



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**PETITION NO. 5 OF 2020**

**IN THE MATTER OF ARTICLES 1, 2, 3(1), 4(2), 10, 19, 20, 21, 22, 23, 24, 27, 41(1), 47, 48, 50(1), 129, 153(4)(a), 156, 159, 165, 232, 234, 258 AND 259 OF THE CONSTITUTION**

**IN THE MATTER OF THE ALLEGED VIOLATION OF ARTICLES 3(1), 10, 19, 20(1), 27, 41(1), 47, 73, 129, 153(4)(a), 232, 259(1) OF THE CONSTITUTION**

**IN THE MATTER OF THE ALLEGED VIOLATION OF SECTIONS 11, 12 AND 31 OF THE PUBLIC SERVICE COMMISSION ACT 2012; SECTIONS 4, 5(2)(c) & (h) AND 10(1) OF THE PUBLIC SERVICE (VALUES AND PRINCIPLES) ACT NO. 1A OF 2015 AND SECTION 4(1) OF THE FAIR ADMINISTRATIVE ACTION ACT 2015**

**IN THE MATTER OF THE ALLEGED VIOLATION OF SECTIONS 6(1)(e) AND 6C OF THE KENYA INFORMATION AND COMMUNICATIONS ACT, NO. 2 OF 1998**

**IN THE MATTER OF THE ALLEGED VIOLATION OF PARAGRAPHS D5 AND E17 OF ANNEXURE 1 TO MWONGOZO (THE CODE OF GOVERNANCE FOR STATE CORPORATIONS)**

**IN THE MATTER OF THE CONSTITUTIONAL AND LEGAL VALIDITY OF THE PURPORTED REAPPOINTMENT BY THE CABINET SECRETARY FOR INFORMATION, COMMUNICATIONS AND TECHNOLOGY OF PATRICIA KIMAMA, LEVI OBONYO AND KENTICE TIKOLO TO THE BOARD OF THE COMMUNICATIONS AUTHORITY OF KENYA**

