



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**PETITION NUMBER 45 OF 2018**

**IN THE MATTER OF: ARTICLES 2, 3, 10, 22, 23,**

**41, 47, 73, 74, AND 236 OF THE CONSTITUTION;**

**AND,**

**IN THE MATTER OF: BRAND KENYA BOARD ORDER 2008**

**[L.N. 38 OF 2008] AND THE EMPLOYMENT ACT, 2007;**

**AND,**

**IN THE MATTER OF: UNLAWFUL REMOVAL FROM THE OFFICE**

**OF THE CHIEF EXECUTIVE OFFICER, BRAND KENYA BOARD;**

**BETWEEN**

**MARY MUNYULI LUSEKA.....PETITIONER**

**VERSUS**

**BRAND KENYA BOARD.....RESPONDENT**

**AND**

**CABINET SECRETARY, MINISTRY OF INDUSTRY,**

**TRADE AND COOPERATIVES.....INTERESTED PARTY /RESPONDENT**

*Rika J*

*Court Assistant: Emmanuel Kiprono*

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*Muchoki Kang'ata Njenga & Company Advocates for the Petitioner.*

*Ojiambo & Company Advocates for the 1<sup>st</sup> Respondent.*

*No representation for the Interested Party / Respondent.*

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**JUDGMENT**

1. The Petitioner filed her Petition on 28<sup>th</sup> May 2018. She states that she was appointed as the Chief Executive Officer [CEO] of the Respondent State Corporation, on 3<sup>rd</sup> October 2016.

2. The Respondent was established as a State Corporation under the Brand Kenya Board Order, 2008, pursuant to the State Corporations Act, Cap 446 the Laws of Kenya. Its principal objectives included coordinating activities and initiatives for marketing Kenya. [The Court makes reference to the Respondent in past tense, because as shall be seen later in the Judgment, the Respondent is no longer in existence].

3. The Interested Party / Respondent is the Cabinet Secretary under whose Ministry the Respondent resided. It is not clear from the Petition, whether the Cabinet Secretary was intended to be an Interested Party or a Respondent in the Petition. The Court does not think that he or she, should be both, as characterized in the Petition. The record however indicates, nothing was filed by the Interested Party/ Respondent in reacting to the Petition.

4. The Petitioner's contract was for a period of 36 months, effective 3<sup>rd</sup> October 2016 to 2<sup>nd</sup> October 2019.

5. She did not see her contract through. Through a letter dated 15<sup>th</sup> May 2018, the Respondent terminated Petitioner's contract, citing clause 27 of the contract, in justifying its decision. The clause is worded as follows: -

*“The contract may be terminated by either party giving a three [3] months’ prior notice [sic], or on payment of an equivalent of three [3] months’ basic salary and house allowance only in lieu of such notice.”*

6. The letter of termination does not give other reasons beyond clause 27 of the contract, in justifying termination. However, the Answer to the Petition, Affidavits and Witness Statements filed by the Respondent, give numerous reasons in justifying termination.

7. Alleging that termination violated her rights under the specified Articles of the Constitution, the Fair Administrative Action Act, and the Employment Act, the Petitioner prays for Judgment against the Respondent in the following terms: -

a. A declaration that the decision by the Respondent Board, removing the Petitioner from the position of Chief Executive Officer, Brand Kenya Board, is unconstitutional and unlawful and thereby null and void *ab initio*.

b. An order directing the Respondents to forthwith reinstate and restore the Petitioner to the position of the Chief Executive Officer, Brand Kenya Board.

c. A declaration that the removal of the Petitioner from the position of Chief Executive Officer, Brand Kenya Board, constitutes unfair dismissal of an Employee from Public Service.

d. Damages being: -

I. Special damages being a sum equivalent to gross pay and gratuity for the remainder of the term of the contract.

II. Damages for unfair dismissal, equivalent of Petitioner's 12 months' gross salary.

III. General damages for breach of contract.

IV. General damages for contravention of the Petitioner's right to fair labour practices under Article 41 of the Constitution of Kenya.

V. General damages for contravention of her right not to be victimized in execution of her duties in the public service under Article 236 of the Constitution.

VI. Aggravated damages for malicious removal from office by the Respondent.

e. Costs of the Petition.

8. The Petitioner mainly relies on grounds listed in her 31- paragraph Petition, and 27-paragraph Supporting Affidavit, both filed on 28<sup>th</sup> May 2018. The grounds are restated in the Petition and the Supporting Affidavit, and may be compressed as hereunder: -

a. The Petitioner was appointed as CEO in an open and competitive process. The process was undertaken by the Board of Directors of the Respondent. Her duties included being responsible for day-to-day management of the operations of the Board and providing corporate leadership, linking the Board of Directors and the Management.

b. She discharged her mandate diligently. She led the Respondent to the position of First Runners-Up in the prestigious Fire Awards 2017; she mobilized resources for the Respondent to the tune of Kshs. 550,645,950 within a period of 6 months of joining the Respondent; oversaw the receipt of positive, unqualified reports from the Auditor- General for the Financial Year 2016-2017; facilitated the establishment of the Nation Branding Strategy; oversaw the Kenya Achievements Campaign and Make-It-Kenya Global Campaign; and won Global Award for the Make-It- Kenya-Global Campaign.

