



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 114 OF 2020

(Before Hon. Justice Hellen S. Wasilwa on 6th October, 2020)

EMMANUEL WANJALA WAMALWA.....PETITIONER

VERSUS

ROBERT PAVEL OIMEKE.....1ST RESPONDENT

BOARD OF DIRECTORS ENERGY &

PETROLEUM REGULATORY AUTHORITY.....2ND RESPONDENT

PUBLIC SERVICE COMMISSION.....3RD RESPONDENT

CABINET SECRETARY

MINISTRY OF ENERGY.....4TH RESPONDENT

CABINET SECRETARY

MINISTRY OF PETROLEUM & MININ.....5TH RESPONDENT

ETHICS & ANTI-CORRUPTION

COMMISSION.....6TH RESPONDENT

JUDGEMENT

Background

1. The 1st Respondent, Robert Pavel Oimeke, was initially appointed as a Director General of the Energy Regulatory Commission (ERC), which was succeeded by the Energy & Petroleum Regulatory Authority (EPRA) after the enactment of the Energy Act 2019, for a 3 year term that commenced on 1/8/2017. His term lapsed on 1/8/2020 but his contract was subject to renewal or extension by the 2nd and 3rd Respondents at any time before even date.
2. On 22/7/2020, the Petitioner filed the Petition herein on his own behalf and that of the public in which he contests the reappointment of the 1st Respondent. He avers that the conduct of the 1st Respondent as Director General has infringed Articles 10, 73, 75 (1) and 232 of the Constitution as he is guilty of abuse of office, mismanagement of a public institution and public resources, corruption, tribalism and favouritism which is uncharacteristic of a public servant.
3. He seeks the following orders/declarations:-

a. A declaration restraining the 2nd, 3rd, 4th and 5th Respondents from deliberating, renewing and or extending the contract of the 1st Respondent as the Director General of the Energy Petroleum Regulatory Authority.

b. A declaration that the 1st and 2nd Respondents' actions or commissions in managing Energy Petroleum Regulatory Authority contravenes Articles 10, 20,21, 27, 46,232 and 236 of the Constitution of Kenya.

c. An order compelling the 6th Respondent to immediately commence investigations against the 1st Respondent in a bid to establish any corruption related activities involving and or perpetrated by him in the course of his employment.

d. General damages

e. The Honourable Court do issue any other orders and give such directions as it may deem fit to meet the ends of justice.

f. Costs of the Petition.

Petitioner's case

4. The Petitioner avers that any reappointment of the 1st Respondent as the Director General of the EPRA must be competitive and procedural as stipulated in the leadership and integrity code of ethics and the Constitution.

5. He states that a person considered for appointment or reappointment for the position of Director General of EPRA must be a member of the relevant professional body as stipulated under section 13 (3) (e) of the Energy Act, 2019. He contends that the 1st respondent does not meet this requirement and that there are many qualified candidates in this country.

6. He contends that the 1st Respondent has continuously disregarded procedures and occasioned multiple litigations against the Respondents thus rendering the public to lose huge amounts of money in defending the cases. He further contends that the 1st Respondent has been orchestrating and masterminding withdrawal of multiple cases against his regulatory mandate therefore putting the lives of the public at risk.

7. He contends that the manner in which the 1st Respondent runs and conducts business as the Director General not only raises ethical questions but also contravenes provisions of the Constitution and statutory provisions regulating public institutions and the conduct of public servants.

8. It is his case that the 1st Respondent operates an ungazetted holding yard where impounded petroleum and gas tankers are kept exposing the public to great danger of accidents.

9. He avers that the 1st Respondent supports illegal LPG dealers by withdrawing criminal cases against them, on charges of operating their business without licences which relevant government agencies have taken to Court.

10. He contends that the 6th respondent should be ordered to commence investigations against the 1st Respondent in a bid to establish any corruption related activities involving and perpetuated by the 1st Respondent.

11. He avers that as a result of the inefficiencies occasioned during the tenure of the 1st Respondent, several sectors have witnessed massive losses be it due to spillages, installation of faulty meters, corruption, court cases against EPRA by former employees wrongly dismissed for pointing out the 1st Respondent's misconduct, incompetence of certain staff members recruited by the 1st Respondent, mismanagement of resources and abuse of office among others.

12. He avers that the 1st Respondent saw the reshuffling of the EPRA's human resource from one directorate to another without prior consultation with the head of directorates and the head of human resource department. As a consequence, most technical directorates are now headed by unqualified persons.

13. The Petition is supported by the affidavit of Emmanuel Wanjala Wamalwa, a citizen of the Republic of Kenya residing in Nairobi County, sworn on 16/7/2020 in which he reiterates the averments set out in the Petition.

