

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

JUDICIAL REVIEW NO. 25 OF 2017

(Before Hon. Lady Justice Maureen Onyango)

IN THE MATTER OF AN APPLICATION BY DR. GABRIEL MUKURIA MUTURI FOR ORDERS OF CERTIORARI AND MANDAMUS

REPUBLIC.....APPLICANT

VERSUS

THE DIRECTOR,

KENYA FORESTRY RESEARCH INSTITUTE (KEFRI).....RESPONDENT

AND

DR. JANE WANGU NJUGUNA.....INTERESTED PARTY

AND

DR. GABRIEL MUKURIA MUTURI.....EX-PARTE APPLICANT

JUDGMENT

The Ex parte applicant filed a suit through a chamber summons seeking leave to file Judicial Review proceedings for orders of certiorari and mandamus by an application dated 6th October 2017 and seeks the following reliefs;

- 1) That the court grants leave for an order of certiorari for quashing the decision of KEFRI to appoint the interested party to the position of senior deputy director research and development made on 12th September 2017.
- 2) That the court grants leave to apply for an order of mandamus compelling the respondent to re advertise afresh the position of Senior Deputy Research and Development for the purpose of fresh recruitment.
- 3) That the leave sought operate as stay of the decision of the respondent in the appointment of the interested party to the advertised position on 12th September 2017 pending hearing and determination of this application.
- 4) That there is no other remedy available to the Ex parte applicant other than the current one.
- 5) That costs be provided for.

The application is premised on the grounds that;

- 1) The Kenya Forestry Research Institute(KEFRI) who is the respondent in appointing the interested party to the position of senior deputy director research and development were procedurally unfair, abused discretion, against the legitimate expectation, failed to take relevant considerations, acted against the material procedure or condition prescribed in the career progression (scheme of service) guidelines for respondents' parastatal, were biased and the appointment is unlawful.
- 2) On 29th May 2017 the respondent placed an internal advertisement for the aforementioned position. It is on this basis that the applicant and five others applied for the position.
- 3) On 1st September 2017 the applicant and five others received letters inviting them for a meeting with the board at the respondents' headquarters boardroom on 8th September 2017 to announce the interview results. The directors announced that five of the candidates had passed very well in the interview scoring above the respondents' threshold but the position was awarded to the interested party.
- 4) Unlike the Ex parte applicant the interested party lacked the minimum qualification for the appointment in the said position being;

- a. At least fifteen years of experience in research and development, three of which should be in a position of a chief research scientist or in a comparable position.
- b. Bachelor's degree in any of the following disciplines, forestry, natural resources management, environmental studies or its equivalent from a recognized institution.
- c. Be a first author of at least three scientific papers in refereed journal or a relevant book chapter or policy briefs and in addition be an author of a grant-winning proposal and first author of one technical note/research note/ two technical guidelines / two information leaflets or be the first author of two verifiable papers in scientific conference/ symposium proceedings and in addition first author of two technical notes/ research notes/ technical guidelines/ two information leaflets.

Applicants Submissions.

The Ex parte applicant avers that the respondent was appointed the director KEFRI on 1st May 2009 through Kenya gazette Volume CXI. No 57 of 17th June 2007 and reappointed for another 3 year term on 22nd March 2012 vide Kenya Gazette Vol CXIV. That no other gazette notice extending his term is available. He believes that the respondent is in office beyond his term limit and is holding the office illegally and therefore anything he does is null and void.

He maintains that the 1st Interested Party is a perpetual beneficiary of malpractice/favouritism as there are shortcomings noted in her qualifications prior to appointment to the position of deputy director forest productivity improvement in the Kenya national audit report of 4th September 2014. The internal advertisement for position of regional director and deputy regional director demonstrates that the two offices are differentiated by requirements and functions and the respondent was unqualified for the position of Deputy Director.

