



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**PETITION NO. 28 OF 2018**

**OKIYA OMTATAH OKOITI..... PETITIONER**

**- VERSUS -**

**SAIMA JEPKEMBOI ONDIMU.....1<sup>ST</sup> RESPONDENT**

**THE BOARD OF SPORTS KENYA.....2<sup>ND</sup> RESPONDENT**

**THE PUBLIC SERVICE COMMISSION...3<sup>RD</sup> RESPONDENT**

(Before Hon. Justice Byram Ongaya on Tuesday 31<sup>st</sup> July, 2018)

**JUDGMENT**

The petitioner filed the petition on 11.04.2018 in person. The petition was in the matter of Articles 1, 2, 3, 4(2), 10, 12(1)(a), 19, 20, 21, 22, 23, 24, 27, 41(1), 47, 48, 50(1), 73, 75, 156, 162, 165, 232, 234, 258, and 259 of the Constitution of Kenya 2010; in the matter of the alleged violation of Articles 2, 10, 27, 41(1), 47, 73, 232, 234, and 259 (1) of the Constitution, sections 31, 80, and 91 of the Public Service Commission Act 2013, the Statutory Instruments Act 2013, Government Circular Ref. No. OP.CBA.2/7A of 20.03.2009 on the mandatory retirement age for public servants, Government Circular No.OP/CAB.9/1A of 23.11.2010 on exiting CEOs of public bodies, Government circular Ref. No. OP.CAB.2/7A dated 14.02.2014 on the retention in service of officers beyond the mandatory retirement age, and the Human Resource Policies and Procedures Manual for the Public Service, 2016; in the matter of the mandatory retirement age for public servants, and the mandatory six-month period for acting in offices in the public service; and in the matter and legal validity of retaining Saima Jepkemboi Ondimu in the public service beyond the mandatory retirement age of 60 years for public servants.

The petition is based on the petitioner's supporting affidavit attached on the petition and the petitioner's supplementary affidavit filed on 30.05.2016.

The petitioner prays for:

- a) A declaration that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents were under obligation of the law and ought to have retired the 1<sup>st</sup> respondent from the public service on 3<sup>rd</sup> April 2018 when she attained the mandatory retirement age in the public service of sixty (60) years.
- b) A declaration that the 1<sup>st</sup> respondent is subject to the mandatory retirement age of 60 years for public servants, and keeping her in employment beyond the mandatory retirement age of 60 years for public servants is illegal and unconstitutional and, therefore, invalid, null and void *ab initio*.
- c) A declaration that since 03.04.2018, after she attained the mandatory retirement age in the public service of 60 years, the 1<sup>st</sup> respondent has been in office illegally and must refund all the earnings she made during her irregular employment since then.
- d) An order permanently prohibiting the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, whether by themselves, or any of their employees or agents or any person claiming to act under their authority from howsoever retaining the 1<sup>st</sup> respondent in the public service in whatever capacity.
- e) An order compelling the 1<sup>st</sup> respondent to refund all earnings she made while in office illegally since 03.04.2018.
- f) An order compelling the 2<sup>nd</sup> and 3<sup>rd</sup> respondents to immediately retire the 1<sup>st</sup> respondent, and to simultaneously commence the process for recruiting and appointing a substantive Director-General for Sports Kenya in strict and full compliance with the law.
- g) An order that the costs of the suit be provided for.

h) Any other relief the Court may deem just to grant.

The 1<sup>st</sup> respondent filed her replying affidavit on 09.05.2016 through the Attorney General and Amelia Chesinya, Litigation Counsel for the Attorney General appeared for all the respondents.

The petitioner's case is that the 1<sup>st</sup> respondent attained the mandatory public service retirement age of 60 years on 03.04.2018 and she has not retired. That the 1<sup>st</sup> respondent was born in Koibate District, Esageri Division, Kiplumbe Location on 04.04.1998 so that she attained 60 years of age on 03.04.2018. Further, contrary to the law which allows persons to act in public offices for a maximum period of 6 months only, the 1<sup>st</sup> respondent has been the acting Director-General of Sports Kenya since May 2017, when the 2<sup>nd</sup> respondent appointed her to head Sports Kenya. The petitioner seeks orders that the 2<sup>nd</sup> respondent and 3<sup>rd</sup> respondents to retire the 1<sup>st</sup> respondent from the public service and directing them to appoint a substantive Director-General of Sports Kenya strictly and in full compliance with the law.