14. In response to the Petition, the 1st and 2nd Respondents filed their respective Replying Affidavits in response to the Petition. However, they had also filed Grounds of Opposition dated 7/8/2020 in which they raise grounds that; the Petition is misconceived and that Petitioner has not invoked any procedures or mechanisms prescribed under Section 42 of the Leadership and Integrity Act, 2012; he has not contested the decision made by the respondents as provided under the Energy Act and that he has not demonstrated how his rights had been infringed.

1st Respondent's case

15. Robert Pavel Oimeke, the 1st respondent herein, filed a Replying Affidavit sworn on 18/8/2020. The affiant deposes that he has met all the statutory qualifications under Section 13 (3) of the Energy Act as well as those under Section 12 (3) of the Energy Act, 2006 (now repealed) for appointment as the Director General.

16. He deposes that he holds a Bachelor of Technology (Chemical & Processing Engineering), is registered graduate engineer with the Engineers/Board of Kenya Registration No. B8389 and is a member of good standing; is a registered life gold member in good standing of the Association of Energy Professionals Eastern Africa and is a member in good standing of the Institute of Directors (Kenya).

17. He deposes that under section 13 (4) of the Energy Act, the Director General of EPRA is eligible for re-appointment for one further term of 3 years. He avers that vide a Letter of Appointment dated 24/7/2017, he was appointed as EPRA's Director General and that Clause 5 of his contract provided that should he have wished to be reappointed in the same position, he was required to make a written request at least 6 months before the expiry of his contract with the ERC.

18. He avers that pursuant to Clause (b) of the Forth Schedule of the Energy Act, he made an application for reappointment as the Director General of EPRA at least 6 month to the expiry of his contract.

19. He contends that it is on the basis of his performance at EPRA that he applied to the Board of Directors of EPRA for reappointment as Director General for a further term of 3 years commencing 1/8/2020 as provided under Section 12 (4) of the Energy Act. He contends that the Board in its 103rd meeting held on 25/3/2020 considered his application for reappointment and observed the notable contributions and successes of EPRA and that subject to the concurrence of the Cabinet Secretary, Ministry of Energy, it renewed his contract for employment for a further 3 years.

20. He avers that vide a letter dated 7/5/2020, the Cabinet Secretary Ministry of Energy approved his reappointment as Director General EPRA for 3 years commencing 2/8/2020 and that he accepted his reappointment on 11/5/2020.

21. He therefore states that his contract of employment was renewed on 7/5/2020 before the filing of this Petition. He further states that a conservatory order by its nature is designed to preserve that which has not taken place and ensure that the statutory processes do not go full cycle. According to him, given that the 2nd Respondent reappointed him on 7/5/2020, the conservatory order sought by the Petitioner cannot issue and/or ought to be set aside as the issue is now moot.

22. He denies having breached or violated any set procedure regulating any of the sub-sectors under EPRA's regulatory mandate or breached Articles 10, 73, 75 (1) and 232 of the Constitution, as alleged by the Petitioner. He further denies that he has colluded with any illegal LPG gas dealers to withdraw multiple cases against them and that he runs any unlicensed and ungazetted holding yard where impounded petroleum gas tankers are kept.

23. It is his case that any regulatory step or action taken by EPRA is solely based on the law and that any action by an officer of EPRA done in good faith is protected from liability under section 18 of the Energy Act. He avers that EPRA has not lost or occasioned any loss, wastage or misappropriation of public funds as alleged by the Petitioner and that there has been no violation of Sections 67 and 68 of the Public Finance Management Act, section 24 of the Leadership and Integrity Act or Articles 201 and 226 of the Constitution.

24. He states that the Petitioner has not lodged any complainant regarding any alleged abuse of office, corruption or the allegation of misappropriation of funds against him with the Ethics and Anti-Corruption Commission (EACC). He further states that the mandatory order sought to compel the EACC to investigate the Petitioner's allegations against him ought not to issue without proof of any wilful refusal by the Commission to investigate a complaint lodged with the Commission.

25. He avers that he has never wrongfully dismissed any employee and that the Petitioner has not identified any former employee who was wrongfully dismissed. He avers that EPRA's directorates are strategically streamlined and are headed by citizens of Kenya of impeccable character, integrity and qualifications.

26. He avers that the Petitioner though not an employee of EPRA, he has illegally obtained private and confidential documents including employees' payslips, staff restructuring memos and transport worksheets. It is his averment that illegally obtained evidence in breach of Articles 31 and 50 (4) of the Constitution as read with section 80 of the Evidence Act is inadmissible in constitutional petitions.

