



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 173 OF 2019

IN THE MATTER OF ARTICLES 1, 2, 3, 4(2), 20, 21, 23, 24, 27, 47, 73, 159, 165, 232, 258 AND 259 OF THE CONSTITUTION

IN THE MATTER OF VIOLATION OF ARTICLES 1, 2, 3, 4(2), 10, 27, 47, 73, 129(1) & (2) OF THE CONSTITUTION

IN THE MATTER OF THE CONSTITUTION AND LEGAL VALIDITY OF THE HANDPICKED AND APPOINTMENT OF STEPHEN GATHAIGA RUIMUKU AS THE MANAGING DIRECTOR OF THE TANA & ATHI RIVERS DEVELOPMENT AUTHORITY (TARDA) WITHOUT GOING THROUGH A FAIR AND COMPETITIVE MERIT BASED AND INCLUSIVE PROCESS AS ENVISAGED IN THE CONSTITUTION OF KENYA, 2010

UNION OF KENYA CIVIL SERVANTS.....PETITIONER

VERSUS

CABINET SECRETARY, MINISTRY OF EAST AFRICAN COMMUNITY &

REGIONAL DEVELOPMENT.....1st RESPONDENT

PUBLIC SERVICE COMMISSION.....2nd RESPONDENT

DIRECTOR, DEPARTMENT

OF CIVIL REGISTRATION.....3rd RESPONDENT

STEPHEN GATHAIGA RUIMUKU.....4th RESPONDENT

HON ATTORNEY GENERAL.....5th RESPONDENT

AND

TANA & ATHI RIVERS DEVELOPMENT AUTHORITY....INTERESTED PARTY

JUDGMENT

1. Stephen Githaiga Ruimuki (the 4th Respondent) was initially employed by the Tana & Athi Rivers Development Authority (the Authority) in 1984 as a Trainee Financial Analyst.
2. In the course of time, the 4th Respondent was promoted including to the position of Deputy Managing Director.
3. On 22 April 2013, the 4th Respondent was appointed to act as the Managing Director of the Authority pending the recruitment of a substantive office holder.
4. The Board of the Authority later met and on 12 November 2014, it recommended to the Cabinet Secretary, Ministry of Environment that the 4th Respondent be confirmed as the substantive Managing Director.
5. The Cabinet Secretary, through a Gazette Notice dated 12 June 2015 appointed one Steven Ruimuki Githaiga as the Managing Director of

the Authority for a term of 3 years (effective date of appointment was given as 8 April 2015).

6. Before the lapse of the term, the 4th Respondent applied for renewal of appointment and in a meeting held on 25 July 2017, the Authority resolved/approved the renewal of contract.

7. On 9 January 2018, the Authority wrote to the Cabinet Secretary, Devolution, to approve the renewal of the contract.

8. Through a letter dated 23 March 2018, the Cabinet Secretary informed the 4th Respondent of the renewal of his contract for a second term.

9. On 25 September 2019, the Union of Kenya Civil Servants (the Union) filed a Petition alleging that the appointment of the 4th Respondent was irregular, unreasonable, illegitimate, unlawful, and unconstitutional, and void because it was made without following due process.

10. It was also alleged that due to integrity issues, the 4th Respondent was not fit to serve as Managing Director of the Authority.

11. Filed with the Petition was a motion under certificate of urgency seeking the suspension from office of the 4th Respondent, and the appointment of an acting Managing Director (to replace him).

12. On 27 September 2019, in lieu of addressing the motion and due to the urgency, the Court directed that it would proceed to hear and determine the Petition.

13. Consequently the Court directed the filing and exchange of pleadings. On 14 October 2019, the Court directed the parties to file and exchange submissions (the parties did not meet the timelines).

14. The following documents were filed

(a) Amended Motion filed on 25 September 2019.

(b) Replying affidavits sworn on 7 October 2019 and 8 October 2019 on behalf of the 4th Respondent and Authority.

(c) Replying affidavit sworn on 8 October 2019 on behalf of the 1st, 2nd, 3rd and 5th Respondents.

(d) Supplementary affidavit on behalf of the Union filed on 17 October 2019.

