefit of the law .That the unfair treatment and discrimination

was clearly elaborated through the Respondent's actions such as the unmerited transfers and re-designations of the petitioner without following laid down procedure, the outright change of qualifications to disadvantage the petitioner, the refusal by the 1st Respondent to avail documents as ordered by the court, the failure to effect annual increments to the petitioner and deliberate refusal to promote the petitioner since 2007 when others were being promoted. That the said actions are contrary to the Public Service Commission - Human Resource Policies and Procedures for the Public Service 2016 which at clausd.22 states,

A public officer shall not bully any person. For the purpose of this section 'bullying' includes repeated offensive behavior which is vindictive, cruel, malicious or humiliating and is intended to undermine a person. 'the substantive law on discrimination in employment is the Employment Act, 2007 which in section 5 states:

...An employer shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice.

No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee.

In the case of Jonathan **Spangler v Centre for African Family Studies (CAFS) [2017] eKLR**, where the court held that;

The question of discrimination against an employee is therefore a matter addressed in law and specifically prohibited. The Employment Act, 2007 provisions are also given further meaning by article 27 of the Constitution which makes it unconstitutional for anybody to discriminate against another on the outlined grounds and. on any other grounds. Article 27(5) provides that; (5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause

(4)...

Counsel prays that the petition be allowed as prayed.

The Respondent submitted that that the petitioner's failure to include a prayer for the alleged unpaid annual increments since 2015 was fatal to his claim. That the court and the parties are bound by their pleadings as was stated in the case of **Joseph Mbuta Nziu V Kenya Orient Insurance Company Ltd [2015] eKLR** where the court cited the Nigerian Supreme Court in **Adetoun Oladeji (Nig) Ltd V Nigeria Breweries Plc S.C. 91/2002** in which the learned Judge, Pius Aderemi J.S.C. expressed himself as follows:

it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.

On the issue of discrimination, counsel submits that the Respondent proved that the Petitioner had moved up the ranks to his managerial position and as such his claim that he was not promoted for over five years fails. That importantly, the Petitioner failed to bring section 5 (3) of the Employment Act, 2007 to the court's attention. The section omitted by the petitioner provides that;

It is not discrimination to-

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distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.

The qualifications for the position of General Manager, Marketing and Operations under clause 5.3.11.1 of the National Cereals and Procedure Board HR Policies and Procedures Manual were meant to act as a guideline for appointment to the office and could be adjusted accordingly as it was done in the instant case.

The respondent's counsel further posits that the Petitioner has failed to meet the threshold set in, **Jonathan Spangler v Centre for African Family Studies (Cafs) [2017]** as he has not established a prima facie case to the effect that he was treated differently from other employees. On whether the Petitioner is entitled to the reliefs sought, counsel reiterates that the petitioner has failed to prove that the respondent discriminated against him. On the prayer for payment of gross salary from **July 2010 to September 2020** under job group counsel submits that the issue only arose in the petitioner's Submissions and has not been specifically pleaded or prayed for in his Petition. That it is trite law that issues are introduced through pleadings and not submissions to enable the opposing party to respond to the same.

Determination

On the pleadings, the evidence and written submissions the court finds the following issues for determination;

1. Whether there was discrimination against the petitioner;
2. Whether the remedies sought should issue

Before delving into the issues identified for determination, despite the parties not addressing the matter of filing the petition as framed, the court finds it relevant to address.

The petitioner opted to file a petition. The claims are as set out above.

The practice of filing petitions instead of moving the court by way of memorandum of Claim is taking root and this has been applied to camouflage claims which ordinarily time barred. As a matter of practice and procedure, the constitutional questions advanced by the Petitioner, if any, could have been raised in terms of Rule 7(3) of the Employment and Labour Relations Court (Procedure) Rules, 2016;

(3) Notwithstanding anything contained in this Rule, a party is at liberty to seek the enforcement of any constitutional rights and freedoms or any constitutional provision in a statement of claim or other suit filed before the Court.

The rationale is that a party raising disputes regarding the enforcement of any constitutional rights and freedoms or any constitutional provision can do so through a Statement of Claim and retain constitutional petitions to matters which relate challenge to legal or statutory provisions which are invalid as otherwise where the law provides for enforcement mechanisms, such law should be invoked.

