



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

PETITION NO. 97 OF 2020

IN THE MATTER OF ARTICLES 3(1), 22, 23, 48, 50(1),

AND 258 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF ALLEGED VIOLATION OF ARTICLES

4(2), 10(2) (a), 27 (1) & (2) AND 47(1) OF THE CONSTITUTION

IN THE MATTER OF THE ALLEGED VIOLATION OF THE

MWONGOZO (THE CODE OF GOVERNANCE FOR STATE

CORPORATIONS); THE HUMAN RESOURCES POLICIES

AND PROCEDURES MANUAL FOR WATER SECTOR TRUST

FUND; AND THE PROCEDURE FOR REAPPOINTMENT OF

SERVICE OF CHIEF OFFICERS IN STATE CORPORATIONS

IN THE MATTER OF THE CONSTITUTIONAL AND

LEGAL VALIDITY OF THE CHIEF EXECUTIVE OF WATER

SECTOR TRUST FUND SERVING FOR A THIRD THREE-YEARS TERM

IN THE MATTER OF THE DOCTRINE OF LEGITIMATE EXPECTATIONS

BETWEEN

OKIYA OMTATAH OKOITI.....PETITIONER

- VERSUS -

ISMAIL FAHMY M. SHAIYE.....RESPONDENT

-AND-

THE BOARD OF TRUSTEES, WATER SECTOR TRUST FUND....INTENDED INTERESTED PARTY

(Before Hon. Justice Byram Ongaya on Friday 16th October, 2020)

RULING

The petitioner filed the petition and a notice of motion on 29.06.2020 in person. The notice of motion was under Articles 20, 22, 50(1), 23(3),

159(2)(d), 165 and 258 of the Constitution of Kenya, 2010, sections 19 and 24 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013; and all other enabling provisions of the law. The petitioner prayed for orders:

- 1) That pending the hearing and determination of the application or the petition herein, the Honourable Court be pleased to issue a temporary order of prohibition prohibiting the respondent, however acting the respondent, however acting from accessing the office of the Chief Executive Officer of the Water Sector Trust Fund.
- 2) That consequent to the grant of the prayers above the Honourable Court be pleased to issue such further directions and orders as may be necessary to give effect to the foregoing orders and favour the cause of justice.
- 3) That costs be in the cause.

The application was based on the attached supporting affidavit and subsequent supplementary affidavits the petitioner filed on 22.07.2020, 24.07.2020, and one sworn on 20.07.2020 and in line with the Court's directions. The application is based on the following grounds:

