



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

PETITION 19 OF 2016

(Before Hon. Justice Hellen S. Wasilwa on 30th January 2019)

OKIYA OMTATAH OKOITI.....PETITIONER/APPLICANT

VERSUS

THE PRESIDENT OF KENYA.....1ST RESPONDENT

CABINET SECRETARY NATIONAL TREASURY.....2ND RESPONDENT

PUBLIC SERVICE COMMISSION.....3RD RESPONDENT

STATE CORPORATIONS ADVISORY COMMITTEE....4TH RESPONDENT

THE HON. ATTORNEY GENERAL.....5TH RESPONDENT

JUDGEMENT

1. The Petitioner herein Okiya Omtatah Okoiti, a member of Kenyans for Justice and Development Trust, initially filed the Petition on 1st March 2016 in which it enjoined five interested parties to the Petition namely: R.E. Kibwana/Joseph Kibwana, Wambui Namu, Esther Gicheru, Francis Parsimei and Kenya Trade Network Agency as the 1st to the 5th Interested Parties.

2. The Petitioner therein contested the appointment of the 1st to the 4th Interested Parties as Chairman and members of the Board of Kenya Trade Network Agency without adhering to the laid down constitutional values and procedures of the rule of law, fairness, inclusiveness, competitiveness, merit and openness.

3. On 25th May 2018 the Respondent informed the Court that the Petition had been overtaken by events since the term of office of the Interested Parties ended on 17th April 2018. However, the Petitioner objected to this and the Court directed that the Petitioner does strike out the interested parties only since the Petition had not been overtaken by events as the main issue was the establishment of Board by the President. Consequently, the Petitioner filed an Amended Petition on 28th May 2018 supported by his Affidavit sworn on 24th May 2018.

4. The Petitioner in his Amended Petition avers that the 1st Respondent herein comprising the President, the Deputy President and the rest of the Cabinet pursuant to Article 130 of the Constitution has been sued for continuing to handpick and appoint persons to boards of State Corporations and to similar bodies without subjecting them to a fair, open, competitive merit based and inclusive recruitment process and without involving the 2nd Respondent.

5. The Petitioner avers that the 3rd Respondent a commission established under Article 233 of the Constitution of Kenya and Sections 11 and 12 of the Public Service Commission Act 2012 has been sued herein for failing to ensure the appointments to boards of state corporations and similar bodies are made strictly in compliance with the Constitution as provided under Section 7 (1) of the Sixth Schedule of the Constitution.

6. The Petitioner avers that the 4th Respondent, which is established under Section 26 of the State Corporations Act Cap 466 whose functions include the advising on the appointment, removal or transfer of officers and staff of state corporations, had been sued herein for failing to ensure that appointments to boards of state corporations and similar bodies are made strictly in compliance with the Constitution as provided under Section 7 (1) of the Sixth Schedule to the Constitution.

7. The Petitioner avers that the 5th Respondent has been sued as the legal advisor of the President and the representative of the Government of Kenya who is to promote, protect and uphold the rule of law and defend the public interest within the meaning of Article 156 of the Constitution.

8. The Petitioner avers that the Petition faults the 1st and 2nd Respondents for appointing members of boards of state corporations and similar bodies without the involvement of the 2nd Respondent and without adhering to the laid down constitutional values and principles and procedures of the rule of law, fairness, inclusiveness, competitiveness, merit and openness in public appointments.

9. The Petitioner avers that it is aggrieved that in allowing the 1st Respondent to handpick and appoint chairpersons and members of state corporations and similar bodies without the involvement of the 2nd Respondent and without adhering to the laid down constitutional values and principles and procedures of the rule of law, fairness, inclusiveness, competitiveness, merit, and openness in public appointments is directly and clearly violative of Articles 73 (1) (a) of the Constitution which proclaims that authority assigned to a state officer is a public trust to be exercised in a manner that is consistent with the purpose and objects of the Constitution.

10. The Petitioner further avers that the 1st Respondent's actions violates Article 73 (2) of the Constitution which proclaims that the guiding principles of leadership and integrity includes the selection on bases of personal integrity, competence and suitability, objectivity and impartiality in decision making and accountability to the public for decisions and actions.

11. The Petitioner further avers that the 1st Respondent's actions violates Article 232 (1) (g) of the Constitution which proclaims that appointments in the public service must be based on fair competition and merit and Article 232 (1) (i) of the Constitution which demands that the State affords adequate and equal opportunities for appointment, training and advancement at all levels of public service.

