



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF
KENYA AT NAIROBI
PETITION NO. 103 OF 2017

OKIYA OMTATAH.....PETITIONER

VERSUS

KENYA REVENUE AUTHORITY BOARD OF DIRECTORS.....1ST RESPONDENT

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

AND

JOHN KARIMI NJIRAINI.....INTERESTED PARTY

JUDGEMENT

1. In the amended petition dated 9th February, 2018 the petitioner avers among others that:

a. *Vide gazette notice No 663, dated the 19th January, 2012, the 1st respondent appointed the interested party “to be the Commissioner General of the Kenya Revenue Authority, for period of three (3) years, with effect from 4th March, 2012”.*

b. *The interested party was then re-appointed for his second and final term as the Commissioner General of the KRA vide his current employment contract which expires on 3rd March 2017, some two months after he turned 60 years of age on 20th December, 2017.*

c. *The petitioner is aggrieved that two parts of the interested party’s current employment contract constitute a gross violation of the rule of law, which is one of the national values and principles of governance enshrined in Article 10 (2) of the Constitution. The offending parts are:*

i. *Offering him a renewable contract of service, making him eligible to serve for a further third term; and*

ii. *Allowing him to work beyond the mandatory retirement age of 60 years in the public service.*

d. *Under the code of Governance for state corporations (Mwongozo) published in January 2015 jointly by the Public Service Commission and the State Corporations Advisory Committee, CEOs of public bodies are only allowed to work for two terms of three years each and, with effect from 1st April, 2009, the mandatory retirement age of 60 years applies to all public officers with the exception of Judges, Academic staff in public universities, research scientists and public servants with disabilities.*

e. *Hence a CEO may be appointed for a cumulative term not exceeding six (6) years.*

f. *The provision in the Act that the Commissioner-General of the Authority shall be appointed by the Minister upon the recommendation of the Board on such terms and conditions as are specified in his instrument of appointment, does not vest the respondents and the interested party with the capacity to draw a contract that is violative of the term limit of 6 years.*

g. *Mwongozo expressly provides for the Tenure of Chief Executive Officers to be: i) Three year term or as otherwise provided under any other written law ii) Renewable once subject to performance evaluated by the Board.*

h. *In the circumstances of this case, this Honourable Court is enjoined to determine the constitutional and legal validity of that*

section of his employment contract which offers/grants him the possibility of serving a third term contrary to law.

i. The petitioner urges the Honourable Court to make a declaration that the interested party is ineligible for appointment to serve a third term upon the expiry of his current contract on 3rd March, 2018.

j. The Kenya Revenue Authority is a public entity wherein the mandatory retirement age in the public service of 60 years of age is applicable.

k. Whereas there is no constitutional or statutory retirement age for public servants in Kenya there is a clear government policy (ie statutory instruments) on the mandatory retirement age in the public service. Further and in particular:

Ki. The Human Resource Policies and Procedures Manual for the Public Service dated May 2016, provides:

Mandatory Retirement Age

D.21 All officers shall retire from the service on attaining the mandatory retirement age of 60 year, 65 years for persons with disabilities and/or as may be prescribed by the government from time to time.

Kii. Vide Government circular Ref. No. OP.CBA.2/7A dated 20th March 2009, and titled “Review of the Mandatory Retirement Age for Public Servants from 55 years to 60 years.”

Kiii. Vide Government Circular No. OP/CAB.9/1A dated 23rd November, 2010 titled “Procedure for Reappointment of Service Chief Executive Officers in State Corporations” exiting CEOs of public bodies are required to go on a six month terminal leave pending the expiry of their contracts, and acting CEOs are to be appointed in the transition period. The position was endorsed by the High Court in **Republic Vs Attorney General & 2 Others Ex-parte consumers Federation of Kenya (COFEK) suing through its officials 2012 eKLR.**

