



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO. 70 OF 2019

(Before Hon. Lady Justice Maureen Onyango)

PAUL KIPSANG KOSGEL.....PETITIONER

VERSUS

NATIONAL INDUSTRIAL TRAINING AUTHORITY.....1<sup>ST</sup> RESPONDENT

KAMAU GACHIGI.....2<sup>ND</sup> RESPONDENT

AND

CABINET SECRETARY, MINISTRY OF LABOUR

AND SOCIAL SERVICES.....INTERESTED PARTY

CORRIGENDA RULING

On 7<sup>th</sup> August 2020, I delivered judgment in this suit in which I made a determination with regards to costs in the last paragraph as follows –

*“In view of the fact that the 2<sup>nd</sup> Interested Party was the author of the circumstances herein, he will personally bear the costs of this petition.”*

The correct position should be the 2<sup>nd</sup> Respondent and not the 2<sup>nd</sup> Interested Party. The mistake is hereby corrected and the said paragraph is deleted from the record and replaced with the following paragraph –

**“In view of the fact that the 2<sup>nd</sup> Respondent (Kamau Gachigi) was the author of the circumstances herein, he will personally bear the costs of this petition.”**

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 1<sup>ST</sup> DAY OF SEPTEMBER 2020

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**PETITION NO. 70 OF 2019**

*(Before Hon. Lady Justice Maureen Onyango)*

**IN THE MATTER OF: ARTICLES 2, 3, 10, 19, 20, 21, 22, 23, 41, 47, 50, 159, 162(2), 165(5)(b), 232, 236, 258 AND 260 OF THE CONSTITUTION OF KENYA 2010;**

**AND**

**IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 10, 27, 28, 32, 33, 35, 41, 47, 48, 50, 232 AND 236 OF THE CONSTITUTION OF KENYA, 2010;**

**AND**

**IN THE MATTER OF: THE ENFORCEMENT OF THE CONSTITUTION OF KENYA, 2010;**

**AND**

**IN THE MATTER OF: SECTIONS 5, 6, 7, 8 AND 10 OF THE EMPLOYMENT ACT 2007;**

**AND**

**IN THE MATTER OF: SECTIONS 5, 6, 7, 8, 9 AND 10 OF PUBLIC SERVICE (VALUES AND PRINCIPLES) ACT NO. 1A**

**OF 2015;**

**AND**

**IN THE MATTER OF: SECTIONS 8, 9, 10, 11 AND 15 OF THE LEADERSHIP AND INTEGRITY ACT CAP 182 OF 2012;**

**AND**

**IN THE MATTER OF: SECTIONS 4, 6, 7, 8, 9 AND 11 OF THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015**

**AND**

**IN THE MATTER OF: THE INDUSTRIAL TRAINING ACT CAP 237**

**AND**

**IN THE MATTER OF: RULES 4, 10, 11, 22, 23 AND 24 OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013;**

***BETWEEN***

**PAUL KIPSANG KOSGEL..... PETITIONER**

**VERSUS**

**NATIONAL INDUSTRIAL TRAINING AUTHORITY..... 1<sup>ST</sup> RESPONDENT**

**KAMAU GACHIGI..... 2<sup>ND</sup> RESPONDENT**

**AND**

**CABINET SECRETARY, MINISTRY OF LABOUR**

**AND SOCIAL SERVICES.....INTERESTED PARTY**

**JUDGMENT**

The petitioner herein was appointed to the position of Director General of the respondent The National Industrial Training Authority, a state corporation established under Section 3 of the Industrial Training Act by Gazette Notice No. 4891. The appointment was for a term of 5 years commencing 14<sup>th</sup> April 2014.

Paragraph 6 of the Petitioner's contract provided for renewal thereof as follows –

**“6. RENEWAL OF APPOINTMENT**

*Should you wish to be reappointed in the same position, you will be required to make a written request at least six (6) months before the expiry date of this contract.”*

In compliance with the said terms of contract and with a circular dated 23<sup>rd</sup> November 2010 issued by the Permanent Secretary, Secretary to Cabinet and Head of Public Service prescribing the procedure for renewal of contracts for Chief Executive Officers of state corporations, the petitioner by letter dated 12<sup>th</sup> October 2018, wrote to the Chairman of the 1<sup>st</sup> respondent who is the 2<sup>nd</sup> respondent herein, applying for the renewal of his contract as Director General of the 1<sup>st</sup> respondent.

At its 63<sup>rd</sup> Board meeting held on 19<sup>th</sup> March 2019, the 1<sup>st</sup> respondent's Board by a resolution resolved to renew the appointment of the petitioner for a second term of 5 years.

By a letter dated 25<sup>th</sup> March 2019, the Chairman of the 1<sup>st</sup> respondent, the 2<sup>nd</sup> respondent herein wrote to the Interested Party seeking concurrence with the resolution of the Board to renew the appointment of the petitioner for a second term of 5 years.

In an unexpected twist, the 2<sup>nd</sup> respondent wrote to the petitioner a letter dated 10<sup>th</sup> April 2020 informing him that the Interested Party, the Cabinet Secretary, had instructed that certain audit reports, among them a systems audit performed by the Treasury on the 1<sup>st</sup> respondent, be tabled to the Board of the 1<sup>st</sup> respondent for consideration before a final decision is made by the Board. The letter advised the petitioner that his term was expiring on the same date, the 10<sup>th</sup> April 2019, and that the 2<sup>nd</sup> respondent would be asking the Interested Party to appoint an Acting Director General whose term would commence the next day, the 11<sup>th</sup> April 2019.

The petitioner protested by his letter of 12<sup>th</sup> April 2019 in which he pointed out that the Board had already decided on his reappointment and the turn of events was a violation of his rights to fair labour practice under Article 41 of the Constitution of Kenya. Further, that the systems audit report from the National Treasury was circulated to Board members while the two other audits referred to had not been submitted and that it was unfair, speculative and unjust, to make decisions on the basis of non-existent reports. The Petitioner further pointed out that his term was not expiring on 10<sup>th</sup> April, but on 13<sup>th</sup> April 2019, so that by 11<sup>th</sup> April 2019 when it was intended to appoint an acting Director General his term would not have lapsed.

The 2<sup>nd</sup> respondent went ahead and appointed an Acting Director General, one Stephen Ogenga, on 15<sup>th</sup> April 2019.