12. The Petitioner avers that he has a legitimate expectation that the chairpersons and members of boards and similar bodies appointed by the 1st Respondent would be recruited by the 2nd Respondent. He further avers that the Constitution imposes a legal duty or obligation on the 2nd respondent and other organs of the state to fill the public offices in a competitive, fair and inclusive process.

13. The Petitioner avers that all appointments to boards of state corporations, which were announced in the special issue of the Kenya Gazette (Vol. CXVII- No. 43) published on 27th April 2013 were not made through a fair, open, competitive, merit based and inclusive process as required by the Constitution.

14. The Petitioner avers that statutes which allow the 1st Respondent to pick and appoint persons to boards of state corporations and similar bodies without subjecting them to fair, open, competitive, merit bases and inclusive recruitment process without the involvement of the 2nd Respondent which violates Articles 10,27,47,232 and 234 of the Constitution. He avers that the constitutionally faulty recruitment and appointment process does not only take away the independence and operational autonomy of the resultant board but gives the 1st Respondent the room to use public office to reward cronies.

15. The Petitioner avers that in circumstances where neither the Constitution nor legislation assign the recruitment component to another body, the 2nd Respondent should carry out the recruitment exercise and then hand names of qualified candidates to the appointing authorities.

16. The Petitioner avers that the opaque manner of appointment where statutes allow the 1st Respondent to handpick and appoint persons to boards without subjecting them to a fair, open, competitive, merit based and inclusive recruitment process and without involving the 2nd Respondent violates Article 232 (1) (i) of the Constitution.

17. The Petitioner avers that the Court's decision in this matter will be a judgement in rem, which applies across board, as it constitutes adjudication upon the status of particular subject matter of the right procedure for making appointments to boards of state corporations.

18. The Petitioner therefore seeks the following orders:-

(i) THAT a declaration is hereby issued that Statutes which allow the 1st respondent to handpick and appoint persons to boards of State corporations and to similar bodies without subjecting them to a fair, open, competitive, merit based, and inclusive recruitment process, and without involving the 2nd Respondent, are in conflict with Articles 2, 10, 27, 47, 129(1), 153(4) 232, 234(2), and 259(1) of the Constitution and, therefore, are void to the extent of the inconsistency, as decreed by Article 2(4).

(ii) THAT a declaration is hereby issued that any appointments made under Statutes which allow the 1st respondent to handpick and appoint persons to boards of State corporations and to similar bodies without subjecting them to a fair, open, competitive, merit based, and inclusive recruitment process, and without involving the 2nd respondent, are legally invalid and, therefore, unconstitutional null and void ab initio.

(iii) THAT a declaration is hereby issued that, in circumstances where neither the Constitution nor legislation assign the recruitment component to another body, the 2nd Respondent should carry out the recruitment exercise and then hand names of qualified candidates to the appointing authorities to appoint.

(iv) THAT a declaration is hereby issued that the judgment herein is in rem and it applies across the board to all appointments made to the boards of State Corporations and similar bodies.

(v) THAT a declaration is hereby issued that all appointments to boards of State corporations and similar bodies, which were

NOT made through a fair, open, competitive, merit based, and inclusive process, and did not involve the 2nd Respondent, as required by the Constitution are null and void ab initio.

(vi) THAT the Honourable Court be pleased to issue and hereby issues an order quashing in their entirety all appointments to boards of State corporations and similar bodies, whereby the 1st Respondent handpicked and appointed persons to boards of State corporations and to similar bodies without subjecting them to a fair, open, competitive, merit based, and inclusive recruitment process, and without involving the 2nd respondent.

(vii) THAT the Honourable Court be pleased to issue an order of Mandamus directing the Respondents to commence the recruitment process of members of boards of State corporations and similar bodies in accordance with the law.

(viii) THAT the Honourable Court be pleased to issue any other or further remedy that the Honourable court shall deem fit to grant.

(ix) THAT the Honourable Court be pleased to order the Respondents to pay the costs of this Petition.