The Court of Appeal in **Sumayya Athmani Hassan v Paul Masinde Simidi & another [2019] eKLR** held that;

It is evident that the petition was hybrid combining violations of various constitutional rights; employment rights under the Employment Act and breach the Public Officers Ethics Act. However, the underlying complaint was the alleged unlawful interdiction and subsequent dismissal of the 1st respondent by the Corporation and appellant. The specific remedies sought were general damages, terminal benefits and issuance of certificate of service. In determining the petition, the ELRC relied wholly on the provisions of Employment Act.

*The **Article 41** rights are enacted in the Employment Act and Labour Relations Act. The two Acts and the rules made thereunder provide adequate remedy and orderly enforcement mechanisms. The 1st respondent filed a petition directly relying on the provisions of the Constitution for enforcement of contractual rights governed by the Employment Act without seeking a declaration of invalidity of the provisions of the Employment Act or alleging that the remedies provided therein are inadequate. The petition did not raise any question of the interpretation or application of the Constitution.*

*We adopt and uphold the general principle in the persuasive authority in **Barbara De Klerk** (supra) that where legislation has been enacted to give effect to a constitutional right, it is not permissible for a litigant to found a cause of action directly on the Constitution without challenging the legislation in question. That principle has been reinforced by the Supreme Court in **Communications Commission** case (supra). (underline added).*

And in the case of **Harrikisson v Attorney General of Trinidad & Tobago (1980) AC 265**, the Privy Council held that;

The right to apply to the High Court underof the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application to the High Court under the mere allegation that a human right or fundamental freedom of the applicant 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 or being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.

In this court's view the Petitioner should have filed a Memorandum of Claim Plaintiff to enforce his rights under the contract which was basically codified in the Employment Act, 2007. Under such legal regime, it would have been apparent that claims relating to alleged discrimination in employment and the failures by the respondent to promote him to the position of general manager, Warehousing and Operations in May, 2010 and alleged failure to be promoted as acting managing director in August, 2013 and addressed in the petition filed in December, 2018 is time barred pursuant to section 90 of the Employment Act, 2007.

This cannot be cured and revised through filing a petition.

Going back on the issues for determination and whether there is discrimination against the petitioner, the petitioner's case is that he qualified and ought to have been promoted by the respondent to the position of General Manager, Warehousing and Operations in May, 2010; to the position of acting Managing Director in August 2013; to the position of General Manager in the 2013 recruitment; and to have been appointed by the respondent to the position of acting Managing Director in May, 2018.

Discrimination against an employee and indeed any person is defined under the constitution, 2010 under article 27 and further replicated under section 5(3) of the Employment Act, 2007 as follows;

(3) No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee—

(a) on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status;

(b) in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.

In this regard, the Supreme Court in defining what is discrimination against a person in the case of **Law Society of Kenya v Attorney**

General & COTU Petition No.4 of 2019 held that discrimination is;

... a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available members of society

The Court of Appeal went ahead to define discrimination against an employee at the workplace in the case of **Barclays Bank of Kenya LTD & Another v Gladys Muthoni & 20 Others [2018] eKLR** and held that;

...discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions... whereby persons of one such description are subjected to ... restrictions to which persons of another description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description....

Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age; sex ... a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.

Discrimination therefore entails the unjust or prejudicial treatment of different categories of people in the same circumstances and in the present matter.

The petitioner applied for the general manager, Warehousing and Operations position in May, 2010. He underwent a competitive process and was not appointed.

Despite being the most senior officer, he was not appointed in an acting capacity in August, 2013. Further he expected to be promoted as acting managing director in August, 2013 but the respondent failed to do so.

The petitioner testified and submitted that recruitment for the various positions was competitive. The respondent was regulated under a human resource policy with regard to placement, promotions, acting appointments and confirmation for various positions. With such modalities, to claim there was discrimination against petitioner on the face of the definitions as set out above is far-fetched.

The existence of policy allow an employer to evenly apply it to all persons sat the shop floor. The advertisement of any vacancy allow for competitive recruitment. The outcome decision on the appointment of a given candidate may not satisfy all applicants, but the purpose of the recruitment process is to pick a candidate best suited for the job.

The petitioner brought in the element of the respondent being inclined to discriminate against him on ethnic lines. That there was history of discrimination based on conscience and ethnicity; corruption cartels within the respondent and agricultural sector. The ethnic considerations were that it became impossible for decades for someone from other ethnic extract to occupy the position of managing director at the respondent.

Whereas matters with regard to the alleged corruption cartels at the respondent entity should be referred to the appropriate authority and government agency to investigate, the aspect of discrimination against the petitioner on ethnic grounds and relevant to his case was left bare. Despite these assertions, the descriptions with regard to such allegation to bring out the unreasonable distinction he suffered due to his specific ethnicity as against other preferred ethnicities were not made.

