



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 75 OF 2016

(Before Hon. Lady Justice Hellen S. Wasilwa on 31st January, 2018)

PETER MACITHI MUIGAI.....PETITIONER/APPLICANT

VERSUS

THE CABINET SECRETARY FOR ENVIRONMENT,

NATURAL RESOURCES & REGIONAL

DEVELOPMENT AUTHORITIES.....1ST RESPONDENT

THE BOARD OF DIRECTORS

KENYA FORESTRY RESEARCH INSTITUTE.....2ND RESPONDENT

THE ATTORNEY GENERAL OF KENYA.....3RD RESPONDENT

BEN CHIKAMAI.....4TH RESPONDENT

JUDGEMENT

1. The Petitioner's Petition is dated 5th May 2016 filed on the same day through the firm of Mburugu and Kanyange Associates Advocates claiming breach and violation of the Constitution.
2. According to the Petitioner, the Respondents have failed in upholding the Constitutional provisions as there have been numerous reports of disregard to the rule of law, misuse of power, corruption, and embezzlement of funds and clear breaches of the law in matters making interpreting and making public policy decisions.
3. The Petitioner alleges that there have been increasing reports of nepotism and favoritism by public officers charged with hiring of staff to state corporations despite clear regulations and guidelines on the appointments. The appointment of the Director of the Kenya Forestry Research Institute (KEFRI) was not in accordance with the law and policy.
4. According to the Petitioner the facts leading to the Petition are that on 17th June, 2009, the 4th Respondent was appointed to the position of the Director of KEFRI by the then Minister for Forestry and Wildlife for a term of 3 years.
5. That on 1st May, 2012, the 4th Respondent's term was further extended for a period of three years by then Minister for Forestry and Wildlife.
6. Further, that on 31st December, 2012, the Minister for Forestry and Wildlife appointed individuals to the Board of KEFRI to serve for a period of three years.
7. The Petitioner states that through a report by the Public Investments Committee (PIC) on Audited Financial Statements of State Corporations dated March 2015, the Committee pointed out that there was non-adherence to the State Corporations Act in the failure to appoint the Board of Directors for KEFRI. That in addition to PIC's report, there was a letter from the Kenya National Audit Office dated 4th September 2014, raising serious concerns that touched on embezzlement of funds, nepotism and favouritism in hiring and promotion of

staff, and breach of procurement laws.

8. The Petitioner contends that the constitutional provisions that have been breached are:

1. Article 10 of the Constitution, which highlights national values, and principles of governance binding state organs, officers, including rule of law, participation of the people, good governance, integrity, transparency and accountability.

2. Article 22 of the Constitution vests locus standi for the enforcement of the bill of rights in among others the Petitioner.

3. Article 23 of the Constitution vests authority in this Honourable Court to uphold the Constitution and makes clear provisions of some remedies that his Honourable Court can grant to ensure this. Read alongside Article 162, the Employment and Labour Relations Court, having the status of the High Court has the mandate to hear and determine disputes relating to employment and labour relations.

4. Article 41 of the Constitution provides for labour relations.

5. Article 73 of the Constitution requires the exercise of authority assigned to a state officer in a manner that demonstrates respect for the people, promotes public confidence and integrity of the office.

6. Article 75 of the Constitution directs state officers to behave in a manner that avoids conflict between personal and public interest and does not compromise any public interest.

7. Article 153 of the Constitution obligates Cabinet Secretaries to act in accordance with the Constitution.

8. Article 232 establishes the values and principles of public service including; high standards of professional ethics, involvement of the people in the process of policy making; accountability for administrative actions and affording adequate and equal opportunities for appointment, training and advancement, at all levels of public service.

9. Article 258 of the Constitution provides that every person has the right to institute Court proceedings including person acting in the public interest claiming that the Constitution has been contravened.

10. Article 259 of the Constitution provides that the Constitution shall be interpreted in a manner that promotes its purposes, values and principles, advances the rule of law, and the human rights and fundamental freedoms in the Bill of rights, permits the development of the law, and contributes to good governance.

9. It is the Petitioner's position that the fact that the Board of Directors has not been appointed, and that the Management led by the 4th Respondent is making decisions, some of which are a preserve of the Board of Directors, they are acting illegally, unilaterally and unprocedurally and ought to have attracted the 1st Respondent's attention.

