



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

JUDICIAL REVIEW NO. 34 OF 2018

(Before Hon. Lady Justice Maureen Onyango)

IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI AND MANDAMUS

REPUBLIC.....APPLICANT

VERSUS

**THE CABINET SECRETARY, MINISTRY OF EAST AFRICAN COMMUNITY
AND REGIONAL DEVELOPMENT.....RESPONDENT**

AND

THE EWASO NG'IRO NORTH

DEVELOPMENT AUTHORITY.....1ST INTERESTED PARTY

JOSIAH WILLY MULWA.....2ND INTERESTED PARTY

AND

OMAR MOHAMMED SHEIKH.....EX-PARTE APPLICANT

JUDGMENT

The Ex parte applicant instituted suit through a Chamber Summons Application dated 8th November, 2018, seeking leave to file Judicial Review Proceedings which he did by an Application dated 1st December, 2018, wherein he seeks for the following reliefs:-

1. That this Court issues an Order of Certiorari bringing into this Court the 2nd Interested Party's Acting Appointment letter dated 6th November, 2018 for the purpose of its being quashed.
2. That this Court issues an Order of *Mandamus* against the Respondent compelling him to consider and enforce the 1st Interested Party's Chief Executive Officer Evaluation Report 2017-2018 dated 1st August, 2018.
3. That this Court issues an Order of *Mandamus* against the Respondent compelling him to enforce the 1st Interested Party's Recommendation for the Applicant's re-appointment vide the 1st Interested Party's Board Minutes dated 19th September, 2018, as the 1st Interested Party's Managing Director; and
4. That the costs of the Application be awarded to the ex-parte applicant

The Application is premised on the grounds that:

1. This Court has jurisdiction to check on excesses of executive/ administrative power over all matters relating to Employment and Labour;

2. This Court has jurisdiction to counter abuse of power by executive/administrative bodies;
3. Every person has the right to fair administrative action;
4. The Respondent- a state organ is enjoined to exercise in accordance with the constitution and in good faith;
5. Every person has the right to fair administrative action
6. The Applicant's tenure as Managing Director of the 1st Interested Party ends on 16th February, 2019.
7. That Applicant was evaluated on his performance and competence and approved/recommended for reappointment as Managing Director of the 1st Interested Party on a 2nd term once his tenure is ended;
8. The Applicant's Recommendation for reappointment was in line with the Government Circular No. OP.CAB.0/1A of 27th February, 2018 (a circular from the Head of Public Service) which Circular addressed terms of service for State Corporations Chief Executive Officers;
9. Having been evaluated and recommended for reappointment in accordance with the Government Circular, the Applicant has legitimate expectation to be confirmed as the 1st Interested Party's Managing Director;
10. The Government Circular No. OP.CAB.0/1A of 27th February, 2018, the Evaluation Report 2017-2018 dated 1st August, 2018 and the 1st Interested Party's recommendation as communicated in the Board Minutes dated 19th September, 2018, confer the Applicant with a legitimate expectation to be confirmed as the 1st Interested Party's Managing Director.
11. The Respondent's Acting Appointment Letter dated 6th November, 2018,, purported to appoint the 2nd Interested Party to the Applicant's position in an acting capacity;
12. The Respondent's actions are averse to the Applicant's terms of service and his right to fair labour practices
13. In failing to consider the Applicant's recommendation for reappointment, the respondent failed to consider relevant matters and acted unreasonably;
14. The Respondent's actions were tainted by bad faith and ulterior motives.
15. The Applicant makes this Application in good faith in defence of his rights;
16. It is in the interest of fairness and justice to grant the Orders sought with costs to the Applicant.

Facts

The ex parte Applicant avers that he was appointed to the position of Managing Director of Ewaso Ng'iro North River Basin Development Authority on 25th February, 2016, with effect from February, 2016. The said appointment was published in the Kenya Gazette No. 946 Vol. CXVIII-No. 15 of 19th February, 2016.

That the terms of his appointment were that he would serve as Managing Director for a period of 3 years by dint of Ewaso Ng'iro North Development Authority Act and the State Corporations Act. He applied for reappointment upon which the Board carried out an evaluation of his performance. The Board of Directors of the 1st Interested Party held a meeting on 19th September, 2018, at which reappointment was considered.

After considering the evaluation report, the Board passed a resolution that the ex parte applicant was the best candidate to serve the Ewaso Ng'iro North Development Authority. They recommended his re-appointment for another 3 year term with effect from 12th November, 2018, on which date, the Respondent informed the 2nd Interested Party of his appointment as Acting Managing Director for a period of 3 months with effect from 12th November, 2018.