(e) Submissions on behalf of the 1st, 2nd, 3rd, and 5th Respondents filed on 29 October 2019.

(f) Union's submissions filed on 11 November 2019.

(g) the Authority's submissions filed on 21 November 2019.

(h) the Authority's case digest filed on 2 March 2020.

15. The Court has given due consideration to the Petition, affidavits and submissions placed before it.

16. It is regrettable that the Union opted not to expressly identify/isolate the Issues it thought pertinent for the Court's attention in its submissions but rather addressed all the Issues in prose (as a whole).

17. The Respondents however identified 3 Issues for the Court's determination in their submissions to wit

(i) Whether the matter (sic) the 4th Respondent is unconstitutionally and illegally in office.

(ii) Whether the Petitioner has satisfied the burden of proof required to prove the allegations made against the Respondent.

(iii) Is the Petition fundamentally defective and should be struck (sic) out?

Defective Petition

18. The Respondents challenged the competence of the Petition on the ground that it was supported by unmarked documents contrary to the provisions of Rule 9 of the Oaths and Statutory Declarations Rules which require annexures to affidavits be sealed and stamped.

19. The Respondents urged the Court to follow in the footsteps of the High Court decision in *Abraham Mwangi v S.O. Omboo & Ors* (2003) eKLR where it was held that annexures without exhibit marks must be rejected.

20. The Union on the other hand urged the Court to consider the provisions of section 60(1)(b) & (f) of the Evidence Act which allows the Court to take judicial notice of certain facts/documents and not to reject the annexures.

21. According to the Union, the annexures such as Reports of the Auditor General and copies of identity documents were official documents worth taking judicial notice of.

22. *Rule 9 of the Oaths and Statutory Declarations Rules* was the subject of discussion by the Court of Appeal in *Zaheer Jhanda & Ar v I.E.B.C. & Ors (2018) eKLR* wherein the Court stated

Rule 9 of the Oaths and Statutory Declarations Act, is intended to prevent various kinds of mischief and to ensure that a deponent owns and secures all the exhibits annexed to his affidavit. The rule further aims to prevent litigants from sneaking into the record documents that were not part of the affidavit, thus prejudicing their opponents. We therefore cannot fault the learned judge for expunging the annexures that were not marked as required by law.

23. In the view of this Court, the mere fact that a document or record is from official sources does not justify the failure to seal/mark it as contemplated by the Rule, the foundation of the objection.

24. The requirement is meant to address a mischief, which mischief has been evident in this Petition.

25. The mischief can be inferred from the fact that the Union sneaked in with its submissions certain documents including a copy of the 4th Respondent's marriage certificate (page 131)(Court notes the Reports of the Auditor General had been introduced through earlier affidavits).

26. In light of the binding authority from the Court of Appeal, this Court's hands are tied and it has no option but to expunge from the record all the documents annexed to the supporting affidavit(s) and supplementary affidavit which were not properly sealed/marked.

27. The Court will however consider the documents introduced through the Supplementary Affidavit of the Union's Deputy Secretary General as they were sealed/marked, and the annexure marked OL 1 in the supporting affidavit sworn on 25 September 2019.

Public office integrity threshold

Fraudulent Change of name

28. One of the grounds upon which the Union challenged the fitness of the 4th Respondent to hold public office was that an audit carried out by the Auditor General in June 2015 (exhibit OL 2) had established that he had changed names and date of birth in order to avoid retirement.

29. According to the Union, the 4th Respondent's passport indicated the date of birth as 20 October 1958 under the name *Ruimuku Steven Githaiga* while the replacement national identity card no. 1901968 issued on 11 April 2011 had the name *Steven Maina Githaiga* (OL 4) with date of birth given as 1953.

30. The Union asserted that the 4th Respondent's initial identity card issued on 11 November 1992 had the year of birth as 1953 and not 1958.

31. The Union further produced extracts of Reports of the National Assembly Public Investments Committee on Audited Financial Statements of State Corporations and Reports of the Auditor General on the Financial Statements of the Tana & Athi Rivers Development Authority.