10. That the Respondents are in breach of the Constitution in the following manner:

a. Failures of the 1st and 2nd Respondent to advertise, competitively recruit and replace the 4th Respondent was and continues to be a breach of the Article 153 Constitutional requirement to act in accordance with the Constitution.

b. Failure by the 1st Respondent, in the absence of the Board of Directors, to scrutinize and investigate concerns of nepotism, favoritism, corruption and breach of procurement laws in the management of KEFRI by the 4th Respondent was a violation of Article 232 to uphold and ensure that the values and principles of public service including accountability for administrative acts and high standards of professional ethics are adhered to by state corporations including the one illegally headed by the 4th Respondent.

11. The Petitioner prays for:

a. A declaration that the 1st and 2nd Respondents have violated the principles enshrined in Articles 10 and 232 of the Constitution by failing to account for their administrative actions and affording adequate and equal opportunities for appointment.

b. A declaration that the 1st Respondent did not act in accordance with the law as expected in Article 153 of the Constitution by allowing an illegality.

c. A declaration that the 4th Respondent is illegally in office.

d. This Honorable Court do issue such further orders and give such directions as it may deem fit to meet the ends of justice and the protection of the Constitution and in the context of the declarations made.

e. The costs of the Petition be awarded to the Petitioner as against the Respondents jointly and severally.

12. It is the Petitioner's position that despite the numerous issues raised regarding the management of KEFRI by key institutions the PIC and

the office of the Auditor General, the 1st Respondent continues to knowingly disregard these clear breaches of law and policy, and has failed to carry out investigations to address or dispel the allegations.

13. The Petition is supported by the Petitioner's affidavit wherein he states that he represents active NGOs in Kipipiri Constituency Development Fund, Nyandarua County and is also a member of the NGO reference group, a lobby body that majorly pushes for the harmonization of the implementation of the Public Benefits Organizations (PBO) Act, 2013.

14. That sometime in the month of March 2016, the Petitioner received an email informing him that the current Director of KEFRI was in office having illegally completed his two terms of three years each as provided by law and policy.

15. The Petitioner alleges that he carried out investigations into the allegations and confirmed that indeed Mr. Ben E.N. Chikamai had first been appointed as Director of KEFRI through Gazette No. 6384 on 1st May, 2009, on 17th June, 2009 for a three year period.

16. He states that the said appointment was extended for a further period of three years effective 1st May, 2012 through Gazette Notice Number 3587 on 7th March, 2012 and that there have been no further extensions of the Director's appointment.

17. Further that in the course of his investigations, he established that the term of KEFRI's Board of Management appointed through Gazette Notice No. 206 on 31st December, 2012 for a three year period had ended and the same had not been legally extended nor a new Board of Management appointed.

18. The Petitioner contends that appointments of this nature must be filled lawfully through gazette notices and in the instant case it is not the case as evidenced by the PIC report dated March 2015 and the letter from the Kenya National Audit Office dated 4th September, 2014.

19. He further contends that the Code of Governance for State Corporations (Mwongozo) is clear on term limits and emphasizes that state corporations must abide by laws, rules, regulations, codes and standards applicable including the Constitution, which in this case has not been done.

20. That the failure by the Respondents to appoint a new Director is illegal and in violation of the rule of law and there is no justification for the failure to advertise, make public, and appoint a new KEFRI Director through a competitive process.

21. The 1st Respondent filed a Reply to the Petition sworn by one Judi W. Wakhungu the Cabinet Secretary wherein she admits that the 4th Respondent is still the Director of KEFRI in line with the existing government procedures (policies and laws vide the government circular Ref No OP/CAB.9/1A of 23rd November, 2010) see Appendix 1.

22. She further states that the appointment of the 4th Respondent to the 3rd term in office was started and completed before the Mwongozo was issued and they followed the prevailing procedures in existence at the time in effecting the appointment. That the Board acted in good faith considering that the appointment and re-appointment of the Chief Executive Officer is a process and not a one-off event.

23. Further she states that it is only in respect of recruitment of the Managing Director of the 2nd Respondent that the process has to be competitive and not in the case of renewal of contract. That the Constitution, Article 232(1) thereof was adhered to as it only provides for appointments and not re-appointments.

24. She also contends that the public at large stands to suffer irreparable loss if the orders sought are granted as there will be a vacuum in the organization. That the Petition should be dismissed with costs for want of merit.

25. The 4th Respondent also filed a reply to the Petition wherein he admits being the current Director of the 2nd Respondent having been initially appointed to office with effect from 1st May, 2009, which term was extended in 2012 and 2015 respectively.

26. He avers that all procedures set out in the Government Circular Reference No. OP/CAB.9/1A dated 23.11.2009 by the then Permanent Secretary to the Cabinet, Head of Public Service were followed to the latter, and as such, his re-appointment was regular.