Respondents' Case

19. The Respondents filed its grounds of opposition to the Amended Petition on 29th June 2018. The Respondents aver that the Petitioner has not demonstrated how his fundamental rights and freedoms under the Constitution have been violated or are threatened contrary to Article 22(1) of the Constitution and as held in **Mumo Matemu v Trusted Society of Human Rights Alliance (2013) eKLR.**

20. They further aver that the powers and functions of the public service commission under Article 234 of the Constitution are subject to the Constitution in its entirety and to legislation. In addition that, Article 132(4) of the Constitution gives the President power to perform any other executive functions provided in the Constitution. The orders as sought cannot issue specifically in regard to declaring the powers and actions of the President to appoint and remove chairpersons and members of board illegal since this constitutes breach of Articles 132 (f) and 132 (4) of the Constitution.

21. The Respondents aver that the State Corporations Act gives the President and the Minister under Section 6 powers to appoint chairpersons and members of state corporations while Section 7 (3) of the State Corporations Act gives the President discretionary powers to revoke appointment to a board or constitute a board for a determined period. Further, the Public Service Commission, in line Article 2 (2) of the Constitution prohibits any person from exercising authority except as authorised under Constitution.

22. The Respondents aver that the principle of fair competition and merit in competition under Article 232 of the Constitution must be evaluated against the process leading to formation of state corporations since the government's structuring of these entities is different as the structure is aimed at achieving desired objectives.

23. The Respondents further aver that the governance framework regarding State Corporations under the distinct established legislation of State corporations do not provide elaborate procedure regarding appointments.

24. The Respondents avers that Article 135 of the Constitution is clear that decisions of the President in performance of his duties must be signed and should bear the signature of the President. They contend that the appointments and revocation are made through gazette notices pursuant to powers of the President provided under the State Corporations Act and specific statutes and that the Petitioner has not filed any gazette notices to warrant the orders sought.

25. The Respondent aver that the Court lacks the requisite jurisdiction to hear and determine the matter in light of the provisions of Article 162 of the Constitution as the matter entails the powers of the President to appoint and remove board members but does not entail a dispute which relates to an employee-employer relationship.

26. The Respondent avers that the constitutionality of inter alia section 7 (3) of the State Corporations Act and the exercise of the presidential powers in appointment of board members of state corporations is the subject of litigation in **Nairobi High Court Constitutional Petition N. 331 of 2016, Katiba Institute and Africa Centre for Open Governance v the Attorney General and the Public Service Commission.** It would therefore only be just that the matter be stayed pending the determination of the said petition under the doctrine of *sub judice*.

27. The Respondents aver that the orders in rem prayed by the Petitioner violates Article 25 (c) of the Constitution which gives every individual a right to fair hearing and that the failure to enjoin the appointed individuals or the respective state corporations under which the individuals have been appointment amounts to denying them the right to fair hearing and equal protection as guaranteed under Article 27 (1) and (2) of the Constitution.

28. The Respondent avers that the Petition lacks legal foundation and that the orders sought are against public interest as the prayers sought counter the doctrine of proportionality.

Respondents' submissions

29. The Respondents submitted that the Petitioner in his initial Petition, relied on annexures which included Gazette Notice No. 2832 and No. 2857 appointing R.E Kibwana as the Chairperson of Kenya Trade Network Agency from 17th April 2015 for a period of three years and Francis Parsimei, Wambui Namu and Esther Gicheru (Dr.) as members of Kenya Trade Network Agency Board from 17th April 2015 for a period of three years.

30. The Respondent stated that the Petitioner on 25th April 2018 informed the court that he wished to amend the petition as the cause of action against the interested parties had been overtaken by events. The Respondent therefore submitted that since the interested parties left office, the Petitioner cannot invite the Honourable Court to quash appointments of people not in office nor parties to this petition whose terms lapsed on or around 17th April 2018.

31. The Respondents submitted that the Court in making a decision to quash the appointments made by the 1st Respondent the Court should consider whether the decision will be proportional to the rights of the large community of Kenya as opposed to individual rights of the Petitioner.

32. The Respondents submitted that the Court's interpretation should ensure that the outcome of such interpretation does not give rise to absurdity or an illogical result. The Respondents relied on the decision in **Center for Rights Education and Awareness & Another v John Harun Mwau & 6 Others [2012] eKLR** where the Court held:-

“There are other important principles which apply to the construction of status, which, in my view, also apply to the construction of a Constitution such as presumption against absurdity result; the presumption against unworkable or impracticable result-meaning that a court should find against a construction which produces unworkable or impracticable result; presumption against anomalous or illogical result,-meaning that a court should find against a construction that creates an anomaly or otherwise produces an irrational or illogical result and the presumption against artificial result, and lastly, the principle that the law should serve public interest-meaning that the Court should strive to avoid adopting a construction which is in any way adverse to public interest, economic, social and political or otherwise.”