Aggrieved by the turn of events, the Petitioner filed the petition herein dated 18<sup>th</sup> April 2019 which he amended on 26<sup>th</sup> April 2019.

In the amended petition, the petitioner prays for the following reliefs –

- a) A declaration that the Respondents' actions in rescinding and declining to renew the petitioner's contract as chief executive officer of the National Industrial Training Authority for no reasonable cause or at all and as recommended by the Board of Directors on 19<sup>th</sup> March 2019 is unfair, unlawful and constitutes breach of the petitioner's constitutional rights to fair labour practices and fair administrative action;
- b) An order compelling the respondent to renew the petitioner's term for a further term of Five years as provided for under section 4C(3) National Industrial Training Authority and other enabling provisions of law; or
- c) Alternatively, and without prejudice to prayer (b) above, an order that the petitioner's contract of service was constructively renewed for five years with effect from 18<sup>th</sup> October 2012;
- d) An order restraining the 1<sup>st</sup> Respondent its servants, officials, representatives, and/or agents from appointing any person to act in the office of the chief executive officer of the National Industrial Training Authority.
- e) A permanent Order staying the proceedings and resolutions made by the Respondent during its Special Meeting held on 18<sup>th</sup> April 2019 declining and rescinding the applicant's contract renewal.
- f) A permanent Order prohibiting/restraining the Respondents, their servants, officials, representatives, and/or agents from

advertising or having so advertised, from acting thereupon, interviewing, recruiting or otherwise in any other manner replacing the Applicant in his position as the Director General of the 1<sup>st</sup> Respondent.

- g) General damages for the constitutional violations of the Petitioner's fundamental rights.
- h) The Court do issue any other Orders and give such directions as it may deem fit to meet the ends of justice
- i) Costs of the Petition.
- j) Interest on the above at Court rates.

In the amended petition, the petitioner avers that the respondents have violated the following Articles of the Constitution: -

Article 2(1) of the Constitution of Kenya, 2010 provides that the **"Constitution is the law of the Republic and binds all persons and all state organs at both levels of the Government."**

Article 2(4) which provides that **"any law that is inconsistent with the constitution is void to the extent of the inconsistency and any act or omission in contravention of the Constitution is invalid."**

Article 10 of the Constitution which highlights national values, and principles of governance binding state organs, officers, including rule of law, participation of the people, good governance, integrity, transparency and accountability.

Article 27 that provides for the equality and freedom from discrimination and particularly: -

- (1) every person is equal before the law and has the right to equal protection and equal benefit of the law.**
- (2) equality includes the full and equal enjoyment of all rights and fundamental freedoms.**

Article 41 of the Constitution of Kenya, 2010 which protects the right to fair labour practices, to fair remuneration, and reasonable working conditions read together with section 5 of the Employment Act, 2007.

Article 47 which protects the right to fair administrative action and provides that **"every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair."**

Article 50 that protects the right to a fair hearing of any dispute that can be resolved by application of law to be decided in a fair and public hearing before a court or if appropriate, another independent and impartial tribunal or body.

Article 73 of the Constitution which requires the exercise of authority assigned to a state officer in a manner that demonstrates respect for the people, promotes public confidence and integrity of the office.

Article 75 of the Constitution directs state officers to behave in a manner that avoids conflict between personal and public interest and does not compromise any public interest.

Article 153 of the Constitution which obligates Cabinet Secretaries to act in accordance with the Constitution.

Article 232 which establishes the values and principles of public service including; high standards of professional ethics, involvement of the people in the process of policy making; accountability for administrative actions and affording adequate and equal opportunities for appointment, training and advancement, at all levels of public service as read together with Section 22 of the Public Officer Ethics Act, 2003 which provides that public officers shall practice and promote the principle that public officers are selected on the basis of integrity, competence and suitability or elected in fair elections.

Article 236 that protects the right of public officers and provides that;

**"A public officer shall not be—**

- (a) victimised or discriminated against for having performed the functions of office in accordance with this Constitution or any other law; or**
- (b) dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law."**

Simultaneously with the petition, the Petitioner filed a motion which was amended on 26<sup>th</sup> April 2019 seeking the following conservatory orders –

1. That this Application be certified as urgent, service be dispensed with and the same be heard ex parte in the first instance.

2. Pending the hearing and determination of this application and or suit a conservatory order do issue that the Applicant continues to hold the position of the chief executive officer and one Mr. Stephen O. Ogenga's appointment as the Acting Director General in the office of the chief executive of officer of the National Industrial Training Authority be stayed pending the inter partes hearing of the petitioner's application or until further orders by the court.
3. That pending the hearing and determination of this application inter partes this court be pleased to stay the proceedings and resolutions made by the Respondent during its Special Meeting held on 18<sup>th</sup> April 2019 declining and rescinding the Applicant's contract renewal.
4. That pending the hearing and determination of this application inter partes this court be pleased to grant a Conservatory order prohibiting/restraining the Respondents, their servants, officials, representatives, and/or agents from advertising or having so advertised from acting thereupon, interviewing, recruiting or otherwise in any other manner replacing the Applicant in his position as the Director General of the 1<sup>st</sup> Respondent.
5. Pending the hearing and determination of this Petition a conservatory order do issue that the Applicant continues to hold the position of the chief executive officer, and one Mr. Stephen O. Ogenga's appointment as the Acting Director General in the office of the chief executive of officer of the National Industrial Training Authority be stayed pending the determination of the petitioner's Petition or until further orders by the court.
6. That pending the hearing and determination of this Petition inter partes this court be pleased to stay the proceedings and resolutions made by the Respondent during its Special Meeting held on 18<sup>th</sup> April 2019 declining and rescinding the Applicant's contract renewal.
7. That pending the hearing and determination of this Petition inter partes this court be pleased to grant a Conservatory order prohibiting/restraining the Respondents, their servants, officials, representatives, and/or agents from advertising or having so advertised from acting thereupon, interviewing, recruiting or otherwise in any other manner replacing the Applicant in his position as the Director General of the 1<sup>st</sup> Respondent.
8. Cost of the Application be provided for.