27. It is the 4th Respondent's position that his re-appointments were based on his exceptional performance which was carefully evaluated by the board which in turn recommended his re-appointment. As such the re-appointment was therefore proper and lawful.

28. As to the allegations on misused funds, nepotism in employment *et al*, the 4th Respondent states that there has been no letter and or communication from the Public Investments Committee (PIC) or the office of the Auditor General raising any direct issue of mismanagement on the part of the 4th Respondent or any breach of law and policy in the management of the 2nd Respondent.

29. That the letter referred to by the Petitioner dated 4.9.2014 was a management letter to the Director seeking clarification on several observations that had been noted during the system audit at the 2nd Respondent for the financial year of 2013/2014 which the 2nd Respondent aptly responded to.

30. The 4th Respondent states that the appointment of the Board is a prerogative exercised by the 1st Respondent a role that is beyond the mandate of management and that even in the absence of a fully constituted board the day to day running of the 2nd Respondent would still continue. That in any event he did bring to the attention of the Principal Secretary of the 1st Respondent that a new board was due for appointment as the current board's term had expired and as such did not neglect his duties. The Respondent prays for the Petition to be

dismissed with costs.

Submissions

31. The Petitioner submits that the Constitution of Kenya 2010, as enumerated in the Petition and Government Policy have been breached. He cites the case of **Benson Riitho Mureithi Vs J.W.Wakhungu (HC Petition 19 of 2014)** where the learned Judge made a determination on whether the Cabinet Secretary was under the obligation to consider the provisions of the law (Chapter 6) of the Constitution, holding that the legal provisions on the subject were a system of ensuring the observance of a Code of Ethics for Public and state officers. She held that the Court could properly inquire into the issue regarding the propriety of the appointment. The Learned Judge in this case found the Cabinet Secretary to have failed to act in accordance with the Constitution and that the appointment fell below the standard set by the Constitution.

32. He also relies on the case of **Anne Kinyua Vs Nyayo Tea Zone Development Corporation and 3 Others (2012) Eklr** where Abuodha J held that the renewal of public appointments in the public service ought to be strictly adhered to.

33. The Petitioner submits that it is suspect that the first two appointments were published whereas the third was never published. This in the Petitioner's view shows a lack of accountability and transparency. They cite the case of **Ali Hassan Joho & Another Vs Suleiman Shahbal & 2 Others Civil Appeal No. 12 of 2013** where it was held:

“The Kenya Gazette is an official newspaper of the Government in which official matters including official notices are published. The Gazette has evidentiary character. Section 68 of the Interpretation and General Provisions Act provides:- “The production of a copy of the Gazette containing a written law or notice, or of a copy of a written law or notice purporting to be printed by the Government Printer shall be prima facie evidence in all Courts and for all purposes whatsoever of the due making and tenor of the written law or notice.”

34. On the issue of malpractices raised in the PIC Report and the Auditor General's report, the Petitioner submits that by the 4th Respondent turning a deaf ear on complaints and issues raised means that he does not dispute their truthfulness or he is simply not interested in the value of transparency which is among the core principles.

35. As to whether the Code of Governance for State Corporations was applicable at the time of re-appointment of the 4th Respondent was appointed the Petitioner submits that the code of conduct is dated January 2015, and the term of office was to expire in April, 2015, and as such the Code was to be applied in the re-appointment.

36. The Petitioner submits that there was legitimate expectation that the Respondents would follow the law in the reappointment of the 4th Respondent. The same was never followed and he therefore prays for the Petition to be allowed.

37. The 1st and 3rd Respondent submit that the Petition offends the provisions of Order 53 of the Civil Procedure Act in that Judicial control of administrative action can only be commenced vide Order 53 and rules subsequent thereunder. That the Petitioner has not sought leave to do the same but instead circumvented the requirement by filing a Petition. Further, that the Petitioner has failed to discharge the burden of proof set out under Article 22(1) of the constitution. They cite the case of **Alphonse Mwangemi Munga & 10 Others Vs African Safari Club Limited (2008) Eklr** to buttress this position.

38. On whether the 2nd Respondent acted ultra vires its powers in extending the 4th Respondent's term in office they submit that under the Fourth Schedule of the Science and Technology and Innovation Act, 2013, Cap 28 Laws of Kenya, there is no law providing for the term in which a KEFRI Director may hold office. That the Government Circular Ref No. OP/CAB.9/1A of 23rd November, 2010 which provided for the re-appointment of Chief Executive Officers was adhered to.

