



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 95 OF 2016

OKIYA OMTATAH OKOITIPETITIONER

VERSUS

THE PRESIDENT OF KENYA.....1ST RESPONDENT

CABINET SECRETARY INTERIOR2ND RESPONDENT

THE HON. ATTORNEY GENERAL3RD RESPONDENT

STATE CORPORATIONS ADVISORY COMMITTEE .4TH RESPONDENT

AND

BETTING CONTROL AND

LICENSING BOARD1ST INTERESTED PARTY

FRANCIS KIPKURUI SANG2ND INTERESTED PARTY

ANTHONY KIMANI KUNG’U3RD INTERESTED PARTY

Petitioner in person

Mr. Kioko for the respondents

Mr. Nyaberi for 2nd interested party

Mr. Mwangi for 3rd interested party

JUDGMENT

1.The petitioner by an amended petition dated 3rd October 2016 seeks the following orders;

a. That a declaration is hereby issued that the 1st respondent’s mandate under Section 7 (3) of the State Corporations Act does not extend to state agencies which are not state corporations established under the Act, and does not supersede the express provisions of Section 3 (1) (a) of the

Betting Lotteries and Gaming Act.

- b. That a declaration is hereby issued that the 1st respondent's appointment of the 2nd interested party to be the Chairperson of the Board is null and void *ab initio* for being in blatant violation of Section 3 (1) (a) of the Betting Lotteries and Gaming Act, which expressly vests the function exclusively in the 2nd respondent.
- c. That a declaration is hereby issued that by violating Section 3 (1) (a) of the Betting Lotteries and Gaming Act, the 1st respondent acted *ultra vires* his powers under Article 132 of the Constitution and Sections 3 (1), 6 (1) (a) and 7 (3) of the State Corporations Act.
- d. That a declaration is hereby issued that the 1st respondent's purported appointment of the 2nd interested party as the chairperson of the board is irregular, unreasonable, illegal, unlawful and therefore unconstitutional, null and void *ab initio* and of no consequence in law.
- e. That a declaration is hereby issued that the 3rd interested party, the incumbent chairperson of the board, was never removed from being the chairperson of the board and remains validly in office for the remainder of his three (3) year term.
- f. That a declaration is hereby issued that by purporting to remove the 3rd interested party under Section 7 (3) of the State Corporations Act is tantamount to publishing untrue or misleading information about his person contrary to Article 35 (2) of the constitution.
- g. That a declaration is hereby issued that the 3rd interested party is entitled to the deletion of untrue or misleading information affecting his person as provided for in Article 35 (2) of the Constitution.
- h. That a declaration is hereby issued that the quashing of Gazette Notice No. 4633 of 23rd June 2016 will amount to enforcing the 3rd interested party's right to the correction or deletion of untrue or misleading information that affects him.
- i. That the Honourable Court be pleased to issue and hereby issues an order of *certiorari* removing into this Honourable Court and quashing the Gazette Notice No. 4633 of 23rd June, 2016, in its entirety.
- j. That the Honourable Court be pleased to issue and hereby issues an order of *certiorari* removing into this Honourable Court and quashing Gazette Notice No. 5356 of 12th July 2016, in its entirety.
- k. That the Honourable Court be pleased to issue and hereby issues an order of prohibition prohibiting the 1st and 4th respondents from usurping the powers of the 2nd respondent in Section 3 (1) (a) of the Betting Lotteries and Gaming Act, to appoint and remove the Chairperson of the 1st interested party.
- l. That the Honourable Court be pleased to issue and hereby issues an order of prohibition prohibiting the 1st and 4th respondents, or any of the respondents herein, and any person acting under their behest or direction, in purported enforcement of the 1st and 4th respondents' decisions contained in Gazette Notice No. 4633 dated 23rd June 2016, from acting upon, or enforcing or complying with the said direction.
- m. That the Honourable Court be pleased to issue and hereby issues an order of *Mandamus* directing the 1st – 4th respondents and the 1st interested party to facilitate the continuation in office of the 3rd interested party as the chairperson of the 1st interested party.

n. That the Honourable Court be pleased to order and hereby orders the 1st and 4th respondents to pay the costs of this petition.

o. That the Honourable Court be pleased to issue any other or further remedy that the Honourable Court shall deem fit to grant.

Facts of the Petition

2. The amended petition faults the decision by the respondents to effect changes in office of the chairperson of the Betting Control and Licensing Board (hereinafter, “the Board”), first, vide Gazette Notice No. 4633 of 23rd June 2016 and later, vide Gazette Notice No. 5356 of 12th July 2016, purporting to appoint the 2nd interested party as the chairperson of the Board in place of the 3rd interested party.