The petitioner relies on section 80 of the Public Service Commission Act, 2017 which provides that where a public officer has attained the mandatory retirement age as may be prescribed in regulations, the public officer shall retire from the service with effect from the date of attaining the mandatory retirement age; and the Commission or other appointing authority shall not extend the service of such retired public officer beyond the mandatory retirement age. Under sections 31 and 92 the Commission is allowed to make regulations for the better carrying out of its functions under the Constitution, the Act and any other national legislation; and regulations for prescribing anything required by the Act to be prescribed generally for the better carrying into effect the provisions of the Act.

The Government Circular Ref. No. OP.CBA.2/7A of 20.03.2009 reviewed the mandatory retirement age for public servants from 55 years to 60 years. Section 80 of the Public Service Commission Act provides that a person who has already attained the mandatory age of retirement from the public service may be employed in the service if the person possesses rare knowledge, skills and competencies for the time being required in the service; is willing to be engaged on contract; and his or her performance shall not in any way be impaired by age.

Section D.18 of the Human Resource Policies and Procedures Manual for the Public Service of May 2016 provides for various forms of exiting types of retirement in public service including retirement on attainment of mandatory retirement age. Section D.21 thereof provides that all officers shall retire from the service on attaining the mandatory retirement age of 60 years, 65 years for persons with disability and as may be prescribed by the government from time to time.

The petitioner's further case is that by the Government circular Ref. No. OP.CAB.2/7A dated 14.02.2014 on "**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 stated that Principle Secretaries were to ensure that all officers aged 58 years and above have duly identified successors to enable smooth exit from the service when they attain the mandatory retirement age of 60 years.

The petitioner is aggrieved that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents have failed in their mandate to retire the 1<sup>st</sup> respondent who has already attained the mandatory retirement age in the public service of 60 years. Further, the petitioner's case is that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents have not commenced the process for recruitment of the substantive Director-General of Sports Kenya. Further the retention of the 1<sup>st</sup> respondent in the public service is contrary to the rule of law, will block the advancement of other deserving Kenyans, and is discriminatory against other public servants who are forced to retire upon attaining 60 years of age.

The petitioner's further case is that the application of the mandatory retirement age for public servants is necessary for compliance with Article 10 and 259(1) on the rule of law and good governance; Article 27 on equality and freedom from discrimination; Article 41(1) on fair labour practices; Article 47 on fair administrative Action; Article 73 as read with section 52 of the Leadership and Integrity Act 2012, on responsibilities of leadership; and Article 232 on the values and principles of public service.

Further the petitioner's case is that the Government Circular No.OP/CAB.9/1A of 23.11.2010 is titled "**Procedure for reappointment of Service Chief Executive Officers in State Corporations**" provides that acting CEOs are supposed to be appointed for the six-month transition period, to hold the vacant offices as new CEOs are recruited and appointed.

The respondents' case as per the replying affidavit is as follows:

- 1) The 2<sup>nd</sup> respondent is established under section 3 of the Sports Act as a body corporate and its functions set out in the Act.
- 2) The office of Director – General is established under section 8(1) of the Sports Act and to be appointed by the Board.
- 3) Prior to appointment as the acting Director-General of Sports Kenya, the 1<sup>st</sup> respondent was substantively serving as Senior Deputy Secretary at the Ministry of Sports and Heritage. On 13.04.2017 the 1<sup>st</sup> respondent received an appointment from the then Cabinet Secretary, Dr. Hassan Wario Arero as the acting Director General, Sports Kenya. The 2<sup>nd</sup> respondent ratified the Minister's appointment on 09.05.2017. The 1<sup>st</sup> respondent had reported for work at Sports Kenya on 01.05.2017 and has been acting for one year, which term ended on 13.04.2017. The 2<sup>nd</sup> respondent had not advertised for substantive recruitment and filling of the vacancy due to financial resource constraints.
- 4) The Cabinet Secretary requested for extension of the 1<sup>st</sup> respondent's acting appointment as Director General of Sports Kenya. The request was based upon the role the 1<sup>st</sup> respondent was playing in undertaking institutional reforms initiatives and re-engineering of processes at Sports Kenya aimed at turning around the institution in view of the Human Resource capacity and financial challenges faced by the institution. The 2<sup>nd</sup> respondent accepted and ratified the acting appointment on 03.04.2018.

