



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

PETITION NO. 68 OF 2020

(Before Hon. Lady Justice Maureen Onyango)

IN THE MATTER OF ARTICLES 10, 23, 27, 28, 29, 41, 47
AND 236 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS
AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013,

AND

IN THE MATTER OF SECTIONS 5, 44, 45, 46, 49 AND 50 OF THE EMPLOYMENT ACT NO. 11 OF 2007

AND

IN THE MATTER OF VIOLATION AND THREATENED VIOLATION OF FUNDAMENTAL
RIGHTS AND FREEDOMS UNDER (INTER-ALIA) ARTICLES 10, 27, 28, 29,
41, 47 AND 236 OF THE CONSTITUTION OF KENYA 2010

BETWEEN

ENG. GEOFFREY KIPROTICH SANG.....PETITIONER

VERSUS

THE CHAIRMAN, BOARD OF DIRECTORS NATIONAL

WATER HARVESTING AND STORAGE AUTHORITY.....1ST RESPONDENT

BOARD OF DIRECTORS, NATIONAL WATER

HARVESTING AND STORAGE AUTHORITY.....2ND RESPONDENT

JUDGMENT

The Petitioner, Eng. Geoffrey Kiprotich Sang filed a Petition dated 4th May 2020 seeking for the following orders: -

a) A Declaration that the Respondents engaged in a malicious scheme of orchestrating the irregular and unlawful suspension from office, removal from office and revocation of appointment of the Petitioner as the Acting Chief Executive Officer of National Water Harvesting and Storage Authority.

b) A Declaration that the Respondents engaged in a malicious scheme of orchestrating the irregular and unlawful suspension from office, removal from office and revocation of appointment of the Petitioner as the Chief Engineer of National Water Harvesting and Storage Authority.

c) A Declaration that the 9th Special Full Board meeting was illegally convened and that all the resolutions passed therein are null and void.

d) This Court be pleased to issue an injunction restraining the Respondents from removing the Petitioner from his position as the Chief Engineer and Acting Chief Executive Officer of National Water Harvesting and Storage Authority.

e) This Court be pleased to issue an injunction restraining the Respondents from illegally and irregularly removing, suspending and or revoking the Petitioner's appointment as Chief Engineer National Water Harvesting and Storage Authority.

f) This Court be pleased to issue an order of CERTIORARI to remove to This Court to be quashed the decision of the Respondents to revoke the appointment of the Petitioner as the Acting Chief Executive Officer of National Water Harvesting and Storage Authority.

g) This Court be pleased to issue an Order of CERTIORARI to remove to This Court to be quashed the decision of the Respondents to appoint the Acting General Manager, Corporate Services one Sharon Obonyo effective the 28th April 2020.

h) A Declaration that Respondents violated the Petitioner's right under Article 27 of the Constitution regarding the right to equality and freedom from discrimination by unlawfully, illegally, selectively and discriminately revoking the appointment of the Petitioner as Acting Chief Executive Officer and Chief Engineer.

i) This Court be pleased to quash the purported appointment of the Acting General Manager, Corporate Services one Sharon Obonyo as the Acting Chief Executive Officer effective the 28th April 2020.

The Petitioner avers that his rights under **Articles 10, 27, 28, 29, 41, 47 and 236 of the Constitution of Kenya and Sections 5, 44, 45 and 46 of the Employment Act** have been violated. He avers that he was appointed the Chief Engineer of the National Water Harvesting and Storage Authority (hereinafter "the Authority") on 2nd November 2015 and was confirmed on permanent and pensionable terms after completing the 6 months' probation period. That he was then appointed the Acting Chief Executive Officer of the Authority for a period of six (6) months or until a substantive Chief Executive Officer is appointed, through a resolution of the Respondents made during the 6th Special Full Board Meeting held on 18th November 2019 and which appointment took effect on 18th November 2019.

He however avers that the 1st Respondent and some members of the 2nd Respondent have since his appointment aggressively pursued a malicious scheme of instigating his unlawful and unfair suspension, termination and/or removal from his position as the Acting Chief Executive Officer of the Authority. That the said scheme was evinced when the Respondents illegally and irregularly advertised for applications to the said position in the Daily Nation Newspaper of 25th March 2020 and on the Authority's website. That they further and deliberately included among the professional qualifications for the position a requirement that the Applicant must possess 15 years' professional experience, which was not based on any legal document and was thus unjustified and aimed at specifically locking him out. That this Court stayed the said advertisement on 9th April 2020 in **ELRC Judicial Review Application No. 10 of 2020 Nairobi – Kenneth Alex Mugwi Mwangi v The Board of Directors, National Water Harvesting and Storage Authority**.