The court heard the application exparte on 18<sup>th</sup> April 2019 and granted the following orders –

1. *That the application be and is hereby certified urgent and admitted for hearing during court vacation.*
2. *The respondents are restrained from filling the position of the Director General of the 1<sup>st</sup> Respondent pending the hearing and determination his application.*
3. *The application is fixed for inter partes hearing on 2<sup>nd</sup> May 2019.*

The respondents and Interested Party all filed replying affidavits in response to the motion as well as in response to the petition. The

1<sup>st</sup> and 2<sup>nd</sup> respondents also filed an answer to the petition.

In the replying affidavit of Dr. Kamau Gachigi, the 2<sup>nd</sup> respondent, he deposes that the petitioner's affidavit contains blatant lies, contradiction, fabrications and material non-disclosure calculated to mislead the court. He deposes that the contract of the petitioner which commenced on 11<sup>th</sup> April 2014 ended by effluxion of time on 14<sup>th</sup> April 2019. That the petitioner applied for renewal of the contract by letter dated 12<sup>th</sup> October 2018, that the renewal of the contract was not automatic, but at the discretion of the Board.

He deposes that on 23<sup>rd</sup> August 2017, the Board of the 1<sup>st</sup> respondent requested the National Treasury to undertake a Systems Audit on the 1<sup>st</sup> respondent. That the report of the systems audit was tabled to the Board on 19<sup>th</sup> March 2019 during the 63<sup>rd</sup> Board Meeting, but the Directors did not have sufficient time to read it as it had been withheld by the petitioner until the day before the meeting on 18<sup>th</sup> March 2019. That the systems audit revealed administrative, ethical and leadership challenges.

That even though the Board made a decision to renew the contract of the petitioner at the meeting held on 19<sup>th</sup> March 2019, a subsequent meeting, the 64<sup>th</sup> Board meeting held on 18<sup>th</sup> April 2019 unanimously decided not to renew the contract. The 2<sup>nd</sup> respondent deposes that on 10<sup>th</sup> April 2019, he informed the petitioner that his contract had expired and the 2<sup>nd</sup> respondent would be appointing an acting Director General whose term would commence on 11<sup>th</sup> April 2019.

He deposes that the decision to appoint the Acting Director General was not unilateral as it was made by the Board.

The 2<sup>nd</sup> respondent deposes that circular OP/CAB.9/1A referred to by the Petitioner in his affidavit sworn on 26<sup>th</sup> April 2019 at annex PKK-5 gives the Board powers to appoint an Acting Chief Executive Officer. Further, that Mwongozo Code of Conduct for State Corporations requires the Chairperson of the Board to provide quarterly updates on governance matters to the responsible Cabinet Secretary and State Corporations Advisory Committee (SCAC). That as Chairman, he was answerable to the Cabinet Secretary.

He deposes that the petitioner had not demonstrated how he relied on the Board's decision to his detriment, that legitimate expectation without detriment cannot *ipso facto* sustain an action founded on the doctrine of legitimate expectation. Further that fixed term contracts carry no rights, obligations or expectations beyond the date of expiry and hence the petitioner's contract ought not be maintained.

The Interested Party filed a replying affidavit of Hon. (Amb) Ukur Yatani, the then Cabinet Secretary, Ministry of Labour and Social Protection. He reiterates the averments in the affidavit of the 2<sup>nd</sup> respondent on the recruitment of the Petitioner and the lapse of the contract, the systems audit undertaken by National Treasury and the application by the petitioner for renewal of his contract.

He deposes that the Petitioner withheld the Internal Auditor's report from the 63<sup>rd</sup> Special Meeting of the Board held on 19<sup>th</sup> March 2019, that there were complaints from various parties including former employees which caused the Ministry's Internal Auditor to establish the veracity of the complaints.

He deposes that the Cabinet Secretary has overriding powers vis-à-vis the Board especially where the Board's conduct or decisions conflict with Government Policies and Regulations. That the Cabinet Secretary is mandated by policy and law to take pre-emptive measures to safeguard national interest such as good governance, integrity, accountability, leadership, efficiency and effective resource management as enshrined in the Constitution.

The affiant avers that the Petitioner does not possess the qualifications set out under Section 4C (4) of the Industrial Training Act (Cap 237) for appointment as Director General of the 1<sup>st</sup> respondent since his background is in law.

He avers that the petitioner has not come to court with clean hands having failed to comply with orders of the court in ELRC Cause No. 130 of 2017.

In the 1<sup>st</sup> and 2<sup>nd</sup> respondent's answer to the petition, the replying affidavit of MR. RAJEN SHAH, a member of the National Industrial Training Board sworn on 18<sup>th</sup> June 2019 and the affidavit of DR. KAMAU GACHIGI sworn on 18<sup>th</sup> June 2019, which is almost word for word with the affidavit of Rajen Shah, they reiterate the averments in DR. GACHIGI's affidavit sworn on 23<sup>rd</sup> May 2019.

When parties attended court on 30<sup>th</sup> May 2019 for hearing of the application, they informed the court that they had discussed and agreed to abandon the application and proceed with the petition. Directions were given for filing of submissions on the petition.

On 1<sup>st</sup> July 2019, the respondents and Interested Party informed the court that they wished to proceed by way of viva voce evidence as they wished to cross examine the Petitioner. They were therefore given time to file witness statements and agreed issues. When the parties again appeared before the court on 31<sup>st</sup> July 2019, they informed the court that they were exploring settlement.

The matter was thereafter mentioned severally until 28<sup>th</sup> November 2019 when parties informed court that discussions for settlement had fallen through. They thereafter filed written submissions.

## **Determination**

I have considered the pleadings and submissions together with the voluminous authorities filed and relied upon by the parties. The issues for determination arising from the pleadings and submissions are the following –

1. Whether the appointment of the petitioner for a second term as Director General was validly revoked.
2. Whether the respondents breached the Petitioner's constitutional rights and legitimate expectation.
3. Whether the petitioner is entitled to the remedies sought.

### **1. Whether the renewal of the petitioner's contract was validly revoked.**

It is not contested that at the 1<sup>st</sup> respondent's 63<sup>rd</sup> Board Meeting

held on 19<sup>th</sup> March 2019 the Board passed a resolution to renew the Petitioner's contract for a second term of 5 years. This is confirmed in the letter of the 2<sup>nd</sup> respondent dated 25<sup>th</sup> March 2019 to the Interested Party which is reproduced below –

*“Ref. NITA/BOARD/1/VOL.1(7)                      Date: 25<sup>th</sup> March, 2019*

*Hon. (Amb) Ukur Yatani*

*Cabinet Secretary*

*Ministry of Labour and Social Protection*

*Box 40246 – 00200*

NAIROBI

Thro'

Peter K. Turn, OGW

Principal Secretary,

Department for Labour

P. O Box 40246 – 00200

NAIROBI

Dear

RE: RENEWAL OF CONTRACT – DIRECTOR GENERAL NATIONAL INDUSTRIAL TRAINING AUTHORITY

Reference is made to the above matter.