5) The 1<sup>st</sup> respondent admits that she reached the retirement age on 04.04.2018 awaiting payment of retirement benefits but that event does not preclude the 1<sup>st</sup> respondent from holding the position of acting Director-General of Sports Kenya on contractual terms.

The 1<sup>st</sup> issue for determination is whether the Public Service Commission Act, 2017 applies to employment of the Director General or acting Director-General of Sports Kenya. Article 234 (1) (a) of the Constitution provides that the functions and powers of the Public Service Commission shall include, subject to the Constitution and legislation to establish and abolish offices in the public service; and appoint persons to hold or act in those offices, and to confirm appointments. Chapter 15 of the Constitution provides for commissions and independent offices. Section 249 (2) thereunder provides that the commissions and the holders of independent offices are subject only to the Constitution and the law; and are independent and not subject to direction or control by any person or authority. The Court has considered those provisions and finds that it is clear that the Public Service Commission's powers to appoint public officers or undertake any of its constitutional functions are subject to provisions of the Constitution and legislation – such legislation not being inconsistent with the Constitution as per Article 2(1) that the Constitution is supreme law of the Republic and binds all persons and all State Organs at both levels of government; and Article 2(4) thereof that any law, including customary law, that is inconsistent with the Constitution is void to the extent of the inconsistency, and any act or omission in contravention of the Constitution is invalid. The Court returns that the Sports Act having provided for the appointment of the Director-General of Sports, the provisions of the Public Service Commission, Act, 2017 will not apply to the office of the Director-General as established under that Act. It has not been submitted that the provisions of the Sports Act offend the constitutional powers and functions of the Commission and the Sports Act not having been shown to be inconsistent with the Constitution, the Court returns that the Sports Act and not the Public Service Commission Act will apply to the appointment of the Director – General under the Act.

The 2<sup>nd</sup> issue for determination is whether the appointment of the 2<sup>nd</sup> respondent is in compliance with the provisions of the Sports Act and the Constitution. Section 8(1) of the Sports Act provides that Sports Kenya shall have a Director-General, who shall be appointed by the Board, through a competitive recruitment process. That provision is in line with Article 232(1) (i) which provides for the public service value and principle of affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service of men and women; the members of all ethnic groups; and persons with disabilities. Again, it is in line with Article 73 (2) (a) which provides for the guiding principles of leadership and integrity to include selection on the basis of personal integrity, competence and suitability, or election in free and fair elections. The 2<sup>nd</sup> respondent has not shown compliance with those provisions and the 1<sup>st</sup> respondent's appointment as acting Director – General since 13.04.2017 and as extended on 03.04.2018 is found to have contravened the express statutory provision and the cited constitutional provisions.

While the Court makes that finding, it is noted that the 1<sup>st</sup> respondent's appointment was by the Cabinet Secretary then ratified by the 2<sup>nd</sup> respondent which procedure was clearly not provided for under the Sports Act. Article 132(3) (c) provides that the President shall by a decision published in the Gazette, assign responsibility for the implementation and administration of any Act of Parliament to a Cabinet Secretary, to the extent not inconsistent with any Act of Parliament. The Court returns that pursuant to that provision a Cabinet Secretary is required to act and implement an Act assigned by the President in strict compliance with the primary statute and other statutes. Thus the Court holds that actions by Cabinet Secretaries are chained by statutory provisions. In view of that provision the Court returns that in the present case the Cabinet Secretary was required to implement the Sports Act in consistency with the provisions of the Act and it has not been shown that the Cabinet Secretary in appointing the 1<sup>st</sup> respondent and then the appointment being ratified by the 2<sup>nd</sup> respondent was acting in line with the provisions of the act. The Court finds such procedure was *ultra vires*.

The 3<sup>rd</sup> issue for determination is whether the 1<sup>st</sup> respondent was disqualified from being appointed acting Director-General by reason of having attained the age of 60 years on 04.04.2018. The Parliament has established the qualifications for the office of Director-General under section 8 (2) of the Sports Act thus, **“A person shall not be qualified for appointment as the Director-General unless that person has held a similar position or served in executive management in an institution of equal status for at least five years and has at least ten years' experience and proven competence in sports and facility management and operation of commerce, industry, finance or general administration.”** The Court returns that in its own wisdom, Parliament did not prescribe an age based criteria as qualification for the office of Director-General of Sports. The petitioner's case that the 1<sup>st</sup> respondent would be disqualified by reason of attaining the age of 60 years will therefore fail. In any event, the Court finds that under Article 27(4) of the Constitution it is clear that the State shall not discriminate directly or indirectly against any person on any ground, including, age. Thus, for discrimination on account of age to pass the constitutional test, it must pass the test in Article 27 (6) thus, **“To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.”** Further it must pass the test in Article 27 (7) thus, **“Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.”** The Court further holds that such would be qualifications to the right of equality and freedom from discrimination and must pass the test for limitation of rights and fundamental freedoms as per Article 24 of the Constitution. In the instant case, the petitioner has failed to establish such valid limitation or the envisaged affirmative action upon which the 1<sup>st</sup> respondent would be disqualified to hold the office of Director-General on account of having attained the age of 60 years.

