



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**PETITION 75 OF 2018**

(Formerly HCC Constitutional Petition 337 of 2017)

**Before Hon. Lady Justice Maureen Onyango**

**IN THE MATTER OF VIOLATION AND INFRINGEMENT OF CONSTITUTIONAL RIGHTS AND FUNDAMENTAL FREEDOM**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA ARTICLES 22(1), 23(1), 25(b), 27 AND 41(1) AND (2)(A)**

**AND**

**IN THE MATTER OF STATE CORPORATIONS ACT CHAPTER 446 LAWS OF KENYA**

**AND**

**IN THE MATTER OF PAYMENT OF DIRECTORS FEES TO BOARD MEMBERS OF KENYA ELECTRICITY TRANSMISSION COMPANY (KETRACO), FOR THE YEARS 2013/2014 AND 2014/2015 FINANCIAL YEARS**

*BETWEEN*

**DANIEL KARURU MWAURA.....PETITIONER**

*VERSUS*

**THE PERMANENT SECRETARY, MINISTRY OF ENERGY AND PETROLEUM...1<sup>ST</sup> RESPONDENT**

**THE PERMANENT SECRETARY, TREASURY.....2<sup>ND</sup> RESPONDENT**

**KENYA ELECTRICITY TRANSMISSION COMPANY (KETRACO).....3<sup>RD</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

The Petitioner through his Petition filed on 5<sup>th</sup> July, 2017 avers that he was appointed as a member of the board of the 3<sup>rd</sup> Respondent herein KETRACO in accordance with the provisions of Section 6(1)(e) of the State Corporation Act, Cap. 446 Laws of Kenya for a period of three (3) years effective from 16<sup>th</sup> January 2009.

The Petitioner further avers that as an express term of the said appointment he was entitled to a taxable sitting allowance of Kshs.20,000 per sitting among other allowances.

He further avers that he performed his duties diligently and faithfully leading to a renewal of his Contract for a further period of three (3) years effective 10<sup>th</sup> February 2012. That his term with the Respondent lapsed on 16<sup>th</sup> March 2015.

The Petitioner further avers that the 2<sup>nd</sup> Respondent in complete disregard of the provisions of Section 10 of the State Corporation Act and Article 41(1) and (2) of the Constitution failed, refused, blocked and/or rejected to approve payment of allowances earned for the financial year 2013/2014 and 2014/2015 denying him his just and fair remuneration for work rendered during the said period.

In his Petition the Petitioner seeks the following:

- a. A declaration be and is hereby issued that the decision of the 2<sup>nd</sup> Respondent withholding the Petitioner's fees for the financial years of 2013/2014 and 2014/2015 is unconstitutional null and void.
- b. A declaration be and is hereby issued that the Petitioner is entitled to payment of the director's fees for the period he served in the financial years of 2013/2014 and 2014/2015.
- c. An Order do issue directing the 1<sup>st</sup> Respondent approval for payment of the Petitioner's fees together with interest thereon at 14.5% per annum from 1<sup>st</sup> June 2013 until payment in full for the period served in the financial years 2013/2014 and 2014/2015.
- d. An Order do issue directing the 2<sup>nd</sup> Respondent to pay the Petitioner his fees for the period served in the financial years 2013/2014 and 2014/2015 together with interest at commercial rates from 1<sup>st</sup> June 2013 until payment in full.
- e. General damages
- f. An apology be tendered to the Petitioner for the humiliation and embarrassment caused by the false allegation that he caused loss to the 3<sup>rd</sup> Respondent.
- g. Costs and interest.

In response to the Petition, the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Respondents through the Office of the Attorney General filed grounds of opposition to the petition in which they raise the following grounds:

- i. That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents acted within their statutory mandate in discharging their duties.
- ii. That the Petition does not disclose/demonstrate any constitutional violation of the petitioner's rights by the 4<sup>th</sup> Respondent.
- iii. That the 2<sup>nd</sup> Respondent's decision not to approve the Petitioner's fees for the said period was based on what the 2<sup>nd</sup> Respondent referred to as "poor financial performance in line with the government policy contained in the circular Ref: OP/CAB. 9/21/2A/L11/43 dated 23<sup>rd</sup> November 2004 issued by the Head of Public Service and the Secretary to the Cabinet, which policy the petitioner knew about.
- iv. That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were well guided by the Government's policy on payment of bonuses/ directors fees is based on performance of state corporations as stipulated in Legal Notice 93 on performance contracting issued by the President in 2004.
- v. That the Petition is misconceived, incompetent and bad in law and the Orders sought by the Respondent are not tenable in law.