The Petitioner contends that the Respondents then lodged baseless allegations against him to the Directorate of Criminal Investigation and he was maliciously arrested, investigated and charged in Court. That the Respondents further lodged complaints against him with the Ethics and Anti-Corruption Commission relating to alleged irregularities in tendering at the Authority and also instigated false and malicious newspaper publications against him over the alleged irregularities. That the 1st Respondent discriminatively sent out a letter dated 27th April 2020 to all the Board members excluding the Petitioner, notifying them of the 9th Special Full Board Meeting scheduled for 28th April 2020. On the said date of 28th April 2020 as scheduled and vide a virtual platform, the Respondents illegally resolved to revoke his appointment as the Acting Chief Executive Officer of the Authority and appointed the Acting General Manager, Corporate Services, Sharon Obonyo in his place.

The further Petitioner avers that since 27th April 2020, the Respondents have locked him out of his office and instructed their agents and servants to bar him from entering the premises of the Authority without any justification, even though he is still the substantive Chief Engineer of the Authority. That he was consequently barred from performing his official duties as the Chief Engineer without issuing to him an official communication to that effect. That the 1st Respondent also broke into his office in his absence. That he filed a complaint of the said breaking at the Industrial Area Police Station.

He avers that he has at all times performed his duties at the Authority as mandated by the Mwongozo Code of Governance for State Corporations, such as when he appointed Lydia Korir as the Head of Procurement Division as recommended by the Chief Procurement Officer on 28th January 2020 to ensure effective management structures which was his duty. He avers that since the Respondents called for a special full board meeting in his absence as the Secretary to the Board and in violation of procedure for such a meeting, any resolution that was made by the Respondents in the said full board meeting held on 28th April 2020 should as such be rendered null and void.

The 1st Respondent filed a Replying Affidavit sworn on 11th May 2020 by Erick Okeyo wherein he avers that as the Chairperson of the Board of Directors of the Authority, he is mandated to ensure that the Chief Executive Officer of the Authority follows the constitutional and statutory obligations of an accounting officer as outlined at **Article 10 and 226 of the Constitution** and the entire provisions of the **Public Finance Management Act 2012**. That the aforesaid governance obligations are further outlined in the provisions of the **State Corporations Act and Section 17(4) of the Water Act 2016**.

He avers that when he assumed office on 20th March 2020, he looked into the corruption allegations with respect to the tender for the Construction of Turkana Peace Dam (naku'etum site) in Turkana County. That he found that the Petitioner had unlawfully solely executed the contract with J. K. Investment Kenya Limited without following internal/routine procedures of having the contract cleared by the Corporation Secretary/head of legal services of the Authority. That he was further briefed on 3rd April 2020 that the Chief Procurement Officer had written an internal memo to the Petitioner advising him against awarding the said tender for the Construction of Turkana Peace Dam to the recommended bidder as they did not meet the required evaluation criteria. That the Petitioner blatantly failed, refused, and/or neglected to terminate the Notification of award and mitigate losses to the Authority as advised and in abuse of office.

He avers that he got concerned with the negative publicity that the Petitioner's arrest had brought to the Authority and thus convened and chaired an online special meeting of the Board that resolved to revoke the Applicant's appointment as Acting Chief Executive Officer. That the said decision was made in good faith after consulting the in-house and external lawyers and was in line with good governance and accountability requirements. That there is therefore no basis to quash the said decision of the Board which was made to safeguard public funds and that the Petitioner cannot seek to be reinstated to a position he does not hold and which had been bestowed to him by the Board of Management. He avers that the Petition herein thus lacks merit and should be dismissed with costs.

In a Further Affidavit sworn on 15th June 2020, the Petitioner denies that he went against his roles or violated the law in his capacity as the Acting Chief Executive Officer to warrant the revocation of his appointment. He further contends that there has never been any report against his office as the Chief Engineer. He denies all allegations of corruption against him with regard to the Turkana Peace Dam construction tender and avers that due procedure was followed prior to the award of the said tender. He also denies that there were any recommendations by the Chief Procurement Officer on the said tender and avers that his arrest was on allegations of irregular employment of staff of the Authority and not on the said tender. He contends that revocation of his appointment was predetermined and unilaterally instigated by the 1st Respondent, which is why he was not notified of the online meeting. That it is evident the revocation of his appointment as Acting Chief Executive Officer and his immediate replacement did not adhere to due procedure and violated his constitutional rights.

The Petition was dispensed by way of written submissions.

Petitioner's Submissions

The Petitioner submits that this Court has the mandate and power to afford such an individual redress on account of a denial, violation, infringement or threat to any individual's right as per the provisions of **Article 23(3) of the Constitution**.