Kiv. Vide Government circular Ref. No. OP.CAB.2/7A, dated 14th February, 2014 and titled “Retention in Service of Officers Beyond the mandatory Retirement Age”, the government discouraged the habit of retaining officers beyond the age of 60 years. The circular directed Principal Secretaries “to ensure that all officers aged fifty eight (58) years and above have duly identified successors to enable smooth exit from the service when they attain the mandatory retirement age of sixty (60) years.

l. Having been born on 20th December, 1957, the interested party is due for mandatory retirement on 19th December, 2017, upon attaining the mandatory retirement age in the public service of 60 years but the 1st and 2nd respondents have not commenced the process in law for replacing him by sending him on the mandatory six month terminal leave pending retirement and appointing an acting Commissioner General.

m. fice and proceeded on the mandatory six months terminal leave pending retirement on 19th August, 2017 and the respondents ought to have appointed an acting Commissioner General, and announced the vacancy to attract interested and qualified candidates.

n. The petitioner posits that since there is no provision in law for the retention of public servants beyond the mandatory retirement age, it is mandatory for public servants liked the interested party to retire upon attaining the age of 60 years.

o. The petitioner posits further that it will be irregular and contrary to both the constitution and statute to retain the interested party in the public service beyond the mandatory retirement age of 60 years.

2. The Petitioner therefore sought several declarations including:

a. A declaration that under the code of governance for State Corporations (Mwongozo), Chief Executive Officers of public bodies cannot be appointed for a cumulative term exceeding six (6) years.

b. A declaration that, upon the expiry of his current contract on 3rd March, 2018, the interested party will have served the maximum six year tenure of two three - year terms allowed in law as the Commissioner General of the Kenya Revenue Authority and, therefore, he is not eligible for appointment to serve a third term, or for any period time, even in an acting capacity for a day longer, as the Commissioner General of the Kenya Revenue Authority.

c. A declaration that, upon the expiry of his second term on 3rd March 2018 employing the interested party for a third three-year term, or even in an acting capacity for a day longer, beyond the mandatory two three-year term limit for CEOs of public entities will be illegal and unconstitutional and, therefore, invalid, null and void ab initio.

d. A declaration that since 20th December, 2017, after he had attained the mandatory retirement age of 60 years, the interested party has been in office illegally and must refund all the earnings he has made in his irregular employment since then.

e. An order prohibiting the 1st and 2nd respondents, whether by themselves or any of their employees or agents or any person

claiming to act under their authority from contracting the interested party as the Commissioner General of the Kenya Revenue Authority for any length of time, even in an acting capacity for one day, upon the expiry of his second and final term on 3rd March, 2018.

3. The 1st respondent filed a replying affidavit through one Dr Edward Sambili who deponed among others:

a. That I am a male adult of sound mind and the Chairman of the Board of Directors of the Kenya Revenue Authority, duly appointed pursuant to Section 6(2) (a) of the Kenya Revenue Authority Act, chapter 469 of the Laws of Kenya.

b. That I wish to state that John Karimi Njiraini was appointed as the Commissioner General of the Kenya Revenue Authority with effect from 4th March 2015 for a term of three (3) years pursuant to Section 11 (1) of the Act.

c. That the said section 11(1) of the Act specifically provides that a Commissioner General of the Authority shall be appointed by the Minister upon the recommendation of the Board on such terms and conditions as specified in his instrument of appointment.

d. That according to the instrument of appointment (essentially a contract for fixed term) signed between my predecessors and the interested party, it is expressly provided that the engagement is for a period of three (3) years commencing 4th March, 2015 and set to expire on 3rd March 2018.

e. That contrary to the averments in paragraphs 4,5,6,7,8 & 9 of the petition, the interested party has not applied for an extension of his contract as the Commissioner General of the Kenya Revenue Authority beyond the stipulated expiry date and the allegations founded on the contrary are therefore baseless.