The 3<sup>rd</sup> Respondent filed a Replying Affidavit in opposition to the Petition deponed to by **Duncan Macharia**, Company Secretary of the 3<sup>rd</sup> Respondent in which he avers that the payment of bonuses/director fees are based on performance of state corporations and that there had been a sharp drop in net profitability of the 3<sup>rd</sup> Respondent from Kshs.437 million in 2010/2011 financial year to Kshs.291 Million in 2012/2013 financial year to Kshs.4.8 million in 2013/2014 financial year prompting the decision not to pay the said fees.

The 3<sup>rd</sup> Respondent further contends that Director's fees are only payable upon approval of the same by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and that it is bound by the decision taken by the said Respondents.

The 3<sup>rd</sup> Respondent urged the Court to dismiss the Petition with costs.

The 2<sup>nd</sup> Respondent also filed a Replying Affidavit deponed by **Dr. Kamau Thugge**, the Principal Secretary of the 2<sup>nd</sup> Respondent in which he reiterates that the withholding of the fees of the Director/Petitioner was justified and was due to poor performance. He deposes that the basis of the refusal was Legal Notice No. 93 of the State Corporations (Performance Contracting) Regulations, 2004. He further deposes that the 2<sup>nd</sup> Respondent did not recommend payment of director's fees, including the Petitioner's fees on account of poor performance.

The 2<sup>nd</sup> Respondent urged the Court to dismiss the instant Petition with costs.

The 1<sup>st</sup> Respondent similarly filed a Replying Affidavit deponed by **Dr. Eng. Joseph K. Njoroge**, the principal secretary of the 1<sup>st</sup> Respondent in which he contends that the 3<sup>rd</sup> Respondent is bound by Legal Notice No. 93/2004 being a state corporation and cannot depart from the same.

He further contends that the Petitioner was not entitled to director's fees due to poor performance of the 3<sup>rd</sup> Respondent.

The 1<sup>st</sup> Respondent urged the Court to dismiss the Petition with costs.

## **SUBMISSIONS**

The petition was disposed off by way of written submissions which they highlighted in court.

### **Petitioner's Submissions**

It is submitted on behalf of the Petitioner that the director's fees is a mandatory benefit and is provided for under his contract under Clause 8. It is further submitted that the Petitioner has earned the fees as he offered the 3<sup>rd</sup> Respondent services. The Petitioner cited and relied on the case of ***Daudi Haji Vs Kenya Ports Authority (2013) eKLR***.

The Petitioner further submitted that failure and/or refusal by the Respondent to pay his fees amounts to a violation of his rights as guaranteed in the Constitution of Kenya, 2010 in particular Articles 22(1), 23(1), 25(B), 27, 41(1) and (2)(a). To reinforce and buttress this argument the Petitioner relied on the cases of ***Peter K. Waweru Vs Republic (2006) eKLR***, ***Kalpana H. Rawal Vs Judicial Service Commission & 4 Others (2015) eKLR*** and ***Didovsky Igor and 11 Others Vs International Bulk Carrier Spa & 2 Others (2015) eKLR***.

The Petitioner urged this Court to allow his Petition as drawn.

### **1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Respondents' Submissions**

It is submitted that the Petitioner is not entitled to the Claims for director's fees for the quoted period by virtue of the State Corporations (Performance Contracting) Regulations, 2004, issued by the then President Mwai Kibaki under Legal Notice No. 93 of 2004. The Respondents relied on the case of ***Republic Vs National Water Conservation and Pipeline Corporation & 11 Others (2015) eKLR***.

The Respondents further contend that the Petitioner was bound by the State Corporations (Performance Contracting) Regulations, 2004 having been engaged by the 3<sup>rd</sup> Respondent in 2009 five years after the coming into force of the regulations even though the same is not directly referred to in the Petitioner's contract.

The Respondents further submit that the Petitioner has failed to prove his case or to meet the threshold for petitions as set out in the case of ***Anarita Karimi Njeru Vs The Republic (1976-1980) KLR 1272***.

The Respondents further submit that the Petitioner has failed to particularize how the law as followed by the Respondents was tantamount to slavery, discrimination or unfair labour practice citing the Authority of ***Mumo Mutemu Vs Trusted Society of Human Rights Alliance & 5 Others (2013) eKLR***.

The Respondents' urged this Court to dismiss the instant Petition with costs.

### **3<sup>rd</sup> Respondent's Submissions**

The 3<sup>rd</sup> Respondent submitted that the Petitioner is not entitled to

the reliefs sought in the Petition. The 3<sup>rd</sup> Respondent relies on the case of ***Anarita Karimi Njeru Vs Republic (1976-1980)*** and ***Mohamed & Another Vs Haidara (1972) EA***.

Like the other respondents, the 3<sup>rd</sup> Respondent urged this Court to dismiss the instant Petition with costs.