9. The Petitioner avers that her problems with the Respondent's Board of Directors, started sometime in 2017, when the Government assigned the Kenya Achievements Campaign, Kshs. 500 million. The allocation precipitated serious governance issues amongst the Board Members. The Board schemed to alter Government's approved utilization of the Kshs. 500 million fund. Among the proposals by the Board was to have the Campaign undertaken in partnership with Coca Cola Limited and its communication agency, Ogilvy & Mather Limited. Board Members had interest in these arrangements and were conflicted. The Petitioner resisted the re-channelling of the allocated funds. She was aware of a Circular issued by Head of Public Service, delineating the role of Boards of Directors of State Corporations and their Management. Boards were not to involve themselves, in procurement and matters relating to payment of suppliers. The Board Members consequently, maliciously plotted to have the Petitioner out of their way.

10. They unilaterally undertook Employee Satisfaction Survey, manipulating the process with the result that the Petitioner was cast as an incompetent CEO, who mistreated Employees under her. They used a 3<sup>rd</sup> Party, one Paul Njuguna to file a doomed Petition in the E&LRC, seeking orders declaring the Petitioner unfit to hold a Public Office. She was summoned by the Board to answer to fabricated complaints.

11. On 5<sup>th</sup> January 2018 and 8<sup>th</sup> January 2018, she was summoned by the Board. Heads of Department were invited and asked leading questions about the Petitioner. On 14<sup>th</sup> March 2018, she was issued a warning letter by the Board. The letter was back-dated to 19<sup>th</sup> January 2018. She was not allowed to respond to the allegations in the letter. On 18<sup>th</sup> April 2018, she was instructed by the Board to hand over to one Foice Mukabana, and proceed on leave. She did so. She had written to the Interested Party/ Respondent on 11<sup>th</sup> October 2017 and to the Head of Public Service on 27<sup>th</sup> April 2018 seeking their intervention, but her letters elicited no response.

12. Her contract was terminated by the Respondent on 15<sup>th</sup> May 2018.

13. She submits that the Board was not properly constituted at the time of her dismissal. It did not have a substantive Chair. She was denied the rights granted under the various Articles to the Constitution, particularly the right to fair labour practices under Article 41. The Respondent acted in violation of Sections 3, 4[a], 5 and 9[1] of the Public Service [ Values and Principles] Act, 2015, which call on all State Organs to observe values of Public Service including high standards of integrity in executing functions. The Respondent deprived the Petitioner of fair administrative action under Section 3[1][a][b] and [c] of the Fair Administrative Action Act, 2015. She was not given notice of the allegations against her. There was no letter to show cause. She was not heard, contrary to Article 50 of the Constitution, granting her fair hearing.

14. She submits that the Court must interrogate Sections 41 and 45 of the Employment Act, with Articles 10, 41 and 236 of the Constitution. Termination was in disregard of these laws. An Employer must state clear and valid reason or reasons justifying termination, and not prevaricate as between different reasons, as held in **Jadiah Mwarania v. Kenya Re-Insurance Corporation Kenya Limited [2018] e-KLR**. The Brand Kenya Board Order, 2008 at Section 3[2] [h] provided explicitly that Respondent's CEO is appointed by the Minister. Appointment was done by the Minister, vide Gazette Notice No. 8311 of 3<sup>rd</sup> October 2016. The Respondent's Board did not have any authority, power or legal basis to terminate the Petitioner's contract. Only the appointing authority could terminate the contract. Section 6 of the Order of 2008, allowed the Board to employ other staff, but Section 3[2] [h] reposed the power to appoint the CEO, in the Minister.

15. In **Fred A. Odhiambo v. Attorney-General & Another [2013] e-KLR**, the Court established that where express power is given to the Minister to appoint a person to a specific position, it is the Minister who reserves and retains the prerogative to terminate such a person's employment. The Court held that, Section 51 of the Interpretation and General Provisions Act, Cap 2 of the Laws of Kenya, provides that, *"whereby or under a written law power or duty is conferred or imposed upon a person to make an appointment or to constitute or establish a board, commission, or committee or similar body, then unless a contrary intention appears, that person shall also have the power or duty to remove, suspend, dismiss or revoke the appointment."* The Petitioner argues that the most the Respondent's Board could do, was to recommend termination of her contract to the Minister, not take the decision to terminate.

16. It is submitted for the Petitioner that the substantive Board Chair Dr. Chris Kirubi, resigned on 15<sup>th</sup> December 2017. There was no substantive Chair, as of the date of termination. The Board was not properly constituted and as held in the Court of Appeal decision, **Michael S. Kamau v. EACC & 4 others [2017] e-KLR**, decision made by an improperly constituted body is tainted with illegality, and cannot legally be sustained.