3. The petitioner faults the respondents for deliberately contravening Section 3 (1) (a) of the Betting Lotteries and Gaming Act which provides that the chairperson of the Betting Control and Licensing Board shall consist of “**a chairman, not being a public officer, to be appointed by the Minister by notice in the Gazette.**”

4. The petitioner’s contention is that Section 3 (1) (a) of the Betting Lotteries and Gaming Act (CAP 131) is an absolute bar to anybody other than the Minister, including the 1st and 4th respondents, appointing or removing the Chairperson of the Board.

5. The Petitioner is inviting the Honourable Court to intervene and determine the constitutional and legal validity of the purported removal of the 3rd interested party and the simultaneous appointment of the 2nd interested party to replace him as the chairperson of the board.

6. The petitioner is praying for orders declaring the impugned administrative action to be inconsistent with the constitution and other laws of Kenya and therefore, null and void *ab initio* to the extent of the inconsistency and as a consequence of the invalidity restore the 3rd interested party as the chairperson of the board.

7. The petitioner is also praying that the court clarifies the procedure in law for the removal and appointment of the chair of the board going forward.

Response

8. The petition was opposed vide respondent’s grounds of opposition dated 27th July 2016 and filed on 28th July 2016. The grounds of opposition are as follows;

(i.) The matter is already spent by dint of the Special Gazette Notice No. 5356 issued on the 12th July 2016 which essentially revoked Gazette Notices No’s 4633 and 367 both of 2016.

(ii.) The 3rd interested party herein withdrew JR cause no. 278 of 2016 on the 25th July 2016 which raises similar issues with the instant petition.

(iii.) The 1st respondent enjoyment as a party in this suit is grossly erroneous and unconstitutional thus offends Article 143 (2) of the Constitution of Kenya thus the 1st respondent herein should be struck off as a party from

these proceedings.

(iv.) The applicant’s application is frivolous and vexatious in nature thus an abuse of the court process thus should be dismissed costs to the respondents.

9. The respondents did not file a replying affidavit in opposition to the facts set out in the supporting affidavits of the petitioner sworn on 2nd August 2016 and 27th June 2016.
10. To the extent, the matters of fact deponed to by Mr. Okiya Omtatah Okoiti remain uncontroverted and are deemed facts not in dispute and therefore proven on a balance of probability.
11. Petitioner traversed the grounds of opposition in a further affidavit dated 2nd August 2016.
12. The parties filed written submissions on 27th March 2017 and 14th February 2017 respectively.
13. The issues for determination are as follows;
 - a. Whether the 1st respondent should be struck off these proceedings.
 - b. Whether the purported removal of the 3rd interested party and replacement by 2nd interested party was unlawful, null and void.
 - c. What remedies are available if at all to the petitioner?

Issue I

14. With regard to whether or not, The President of Kenya, ought to be struck off these proceedings, it was submitted by the Attorney General that suing the President of Kenya while still in office offends Article 143 (2) of the constitution of Kenya which provides that;

“Civil proceedings shall not be instituted in any court against the President or the person performing the functions of that office during that tenure of office in respect of anything done or not done in the exercise of their powers under the constitution.”

15. The petitioner on the other hand submits that this is a constitutional petition and does not fall under the ambit of civil proceedings. That the President is not exempted by the constitution or any other written law from being sued vide a constitutional petition.

16. That if the President’s action violate the constitution, it must be scrutinised by the court.

17. Whereas this is an interesting area of the law, the court finds that the necessity to maintain the President of Kenya as a party in this suit was negated by the revocation of Gazette Notice no. 4633 of 23rd June 2016 in which the President purported to revoke the appointment of the 3rd interested party as the chairman of the Betting Control and Licensing Board and replacing him with the 2nd interested party.

18. The revocation of the Gazette Notice by the President is not in dispute and therefore the court finds it unnecessary to retain the President of Kenya as a party in this suit and is struck off the proceedings.

Issue ii

19. The next issue for determination is whether the revocation of the appointment of the 3rd interested party as a chairman of the Betting and Licencing Board for a term of three years while the term had not expired and without any recourse was unlawful, null and void.

20. The 2nd respondent, the Cabinet Secretary of Interior, upon admitting that the 1st respondent had acted in excess of his powers sought to regularise the situation by issuing Gazette Notice No. 5356 of 12th July 2016 in which the 2nd respondent purported to revoke the earlier Gazette Notice No. 4633/2016 issued in error by the President and in the same vein purported to again revoke the unexpired term of the 3rd interested party as the Chairman of the Betting Board and replace the 3rd interested party with the 2nd

interested party.

21. It is not in dispute that the 2nd respondent did not give notice of removal to the 3rd interested party, did not give the 3rd interested party notice to show cause why his appointment ought to be revoked, did not give the 3rd interested party any reasons(s) for the purported removal nor did the 2nd respondent give the 3rd interested party an opportunity to explain in writing or otherwise why his unexpired appointment should not be summarily revoked.