According to the exparte applicant the 1st Interested Party's Chairman wrote to the Respondent faulting the Respondent for ignoring the 1st Interested Party's recommendation and recruiting an acting Managing Director Pending the expiry of his term. In the said letter the 1st Interested Party's chairman also pointed out that the ex parte applicant's recommendation was above board and in accordance with the Circular No. OP.CAB.0/1A of 27th February, 2018, from the Head of Public Service; which circular addressed the terms of service for State Corporations Chief Executive Officers.

He avers that he had legitimate expectation of being reappointed and without the Court's intervention he will be hounded out of office prematurely, unfairly and in breach of his terms of service. He urges the Court to allow the orders sought in the interest of justice, fairness and the rule of law.

The Respondent in Response to the Application filed a Replying Affidavit sworn by one Hon. Adan Mohamamed, EGH, wherein he avers

that the ex parte applicant was first appointed to the position of Managing Director of the Ewaso Ng'iro North River Basin Development Authority on 15th February, 2013 vide Kenya Gazette dated 1st March, 2013 N. 2620 Vol. CXV-NO. 32. Prior to the said appointment the ex parte applicant had earlier been appointed Acting Managing Director on 11th December 2012, before being appointed as the substantive Managing Director on 15th February 2013.

That the ex parte applicant was appointed for his 2nd term vide Gazette Notice N. 9119 Vol.CXVII No. 136 of 27th November, 2015 for a term that was to begin on 16th February, 2016 which term was to come to an end on 16th February, 2019.

The Respondent avers that the appointment was not renewable as the then Cabinet Secretary as the appointing Authority in her own wisdom did not give any room for re-appointment. Further that under section 4 of the Ewaso Ng'iro North River Basin Development Authority, Act Cap 448 (ENNDA) that the ex parte applicant relied on renewal of contract applies only to the chairman and members of the Board of directors but not to the Managing Director.

That the Board of the 1st Interested Party erred by introducing renewability that had not been provided for in the instruments of appointment and had the Respondent acted on the recommendation of the Board of the 1st Interested Party it would have contravened Section 9(1) of the ENNDA Act.

The Respondent denies the Ex parte Applicant's averment that he was evaluated by the Board of Directors of the 1st Interested Party and emerged the best candidate creating the impression of a competitive recruitment process which amounts to misrepresentation of facts as there were no other candidates. That the Ex parte applicant could therefore not have emerged as the best candidate in a lone competition.

That the Mwongozo guidelines which the ex parte applicant seeks to rely on limits the term of CEOs of State Corporations to a maximum of two terms. That the best practices provide that a Chief Executive Officer who is retiring or completing a contract term proceeds on terminal leave prior to the end of contract/retirement to pave way for smooth transition. During the terminal leave, the ex parte applicant would still be enjoying his full salary and benefits as provided in his appointment letter.

The Respondent maintains that he was exercising his responsibility in line with Clause A.6 of the Human Resource Policies and Procedures Manual for the Public Service which stipulates the role of the Cabinet Secretaries as being accountable individually and collectively to the President for the exercise of their powers and the performance of their functions concerning a matter for which the Cabinet Secretary is responsible, which includes steering the strategic human resource management matters in the ministry where the State Corporation falls.

That the matter should be dismissed as the Orders sought by the ex parte applicant relate to contract of employment where an employer should be able to choose its employees. That granting the orders sought would amount to the Court imposing an employee upon an employer and violate the freedom of contract, a right enshrined in the very nature of contracts.

In a rejoinder, the ex parte applicant states that the Human Resource Policies and Procedures Manual referred to by the Respondent are inapplicable and that the assertion that the Board erred in approving an appointment for the third term is not founded in any provision of the law. He also avers that the Respondent did not act in the best interest of the Authority and as such the Orders sought should be allowed.

Submissions

It is submitted on behalf of the ex parte applicant that the Circulars of the Head of Public Service of 27th February, 2018, and 23rd November, 2010, which provided that contracts of Chief Executive Officers in state Corporations are renewable subject to performance gave him legitimate expectation which the Respondent did not live up to.

He cites the Supreme Court decision in *Communications Commission of Kenya & 5 Others vs Royal Media Services Limited & 5 Others (2014) eKLR*, where the Court described the doctrine of legitimate expectation as one that applies the principles of fairness and reasonableness, to the situation in which a person has an expectation, or interest in a public body retaining a long standing practice, or keeping a promise. That legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil. A party that seeks to rely on the doctrine of legitimate expectation has to show that it has locus standi to make a claim on the basis of the legitimate expectation.