**BETWEEN**

**OKIYA OMTATAH OKOITL.....PETITIONER**

**VERSUS**

**CABINET SECRETARY FOR INFORMATION,**

**COMMUNICATIONS AND TECHNOLOGY....1<sup>st</sup> RESPONDENT**

**PUBLIC SERVICE COMMISSION.....2<sup>nd</sup> RESPONDENT**

**STATE CORPORATIONS ADVISORY**

**COMMITTEE.....3<sup>rd</sup> RESPONDENT**

**HONOURABLE ATTORNEY GENERAL.....4<sup>th</sup> RESPONDENT**

**AND**

**PATRICIA KIMAMA.....1<sup>st</sup> INTERESTED PARTY**

**LEVI OBONYO.....2<sup>nd</sup> INTERESTED PARTY**

**KENTICE TIKOLO.....3<sup>rd</sup> INTERESTED PARTY**

**COMMUNICATIONS AUTHORITY**

**OF KENYA.....4<sup>th</sup> INTERESTED PARTY**

**CONSUMERS FEDERATION OF**

**KENYA.....5<sup>th</sup> INTERESTED PARTY**

**KATIBA INSTITUTE.....6<sup>th</sup> INTERESTED PARTY**

**JUDGMENT**

1. On 29 April 2016, through Gazette Notice No. 3152, the Cabinet Secretary for Information, Communications and Technology (Cabinet Secretary) appointed some 7 named persons as independent members of the Board of the Communications Authority of Kenya.
2. The independent Board members included Patricia Kimama, Levi Obonyo and Kentice Tikolo (the Interested Parties).
3. The 7 independent Board members were to serve for 3 years which means that the tenure ended on or about 28 April 2019.
4. On 18 July 2019, the Cabinet Secretary, vide Gazette Notice No. 6657 of 19 July 2019 reconstituted the Board of the Communications Authority by appointing Mahmoud Mohamed Noor, Paul Muraguri, Jackson Kiprotich Kemboi and Laura Chite as members of the Board to replace the independent members whose terms had lapsed (under the law appointments are staggered to ensure continuity).
5. The appointment of the 4 persons named in the preceding paragraph was challenged by the Petitioner and this Court (differently constituted) quashed the Gazette Notice and nullified the appointments through a judgment delivered in *Okiya Omtatah Okoiti & Ar v Cabinet Secretary for Information, Communications and Technology & 2 Ors; Mahmoud Mohamed Noor (1st Interested Party) & 9 Ors* (2019) eKLR.
6. Upon the quashing of the Gazette Notice and nullification of the appointment of the 4 persons, the Cabinet Secretary published Gazette Notice No. 57 of 6 January 2020 re-appointing the Interested Parties as independent Board members of the Communications Authority of Kenya.
7. On 10 January 2020, the public-spirited and indefatigable Okiya Omtatah Okoiti (Petitioner) moved the Court against the Cabinet Secretary, the Public Service Commission, the State Corporations Advisory Committee and the Attorney General (Respondents) contending that the re-appointment(s) of the Interested Parties violated several Constitutional provisions and were therefore invalid, null and void *ab initio*.
8. Filed together with the Petition was an application under a certificate of urgency seeking orders suspending the re-appointment of the Interested Parties as members of the Board of the Communications Authority of Kenya.
9. When the application was placed before the Duty Court on 13 January 2020, it issued interim orders suspending Gazette Notice No. 57 of 6 January 2020 pending *inter partes* hearing.
10. Meanwhile, on 21 January 2020, one Francis Wamukota Wangusi filed an application to be enjoined as the 7<sup>th</sup> Interested Party in the proceedings (on 13 February 2020, the Court declined to allow the application for the joinder of Francis Wangusi as an Interested Party).
11. The Respondents filed a replying affidavit sworn by Jerome Ochieng, Principal Secretary in the Ministry of Information, Communications and Technology in opposition to the application and Petition on 28 January 2020 while Ngene Gituku, Chairperson of the Board of the Communications Authority of Kenya filed a replying affidavit on behalf of the 1<sup>st</sup> to 4<sup>th</sup> Interested Parties on 24 January 2020.
12. When the application came up for *inter-partes* hearing on 29 January 2020, the Respondents and Interested Parties did not object to the extension of the interim orders to facilitate the expedited determination of the Petition.
13. The Court extended the orders and also gave directions on the filing and exchange of further affidavits and submissions and directed that judgment would be delivered on 27 March 2020.
14. The Judgment could not be delivered on the scheduled date due to the declaration of a public health emergency and the delay is regretted.
15. The Petitioner filed a further supplementary affidavit and submissions on 20 February 2020 while the Respondents filed their submissions on 27 February 2020.
16. The Interested Parties submissions (even extended) were not on file by the agreed and set timelines.
17. The Petitioner identified 9 Issues, to wit:
  - (i) Whether the Petition qualifies as public interest litigation?

- (ii) Whether the Petitioner has the standing to institute these proceedings?
- (iii) Whether the Employment and Labour Relations Court has jurisdiction in these proceedings?
- (iv) Whether the law prohibits the re-appointment of former employees?
- (v) Whether the vacancies on the CA Board should be advertised
- (vi) Whether the 1<sup>st</sup> Respondent's impugned re-appointment of former directors violated the Petitioner's legitimate expectations under the law?
- (vii) Whether the High Court's voiding of the amendments made to section 6 of the KICA invalidated the purported re-appointments?
- (viii) Whether the orders prayed for should be granted?
- (ix) Whether costs are payable?

18. The Respondents on their part identified only 2 Issues for determination, namely

- (i) Whether the purported re-appointments of the 1<sup>st</sup> to 3<sup>rd</sup> Interested Parties to the Communications Authority of Kenya Board is unconstitutional and therefore null and void ab initio?
- (ii) Whether the Petitioner is entitled to the orders sought?

19. The Court will adopt the Issues as summarised by the Respondents on the understanding that they did not to consider the other issues raised by the Petitioner as contentious or requiring the Court's adjudication.

#### **Constitutionality/legality of the re-appointment of the Interested Parties**

20. In challenging the re-appointment of the Interested Parties, the Petitioner at the outset asserted that a re-appointment denoted and was a *continuation in a particular job*, in terms of section 6C of the Kenya Information and Communication Act as read with the Mwongozo Code of Governance.

21. According to the Petitioner, the Interested Parties had long ceased being members of the Board at the purported time of their re-appointment (terms had expired some 8 months or so earlier) and, therefore, they were not incumbents in office and could not be re-appointed, after the expiry of their terms.

22. In the view of the Petitioner, upon the expiry of the Interested Parties terms, vacancies automatically arose and therefore re-appointment could not be lawfully made unless in terms of section 37(1) of the Public Service Commission Act, 2017.

23. The section provides

Where a vacancy in a public office is to be filled, the Commission or authorised officer shall invite applications by advertising the vacancy in the Commissions website, at least one daily newspaper of nationwide coverage, the radio and other modes of communication, so as to reach as wide a population of potential applicants as possible.

24. The only way the Interested Parties could get back into their positions as directors, if there was no extension of tenure before expiry, it was urged, was through a fresh recruitment process, as they had ceased being directors upon expiry of their terms.

25. A re-appointment, the Petitioner asserted in ordinary English as understood within the definition in *Cambridge English Dictionary* usage meant the extension of an existing mandate.