27. He urges the Court to allow him enjoy his legitimate expectation and accrued right to continue holding office as Director General – EPRA until his term expires of his contract or is terminated in accordance with the Energy Act, 2019 and his contract.

2nd Respondent's case

28. The 2nd Respondent filed a Replying Affidavit sworn by Eng. Samuel Maugo, its Board Member and Chairperson of the Finance and Administration Committee at EPRA, on 27/8/2020.

29. The affiant confirms that on 24/7/2017, the 1st Respondent was appointed as Director General of EPRA for 3 years with effect from 1/8/2017 and that he had been acting as Director General for a period of 6 months after the position fell vacant. He further confirms that Clause 5 of the 1st Respondent's letter of appointment provided that should the he be reappointed in the same position, he was required to make a written statement at least 6 months before expiry of his contract.

30. The affiant deposes that the 1st Respondent on 22/1/2019 made a request to EPRA for the renewal of his contract pursuant to the provisions of Clause 5 of his letter of appointment. He confirms that the Board in its meeting held on 25/3/2020 considered the 1st Respondent's application for renewal of contract alongside his Performance Evaluation undertaken by the State Corporations Advisory Committee (SCAC) in which he scored over 90%.

31. He avers that the Board vide a letter dated 25/3/2020 recommended to the Cabinet Secretary, the re-appointment of the 1st Respondent for a further 3 year term based on the SCAC performance evaluation and internal Board rating of the 1st Respondent performance as 'very good'.

32. He also avers that at the time of the filing of the instant Petition, the 1st Respondent's re-appointment had already been done and as such

the Petition is overtaken by events. He avers that the Petition is without merit and should be dismissed with costs.

33. The Petition proceeded byway of written submissions.

Petitioner's submissions

34. The Petitioner submitted that the Petition discloses a reasonable cause of action and by virtue of Articles 22 and 23 of the Constitution and that he had demonstrated that the provisions of the Constitution had been violated. He argued that the issue of *locus standi* is now well settled in our jurisprudence and relied on the case of **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR** where the Court held that *locus standi* was fundamentally transformed by the enactment of the Constitution.

35. He submitted that the complaints raised are not invalidated and therefore the Court has an unqualified jurisdiction under Articles 23,165 and 258 of the Constitution to determine the issues canvassed in the Petition by virtue of their own merits.

36. He maintained that any appointment or reappointment of a public officer must adhere to the values laid out under Articles 10 and 232 of the Constitution and must take into account the provisions of Chapter Six in particular Article 73 (2).

37. He argued that no one should be appointed/reappointed to any public office if he or she does not meet the required personal integrity standard as set out in the Constitution and in other statutory laws. He relied on the Court of Appeal decision in **Ferdinand Ndung'u Waititu v Benson Riitho Mureithi (suing on his behalf an o behalf of the general public) & 2 others [2018] eKLR**, where it held that Article 73 (2) of the Constitution places an obligation on any appointing authority with regard to the appointment of a state officer to inquire into the personal integrity, competence and suitability of the appointee.

38. He argued that pursuant to Sections 67 and 68 of the Public Finance Management Act, 2012, Section 24 of the Leadership and Integrity Act, 2012 and Articles 201 and 226 of the Constitution, the 1st Respondent was under responsibility to ensure proper and prudent management of public funds. However, he deliberately failed in the said responsibility by allowing board members to earn irregular allowances and overseeing unlawful tendering and procurement processes.

39. He submitted that the Court in **Republic v Principal Secretary Agriculture Livestock and Fisheries & 2 Others Ex-parte Douglas M Barasa & 2 Others [2015] eKLR** cited the case of **International Centre for Policy an Conflict & 4 Others v Hon. Uhuru Kenyatta and Others** where the Court set out the standard/threshold of integrity required to be met by state and public officers.

40. He submitted that by misusing a public vehicle for personal benefits and also earning a pension which he ought not to earn as he is only entitled to a gratuity, the 1st Respondent acted in a manner that is contrary to the level of integrity under Article 260 of the Constitution. He submitted that Section 13 (3) of the Energy Act makes it mandatory for the Director General to meet the requirements of leadership and integrity set out in Chapter Six.

41. He argued that the 1st Respondent does not have the professional competency as required under Section 13 of the Energy Act of which Section 13 (3) (e) should be construed in line with Sections 49 (3) and 50 (2) of the Engineers Act, 2001. He contended that the 1st Respondent does not have an engineering professional qualification for the appointment of the position of Director General.

42. He submitted that the 1st Respondent holds a bachelor's degree in Technology (Processing and Chemical Engineering) thus the relevant body he ought to be a member in, as provided under Section 13 (3) (e) of the Energy Act is the Institution of Engineers of Kenya (IEK).