17. The Petitioner submits that her prayer for reinstatement is practical and available, the Court having given orders barring the Respondent from recruiting a new CEO. She submits that she is entitled to back-salaries and benefits from 15<sup>th</sup> May 2018. She submits, although this not one of her prayers in the Petition, that she is entitled to an order of injunction restraining the Respondent's Board, from interfering with her terms and conditions of employment. She submits that she is entitled to various forms of damages, which she has quantified in her submissions at astronomical figures, including coalesced general damages at Kshs. 162,687,600.

18. The Petitioner therefore urges the Court to grant her Petition.

19. She simultaneously with the Petition, filed an Application asking the Court to reinstate her pending the hearing of her Petition.

20. The Court gave the following *ex parte* orders on 29<sup>th</sup> May 2018: -

I. The Application is certified urgent and fixed for *inter parte* hearing on 5<sup>th</sup> June 2018.

II. Pending hearing *inter partes*, the Respondent by itself, or by its agents, is hereby precluded from advertising, recruiting or appointing any other person to the vacancy, flowing from the letter of termination.

III. Costs in the cause.

21. The orders were subsequently extended upon various mentions. There is nothing on record to show that *inter parte* hearing ever took place, and the *ex parte* orders confirmed. Parties have asked the Court to rule on the Application, contemporaneously with the Judgment, a rather unusual way of dispensing justice.
22. The Respondent relies mainly on the Replying Affidavit of its Director of Finance and Procurement, Geoffrey Shimanyula, in responding the Petition and the Application dated 26<sup>th</sup> May 2018. The Respondent also filed an Answer to the Petition, dated 22<sup>nd</sup> June 2018, which mirrors the Affidavit sworn by Shimanyula.
23. Shimanyula explains that the Respondent's Board Chair, resigned on 15<sup>th</sup> December 2017. His resignation did not affect the powers of the Board to take decisions, or invalidate any decision made by the Board.
24. The Petitioner first joined the Respondent in February 2016, being seconded from the Ministry, from the Tourism Board. She misrepresented on applying for the position of CEO, that she had an MBA at the time of appointment. It was realized later that she did not have the requisite minimum qualifications.
25. Under her contract, she was to report to the Board of Directors. Her duties were defined under contract, at clauses 3 and 23. The contract was executed pursuant to Government Policy contained in The Code of Governance of State Corporations, Mwongozo. Her performance was to be reviewed regularly by the Board.
26. Clause 27 of the contract allowed either Party to terminate the contract through a written notice of 3 months, or payment of 3 months' consolidated salary.
27. Following her appointment by the Board, her name was gazetted by the Minister confirming her appointment as the Accounting Officer, on 17<sup>th</sup> October 2016. It is not correct that she was hired by the Minister, or that the Board had no power to terminate her contract. She declined to respond to letters from the Board, in the mistaken belief that the Board had no powers to supervise and discipline her.
28. The Board terminated her contract on 15<sup>th</sup> May 2018, and gave requisite notice to the Ministry on 16<sup>th</sup> May 2018.
29. She was not diligent. She had a Draft Strategic Master Plan from a consultant for over years, but was unable to implement it.
30. Her tenure was marked with significant failures. She failed to renew staff medical cover; she failed to service vehicles; she failed to implement the situation room project, breaching a contract with a service provider, exposing the Respondent to litigation; she failed to renew group insurance cover; she failed to pay motor vehicle insurance; she failed to pay for cleaning services; she failed to pay partner hotels for their services rendered to the Respondent, leading to blacklisting of the Respondent by the hotels; she failed to provide for basic amenities; and was vulgar, hostile, profane and disrespectful to staff, instilling fear in them, and creating a hostile work environment.
31. The Respondent denies that the Petitioner could be credited with the First Runners-Up Fire Awards 2017. This Award was merited by the Financial Report for the year ended 30<sup>th</sup> June 2016. The Petitioner joined the Respondent in February 2016. She had no role in evaluation or preparation of the Reports. She did not mobilize allocation of Kshs. 550,645,950 million. The money was not sourced from donors. It was allocated by the Treasury. The Respondent had a history of clean Audit Reports and the Petitioner did nothing unusual, in securing a positive Report for 2015-2016 and 2016-2017 financial periods. There was no Nation Branding Strategy developed by the Petitioner. She did not achieve targets in the Kenya Achievements Campaign and the project was enveloped in procurement irregularities. Make-It-Kenya Global Campaign was arranged by the Ministry in 2013-2014, long before the Petitioner arrived at the scene.
32. Her accusations against the Board were a red herring, intended to mislead the Court that the Board interfered with procurement. In total disregard of the Public Procurement and Asset Disposal Act 2015, the Petitioner formulated tender skewed to favour one candidate. She awarded tender to the highest bidder at Kshs. 10,488,720, overlooking lower bids. She went on to vary the awarded tender to Kshs. 83,511,120 from Kshs. 10,488,720. This was an irregularity captured by the Internal Auditor and the Audit Committee.
33. The Chair of the Board was compelled to write to the Respondent on 3<sup>rd</sup> October 2017, stopping the fraudulent payments to safeguard public funds. The proposal to rope in Coca Cola and its agent Ogilvy & Mather was intended to market Kenya through the Coca Cola network throughout the world, at no cost. The Board Members did not execute any plan to have the Petitioner's contract terminated. She helped in preparation of Staff Satisfaction Work Plan. The Board did not act unilaterally. She was subject of many staff complaints. Her attitude to staff was deplorable and indecorous. There were oral and written complaints. Shimanyula exhibited some of the written complaints in his Affidavit, marked 'GS-11.' There were staff complaints filed with the Ministry as well as the Office of the Ombudsman – 'GS-12.' The behaviour of the Petitioner resulted in staff resignations, shown in resignation letters – 'GS-13.'
34. The Petitioner was asked by the Respondent to respond to findings of Staff Satisfaction Survey, in a letter dated 3<sup>rd</sup> October 2017. She did not respond. She believed she was only answerable to the Cabinet Secretary. She was given 90 days by the Board on 19<sup>th</sup> January 2018 to improve. She was issued letter of warning on 14<sup>th</sup> March 2018 and chose not to respond. She was contemptuous of the Board. The Respondent hired 7 Heads of Department in November 2017. By May 2018, Corporation Secretary Frida Mbugua, Branding Manager Angela Wachira and Media and Publicity Manager Maureen Mambo, had all resigned. The Board was able to persuade Mambo to return, after the Petitioner's contract was terminated.
35. The Respondent came to the conclusion that the Petitioner was a disruptive influence at its head. She had been given 3 months to get her act together on 19<sup>th</sup> January 2018. She was given hearings on 5<sup>th</sup> January 2018, 8<sup>th</sup> January 2018, 19<sup>th</sup> January 2018, 18<sup>th</sup> April 2018 and 2<sup>nd</sup> May 2018. The minutes are exhibit 'GS-16.' Her contract was terminated in the interest of the Respondent Corporation.