32. The alterations, the Union urged, violated Articles 73(1)(a)(i),(iii),(iv) & (2)(c)(i).

33. Responding to the change of identification particulars, the 4th Respondent maintained that his passport, identity card, birth certificate, baptismal card and police clearance certificates all showed date of birth as 20 October 1958. He denied being privy to the identity card filed by the Union showing different dates.

34. The 4th Respondent urged the Court to ignore the copy of the identity card showing date of birth as 1953 because it was not certified as required by section 26 of the Births and Deaths Registration Act.

35. For the other Respondents, it was contended that the position of Managing Director being contractual, the general public service policy on retirement was not applicable and therefore the age of the 4th Respondent was immaterial.

36. The Respondents, including the Director, Department of Civil Registration did not respond to the apparent name discrepancy between *Steven Maina Githaiga* and *Ruimuku Steven Githaiga*.

37. Among the documents filed by the Union were extracts of Reports from the National Assembly and, the Auditor General Reports.

38. The documents indicate that the Immigration Department had in an Preliminary Report shared with the Ethics and Anti-Corruption Commission established that the owner of Identity Card No. 1901968 while making passport applications had filed date of birth as 31 December 1953 and that marriage certificate issued to the said *Steven Maina Githaiga* by the Registrar of Marriages indicated age as 35 years.

39. The initial finding of the preliminary investigations was that *Steven Maina Githaiga* and *Steven Githaiga Ruimuku* were the same person.

40. The Court is satisfied based on the records produced that *Steven Maina Githaiga* and *Steven Githaiga Ruimuku* are one and the same person, the 4th Respondent, and that the 4th Respondent had caused to be altered his birth records.

41. The 4th Respondent is (was) not a state officer within the context of Article 73 of the Constitution. However, there is no denying he is (was) a public officer subject to the Values and Principles of public service as set out in Chapter Thirteen of the Constitution.

42. Some of the values outlined in Article 232 include accountability and transparency.

43. The 4th Respondent was in violation of the values and principles, for he was the one who stood to benefit by the alteration of particulars of birth.

Nepotism

44. The Union also challenged the fitness of the 4th Respondent on the grounds of nepotism and favouritism, in that he had used his position to employ his relatives in the Authority.

45. In this respect, the Union alleged the 4th Respondent caused the Authority to employ about 41 of his relatives.

46. The affidavit in support of the Petition at paragraph 15 disclosed the names and nature of relationship(s).

47. The 4th Respondent made a response to the assertions in paragraph 14 and 15 of his replying affidavit.

48. Apart from making a general denial, the 4th Respondent merely contended that the allegations were subject of investigations by the responsible authorities and therefore the claims were *mala fides*.

49. The Personnel numbers of the 41 alleged relatives of the 4th Respondent suggest they were employed at around the same time or consequentially.

50. The Report of the Auditor General for the financial year ended 2015 established that the 4th Respondent irregularly caused the employment of staff from a particular region over a period of time while acting as the Managing Director in breach of Treasury Circular No. 9/2013 of 26 July 2013.

51. Article 232 of the Constitution provides for values and principles of public service. The Article also provides for equal opportunity in employment. Ethnicity is one of the factors to consider.

52. The Article has been given content and context in the Leadership and Integrity Act, 2012 and the Public Officer Ethics Act.

53. Section 13 of the Leadership and Integrity Act sets out the moral and ethical requirements expected of public officers while Part III of the Public Officer Ethics Act outline the general code of conduct and ethics for public officers. Section 17 thereof addresses nepotism.

54. The Court is satisfied that the 4th Respondent was in breach of the values and principles of public service as well as the requirements on code of conduct and ethics by causing to be employed by the Authority, persons related to him.

Competitive recruitment

55. The 4th Respondent was first employed by the Authority as a Financial Analyst Trainee in 1984. He subsequently rose through the ranks up to Deputy Managing Director.

56. Sometime in 2008, the position of Managing Director fell vacant. The Authority carried out a recruitment process in which the 4th Respondent emerged top but unfortunately, the Minister for Regional Development did not approve his appointment. Someone else was appointed.