f. That in response to paragraphs 10,11,12,13,14,15 & 16 of the petition, I would wish to state that whereas the petitioner is perfectly entitled to access justice in our courts under the constitution, in the circumstances of this case he has failed to demonstrate and particularise how the 1st respondent in appointing the interested party to the position of Commissioner General of the KRA has infringed on his rights or rights of other Kenyans.

g. That in response to paragraphs 17,18,1,20 & 21 of the petition, I wish to state that:

i. The tenure of the Commissioner General of the Kenya Revenue Authority is premised on section 11(1) of the Act and a valid contract set to expire on 3rd march 2018 and therefore the contents of the circulars and manuals annexed to the petitioner's pleadings as "Exhibit 0001" do not apply in the current circumstances;

ii. The interested party has not sought for an extension of his contract as the Commissioner General of the Authority;

iii. The interested party's contract, with the KRA does not offend any constitutional or statutory provision. Indeed the petitioner has admitted the same in paragraph 19 of the petition.

iv. With prejudice to a, b, & c above, at the time of filing this suit the petitioner admits that the Commissioner General is yet to reach the alleged mandatory retirement age of 60 year.

h. That going by the express provisions of the Act and the existing valid contract, it is quite clear that the terms of service of the interested party are not affected by the documents set out in paragraph 19 of the petition and paragraph 5 of the supporting affidavit of the petitioner.

i. That any decision made by the 1st respondent that s contrary to the instrument of appointment will be a violation of section 11 of the Act.

j. That whereas the petitioner pointed out and annexed as part of his "Exhibit 0001" a provision on mandatory retirement age in the Human Resource Policies and Procedures Manual for Public Service of May 2016, he conveniently did not annex the relevant paragraph D18of the same document dealing with Exit from Service And Terminal Benefits.

k. That the said paragraph D18 of the manual provides that there are various forms of exit from the public service which includes, resignation, termination in accordance with the letter of appointment, expiry of contract, retirement, dismissal and death.

l. That the allegations touching on mandatory retirement and that the interested party should be sent on compulsory leave for six (6) months as being pursued by the petitioner in paragraphs 21,22,23,24,25,26,27,28,29 & 30 of the petition are not only baseless but also prematurely made and highly speculative because:

i. The interested party's appointment with KRA is governed by the Act and a valid contract which has a provision on termination/exit.

ii. Before approaching this honourable court, the petitioner never bothered to enquire whether the 1st respondent has already put in place relevant processes to ensure that a successor to the interested party upon the expiry of the latter's contract; and

iii. The allegations presuppose that the interested party has applied for a renewal of his contract and that the 1st respondent is already working towards the same, which is not true.

m. That the contention by the petitioner that mandatory retirement term applies to the interested party's therefore not correct since his terms and conditions of appointment are governed by the legal instrument of appointment.

n. That as a board statutorily constituted, the 1st respondent is aware that the interested party's contract is due to expire in March 2018 and the remaining period is adequate to enable it take necessary steps to recruit another Commissioner General of the Kenya Revenue Authority.

o. That whereas in paragraph 31,32,33,34,35,36,37,38,39,40,41,42,43,

44 and 45 the petitioner makes sweeping averments that there is a universal application of retirement age, and makes global reference to Articles 10,259, 27,47,73 and 232 of the Constitution of Kenya and Section 52 of the Leadership and Integrity Act and fails to particularize how the Interested Party's contract with the KRA offends the said Articles of the Constitution.

p. That I have been advised by Counsel on record for the 1st respondent, which advise I verily believe to be sound that contrary to the allegations by the petitioner that it is mandatory for all public servants to retire at the age of 60 years.

i. The circulars which the petitioner has heavily relied on, though an indication of Government's Policy position do not clearly deal with cases of contract like in the Interested Party's case which runs beyond the age of 60 years and where such contracts are executed pursuant to a specific piece of legislation.

ii. The circulars clearly give a policy direction to statutory boards like the 1st respondentnet herein o how to deal with cases where the Chief Executive Officers (CEOs) of Parastatals and State Corporations are keen on a renewal of their contracts (to ensure smooth transition) which is not applicable in this case.