36. The Board did not instigate the Petition against the Petitioner filed by Citizen Patrick Njuguna, seeking declaration that the Petitioner was unsuitable to hold Public Office. The Board engaged a Lawyer to defend the Petitioner in the said Petition.
37. While she responded to complaints against her made to the Ministry and the Ombudsman, she did not respond to the Board. She did not believe that the Board had any power over her, even in light of her Contract and the Mwongozo Policy.
38. Shimanyula states that Mwongozo, repealed paragraph 3[2][h] of the Order of 2008, with the power to appoint the CEO placed in the hands of the Board, not the Minister.
39. The Respondent submits the prayers for conservatory orders has been overtaken by events, the Respondent having appointed Foice Mukabana as the acting Chief Executive Officer. The orders were not grantable, reinstatement being a substantive remedy, as held in **Industrial Court Cause No. 620 of 2013, Alfred Nyungu Kimungui v. Bomas of Kenya**.
40. The Petitioner's contract was terminated under clause 27 lawfully, and she was paid terminal dues under the contract.
41. In considering the order of reinstatement, the Court must examine practicability of the remedy. The Court looks at the potential for re-imposition of the employment relationship. Practicability cannot be construed as being simply possible, irrespective of consequences, as held in **New Zealand Educational Institute v. Board of Trustees of Auckland Normal Intermediate School [1994] 2 ERNZ 414 [CA]**. Reinstatement would not be practicable remedy considering the Petitioner's relationship with Respondent's Employees.
42. She does not merit reinstatement. She was incompatible. An Employer is justified in getting rid of incompatible Employees as held in **Cause Number 119 [N] OF 2009, Transport and Allied Workers Union v. Swissport Kenya Limited / Airside**. The Respondent cites **Maurice Ouma Omollo v. Gothic Investments Limited e-KLR, [2014]** where it was held that orders of specific performance should not issue, except in very rare circumstances.
43. In **Anne Kinyua v. Nyayo Tea Zone Development Corporation & 3 others [2012] e-KLR**, it was held that the Office of CEO, previously held by Kinyua was now held by an acting CEO who was delivering, and there was no reason to warrant reinstatement of Kinyua. The Respondent submits it would harm public interest to order reinstatement of the Petitioner herein.
44. The Petitioner was granted all procedural and substantive rights under the Fair Administrative Action Act, the Employment Act, and the relevant Constitutional Articles cited by the Petitioner.
45. She has not established the prayer for general damages. She has not shown entitlement to special damages as required on authority of the Court of Appeal, in **Bangue Indosuez v. DJ Lowe & Company Limited [2006] 2 KLR 208**.
46. It is conceded that the Petitioner's contract had a clause for payment of gratuity. However, gratuity was only payable on successful completion of the contract, which the Petitioner did not achieve. It was not payable if the Petitioner was separated from the Respondent through misconduct.
47. It is worth noting that on 19<sup>th</sup> February 2020, the Respondent filed an Application, seeking to have its Pleadings amended, to change the name of the Respondent to Kenya Export Promotion and Branding Agency [Brand.KE]. Based on the Affidavit of Corporation Secretary, Kenya Export Promotion Branding Agency [ Brand. KE], Frida Mbugua sworn on 18<sup>th</sup> February 2020, the Respondent explained that **by Legal Notice Number 110 of 9<sup>th</sup> September 2019, Brand Kenya Board Order, 2008**, was revoked, with all assets and liabilities of the Respondent transferred and vested in the Kenya Export Promotion and Branding Agency [ Brand. KE].
48. Accessible public legal information, corroborates that there was a merger between Export Promotion Council and Brand Kenya Board, through Legal Notice Number 110 of 2019. A new State Corporation, Kenya Export Promotion and Branding Agency [KEPROBA] was put in place.
49. The Court found in a Ruling dated 28<sup>th</sup> July 2020 that proposed amendment would serve no purpose, and disallowed the Application.
50. The Application and the facts upon which it was founded however, have significance in determining the Petition, as shall be explained in the findings of the Court below.
51. Parties agreed that the Petition is determined on the strength of the record. Judgment was reserved for 23<sup>rd</sup> November 2021, but has been prepared earlier and is ready for delivery, on the date indicated at the close of this Judgment.
52. **The first issue for consideration of the Court, is whether the Petitioner was an Employee of the Respondent's Board of Directors or the Cabinet Secretary, and whether the Board or the Cabinet Secretary, had the mandate to terminate her contract. The other issues, as suggested by the Parties in their Submissions can be summarized as follows: whether conservatory orders should have been confirmed; whether the Petitioner's contract was terminated lawfully and fairly; whether the Petitioner was subjected to constitutional and statutory deprivations; and lastly whether the Petitioner is entitled to the pleaded remedies.**