26. Further, the Petitioner contended that a re-appointment required and could only be made after a positive assessment/recommendation from the Communication Authority of Kenya, during the incumbency of the Interested Parties.

27. The Petitioner made the further contention that section 6 of the Kenya Information and Communications Act, upon which the Cabinet Secretary had relied to re-appoint the Interested Parties had been invalidated on 30 January 2020, and therefore recourse had to be taken to the process envisaged under the repealed section 6B of the Act which provided for a Selection Panel.

28. To buttress the point, the Petitioner took the stance that once the term of the Directors expired on 28 April 2019, the Cabinet Secretary had no other avenue but to advertise the vacancies to facilitate transparent, competitive, inclusive and merit-based recruitment as demanded by the national values and principles of governance, equality before the law, fair labour practices, fair administrative action, requirements of leadership and integrity in public office and the values and principles of public service.

29. On the same lines, the Petitioner submitted that since the Cabinet Secretary had relied on amendments made to the provisions of section 6 of the Kenya Information and Communications Act through the Statute Law (Miscellaneous Amendment) Act No. 18 of 2018) which had been voided by the High Court in *Okiya Omtatah Okoiti & 4 Ors v the Honourable Attorney General & 5 Ors & 4 Interested Parties* (2020) eKLR to re-appoint the Interested Parties, the only recourse available to the Cabinet Secretary was to use a Selection Panel to appoint independent members of the Board of the Communications Authority of Kenya.

30. In re-appointing the Interested Parties, the Petitioner submitted, the Cabinet Secretary was acting beyond the powers donated to him and thus *ultra vires*.

31. The decision of the Cabinet Secretary, the argument was presented, breached the right to fair administrative action as it was unreasonable as set out in Article 47 of the Constitution. The decision, it was posited was irregular.

32. By acting outside the lawful confines of the mandate given to him, the Petitioner was of the view that the Cabinet Secretary had violated his legitimate expectation under the law.

33. In respect of the 2<sup>nd</sup> Interested Party, the Petitioner asserted that he had already served two terms and was not eligible for renewal or further appointment to serve as a Board member.

34. The Respondents strongly defended the decision of the Cabinet Secretary.

35. On their behalf, it was contended that a reappointment to public office and in particular of the Interested Parties did not require competitive or fresh recruitment and that the Cabinet Secretary had considered the evaluation report carried out by the Communication Authority of Kenya.

36. Citing *Peter Muigai v Cabinet Secretary for Industrialisation and Enterprise Development & 4 Ors* (2016) eKLR, *R v Cabinet Secretary for Education, Science & Technology & 3 Ors* (2014) eKLR and *Wilfrida Itondolo & 4 Ors v President & 7 Ors* (2015) eKLR, the Respondents submitted that a re-appointment did not require a fresh competitive recruitment process.

37. According to the Respondents, the re-appointment of the Interested Parties several months after vacating office was in line with the requirement to stagger the appointment so that expiry dates fall at different times as envisaged under section 1(2) of the first schedule of the Kenya Information and Communications Act and Chapter 1 section 1.14 of the Mwongozo Code of Governance.

38. The quoted part of the first schedule of the Kenya Information and Communications Act provides

#### 1. Tenure of Office

(1) The Chairman or a member of the Board other than an ex-officio member shall, subject to the provisions of this Schedule, hold office for a period not exceeding four years, on such terms and conditions as may be specified in the instrument of appointment but shall be eligible for reappointment for one more term of a period not exceeding four years.

(2) The members of the Board shall be appointed at different times so that the respective expiry dates of their terms of office shall fall at different times.

39. The Respondents also submitted that pursuant to the provisions of Chapter 1 Section 1.5 of the Mwongozo Code of Governance, a Board member was eligible to serve a cumulative term not exceeding 6 years or 2 terms of three years each and that the provision gave an option to re-appoint even after the expiry of the term, or vacation of office.

40. The aforesaid provision provides that the tenure of a Board member shall not exceed a cumulative term of six years or two terms of three years each.

41. The re-appointments of the Interested Parties, the Respondents contended were well within the law.

42. On behalf of the Interested Parties, evidence was filed to demonstrate that evaluations of their (individual) performances had been carried out (there were some challenges) and that they were fit and proper to be re-appointed and therefore there was nothing unlawful in the decision of the Cabinet Secretary.

#### **Evaluation**

43. Before delving into the legality of the re-appointment of the 3 Interested Parties, the Court will address the question raised by the Petitioner that the 2<sup>nd</sup> Interested Party had already served 2 terms of 3 years each as a director of the Communications Authority of Kenya.

44. Although making the allegation, the Petitioner did not provide to the Court any evidence in the form of a Gazette Notice of appointment(s) or any other instrument, contractual or legal to confirm the assertion.

