



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO 96 OF 2015

[FORMERLY HIGH COURT PETITION NO 519 OF 2015]

IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

**IN THE MATTER OF ARTICLES 10, 22, 153, 232 AND 259 OF THE CONSTITUTION OF THE
REPUBLIC OF KENYA**

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLES 10, 22, 153 AND 232
OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

AND

IN THE MATTER OF THE SCIENCE, TECHNOLOGY AND INNOVATION ACT, 2013

AND

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

AND

IN THE MATTER OF THE KENYA GAZETTE NOTICE VOL. CXVII-NO 121 (GN. NO. 8234)

AND

**IN THE MATTER OF MWONGOZO (THE CODE OF GOVERNANCE FOR STATE
CORPORATIONS)**

BETWEEN

PETER MACITHI

MUIGAI.....PETITIONER

VS

**THE CABINET SECRETARY FOR INDUSTRIALISATION AND ENTERPRISE
DEVELOPMENT.....1ST RESPONDENT**

**THE CHAIRPERSON OF THE BOARD OF DIRECTORS KENYA
INDUSTRIAL**

**RESEARCH AND
DEVELOPMENT INSTITUTE.....2ND
RESPONDENT**

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

**MBECHA CHARLES Z.
MOTURI.....4TH RESPONDENT**

**KENYA INDUSTRIAL RESEARCH AND DEVELOPMENT
INSTITUTE.....5TH RESPONDENT**

JUDGMENT

Introduction

1. The Petitioner, Peter Macithi Muigai is the Executive Director of *Kivuli Cha Haki*, a Non Governmental Organisation involved in matters of public interest and legal empowerment.
2. The 1st Respondent is the Cabinet Secretary for Industrialisation and Enterprise Development charged with industrialisation and cooperative policy formulation as well as implementation of industrial property rights regimes.
3. The 2nd Respondent is the Chairperson of the Board of Directors of Kenya Industrial Research and Development Institute (KIRDI) a government body charged with national industrial research, technology and innovation.
4. The 3rd Respondent is the Attorney General of the Republic of Kenya and is sued in his capacity as the Principal Legal Advisor to the Government and is also charged with protection and upholding of the rule of law and public interest.
5. The 4th Respondent is the Director of KIRDI and the renewal of his term is the subject of this Petition. KIRDI was joined as the 5th Respondent by an order granted by **Ngugi J** on 3rd December 2015. By the same order, the Petition was transferred from the Constitutional and Human Rights Division of the High Court to this Court.

The Petition

6. The Petitioner states that in spite of clear regulations on the appointment of the Director for KIRDI, the 1st Respondent proceeded to reappoint the 4th Respondent in total disregard of the law and policy. The Petitioner adds that the reappointment ignored several issues raised by the 2nd Respondent.
7. It is the Petitioner's case that the aforesaid action by the 1st Respondent is in violation of Articles 10, 153 and 232 of the Constitution of Kenya, 2010.
8. Narrating the facts giving rise to this Petition, the Petitioner states that by letter dated 14th February 2014 addressed to all relevant state officers, the Chief of Staff and Head of Public Service clarified that the mandatory retirement age for public servants, with the exception of judges, academic staff in public universities, research scientists and public servants with disabilities, was sixty (60) years. The letter mandated principal secretaries to prepare a succession plan for offices whose holders were aged fifty

eight (58) years and above.

9. On 28th April 2015, the Chief of Staff and Head of Public Service wrote another letter to all cabinet secretaries and Secretary to the State Corporations Advisory Committee directing full implementation of and compliance with Executive Order No. 7 being; *Mwongozo: Code of Governance in the Appointment of Chairpersons, Board Members and Chief Executive Officers of State Corporations*.

10. By letter dated 28th May 2015 addressed to the 4th Respondent, the 2nd Respondent asked for renewal of his contract that was due to expire by 30th November 2015. This issue was discussed on 30th June 2015 at a full meeting of KIRDI. Six (6) out of thirteen (13) members, including the 4th Respondent attended this meeting.

