



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**PETITION NO. 79 OF 2020**

**IN THE MATTER OF: BREACH OF FUNDAMENTAL RIGHTS AND FREEDOMS**  
**ESPECIALLY ARTICLES 1(1)b), 1(4)(b), 2, 3, 10, 19, 20, 21, 22 23, 27, 28, 41,**  
**43, 47, 50, 73, 75 and 77 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF: THE ALLEGED VIOLATION OF PARAGRAPH 10(1) OF THE KENYA WATER TOWERS AGENCY ORDER, 2012 (KENYA GAZETTE SUPPLEMENT NO. 27, LEGAL NOTICE NO. 27 OF 20<sup>TH</sup> APRIL 2012)**

**AND**

**IN THE MATTER OF: EQUAL EMPLOYMENT OPPORTUNITY UNDER THE EMPLOYMENT ACT, 2007**

**AND**

**IN THE MATTER OF: ARTICLES 2, 3, 4, 7, 13 AND 19 OF THE AFRICAN CHARTER ON HUMAN AND PEOPLES RIGHTS**

**AND**

**IN THE MATTER OF: THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS (PRACTICE AND PROCEDURE) RULES, 2013 SECTION 4**

**AND**

**IN THE MATTER OF: THE DOCTRINE OF LEGITIMATE EXPECTATION**

**BETWEEN**

**LEGEUS LOMOSI MUDEGU.....PETITIONER**

**v**

**BOARD, KENYA WATER TOWERS AGENCY.....RESPONDENT**

**JUDGMENT**

1. On 28 January 2020, a consent order was entered in Petition No. 177 of 2019, *Okiya Omtatah v Board, Kenya Water Towers Agency & Ar* quashing an advertisement for the position of Chief Executive Officer for the Kenya Water Towers Agency (Respondent).
2. The consent order further required the Respondent to re-advertise for the position of Chief Executive Officer within 7 days with a rider that a PhD requirement would be an added advantage, and that the Respondent would send 3 names of recommended applicants for appointment to the Cabinet Secretary, Ministry of Environment and Forestry.

3. Pursuant to the consent order, the Respondent re-advertised for the position in its website and the Daily Nation newspaper.
4. On 31 March 2020, the Respondent published the names of the applicants and those who had been shortlisted.
5. Legeus Lomosi Mudegu (Petitioner) however moved the Court on 24 April 2020 alleging that the fresh recruitment process violated the law because members of the public had not been invited to give their views on the shortlisted applicants and that no female applicant had been shortlisted.
6. The Petitioner also contended that there had been a disregard of COVID 19 public health protocols; those with PhDs had not been shortlisted; applications had been made to an *ad hoc committee* and not the Board contrary to the Mwongozo Guidelines.
7. Filed together with the Petition was a Motion under a certificate of urgency seeking interim conservatory orders.
8. On 5 June 2020, the Court issued temporary conservatory orders suspending the advertisement/recruitment process.
9. At the same session, the Court directed the parties to file and exchange further pleadings and submissions.
10. The following documents were subsequently filed
  - (a) Respondent's replying affidavit.
  - (b) Petitioner's supplementary affidavit and submissions.
  - (c) Respondent's submissions.
11. In his submissions, the Petitioner identified 3 Issues viz
  - (a) Whether the recruitment process is being conducted in a lawful manner.
  - (b) Is the Petitioner entitled to the reliefs sought? (c) Who bears the costs of this Petition?
12. The Respondent adopted the Issues as identified by the Petitioner in its submissions.
13. The Court has considered the Petition, affidavits and submissions.

#### **The legality of the recruitment process**

14. Urging his case, the Petitioner contended that the position of Chief Executive Officer of the Respondent was a public office and therefore in terms of Article 10 of the Constitution, the recruitment process should be subjected to public participation in order to engender transparency.
15. In the instant, case, the Petitioner asserted that the public had not been invited to give their views on the shortlisted applicants.
16. Citing Article 73 of the Constitution, the Petitioner submitted that public office was an office of honour and integrity was a prerequisite, and that in order to ensure there were integrity and honour in the office, the recruitment process should be based on personal integrity, competence, suitability and objectivity, amongst other values and principles of leadership and integrity.
17. And to support the lack of integrity of some of those shortlisted, the Petitioner stated that 2 of them had been adversely mentioned in a report by the National Intelligence Service.
18. Insisting that the process was illegal, the Petitioner lamented that under the initial recruitment process, 12 applicants had been shortlisted while under the fresh recruitment, only 8 applicants had been shortlisted.
19. This, the Petitioner argued was suspicious and led to concerns about honesty and transparency in the process.
20. The Petitioner further challenged the process on the ground that it did not comply with the Mwongozo Guidelines because applications were made to an *ad hoc committee* of the Board while the notice on shortlisted candidates was issued by the Board.
21. According to the Petitioner, once the Board had delegated the function to the *ad hoc committee*, it was not open to the Board to usurp the powers of the *ad hoc committee*.
22. The usurpation, the Petitioner submitted, was *ultra vires* the powers of the Board.
23. Submitting on the last ground of challenge, the Petitioner contended that the shortlisting of 1 female was contrary to the gender principle as espoused in Article 81 of the Constitution.