The respondent did not possess a recognized strategic leadership development certificate as she was financially supported by the respondent to undertake the course at the Kenya school of government to cover up the deficiency retrospectively. The senior deputy research and development position was advertised internally where the institute has adequate candidates qualified for such positions and the policy was adhered to in 2013 for all deputy director positions. The reason the respondent advertised the positions of senior deputy director finance and deputy director finance externally but restricted advertisement of senior deputy director research and development was to protect his preferred candidate from internal and external competition. The respondent exhibited procedural impropriety by accepting the interested party's application on 19th June 2017, three days after the official deadline for submitting applications. This is also shown by the panel recommending all candidates to the next stage when it was clearly shown some applicants never met the requirements sought within the prescribed deadline a fact known to some panellists who nevertheless proceeded with the interviews. The impropriety is demonstrated in shortlisting candidates for the position of senior deputy director, research and development and its subsequent adoption by adulterating scientific productivity requirements for appointment to the position of senior deputy director research and development.

According to the Ex parte applicant, the KEFRI career progression guidelines is the institutes blueprint for human resource recruitment and career progression and the position of senior deputy director is synonymous to deputy director research and development. This appointment is also guided in other internal policies reflected in advertised positions, laws and government circulars including Mwongozo. The KEFRI staff involved in the recruitment process, technical committee of the board and the panel lacked skills of eminent researchers to evaluate and rank the candidates objectively. It is claimed that the board was not properly constituted as not all the members were gazetted since there was no substantive chairman and corporate secretary as stipulated in Mwongozo and the letter from the head of public service. Both the respondent and interested party are aware of the bachelor's requirement for the position and colluded in falsifying that the interested party has a non-existent degree of forest science in human resources documents shared with the scientists after her appointment.

The Ex parte applicant contends that KEFRI has never recruited another senior deputy director research and development using the career progression guidelines 2011 and therefore discussions on adulteration of publications requirement for appointment was not precedent to the recruitment process at

hand.

The Ex parte applicant submits that there are many remedial channels for dealing with such case but despite letters being sent to such bodies for directions, only the court has taken action. The applicant continues that the remedial mechanism was not feasible based on previous experiences in addressing recruitment malpractices and that dissenting views expressed after results were announced were not well received by the acting board chairman.

The Ex parte applicant avers that the board members have no proprietary interest on the job position and the matter is meant to ensure that the respondent as the appointing authority adheres to the recruitment requirements as set out. The applicant believes that the respondent had a preferred candidate for the position whom they shielded from more qualified candidates by adulterating job requirements and side-lining more qualified applicants. That the respondent has discriminated against him in previous staff evaluation processes and tainted the applicant's character to staff.

The Ex parte applicant submits that some board members are either too close to KEFRI staff or have stayed beyond the requisite 6 years and some interact freely with staff in research work thereby jeopardizing the independence of board members envisaged in Mwongozo. The applicant currently reports to the office currently occupied by the interested party and is currently suffering

prejudice which will derail public service delivery in his current position.

The respondent and interested party filed their reply to the notice of motion dated 6th October 2017. The respondent avers that this particular matter is brought in bad faith and out of malice. That the applicant has failed to address real issues as to how he was aggrieved during the

recruitment exercise such that he is attacking personally the Director and Acting Board Secretary Ms Sarah Mogaka who are not party to these proceedings.

The respondent submits that the attack on the decision of the respondent to appoint the Interested Party to the position in dispute constitutes personal attack on the integrity of the interested party. The allegation that the Respondent adopted restricted advertisement of the position in dispute to be internal in an effort to protect its preferred candidate from internal and external competition is baseless and without merit. The applicant has not placed any evidence before this court to back his allegation. The applicant had a right to challenge the internal advertisement immediately it was advertised and therefore he is estopped from raising it now as an afterthought. The allegation that the Interested Party was appointed through a biased process again is not proved by any evidence at all.

In response to the Ex parte applicant prayer to the court to think of the possibility of bias rather than the probability of bias and find in his favour, the respondent states that a party who alleges has the burden to prove their allegations and that our judicial system is adversarial to so that the burden of proof is placed on the party alleging. That the applicant's argument inviting the court to think for him be rejected. The respondent submits that the applicant has not demonstrated bias on the part of the acting corporation secretary, the director, 4 members that conducted the interview or even members of the Board who never participated in the process. The allegation of bias is only meant to divert the court's attention from the real issues which have not been proved to warrant the orders sought.