39. They submit that reappointment of state officers is not subject to the same conditions of recruitment as those of appointment. They cite the case of **Republic Vs Cabinet Secretary for Education, Science and Technology and 3 Others (JR Case No. 280 of 2013) (2014) Eklr** where it was held:

“I don't think that the drafters of the Constitution expected that any person eligible for reappointment to a public office ought to be taken through a competitive process. One cannot compare the appointment to a public office to an electoral process in which the incumbent seeking another term should submit himself/herself to an election. The competitive process, in my view, only kicks in when a person is being recruited for the first time. When it comes to reappointment for a further term the body responsible for re-appointment assesses the person and makes a decision whether to re-appoint the incumbent or open the position for competition.”

40. They further submit that the Cabinet Secretary did not act ultra vires her powers by issuing employment contract to the 4th Respondent following the appointment by the Board of Directors. That the Cabinet Secretary approved reappointment/renewal of term of the 4th Respondent on 10th April, 2015, which decision was acknowledged on 4th May, 2015. They submit that the Cabinet Secretary acted accordingly in issuing a renewal of contract to the 4th Respondent.

41. The Respondents submit that the Petitioner has failed to establish merits of the Petition and as such, it should be dismissed with costs.

42. In the 2nd and 4th Respondents' submissions they state that extension of the 4th Respondent's term of office was in line with the Government circular dated 23rd November, 2010, and that the Mwongozo had not come into effect as at the time of reappointment. The Mwongozo came into effect eighteen days after reappointment of the 4th Respondent.

43. That the allegations of malpractices and abuse of office as alleged in the Petition was not proved and as such the Court should not delve into such.

44. It is also the Respondent's position that the Petition offends the provisions of Order 53 of the Civil Procedure Act as was held in the case of **Pastoli Vs Kabale District Local Government Council and Others (2008) EA 300.**

45. The Respondents submit that KEFRI has no law providing for the term in which a director should hold office and as such, the 3rd term reappointment was in line with the law. Further, that reappointments are not subjected to a competitive process as is done during new appointments. It is their position that the KEFRI did not act ultra vires in extending the 4th Respondent's term in office. They pray for the Petition to be dismissed with costs.

46. I have examined all the averments of the parties herein. the issues for determination are as follows:-

- 1. Whether the 1st and 2nd Respondents have violated the principles of the Constitution enshrined in Articles 10 and 232 of the Constitution.**
- 2. Whether the 1st Respondent acted in contravention of Article 153 of the Constitution.**
- 3. Whether the 4th Respondent is legally in office.**
- 4. Any relief this Court can grant.**

47. On the 1st issue the Petitioner has averred that the 1st and 2nd Respondent have violated the law being Articles 10 and 232 of the Constitution. Article 10 of the Constitution of Kenya deals with national values and principles of governance which values include patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized, good governance, integrity, transparency and accountability and sustainable development.

48. Article 232 deals with values and principles of public service and these are:-

- 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.**

49. In determining whether the 1st and 2nd Respondents violated any of the above principles, I note that the 1st and 2nd Respondents are the Cabinet Secretary and the Board of Directors of the KEFRI who are key in making appointments in KEFRI and in particular that of the 4th Respondent. Under the rules governing appointments of the KEFRI's Chief Executive Officer, the circular from the Office of the President Ref. No. OP/CAB.9/1A dated 23rd November 2010 is instructive.

50. Under this circular, in case of renewal of appointments, the circular provided as follows:-

- a) "the Chief Executive Officer wishing to be reappointed will indicate interest by writing to the Board at least six months before expiry of his/her term.**
- b) The Board will evaluate the performance of the Chief Executive Officer and make a report to the appointing authority with a**

recommendation on either renewal or termination of the contract upon expiry.

c) In the event that the Board does not recommend renewal of the contract, the Chief Executive Officer will be required to proceed on terminal leave to pave way for the recruitment and appointment of a new Chief Executive Officer. This is important to ensure a smooth transition.

d) The Board will recruit an acting Chief Executive Officer, in consultation with the parent Ministry and the State Corporations Advisory Committee (SCAC) as provided for by Section 27(1)(c) of Cap 446, in a care taker position when the process of recruiting a new Chief Executive Officer is ongoing ----“.

51. In case of the 4th Respondent, he wrote to the 2nd Respondent on 15th September 2014 indicating that his term was coming to an end on April 30th 2015. The Board considered his performance and on 27th October 2014, wrote to the 1st Respondent recommending he be re-appointed for another term of 3 years.

