



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET**

**PETITION NO 13 OF 2019**

**JANET NDUKU .....PETITIONER**

**VERSUS**

**THE BOARD OF AUTHORITY**

**KERIO VALLEY DEVELOPMENT AUTHORITY.....RESPONDENTS**

**RULING**

1. By a Notice of Motion dated 30<sup>th</sup> October, 2019, the Petitioner sought orders among others that pending hearing and determination of the petition herein the Court grants a stay order staying the on-going recruitment exercise for the position of the Managing Director of Kerio Vally Development Authority as stated in the press advertisement and on KVDA's website by the Board.

2. The application was premised on the grounds among others that the legislation establishing the respondent provided under section 9 that the appointment of the respondent's Managing Director was vested on the Minister. The petitioner further stated that she has been following keenly graft related cases in Kenya and more particularly the involvement of KVDA in the Arror and Kimwarer Dam scandals as aired in local media stations and online print media.

3. The respondent's Board had placed an advertisement to recruit and fill in the position of the MD. On contract terms with a suitable competent and passionate professional. According to the petitioner the position of the MD was very crucial in the KVDA and any recruitment to replace the outgone MD should be in line with the law as the position is key in running and management of KVDA as a state authority.

4. According to the petitioner, the advertisement for the recruitment of the MD was illegal, null and void as the respondent's Board was not mandated under the KVDA Act to recruit to fill the position of the MD on contract terms. The Petitioner further contended that the advertisement contravened the PSC code of regulations which requires that such advertisement be placed for at least 21 days before the deadline of the application.

5. On 19<sup>th</sup> November a claim being ELRC cause member 54 of 2019 was filed over the same issue but by a different Claimant but against the respondent. The Court directed the Claimant in cause number 54 of 2019 becomes an interested party in the current application and petition and further that the Claimant files submissions in respect of the present application.

6. In opposing the Motion, the respondent filed a replying affidavit through one Sammy Naporos and Dr. Margaret Mwakima. Mr. Naporos in his affidavit deponed on the main that: -

(i) THAT I am the Acting Managing Director of the Respondent. I am also the Secretary to the Board of the Respondent. I have personal knowledge of the matter the subject matter of these proceedings. I am duly authorized by the Respondents Board of Directors to sear this affidavit on behalf of the Respondent. I am thus competent to swear this affidavit.

(ii) THAT Kerio Valley Development Authority is a statutory entry established in 1979 as a Regional Development Authority. It is also a State Corporation under the state Department for Regional and Northern Corridor Development in the Ministry of East African Community and Regional Development.

(iii) THAT subsequent to the termination of the Respondent's immediate former Managing Director's contract of employment, the Respondent's Board commenced the process of recruiting a replacement in accordance with Section 5(3) of the State Corporations Act.

(iv) THAT to this end, I sought and obtained , by a letter dated 15<sup>th</sup> October, 2019 , the authority of the Principal Secretary, state Development of Regional and Northern Corridor Development, Ministry of East African Community & Regional Development to advertise the vacancy in the office of the Respondents Managing Director and the Respondent's Board intention to recruit a Managing Director directly in the Daily Nation of 16<sup>th</sup> October, 2019.

(v) THAT the Respondent, pursuant to the said authority, placed directly an advertisement on the **16<sup>th</sup> October,2019** in the Daily Nation Newspaper.

(vi) THAT the advertisement of the 16<sup>th</sup> of October, provided that applications pursuant to the advertisement were to be received on or before the 6<sup>th</sup> of November,2019. The period between the placing of the advertisement and the closing date for the applications was 22 days which period was in accordance with the Public Service Commission Code of Regulations (Human Resource Policies and Procedures Manual for Public Service) which requires that advertisement be placed for at least 21 days before the deadline. The allegations that the advertisement notifying those interested that the Respondent was recruiting a Managing Director was not in compliance with Public Service Commission Code of Regulations (Human Resource Policies and Procedures Manual for Public Service) is untrue.

(vii) THAT THE Respondent further publicized the fact that it was recruiting a Managing Director by placing an advertisement in the MyGov Supplement in the Standard Newspaper of 24<sup>th</sup> October2019. This advertisement was placed in good faith by the Respondent as the authority produced above as Annexure SN1 allowed the Respondent to place the advertisement notifying those interested that it was recruiting a Managing Director directly in the Daily Nation Newspaper of 16<sup>th</sup> October,2019. The effective advertisement is therefore that of 16<sup>th</sup> of October 2019.

(viii) THAT upon completion of the recruitment process, the Respondent will identify three (3) most suitable candidate's and forward their names, curriculum vitae and other relevant supporting documents to the Cabinet Secretary, Ministry of East African Community and Regional Development who shall, after due consideration, appoint one of them as the Managing Director of the Respondent in accordance with **Section 9(1) of the Kerio Valley Development Authority Act**.