- a) On 24.06.2020 the interested party wrote a letter to the respondent declining to renew his tenure as the Chief Executive Officer (CEO) of the Water Sector Trust Fund (the Fund) and instead send him on a three months' terminal leave and 40 accumulated paid annual leave days pending his exit at the expiry of his second and final term on 09.11.2020. On the same date the Board appointed a senior staff of the Fund as acting CEO pending recruitment of a substantive holder of the office of the CEO.
- b) On 25.06.2020 the respondent caused commotion at the Fund when he arrived with armed police officers and forced his way into and occupied the office of the CEO. The incident went viral on social media attracting the petitioner's attention.
- c) Under the law the CEO of the Fund is appointed for a term of three years' renewable only once upon satisfactory performance.
- d) The respondent served his first three-year term as CEO of the Fund from 10.11.2014 TO 9.11.2017. The contract was renewed for a term of three years from 10.11.2017 to 09.11.2020. prior to expiry of the second term, the respondent should proceed on a three months' terminal leave to pave the way for the appointment of an acting CEO and the smooth transition and competitive recruitment of his successor.
- e) The respondent demands for a third three-year term and has resisted the Board's decision to send him on terminal leave pending the expiry of term and appointment of the next substantive CEO of the Fund. The petitioner's case is that under the law and applicable policies the respondent is barred from reappointment for a third term as CEO of the Fund. Instead he should proceed on a terminal leave per the Circular by Permanent Secretary, Secretary to the Cabinet and Head of Public Service Ambassador Francis Muthaura issued on 23.11.2010 titled "**Procedure for Reappointment of Service Chief Executive Officers in State Corporation**". The best practice in the public service has been that CEO's whose term is expiring proceed on a 6 or 3 months' terminal leave to allow for smooth recruitment of the successor and such leave is normal. The respondent's refusal to proceed on terminal leave is a gross display of impunity which is causing concern to the petitioner. The Constitution, Mwongozo, and the Fund's human resource manual apply. The respondent is acting contrary to law by forcefully holding on the public office. The fund is a state corporation and relevant constitutional, statutory and policy provisions apply to the office of the Fund's CEO.
- f) Section 118 of the Water Act, 2016 and Section 5(3) of the State Corporations Act don't set limits for the tenure of the Fund's CEO, Articles 10, 27(1) & (2) and 47(1) of the Constitution on rule of law and good governance are binding. The relevant good governance applies, thus, under paragraph 1 of annexure to Mwongozo (the Code of Governance for State Corporations) the term of a CEO shall be a three-year term or as otherwise provided under any other law – renewable once subject to performance evaluated by the Board; and paragraph 2.5.2 of the Human Resources Policies and Procedures Manual for Water Sector Trust Fund, the CEO shall be appointed on a contract of three- years renewable once subject to satisfactory performance. Further, the Circular by Permanent Secretary, Secretary to the Cabinet and Head of Public Service Ambassador Francis Muthaura issued on 23.11.2010 titled "**Procedure for Reappointment of Service Chief Executive Officers in State Corporation**" states thus, "...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." The circular further states that the Board will recruit an acting CEO, in consultation with the parent ministry and State Corporations Advisory Committee (SCAC) as provided for by section 27(1) (c) of Cap 466 in a caretaker position when the process of recruiting a new CEO is ongoing.
- g) Orders are prayed for per Article 23(3) of the Constitution on the authority of courts to uphold and enforce the Bill of Rights. Article 23(3) provides for remedies of declaration of rights, injunction, conservatory order, or an order of judicial review in any proceeding under Article 22.
- h) The petitioner and people of Kenya will suffer great loss if the respondent's impugned actions are not enjoined and which actions by the respondent are catastrophic, irregular, unreasonable, illegitimate, unlawful, *ultra vires*, and unconstitutional, null and void *ab initio*.
- i) The applicant has established a *prima facie* case and prayers made are in the best public interest. Balance of convenience favours granting of the prayers to avert irreparable injury and the Court has jurisdiction to grant the prayers.
- j) By the letter dated 23.06.2020 the Chairman of the interested party (one Patrick O. Kokonya) conveyed to the respondent that the Attorney General had provided advisory on the respondent's request for renewal of his employment contract. Further that the Attorney General by the letter Ref. No. AG/CONF/21/78/10 Vol.1 dated 28.04.2020 had referred to Mwongozo, the Fund's Human Resources Manual, and the Circular by the Head of Public Service and advised that since the respondent had served for two terms of three years each, he is ineligible for re-appointment for a third term. Further, the resolution of a special board meeting held on

23.06.2020 required the respondent to proceed on 30 working days and a further 10 annual leave days carried forward and effective 24.06.2020 to 07.08.2020 and 3 months (90 days) terminal leave effective 11.08.2020. The letter advised the respondent to handover not later than 24.06.2020 to Mr. Wills Okello Ombai, Chief Manager, Investments and Programs who was to take over in acting capacity as the Fund's CEO. The Chairman equally conveyed his letter dated 23.06.2020 to the said Mr. Wills Okello Ombai on his appointment in an acting capacity as the Acting CEO.

k) The Chairman of the Board was subsequently removed from office and the issue is subject of **ELRC JR 64 of 2020, Republic – Versus- The Hon. Attorney General & Another Ex-parte Okiya Omtatah Okoiti** and the order of 03.07.2020 granted leave to the ex-parte applicant to file the substantive application whereas, the order of 15.07.2020 was that the leave granted to operate as stay.

l) The respondent on his part has filed **ELRC Petition 98 of 2020, Ismail Fahmy Shaiye –Versus- Water Sector Trust Fund and Another and Willis Okello Ombai (Interested Party)** and the petitioner has exhibited the pleadings in his supplementary affidavit filed on 22.07.2020 in which the respondent herein challenges the annual and terminal leave as imposed and further challenges the acting appointment of Willis Okello Ombai.