The petitioner served under various managing directors for the period of 2010 to 2018;

- July, 2010 to August, 2013 Prof. Gideon Kirwa Miso;
- Cornel Kiprotich Ngelechey was appointed acting managing director;
- 2014 Newton Terer appointed managing director until 17th May, 2018 when he resigned; and
- Albin Ruto Sang was appointed acting managing director from the Ministry of Agriculture.

The linkage to these officers to the petitioner is not contradistinguished to bring out what the petitioner may have intended to address. Ethnic preference. This is not apparent to the court. He felt shy to give details. This should have been specifically gone into so as to address the core content of the ethnic application for the court to address whether there was discrimination against the petitioner or not.

The petitioner's case is that he was discriminated against by the respondent when it failed to appoint him as General Manager following a recruitment process. That he qualified and ought to have been promoted by the respondent to the position of General Manager, Warehousing and Operations in May, 2010; that he pending such appointment he ought to have been appointed to the position of acting Managing Director in August 2013; that he applied and was interviewed and passed for the position of General Manager in the 2013 and should have been appointed; and that he ought to have been appointed by the respondent to the position of acting Managing Director in May, 2018.

The petitioner admits in the petition that he was interviewed for 3 positions in following interviews conducted in May, 2010 and because he could not be taken in all of them, he received information that he had been recommended for appointment in the position of General Manager, Warehousing and Operations but was not appointed. That In June 2010, staff who had been suspended on suspicion of being involved in the maize scandal of 2009 and who included the then Managing Director, Prof. Gideon Kirwa Miso reported back on duty.

Effectively, the substantive office holder for the position the petitioner had applied for and which had been vacant resumed duty. Such position was no longer available to be filled. There was no discrimination as alleged.

The court finds no matter of discrimination against the petitioner.

On whether the petitioner should have been promoted The respondent is regulated under statute, the National Cereals and Produce Board Act. At the helm is the Board and under it is the Managing Director and who sits at the board as secretary.

The petitioner was employed by the respondent in the year 1992 under industrial attachment and moved through the ranks as Silo Manager, Area Regional Manager, head of Services Marketing, Head of Operations and Head of Monitoring and Evaluation. Each position held was accompanied by a letter of promotion, transfer, redeployment or re-designation.

All employment changes or changes in employment particulars should be in writing and in accordance with section 10 read together with section 13 of the Employment Act, 2007 which requires that;

(1) If, after the material date there is a change in any of the particulars required under sections 10 and 12, the employer shall give to the employee a written statement containing particulars of the change.

The petitioner was at all material times under written contracts/letters and with particulars. This is demonstrated by his letters dated;

- March, 1992 appointed as management trainee;
- August, 1992 acting Silo Manager;
- January, 1995 confirmed as silo manager;
- July, 1996 acting area manager;
- August, 1997 confirmed as area manager;
- September, 2000 services marketing manager;
- August, 2006 services marketing manager;
- June, 2008 manager services and marketing;
- November, 2014 marketing services manager; and
- August, 2016 marketing services manager.

All these appointments and re-deployment and re-designations are accompanied by a written letter, such is lawful and legitimate and in tandem with section 13 of the Employment Act, 2007.

Without any written letter appointing the petitioner as managing director or general manager to claim the salary due under such positions or that an acting position and allowances due be paid is without foundation. Each appointment of the petitioner over the ranks was processed and communicated in writing and the applicable salary paid. Salary bands cannot be asserted outside the same.

The claim for payment of damages with regard to the findings above is declined.

The petition raising claims going back to the year 2010 are largely time barred and should have been addressed within time as on the whole, the petition is found without justification and is hereby dismissed.

Before conclusion, the petitioner remotely addressed his case with regard to termination of employment and on the grounds that he was retired On 3rd August, 2020 on retirement following abolition of office. That upon enquiry to the Chair to the Board there were indication that there was merging of his roles with corporate planning function and a hint of redundancy without due process and a misapplication of the retirement age under the 50-year rule that applies to a staff making request for this to apply.

These are serious matters of law and ought to been addressed separately from the instant petition which was filed way before in the year 2018 and there was no amendment to the petition to accommodate such matters and or make the necessary remedy in that regard. This much shall suffice, save, the petitioner remains at liberty to move the court as appropriate.

Accordingly, petition herein is found without merit and is hereby dismissed with costs to the respondent.

Delivered in court at Nairobi this 10th day of June, 2021.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Okodoi

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