iii. For instance vide circular No. OP/CAB 2/7A dated 14th February, 2014 it can be seen that the government discouraging a trend from a certain cadre of its employees from seeking to remain in service after attaining the age of 60 years due to such challenges like wage bill sustainability, parity of treatment and equity; and

iv. The petitioner himself admits in paragraph 19 of the petition that there is no constitutional statutory retirement age for public servants in Kenya.

v. Notwithstanding the foregoing and the petitioner having failed to appreciate the context in which the government circulars that he relies on were being issued he has instead erroneously proceeded on a constitutional litigation spree to vex the KRA Board and the other respondents.

4. The Interested party also filed a replying affidavit in which he deponed on the main that:

a. That I was appointed as the Commissioner General of the Kenya Revenue Authority with effect from 4th March 2015 for a term of three (3) years pursuant to section 11(1) of the Act, which provides:

“11(1) There shall be a Commissioner General of the Authority who shall be appointed by the Minister upon the recommendation of the Board on such terms and conditions as are specified in his instrument of appointment.”

b. That according to the said instrument (contract) that I signed with the 1st Respondent, it is expressly provided that my engagement with the Kenya Revenue Authority is for a period of three (3) years commencing 4th March, 2015 and that period is set to expire on 3rd March 2018.

c. That contrary to the averments in paragraphs 4,5,6,, & of the petition; I have not sought for an extension of my contract as the Commissioner General of the Kenya Revenue Authority beyond the stipulated expiry date and reiterate that my appointment to the said office is well founded in the Act.

d. That in response to paragraphs 17,1,1,20 &21 of the petition I wish to state that:

i. My tenure as the commissioner General of the Kenya Revenue Authority is premised on section 11(1) of the Act and a valid contract set to expire on 3rd March,2018and therefore the contents of the circulars and Manuals annexed to the petitioner's pleadings as “Exhibit 0001” do not apply in the current circumstances.

ii. I have not sought for an extension of my contract as the Commissioner General of the Authority;

iii. My contract with the KRA does not offend any constitutional or statutory provision. Indeed the petitioner has admitted to the same in paragraph 1of the petition.

iv. Even without prejudice to a), b) & c) above, at the time of filing this suit the petitioner admits that I am yet to reach the

alleged mandatory retirement age of 60years.

5. In his final submissions, the petitioner contended regarding *locus standi* that articles 22 and 258 of the constitution are tailored for the community and they enact into the constitution the doctrine of public interest litigation. They vest in every person including the petitioner with the *locus standi* to institute proceedings for the protection of rights and fundamental freedoms and for protection of the constitution. On the question of whether the interested party's employment contract violated the law, the petitioner submitted that the existing law superseded any contracts made thereunder.

6. According to him the laws in existence when the contract was made and signed limited the employment in public service by restricting the tenure for CEO's of public bodies to a maximum of two terms of three years each. According to the petitioner, the provision in the contract that it is renewable by mutual agreement of both parties subject to section 11 of the KRA Act violated the provisions of the law (Mwongozo). Further, the provision in the Act that the Commissioner General of the Authority shall be appointed by the Minister upon the recommendation of the Board on such terms and conditions as are specified in his instrument of appointment did not vest the respondent's and the interested party the capacity to draw a contract that violates the term limit of sixty years.

7. The petitioner further submitted that pursuant to Chapter 8 of Mwongozo the respondents had an obligation to execute their mandate under section 11 of the KRA Act in full compliance with the constitution, all applicable laws and regulations and in line with accepted national and international standards as well as internal policies of the KRA. Mr Omtatah further submitted that when the contract was entered into, there were laws (ie statutory instruments) in existence that limited employment in public service by setting the mandatory retirement age at 60 years.