57. When the term of this Managing Director lapsed, on 22 April 2013, the 4th Respondent was appointed acting Managing Director pending the recruitment of a substantive Managing Director.

58. On 16 October 2014, the Authority met and resolved that the 4th Respondent be evaluated with a view to confirmation as the Managing Director. An *ad-hoc* Committee of the Board met and evaluated the 4th Respondent.

59. Through a letter dated 12 November 2014, the Board wrote to the Cabinet Secretary, Ministry of Environment, Water & Natural Resources recommending the appointment of the 4th Respondent as Managing Director.

60. Based upon the recommendation, the Cabinet Secretary, Ministry of Environment gazetted the appointment of the 4th Respondent as Managing Director of the Authority, backdated to 8 April 2015.

61. On 25 July 2017, about a year before the lapse of the 4th Respondent's term, the Board of the Authority met and resolved to approve the renewal of term.
62. On 9 January 2018, the Board of the Authority wrote to the Cabinet Secretary, Ministry of Devolution, recommending the renewal of term.
63. The Cabinet Secretary, Ministry of Devolution accepted the recommendation and through a letter dated 23 March 2018 wrote to the 4th Respondent, notifying him of the renewal of his contract (it is not clear if the renewal was gazetted).
64. The renewal of contract precipitated the instant Petition in which the Union contended that the appointment and/or renewal was unconstitutional, irregular, unlawful, illegitimate and therefore null and void because the values and principles of fairness, inclusivity, competitiveness, merit and openness in public appointments were not adhered to.
65. In justifying the legality of the appointment and/or renewal of contract, the Respondents found refuge in sections 5(3) and 10(1) & (2) of the State Corporations Act.
66. The Respondents, citing guidelines issued by the State Corporations Advisory Committee asserted that the 4th Respondent was suitable, eligible and qualified for appointment as Managing Director in 2014/2015, and that it was in that respect that a recommendation was made by the Board and approved by the Cabinet Secretary. The performance of the 4th Respondent, it was contended was exemplary.
67. Section 5(3) of the Act is in the following terms
- 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.
68. Article 10 of the Constitution has set out the national values and principles. These include participation of the people and equality.
69. In the same vein and in relation to public service, Article 232 of the Constitution outlines the values and principles of public service to include competition and merit as basis of appointment to public office and affording equal opportunities for appointment to public office.
70. Predating the Constitution is the Employment Act, 2007 which at section 5(1) requires the promotion of equal opportunity in employment.
71. The Respondents did not provide any evidence that the recruitment of a Managing Director for the Authority in April 2015 was subjected to public participation, competition or merit.
72. The initial appointment, in the view of the Court failed to meet the expectations, values and principles of the public service. It was a nullity. The Board and the Cabinet Secretary acted subjectively.
73. The recommendation by the Authority in 2018 for the appointment and/or renewal of contract of the 4th Respondent, and the renewal of contract by the Cabinet Secretary was founded upon an obvious breach of the guiding norms and cannot be allowed to stand.

Conclusion and Orders

74. From the foregoing the Court finds and orders
- (a) A declaration is hereby issued that the appointment of the 4th Respondent Steven Githaiga Ruimuku as Managing Director of Tana & Athi Rivers Development Authority is/was null and void.
 - (b) A declaration is hereby issued that the 4th Respondent Steven Githaiga Ruimuku failed the integrity test to hold public office.
 - (c) The Interested Party to immediately commence the process of recruiting a Managing Director as by law mandated.
75. The Union did not set out concisely the Issues for determination. Its submissions were a copy paste of the Petition. It is denied costs.

Delivered through Microsoft teams, dated and signed in Nairobi on this 25th day of September 2020.

Radido Stephen

Judge

Appearances

For Union Mr. Jaoko instructed by Nchoe, Jaoko & Co. Advocates

For 1st, 2nd, 3rd & 5th Respondents Ms Beatrice Akuno, Senior State Counsel instructed by the Office of the Attorney General

For 4th Respondent Ngonyo Munyua & Co. Advocates

For Interested Party Muchoki Kangata Njenga & Co. Advocates

Court Assistant Judy Maina