Furthermore, that the Applicant's expectation is founded in law: Section 4(1), (3) of the Ewaso Ng'iro North River Basin Development Act Cap 448, to the effect that a retiring member shall be eligible for reappointment.

On relevant and irrelevant considerations it is submitted that in the instant case relevant considerations included the provisions of the State Corporations, Ewaso Ng'iro North River Basin Development Act, Government Circulars, the ENNDA Evaluation and the ENNDA recommendations. That the Respondent failed to take into account these considerations and thus the decision to appoint the 2nd Interested Party instead of reappointing the applicant subjected the applicant to unfair administrative action.

That the Respondent's conduct was also irrational/unreasonable and in bad faith and for the Court to intervene the Respondent's actions must be shown to have been Wednesbury-unreasonable which test requires that the decision in question must have been made:

- a. Taking in to account irrelevant considerations;
- b. Failing to take into account relevant considerations;

- c. Acting so absurdly ‘that no sensible person could ever dream that it lay with the powers of the authority; and
- d. Acting in bad faith.

It is submitted that the refusal by the Respondent disregarded the law on reappointment, unlawfully reneged on Government policies and Circulars, failed to take into account relevant considerations and acted in bad faith and prejudiced the Applicant.

The Applicant also submits that the Respondent’s actions were ultra vires for the reason that he did not rely on any statutory provisions in failing to reappoint the Applicant and that the 3 circulars from the Head of Public Service and their applicability have not been denied. The Applicant submits that the Application is merited and should be allowed.

Respondent and Interested Parties’ Submissions

It is submitted that the ex parte applicant has served the maximum limit of two terms. The 1st term of Service for the ex parte applicant was the appointment vide Gazette Notice No. 2620 of 2013 which was to begin on 15th February, 2013, and the 2nd term vide Gazette Notice No. 946 of 2016 which term began on 16th February, 2016 to 16th February, 2019. That the Court does not have the jurisdiction to extend fixed term contracts as was held in the case of **Registered Trustees of the Presbyterian Church of East Africa & Another Vs Ruth Gathoni Ngotho (2017) eKLR**.

The Respondent further submits that the Cabinet Secretary was well within his mandate to decline the appointment of the ex parte applicant for a third term in office as Section 9 of the Ewaso Ng’iro North River Basin Development Authority, Cap, 448 Laws of Kenya stipulates that:

“There shall be an officer of the Authority, to be known as the Managing Director, who shall be appointed by the Minister and who shall be responsible for the execution of the policy of the Authority and for the control and management of its day-to-day business.”

Further subsection 3 thereof stipulates:

“A state corporation may engage and employ such number of staff, including the Chief Executive, on such terms and conditions of service as the Minister may, in consultation with the Committee approve.”

That in light of the above provision the Respondent, who is the Cabinet Secretary has discretion to consider the recommendations of the Board or not as the wording of the Act is not mandatory.

Furthermore, that the appointment of the Managing Director is not within the powers of the Board. That the Board erred in the instant case in the extension of the applicant’s term over his maximum two term limit especially because there was no overbearing absence of technical capacity and expertise to warrant the appointment of the ex parte applicant for a third term.

That the Respondent was not wrong in subjecting the recruitment of a new Managing Director to a competitive process since the performance of the applicant is a factor to be considered in determining whether to retain the Respondent or not. They cite the case of **Joseph Mutuura Mbeeria and Another Vs Cabinet Secretary for Education, Science and Technology and 2 Others (2013) eKLR**.

On legitimate expectation it is submitted that there cannot be legitimate expectation against clear provisions of the law. That the applicant did not meet the principles on the application of the doctrine of legitimate expectation and thus the assertion should fail.

That the Respondent adhered to the principles of the law and as such the ex parte applicant’s assertion should fail.

Determination

The issues for determination are

1. Whether the decision of the Respondent was lawful
2. Whether the ex parte applicant is entitled to the remedies sought.

Judicial intervention in Judicial Review matters is limited to cases where the decision was arrived at arbitrarily, capriciously or mala fide or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose, or where the functionary misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or where the decision of the functionary was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter.

The ex parte applicant contends that the Respondent did not take into account the State Corporations Act Cap 446 laws of Kenya, and the Ewaso Ng’iro North River Basin Development Authority Act, Cap 448 Laws of Kenya in declining his reappointment despite the recommendation of the Board. That the Respondent failed to consider circulars of the Head of Public Service to the effect that CEO’s of State Corporations should be appointed on renewable term contracts.