The respondent appointed Odhiambo & Talam Advocates to act in the matter. The respondent filed on 21.07.2020 his replying affidavit. He filed a further replying affidavit on 29.07.2020. The respondent stated and urged as follows:

a) The interested party convened several special meetings on 08.05.2020, 16.06.2020 and on 23.06.2020 which determined his fate and replaced him prior to end of his term of service.

b) The Chairman decision on ineligibility of the respondent for renewal was unilaterally hatched and executed by the board Chairman unilaterally without involving the full board and the Cabinet Secretary as required. The special board meeting that put him on annual and terminal leave actually never took place. The Chairman violated the provisions of the 1st schedule to the Water Act that provides that the decisions of the board are to be reached by a majority of the board. Further the Chairman had acted maliciously against the respondent in view of the respondent's cooperation with the Ethics and Anti-Corruption Commission (EACC) which was investigating alleged corruption and embezzlement claims against the Chairman and as per the exhibited correspondence between EACC and the respondent.

c) The Chairman irregularly sought a legal opinion from the Attorney General because there was no board resolution in that regard.

d) The applicant had not applied for any information about the present case and now exhibited for the petitioner.

e) The petitioner lacks *locus standi* to bring the petition under Article 258 of the Constitution.

f) The Chairman already polluted the waters of justice by acting maliciously and unlawfully against the respondent and that negates the petitioner's otherwise good intentions to enforce the values and principles in Mwongozo code.

g) The appointment of the Chairman Patrick O. Kokonya having been revoked and his unilateral decisions against the respondent having been recalled, the petition and application has been overtaken by events.

h) The application is misplaced, unmeritorious and an abuse of the Court's process and the same should be dismissed with costs.

i) The respondent is still the CEO of the interested party because his contract has not come to an end.

j) Whereas the Water Act No.43 of 2016 classifies the other CEOs of the Boards established under the Act including Water Resources Authority, Water Harvesting and Storage Board and Water Works Development Agencies Board as members of those Boards to be appointed by the Cabinet Secretary in charge of Water, the CEO of the interested party is clearly classified as an employee of the Fund and is employed by the Board and the terms of service regulated by the Cabinet Secretary in charge of the public service. The Act caps the term of service for the other Boards' CEOs but not in the case of CEO for the interested party.

k) The applicant is not an employee of the interested part or a board member thereof and cannot swear as to the details of the terms of the respondent's employment as done in paragraph 10 of the 2nd supplementary affidavit which should be struck out as mere hearsay. Further the applicant is not a member of the board and the board members having denied the holding of the special meeting at which the Chairman's letter says it was resolved the respondent is ineligible for reappointment and should proceed on leave, the applicant cannot insist that the special meeting took place as done in paragraphs 11, 12 and 13 of the 2nd supplementary affidavit.

l) The interested party's operational procedure is to first seek legal opinion from the in-house legal counsel and in event of dissatisfaction, a resolution is made to seek advice from the Attorney General.

m) The CEO of the interested party is appointed by the board per section 118 of the Water Act No.43 of 2016 and the Chairman cannot make unilateral decisions in that case.

n) The petitioner should not be allowed to represent the former board Chairman through the backdoor.