33. The Respondent submitted that the Petition does not meet the threshold set out in the **Mumo Matemu v Trusted Society of Human Rights and Anarita Karimi Njeru** cases where the Court in the former case set out the threshold to be met in a Petition and opined that the it should define the dispute to be decided by the court and plead with particularity and reasonable precision on the provisions breached and the nature or manner of breach alleged or complained of.

34. The Respondents submitted that the Petitioner has failed to establish how Articles of the Constitution have been violated. The Respondents submitted that the Petitioners have failed to establish the violation of his rights under the Constitution.

35. The Respondents submitted that the Petitioner has failed to appreciate Article 7 of the Sixth Schedule of the Constitution and section 6(1) (a) of the State Corporations Act which gives the 1st Respondent power to appoint chairpersons of state corporations. The Respondent submitted that ever appointment made by the President under Section 6 of the State Corporations Act constitutes a contract anchored by a statutory provision. The Respondent relied on the decision in the case of **Joseph Kimani & 2 others v A.G & 2 Others [2010] eKLR**.

36. The Respondent submitted that the Petitioner raised allegations that appointments to state corporations are to comply with public law and governance policies since state corporations are public bodies. In response to this the Respondents relied on the case of **Humphrey Nyongesa Makhoha & Another v CAK & Another JR No. 4 of 2018** where the Lady Justice Maureen Onyango held:-

“A public body like any other employer, enters into private contracts with its employee. In such cases, the rights, duties and obligations of the public body is no different from any other private entity that has entered into a private contract with its employees.”

37. The Respondents further submitted that this honourable court has no jurisdiction to grant the prayers sought for reasons that the Court of Appeal in setting aside the orders issued in **Olive M. Mugenda and another v Okiya Omtata Okoiti & 4 Others [2016] eKLR** held that this court has no jurisdiction in determining and overseeing recruitment of individuals.

38. The Respondents submitted that the Court has an obligation to uphold and defend the constitution under Article 3 (1) of the Constitution, which includes safeguarding and securing the independence of Constitutional Commissions, being the Public Service Commission in this matter, and independent offices. They finally submitted that the Petition has no merit and prayed that it be dismissed with costs.

39. I have examined all evidence on record plus submission filed. The issues for determination are as follows:-

1. Whether this Court has jurisdiction to handle this matter.

2. If so, whether the Respondents have violated the Constitution in appointments made to Chairperson and Members of Boards of State Corporations.

3. Whether prayers sought can be granted.

40. In terms of issue No. 1, this Court's jurisdiction is set out under Section 12 (1) of the ELRC Act 2016:-

1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including:-

a) disputes relating to or arising out of employment between an employer and an employee;

- b) disputes between an employer and a trade union;*
- c) disputes between an employers' organisation and a trade unions organisation;*
- d) disputes between trade unions;*
- e) disputes between employer organisations;*
- f) disputes between an employers' organisation and a trade union;*
- g) disputes between a trade union and a member thereof;*
- h) disputes between an employer's organisation or a federation and a member thereof;*
- i) disputes concerning the registration and election of trade union officials; and*
- j) disputes relating to the registration and enforcement of collective agreements.*

41. The issue is whether appointments for Boards Chairperson and Members are employment related. In determining this, I refer to Section 2 of Employment Act 2007, which defines an employee as a person employed for wages or a salary and includes an apprentice and indentured learner. I note that the members appointed as Chairpersons and Members of Boards earn some sort of wages as retainer fees.

42. In this respect, they can be referred as employees. It is for this reason that I find that the issue of appointments to serve in the public service and whereby the appointees are paid some wages, then they can rightly be referred to as employees of the government and as such this Court has jurisdiction to deal with the issues surrounding the said appointments.

43. On the 2nd issue, other than the fact that they are paid wages, they serve in the public and moneys paid out to them are drawn from public resources or taxes. In this respect then it would be important that appointments in state corporations comply with public law, governance and policies as provided for in the Constitution of Kenya Article 10, which envisages good governance, integrity, accountability and transparency.

44. In the cited case **Humphrey Nyongera Makokha and Another vs CAK and Another JR No. 4 of 2014** the appointees serve the public in the public bodies where they are appointed. In such cases, the rights, duties and obligations of the public body is no different from any other private entity that has entered into a private contract with its employees.