(ix) THAT the allegation by the petitioner that the wording of the said advertisements contravenes Section 9(1) of the Kerio Valley Development Authority Act is untrue. I am advised by the Respondent's Advocate on record, which advise I verily believe to be true, that the function reserved for the Cabinet Secretary, Ministry of East African Community and Regional Development by Section 9(1) of the **Kerio Valley Development Authority Act** is the appointment of the Respondent of the Respondents Managing Director. I am further advised by the Respondents Advocate on record, which advise I verily believe to be true, that recruitment and appointment are separate and distinct functions.

(x) THAT the Respondent, aware of the aforesaid Section 9(1) of the **Kerio Valley Development Authority Act**, has not at any time arrogated to itself the function of the Cabinet Secretary, Ministry of East African Community and Regional Development to appoint the Managing Director as depicted by the Petitioner. I affirm that at no time has the Respondent purported to appoint its Managing Director and the recruitment of a Managing Director is well within the Respondents ability.

7. DR Mwakima on the other hand deponed in the main as follows: -

(i) THAT I am the Principal Secretary, Ministry of East African Community & Regional Development. I have personal knowledge of the matter that is the subject of this Petition by virtue of being the Principal Secretary, Ministry of East African Community & Regional Development. I am therefore competent to swear this affidavit.

(ii) THAT Kerio Valley Development Authority is a State Corporation under the State Department for Regional and Northern Corridor Development in the Ministry of East African Community and Regional Development.

(iii) THAT the Respondent is in the process of recruiting a competent professional to fill the position of Managing Director in accordance with the provisions of the **Section 5(3) of the State Corporations Act**.

(iv) THAT upon completion of the recruitment process, the Respondent will identify three (3) most suitable candidate's and forward their names, curriculum vitae and other relevant supporting documents to the Cabinet Secretary, Ministry of East African Community and Regional Development who shall, after due consideration, appoint one of them as the Managing Director of the Respondent in accordance with **Section 9(1) of the Kerio Valley Development Authority Act**.

(v) THAT the appointment of the Managing Director of the Respondent is the exclusive preserve of the Cabinet Secretary, Ministry of East African Community and Regional Development. This function has at no time been delegated or exercised by the Respondent as is purported by the Petitioner.

(vi) THAT I confirm that once the names of the suitable candidates are forwarded by the Respondent to the Cabinet Secretary of East African Community and Regional development, the Cabinet Secretary shall consider the same and appoint one of them as the substantive Managing Director of the Respondent. In accordance with **Section 9(1) of the Kerio valley Development Authority Act**.

8. In the submissions in support of the application the petitioner principally submitted that the advertisement for recruitment of the MD of KVDA was illegal, null and void as the respondent's Board was not mandated under KVDA Act to recruit to fill the position of the MD.

9. Concerning the advertisement Mr. Ayieko submitted that it contravened the Public Service Code of regulations (Human Resource Policies

and Procedures Manual, 2016) which required that such advertisement be placed for at least 21 days before the deadline of the application.

10. According to Counsel the advertisement was placed on 16<sup>th</sup> October, 2019 requiring that application be submitted by 6<sup>th</sup> November, 2019. This provided only fifteen working days. The counsel submitted this was done in haste in clear bid to lock out deserving Kenyans from applying for that key position.

11. On the question of the mandate of the respondent to appoint the MD Counsel submitted that under section 9 the appointed of the MD was vested only on the Cabinet Secretary. The advertisement for the recruitment of the MD by the respondent was therefore illegal, null and void.

12. The interested party in his submissions in respect of the Notice of Motion dated 30<sup>th</sup> October, 2019 took the unprecedented step of punching holes on the Motion when the Court thought he would support the same. According to the interested party he had an identifiable stake in the matter having been the immediate holder of the office of the MD. His Counsel Mr. Kigamwa submitted that the petitioner's application had failed to establish a prima facie case for grant of conservatory orders. The petition according to Counsel lacked details of particulars and specific breaches of the Constitutional provisions. He further submitted that the Court had no power to issue a temporary prohibition as the relief arises as a consequence of a final determination of the matter.

13. On advertisement in the Daily Nation, Counsel disagree that the period was less than 21 day he however faulted the advertisement for failing to disclose the proposed remuneration with respect to the Motion dated 21<sup>st</sup> November, 2019 filed together with cause No 54 of 2019 Counsel submitted that the Interested party (the Claimant) had demonstrated a prima facie case with probability of success. According to Counsel, the Claimant's termination was carried out without according him a chance to show cause why he should not be dismissed. This was in breaching article 41 of the Constitution and Section 41 of the Employment Act further, the respondent made the decision to terminate the Claimant's employment notwithstanding that the Board meeting held on 15<sup>th</sup> December, 2017 made a decision to recommend the extension of the Claimant's contract to Cabinet Secretary after taking into account the Claimant's performance and law.