Section 4 of the Ewaso Ng'iro North River Basin Development Authority Act, Cap 448 Laws of Kenya provides for membership of the Board which comprises of:-

4. Membership of the Authority

(1) *The Authority shall consist of the following members—*

a. A chairman who shall be appointed by the President;

b. The Permanent Secretary to the Ministry for the time being responsible for matters relating to the functions of the Authority or a person deputed by him in writing for the purposes of this Act;

c. The Permanent Secretary to the Ministry for the time being responsible for finance or a person deputed by him in writing for the purposes of this Act;

d. The Permanent Secretary to the Ministry for the time being responsible for agriculture or a person deputed by him in writing for the purposes of this Act;

e. The Permanent Secretary to the Ministry for the time being responsible for health or a person deputed by him in writing for the purposes of this Act;

f. The Permanent Secretary to the Ministry for the time being responsible for livestock development or a person deputed by him in writing for the purposes of this Act;

g. The Permanent Secretary to the Ministry for the time being responsible for energy or a person deputed by him in writing for the purposes of this Act;

h. The Permanent Secretary to the Ministry for the time being responsible for water development or a person deputed by him in writing for the purposes of this Act;

i. The Permanent Secretary to the Ministry for the time being responsible for environment or a person deputed by him in writing for the purposes of this Act;

j. The Provincial Commissioners for Rift Valley, Central, Eastern and North-Eastern Provinces or persons deputed by them in writing for the purposes of this Act;

k. The Inspector of State Corporations or a person deputed by him in writing for the purposes of this Act;

l. Not more than twelve other members appointed by the Minister, in consultation with the President, ten of whom shall be appointed from the Area affected by the operations of the Authority;

m. The Managing Director.

In the instant case the ex parte applicant was the managing director/CEO and therefore qualifies as a member of the Board.

Section 4(2) of the Act provides:

Every appointment under subsection (1)(a) and (l) shall be by name and by notice in the Gazette and shall be for a period of three years from the date of appointment.

Section 4 (3) of the same Act provides that:

A retiring member shall be eligible for re-appointment.

Mwongozo is a Code of Governance for Government Owned Entities. The Code addresses matters of effectiveness of Boards, transparency and disclosure, accountability, risk management, internal controls, ethical leadership and good corporate citizenship.

In the Mwongozo it is provided that the tenure of a Board member shall not exceed a cumulative term of six years or two terms of three years each provided that upon first implementation of this Code, the appointing authority may extend the term of not more than a third of the members of the Board in order to achieve continuity.

Given the definition of the Mwongozo, it is evident it forms part of the terms of engagement of a member of the 1st Interested Party. It is therefore right to say that the terms of engagement of a board member shall be interpreted wholesomely in accordance with the law, government circulars, and the Mwongozo Code.

The Respondent in their Replying Affidavit sworn by the Cabinet Secretary states that the Respondent was appointed as an Managing

Director on a non-renewable term as the letter of appointment lacks a renewal Clause and that he Cabinet Secretary is enjoined by Cap 448 to appoint the Managing Director of the Board. Furthermore the Cabinet secretary declined to renew the ex parte applicant's membership to the board because he had already served the maximum 2 term limit provided in the relevant governance documents cited herein.

From the above it is clear that the decision of the Respondent was regular and the considerations made in declining the ex parte applicant's reappointment were not unreasonable neither were they irrelevant. In any event the 2nd Interested Party was appointed to the position of Acting Managing Director and the substantive position is yet to be filled.

On legitimate expectation the applicant contends that after he had been recommended by the Board for reappointment he had legitimate expectation that he would be appointed to the position of Managing Director for another term. In the case of ***Communications Commission of Kenya & 5 Others Vs Royal Media Services Limited and 5 Others (2014) eKLR*** it was held:

“There cannot be a legitimate expectation for a grant of a licence by the 1st appellant without adherence to statutory or constitutional provisions. It has been held in several persuasive authorities, R. v. Devon County Council, ex parte Baker & Another [1995] 1 All. E.R. 73; R. v. Durham County Council, ex parte Curtis & Another [1992] 158 LGRev R 241 (CA) and R. v. DPP ex p. Kebilene [1993] 3 WLR 972, that no legitimate expectation can override clear statutory provisions.”

The ex-parte applicant has not set out the legal basis for his re-appointment for a third term. There is therefore no breach of his legitimate expectation.

Having found that the Decision of the Respondent was lawful, the applicant is not entitled to the orders of judicial review sought as he has failed to establish that the Respondent misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones. Further the Applicant did not establish that the Respondent's decision was so grossly unreasonable as to warrant the inference sought and that he had failed to apply his mind to the matter.

The Application fails in whole. The same is accordingly dismissed. Each party shall bear its costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 1ST DAY OF MARCH 2019

MAUREEN ONYANGO

JUDGE