45. In CA No. 2/2015 Visam, Koome and Odek JJA (Nyeri) the Hon. Judges discussed the pleasure doctrine as follows:-

“23... Originally the doctrine of pleasure was a prerogative power which was unfettered. A holder of an office under pleasure could be removed at any time, without notice, without assigning cause, and without there being a need for any cause. However, with the passage of time and evolution of democracy this doctrine has undergone a series of modification. In B.P. Singhal –vs- Union of India & Another (supra) the Supreme Court of India observed:-

“13. There is a distinction between the doctrine of pleasure as it existed in a feudal set-up and the doctrine of pleasure in a democracy governed by rule of law. In the nineteenth century feudal set-up unfettered power and discretion of the Crown was not an alien concept. However, in a democracy governed by Rule of Law, where arbitrariness in any form is eschewed, no Government or Authority has the right to do what it pleases. The doctrine of pleasure does not mean a license to act arbitrarily, capriciously or whimsically. It is presumed that discretionary powers conferred in absolute and unfettered terms on any public authority will necessarily and obviously be exercised reasonably and for public good.”

In Administrative Law, HWR Wade & CF Forsyth, 9th Ed pg-354-355, the learned authors stated:-

“The common theme of all authorities as far mentioned is that the notion of absolute or unfettered discretion is rejected. Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely- that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended. Although the Crown’s lawyers have argued in numerous cases that unrestricted permissive language confers unfettered discretion, the truth is that, in a system based on the rule of law, unfettered government discretion is a contradiction in terms. The real question is whether the discretion is wide or narrow, and where the legal line is to be drawn. For this purpose everything depends upon the true intent and meaning of the empowering Act.

.....

The whole concept of unfettered discretion is inappropriate to a public authority, which possesses powers solely in order that it may use them for the public good. There is nothing paradoxical in the imposition of such legal limits. It would indeed be paradoxical if they were not imposed.”

The evolution of the doctrine of pleasure has been on the basis of firstly, putting to an end arbitrary action by a public authority

and secondly, ensuring that such a power is exercised reasonably and for the public good”.

46. From the above findings of the Court, the proposition that the 1st Respondent herein cannot just hand pick persons and appoint as Chairperson and Board Members to various State Corporation Boards is true.

47. The appointments must be transparent and not done arbitrarily. In circumstances where appointments have previously been made without adhering to transparency and without unilaterally hand picking persons to be appointed, it would be important that such appointments should not be sustained. It is for this reason that I agree with the Petitioner’s preposition that the principles of the Constitution under Articles 10, 27 (equality and freedom from discrimination) and 232 have been violated.

48. Article 232 of the Constitution provides as follows:-

1) “The values and principles of public service include:-

a) high standards of professional ethics;

b) efficient, effective and economic use of resources;

c) responsive, prompt, effective, impartial and equitable provision of services;

d) involvement of the people in the process of policy making;

e) accountability for administrative acts;

f) transparency and provision to the public of timely, accurate information;

g) subject to paragraphs (h) and (i), fair competition and merit as the basis of appointments and promotions;

h) representation of Kenya’s diverse communities; and

i) affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service, of:-

(i) men and women;

(ii) the members of all ethnic groups; and

(iii) persons with disabilities.

2) The values and principles of public service apply to public service in:-

a) all State organs in both levels of government; and

b) all State corporations.

3) Parliament shall enact legislation to give full effect to this Article.

49. In terms of remedies, the Petitioner had asked the Court to make certain orders. The Petitioner has asked the Court to declare all previous appointments made to Boards of State Corporations and similar bodies, which were not made through a fair, open, competitive, merit based and inclusive process null and void ab initio.

50. However, based on the principle of proportionality, the larger community of Kenya as opposed to individual rights of the Petitioner would be trampled upon. Government Corporations serve a big role in the economy of the country and therefore interfering with appointments already made will be counteractive and have grievous ripple effects on the economy and the running of those bodies and even those employees already serving in those State Corporations.

51. In the circumstances, I decline to issue orders declaring previous appointments null and void. However, I make an order that future appointments should be based on the law, on the Constitution and should be fair, open, competitive, merit based and through an inclusive process. There will be no order as to costs.

Dated and delivered in open Court this 31st day of January, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Odukenya for Respondents – Present

Petitioner – Present