43. He avers that the respondent being a graduate member is not a member as envisioned under Section 13 (3) (e) of the Energy Act. He argued that section 1.1 (e) (iii) of the EPRA's Career Guideline (May 2018) is emphatic that a master's degree is a mandatory requirement for appointment of all senior management positions of the Authority including that of the Director General.

44. It was his submission that the 1st Respondent has not met the requirements under Sections 49 (3) and 50 (2) of the Engineers Act and Section 1.1 (e) (iii) of the Authority's Career Guideline and that to reappoint the 1st Respondent to Job Grade 1 will be a blatant breach of EPRA's Career Guideline(May 2018).

45. He argued that Section 13 (1) of the Energy Act, 2019 gives the Board of Directors the powers to appoint the Director General of the Authority and that upholding an illegal appointment of the 1st Respondent by the Cabinet Secretary will be an affront of the provisions of the Constitution and Energy Act. In addition, it will be a negation of the energy sector reform agenda envisioned by the framers of the Energy Act, 2019.

46. On whether the matter has been overtaken by events, the Petitioner relied on the case of **Republic v Principal Secretary Agriculture Livestock and Fisheries & 2 Others Ex-parte Douglas M Barasa & 2 Others [2015] eKLR** cited with approval in the case of **Federation of Women Lawyers (FIDA-K) & Others v Attorney General & Another** that; if an appointment is unconstitutional, wrong, unprocedural and illegal, it cannot lie for the Respondent to state that the process is complete and even if the persons were sworn in the Court has jurisdiction to entertain the matter.

47. He submitted that the rule of law must be respected in the making and implementation of policy. He relied on the cases of **Republic v Returning Officer of Kamukunji Constituency & the Electoral Commission of Kenya HCMCA No. 13 of 2008** and **John Chege Njoroge v Attorney General & 3 Others [2018] eKLR**.

48. He urged the Court to find that the 3rd Respondent contravened a mandatory requirement that the reappointment of the Director General

shall be done by the Board of Directors in strict compliance with the Constitution and the Energy Act.

49. He further argued that the 3rd Respondent did not adhere to the threshold under Articles 10 and 73 of the Constitution in effecting the purported illegal reappointment of the 1st Respondent as the 3rd Respondent ignored to consider his integrity issues.

50. He submitted that as a consumer of energy products and services who pays levies on electric energy and petroleum products to the authority, he had a legitimate expectation that those conferred with the responsibility and powers to appoint public officers would act in the best interest of the public in exercising both their appointment powers and oversight role.

51. He however submitted that the Court in **East African Cables Limited v The Public Procurement Complaints Review & Appeals Board and ano [2007] eKLR** held that allowing the application would hurt the greatest number of people.

52. He submitted that the Constitution provides for remedies for breach of fundamental rights and freedoms under Article 23 (3) of the Constitution and that that Section 12 (3) of the Employment and Labour Relations Court Act provides for costs as a remedy.

53. In conclusion, he urged the Court to find that he is entitled to the prayers sought in the Petition.

1st Respondent's submissions

54. The 1st Respondent submitted that the documents annexed to the Petitioner's Supporting Affidavit are confidential documents obtained from EPRA or its employees who are not disclosed in the affidavits.

55. He submitted that it is a constitutional requirement that citizens exercise their right under Article 35 of Constitution by following the due process required under the Access to Information Act and the Evidence Act. For emphasis, he relied on **Okiya Omtath Okoiti & 2 Others v Attorney General & 4 Others [2020] eKLR** where the Court held:-

“This issue brings to the fore the tension between the need for the court to be able to consider and have access to evidence which would enable it to fairly and effectively determine a dispute on the one hand and the need to avoid irregularity or impropriety in the way in which evidence is obtained or secured... The sources of those documents were not disclosed in those affidavits and neither were such of those documents that consisted of public documents, certified.”

56. He further submitted that the Petitioner did not comply with the Evidence Act and did not indicate the sources of those documents. He submitted that it is to his detriment that the documents were illegally obtained in breach of the privacy of EPRA and its members of staff and the privacy of its communication under Article 31 of the Constitution.

57. He cited the case of **Njonjo Mue & another v Chairperson of Independent Electoral and Boundaries Commission & 3 Others [2017] eKLR** where the Supreme Court held that a duty has to be imposed upon citizens to follow the prescribed procedure in acquiring access to any information. It further held that there was a violation of the laid out procedure of the law in accessing the information.

58. He submitted that the Petitioner, in his submissions, panel beat Section 13 (3) of the Energy Act to include extraneous qualifications not contained in the statute and rely on those extraneous qualifications to claim that the 1st Respondent is not qualified to hold office as Director General.