**The Court Finds: -**

**Whose Employee?**

53. The Petitioner first joined the Respondent, Brand Kenya Board State Corporation, in February 2016 from the parent Ministry.

54. She was appointed Respondent's CEO on 3<sup>rd</sup> October 2016 by the Cabinet Secretary Ministry of Industry, Trade and Cooperatives.
55. She executed a contract of employment between her and the Board of Directors of Brand Kenya Board. The contract is dated 4<sup>th</sup> November 2016, signed by the Petitioner on 5<sup>th</sup> November 2016.
56. Termination of the Petitioner's contract was done by the Board of Directors, through a letter dated 15<sup>th</sup> May 2018, signed by acting Chair Geoffrey Shimanyula.
57. The Petitioner argues it was unlawful for the Board of Directors to terminate her contract, because it did not in the first place, employ her. Only the Cabinet Secretary, who appointed her could terminate her contract.
58. In *Fred A. Odhiambo v. Attorney-General* [citation above], the Court, relying on Section 51 of the Interpretation and General Provisions Act, Cap 2 the Laws of Kenya, held that where the law gives power to the Cabinet Secretary to appoint an Officer to a specific position, it is the prerogative of the Cabinet Secretary to terminate that Officer's contract.
59. Caution must be exercised however, in reading and applying the above decision and provision of the law. There is an exception in the law. It states that the Cabinet Secretary is vested with the power to appoint and consequently power to terminate an Officer's contract, unless contrary intention appears.
60. Section 3 [2] [h] of the constitutive Brand Kenya Board Order, 2008, stated that the Board shall consist among others, a: -

*‘‘ Chief Executive Officer, appointed by the Minister. ’’*

61. The responsible Cabinet Secretary issued a letter of appointment to the Petitioner dated 3<sup>rd</sup> October 2016, and Gazette Notice No. 8311 of the same date, pursuant to the powers vested in him, under the Order of 2008.
62. The contract executed by the Petitioner, was however issued by the Board of Directors. The contract defined the Petitioner's terms and conditions of employment.
63. Section 6 of the Order of 2008, allowed the Board to employ such number of Staff, on such terms and conditions of service, as the Board deemed fit. The Petitioner argues that the term 'Staff' in this instance, was restrictive, and did not include the CEO, because Section 3 [2] [h] of the Order, spoke to the appointment of the CEO by the Cabinet Secretary.
64. The State Corporations Act, Cap 446 the Laws of Kenya, under which the Order of 2008 was made, defines the term 'Chief Executive Officer' to mean a person appointed and employed as such under Section 5[3], or a person for the time being exercising the executive powers of a State Corporation. The use of the words 'appointed' and 'employed' appear to suggest to the Court that the appointing authority, need not be the Employer.
65. Section 5 [3] of the State Corporations Act, mirrors Section 6 of the Order of 2008. The Provision is however specific, that Staff include the Chief Executive Officer. It is worded as follows: -

*‘‘ A State Corporation may engage and employ such number of Staff including the Chief Executive, on such terms and conditions of service as the Minister may, in consultation with the Committee, approve. ’’*

State Corporations act through their Board of Directors, not the Cabinet Secretaries responsible for the Parent Ministries. The understanding of the Court of reference to a State Corporation under Section 5[3] of the State Corporations Act above, means, State Corporations acting through their Boards of Directors.