### **Analysis and Determination**

Having considered the petition and the supporting affidavit, the grounds of opposition, the various replying affidavits and submissions by the parties, the following are the issues for determination:

1. Whether the Petitioner's Constitutional rights were violated
2. Whether the Petitioner is entitled to the director's fees claimed

The Petitioner's argument is that failure by the Respondents to pay his fees is tantamount to violation of his constitutional rights as envisaged in the Constitution of Kenya, 2010.

The Respondents' on the other hand submit that the Petitioner has failed to meet the threshold for constitutional petitions as discussed in the case of ***Anarita Karimi Njeru Vs The Republic (1976-1980) KLR 1272*** where it was held:

“... We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

I agree with the submissions of the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents that the petitioner has not stated how his constitutional rights under Articles 22(1), 23(1), 25(b), 27, 41(1) and (2)(a) have been violated by the respondents beyond mere regurgitation of the said provisions.

This court in the case of *Bernard Murage –V- Fineserve Africa Limited & 3 Others (2015) KLR* held that –

“it is now a determined principle in constitutional litigation that where a person is seeking redress from the High Court for an alleged violation of the Constitution, he must set out with a reasonable degree of precision that of which he complains of, the provisions said to have been infringed and the manner in which it has been infringed.”

At paragraph 18 of his Petition, the Petitioner avers that the then Chairman of KETRACO as he was retiring from the board was paid up to his last day. He did not any evidence to prove that the said Chairman was paid Director’s fees, which is the subject of this suit. He did not even produce evidence of who this Director was or that this contract provided for payment of Director’s fees. He therefore has not proved that there was discrimination against him as compared to the said Chairman.

On the second issue for determination, the Petitioner submitted that he is entitled to payment of directors fees for the financial year 2013/2014 and 2014/2015 by virtue of his employment contract.

I think the starting point here would be to look at the letter appointing the petitioner. The letter is reproduced below –

“Ref. No. MF/CONF/1/1/7                      Date: January 16, 2009

Mr. Karuru Mwaura

P.O. Box 4965 – 00506

NAIROBI

Dear Karuru

RE: LETTER OF APPOINTMENT

I am pleased to inform you that the Government has appointed you to be a member of the Board of Kenya Electricity Transmission Company in accordance Section 6(1)(e) of the State Corporations Act.

The terms and conditions attached to this appointment are as follows:

#### DURATION

1. Your appointment is for three (3) years with effect from January 16, 2009 and is tenable and renewable at the discretion of the Government.

#### SITTING ALLOWANCE

2. You will be paid a taxable sitting allowance of Kshs.20,000 per sitting.

#### ACCOMMODATION ALLOWANCE

3. When official duties necessitate an overnight stay away from home locally, you may claim and be paid accommodation allowance of Kshs.10,000 per night.

#### LUNCH ALLOWANCE

4. When lunch is not provided at Board or Committee meetings, or when on approved official duty, you will be paid a lunch allowance of Kshs.2,000 per day.

#### TRANSPORT

5. When official transport is not provided to you to attend a meeting or an official function, which you are officially required to attend, you will be reimbursed the cost of travel by the most cost effective public transport means on production of receipted bills, or be reimbursed for actual mileage performed on your or your spouse’s vehicle at rates not higher than the prevailing Automobile Association rates.

#### ACCIDENT INSURANCE

6. You will be covered for any personal accident which may occur while on or travelling on Board’s business. In addition, you will

be entitled to a group medical insurance cover (but not life), the basic funeral expenses cover which the Kenya Electricity Transmission Company (KETCO) may procure for its Board members, subject to the provision of the office of the President Circular No. OP/CAB.9/1A/Vol.XX (132) dated June 30, 2006.

#### MEDICAL

7. Should you fall sick while on Board business, you will be covered under the Company's medical scheme as approved by the Government from time to time.

#### DIRECTOR'S FEE

8. Director's fees will be approved by the Board of Directors in consultation with the Ministry of Energy and the Treasury.

Finally, I would like to wish you every success in your appointment and assure you of the Ministry of Energy's support in the discharge of your duties as a Board Member of the Company.

Please acknowledge receipt of this letter.

Yours

SIGNED

Patrick M. Nyoike, CBS

PERMANENT SECRETARY"

The petitioner has no issue with sitting allowance, accommodation allowance, lunch allowance, transport, accident insurance and medical. It must be presumed that these were provided to the satisfaction of the petitioner. His only issue is with payment of directors fee. This, as expressly stated in the instrument that appointed him, is only payable **upon approval by the Board of Directors in consultation with the Ministry of Energy, the 1<sup>st</sup> respondent, and the Treasury, the 2<sup>nd</sup> respondent.** It is therefore not an entitlement until it has been approved. It is my opinion that from the wording of the contract, the same only becomes due upon approval. The letter does not specify how much is payable because only what is approved is payable so that if nothing is approved, nothing becomes payable. (emphasis added)

It is further the petitioner's averment at paragraph 16 of the affidavit in support of the petition that at the time he left to Board he had not been paid his fees for financial year 2013/2014 amounting to Kshs.420,000 and a further Kshs.420,000 for financial year 2014/2015.