The respondent submits that the recruitment process was within the law and very fair. They continue that the applicant is inviting this Court to hold that since Wasilwa J. found that the director of KEFRI was illegally in office in Petition 75 of 2016 then anything that the director did while illegally in office is a nullity in law. The applicant has not cited any provision of the law or even case law to back up this argument. This advances the respondent's argument that the applicant is fearful of competition and is being petty. That Wasilwa J. only declared the director being illegally in office and not anything else he did during his tenure in office.

The respondent maintains that the allegation that the then Director chaired many meetings leading to the interview is without substance. That the allegation that the Board members have been in office for more than two terms contrary to the Mwongozo are irrelevant to the issues for determination herein. The respondent observes that there is a sitting Board that was gazetted in May 2016 for a term of 3 years. That Wasilwa J. finding that there was no Board in place was in excess of her jurisdiction as it was never pleaded in the said petition. Further, the Court of Appeal has already stayed the execution of the decree as regards the appointment of the Board of Directors of KEFRI pending the determination of the intended appeal in Civil Application No. 59 of 2018. According to the respondent, Mwongozo governs the appointment of CEOs, Board Members and Secretaries to state corporations and there is no statutory requirements underpinning that Mwongozo should have been adopted in filling the position in dispute or at all.

The respondent contends that a legitimate expectation arises from an expectation from a promise or representation given on behalf of a public body or from the existence of a regular practice which the claimant can reasonably expect to continue. The respondent maintains that the Institute's fifth Strategic Plan 2013-2018 specifically provided that senior positions in KEFRI shall be filled competitively either internally or externally. The applicant herein is not a new recruit in the corporation and was aware that such senior positions would be filled competitively and he willingly became part of that process and so if he had any issues about the strategic plan that was adopted in 2013 nothing would have been easier than to challenge the same then rather than wait now when the same is tested and accepted for over 4 years down the line. The respondent points court to the material placed before the court to show that it is clear that the Applicant had not been given the benefit of being hand-picked to the position in dispute before the institution of this suit. Legitimate expectation would only have arisen if the applicant had been promised that he will be given the position in dispute and the Respondents without notice withdrew the exercise of that right. That the applicant has not demonstrated that he had any legitimate expectations which the respondents could have violated.

The respondent avers the applicant has failed to prove his case to the required standard and maintains that the application is brought in bad faith and is attacking everybody and anybody who ever participated in the recruitment process. It submits that because the Interested Party is now Acting CEO pending the recruitment of substantive CEO the applicant feels very aggrieved with the interested party. The respondent submits that the applicant should be advised that leadership is not only about academic papers but leadership skills demonstrated by interacting with everyone on daily basis. That the results given by the four panellists speak for themselves and demonstrate the ability each applicant demonstrated one-on-one with the interviewers. It is submitted that the applicant is not challenging those results or at all.

The respondent submits that the applicant has not proved any illegality, irrationality and impropriety of procedure committed/omitted by the respondent during the recruitment for the said position to warrant the orders sought. It submits that the court should find that the Board acted lawfully in appointing the Interested Party to the position in dispute in a fair and competitive process. It prays that the suit be dismissed with costs to the Respondent.

Interested Party's Submissions.

The Interested Party submits that on the 29th May 2017 KEFRI placed an internal advertisement for the position of Senior Deputy Director Research and Development. The Interested Party and the Ex parte applicant together with four others applied for the position. On 7th August 2017, the shortlisted candidates were individually invited for interviews that were held on 22nd August 2017. The Interested Party emerged the winner with an average score of 82.8% while the Ex parte applicant came third with an average of 76.6%. The results were released on 8th September 2017 in the presence of all the six candidates in a meeting of the board of directors where the winner was declared. The Interested Party was issued with an appointment letter and on the 12th September 2017 assumed her duties. It is from this appointment that the Ex parte applicant has moved this court on the grounds that the interested party lacked the requisite qualifications for the job as advertised.

The Interested Party avers that the Ex parte applicant has repeatedly talked about the appointment being biased, unlawful and against legitimate expectations but has not established the same. She notes that the claim by the Ex parte applicant that the position was internally advertised to protect the interested party from internal and external competition is meant to mislead the court as it is outrageous, malicious and brought in bad faith. She continues that the hiring process took a period of three months and ten days and at no time did the Ex parte applicant raise any issue. That he only did so after being unsuccessful. That according to the Ex parte applicant the process would only have

been fair if he had emerged the winner.