66. Mwongozo, The Code of Conduct for State Corporations, which is an acclaimed governance instrument in running State Corporations, founded on the principles of public service governance enunciated in the Constitution of Kenya, restates the provisions of the State Corporations Act on employment of the CEO. Mwongozo is however, not a law, capable of repealing any subsidiary legislation as the Respondent submits. It remains a good policy document, akin to the Industrial Relations Charter. It is reduced to an Executive Order. It is not a law, capable of repealing existing legislation.

67. Clause 1 [k] of Mwongozo, on Role and Functions of the Board, states: -

*‘‘ Hire the CEO on such terms and conditions of service as may be approved by the relevant Government Organ[s] and approve appointment of Senior Management Staff. ’’*

68. There is clause 1.18 in Mwongozo on the specific subject of appointment of the CEO. It reads that the Board should: -

*‘‘ appoint and remove the CEO... ’’*

69. There is sufficient evidence to conclude that the Board is intended to employ and remove CEOs of State Corporations. There are express provisions of the law and clauses in Mwongozo, to this effect.

70. The Order of 2008 which vested the power of appointment in the Cabinet Secretary, cannot in the view of the Court, have intended that the Cabinet Secretary retains the power to terminate the contract of the CEO. The Cabinet Secretary was not the Employer. The Court thinks there are clear reasons to conclude that the Board, not the Cabinet Secretary, employed the Petitioner. The Board not the Cabinet Secretary was vested with the power to terminate her contract. It issued the Petitioner her contract of employment.

71. The role of the Cabinet Secretary under Section 4 of the State Corporations Act is described as "Ministerial responsibility." This responsibility is assigned by the President. It does not include employment and removal of State Corporation CEOs. Ministerial responsibility would include consultation with the State Corporations Advisory Committee on staff levels and approval of terms and conditions of service in the relevant State Corporations. The Parent Ministry is represented in the Boards of Directors of the State Corporations by the Principal Secretary. In employing, or terminating the contract, of the CEO, the Parent Ministry is not excluded. It is part of the Board of Directors.

72. The Petitioner was an Employee of the Board of Directors, who terminated her contract.

### **Conservatory Orders.**

73. The Parties should have exhausted the Application for conservatory measures, before going into the merits of the Petition. What they are asking the Court to determine, with regard to those measures is moot. The measures were intended to conserve the subject matter until the Petition was heard and determined.

74. Once the Parties agreed that the Petition is determined based on their Affidavits, Documents, Pleadings and Submissions, they should have agreed to have the interim orders barring the filling of the CEO's position confirmed, pending determination of the Petition. It is meaningless to ask the Court to rule on the Application simultaneously with delivering the Judgment on the Petition.

75. The record indicates that interim orders were last extended on 11<sup>th</sup> July 2018 before Hon. Justice Byram Ongaya. In subsequent proceedings including those before Hon. Justice Hellen Wasilwa, the Court has not seen orders for extension of interim orders.

76. The interim orders cannot have remained in force without extension.

77. It is noted that the Brand Kenya Board merged with another State Corporation, Export Promotion Council on 9<sup>th</sup> August 2019 vide Legal Notice Number 110. There was a new State Corporation birthed, Kenya Export Promotion and Branding Agency [KEPROBA]. There were no orders directed at KEPROBA, barring it from appointing its own CEO.

78. The most appropriate conclusion on the application for conservatory measures is that it ought to have been prosecuted before the Petition was prosecuted. Secondly it would be meaningless to issue orders against an entity which was no longer in existence. Thirdly the interim orders were not extended from 11<sup>th</sup> July 2018. The Court shall treat the application as having been overtaken by events and therefore spent.

### **Fair, lawful termination, under the Contract and the Law?**

79. There were multiple allegations against the Petitioner made by the Board of Directors. There were counter-accusations by the Petitioner against the Board. While the CEO and the Board of State Corporations are intended to pull in the same direction in stewardship of the Corporation, the Petitioner and the Respondent's Board constantly pulled apart for most of the time the Petitioner was at the helm.

80. The Respondent did not, as stated elsewhere in this Judgment, give any specific reason or reasons justifying termination, as required under Section 43 and 45 of the Employment Act.

81. It does not serve any purpose in examining the fairness and legality of termination, to delve into issues which were not given in the letter of termination, as the reasons justifying the decision. The Respondent failed in reducing its accusations against the Petitioner to specific charges disclosing employment offences. It could not in the end say in the termination letter, that the Petitioner's contract was terminated for particular reason or reasons. An Employer must be focused in stating the reason or reasons justifying an Employee's termination of employment. Accusations must be targeted, and be shown to fall within known employment offences or other statutory or contractual breaches as held in *Jadiah M. Mwarania v. Kenya Reinsurance Corporation Limited [2018] e-KLR*. The Court has no obligation to examine the validity of helter-skelter accusations made by an Employer against an Employee.

82. The Respondent only cited clause 27 of the contract of employment in justifying termination. The clause allowed Parties to terminate the contract on notice. It did not however shield the Respondent from giving reason or reasons, for its decision under Sections 43 and 45, and from observing the standards of fairness under Section 41 and 45, of the Employment Act. At-will employment doctrine, advanced by the Respondent, is no longer accepted in Kenyan employment law. To uphold that all the Respondent needed to show, was that there was a clause on termination by notice in the contract, and that the Respondent acted under that clause, would be an endorsement of a doctrine that was discarded in the mists of antiquity, through the enactment of the Employment Act, 2007.