The respondent also filed a notice of preliminary objection on 21.07.2020 upon the following grounds:

- a) The petitioner does not meet the threshold of *locus standi* envisioned under Articles 22 and 258 of the Constitution to institute and prosecute the application.
- b) The petition seeks to enforce a circular and fails to meet the threshold for constitutional petitions.
- c) The petition and the application have been overtaken by events.
- d) The petition is frivolous, fatally defective. Misconstrued and bad in law.

The interested party appointed Sheikh & Shariff Advocates to act and filed the replying affidavit of its Corporation Secretary Halima Ali sworn on 17.07.2020 and the further replying affidavit of Halima Ali sworn on 28.07.2020. The interested party urged as follows:

- a) The board has authorised her to make the replying affidavit (but the authority is not exhibited).
- b) The respondent was appointed CEO by the board per section 118 of the Water Act No.43 of 2016. The appointment was for an initial term of 3 years, renewable. The contract was renewed for a further term of three years from 10.11.2017.
- c) The Chairman issued a letter dated 23.06.2020 unilaterally sending the respondent on a terminal and annual leave and appointed Willis Okello Ombai to act as CEO. The alleged special board meeting of 23.06.2020 never took place as confirmed by majority of the board members in a letter dated 24.06.2020 to the Cabinet Secretary who responded by her letter dated 24.06.2020 declaring the resolution null and void and the respondent is still in office as CEO.
- d) The advisory opinion by the Solicitor General dated 28.04.2020 relied on by the Chairman in the letter dated 23.06.2020 was obtained without board resolution and therefore unprocedural. Clause 1.2 of Mwongozo requires the board members to exercise their role collectively and not individually.
- e) The Chairman is under investigation by the EACC. Further, the President vide Gazette Notice No. 4467 dated 29.06.2020 has revoked his appointment and appointed Mary M. Khimulu as Chairperson of the board.
- f) The allegation that the respondent resisted the Chairman's decision and caused commotion on 25.06.2020 is hearsay and false or misleading. The respondent's term of service ends on 09.11.2020.
- g) The board has not determined the issue of renewal of the term of contract.
- h) The petitioner lacks locus to bring the present application and petition. He is litigating on behalf of the Chairman Partrick O. Kokonya.

The interested party also filed the notice of preliminary objection dated 28.07.2020 upon the following grounds:

- a) The petitioner lacks standing to move the Court.
- b) The Court lacks jurisdiction to adjudicate the dispute.
- c) The petition does not disclose any issue of constitutional controversy.
- d) The petition is incompetent and legally untenable.

The interested party also filed a notice of motion dated 28.07.2020 under Rule 3(2) & (8), 19 of the Constitution of Kenya (Protection of Rights & Fundamental Freedoms) Practice and Procedure Rules, 2013, section 8 of Access to Information Act, 2016 and all other enabling provisions of the law. The application prayed for orders expunging from the record listed documents from the petition and supporting affidavit; listed documents from the petitioner's supplementary affidavit sworn on 20.07.2020; and listed documents from the supplementary affidavit sworn on 22.07.2020. The grounds for the prayers were as follows:

- a) The petitioner obtained the documents unlawfully and illegally and they are inadmissible.
- b) The petitioner has never applied to access the documents and they were obtained in breach of section 8 of the Access to Information Act.
- c) The contents of some of the annexures are false, misleading and have been selectively introduced hence inconclusive as to the issues raised.
- d) The documents relate to employment relationship between the interested party and the respondent and are introduced by the petitioner in violation of employee's rights to privacy.
- e) The evidence does not advance justice in the matter.

The petitioner opposed the application by filing his replying affidavit sworn on 28.07.2020. The petitioner urged that being on study leave,

Halima Ali is incompetent to swear the supporting affidavit. The documents in issue are already part of the official public record in ELRC JR 64 OF 2020 where they were produced in an affidavit sworn by the Fund Chairman in support of an application the petitioner filed therein to cite the respondent herein for contempt of Court.