8. These laws/statutory instruments relied on by the Petitioner are Public Service Commissions code of Regulations 2006 now repealed and replaced with Human Resource Policies and Procedures manual for Public Service; Government Circular Ref. No OP.CAB.2/7A of 20th March, 2009 entitled Review of the Mandatory Retirement age for Public Servants which reviewed retirement age upwards from 55 years to 60 years. Government Circular Ref No. OP.CAB 2/7A dated 14th February, 2014 entitled Retention in Service of Officers Beyond the Mandatory Retirement Age which discouraged retention of officers in service after they attain the mandatory retirement age of 60 years. The petitioner further submitted that having stated on oath that the interested party had not sought for extension of his employment contract beyond the stipulated expiry date they are estopped from extending the tenure of the interested party beyond 3rd March, 2018.

9. Mr Warweru Gatonye for the 1st respondent and interested party on his part submitted that the petition was filed contrary to the express provisions of section 12 of the Employment and Labour Relations Court Act and Article 162 (2) of the Constitution. According to counsel, the jurisdiction of the court is guided and limited by section 12 of the Act which provides for persons who can lodge a claim or complaint to the court. These include employee, employer, a trade union, an employer's organization, a federation, the Registrar of Trade Unions. According to Counsel, the petitioner is not clear on whose behalf the petition has been brought save that he is a member of the public. To this extent it was submitted that the petition had been brought by a person other than those listed under section 12 hence the court lacked jurisdiction.

10. On whether the petition raises constitutional questions, counsel submitted that the crux of the petition was that the current Commissioner General of KRA should have been sent on mandatory terminal leave and that he ought to by law retired on 19th December, 2017 when he attained the mandatory age of 60 years. According to Mr Gatonye, whereas the petitioner has cited nearly all the justifiable provisions of the constitution in an attempt to make a constitutional case he has also admitted that there is no constitutional or statutory provisions on mandatory retirement age in public service.

11. Counsel further submitted that the Government circulars heavily relied on by the petitioner do not state clearly the policy position in cases where CEO of parastatals have existing contracts which ran beyond the age of 60 years and further in this case where such contracts are anchored on a statute. Mr Gatonye submitted that the interested party has a contract executed pursuant to section 11(1) of the KRA Act and was valid up to 4th March, 2018. There was no provision in the contract for mandatory terminal leave. Therefore to send the interested party on a terminal leave and appoint an Acting Commissioner General as sought would be in breach of contract and section 11(3) of the KRA Act.

12. According to counsel, the interested party having executed a valid contract had a legitimate expectation to continue serving the people of Kenya pursuant to his contract. In support of the submission counsel relied on the case of **Jackson K. Birenge Vs Masai Mara University** per Radido J and the case of **Henry Mwema Kimanthi Vs Nairobi City Water & Sewerage Company Ltd** per Mbaru J. Mr Gatonye further submitted that clause B20 of the Human Resource Policies and Procedure Manual relied on by the Petitioner permits persons who may not ordinarily qualify for pension to be engaged on a renewable contract for a maximum period of 3 years per contract. On the strength of the foregoing, Counsel submitted that no case had been established for constitutional violation. Counsel therefore submitted that the amended petition is frivolous invocation of constitutional jurisdiction of the court and ought to be discouraged. In this regard, counsel relied on the case of **East African Portland Cement Company Ltd Vs Attorney General** per Rika J.

13. On the question whether the extension of the interested party's contract was lawful, counsel submitted that the Mwongozo code heavily relied on by the petitioner to contend that the interested party should leave office is expressly said to be implemented on a comply or explain basis. The basis of implementation is stated to be an approach recognized that implementation would be at different levels of compliance with corporate governance norms. Counsel therefore submitted that Mwongozo as a good governance code is meant to aid the government of the day in exercising its managerial discretion and ought not and cannot be a tool to cripple government operations.