83. The Petitioner received various letters on different dates asking her to explain certain allegations. These were however never reduced to a letter to show cause, or specific charges, tested through a disciplinary hearing, leading to the letter of termination. The Board meetings to which the Petitioner was occasionally summoned to, were not structured as disciplinary proceedings. Accusations against the Petitioner were at large.

84. It was just allegations upon allegations from the Board.

85. There is no evidence that these allegations were brought to the attention of the investigatory agencies of State Corporations established under the State Corporations Act, such as the Inspector- General of State Corporations.

86. There is no Report exhibited before the Court from the Auditor-General, establishing the correctness of the allegations about misuse of public resources made by the Board against the CEO. There are no Reports from the EACC or the Public Investments Committee, implicating the Petitioner in the potpourri of financial irregularities laid against her by the Respondent.

87. The allegations about the Petitioner's mistreatment of Employees, like other allegations were not reduced into specific charges and established at a disciplinary platform. There is no report from the Ministry or the Ombudsman, who were said to have received the staff complaints against the Petitioner, concluding that accusations on staff mistreatment had been substantiated. They in the end, remained grave, but un-established allegations.

88. The Respondent went as far as questioning the Petitioner's minimum qualifications, well past the midpoint in her contractual term.

89. There was a warning issued by the Respondent on 14<sup>th</sup> March 2014. Warnings are disciplinary sanctions. A month later, on 18<sup>th</sup> April 2014, the Petitioner was placed on administrative leave and asked to hand over her docket to Floice Mukabana. The Respondent did not show what precipitated the decision to send the Petitioner home. What misconduct took place between the date of the warning and the date she was asked to hand over to Mukabana, and go home?

90. Part of the reason there was bad blood between the Petitioner and the Board of Directors, is that the Board encroached on the CEO's and Management's role, by engaging in day to day management of the affairs of the Respondent. It was not the role of the Board to involve in procurement of goods and services. It was not for the Board to propose that Coca Cola Limited undertakes branding services, even if for free. The role of procurement of goods and services was a preserve of the CEO and her Management.

91. There was a Circular dated 30<sup>th</sup> June 2014 by the Head of Public Service restating the law, advising that procurement and disposal of goods and services, is vested in the Management. The Officers involved in procurement are personally liable for any decisions made, which are in contravention of the law.

92. There is evidence on record that the Board of Directors went beyond their mandate in orienting the Petitioner in her discharge of the CEO's role. Dr. Kirubi acted like an Executive Chair. In law he was a Non-Executive Chair, without operational responsibilities. This encroachment led the Petitioner to push back, creating the impression that she did not recognize the role of the Board of Directors. She made her own accusations against the Board for having vested interest in procurement, accusations which are not shown to have been sufficiently discounted.

93. Ultimately, it was for the Respondent to show valid reason or reasons justifying termination. This was not shown. Procedure did not conform to the minimum statutory standards of fairness under Sections 41 and 43 of the Employment Act.

94. The Court does not take issue with the composition of the Board of Directors at the time relevant decisions were made by the Board. Activities of Boards of Directors of State Corporations do not come to a standstill, simply because the substantive Chair is unavailable. Dr. Chris Kirubi the Chair, resigned but at subsequent meetings, there was a Chair nominated by other Directors for discharge of business. This is evinced in different minutes of the Board meetings.

95. The decision in *Michael S. Kamau v. EACC & 4 Others [2017] e-KLR* does not establish that in the absence of the substantive Chair to the Board of a State Corporation, the Board becomes immobilized. The decision involved a Constitutional Commission. It was about a mandatory constitutional requirement for a certain number of Commissioners to be in office, for the particular Commission to be deemed as properly constituted, to enable it make legitimate decisions. The Petitioner has not shown that there is any provision in the State Corporations Act, which renders Boards of State Corporations improperly constituted and dysfunctional, in the absence of a substantive Chair. The Board would only have been hampered in taking decisions against the Petitioner, if it did not have the required quorum, including an acting Chair. The Petitioner does not question the numbers, but submits that there was no substantive Chair. There need not have been a substantive Chair. There was a Chair nominated by the other Directors at every turn, in the meetings of the Board leading to termination of the Petitioner's contract.

96. There is merit in Respondent's proposition, at paragraph 3 of the Answer to the Petition, that this is a dispute that can be resolved, without resort to the Constitution. The main remedies sought include reinstatement and various damages which can be extended to the Petitioner, under the Employment Act and the Employment and Labour Relations Court Act. The Petitioner was not a Constitutional Office-Holder. She held an Office created and regulated under an Act of Parliament. If remedies are available, for the various breaches alleged to have taken place against the Petitioner, under Acts of Parliament, and under her contract, why disturb the Constitution of Kenya?