The Interested Party submits that the decision to appoint her to the position was lawful that there was no legitimate expectations as alleged and it is preposterous for the Ex parte applicant to raise the issue of legitimate expectation because that would imply that the respondent had promised him the position or had indicated to him that he is the most qualified and would therefore automatically qualify for the position should a vacancy arise in the position. The Interested Party maintains that the position was competitively filled and due process was adhered to.

The Interested Party submits that Mwongozo is meant to guide the appointment of the chief executive officer, board members and the corporation secretary and at no point does it talk of the appointment of senior director research and development. The interested party avers that the board secretary Ms. Sarah Mogaka is not part of the proceedings and entertaining the application would be condemning the officer unheard. Further, the said officer is not a part of the recruitment panel and no evidence has been adduced to show the court how the officer influenced the appointment.

The Interested Party submits that the recruitment process was procedural and adhered to all relevant considerations to ensure a suitable candidate filled the vacant position as advertised. That the allegation to the effect that the interested party lacked the minimum academic and professional qualifications as advertised is malicious, outrageous and bad in faith. She maintains that it is the Ex parte applicant who does not meet all the qualifications as he lacked the strategic leadership certificate at the time of the briefing. The Interested Party submits that the Ex parte applicant is a bitter opponent unwilling to accept defeat and that if he was aware that the qualifications were adulterated he should not have taken part in a flawed process and should not have waited to be unsuccessful. The Interested Party submits that she has published a number of papers, technical notes and book chapters and the Ex parte applicant is on a fishing expedition with the hope of making a catch.

The Interested Party avers that she submitted her application on 16th June 2017 and not 19th June 2017 as was alleged and therefore the application was on time. The Interested Party submits that the Ex parte applicant has not satisfied the grounds upon which the orders sought can be granted being irrationality, illegality and impropriety of procedure.

The Interested Party submits that the appointment by the Board was lawful and was done lawfully. She prays that the court finds that the applicant does not merit the orders sought and his application be dismissed with costs to the Interested Party.

Determination

I have considered the pleadings and submissions of the parties as presented to the court. The issue for determination is whether the appointment of the Interested Party was biased, unlawful and against the legitimate expectation of the Ex Parte Applicant.

The Ex Parte Applicant's contention is that the Interested Party did not meet the minimum qualifications as she did not have the following which were requirements in the advertisement –

- i. At least fifteen (15) years of experience in research and development: three (3) of which should be in the position of a Chief Research Scientist or in a comparable position.
- ii. That in 2014 the Interested Party was holding the position of Deputy Director Forestry Productivity and Improvement, an Audit Report Kenya national audit was carried out and established that the Interested Party lacked ten (10) year experience required for the position. It is therefore not possible to have met the fifteen (15) year experience three (3) years later.
- iii. Bachelor's Degree in any of the following disciplines: Forestry, Natural Resources Management, Environmental Studies or its equivalent from a recognized institution.
- iv. That the Interested Party's 1st Degree was a Bachelor's of Science General which is not an equivalent to the Bachelor's Degree in Forestry or other disciplines required for the position.
- v. Be a first author of at least three(3) scientific papers in refereed journal or a relevant book chapter or policy briefs and in addition be an author of a grant-winning proposal and first author of one Technical Note/Research Note/two(2) Technical Guidelines/two(2) Information leaflets;

OR

Be the first author of two (2) verifiable papers in scientific conference/symposium proceedings and in addition first author of two (2) Technical Notes/ Research Notes/Technical Guidelines/ two (2) information leaflets.

- vi. That the Interested Party has not published at least three (3) scientific papers in refereed journal or a relevant book chapter or policy neither briefs nor is she the first author of two (2) verifiable papers in scientific conference/symposium proceedings after she occupied the position of Deputy Director Forestry Productivity and Improvement.

To support his allegations the Ex Parte Applicant annexed copies of the Interested Party's degree in Bachelor of Science from Nairobi University obtained in 1987, her Master of Science degree from University of Melbourne dated 30th March 1996, her Doctor of Philosophy degree dated March 2011 from Sveriges Lantbruksuniversitet, her promotion to Deputy Director, Forest Productivity and Improvement with effect from 1st February 2014 and an Audit Report of Kenya Forestry Research Institute dated 4th September 2014 from Kenya National Audit Office.