That the Respondents' revoking of his appointment as Chief Executive Officer of the Authority without any notice and immediately replacing him without approval by the Cabinet Secretary offend the rule of law and the principle of natural justice. That he was not heard prior to the revocation of his appointment as Chief Executive Officer and this Court must thus find that his right to fair hearing under **Article 50** and his right to fair labour practices under **Article 41** were violated by the Respondents. That the Respondents further violated his right to fair administrative action under **Article 47** and his right not to be discriminated upon because he only learnt of the revocation through an internal memo. To support his submission that the 9th Special Full Board meeting was null and void for the reason that the proceedings violated clear provisions of the law and due process, he relies on the decision in **Geothermal Development Company Limited v Attorney General and 3 others** cited with approval in **Joseph Mbalu Mutava v Attorney General & another [2014] eKLR**.

The Petitioner further submits that **Article 236 of the Constitution** providing for protection of public officers in the performance of their duties applies to him by virtue of being a state officer and that the revocation of his appointment therefore violates the provisions of Article 236.

It submits that the Respondents have not proved their reasons for revoking his appointment as under **Section 43 of the Employment Act** and that there is no proof he awarded the tender unscrupulously or that he was involved in any corrupt dealings. That **Section 4(3)(a) of the Fair Administrative Actions Act** provides that where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected prior and adequate notice of the nature and reasons for the proposed administrative action. That the Respondents have not given him the reasons why they failed to invite him for the 9th special full board meeting and that the provisions of the state Corporations Act Water Act, 2016 relied upon by the Respondents are not superior to the provisions of the Constitution and the Fair Administrative Action Act.

On the Petitioner being denied access to his office, he cites the case of **Fredrick Saundu Amolo v Principal Namanga Mixed Day Secondary School & 2 Others (2014) eKLR, Industrial Court at Nairobi, Cause No. 747 of 2014** where the court held that where there is imminent danger of the employee interfering with any pending investigation, a unilateral but procedural administrative action may be considered. That **Article 41** guarantees the rights to fair labour practices including the right to fair remuneration and to reasonable working conditions including access to his work station without any difficulty, among others. That since he has been barred from accessing his office, this Court should intervene before the Respondents formally terminate his employment as Chief Engineer of the Authority.

He submits that the agenda of the 9th Special Full Board meeting was tabled on the floor contrary to the **Mwongozo Code of Conduct at Clause 1.8.4** which requires that board papers are made available to members of the board not less than ten days before the meeting.

It is the Petitioner's submission that he is indeed entitled to the reliefs sought having demonstrated that his appointment as Acting Chief Executive Officer was wrongfully and unfairly revoked and he has been denied access to his office. He asks the Court to be guided by the decision of the South African Constitutional Court in **Minister of Health & Others v Treatment Action Campaign & Others (2002) 5 LRC 216 at Page 249**, cited with approval in the case of **Solai Ruiyobei Farm Limited v Registrar of Companies, Judicial Review No. 14 of 2018**, where the court held that:-

"... Appropriate relief will in essence be relief that is required to protect and enforce the constitution. Depending on the

circumstances of each particular case, the relief may be a declaration of rights, an interdict, a mandamus, or such other relief as may be required to ensure that the rights enshrined in the constitution are protected and enforced. If it is necessary to do so, the court may even have to fashion new remedies to secure the protection and enforcement of these all important rights...the courts have a particular responsibility in this regard and are obliged to “forge new tools” and shape innovative remedies, if need be to achieve this goal.”

Respondents’ Submissions

The Respondents submit that the Petitioner’s signing of the problematic tender contract was in breach of his duties under **Clause 1.19 of the Mwongozo Code of Governance for State Corporations** and **section 33(4) of the Water Act 2016**. That the Petitioner was quick to sign the said contract to avoid statutory oversight from the 2nd Respondent. That it is evident he was in collusion with J. K. Investment Limited and that the same cast aspersions on the character of the Petitioner in performing his duties. That the Respondents were therefore right to revoke the Petitioner’s authority as the Acting Chief Executive Officer on the grounds of negligence of duty and or abuse of office.

They submit that the resolutions passed during the Special Board Meeting were in accordance with the law. They rely on **Section 18 of the Water Act** which provides that: -

The Chief Executive Officer may be removed from office by the Cabinet Secretary on the recommendation of the Management Board, in accordance with the terms and conditions of service.