*During the 63<sup>rd</sup> Special Meeting of the National Industrial Training Board held 19<sup>th</sup> March, 2019, the Board resolved to renew Mr. Paul K. Kosgei, Director General's contract for another term of five (5) years. The Director General's current contract will expire on April, 13<sup>th</sup> 2019. We wish to note that the State Corporation Advisory Committee's facilitated performance evaluation formed basis for the Board's deliberations (see copy attached). The outcome of the deliberations was renewal whereby two Board members were against the renewal, two were absent and the remainder were for renewal.*

*This is therefore to inform you of the Board decision to renew Mr. Paul Kosgei's Contract for another term of five years and seek your concurrence.*

*Please find attached the following documents for your reference.*

- (i) Mr. Paul Kipsang Kosgei's appointment letter dated 14<sup>th</sup> April, 2014*
- (ii) Kenya Gazette. No. 4891/2014.*
- (iii) Mr. Paul Kipsang's Performance Evaluation Report for the financial year 2017/2018.*

Yours

Dr. Kamau Gachigi

CHAIRPERSON NATIONAL INDUSTRIAL TRAINING BOARD"

In his letter dated 12<sup>th</sup> April 2019 at page 81 of the Amended Petition, the petitioner informed the 2<sup>nd</sup> respondent thus –

*"The decision was communicated to me by yourself and the Board Members during the meeting that passed the resolution. You congratulated me for the achievement and we all shook hands to signify the conclusion of the process."*

In the 2<sup>nd</sup> respondent's letter to the petitioner dated 10<sup>th</sup> April 2019, he informed the petitioner that the Cabinet Secretary had instructed that some 3 audit reports be tabled before to the Board so that the reports are considered in making a final decision. Those instructions of the Interested Party have not been availed to the court. Further the minutes of the Board meeting of 19<sup>th</sup> March made a final decision on the appointment as communicated to the Interested Party.

The Interested Party swore a replying affidavit on 29<sup>th</sup> May 2019 where he makes no mention of directions to the Board to consider the alleged reports before making another decision on the Petitioner's appointment. The Interested Party swore another affidavit on 18<sup>th</sup> June 2019 where at paragraph 13 and 14 he deposes as follows –

*"That though I received a letter from the 2<sup>nd</sup> Respondent on 3<sup>rd</sup> April 2019 seeking my concurrence to renew the term of the Petitioner, I wrote to the Board of the 1<sup>st</sup> Respondent through the 2<sup>nd</sup> Respondent drawing its attention to the Systems Audit Report and two more ongoing audit reports. I requested the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to table the Systems Audit Report and consider it in making their decision.*

*That the Petitioner has annexed the letter referred to in paragraph 13 as annexure PKK.-7 (refer to page 78 of the Petitioner's bundle) and which letter I am aware has left out an entire paragraph. The Petitioner is put on notice to produce the entire letter to*

*guide the court in making an informed decision and more so if the Petitioner wishes to rely on it.”*

The affidavit of the Interested Party sworn on 29<sup>th</sup> May 2019 was however withdrawn by Notice of Withdrawal dated the 18<sup>th</sup> June 2019.

It is not denied that the Systems Audit Report which has been stated to be the reason for reversing the renewal of the petitioner's appointment was tabled to the said Board on the very date that the resolution was made to renew the petitioner's contract. The minutes of the meeting held on 19<sup>th</sup> March 2019 are reproduced below for their full tenor and purport –

*MINUTES OF 63<sup>RD</sup> SPECIAL MEETING OF THE NATIONAL INDUSTRIAL TRAINING BOARD HELD ON TUESDAY – 19<sup>TH</sup> MARCH, 2019 AT 10 AM, AT THE NITA CONFERENCE ROOM, INDUSTRIAL AREA, COMMERCIAL STREET, NAIROBI.*

*MEMBERS PRESENT*

- 1. Dr. Kamau Gachigi*
- 2. Mr. Earnest Nadome*
- 3. Eng. Aram Mbui*
- 4. Mr. Benson Okwaro*
- 5. Mr. Rajab Mwondi, EBS*
- 6. Ms. Joyce Mwale*
- 7. Mr. Rajen Shah*
- 8. Mr. Hirji Shah, OGW*
- 9. James Onyango*

*APOLOGIES*

- 1. Ms. Jackline Mugo, EBS*
- 2. Ms. Alice Nyariki*

*Min. No. AGENDA*

*01/NITB/19 PREAMBLE AND OPENING PRAYERS*

*The meeting was called to order at 10 am. Director Joyce offered the prayers.*

*02/NITB/19 NOTICE OF THE MEETING*

*The notice of the meeting was read as per call-up notice referenced number NITA/NITB/14/231 and dated 14<sup>th</sup> March 2019.*

*03/NITB/19 CONFIRMATION OF QUORUM AND NOTING OF APOLOGIES*

*The quorum for the meeting was confirmed.*

*04/NITB/19 ADOPTION OF THE AGENDA*

*The agenda was adopted as is.*

*05/NITB/19 REGISTER OF CONFLICT OF INTEREST*

*No conflict of interest was registered.*

*06/NITB/19 CHAIRMAN'S WELCOMING REMARKS*

*The Chairman informed members about the critical nature of the DG's application to renew contract. In his opinion adjoining issues*

such as the just received audit report was to form part of the discussion. This way the DG's performance could be viewed in its fullness. At this point the Chair sought for members input on whether or not the „ audit report should be used as part of the evaluation criteria. In their response, members were not supportive of using the just received audit report as an additional evaluation criterion for the following

reasons:

This was just one of the audit reports. Using it in isolation would hurt the DG's fair chance to evaluation

Introducing the audit report would amount to alteration of the agenda.

There was need to allow members enough time to read and understand the audit report.