59. He argued that his contract transcended 2 statutes and that with the enactment of the Energy Act 2019, EPRA took over of ERC's employees pursuant to section 225 as read with clause 1 (d) of the Fourth Schedule. He averred that he became director in the same terms and conditions of his contract dated 14/7/2017 under the Energy Act.

60. He argued that the Petitioner's main contention is with respect to the additional qualifications under Section 13 (3) (e) and (f) which require the Director General to be a member in good standing of the relevant professional association. He reiterated that he has presented his copies of his registration certificate and a certificate of good standing issued by the statutory body for registration and licensing under section 7 of the Engineers Act.

61. He submitted that as of 27/7/2020, the Engineers Board of Kenya (EBK) issued him with a Certificate of Good Standing confirming that he is a registered member of EBK in good standing. He argued that the only body capable of registration, licensing, regulation and disciplining of engineers is the EBK and the body applicable under Section 13 (3) of the Energy Act.

62. He argued that Clause 4.03 (b) and 4.08 of the Institute of Engineers Kenya Constitution requires a person to be registered with the EBK before gaining either corporate or graduate engineer status with IEK. He therefore avers that the Petitioner's submission that the Clause 3.05 of IEK's Constitution excludes graduate members is a clear misinterpretation of the provision, which deals with limitation of the rights of members to the specific class of membership to which they belong.

63. He submitted that should Parliament have wanted to particularise the cadres of membership required for appointment as the Director General, nothing would have been easier than specifying so given that the Engineers Act, 2011 was extant at the time of enactment of the Energy Act.

64. According to him, parliament only required a person to possess a degree in Engineering and be a member in good standing of the relevant professional association. He urged the Court to dismiss the Petitioner's allegation that he is not qualified or competent to hold office under Section 13 (3) of the Act.

65. He submitted that in reappointment the Board exercised its statutory mandate under Section 13 (1) of the Energy Act. He averred that what the Board sought from the 4th Respondent was his approval or concurrence which was communicated in the letter dated 7/5/2020. He argued that his reappointment was in accordance with the Mwongozo Code of Governance for State Corporations issued by January, 2015 by the 3rd Respondent.

66. He urged the Court to be rely on the Court of Appeal's finding in **Wilfrida Itolondo & 4 Others v President & 7 Others [2015] eKLR** that the Vice Chancellor was validly reappointed by a competent authority and as by established by law.

67. He submitted that the Petitioner has raised new allegations and facts not embodied in his Petition on irregular tendering, illegal allowances and pension. He argued that the Courts have held that submissions are not evidence and they do not supplant pleadings or evidence. For emphasis, he relied on the finding in **Daniel Toroitich arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR** that submissions are parties' "general marketing" and do not constitute evidence.

68. Further, he submitted that pursuant to section 107 and 109 of the Evidence Act, the Petitioner is required to table clear evidence in support of all the allegations made.

69. He submitted that the EACC having confirmed that the Petitioner has not lodged any complaints on any allegation of abuse of office, corruption or misappropriation of funds by the 1st Respondent, the order compelling EACC to investigate him should not issue without proof.

70. He submitted that the whole Petition lacks merit and is liable for dismissal. With respect to costs, he submitted that in **Okiya Omtatah Okoiti v Central Bank of Kenya & 7 Others [2019] eKLR** the Court held that the Petitioner was pursuing a private matter disguised as a Petition and directed that the Petitioner pays costs.

2nd, 3rd, 4th and 5th Respondent's submissions

71. They submitted that at the time of filing the Petition, the 1st Respondent had already been reappointed for a 2nd term and as such the orders are overtaken by events. They relied on the case of **Kalya Soi Farmers' Cooperative Society v Paul Kirui & another** where the Court held that a Court cannot stultify itself by making orders that cannot be enforced or an ineffective injunction for practical purposes.

72. They further relied on the cases of **Eric V.J Makokha & 4 Others v Lawrence Sagini & 2 Others Civil Application No. 20 of 1994 (12/94 UR)** and **Chris Munga Bichange v Richard Nyagaka Tong'i & 2 Others [2017] eKLR** and **Mary Wambui Munene v Peter Gichuki King'ara & 2 Others [2014] eKLR** that equity cannot act in vain where an action that is to be restrained has taken place and that where statutory process have been concluded, causes of action ought not to be reopened.

73. They submitted that the Petitioner did not seek to amend his Petition thus the instant Petition is moot. They submitted that the Petitioner has not adduced any evidence before the Court to indicate that he has sought to have the 1st Respondent investigated for the allegations levelled against him.