52. On 10th April 2015 the 1st Respondent wrote to the 4th Respondent reappointing him for a further period of 3 years with effect from 1st May 2015 to 30th April 2018.

53. In terms of this circular, the 1st and 2nd Respondent performed as is required by the law save that as submitted by the Petitioner, the reappointment of 1st May 2015 was never gazetted.

54. It is also imperative to note that on 28th April 2015, the chief of Staff and Head of the Public Service wrote another circular Ref. No. OP/SCAC.9/1/5/2(2) on implementation of the Executive Order No. 7 Mwongozo, the code of governance Mwongozo is a framework for governance and oversight of State Corporations. This Executive Order was signed on 25th March 2015 by His Excellency the President but is dated January 2015. Under paragraph 1.18 of this code it is stated as follows:-

“Appointment of the Chief Executive Officer: The Board should:-

a) Appoint and remove the Chief Executive Officer.

b) Ensure that the Chief Executive Officer is recruited through a competitive process.

c) Ensure that the Chief Executive Officer possesses the minimum qualifications and experience set out in attachment 1.

d) Define and approve authority levels for the Chief Executive Officer as set out in the performance targets of the Chief Executive Officer.

e) Ensure that it has put in place a succession plan for the Chief Executive Officer and other senior management staff----“.

55. The gist of these provisions is that all appointments of a Chief Executive Officer in State Corporations should be through competitive process and through observation of the law and the Constitution which will ensure that qualified persons are appointed to public office. The appointment should also be in accordance with the values and principles of the law and Constitution and in particular Articles 10 and 232 of the Constitution.

56. Article 1.5 of Mwongozo also limits the tenure of a board member to 6 years or two terms of 3 years each. The 4th Respondent herein as Chief Executive Officer is the Secretary to the Board as such his term under the Mwongozo should not exceed 6 years.

57. The Petitioner has argued that the 4th Respondent’s appointment should not be guided by the Mwongozo Code but the Respondents argue that the Mwongozo code came in place after the 4th Respondent’s appointment and cannot therefore operate retrospectively.

58. As indicated earlier the 4th Respondent was re-appointed on 1st May 2015 as per the letter from the 1st Respondent dated 10th April 2015 reappointing him to a further term of 3 years. Mwongozo Code on the other hand came in force in January 2015. It was signed by the President on 23rd March 2015. Knowledge of this Code was communicated to the 1st Respondent and Secretary to State Corporation Advisory Committee earlier on in November 2014 as per the letter dated 28th April 2015 Ref No. OP/SCAC 9/1/5/2(2).

59. The appointment of the 4th Respondent was effective 1st May 2015. This was after Mwongozo came into place. The 1st and 2nd Respondent cannot hide behind the fact that they were not aware of Mwongozo by 10th April 2015 when the letter re-appointing the 4th Respondent was done. His Excellency the President had already signed this Executive Order and it was in force then.

60. The issue of retrospective application of Mwongozo Code on 10th April 2015 does not therefore arise.

61. By not adhering to the provisions of Mwongozo when the 1st and 2nd Respondent re-appointed the 4th Respondent as Chief Executive Officer of KEFRI they acted in contravention of the law. Article 10 of the Constitution on competitive recruitment was not adhered to.

62. On Article 153 of the Constitution – this deals with responsibilities of Cabinet Secretaries. Article 153(2) of the Constitution indicates that the Cabinet Secretaries are accountable individually. In this case the illegal acts of the 1st Respondent in sanctioning a re-appointment of

the 4th Respondent is fall upon her individually.

63. From the above analogy, it is my finding that the 4th Respondent is illegally in office and that the 1st Respondent failed in her duties to ensure proper appointment of KEFRI's Chief Executive Officer. It also emerges that the illegal term of the 4th Respondent comes to an end in April 2018. No board of KERFRI is in place and this means further delay in appointment of a substantive Chief Executive Officer.

64. I therefore direct that the 4th Respondent vacates his office immediately. The 1st Respondent should henceforth appoint an Ag Chief Executive Officer who should be in office for a maximum of 6 months during which period a board should be appointed and competitive recruitment of the Chief Executive Officer done.

65. I also direct that this Judgement be served upon the 1st Respondent personally and action to be commenced as ordered by this Court. Due to the public interest nature of this Petition, each party will bear its own costs.

Read in open Court this 31st day of January, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Odukenya for 1st Respondent – present

And holding brief for Fundi for 2nd and 4th Respondent

Mrs. Kimani holding brief for Kanyonge for the Petitioner – Present