Allowing the Audit committee to discuss the audit report ahead and cascade deliberations to the board is procedural

Any other parameter used in the evaluation was only to serve to augment SCAC's evaluation.

Based on the foregoing, the Chair directed the meeting to proceed with the DG's application without using the audit report.

**07/NITB/19 CONSIDER THE APPLICATION FOR RENEWAL OF THE TERM FOR MR. PAUL KOSGEI- DIRECTOR GENERAL, NATIONAL INDUSTRIAL TRAINING AUTHORITY**

In order to set off the discussion the following documents were read and discussed: DG's application with annexures (attached). The annexures detailed a self-assessment of what he had achieved during his term of office based on the PC targets.

Excerpts of the board's private meeting of 17<sup>th</sup> August, 2017 that led to the institution of a systems audit (attached).

DG's duties and responsibilities as spelt out in his letter of appointment.

There was general consensus that the above mentioned documents formed a critical basis for discussing the contract renewal.

Summary of DG's performance as viewed by members:

<b>For</b>	<b>Against</b>
(1) NITA has consistently scored well in successive evaluations improving the overall score of the Ministry of Labour and Social Protection	1 NITA has experienced a lot of image issues that the DG could do more to stem.
(2) SCAC evaluation scored the DG well. This came despite notable resource constraints that he contends with.	2 Probably item 1 above could be the result of disconnect between the DG and the management team. He should devote more effort to improve on this.
(3) In his self-assessment the DG listed his achievements which are also supported by board deliberations	3 DG was notably not good at taking personal responsibility for failure under his watch. A change in attitude could record better outcomes.
(4) It is difficult to compare NITA - a public organization with its private sector counterparts as the operating environments are far apart	

**08/NITB/19 WAY FORWARD ON DG'S APPLICATION FOR CONTRACT RENEWAL**

The Board then voted on whether or not to accept the DG's application for contract renewal. Seven (7) members voted for while two (2) voted against.

In addition, going forward there is need for Board to improve on the following areas to enhance NITA's performance:

Board Chair needs to be more assertive so as to hold the DG to account. At the same time, the Board to be more firm.

Better thought out performance contracting between the Board and the DG on a half yearly basis. Evaluation of the same to ensure conformity.

*Move forward as a unit and consider starting on an empty slate. Hence the need for a bonding session for the Board. The Chair could also use that opportunity to do follow up interviews for board members as advised by SCAC evaluation.*

*Chair should write to the Ministry of Labour and SCAC to confirm DG reappointment.*

*09/NITB/19 BOARD RESOLUTION*

*DG be granted another term of office upon expiry of his current term.*

*10/NITB/19 CLOSURE OF MEETING*

*There being no other business, the Board adjourned at 12.45 pm.”*

It is clear from the minutes that the issue of the Systems Audit Report was discussed and a unanimous decision was made to use only the evaluation of the State Corporations Advisory Committee (SCAC) to assess the Petitioner’s application for renewal of his term.

The minutes clearly state that “*Based on the forgoing, the Chair directed the meeting to proceed with the DG’s application without using the audit report.*”

The averments by the 2<sup>nd</sup> respondent and Interested Party about the Board not having looked at the Systems Audit Report is incorrect as the Board deliberately decided to rely on SCAC Report alone when the Systems Audit Report had been tabled and was an agenda item for the day.

The other reports referred to by the respondents and Interested Party are dated long after the decision to reverse the resolution for renewal of the contract had been made. They could therefore not have formed the basis for the reversal of the decision to renew the contract.

The performance evaluation for the petitioner at page 62 of his bundle of documents relied upon by the Board shows his score as 74.27%.

Further, by the time the 2<sup>nd</sup> respondent informed the petitioner that his contract was being reconsidered on 10<sup>th</sup> April 2019, no board decision had been made to revoke the resolution to renew the contract. Indeed, no communication has been made to the Petitioner of the Board’s decision to reverse the renewal of his contract to date.

Having already made a decision to renew the contract of the petitioner, any review of the decision to his detriment should only have been taken after giving him an opportunity to respond to the new issues relied upon to revoke the decision as provided under the Fair Administrative Action Act. Section 4 of the Act provides as follows –

**4. Administrative action to be taken expeditiously, efficiently, lawfully etc.**

**(1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.**

**(2) Every person has the right to be given written reasons for any administrative action that is taken against him.**

**(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-**

**(a) prior and adequate notice of the nature and reasons for the proposed administrative action;**

**(b) an opportunity to be heard and to make representations in that regard;**

**(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;**

**(d) a statement of reasons pursuant to section 6;**

**(e) notice of the right to legal representation, where applicable;**

**(f) notice of the right to cross-examine or where applicable; or**

**(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.**

**(4) The administrator shall accord the person against whom administrative action is taken an opportunity to-**

**(a) attend proceedings, in person or in the company of an expert of his choice;**

**(b) be heard;**

(c) cross-examine persons who give adverse evidence against him; and

(d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.

(5) Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.

(6) Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 41 of the Constitution, the administrator may act in accordance with that different procedure.

The reports referred to by the 2<sup>nd</sup> respondent and the Interested Party in their affidavits in respect to the Petitioner are dated May 2019, long after the decision to revoke the resolution to renew the petitioner's contract. Further, the contents thereof were never presented to the petitioner to enable him respond to the same before they were allegedly used against him.

In the case of **Robert Muriithi Ndegwa v Minister for Tourism [2012] eKLR**, the court held that –

*“Article 47 of the Constitution entitled the petitioner to administrative action that was expeditious, efficient, lawful, reasonable and procedurally fair. Further, for any adverse decision by the respondent, the petitioner was entitled to receive written reasons from the respondent for the refusal to renew the contract. Despite making a unilateral decision not to renew the contract, the respondent failed to convey his position and the reasons before and after the due date for the renewal. The court finds that the respondent acted in contravention of the Article. The court has considered the evaluation report by the Board and the awards for excellent performance accorded to the petitioner and finds that failure to renew the petitioner's contract amounted to victimization for having performed the functions of office in accordance with the values and principles of public service provided for in Article 232 of the Constitution. The court further finds that refusal to renew the contract also amounted to the respondent's attempt to remove the petitioner from public office without due process of law. The court holds that such respondent's actions and omissions did not only contravene Article 236 of the Constitution that protects public officers, but also amounted to unfair labour practices as protected in Article 41 of the Constitution. Accordingly, the court finds that the petitioner is entitled to the declaration as prayed.”*

The Board of the 2<sup>nd</sup> respondent thus violated the Petitioner's right to fair administrative action under Article 47 of the Constitution and Section 4 of the Fair Administrative Action Act. The Board further violated Article 50 of the Constitution in the manner stated by the Court of Appeal in **Judicial Service Commission v Gladys Boss Shollei and Another [2014] eKLR** where the court stated; -

*“Article 50(2) of the Constitution provides for a right to a fair trial to an accused person in criminal trials. That sub-article was not applicable in the disciplinary proceedings against the Respondent which, as already noted were neither criminal proceedings nor quasi-criminal proceedings. The Respondent was entitled to a right to a fair hearing as provided under Article 50(1) of the Constitution that deals with “any dispute that can be resolved by the application of law.*

...