### **Remedies**

97. The Court is satisfied that termination of the Petitioner's contract was not based on valid reason, or reasons. It did not meet the minimum statutory standards of fairness. It was not in accordance with Sections 41, 43, 45 and 47[5] of the Employment Act. ***It is declared that termination was unfair.***

98. Prayer [b] directing the Respondent to reinstate the Petitioner to the position of Chief Executive Officer, Brand Kenya Board, is not practicable, reasonable or legal.

99. Brand Kenya Board ceased to be a State Corporation. It was succeeded by KEPROBA, a merger of 2 State Corporations which took place on 9<sup>th</sup> August 2019. KEPROBA probably has its own CEO today. Where is the Petitioner to be reinstated?

100. Section 12 [3] [viii] of the Employment & Labour Relations Court Act, Cap 234 B, the Laws of Kenya does not allow the Court to grant orders of reinstatement, beyond 3 years from the date of dismissal or termination. The Petitioner's contract was terminated on 15<sup>th</sup> May

2018. 3 years lapsed in May 2021.

101. The Petitioner's contract was a limited term contract. It commenced on 3<sup>rd</sup> October 2016, and was to expire on 2<sup>nd</sup> October 2019. The Parties intended, that the Petitioner would serve for 36 months, ending 2<sup>nd</sup> October 2019. An order of reinstatement would result in extending the date the contract was intended to expire. CEOs of State Corporations hold renewable terms of 3 years. Renewal can only be done once. Reinstatement, while the first term would have expired on 2<sup>nd</sup> October 2019, would result in changing the date when the contract was set to expire, and run contrary to the intention of the law on term limits. It would result in limiting the opportunity for other suitable Kenyans, in stewarding the relevant State Corporation.

102. For these reasons, the prayer for reinstatement is declined.

103. Clause 14 of the contract availed to the Petitioner 31% of her annual basic salary as gratuity. Gratuity was payable upon successful completion of the contract term, and would not be paid if the Petitioner was dismissed for gross misconduct.

104. The Petitioner left employment on allegations which the Court has concluded, were not substantiated by the Respondent through a disciplinary hearing. Termination was on 15<sup>th</sup> May 2018. The contract was to expire on 2<sup>nd</sup> October 2019. There was about 17 months to the end of the contract. The Petitioner cannot be blamed for not successfully completing her contractual term. The Respondent terminated her contract without valid reason or reasons. It is also noted that the Respondent ceased to exist as a State Corporation, on a date prior to 2<sup>nd</sup> October 2019.

105. In the circumstances, there would be no good reason not to grant the prayer for gratuity, based on a period of 19 months completed in service. The Petitioner earned a basic monthly salary of Kshs. 360,000, or annual basic salary of Kshs. 4,320,000. Gratuity over a period of 36 months would be 31% of Kshs. 4,320,000 = Kshs. 1,339,200. The period of 19 months would earn the Petitioner gratuity of Kshs. 706,800. ***She is allowed the prayer for gratuity at Kshs. 706, 800.***

106. The Petitioner has not demonstrated the prayers for salary for the remainder of her contract; general damages for breach of contract; general damages for breach of right to fair labour practices; general damages for contraventions of her right not to be victimised; and aggravated damages for malicious removal from Office. As observed above, the Petitioner has not established the prayers made on Submissions for grant of coalesced damages, exaggeratedly submitted at over Kshs. 120 million. The Court of Appeal in ***Elizabeth Wakanyi Kibe v. Telkom Kenya Limited [2014] e-KLR***, held that employment remedies must be proportionate to the economic injury sustained by the Employee, and are not aimed at unjust enrichment.

107. She has established the remedy of compensatory damages under Section 49 of the Employment Act and Section 12 of the Employment and Labour Relations Court Act. It has been taken into account that that the Petitioner was on a limited term contract, which was 17 months to the date of its expiry, at the time it was unfairly and prematurely terminated by the Respondent. The contract had a clause on termination by notice. The contract was renewable, but it is noted that the Respondent was merged with another State Corporation, rendering the renewal of the Petitioner's contract impracticable. She is not shown to have contributed to the circumstances leading to termination. No reasons were given to her in the letter of termination, why her contract was terminated. The primary remedy of reinstatement which is her preference, was placed beyond her by various legal and factual factors, explained by the Court in the Judgment. She merits full compensation equivalent of her 12 months' gross salary, for unfair termination.

108. Her gross monthly salary on termination was Kshs. 520,000. ***She is granted equivalent of 12 months' gross salary at Kshs. 6,240,000 in compensation for unfair termination.***

109. ***No order on the costs.***

**IN SUM IT IS ORDERED: -**

***a. It is declared that termination of the Petitioner's contract was unfair.***

***b. The Respondent shall pay to the Petitioner: gratuity at Kshs. 706,800; and equivalent of 12 months' salary in compensation for unfair termination at Kshs. 6,240,000 – total Kshs. 7,130,000.***

***c. No order on the costs.***

**DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY AT NAIROBI, UNDER MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 2ND DAY OF NOVEMBER 2021.**

**JAMES RIKA**

**JUDGE**