45. The Court will, therefore, dismiss the allegation as not backed with evidence or law.

46. On the issue of competitive recruitment, in line with the emerging jurisprudence, the parties agreed that there is no need to put the

person(s) on the re-appointment list to a further rigorous process of fresh recruitment.

47. The next question the Court will address is whether the re-appointment of the Interested Parties after the expiry of their terms, which was on or around 28 April 2019 can pass constitutional and legal muster.

48. None of the parties suggested or argued that the power to re-appoint a director of the Communications Authority of Kenya under the applicable statutory framework is time-bound.

49. The Petitioner's case was that a re-appointment must be made before the expiry of the term while the director was still an incumbent. He sought to firm up by the argument by referring to the dictionary meaning of *reappointment: the act or process of deciding officially that someone should continue in a particular job.*

50. In the view of the Petitioner, it was not possible to re-appoint a person to a vacant office, an office he had already vacated.

51. It is not unheard of for a Court to look at dictionary definitions when interpreting and applying the law, where there are ambiguities or uncertainty.

52. However, in the view of this Court, such recourse should only be made after examining the applicable statutory provision in place. If the language of the provision is plain and unambiguous, the Court should not import or read into it meanings which would be contrary to it. The construction adopted by the Court should carry out the legislative intention.

53. In this jurisdiction, one of the primary laws which serve to aid the Courts in the interpretation and application of statutes is the Interpretation and General Provisions Act.

54. For purposes of the instant dispute, the Court finds two sections relevant. These are sections 51 and 58 of the Act.

55. Section 51 of the Act provides thus

51 (1) Where by or under a written law a power or duty is conferred or imposed upon a person to make an appointment or to constitute or establish a board, commission, committee or similar body, then, unless a contrary intention appears, the person having that power or duty shall also have the power to remove, suspend, dismiss or revoke the appointment of, and to reappoint or reinstate, a person appointed in the exercise of the power or duty, or to revoke the appointment, constitution or establishment of, or dissolve, a board, commission, committee or similar body appointed, constituted or established, in exercise of the power or duty, and to reappoint, reconstitute or re-establish it.

(2) Where the power or duty of a person under this section is exercisable only upon the recommendation, or is subject to the approval or consent, of another person, then the power shall, unless a contrary intention appears, be exercisable only upon that recommendation or subject to that approval or consent.

56. The Court's understanding of the provision is that unless there is an express statutory requirement otherwise, the Cabinet Secretary had the authority to re-appoint the Interested Parties.

57. The other challenge, and which must have precipitated the Petition herein is that there were no express timelines for the re-appointments of the independent Board members of the Communications Authority of Kenya.

58. Section 58 of the Interpretation and General Provisions Act appears to have the answer to the question of timelines. It provides

Where no time is prescribed or allowed within which anything shall be done, such thing shall be done without unreasonable delay, and as often as due occasion arises.

59. The Kenya Information and Communications Act has not set out any timelines within which a re-appointment should be made by the Cabinet Secretary.

60. By dint of section 58 aforesaid, the Cabinet Secretary was under an obligation to act without unreasonable delay.

61. In the instant case, the explanation given by the Respondents for the delay of re-appointment of the Interested Parties was that there was a regulatory basis for staggering the appointments of the members of the Board of the Communication Authority of Kenya to ensure continuity of operations.

62. The explanation, anchored on the first schedule of the Kenya Information and Communications Act was not shown by the Petitioner as an unreasonable explanation.

63. In the view of the Court, a consideration of the statutory framework leaves no other option than to conclude that the language of the law and intention of the legislature must triumph over the dictionary meaning of the term, re-appointment.

64. The Cabinet Secretary did not act outside his mandate or so unreasonably that his decision should be quashed.

## **Conclusion and Orders**

65. The Petitioner sought in the main a declaration that the reappointment of the Interested Parties was unconstitutional, invalid and therefore null and void *ab initio* and an order quashing Gazette Notice No. 57 of 6 January 2020.

66. From the foregoing, the Court finds the Petition without merit and it is dismissed.

67. The Petition was public interest litigation and the Court orders that each party bears their own costs.

**Dated, signed and delivered through video/email in Nairobi on this 8<sup>th</sup> day of May 2020.**

**Radido Stephen**

**Judge**

**Appearances**

Petitioner in person

For Respondents Ms. Christine Oyugi, Senior Litigation Counsel, Office of the Attorney General

For 1<sup>st</sup> – 4<sup>th</sup> Interested Parties Igeria & Ngugi, Advocates

For 5<sup>th</sup> Interested Party Kurauka & Co. Advocates

Court Assistant Judy Maina