*First is the need for the adjudicator to be independent and impartial, and the second is the requirement for fairness in the hearing procedures adopted.”*

Further, there is no communication from the Interested Party rejecting the decision of the 1<sup>st</sup> respondent as communicated in the letter dated 25<sup>th</sup> March 2019 notifying the Interested Party of the resolution of the Board to renew the Petitioner's contract. The Chairman's letter dated 10<sup>th</sup> April 2019 informing the Petitioner of the expiry of his contract did not make any reference to a decision of the Board or of the Cabinet Secretary.

Section 4C of the Industrial Training Act provides for appointment of Director General as follows –

#### **4C. Director-General**

(1) There shall be a Director- General of the Authority who shall be the chief executive of the Authority, and secretary to the Board and the Committees.

(2) The Director-General shall be appointed by the Board on such terms and conditions of service as the Board may determine.

(3) The Director-General shall hold office for one term of five years and shall be eligible for re-appointment for one further term of five years.

(4) A person shall not be appointed Director-General unless that person—

(a) is a holder of a degree in the field of engineering, technology, administration, finance, technical or industrial education, from a recognized university; and

(b) has at least fifteen years working experience in a related field, five of which shall be in matters

relating to industrial training.

**(5) The Director General shall subject to the directions of the Board, be responsible for the day to day management of the Authority**

Further the State Corporations Act provides as follows with respect to appointment of Chief Executive Officers –

Section 2 – definition of Chief Executive, Committee and Minister

**“chief executive” means the person appointed and employed as such under section 5(3) or the person for the time being exercising the executive powers of a state corporation;**

**“Committee” means the State Corporations Advisory Committee established by section 27;**

**“the Minister” means the Minister for the time being assigned ministerial responsibility for a state corporation and matters relating thereto by the President under section 4 and “parent Ministry” shall be construed accordingly;**

Section 5 provides at (3) and (4) as follows –

**(3) 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.**

**(4) A state corporation may, with the approval of the Minister in consultation with the Treasury and the Committee, establish pension, gratuity, superannuation, provident or other funds for the state corporation’s employees and their dependants.**

As was stated in the minutes of the 1<sup>st</sup> respondent’s Board held on 19<sup>th</sup> March 2019, the State Corporations Advisory Committee had assessed the Petitioner and scored his performance during his first tenure. His scores were high as expressed in the minutes.

It is therefore my finding that the letter dated 10<sup>th</sup> April 2019 by the 2<sup>nd</sup> respondent to the Petitioner advising him that his term was expiring on the said date was without authority of either the Board or the Minister since the Board had by then approved the renewal of the appointment and there had been no objection from the Interested Party. Further both the 2<sup>nd</sup> respondent and the Interested Party did not have such powers under the Industrial Training Act, Mwongozo Code of Governance of State Corporation or the State Corporations Act. The letter of 10<sup>th</sup> April 2019 was thus ultra vires the powers of the 2<sup>nd</sup> respondent.

It is further my finding that the respondents and Interested Party breached the petitioner’s constitutional rights under Articles 47 and 50 of the Constitution, as well as Article 236 which provides at sub-article (b) that –

**Protection of public officers.**

**236. A public officer shall not be—**

**(a) victimised or discriminated against for having performed the functions of office in accordance with this Constitution or any other law; or**

**(b) dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law.**

**Whether the Respondent’s breached the Petitioner’s legitimate expectation POLLARD, PARPWORTH AND HUGHES** writing at page 583 in the 4<sup>th</sup> edition of **CONSTITUTIONAL AND ADMINISTRATIVE LAW: TEXT WITH MATERIAL** posited as follows: -

*“Legitimate expectation refers to the principle of good administration or administrative fairness that, if a public authority leads a person or body to expect that the public authority will, in the future, continue to act in a way either in which it has regularly (or even always) acted in the past or on the basis of a past promise or statement which represents how it proposes to act, then, prima facie, the public authority should not, without an overriding reason in the public interest, resile from that representation and unilaterally cancel the expectation of the person or body that the state of affairs will continue. This is of particular importance if an individual has acted on the representation to his or her detriment”.*

In **HALSBURY’S LAWS OF ENGLAND 4<sup>th</sup> Edition, Vol. 1 (1) at page 151, paragraph 81** outlines legitimate expectation follows:

*“A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though he has no legal right in private law to receive such treatment. The expectation may arise either from a representation or promise made by authority, including an implied representation, or from consistent past practice”.*

In the case of **Republic v Principle Secretary, Ministry of Transport, Housing and Urban Development Ex parte Soweto Residents Forum CBO [2019] eKLR** the Court held that –

13. ..., the *exparte* applicant's counsel submitted that the Respondent created a legitimate expectation to the *exparte* applicants that once the construction of the modern houses were completed, they would be the first ones to be relocated into the new houses. To buttress his argument, Dr. Khaminwa cited **Communications Commission of Kenya & 5 Others v Royal Media Services & 5 Others (2016) eKLR** where the Supreme Court stated that:-

"Legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil. Therefore, for an expectation to be legitimate, it must be founded upon a promise or practice by public authority that is expected to fulfil the expectation."

16. Addressing the subject of legitimate expectation, **H. W. R. Wade & C. F. Forsyth [3] at pages 449 to 450**, thus:-

"It is not enough that an expectation should exist; it must in addition be legitimate....First of all, for an expectation to be legitimate it must be founded upon a promise or practice by the public authority that is said to be bound to fulfil the expectation..... Second, clear statutory words, of course, override an expectation howsoever founded..... Third, the notification of a relevant change of policy destroys any expectation founded upon the earlier policy...."