That the said meeting was convened as provided for under **Section 8(c) of the First Schedule of the Water Act** which states that the Chairperson shall on the written application of one third of the members convene a special meeting of the board or committee. Further, that the quorum of the said meeting aligned with **section 9 of the First Schedule of the Water Act** which provides that a third of the members of a board or a committee shall constitute a quorum at any meeting of the board or committee. That since the quorum for holding the meeting was met as per law, the Petitioner needed not to have attended as he does not have any voting right as the secretary of the board. It is their submission that the Petitioner has not provided sufficient proof to warrant the quashing of the Board’s resolution to revoke his appointment and appoint the current Acting Chief Executive Officer.

The Respondents submit that the said revocation was for an acting position, meaning the appointment was temporary and hence the Petitioner’s right to hold office as "Acting Chief Executive Officer" was merely temporary. That the Employment Act does not apply to acting positions as has been asserted by the Petitioner in his submissions. They rely on the case of **John Mark Wambugu v National Sports Fund Board of Trustees [2019] eKLR** where the Court in dismissing the petition held:

“43. The Employment Act, 2007 and the other primary labour statutes do not provide for any rights as to an acting position.

44. The Constitutional provisions implicated herein by the Petitioner do not show any restrictions upon an employer exercising the power to remove or revoke an acting appointment, or that the removal from an acting appointment are only exercisable on specified grounds.

45. The acting appointment, in my view was held at the pleasure of the Respondent/employer as no law providing protections from removal from the acting appointment was invoked. The removal was not part of a disciplinary process.

46. The Court would in this regard endorse the legal principle by the Court of Appeals Philippines that an acting appointment is temporary and lasts until revoked or a new appointment is made.

47. In the view of the Court the removal of the Petitioner from the acting appointment was not a penalty or sanction arising from allegations of misconduct, performance or incapacity warranting the invocation of the age old doctrine of natural justice or right to a hearing.”

That the Petitioner is still the Chief Engineer of the Authority and has access to his office and there is therefore no constructive dismissal as alleged by the Petitioner. That they have therefore not violated the Petitioner’s rights under the Employment Act.

On the allegation of discrimination, they rely on the case of **John Harun Mwau v Independent Electoral and Boundaries Commission & Another [2013] eKLR** where the court stated in reference to Article 27 that it does not necessarily mean that different treatment or inequality will per se amount to discrimination and a violation of the constitution.

They further submit that the Petitioner has not demonstrated the alleged violations and contraventions of the Constitution or presented any concrete evidence before this court to demonstrate how his Constitutional rights have been violated. To that end, they rely on the case of **Anarita Karimi Njeru v Republic** and submit that the Petition fails to meet the test for a constitutional petition as the Petitioner has just listed the Articles of the Constitution. That the Court should thus dismiss the Petition on account of the fatal omission and specifically on the grounds that the court is unable to ascertain with precision the orders that the Petitioner seeks to enforce against the Respondents. That it is also noteworthy that the cause of action has been overtaken by events as the Petitioner is no longer the Acting Chief Executive Officer and that the same was communicated to him through a letter titled ‘*Revocation of Acting Appointment*’ as shown at **annexure S-05 in the Respondents’ Replying Affidavit**.

Analysis and Determination

The issues for determination are –

1. Whether the Respondents maliciously orchestrated the suspension from office of the Petitioner and his removal as Acting Chief Executive Officer of the National Water Harvesting and Storage Authority.
2. Whether the 9th Special Board Meeting of the 1st Respondent was irregular and the resolutions passed thereat null and void.
3. Whether the Petitioner is entitled to the orders sought.

The Petitioner did not adduce any evidence in support of the allegation of malice in the revocation of his appointment. On the contrary, having been the subject of investigations by the Ethics and Anti-Corruption Commissions, the 1st Respondent had valid reason to doubt his integrity and his suitability for the acting appointment. Having not been competitively selected to the acting position, it carried no guarantee of job security, having been of a temporary nature.

The prayer for injunction for removal of the petitioner from his position as Chief Engineer, National Water Harvesting and Storage Authority is also not supported by any evidence as the letter revoking the appointment of the petitioner as Acting Chief Executive Officer does not make any reference to his substantive position as Chief Engineer. This has been confirmed by the Respondents who have submitted that the petitioner is still the Chief Engineer of the Authority as is also deponed at paragraph 26 of the Replying Affidavit of ERICK OKEYO, the Chairman of the Board, the 1st Respondent herein.

From the foregoing I find no proof of violation of any of the Petitioner's constitutional rights and freedoms under Articles 27, 28, 29, 40, 47 or 236. I further find no proof of violation of Sections 5, 44, 45 or 46 of the Employment Act by the Respondents.

The result is that the petition fails in its entirety and is accordingly dismissed.

In view of the subsisting relationship between the Petitioner and

the Respondents, there shall be no orders for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 16TH DAY OF OCTOBER 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 15th March 2020 and subsequent directions of 21st 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