24. On its part, the Respondent admitted that the recruitment process was subject to the requirements of the Constitution of Kenya, the Kenya Water Towers Act and the Mwongozo Code.

25. The Respondent also agreed that public participation in the recruitment process was essential.

26. As to the form of public participation, the Respondent drawing from *Minister for Health v New Clicks (Pty) Ltd & Ors* (2005) ZACC 14 and *Peter Kyalo v Alfred Mutua* (2018) eKLR submitted that the level of public participation would vary from case to case.

27. According to the Respondent, the position of Chief Executive Officer was advertised and interested persons applied, the names of the applicants and those shortlisted were published in the newspaper(s) and date of interviews set thus making the process competitive, and that satisfied the test of public participation.

28. In any case, the Respondent asserted, public participation could be conducted after the conclusion of interviews and before names of those recommended for appointments were sent to the appointing authority.

29. Personal integrity, the Respondent conceded, was a requirement but argued that the shortlisting of 2 applicants with adverse reports from the National Intelligence Service was not in breach of any known law.

30. On the utility of such an adverse report, the Respondent submitted that it could only be considered during the interview stage or after the interview but before the appointment.

31. Responding to allegations of not complying with the Mwongozo Guidelines, the Respondent contended that the Guidelines merely set the minimum requirements and that it had indicated in the advertisement that a PhD requirement was set as an added advantage.

32. The PhD qualification, the Respondent argued was not the only qualification to be considered but was one of several.

33. The Respondent asserted that it had not sought to vary the qualifications and requirements in the middle of the recruitment process.

34. On the question of delegation, the Respondent was of the view that it was within its powers to delegate any of its functions to an *ad hoc committee* of the Board with a limited mandate.

35. Lastly, responding to the gender challenge, the Respondent asserted that 9 females applied and that all the applicants were subjected to similar qualification criteria regardless of gender.

## **Evaluation**

36. The Respondent cancelled the initial advertisement in terms of the consent agreed by the parties in Petition No. 177 of 2019. A re-advertisement was published in a daily newspaper. The re-advert set out the requisite qualifications.

37. The names of the applicants and those shortlisted were also published in a daily newspaper. The public was informed of the interview dates.

38. However, the latter advert did not call upon members of the public to give and/or submit views on the integrity and suitability of the shortlisted applicants.

39. The Respondent argued that the public could submit their views after the conclusion of the interviews and/or before sending the names to the appointing authority.

40. In the view of the Court, the contention by the Respondent is legally deficient. Legally deficient because the rules of natural justice require that applicants for public office be confronted with the concerns raised by the public at the interview stage to enable them to respond before the recruitment panel can decide that an applicant meets the threshold expected of public office.

41. By failing to invite members of the public to submit their views and/or any information, adverse or good on the applicants, and advising the public to whom and how they should address their concerns about the applicants, the Respondent was in breach of the requirement of public participation as envisaged by Article 10(2)(a) & (c) of the Constitution.

42. On the challenge on the delegation to an *ad hoc committee* of the Respondent, the Court finds no violation of the law or Mwongozo Guidelines. When a person or entity entrusted with a power or function delegates such power, it does not mean that it has washed its hand off the power.

43. It is also well within the public knowledge that Boards within the public sector usually constitute committees to perform certain functions on behalf of the Board after which the Board adopts/ratifies any recommendations made by such committees.

## **Conclusion and Orders**

44. From the foregoing, the Court finds and orders that

(a) A declaration be and is hereby issued that the recruitment process for the position of Chief Executive Officer by the Respondent did not meet the Constitutional threshold of public participation and is therefore invalid, null and void.

(b) The Respondent commences recruitment for the position of Chief Executive Officer in conformity with the applicable laws and with public participation.

45. This being public interest litigation, each party to bear own costs.

**Delivered through Microsoft teams, dated and signed in Kisumu on this day 25<sup>th</sup> day of November 2020.**

**Radido Stephen**

**Judge**

**Appearances**

For Petitioner      Omboko & Co. Advocates

For Respondent    TripleOKlaw LLP, Advocates

Court Assistant    Judy Maina/Chrispo Aura