14. Counsel further submitted that the Claimant's contract was a fixed term contract which was set to lapse on 4<sup>th</sup> May, 2021, the Claimant had reasonable expectation of continuing to work for the respondent up to the lapse of his contract. The Claimant thus sought reinstatement as there was no likelihood that at his age he would get employment on similar terms. He further contended that his reinstatement would not bring to an end at the interlocutory stage, the claim.

15. Mr. Nyamodi for the respondent submitted that conservatory orders were discretionary in nature and are granted on the basis of evidence availed by the applicant and sound legal principles. Conservatory orders should therefore be granted on the interest merit of a case bearing in mind the public interest the constitutional values and the proportionate magnitudes and priority levels attributable to the relevant cases.

16. Regarding the power of the respondent to recruit, counsel submitted that PSC code of Regulations, 2016 rule B4 provided that ministries /state departments will advertise all vacant posts in a manner that reaches the widest pool of potential applicants and allow for at least twenty-one days before closing the advert. According to counsel the advertisement notifying those interested that the respondent was recruiting a MD was in compliance with the PSC code of regulation, 2016.

17. Further the respondent had demonstrated that the approval by the PS State Department for Regional and North Corridor Development pursuant to which the advertisement was placed was in compliance with rule B4 above.

18. Counsel further submitted that one of the powers of state corporations is the engagement and employment of its staff including the MDs and CEO. This was provided for under Section 5(3) of the State Corporations Act. According to Mr. Nyamodi, although the respondent had power to engage and employ its staff including the MD, the power to appoint the said MD was reserved for the CS by section 9(1) of the KVDA Act. Counsel submitted that the respondent demonstrated that the function evidenced by the advertisement of 16<sup>th</sup> October, 2019 was the recruitment of the respondent's MD which was done by section 5 of the State Corporations Act and not appointment which was to be exercised by the CS. According to Counsel recruitment was the process of assessing the suitability of a candidate for a position. It typically entailed advertisement, receipt of applications, shortlisting interviewing and background checks. Appointment on the other hand was the action taken once a suitable candidate is identified. The act entails the offering of a position to a potential employee who becomes one once the offer is accepted.

19. Regarding the orders sought, Mr. Nyamodi submitted that for the Court to grant the relief sought, there must exist a competent constitutional petition. According to Counsel there was no competent constitutional petition before the Court since the reading of the petition reveals no constitutional controversy between the parties. The petition did not reveal any constitutional right which the petitioner sought to enforce.

20. Concerning the interested party (Claimant) Counsel submitted that his contract for a period of three years with effect from 23<sup>rd</sup> April, 2018 was irregular as the concurrence of the Head of Public Service on the extension of the Claimant's contract was not obtained.

21. Before this Court were two interlocutory applications one filed concurrently with the petition and dated 30<sup>th</sup> October, 2019 and another filed with statement of claim in cause number 54 of 2019 and dated the same day. The two applications essentially seek conservatory orders and or injunction restraining the respondent from proceeding with the process and eventual recruitment and appointment of the respondent's Managing Director. The petitioner described herself as a Kenyan citizen and that she had been following keenly on graft related cases in Kenya and more particularly the involvement of KVDA in the Aror and Kimwarer Dam scandals as aired out in local media stations and online print. According to the petitioner the position of the respondent's MD was very crucial and any recruitment to replace the outgoing MD should be in line with the law as the position was key in the running of and management of the respondent as a state authority.