The Ex Parte applicant further submitted some untitled documents at ages 55 to 66 of his bundle and the Career progression Guidelines for KEFRI.

According to the shortlisting submitted by the respondent, the six candidates were all qualified as follows -

MINIMUM REQUIREMENTS CRITERIA/STATUS							
REQUIREMENTS CRITERIA/STATUS							
Requirement	Jackson Mulatya	Gabriel Muturi	Mbae Muchiri	James Ndufa	Joshua Cheboiwo	Jane Njuguna	
15 Yrs. Experience (3) CRO	Yes	Yes	Yes	Yes	Yes	Yes	
Ph.D.	Yes	Yes	Yes	Yes	Yes	Yes	
Masters Degree	Yes	Yes	Yes	None	Yes	Yes	
Clearance certificates	i. EACC ii. POLICE iii. CRB No KRA, CUE and HELB	i. EACC ii. KRA iii. CUE iv. POLICE v. CRB vi. HELB	i. EACC ii. KRA iii. CUE iv. POLICE v. CRB vi. HELB	i. KRA ii. HELB iii. CUE iv. EACC v. POLICE vi. CRB	i. CRB ii. KRA iii. POLICE iv. HELB v. EACC No CUE	i. EACC ii. CUE iii. CRB iv. KRA v. HELB vi. POLICE	
Strategic Leadership Course	Yes	No (Has Senior Management Course)	Yes	Yes	Yes	Yes	
Authorship							
3 Scientific Papers	2	5	8	2	9	1	
Book Chapter	0	0	0	2	1	0	
Policy briefs	3	0	0	0	4	0	
Grant Winning Proposal	1	8	0	2	3	1	
1 Technical Note/ Research note/ 2 tech, guidelines/ 2 information Leaflets	0	3	5	2	13	6	

	OR						
	2 Verifiable Papers in Scientific conference / symposium	0	4	4	3	1	2
	2 Technical notes/Research notes/ Technical Guidelines/ Information Leaflets	0	1	5	4	13	6

The scores during the interview are as follows –

NAMES OF CANDIDATES

Details of Panelists	Jackson Mulatya	Gabriel Muturi	Mbae ' Muchiri	James Ndufa	Joshua Cheboiwo	Jane Njuguna
Panel Member 1	64	80.3	55.7	70.7	78.3	81.3
Panel Member 2	59	77.3	54.7	71.7	74.3	86.8
Panel Member 3	69	74.3	50.7	68.7	84.3	85.3
Panel Member 4	69.5	74.3	60.4	73.7	80.3	77.8
Grand Total	261.5	306.2	221.5	284.8	317.2	331.2
Average	65.4	76.6	55.4	71.2	79.3	82.8
Rank		3	6	4	2	1
Age	58	55	63	55	59	54
Gender	Male	Male	Male	Male	Male	Female
Ethnicity	Kamba	Kikuyu	Meru	Kikuyu	Kalenjin	Kikuyu

No evidence was produced by the Ex Parte applicant to prove bias and illegality, neither did he submit any evidence that the Interested Party did not meet the requirements for the job as advertised. The Interested Party states in her affidavit that she holds the following qualifications –

“That I am advised by counsel on record which advice I verily believe to be true that the applicant has not demonstrated any illegality, irrationality and impropriety of procedure on the part of KEFRI Board of Management which is the appointing authority to warrant the orders sought. The applicant seeks remove me from office without affording me a chance to be heard contrary to the rules of natural justice and the Constitution of Kenya 2010.”

She demonstrated the same by attachment of copies of the certificates.

From the foregoing I find that the Interested Party met the qualifications and scored the highest at the job interview.

The ex parte applicant has not demonstrated bias or illegality. He has not demonstrated how the appointment of the Interested Party was against legitimate expectation.

For the foregoing reasons I find that the motion filed by the ex parte applicant does not meet the threshold for the grant of the orders sought

therein with the result that the same is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 24TH DAY OF MAY 2019

MAUREEN ONYANGO

JUDGE