"An expectation whose fulfilment requires that a decision maker should make an unlawful decision, cannot be a legitimate expectation. It is inherent in many of the decisions, and express in several, that the expectation must be within the powers of the decision-maker before any question of protection arises. There are good reasons why this should be so: an official cannot be allowed in effect to rewrite Acts of Parliament by making promises of unlawful conduct or adopting an unlawful practice."

17. A procedural legitimate expectation rests on the presumption that a public authority will follow a certain procedure in advance of a decision being taken. In adjudicating legitimate expectation claims the court follows a two step approach. Firstly it asks whether the administrator's actions created a reasonable expectation in the mind of the aggrieved party. If the answer to this question is affirmative, the second question is whether that expectation is legitimate. If the answer to the second question is equally affirmative, then the court will hold the administrator to the representation, that is enforce the legitimate expectation. The first step in the analysis has both an objective and a subjective dimension. It is firstly asked whether a reasonable expectation of a certain outcome was created. The representation itself must be precise and specific and importantly, lawful. Once a reasonable expectation exists the administrator is required to act in accordance with that expectation, except if there are public interest considerations which outweighs the individual's expectation.

18. The requirements for the existence of such an expectation in South African law (whose legislation is similar to ours) were restated in **National Director of Public Prosecutions v Philips 2002 (4) SA 60 (W)** These include:-

(i) that there must be a representation which is "clear, unambiguous and devoid of relevant qualification",

(i) that the expectation must be reasonable in the sense

that a reasonable person would act upon it,

(ii) that the expectation must have been induced by the decision-maker and

(iii) that it must have been lawful for the decision-maker to make such representation.

If such an expectation exists it will be incumbent on the administrator to respect it and afford the individual holding that expectation due procedure before the expectation is disappointed. Failing such procedure, the individual may approach a court to review the administrator's actions on the ground of procedural unfairness. If the court finds that a legitimate expectation did in fact exist, it will ordinarily invalidate the administrative action and refer the matter back to the decision-maker to deal with it in a procedurally fair manner."

The decision above is in consonance with Section 7(2)(m) of the Fair Administrative Actions Act which provides that the Court may review an administrative action or decision if the action or decision violates the legitimate expectation of the person to whom it relates.

In his further affidavit sworn on 28<sup>th</sup> June 2081, the Petitioner stated that he never received an adverse report on his performance. That the renewal of his contract was supported by an overwhelming majority and that he was never given an opportunity to respond to the report of the Systems Audit. Further, that the 2<sup>nd</sup> respondent abused the powers of his office by informing him that his contract had lapsed yet in the same letter he was informed that the Interested Party had directed that the reports referred to in the letter be considered before the renewal. That by the time the Board voted to rescind the decision to renew his contract the said reports had not been placed before it for deliberation.

These averments are supported by the uncontroverted facts as set out in the affidavits of all the parties.

The Petitioner further stated that the letter dated 10<sup>th</sup> April 2019 informing him that his contract had lapsed was not supported by the members of the Board. That the 2<sup>nd</sup> respondent had personally communicated to him the decision of the Board to renew his contract and had congratulated him.

In the further affidavit the Petitioner attached email communication of the members of the Board disapproving the action of the Chairman variously as follows –

*"From: Security Server <benayore@yahoo.com>*

*Date: 16 April 2019 at 08:47:56 EAT*

*To: "pkosgey2001@yahoo.com ...*

*Subject: Re: DG NITA Renewal Request 2019*

*Reply-To: "benayore@yahoo.com" <benayore@yahoo.com>*

*Dear Paul, I have read your communication to the Chairman regarding renewal of your term and I agree fully. I find it difficult to understand what is happening may the Chairman should convene an urgent board meeting to discuss this matter*

*Okwaro"*

*"From: joyce mwanika <mwanikajoyce@yahoo.co.uk>*

*Date: 13 April 2019 at 13:57:31 EAT*

*Subject: Re: DG NITA Renewal Request 2019*

*Reply-To:"mwanikajoyce@yahoo.co.uk" ...*

*Just to add that this be done in accordance with the law please*

*Thank you*

*"On Sat, 13 Apr 2019 at 13:53, joyce mwanika '*

*<mwanikajoyce@yahoo.co.uk> wrote:*

*Good afternoon*

*Let the Chairman provide the next step/s in as far as the matter is concerned given that from Monday there will be a vacuum at the managements helm. Joyce"*

*"On Sat, 13 Apr 2019 at 12:14, Hirji Shah*

*<hirji@comcraft.com> wrote:*

*Good morning everyone. I am away but just read the latest exchanges of email.*

*Personally I fully agree with the comments by Director Ernest*

*Nadome. Suggest the Chairman to withdraw his earlier email which I thought is against the unity of the Board and not for the good of NITA.*

*May the sense prevail.*

*Regards*

*Hirji Shah, OGW"*

*"On 13 Apr 2019, at 9:37 AM, ernest nadome <ernestnadome@gmail.com> wrote:*

*Good morning Director,*

*We are fully in agreement with the contents of your letter.*

*The BOARD by majority vote extended your contract in accordance with our ACT.*

*Any other communication arising from informal consultations outside the BOARD, is not only ILLEGAL but NULL and VOID, PERIOD.*

It is my finding that the Petitioner has established that the Respondents and Interested Party violated the legitimate expectation of the Petitioner.

Further, the Petitioner has established that the respondents and Interested Party violated his right to fair administrative action when they relied on non-existent reports and on the systems audit report which had not been presented to him to respond before the decision to revoke the renewal of his appointment was made.

### **Remedies**

The Petitioner has asked the court to enforce the decision of the 1<sup>st</sup> respondent’s Board and declare his contract to have been renewed as the decision to reverse the renewal was unfair, unlawful and a breach of the Petitioner’s rights to fair labour practices and fair administration. He wants this court to compel the respondents to renew the contract or to find that the contract was constructively renewed.