11. On 1st July 2015, the 2nd Respondent wrote to the 1st Respondent objecting to renewal of the 4th Respondent's contract on the following grounds:

a. The extension was in total disregard of Executive Order No. 7 being *Mwongozo: Code of Governance for State Corporations* which limits the term of Directors to 2 terms of 3 years each;

b. The 4th Respondent was above the mandatory retirement age of 60 years;

c. The Board meeting that discussed the renewal was not quorate; the quorum ought to have been two thirds or 9 and not 6 members;

d. The request for renewal, having been received 5 months before expiry of the running contract, did not meet the 6 months' notice period as required;

e. The Director had failed to carry out his duties including; failure to convene senior management meetings for 2 years, allocation of funds to a non existent entity by the name KIRDI Enterprises, keeping some employees without clear terms of service and failing to notify the Board accordingly.

12. The Petitioner further states that while serving his 2nd term, the 4th Respondent had been interdicted for a period of one month for failure to account for earmarked funds.

13. The 1st Respondent responded to the concerns raised by the 2nd Respondent by his letter dated 14th July 2015. The Petitioner states that the 1st Respondent disregarded the concerns raised without assigning any reasons and proceeded to approve extension of the 4th Respondent's term for a period of one year.

14. On 20th July 2015, the 2nd Respondent wrote to the Chief of Staff and Head of Public Service reiterating his concerns.

15. The sequence of events was concluded by Gazette Notice No 8234 of 6th November 2015 by which the 1st Respondent re-appointed the 4th Respondent as Director for KIRDI for a period of one year effective 30th November 2015.

16. The Petitioner cites the following constitutional violations and breaches:

a. Failure by the 2nd Respondent to ensure that the Board conducted its meetings according to the law in violation of Article 10 on upholding the rule of law as a principle and value of good governance;

b. Failure by the 1st Respondent to adhere to the law and policy on appointment of Chief Executive Officers of State Corporations thus breaching Article 10 on upholding the rule of law as a principle and value of good governance;

c. Failure by the 1st Respondent to adhere to the law and policy on appointment of Chief Executive Officers of State Corporations in breach of Article 153;

d. Failure by the 1st Respondent to subject the appointment of the CEO to a competitive process thus compromising the principle of equal opportunities in violation of Article 232;

17. The Petitioner seeks the following reliefs:

a. A declaration that the Respondents have violated the principles enshrined in Articles 10 and 232 of the Constitution;

b. A declaration that the 1st Respondent did not act in accordance with the law as expected under Article 153 of the Constitution;

c. An order invalidating Gazette Notice No 8234 dated 6th November 2015 appearing in Vol CXVII-No 121;

d. An order awarding the costs of this Petition to the Petitioner.

The 1st and 3rd Respondents' Reply

18. The 1st and 2nd Respondents' Reply is contained in a replying affidavit sworn by the Cabinet Secretary, Ministry of Industrialisation and Enterprise Development, Adan Mohamed on 9th December 2015. The Cabinet Secretary depones that KIRDI is a State Corporation under his Ministry whose mandate includes research and development. He adds that since the Corporation is a research and development institute, its Chief Executive Officer must possess a PhD in Industrial Research.

19. Mohamed further depones that the 4th Respondent has served KIRDI professionally and diligently for 2 terms of 3 years each running from November 2009 to 30th November 2015. He goes on to state that the 4th Respondent by his letter dated 28th May 2015, applied to the Board of KIRDI through its Chairman for a one year extension of his contract.

20. At a meeting held on 30th June 2015, the Board of KIRDI resolved, with the Chairman dissenting, that the term of the 4th Respondent be extended and the resolution was communicated to the Cabinet Secretary's office. The Cabinet Secretary proceeded to gazette the re-appointment for a period of one year with effect from 30th November 2015.

21. According to the Cabinet Secretary, the retirement age of the CEO of KIRDI is not limited to 60 years as alleged by the Petitioner since he is a Research Scientist as envisaged in a circular dated 6th August 2003 enhancing the retirement age for all scientists working in research institutes and other related institutions to 65 years.

The 2nd Respondent's Reply

22. In a replying affidavit sworn by the 2nd Respondent, Nathan Psiwa on 15th January 2016, he depones that the decision to extend the term of the Director of KIRDI was made by the Board and although he personally opposed the extension, he was legally bound by the majority vote.

23. Psiwa further depones that he stands by the contents of his letter dated 1st July 2015 but recognises that he must subordinate his stand to the collective Board decision and the authority of the Cabinet Secretary. Psiwa believes that he is not properly joined in this Petition.

24. Significantly, the 2nd Respondent states that since the institution of this suit, the Board of Directors of KIRDI has not met to decide the course to take nor the legal position to adopt. He adds that the position espoused in the 5th Respondent's response is unilaterally taken by an alternate director and does not represent the Board position.