This ruling is for determination of the application by the petitioner dated 26.06.2020, the preliminary objections filed for the respondent and the interested party, and the application to expunge documents from record filed for the interested party dated 28.07.2020. Parties filed their respective submissions and made oral submissions as well. The Court has considered the material on record in that regard and the parties' respective cases and makes findings as follows.

The **1st issue** for determination is whether the application dated 28.07.2020 for expunging documents as listed should be allowed. The interested party admits that under Article 35(1) (a) and (b) of the Constitution and Section 4 of the Access to Information Act, all citizens have the right to access information held by the state or public agencies such as the interested party. The procedure to obtain the information, it is submitted, is provided for in Section 8 of the Access to Information Act, 2016. The section provides for application to access information. The interested party submits that in absence of an application under the section, the petitioner obtained the information illegally. The petitioner says that the information is in the public domain including that it has been exhibited in related pending court cases. The Court finds that indeed, mere absence of an application under section 8 of the Access to Information Act would not establish that the documents have been illegally obtained. In the opinion of the Court, the section is available for application to access information in cases whereby the applicant otherwise has been unable to access information and is desirous of obtaining the same from the relevant public entity or body. The section is not the exclusive procedure for accessing the information. The Court further finds that as submitted for the petitioner, some of the documents it is prayed to be expunged are clearly in the public domain such as the circular by the Head of Public Service dated 16.04.2020. It is also clear to the Court that disputes have erupted in the interested party's board including disputes surrounding the renewal of the respondent's service as CEO upon the lapsing of his current tenure with the consequence that numerous suits have been filed in which the parties have exhibited most or all of the documents now subject of the present application. The pending cases have been referred to by the parties herein and some of the documents exhibited herein as already filed in court in the other cases. The Court therefore finds that the interested party has failed to establish the alleged illegality on the part of the petitioner and as at the time of making this ruling, even if some of the documents relate to the contract between the respondent and the interested party, the Court is persuaded that the documents are in public domain as already disclosed in the pending several legal proceedings involving the respondent and the interested party one way or the other. As to the relevance of the documents and whether they advance justice in the case, it is for the parties to make appropriate submissions and for the Court to decide. Accordingly, the application to expunge the documents will fail. While making that finding, the Court has considered order 19 rule 6 of the Civil Procedure Rules which provides that the court may order to be struck out from any affidavit any matter which is scandalous, irrelevant or oppressive and returns that the interested party's application has not established any of the prescribed grounds for striking out.

The **2nd issue** for determination is whether the preliminary objections as filed for the respondent and the interested party are meritorious.

The first ground of objection is that the Court lacks jurisdiction for want of employer-employee relationship. Parties are in agreement that the Court's jurisdiction flows from Article 162(2) (a), Article 165 (5) (b) and the provisions of the Employment and Labour Relations Court Act, 2011. There is no doubt that the dispute is about whether the respondent as an employee of the interested party should proceed on leave and is ineligible for reappointment for a third term of service. The Court considers that leave and reappointment are clearly human resource functions that squarely fall under the jurisdiction of the Court and the Court enjoys the relevant jurisdiction. Section 12(1) of the Employment and Labour Relations Court Act, 2011 is clear that the Court has exclusive original and appellate jurisdiction to hear and determine disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of the Act or any other written law. Section 12 (2) of the Act further provides that an application, claim or complaint may be lodged with the Court by or against an employee, an employer, a trade union, an employer's organisation, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose – and by that provision, it is clear that in the instant petition the petitioner has by way of the petition lodged a complaint against an employee, the respondent. The Court further holds that by reason of section 12(2) of the Act the proceedings are not limited to parties listed in section 12(1) of the Act but the jurisdiction spreads to disputes about employment even by and against persons not being employees or employers or parties to the contract of service. The Court finds that to be the case especially in view of Article 162(2) as read with Article 165 (5) (b) of the Constitution.