The 4<sup>th</sup> issue for determination is whether the petitioner is entitled to any of the remedies as prayed for. The Court makes findings as follows:

a) The petitioner prays for a declaration that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents were under obligation of the law and ought to have retired the 1<sup>st</sup> respondent from the public service on 3<sup>rd</sup> April 2018 when she attained the mandatory retirement age in the public service of sixty (60) years. The Court has found that age was not criteria for holding the office of Director-General under the Sports Act and the prayer will fail.

b) The petitioner prayed for a declaration that the 1<sup>st</sup> respondent is subject to the mandatory retirement age of 60 years for public servants, and keeping her in employment beyond the mandatory retirement age of 60 years for public servants is illegal and unconstitutional and, therefore, invalid, null and void *ab initio*. Once again the Court has found that the age was not a qualification

for holding the office of the Director-General and the prayer will fail.

c) The petitioner prayed for a declaration that since 03.04.2018, after she attained the mandatory retirement age in the public service of 60 years, the 1<sup>st</sup> respondent has been in office illegally and must refund all the earnings she made during her irregular employment since then. The Court finds that the 1<sup>st</sup> respondent has worked as appointed and there was no bad faith on her part as she performed as was appointed and the prayer will fail.

d) The petitioner prayed for an order permanently prohibiting the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, whether by themselves, or any of their employees or agents or any person claiming to act under their authority from howsoever retaining the 1<sup>st</sup> respondent in the public service in whatever capacity. The Court has found nothing barring the appointment of the 1<sup>st</sup> respondent from qualifying to hold the office of Director-General or other public office as she may qualify to hold and the prayer will therefore fail.

e) The Court has found that the 1<sup>st</sup> respondent has worked as appointed and is not guilty of bad faith at all material times and the prayer for an order compelling the 1<sup>st</sup> respondent to refund all earnings she made while in office illegally since 03.04.2018 will fail. Having not appointed herself to the position, the 1<sup>st</sup> respondent is not liable in any manner to refund the remuneration and pay earned while her appointment, though questionable, subsisted.

f) The petitioner prays for an order compelling the 2<sup>nd</sup> and 3<sup>rd</sup> respondents to immediately retire the 1<sup>st</sup> respondent, and to simultaneously commence the process for recruiting and appointing a substantive Director-General for Sports Kenya in strict and full compliance with the law. The Court has found that the appointment of the 1<sup>st</sup> respondent to acting Director-General of sports was **ultra vires** section 8(1) of the Sports Act and contravened Articles 73(2) (a) and 232(1) (i) and the petitioner is entitled to the prayer to that extent.

g) As the 1<sup>st</sup> respondent acted in good faith as appointed in and the 3<sup>rd</sup> respondent was a misconceived party and did not file a replying affidavit, the 2<sup>nd</sup> respondent will pay the petitioner's costs of the petition and the other parties will bear their own costs of the proceedings.

In conclusion judgment is hereby entered for the petitioner against the 1st and 2<sup>nd</sup> respondents for:

1) The declaration that the appointment of the 1<sup>st</sup> respondent by the 2<sup>nd</sup> respondent to the position of acting Director-General Sports was was **ultra vires** section 8(1) of the Sports Act and contravened Articles 73(2) (a) and 232(1) (i) and the petitioner is entitled to the prayer to that extent, the 2<sup>nd</sup> respondent to immediately retire the 1<sup>st</sup> respondent, and to simultaneously commence the process for recruiting and appointing a substantive Director-General for Sports Kenya in strict and full compliance with the law.

2) The 2<sup>nd</sup> respondent to pay the petitioner's costs of the petition.

**Signed, dated and delivered in court at Nairobi this Tuesday 31<sup>st</sup> July, 2018.**

**BYRAM ONGAYA**

**JUDGE**