The 4th Respondent's Reply

25. The 4th Respondent, Dr. Mechah Charles Z. Moturi, adopted his affidavit sworn on 30th November 2015 as his Reply to the Petition. He depones that he was appointed to the position of Chief Executive Officer of KIRDI in 2009 initially for a term of 3 years which was extended for a similar term ending November 2012. Moturi states that his re-appointment which is the subject of this Petition was regular and legal.

26. Moturi states that he is a Research Scientist charged with the responsibility of initiating and coordinating industrial research and development activities at KIRDI. He cites his professional qualifications as; Higher National Diploma in Advanced Analytical Chemistry, Bsc in Chemistry, Msc in Analytical and Environmental Chemistry and PhD in Environmental Science. He adds that he has worked at KIRDI in various capacities for the last 34 years and has published in his area of expertise.

27. Moturi takes the position that by virtue of Article 1.1(4) of Executive Order No 7-*Mwongozo*, a Chief Executive Officer is a member of the Board. Further, Article 1.5 of *Mwongozo* gives the Cabinet Secretary authority to extend CEO's appointment for purposes of achieving continuity at board level.

The 5th Respondent's Reply

28. The 5th Respondent, KIRDI adopted the affidavit sworn by its Director, Nancy Muya on 1st December 2015 as its reply to the Petition. Muya depones that as a Research Scientist, the 4th Respondent fell within the exception to the directive that sets the retirement age at 60 years. She contests the Petitioner's averment that the 4th Respondent's request for extension of contract was not received within the stipulated time and that the Board meeting of 30th June 2015 which considered the request was not quorate.

29. With regard to the 4th Respondent's previous interdiction, Muya states that it was on account of failure to respond to queries raised on the construction of KIRDI Headquarters and not failure to account for funds. The interdiction was lifted once the response was received.

30. Muya supports the 4th Respondent's contention that under Clause 1.1(4) of *Mwongozo*, the Cabinet Secretary, being the appointing authority was well within his powers to extend the 4th Respondent's term for purposes of achieving continuity in the Board of KIRDI.

Findings and Determination

31. From the pleadings, supporting documents and submissions filed by the parties, I have distilled the following issues for determination in this Petition:

- a. Whether the reappointment process was lawful;
- b. Whether the 4th Respondent was eligible for reappointment;
- c. Whether the Board and the Cabinet Secretary acted within the law;
- d. Whether the Petitioner is entitled to the remedies sought.

The Reappointment Process: 4th Respondent's Request and Board Decision

32. On 28th May 2015, the 4th Respondent wrote to the Board of KIRDI through its Chairman requesting for extension of his contract. Both the Petitioner and the 2nd Respondent state that the request was not received until 10th June 2015. According to a government circular dated 23rd November 2010 which was produced by the 1st and 3rd Respondents, a Chief Executive Officer (CEO) of a State Corporation wishing to be re-appointed is required to indicate their interest at least six months before expiry of their term.

33. According to the evidence on record, the 4th Respondent wrote to the 2nd Respondent on 28th May 2015 seeking renewal of his contract. The letter was however received on 10th June 2015. It is the

Petitioner's and also the 2nd Respondent's case that the 4th Respondent's request was received late and therefore ought not to have been considered. The 1st, 3rd, 4th and 5th Respondents maintain that the operative date was the one appearing on the body of the letter.

34. My reading of the circular dated 23rd November 2010 is that a CEO wishing to apply for renewal of contract must write their request at least six months before expiry of the contract. The 4th Respondent wrote his request on 28th May 2015 but the request reached the Chairman of the Board on 10th June 2015. It would appear that there was some delay in delivery.

35. It is my view however, that a delay caused in the normal inter-office delivery of mail does not invalidate an otherwise competent application for renewal of contract. The Court therefore finds that the 4th Respondent's application for renewal of contract dated 28th May 2015 was properly before the Board of KIRDI notwithstanding the date of receipt by the 2nd Respondent.

36. The second procedural issue has to do with the quorum of the Board meeting that considered the 4th Respondent's application for renewal of contract. As per the minutes of the Board meeting held 30th June 2015 at which the issue was discussed, there were six (6) substantive Board members present, including the 4th Respondent. According to Clause 1.8.3 of *Mwongozo*, 'the quorum for Board meetings shall be five members where the total membership is eight to nine and four where the total membership is seven and below.'