I would agree with him. After passing a resolution to renew the Petitioner’s contract, all that was left was to send him the letter renewing the contract. According to Section 4C(2) of the Industrial Training Act, the appointment of the Director General is the responsibility of the Board. Further under Section 5(3) of the State Corporations Act, the Minister had no power in the renewal of the contract. The only role of the Minister is to approve the terms and conditions of service for the Chief Executive Officer and staff. This is confirmed by the fact that the Petitioner’s original appointment letter was signed by the Chairman, Prof. Thomas E. Akuja PhD who also signed the gazette notice dated 27<sup>th</sup> June 2014. The Minister thus has no role in the appointment and could therefore not veto the decision of the Board.

Secondly, once the Board decided to renew the Petitioner’s appointment, it had no capacity to reverse the resolution. The only way to validly remove the Petitioner after the Board approved the renewal was to take him through due process as provided for in Article 41 and 236(b) of the Constitution and Section 4(3) of the Fair Administrative Actions Act. The decision of the Board made on 18<sup>th</sup> April 2019 is thus without legal backing and therefore a nullity.

In the instant petition, the petitioner’s contract was not terminated in the manner anticipated under Sections 41, 43 and 45 of the Employment Act. Rather, the contract came to an end and a resolution was made by the Board of the 1<sup>st</sup> respondent to renew the same. However, the 2<sup>nd</sup> respondent, with or without support of the Interested Party refused to do so. The renewal was within the law as it was discussed as a sole agenda item in the special meeting of the 1<sup>st</sup> respondent’s Board held on and approved. The Interested Party is a Member of the Board. So is the 2<sup>nd</sup> respondent who chairs the Board and was therefore party to the resolution of the Board meeting that decided to renew the contract of the Petitioner.

In what would appear to be malice and without authority of the Board, the 2<sup>nd</sup> Respondent apparently with the support of and the 1<sup>st</sup> Interested Party decided to go against the resolution of the Board to renew the Petitioner’s contract. The grounds they attempted to rely on were those that were in the knowledge of the Board and had been discussed during the Board’s meeting of 19<sup>th</sup> March 2019 at which it was resolved to renew the Petitioner’s contract. They also relied on matters in non-existent reports. To persuade the Board to review its decision at a later meeting of 18<sup>th</sup> April 2019, long after the 2<sup>nd</sup> respondent communicated to the Petitioner the non-renewal of his contract, the Board referred to reports that were not in existence when the decision to revoke the renewal of the contract was made, the Board was thus fishing for reasons, at the behest of the 2<sup>nd</sup> respondent, to endorse and/or rubberstamp a decision that was irregularly made by the 2<sup>nd</sup> respondent.

This is one of those cases where giving force to the decision of the 1<sup>st</sup> respondent’s Board is merited. This is more so because this court granted orders preserving the position which is therefore vacant and available.

I have however considered that this is a position that has to work closely with the Chairman whom I presume is still in office. It is also obvious that it is the Chairman who singlehandedly choreographed the revocation of the renewal of the Petitioner’s contract.

It would not be easy for the Petitioner and the Chairman to work in harmony and this would not serve the public interest. I have further considered that it has been over one year since the revocation of the approval of the Petitioner’s contract. This is a long time in a public office. It is for these reasons that I think it would serve all parties involved and the greater public interest if the Petitioner is granted general damages instead of the prayers to enforce his contract

For these reasons I will award the Petitioner the alternative prayer of general damages. In assessing the general damages, I have considered the fact that the Circular No. 10 for renewal of contracts of Chief Executive Officers for parastatals provides that –

*“23<sup>rd</sup> November 2010*

*All Ministers and Assistant Ministers*

*All Permanent Secretaries*

*The Attorney General*

*Controller and Auditor General*

*PROCEDURE FOR REAPPOINTMENT OF SERVICE CHIEF EXECUTIVE OFFICERS IN STATE CORPORATIONS*

Your attention is drawn to the Terms and Conditions of Service to for Chief Executive Officers of State Corporations as set out in the Guidelines issued by the Government on 23<sup>rd</sup> November 2004

and this office circular Ref. No. OP/CAB.9/I of 9<sup>th</sup> May 2008.

In regard to appointment of Chief Executive Officers (CEOs) the Guidelines stipulated the manner of their appointment and also renewal of the appointments upon expiry of contract(s). In addition to the provisions in the guidelines and; the circular cited above and for purposes of clarity it is emphasized that where a serving Chief Executive Officer (CEO) is keen on being reappointed for a further term, the procedure below will apply:

- (a) The CEO wishing' to be reappointed will indicate interest by writing to the Board at least six months before expiry of his/her term.
- (b) The Board will evaluate the performance of the CEO and make a report to the appointing authority with a recommendation on either renewal or termination of the contract upon expiry.
- (c) In the event that the Board does not recommend, renewal of the contract, the CEO will be required to proceed on terminal leave to pave way for the recruitment and appointment of a new CEO. This is important to ensure a smooth transition.
- (d) The Board will recruit an acting CEO, in consultation with the parent Ministry and the State Corporations Advisory Committee (SCAC) as provided by Section 27(1)(c) of CAP.446, in a care taker position when the process of recruiting a new CEO is ongoing.

For avoidance of doubt, the position of Chief Executive Officer shall be declared vacant only when the Board of Directors has no intention to renew the appointment of the incumbent for a further term.

Signed

AMB. FRANCIS K. MUTHAURA, EGH

PERMANENT SECRETARY/SECRETARY TO THE

CABINET AND HEAD OF THE PUBLIC SERVICE”

Had this issue been managed properly, the Petitioner would have been informed of his fate well in advance and would have taken terminal leave. He would thus have been able to manage his exit appropriately during this period by making a decision of what to do after expiry of his contract. He was denied this opportunity by the manner in which his exit was handled.

In the circumstances of the Petitioner’s very peculiar situation it is my view that he is entitled to general damages for violation of his constitutional rights under Articles 41, 47, 50 and 236 of the Constitution. He is further entitled to damages for breach of his very valid legitimate expectation as well as breach of the values and principals of public service under Article 232. Since in my finding he was legitimately appointed for a second term which because of machinations by the 2<sup>nd</sup> respondent and the Interested Party, he was denied, **I will award the Petitioner general damages in the sum of Kshs.27,600,000.**

In view of the fact that the 2<sup>nd</sup> Interested Party was the author of the circumstances herein, he will personally bear the costs of this petition.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 7<sup>TH</sup> DAY OF AUGUST 2020**

**MAUREEN ONYANGO**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**MAUREEN ONYANGO**

**JUDGE**