74. They averred that the issues of the 1st Respondent's qualifications were comprehensively elaborated in his affidavit. They submitted that the Petition does not meet the threshold for a constitutional petition as set out in **Anarita Karimi Njeru v Republic [1979] eKLR** and **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR** as there should be precision on the pleadings in respect of the infringed rights.

75. They relied on the case of **Hon. Gitobu Imanyara & 2 Others v The Hon. Attorney General Civil Appeal No. 98 of 2014** in which it was held that the State bears the responsibility for constitutional violations and not the individual that committed the violations and that damages awarded under public law violations of constitutional rights should not be punitive.

76. They submitted that the prayer for damages should fail. Finally, they urged the Court to dismiss the Petition with costs.

6th Respondent's submissions

77. It submitted that in the performance of its functions, it is not subject to direction of any person or authority and cannot be compelled to institute investigations as such would be contrary to Section 13 (2) (c) of the Ethics and Anti-Corruption Commission Act and Sections 25 and 25 of the Anti-Corruption and Economic Crimes Act, 2003.

78. It submitted that no complaint has been lodged by the Petitioner with it, the 6th Respondent herein with respect to the allegations stated in the Petition and that the Petitioner has not presented any evidence that the 6th Respondent has failed, refused or neglected to exercise its powers in respect of the allegations.

79. It submitted that the Order sought against the 6th Respondent is a clear abuse of the Court process as the Petitioner has neither invoked the prescribed mechanisms under Section 13 (2) (c) of the Ethics and Anti-Corruption Act and Section 42 of the Leadership and Integrity Act nor has he provided particulars in which it has infringed the Petitioner's rights.

80. It was its submission that the orders sought against it are misconceived and without merit.

81. I have examined all the evidence and submissions of the Parties herein. The issues for this Court's determination are as follows:-

1. Whether the 1st Respondent has qualifications to be the 2nd Respondent's Chief Executive Officer.

2. Whether there are actions or omissions committed by the 1st Respondent that disqualify him from being the 2nd Respondent's Chief Executive Officer.

3. What is the status of the 1st Respondent to the 2nd Respondent?

4. What remedies to grant in the circumstances.

Issue No. 1

82. The Petitioner herein has submitted on this issue that the 1st Respondent is not qualified for appointment or reappointment as Chief Executive Officer of the 2nd Respondent because he does not qualify as a member of a professional body as stipulated under Section 13(3) (e) of the Energy Act 2019.

83. Section 13 (3) of the Energy Act provides qualifications a person must hold in order to be appointed as Director General of the 1st Respondent.

84. Section 13(3) provides as follows:-

3) "A person shall be qualified for appointment as a Director-General if such person:-

a) is a citizen of Kenya;

b) holds a degree from a university recognized in Kenya or its equivalent in the fields of engineering, physical sciences, law, finance, environmental studies, economics or energy;

c) has at least seven years management experience at a senior level;

d) has at least two years of experience in petroleum and energy;

e) is a member in good standing of the relevant professional association; and

f) meets the requirements of leadership and integrity set out in Chapter Six of the Constitution.

85. The Applicant avers that the 1st Respondent does not possess the above qualifications and in particular No. (e) above as he is not a member in good standing of a relevant professional association.

86. In reply to this issue, the 1st Respondent submitted that he holds a Bachelor of Technology, Chemical, and Processing Engineering from Moi University. He annexed his degree certificate issued on 6th December 200 as Appendix RBO- 001.

87. He further submitted that he is a registered Graduate Engineer registered with the Engineer Board of Kenya with Registration No. B8389. He also indicated that he is in good standing with the Board and he annexed his certificate of good standing as annex RBO-001 at page 2.3.

88. Other than the above confirmation, the 1st Respondent also averred that he is a registered Life Gold Member in good standing with the Association of Energy Professionals Eastern Africa. (Annex RBO-001 – page 4).

89. The 1st Respondent is also a member of the Institute of Directors (Kenya) Annex RBO-001 – page 5.

90. The assertion by the Applicant that the 1st Respondent is not a member of a professional body in good standing therefore holds no truth.

Issue No. 2

91. The Applicant also averred that the 1st Respondent has committed various acts and omissions to the detriment of the 2nd Respondent and should therefore not be allowed to continue serving as Director General of the 2nd Respondent.

92. The Applicant averred that the 1st Respondent has infringed Articles 10, 73, 75(1) and 232 of the Constitution. He indicated that the 1st Respondent is guilty of abuse of office, mismanagement of a public institution and public resources, corruption, tribalism, favouritism which conduct is uncharacteristic of a public servant.

93. The Applicant has averred that the 1st Respondent held unscrupulous alliances with illegal LPG dealers by withdrawing business dealers licences and also supported illegal LPG dealers by withdrawing criminal cases against them on charges of operating their businesses without relevant licences which relevant government agencies had taken to Court against such illegal LPG business people.