37. The 5th Respondent presented a document dated 16th June 2015 showing the full Board of Directors consisting of ten members, including the Chief Executive Officer. The Court found no evidence to counter this position and consequently arrived at the conclusion that the 5th Respondent's Board was made up of nine substantive members and a meeting attended by five of those members was therefore quorate.

The 4th Respondent's Eligibility for Reappointment.

38. The first question under this head is whether the 4th Respondent was exempted from the 60 years retirement rule. It is not in contest that at the time he was re-appointed, the 4th Respondent had passed the retirement age of 60 years. The question is whether he was exempted from this limitation. According to the Petitioner and the 2nd Respondent, being 62 years, the 4th Respondent was not eligible for re-appointment.

39. The 1st, 3rd, 4th and 5th Respondents on the other hand maintain that being a Research Scientist, the 4th Respondent was not confined by the 60 years retirement requirement. In this regard, the Court was referred to a circular dated 6th August 2003.

40. This circular addressed to all Accounting Officers by the then Head of Public Service and Secretary to the Cabinet states as follows:

“REVIEW OF THE RETIREMENT AGE FOR RESEARCH SCIENTISTS IN THE RESEARCH INSTITUTES AND OTHER RELATED INSTITUTIONS

It has come to the attention of Government that, there has recently been an exodus of research scientists from the research institutes to public universities due to a number of factors including the fact that public universities have an enhanced retirement age. As a consequence this office has been receiving requests for enhancement of the retirement age for research scientists working in research institutes and other related institutions.

In order to ensure parity of treatment between scientists working in public universities and those working in research institutes and to stabilize the retention of research scientists, it has been decided that the current compulsory retirement of 55 years for scientists in research institutes be enhanced to 65 years and that voluntary retirement be increased from 50 to 55 years.

You are therefore required to ensure that all research institutes falling under your Ministry implement the above decision with effect from 1st July 2003.

AMB FRANCIS MUTHAURA, MBS”

41. The question before the Court is whether the position of CEO falls within the category of Research Scientists contemplated for exemption from the 60 years retirement rule. The argument by the 1st, 3rd, 4th and 5th Respondents is that since the 4th Respondent holds the qualifications of a Research Scientist and he heads a research institute, then he qualifies for exemption from the 60 years retirement rule.

42. To answer this question, one must ask yet another question; what is the core business of the CEO for KIRDI? According to Clause 1.19 of *Mwongozo*, the role of the CEO of a State Corporation, such as KIRDI is to provide managerial leadership, oversee day to day operations and provide a critical link between the Management and the Board. To my mind the intention of Government in issuing the circular dated 6th August 2003 was to retain Research Scientists actively engaged in research work. I do not think that this circular was intended to retain CEOs engaged in management and administrative work in the target institutes. I must add that the fact that the CEOs also hold the qualifications of a Research Scientists does not secure their management and administrative positions beyond the retirement age.

43. Having said so, I must rule that by the time of the re-appointment in issue, the 4th Respondent who had passed the retirement age of 60 years was not an eligible candidate for re-appointment as CEO, which is a distinct administrative position. I need to add that nothing bars the 4th Respondent from candidating for a research role as provided under Government circular dated 14th May 2015, which he himself produced.

44. A related issue is whether having served two terms of three years each, the 4th Respondent could get a further extension of his contract. Attachment I to *Mwongozo* provides the tenure of the CEO as:

- a. Three year term or as otherwise provided under any written law;
- b. Renewable once subject to performance evaluated by the Board.

45. The Court was referred to Clause 1.5 of *Mwongozo* on term limits for Board members. Under this Clause, the appointing authority was given some leeway at the first implementation of *Mwongozo* to extend the term of one third of the members of the Board in order to achieve continuity.

46. Having looked at this Clause alongside other provisions in the policy document, I do not think it can be legitimately applied to a CEO. I say so for two reasons; first, under Clause 1.1.4, the CEO though a member of the Board, has no voting rights. Second, the appointment of the CEO is provided for under a separate clause and it could not therefore have been the intention of the drafters of the policy document to mix the appointment of the CEO with other Board members. At any rate, the CEO is an employee and is only a member of the Board by virtue of office.