14. From the summary of pleadings and submissions by the Petitioner, the respondent and the interested party the court discerns the following questions as important and decision thereon would adequately resolve the dispute. First, does the petitioner have *locus standi* to move this court on the issues raised in the petition? Second, was the interested party's contract in conflict with government circulars regarding retirement age and terms of appointment for heads of parastatals? That is to say was the interested party's contract which was executed to expire on 4th March, 2018 in contravention of the Constitution and government policy on retirement age. Third, what is the appropriate order to make in this petition.

a. Does the petitioner have *locus standi* to bring the petition before this court?

Article 22 of the Constitution provides that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened. Sub article 2 provides that in addition to a person acting on their own interest, court proceedings under clause 1 may be instituted by a person acting on behalf of another person who cannot act in their own name, a person acting as a member of or in the interest of, a group or class of persons; a person acting in public interest.

15. The petitioner herein has contended that this petition was brought in the public interest under the growing practice of public interest litigation. This is a very sound ground however is the matter before the court a matter of public interest? The petition concerns appointment and exit from public service. Article 232 of the Constitution sets out the values and principles of public service which include; high standards of professional ethics; involvement of the people in the process of policy making, accountability for administrative acts and fair competition and merit as the basis of appointments and promotions. Sub article 2 of the article provides that principles of public service apply to public service in all state organs in both levels of government and all state corporations.

16. Public servants are appointed to discharge duties and functions in the interest of the public. Their remuneration are drawn from public resources in form of revenue collected by the government. To this extent it cannot be gain said that the petitioner as a member of the public has the *locus standi* to bring the present petition. He has as any other citizen the right to question any matter concerning the operationalization of the values and principles of public service as encapsulated under article 232 of the Constitution.

17. This brings me to the second question, that is whether the interested party's contract of employment with the 1st respondent was in contravention of the Constitution and Government policy on retirement from public service? The Court adequately summarized the petitioner's submissions on this issue. The main pillars of the petitioner's submissions are anchored on Government Circular Ref. No.OP.CBA.2/7A of 20th March 2009 titled "Review of the Mandatory Retirement Age for Public Servants which reviewed retirement age from 55 years and the Code of Governance for State Corporations (Mwongozo) published in January 2015. The petitioner further relied on government Circular No. OP/CAB.9/1A dated 23rd November, 2010 titled procedure for reappointment of service Chief Executive Officers in state corporations.

18. The gist of these circulars as summarized from the petitioners submissions is that public officers should exit service upon attainment of mandatory retirement age and that CEO's of state corporations should hold office for a maximum of two terms of 3 years each subject to the mandatory retirement age of sixty years.

19. Mr Gatonye for the respondent and interested party has contended that the interested party's contract is governed by the KRA Act and a contract between two parties which is not affected by the various Government circulars relied on by the Petitioner. The KRA Act at the preamble provides as follows:

"An Act of Parliament to establish the Kenya Revenue Authority as a central body for assessment and collection of revenue, for the administration and enforcement of the laws relating to revenue and to provide for connected purposes",

20. Under section 3(2) of the Act, KRA is designated as a body corporate with perpetual succession capable of suing and being sued. Provided that any legal proceedings against the authority arising from the performance of the functions or the exercise of any of the powers of the authority under section 5 shall be deemed to be legal proceedings against the Government. The functions of KRA under section 5 referred to above include being an agency under the general supervision of the Minister for Collection and receipt of all revenue. The authority further serves as an advisor of the Government on all matters relating to the administration of and the collection of revenue under the written laws. On the other hand under section 2 of the State corporations Act a state corporation is defined as:

a. State corporations established by the President

b. A body corporate established before or after the commencement of the Act by or under an Act of Parliament or other written law.

21. To this extent KRA is a state corporation. However, the proviso to section 3(2) that any proceedings against KRA arising out from the performance of its functions or exercise of powers under section 5 shall be deemed to be legal proceedings against the Government makes KRA a state corporation *sui generis*. This is because whereas state corporations are deemed to be bodies corporate capable of suing or being sued certain, functions and operations of KRA are deemed to be actions of the Central Government for which if legal proceedings are commenced, such proceedings shall be deemed to be proceedings against the Government.