94. The Applicant further accused the 1st Respondent of being guilty of misappropriating public funds, through irregular earnings and tax evasion and thus avers that the appointing authority should take into account the integrity, competence and suitability of the 1st Respondent.

95. In support of all these allegations, the Petitioner annexed a letter from the 1st Respondent which ask the police to withdraw charges against a suspect. In the letter in question, the 1st Respondent was giving a reason why the charges had to be withdrawn as requisite licence had since been granted. The issue of collusion before 1st Respondent and unscrupulous LPG Operators had not been brought out.

96. The Applicant also avers that the 1st Respondent was also guilty of nepotism and tribalism and the explanation to prove this assertion was not brought out.

97. The 1st Respondent submitted that even the documents used as annexures were obtained illegally from the Respondent and should therefore be expunged from the record. The 1st Respondent relied on the Court of Appeal case **Okiya Omtata and 2 Others vs the Attorney General and 4 Others [2020] eKLR** (supra) where the Court of Appeal held as follows:-

“76. Part IV of the Evidence Act deals with public documents which are defined under Section 79(1)(a)(iii) to include documents forming the acts or records of acts of public officers. For purposes of authenticity, Section 80 of the Evidence Act, provides that every public officer having custody of a public document which any person has a right to inspect shall give the person on demand a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed whenever such officer is authorized by law to make use of a seal, and such copies so certified shall be called certified copies. Section 80(2) of the Evidence Act provides that any officer who by ordinary course of official duty is authorized to deliver copies of public documents shall be deemed to have custody of such documents within the meaning of that section. Section 81 of the Evidence Act on proof of certified copies provides that certified copies of public documents may be produced in proof of the contents of the documents or part of the documents of which they purport to be copies. (Emphasis added).”

98. It is indeed true that the Petitioner did not lay down the basis of the documents he has sought to use against the 1st Respondent. The same are not certified. That notwithstanding, the documents have also not laid out the case the Petitioner wishes to establish against the 1st Respondent.

99. At its judgement, in the Omtata case above the Court of Appeal concluded as follows:-

“79. This Court had occasion again to consider the matter of admissibility of illegally obtained evidence in the case of United Airlines Limited vs. Kenya Commercial Bank Limited [2017] eKLR where the Court rejected the contention that illegally obtained evidence is admissible in criminal law as long as it was relevant. The Court stated that the Constitution of Kenya 2010 had changed that position and that such evidence is not admissible by dint of Article 50(4) of the Constitution, which provides:-”

“50 (4) Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice...””

80. The interpretation given by the Court in that case that Article 50(4) of the Constitution applies only to criminal law and not civil law is, with respect, doubtful. Article 50 of the Constitution deals generally with “fair hearing”. In Article 50(1) for instance, reference is made to “every person” as having the right to a fair hearing. This is in contrast to Article 50(2), which is specific “every accused person”. In our view, under Article 50(4) if a court determines that admission of ... evidence obtained in a manner that violates any right or ... fundamental freedom in the Bill of Rights would be ... detrimental to the administration of justice, the court may reject it irrespective of whether it is in connection with a civil or criminal trial. This view accords, we believe, with the Supreme Court decision in Njonjo Mue & Another vs. Chairperson of Independent Electoral and Boundaries Commission & 3 Others [2017] eKLR.”

100. The Court of Appeal echoed the Supreme Court in **Njonjo Mue & Another vs Chairperson of Independent Electoral Commission and Boundaries Commission & 3 Others** where Supreme Court held as follows:-

“Having found that there are procedures provided for under the law through which any person who seeks to access information should follow, the question that follows is; what happens where a person ‘unlawfully’ or ‘improperly’ obtains any information held by an entity” Can a court of law admit such evidence... We also recognize that information held by the State or State organs, unless for very exceptional circumstances, ought to be freely shared with the public. However, such information should flow from the custodian of such information to the recipients in a manner ... recognized under the law without undue restriction to access of any such information... Further, a duty has also been imposed upon the citizen(s) to follow the prescribed procedure whenever they require ... access to any such information. This duty cannot be abrogated or derogated from, as any such ... derogation would lead to a breach and/or violation of the fundamental principles of freedom of access to information provided under the Constitution and the constituting provisions of the law. It is a two way channel where the right has to be balanced with the obligation to follow due process.””