The second objection is whether the petitioner has the necessary standing to file the present petition and application. It is urged for the respondent and the interested party that the petitioner is litigating on behalf of the former chairman one Patrick O. Kokonya and the petitioner has not established *locus standi* because he has no sufficient interest in the dispute and he is not acting in the public interest. Related to that objection is the third ground of objection that the petitioner has not sufficiently pleaded his case as to establish a constitutional claim for breach of the Bill of Rights or violation of the Constitution.

As for issues raised on sufficiency of pleadings, the Court finds that with clarity, the petitioner has at paragraph 29 of the petition stated, “**29. The decision by the respondent NOT to proceed on terminal leave as directed by the Board violates the principle of the rule of law which is enshrined in the Constitution under Articles 4(2), 10(2) (a), 27(1) & (2) and 47(1)**” The Court therefore returns that the preliminary objection based on want of better pleadings will collapse. The Court further finds that the parties are not in dispute that the matter in issue is about the public office held by the respondent and public decisions by the board and its members about that public office. There is no dispute that the office in issue is regulated by constitutional, statutory, and public policy provisions. The Court therefore returns that on the material before Court the petitioner has established that he has moved the Court in the public interest. The petitioner has alleged violation of Article 27(1) & (2) and article 47(1) of the Constitution and being part of the Bill of Rights. As submitted for the respondent, the Court should look at the pleadings and looking at the pleadings, the petitioner has alleged a case for a petition under Article 22, and therefore standing has been established. Further the Court finds that as per holding in **Trusted Society of Human Rights Alliance –Versus- Nakuru Water and Sanitation Services Company & Another [2013] eKLR**, the petitioner has established standing under Article 258 (2) (c) as he is acting in public interest because he has established that the respondent holds a public office and the renewal of his tenure upon the lapsing of the present but about to end contract is such a thing that the general public has stakes as is protected by constitutional provisions, executive policy, and legislative provision.

Thus the Court returns that the preliminary objections filed for the respondent and the interested party will collapse and are dismissed.

The **3rd issue** is whether the petitioner is entitled to the prayers made in the notice of motion dated 26.06.2020 and filed on 29.06.2020. The petitioner prays that the respondent should be prohibited from accessing the office of the CEO of the Water Sector Trust Fund pending the hearing and determination of the petition. The petitioner relies on the letter dated 23.06.2020 by the Chairman Patrick O. Kokonya emplacing the respondent on terminal leave. The Court has considered the submissions made for parties and the material on record and finds as follows:

- a) There is no dispute that the respondent's current contract of service is due to end on 09.11.2020.
- b) There is a dispute as to validity of the Chairman's letter dated 23.06.2020 especially whether it was made unilaterally by the Chairman and whether the special board meeting the letter refers to took place or not.
- c) Clause 17.2. of the Human Resource Policies and Procedures Manual for the Water Sector Trust Fund, July 2019 and which apply to the respondent's service with the interested party provide for Complaints and Grievances and it provides that the Fund may on its own initiative or complaint made by any person investigate any issue relating to its statutory functions and powers and make such decision as it considers just and in the circumstances of the case. Further, the Fund in carrying out investigation under the paragraph shall accord every party involved an opportunity to make a representation of their case.

The Court finds that the petitioner has not established a *prima facie* case because the respondent is still in the interested party's employment and there is no established ground to deny him access to the CEO's office as prayed for. Further, the Chairman's letter and which is in dispute did not state that the respondent should not access the office of the CEO but it only emplaced the respondent on leave. Finally, the grievance management procedure which was open to every person including the petitioner has not been shown to have been invoked or exhausted. The petitioner not having established a *prima facie* case with a high likelihood of success, the application will be declined.

The Court has considered the parties' margins of success and each party shall bear own costs of the applications and preliminary objections.

In conclusion, the application by the petitioner herein, the application by the interested party herein, the preliminary objections by the respondent and the interested party respectively, are each hereby dismissed with orders that each party to bear own costs.

Signed, dated and delivered by the court at **Nairobi** by video-link this **Friday 16th October, 2020**.

BYRAM ONGAYA

JUDGE