22. These functions as outlined earlier include KRA being an agency under the general supervision of the Minister for collection and receipt of all revenue. The Authority further serves as an advisor to the Governments on all matters relating to the administration of and collection of revenue. These functions are at the core of any Government since for the Government to budget and plan for services and programmes it must know how much revenue is collected or capable of collection. It is therefore quite logical that whereas the Government recognizes KRA as a body corporate capable of suing or being sued, these key functions remain under close control of the Central Government.

23. Under section 5, KRA operates under the general supervision of the Minister (read Cabinet Secretary) for the time being in charge of Finance. The role of Cabinet Secretaries is set out under clause A.6 of PSC's Human Resource Policies and Procedures manual as follows:

"Cabinet secretaries are 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. These include:

i. Strategic policy formulation and direction of the Ministry to which they are assigned;

ii. Being the link between the Ministry and the President or Parliament as the case may be.

24. From the foregoing, it is reasonably deducible that the Cabinet Secretary Finance has control over performance and strategic direction of KRA including recruitment and retention of staff in certain key positions in order to realize its functions set out under section 5 of the Act. In the context of the above, Mwongozo and the circulars relied on by the petitioner to question the constitutionality and legal validity of the interested party's contract are policy documents issued by Government from time. Their intention in most cases is to harmonize or in certain cases explain departure or variation of any existing policy. They however cannot be used to bar or prevent a strategic decision of the Government.

25. Whereas the running of Government should be on a clear and predictable policy, it ought however to be noted that policy influences but does not bind the Government in executing its duties especially where such exercise of duty is accompanied by reasonable explanation and is carried out in a way that does not on the face of it violate the law or the constitution. In the contrary case, the court would have reason to interfere.

26. The petitioner has complained that the interested party's appointment as Commissioner General of KRA which was done initially on 19th January, 2012 for a period of 3 years and upon expiry renewed for a further period of 3 years terminating on 3rd March, 2018 violated the constitution and Government policy on retirement age since the interested party having been born on 20th December, 1957 was due for mandatory retirement on 19th December, 2017 when he turned sixty years.

27. Section 11(1) of the KRA Act provides;

“There shall be a Commissioner General of the Authority who shall be appointed by the Minister upon recommendation of the Board on such terms as the minister may in consultation with the Committee approve”,

28. As observed earlier in this judgement, section 5 of the KRA Act, places the authority under the general supervision of the Minister (read Cabinet Secretary) for Finance further under clause A.6 of PSC's Human Resource Policies and Procedure manual, the Cabinet Secretaries roles includes steering the strategic human resource management matters in the Ministries under them.

29. Further, the interested party herein was appointed on fixed term contract which is permissible under section 80(2) of the Public Service Commission Act which permits appointment of a public officer who has attained the mandatory retirement age to serve on fixed term contract. Fixed term contract employees are not pensionable hence not subject to the 60 year retirement age rule. Such persons' contracts are governed by their instruments of appointment.

30. To this extent the court will not declare the interested party's contract entered into on 4th March, 2015 and which expired on 4th March, 2018 contrary to the constitution, Mwongozo and other Government circulars relied on by the petitioner.

31. An issue arose during the pendency of this petition over a further extension of the interested party's contract for a further one year. Whereas the court has indirectly dealt with this issue, it was contended by counsel for the respondent that the extension was done pursuant to circular Ref. No.OP/CAB.9/1A on 27th February, 2018. This is the subject of the Judgement in the related petition No. 24 of 2018 and for avoidance of repetition the issue will be addressed in that judgement.

32. In conclusion, the petition is unsuccessful and the orders sought are declined with no order as to costs.

33. It is so ordered.

Dated at Nairobi this 29th day of June, 2018

Abuodha J. N.

Judge

Delivered at Nairobi this 29th June day of June, 2018

Abuodha J. N.

Judge

In the presence of:-

..... for the Claimant

..... for the Respondent