22. The petitioner's complaint was that the respondent's Board lacked the mandate under the KVDA Act to recruit and fill the position of the Managing Director. The petitioner further complained that the advertisement contravened the PSC code of regulations (Human Resource Policies and Procedures) manual for public service, 2016 which requires that such an advertisement be placed for at least 21 days before the deadline of the application. As a consequence, the petitioner sought in the ultimate an order staying the purported recruitment and an order prohibiting the respondent from proceeding to give effect to the recruitment of the MD.
23. In the Motion dated 30<sup>th</sup> October, 2019 the Claimant/ applicant stated that he was summarily dismissed from respondent's employment on 30<sup>th</sup> May, 2019 without prior notification that the respondent was considering terminating his employment and that he was never given a chance to show cause why he should not be dismissed. The Claimant further complained that the respondent's Board made a decision to terminate the Claimant's employment notwithstanding that the Board in its meeting held on 15<sup>th</sup> December, 2017 made a decision to recommend the extension of the claimant's contract to the CS after taking in account the Claimant's performance and the law.
24. Further by a letter dated 18<sup>th</sup> April, 2018 the CS Devolution appointed the Claimant as the respondent's MD for a period of three years effective 23<sup>rd</sup> April, 2018.
25. As a consequence, the Claimant sought in the application an order restraining the respondent from shortlisting, interviewing or recruiting for the position of the respondent's MD pending the hearing and determination of the claim.
26. The respondent on its part has contended that it had demonstrated that the Claimant was appointed and served as the MD for two consecutive terms of three years each and was therefore ineligible to serve again for a third term as per the Code of Governance for State Corporations (Mwongozo). The respondent had further demonstrated that the renewal of the interested party's contract for a period of three years with effect from 23<sup>rd</sup> April, 2018 was irregular as the concurrence of the Head of Public Service on the extension of the Claimant's contract was not obtained.
27. The two applications are interlocutory applications and in considering whether to grant the orders sought the Court will in addition to the principles set out the often-cited case of Giela v Cassman Brown, take into account the principles governing issuance of conservatory orders.
28. The Supreme Court in the Peter Munya's case [2014] eKLR relied on by the respondent has observed that:
- “Conservatory orders are not linked to private party issues. Such as the prospects of irreparable harm occurring during the pendency of the case or high probability of success. Conservatory orders should be granted on the inherent merit of the case bearing in mind the public interest, the constitutional values and the proportionate magnitude and priority levels attributable to the relevant causes.
29. To this extent the court will do a casual analysis of the case as presented either in the petition or statement of claim. With regard to the petition the Court was able to pick only two issues of complaint. First was that the respondents Board lacked the mandate under the KVDA Act to recruit and fill the position of the MD and second was that the advertisement contravened the PSC code of regulations.
30. In the Court's view these two complaints arose from the petitioners understanding of the KVDA Act and the PSC -Manual issued pursuant to the PSC Act. These statutes can adequately address the petitioner's complaint without resort to the Constitution. The often – cited Anarita Karimi Njeri's case is clear on what constitutes a constitutional question. A party must precisely identify the constitutional provision violated and in what manner it has been violated. The Court has carefully reviewed and considered the petition and is of the view that devoid of substantive amendment, the same discloses no constitutional questions for the Court to decide and which would warrant the issuance of conservatory orders pending its hearing and determination.
31. Concerning the Motion by the Claimant in cause No 54 of 2019, the Claimant has in the statement contested the termination of his employment saying the same was done without notice and that he was never heard before the decision to terminate his contract was made. The Claimant has consequently sought an order of reinstatement and in the alternative some Kshs. 46 million as compensation and terminal benefits. In the meantime, the Claimant in the application has sought an order for reinstatement pending hearing and determination of the claim and further an order preventing recruitment of the respondent's MD pending hearing and determination of the claim. The respondent though is yet to file a response to the claim, has averred in the replying affidavits in opposition to the application that the Claimant's appointment through the letter dated 18<sup>th</sup> April, 2018 was irregular since the Claimant had served two contracts of three years each as per Mwongozo Code hence was ineligible for further appointment and further that the concurrence of the Head of Public Service was never obtained before the appointment was made. These are two hotly contested positions and the correct position can only be decided after full trial and hearing of evidence.
32. Interlocutory order for reinstatement is an exceptional order and may only be made in plain and obvious cases where any reasonable person and the Court can clearly see that no reasonable employer in its right mindset could bring to an end the employment contract in the manner it was done. The termination must border on outright illegality and plain unreasonableness which no person in their right mind could reasonably think of. A reinstatement order is usually more appropriate to consider at the conclusion of a full trial on merit and after taking into account the parameters set out under section 49(4) of the Employment Act.
33. From the foregoing analysis the application as presented does not present an exceptional case for interlocutory reinstatement.
34. Concerning the order preventing the recruitment of the respondent's MD, the Court takes judicial notice that the respondent is a public body run on public funds hence there is greater public interest in the smooth and continued running of its operations.
35. An order interdicting recruitment of the respondent's MD would therefore be serving the Claimant's private interest more than the public interest in having the affairs of the respondent continue as the Claimant pursues his private interest through the Court process.

36. In Conclusion the two applications are found unmerited and are hereby disallowed.

37. Costs in the cause.

38. It is so ordered.

Dated at Eldoret this 30th day of January 2020

**Abuodha Jorum Nelson**

**Judge**

Delivered this 30th day of January 2020

**Abuodha Jorum Nelson**

**Judge**

**In the presence of:-**

.....for the Claimant and

.....for the Respondent.

**Abuodha J. N.**

**Judge**