Board and Cabinet Secretary's Actions

47. My final task in this Judgment is to examine the actions by the Board and the Cabinet Secretary for constitutionality and legality. The Petitioner pleads that by re-appointing the 4th Respondent, both the Board and the Cabinet Secretary violated Articles 10, 153 and 232 of the Constitution.

48. Article 10 sets out national values and principles of governance including equity and good governance while Article 232 sets out the values and principles of public service including fair competition, merit and equal opportunities for public appointments. Article 153(4) requires Cabinet Secretaries to act in accordance with the Constitution.

49. In *Anne Kinyua v Nyayo Tea Zone Development Corporation & 3 Others [2012] eKLR Aboudha J* held that renewal of appointments in the public service ought to be in accordance with the values and principles of public service enshrined in the Constitution.

50. The Petitioner states that the 4th Respondent's re-appointment ignored the above cited values especially because the process was not competitive. The answer by the 1st, 3rd, 4th and 5th Respondents is that since the 4th Respondent's initial appointment was by a competitive process, the renewal did not require such a process.

51. In this regard, the Court was referred to *Republic v Cabinet Secretary for Education, Science & Technology & 3 Others [2014] EKLK* where **Korir J** stated the following:

“I do not think that the drafters of the Constitution expected that any person eligible for re-appointment 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 re-appointment 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.”

52. I agree with the holding by **Korir J**. However, this ratio is only applicable where the candidate is eligible for re-appointment by virtue of law and past satisfactory performance. It cannot be used to cure an otherwise flawed re-appointment. I have already stated that the 4th Respondent was not a competent candidate for re-appointment, based on law and regulation.

53. With regard to his past performance, both sides made general comments that were largely unsupported by evidence.

54. Clause 1.18 of *Mwongozo* lays the following responsibilities on the Board:

- a. Appoint and remove the CEO.
- b. Ensure that the CEO is recruited through a competitive process.
- c. Ensure that the CEO possesses the minimum qualifications and experience set out in Attachment I.
- d. Define and approve authority levels for the CEO.
- e. Set the performance targets of the CEO.
- f. Ensure that it has put in place a succession plan for the CEO and other senior management staff.

55. Attachment I itself enjoins the Board to manage the performance of the CEO. No evidence was produced to show any efforts by the Board to manage the 4th Respondent's performance or to put in place a succession plan for KIRDI. In fact, this lapse was urged by the 1st, 3rd and 5th Respondents as a justification for the impugned renewal of term.

56. This is an indictment on the Board of KIRDI, which having failed to discharge its mandate is asking the Court to perpetuate this failure by confirming an illegal re-appointment of the CEO because there is a crisis at KIRDI. This Court will not confirm an unlawful action just because a gap has been created. Boards of public bodies must be held accountable for their acts of omission and commission.

57. Having found fault with the action by the Board, I must also fault the action by the Cabinet Secretary who endorsed the decision by the Board and went ahead to gazette the re-appointment in issue.

Remedies

58. Before signing off this Judgment, I need to deal with an issue raised by Counsel for the 1st and 3rd Respondents on the admissibility of some of the documents produced by the Petitioner. Counsel took issue with production of internal confidential documents belonging to the 5th Respondent whose source was not disclosed.

59. This is a valid concern. We now have a Constitution that allows parties to access documents necessary for their case through legal means and there is therefore no need to resort to street methods in this regard. As held by **Lenaola J** in **Okiya Omtatah Okiiti & 2 Others v Attorney General & 3 Others [2014] eKLR** a court of law will not rely on documents that are improperly obtained. Consequently, in reaching my decision in this matter, I have chosen to rely only on those documents that are in the public domain or those produced by the authorised custodians if restricted.

60. In the final analysis, I find for the Petitioner and proceed to make the following orders:

- a. The re-appointment of Mechah Charles Z. Moturi (Dr) as the Director of the Kenya Industrial Research and Development Institute for a period of one (1) year with effect from 30th November 2015 is hereby nullified;
- b. Gazette Notice No 8234 dated 4th November 2015 is hereby quashed.
- c. Each party will bear their own costs.

61. These are the orders of the Court.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 5TH DAY OF FEBRUARY 2016

LINNET NDOLO

JUDGE

Appearance:

Mr. Kanyonge for the Petitioner

Ms. Kamande for the 1st and 3rd Respondents

Mr. Koyyoko for the 2nd Respondent

Mr. Omariba for the 4th Respondent

Mr. Gitonga for the 5th Respondent