As stated by the Principal Secretary of the 2<sup>nd</sup> respondent Dr. Kamau Thugge in his replying affidavit, payment of Directors fees is government by guidelines under circular ref: OP/CAB/21/2A/LII/43 dated 23<sup>rd</sup> November 2004 issued by the Head of Public Service and Secretary to Cabinet to the effect that director's fees are payable based on performance of directors during their tenure. He states that the 2<sup>nd</sup> respondent did not recommend payment because the 3<sup>rd</sup> respondent which is incorporated as a commercial entity and whose performance indicator is profit/loss for the particular period in reference, did not perform well as its profits declined from 291 million in 2012/2013 financial year to Kshs.4.8 million in 2013/2014 financial year against a budgeted profit of Kshs.341 million for the period. He further stated that the poor performance of the 3<sup>rd</sup> respondent was attributed to poor financial stewardship by the directors of the company, among them the petitioner, which resulted in a 15% increase in total operating expenses from Kshs.565 million in 2011/2012 financial year to Kshs.649 million in 2013/2014 financial year when compared with a drop of Kshs.295 million in total recurrent revenue from Kshs.1,104 million in 2012/2013 financial year to Kshs.790 million in 2013/2014 financial years. In other words, profitability of the company dropped by a big margin during the relevant period.

Dr. Thugge further states that Legal Notice No. 93 of 2004, the State Corporations (Performance Contracting) Regulations, 2004 is subsidiary legislation under the State Corporations Act and is binding on all state corporations including the 3<sup>rd</sup> respondent.

The State Corporations (Performance Contracting) Regulations 2004 provide at Regulation 12 that –

#### 12. Incentives and Bonuses

**1. The Minister for the time being responsible for matters relating to finance may, in consultation with the committee, approve incentives for Board members and employees of state corporations whose performance achieves the agreed targets.**

**2. The Minister for the time being responsible for matters relating to finance, shall in consultation with the Committee, develop guidelines on sanctions against Board members and employees of state corporations whose performance is below the agreed targets.**

The circular No. OP/CAB.9/21/2A/LII/43 provides that –

“Director's fees will be approved by the Boards of Directors based on performance.”

For the year 2014/2015 the 3<sup>rd</sup> respondent state as follows in its letter dated 31<sup>st</sup> March 2016 filed with petitioner's supplementary list of documents 9<sup>th</sup> April 2018 –

“Please reconsider and convey your approval to pay outstanding Director's fees for 2013/14. Further, we are happy to report impressive financial performance results for the year 2014/15 with a profit of Kshs.238 million compared to Kshs.4 million reported in 2013/14 arising from the prudent business decisions made in the past.

I wish to appeal that Ketraco Directors who served during the period 2014/15 financial year be paid fees and a bonus for the turnaround.

Please convey your approval to facilitate payment of Director's fees for 2013/2014 and 2014/2015 financial years. ...”

Can the 2<sup>nd</sup> and 3<sup>rd</sup> respondents be compelled by the court to approve the payments? The 3<sup>rd</sup> respondent submitted that director's fees is discretionary and the 3<sup>rd</sup> respondent was bound by the decision of the 1<sup>st</sup> and 2<sup>nd</sup> respondents. The petitioner has not stated that the refusal by the 2<sup>nd</sup> respondent to approve the payment or the grounds cited for the same was unreasonable or illegal.

Further from the legal documents cited, director's fees is not an entitlement but an incentive to be paid only upon approval based on the relevant guidelines. The guidelines refer to performance. It is not denied that for the financial year 2013/2014, the 3<sup>rd</sup> respondent performed way below it financial targets.

### **Conclusion**

From the foregoing, I find that first, the petitioner has not met the

threshold for a constitutional petitioner as he failed to establish that his constitutional rights had been curtailed, infringed upon or violated by the respondents. Secondly he failed to establish that the failure of the 1<sup>st</sup> and 2<sup>nd</sup> respondents to approve the director's fees was unreasonable or unlawful and finally he did not prove that he was entitled to director's fees as of right.

For the forging reason I find no merit in the petition with the result that I dismiss the same.

Each party shall bear its costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19<sup>TH</sup> DAY OF JULY 2019**

**MAUREEN ONYANGO**

**JUDGE**