“The Petitioners, using the above test, do not show how they were able to obtain the internal memos showing communication between employees of the 2nd Respondent... The use of such information ... before the Court, accessed without following the”

requisite procedures, not only renders it inadmissible but also impacts on the probative value of such information. This is the point of divergence between the instant matter, and the case of Nicholas Randa Owano Ombija v. Judges and Magistrates Vetting Board (supra). In the present instance, there has been a clear violation of laid out procedures of law attributable to access of information, and violation of the rights of privacy and protection of property that the 2nd Respondent is guaranteed under the Constitution and Section 27 of the IEBC Act. This is because the limitation imposed by both Article 50(4) and Section 27 aforesaid squarely apply to the matter before us.” (Emphasis added).

101. The law having been established by the Superior Courts, it is true and binding on this Court to conclude that the Petitioner having not established the source of documents he wishes to rely against the 1st Respondent, if allowed it would be detrimental to justice and prejudicial to the 1st Respondent and allow admission of irregularly obtained documents.

102. The 6th Respondent who is the investigator of corruption and integrity issues on the other hand submitted that no complaint has been lodged by the Petitioner with the 6th Respondent in respect of allegations stated in the Petition and no evidence rendered by the Petitioner informing this Court of any complaint lodged with the 6th Respondent. It avers that it has no complaints against the 1st Respondent.

103. It is therefore my finding that it has not been established that there are acts or omissions committed by the 1st Respondent that disqualify him from being the 2nd Respondent’s Director General.

3rd issue

104. The Applicant sought orders to bar the 2nd Respondent from discussing and considering the reappointment of the 1st Respondent as its Director General.

105. The 1st Respondent submitted that the 1st Respondent has the necessary qualifications for appointment as the Director General of the 2nd Respondent. The issue of qualification of the 1st Respondent has already been addressed by this Court in this judgement.

106. The 2nd Respondent further submitted that they lawfully reappointed the 1st Respondent as its Director General for a further term of 3 years. They aver that on 24/7/2017, the 1st Respondent was competently and transparently recruited and appointed as Director General - EPRA for 3 years as per their annexure RPO -002.

107. They also averred that under Clause 5 of the contract, the 1st Respondent’s contract was renewable for a further term of 3 years as provided for under Section 12 (4) of the Energy Act 2006 (repealed).

108. As for the reappointment, they aver that the 1st Respondent applied for his consideration and made the requisite application 6 months before the expiry of the contract. This request was considered by the board of the 2nd Respondent on 25th March 2020 and allowed and the 1st Respondent was reappointed for a further term of 3 years on 25/3/2020 with effect from 2nd August, 2020.

109. The 2nd Respondent avers that they considered the 1st Respondent’s application for reappointment and were satisfied that his performance was very good. They aver that the 1st Respondent accepted his reappointment on 11th May, 2020 for a further 3 years. They therefore submit that at the time the Petition was filed, the 1st Respondent’s contract had been extended with effect from 2nd August, 2020.

110. It is indeed true that the 1st Respondent applied to be reappointed as Chief Executive Officer of the 2nd Respondent in January, 2020. This application was considered and allowed in March 2020. The decision to reappoint the 1st Respondent was communicated to him and he accepted it in writing in May 2020. It is therefore true that at the time the Petition was filed the issue of the reappointment of the 1st Respondent had already been considered and concluded.

Remedies

111. On 22/7/2020, the Petitioner sought various orders before this Court among them an order restraining the 2nd, 3rd, 4th and 5th Respondents from deliberating renewing and extending the contract of the 1st Respondent as Director General of EPRA.

112. This Court granted the orders. It has now emerged that at the time, the 2nd, 3rd, 4th and 5th Respondents had already considered the 1st Respondent’s appointment as Director General and even reappointed him. The order/prayer was then overtaken by events.

113. I have now reconsidered the same prayer, I find that it had already been overtaken by events and I therefore find that order cannot be sustained.

114. I therefore lift the order granted on 28/7/2020 injuncting the Respondents from considering and reappointing and renewing the contract of the 1st Respondent.

115. As for the order to compel the 6th Respondent to immediately commence investigations against the 1st Respondent, I have also addressed it as per the response from the 6th Respondent who have averred that they have never received any complaint from anybody concerning the integrity issues of the 1st Respondent.

116. The 6th Respondent is also an independent commission and cannot be compelled to act by anybody. The prayer to compel them to investigate without any complaint cannot therefore be sustained.

117. It is therefore my finding that this Petition is found to be without merit. I therefore dismiss it in its entirety and order the status quo of the 1st Respondent reinstated immediately as Director General of 2nd Respondent.

118. There will be no order of costs.

Dated and delivered in Chambers via zoom this 6th day of October, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kioko for 2nd to 5th Respondents – Present

Wambugu holding brief Ocharo for 6th Respondents – Present

Ouma with James Oduol for 1st Respondent – Present

Kurauka and Okoth for Petitioner – Present