22. It is pertinent to note that, unlike chairpersons of public organisations who are appointed by the President of Kenya, the appointment of the chairman of this board is by the Minister of Interior.

23. This appointment is similar to the appointments of the chairpersons and members of councils of public universities. The court had opportunity to deal with this kind of appointments in the ELRC case of **Joseph Mutuura Mbeeria and another –vs– Cabinet Secretary for Education, Science and Technology and 2 others [2014] eKLR** in which the court relying on written advice by the Honourable Attorney General held thus;

“22 indeed, the Honourable Attorney General submits as follows in the ultimate paragraph of his able submissions;

“We rely on the provisions set out above in holding the view that the Minister should have applied the provisions of Article 10 and 232 of the Constitution as well as Section 36 (1) (d) of the Act and subjected the appointment of the interested party’s council members subject of this petition to an inclusive, competitive, accountable and transparent process that involves public participation and best practice in management, equal and affordable opportunities for all, promote public trust, is non-discriminatory, promote equity, equality and social justice;

This would be through advertising for the position, shortlisting for interviews and conducting the interviews in accordance with the stated provisions. Even where the immediate incumbent is seeking re-appointment and the employer has assessed his performance to be good and wants to retain him, we are of the view that the vacant position must be subjected to the appointment process. His performance will be a factor to be considered in determining whether to retain him or not as against the other candidates who have been afforded an opportunity to compete for the same.”

24. The court fully embraced this noble advice by the Honourable The Attorney General and held;

“The court upholds these to be the minimum standards applicable to the appointment of the chairman and members of the council of JKUAT. Further the court holds these standards to be the minimum standards applicable to the appointment of the chairman and members of the council of all other public universities;”

25. In the present case, the court first notes that the position of the chairman of the Betting Board was not vacant but the Minister purported to revoke the appointment and replace the chairman with another person without following any due process and without giving any reasons.

26. The due process of the law is provided under Article 47 of the Constitution titled; fair administrative action which provides;

“47 (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.”

27. This to be read with the relevant provisions of the fair administrative action Act, 2015 enacted to give effect to Article 47 of the constitution.

28. The 2nd respondent is not immune from the provisions of Article 47 (1) and the enabling statute aforesaid.

29. Accordingly, following the principle enunciated in the case of **The County Government of Nyeri and another –vs– Cecilia Wangechi Ndung’u, Civil Appeal No. 2 of 2015**, the Court of Appeal Judges while interpreting the powers of a Governor under Section 31 (a) of the County Governments Act held;

“Section 31 (a) provides that a Governor may dismiss a County Executive Committee member at any time, if he/she considers that it is appropriate or necessary to do so. We find that the provision places an obligation on the Governor to exercise the said power only when necessary or appropriate. In our view this entails reasonableness on the part of the Governor in exercising this power.

In Dunsmuir –vs– New Brunswick (supra) the Supreme Court while discussing reasonableness observed reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness; certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions.A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

Further, by virtue of the fact that a Governor ought to exercise his powers for the public good he should not act on selfish motives but for the benefit of his/her county. We find that the reason for exercising the said power ought to be valid and compelling and will depend on the circumstances of each case. Consequently, the power to dismiss a member of the County Executive is qualified to the extent that the same ought to be for the benefit of the County and in accordance to the principles of devolution as set out herein above.

30. The court fully embraces this holding by the Court of Appeal in the present matter. The Cabinet Secretary – Interior is bound to have good reasons and communicate the same to the chairman or member of the board before their removal from office.

31. In the case of **Joseph Mutuura Mbeeria (supra)**, the court held that chairpersons and members of public boards appointed by cabinet secretaries as opposed to those appointed by the President of Kenya must;

(i.) Be appointed following an open and competitive process;

(ii.) Re-appointed upon expiry of their terms following an open and competitive process, unless the appointment has an automatic renewal clause for a specified term;

(iii.) And the removal from office must be in accordance with the provisions of Article 47 (1) as read with the relevant provisions of the Fair Administrative Action Act, 2015.

32. The revocation of the appointment of the 3rd interested party and purported replacement by the 2nd interested party did not meet the aforesaid criteria and was unlawful, null and void.

33. The final orders of the court are as follows;

(a.) A declaration is hereby issued that the 2nd respondent’s purported removal of the 3rd interested party and the appointment of 2nd interested party to replace the 3rd interested party as the chairman of the Betting and Licencing Control Board is unlawful, null and void.

(b.) The Gazette Notice No. 5331 of 12th July 2016 is a nullity in law *ab initio*

(c.) The 3rd interested party to serve his full three (3) year term as the Chairman of the Betting Control and Licensing Board unless otherwise lawfully removed from office.

(d.) Costs to follow the outcome of the petition.

Dated and Delivered at Nairobi this 19th day of May 2017

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE