REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

CAUSE NUMBER 1065 0F 2012

DR ANNE KINYUA..... CLAIMANT/APPLICANT

vs

NYAYO TEA ZONE DEVELOPMNET CORPORATION..... 1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL..... 2ND RESPONDENT

DR. ROMANO KIOME, CBS.....3RD RESPONDENT

THE PERMANENT SECRETARY

MINISTRY OF AGRICULTURE..... 3RD RESPONDENT

RULING

By a Notice of Motion dated 21st June, 2012 filed concurrently with a memorandum of claim and brought under certificate of urgency, the claimant/applicant sought among others, orders that:

1. Pending the hearing and determination of the application the Honourable Court be pleased to issue an interim order of injunction to restrain the Minister for Agriculture from appointing and/or gazetting such appointment of any person recruited by the first respondent's Board to replace the Claimant as the Managing Director of the first respondent.

2. Pending the hearing and determination of this suit the Honourable Court be pleased to issue an order of injunction to restrain the Minister of Agriculture from appointing and/or gazetting such appointment of any person recruited by the first respondent's Board to replace the Claimant as the Managing Director of the first respondent.

3. Pending the hearing and determination of the application an order of injunction be issued to restrain any other person recruited by the first respondent's Board, appointed and/or gazetted by the Minister to replace the claimant as the Managing Director of the first respondent from assuming, taking office or performing the duties of the Corporation's Managing Director.

4. Pending the hearing and determination of this suit the Honourable Court be pleased to reinstate the claimant as the Managing Director of the first respondent.

The motion was supported by the claimant's affidavit sworn on 21st June, 2012. She stated that she was first appointed to the position of the 1st Respondent's MD on 18th June, 2003 and subsequently reappointed for further terms of 3 years the last appointment being in 2009 which expired on 18th June,

2012.

It is the claimant's deposition that her re-appointment to serve a third term was informed among others by the exemplary performance of the Corporation during her tenure. She evinced her wish to be reappointed for the 4th term by a letter dated 29th November, 2011 as consequence of which the Board held a special meeting on 14th December, 2011 for purposes of evaluating her performance for purposes of recommending her reappointment. At the end of the meeting, she depones, the Board by a letter dated 19th December, 2011 informed the Ministry of their decision to renew her contract and sought the Ministry's approval of the same. She however lamented that by a letter dated 2nd May, 2012 the 3rd Respondent informed the Corporation's Board that it was recommended that her term should not be renewed because she had already served three consecutive terms as the Managing Director and so in accordance with good management practice she ought not to be reappointed.

The claimant has further deposed that the decision by the Board to accede to the recommendation of the Ministry was unlawful and unjust because as an autonomous Board vested with power to renew appointments, it was enjoined to follow the law and reject recommendations lacking basis in law. She further referred to a letter dated 9th May, 2008 addressed to all Permanent Secretaries from the the Head of Public Service which underscored the fact that under the Guidelines running contracts for CEOs of State Corporations were renewable on the basis of good performance determined through appraisal by the Board. She further referred to another letter from the Head of Public Service dated 23rd November, 2010 again addressed to all Permanent Secretaries, the Attorney General, and the Controller and Auditor General setting out the procedure for reappointment of service chief executives officers in State Corporations. Specifically the letter stated that the position of the CEOs shall only be declared vacant only when the Board of Directors has no intention to renew the appointment of the incumbent for a further term.

On the other hand, the 3rd respondent in his affidavit in opposition to the respondent's application has deposed that the Guidelines on Terms and Conditions of Service for State Corporations, Executive Officers, Chairmen and Board Members Management Staff and Unionizable Staff (The Guidelines) clearly stated at section 15 that appointments of Chief Executive Officers should be competitive. He further stated that when the Board of Directors proposed to have the term of the claimant renewed for another fourth term, they had not followed the requirements of section 15 of the aforesaid Guidelines by failing to create a competitive forum especially since the Claimant had already served in the same capacity for 3 terms. And that when the Board of Directors proposed to have the term of the claimant renewed for another term, they were purporting to create security of tenure meaning that the claimant could also be reappointed for a fifth and sixth term if she applied in future.

The 3rd respondent further deposed that in his letter in response to the one written by the Acting Head of Public Service, he explained to him that it has been the practice of the Ministry not to renew tenures of Directors beyond a third term as a good practice of corporate governance, best international corporate governance practice and in accordance with the Constitution of Kenya, 2010. He further stated that on appointments of that nature the authority is vested entirely on the Minister for the time being responsible for the 1st respondent and therefore the decision by the Ministry to proceed with competitive recruitment of the Managing Director of the 1st Respondent was not in any way insubordination of the acting Head of Public Service.

The 3rd Respondent further deposed that the decision to proceed with competitive recruitment was informed by section 15 of the Guidelines, article 232(g) (h) and (i) of the Constitution that provide for values and principles of public service which include fair competition and merit as a basis for appointment. The article further allows representation of members of diverse communities to apply for the job as well as men and women and also persons with disabilities to also apply and compete for the job.

Counsel for the applicant Mr. Kibe Mungai appeared before Hon. Justice Kosgey of the former Industrial Court on 22nd June, 2012 *ex parte* and that Court upon hearing counsel was persuaded and granted an order restraining the Minister for Agriculture from appointing or gazetting the appointment of any person

as the Managing Director of the first respondent, that Court further restrained any person so appointed from assuming duties as the Managing Director of the first respondent pending the determination of the application.

When the application came before me for *inter partes* hearing on 24th October, 2012 Mr. Kibe Mungai vehemently urged me to confirm the interim orders pending the determination of the claim herein. However Mr. Cecil Miller who appeared together with his assistant Mr. Onyango indicated to the Court that he had a preliminary objection to raise. I however directed that the preliminary objection be taken together with his objection to the application and that I would consider the preliminary objection and if successful would stop there.

Mr Kibe then proceeded to argue his application which he stated was brought under section 12 of the Industrial Court Act. Under this section he argued, the Court has power to issue conservatory, prohibitory and reinstatement orders. He submitted that under this section the Industrial Court has a clearly different jurisdiction from the customary jurisdiction of the High Court. In this respect he submitted that damages is not the only remedy the Court can grant.

Counsel submitted that the claimant seeks in the main orders for specific performance and reinstatement. She challenges the process of her replacement and argued that the Court would not be able to make an order for reinstatement if the prevailing status quo is not preserved. According to Counsel any subsequent declaration of illegality will be useless if the injunction is discharged. It is for this reason that he submitted that the Court should ensure that the matter is determined effectively and in accordance with the Constitution.

Mr. Kibe stated that the legal justification for his application rests on five grounds. First, by a letter dated 19th December, 2011 (AKK 4), the Board of the 1st respondent made a decision to renew the contract of the claimant for a further term of three years. Counsel submitted that the substantive right to renew the contracts for heads of corporations is conferred on the Boards by the State Corporation's Act. It was Mr. Mungai's contention that the decision to renew her contract having been made the claimant had a legitimate expectation that the Minister would formally gazette her renewal of appointment.

Regarding the letter by the Permanent Secretary's (PS) in response to the Board's recommendation for renewal of the claimant's contract (AKK 6), counsel submitted that the PS had no legal basis to make the recommendation he did to the Board and that the Board became *functus officio* immediately it made recommendation for the renewal of the claimant's appointment. The PS letter, it was argued is liable to be quashed by the Court and pending such quashing the Court has power to issue injunction.

Counsel submitted that the reason's given for getting the claimant out of office are not justifiable and not founded on any law. According to Mr. Mungai, renewal of contracts is based on performance which is evinced through performance contracting administered by the Prime Minister's office. Hence Mr. Mungai submitted, the Board could not have recommended renewal if the claimant was not suitable.

In seeking to demonstrate the claimant's performance, Counsel informed the Court that the 1st respondent under the claimant's leadership received Presidential Award twice and as a woman this was very commendable and it would thus be unfair if she was locked out in the light of her achievement. According to Mr. Mungai, the Constitution protects merit in public service and that the removal should be on good cause. In this respect, the Head of Public Service and Secretary to the cabinet communicated to the PS Agriculture telling the latter that it was the Government's position that the claimant's contract be renewed.

Counsel contended that under section 7 of the State Corporation's Act, the President has power to give direction on matters relating to State Corporations and where the President has exercised this power there can be no basis for non-compliance. Mr. Mungai was therefore of the view that refusal by the 2nd and 3rd respondent to renew the claimant's appointment therefore amounted to insubordination of the President.

Regarding the Constitutionality of the matter Counsel submitted that two issues arose. First was the issue of fairness of the process in light of article 27, 47 and 50 of the Constitution.

Under article 27, it would be discriminatory if the PS would use the claimant's previous good record to disqualify her. Under article 47, Counsel submitted the claimant is entitled to fair administrative justice where a decision is being made that affects her fundamental rights. She was, according to Counsel, entitled to be given reasons for non-renewal of her contract. The decision by the PS in the above context breaches article 47 of the Constitution.

Concerning article 50 of the Constitution, Counsel submitted that where a legal dispute has arisen, it should be resolved by a Court of competent jurisdiction therefore the PS ought to have moved to Court in that regard. The PS, Mr. Mungai argued, could not on his own motion take a position without the Court's intervention. In that regard he submitted, the Court has a reason to declare the action of the respondents lacking in constitutionality. Mr. Mungai further drew the Court's attention to articles 73(2)(c) and (d) of the Constitution and submitted that there has to be accountability for decisions of public officers. In his view the PS did not act in an accountable manner in negating the Board's decision. Further, according to Counsel, article 232(1)(e) of the Constitution regarding values and principles of public service requires fair competition, merit on appointments and transparency.

Mr Mungai concluded by submitting that the claimant has made a *prima facie* case meriting the confirmation of the interim orders.

Mr Miller for the 1st Respondent opposed the application and arguing that the application and the claim is defective in law. According to Counsel section 12 of the Industrial Court Act defines the jurisdiction of the Court and who qualifies to move the Court and the claimant did not fall under the categories given under section 12.

Counsel submitted that the claimant's contract expired on 18th June, 2012 so on 22nd June, 2012 when the orders were issued she was no longer an employee of the 1st Respondent hence the Industrial Court Act did not apply to her. On this ground Counsel argued, the Court lacked jurisdiction. Counsel further submitted that the claimant's contract having expired on 18th June, 2012 there was nothing to preserve by the time the orders were issued on 22nd June, 2012 and that the purpose of the injunction was to prevent the gazettement of her successor.

Mr. Miller submitted that if there is any wrong done to the claimant the same could be compensated for by an award of damages. According to Counsel, the granting of an injunction was extreme.

On the suit, Counsel submitted that the claim was defective since notice of intention to commence proceedings against the Government was not issued prior to the commencement of the action as required by section 13A of the Government Proceedings Act. Concerning, the injunction counsel submitted that this does not lie against the Government nor an order for specific performance.

On jurisdiction counsel submitted that issue raised by the claimant ought to determined by the Constitution and Judicial Review division of the High Court and that this court lacked jurisdiction to hear them.

Mr. Miller submitted that if 18th June, 2012 is taken as the date of expiry of the claimant's contract, the reinstatement cannot arise as the position had already been advertised , people applied and were interviewed. The applicant never applied though she was aware of the advertisement. Counsel therefore submitted that the contract having expired, there cannot be an order for specific performance and the injunction had therefore been overtaken by events. According to Counsel, the injunction purports to maintain a status quo that did not exist at the time it was issued.

On the issue of the status of the Board after recommendation for renewal of the claimant's contract as *functus officio,* Mr. Miller submitted that the request for approval by the PS meant that under no circumstance could the Board be said to be *functus officio* as they were awaiting approval by the PS.

According to Counsel the PS Agriculture in his response declined to confirm the renewal of the claimant's contract and assigned reasons therefor. There was in the circumstances no insubordination by either the

PS or the Minister or the Corporation. Counsel further contended that the Ministry has supervisory role over 31 corporations and the 1st Respondent was one of them. According to him no allegation has been made on the claimant's conduct or good performance. The issue was good corporate management practice the basis of which is founded on article 232(i) of the Constitution which provides for equal opportunity to all in public appointments.

According to Counsel, the claimant was appointed for the first time in 2003 for a term of 3 years which was renewed in 2006 and 2009 for further terms of three years. Her bid for reappointment after the expiry of her term would have been the fourth appointment. Counsel submitted that in the spirit of the new Constitution every public office has a limit in the number of times one can serve. He stated that for purposes of good governance others should also be given an opportunity to serve.

Miss Kahara for the Attorney General while associating with Mr. Miller's submissions added that if it was the intention of the section 5(3) of the State Corporation's Act that the decision of the Board would be final it would have been expressly provided and that the Board did not have to consult the Minister.

According to her, the Guidelines for recruitment of Board Chairmen, Board Members and Chief Executive Officers in State Corporations required competitive selection by the Board or reputable selection agencies and in both cases the process should select the best three and submit the names to the Minister for appointment of one of them. She therefore submitted that the Minister was the appointing authority for CEO's of State Corporations. The decision by the PS and the Minister not to reappoint the claimant was therefore not illegal in any way. In her view the letter by the PS Office of the President amounted to interfering with the authority of the Minister. According to her section 7 of the State Corporations Act does not guide the letter by the PS Office of the President. That section according to her requires the memorandum and articles of association of the corporation concerned to be amended to conform with the directives from the President. She submitted the memorandum and articles of association of the 1st Respondent have not been amended in that regard. Therefore the decision by the PS Agriculture was legal, she submitted.

With regard to the Constitution, she submitted that article 232 of the Constitution requires equal opportunity in public appointments and that there was nothing at all to show that the claimant was the only person competent to hold the office of the CEO of the 1st Respondent. Counsel pointed out that in paragraph 5 of the claimant's affidavit, she showed that the procedure used in evaluating her was wanting. She relied on paragraphs 25 of the 2nd and 3rd respondent's affidavit and paragraph 26 (annex RMK 2) to show that the evaluation criteria was wanting. She thus submitted that since the Ministry had found the criteria wanting, it could not be relied on to recommend the claimant's reappointment.

In reply Mr. Mungai reiterated that this Court has jurisdiction to hear and grant the prayers sought. Regarding the Government Proceedings Act he submitted that by logic of the Constitution and section 12 of the Industrial Court Act, the right of equality has been preserved and the requirements of section 13A of Government Proceedings Act does not conform with the Constitution as the constitution requires equality of all litigants. He submitted that section 7(1) of the 6th Schedule to the constitution prohibits application of section 13(A) of the Government Proceedings Act. He further submitted that no urgency would demonstrated if one were required to give notice first as required by the Government Proceedings Act.

Mr Mungai drew the attention of the Court to annexture AKK 8 to the memorandum of claim at page 35 and submitted that the CEO's position was to be declared vacant if the Board decides so or the incumbent is not interested. However in this case the claimant had shown interest to be reappointed and an appraisal was done and the Board made a decision. Therefore according to Counsel the claimant was entitled the position in accordance with the guidelines.

In order to reach a decision on whether to confirm or discharge the interlocutory injunction the Court will albeit guardedly, attempt an analysis of the case in the context of the now well settled principles in *Giella v. Cassman* Brown and *American Cynamid v. Ethicon.* The merit or otherwise of this claim will be subject of the main trial.

To do this,the Court will interrogate the legality or otherwise of the recommendation by the Ministry that the claimant's contract should not be renewed as communicated vide the letter dated 2nd May, 2012 against the earlier Board's recommendation that it be done. In this regard the Court will undertake an analysis of the role of the Board vis-a-vis the role of the Minister and the PS in appointment of 1st respondent's CEO. As a corollary the Court will also seek to understand the role conferred on the President by section 5(3) and 7 of the State Corporation's Act in order to determine if the powers conferred by this section are overarching to those of the Minister on appointment of heads of parastatals.

Second the Court will undertake an analysis of the provisions of the Guidelines on Terms and Conditions of Service for State Corporations, Executive Officers, Chairmen and Board Members Management Staff and Unionizable Staff, various letters by the Head of the Public Service exhibited before the Court and seek to interpret their true meaning and effect in the context of the various provisions of the Constitution referred by Counsel during their submissions before me. In conclusion the Court will reach a decision whether this is a proper case for interlocutory injunction generally and specifically in the context of section 49 of the Employment Act, 2007.

However before this is done, the Court must resolve the issue of jurisdiction raised by Mr. Miller for the 1st Respondent. Mr Miller contended that the jurisdiction of this Court is delimited by section 12 of the Industrial Court Act and the issues sought by the claimant being constitutional in nature, the same are within the exclusive jurisdiction of the Judicial Review and Constitutional Division of the High Court.

The question of jurisdiction whenever raised, the Court must inquire into it and make a determination *in limine* since a court that entertains a matter in respect of which it has no jurisdiction is not only a busy body but erodes its authority by trying issues it lacks the competence to try.

In the case of **The Owners of the Motor Vessel "Lillian S" v. Caltex Oil (Kenya)Ltd [1989 KLR 1** at pp. 14-15, Nyarangi J stated:

> "Jurisdiction is everything, without it, a court has no power to make one more step. Where a Court has no jurisdiction there would be no basis for continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

The Court either on its own motion or on being moved by a party must as preliminary inquire into the question of jurisdiction and decide it before anything else. The seriousness of the issue of jurisdiction is founded on the fact that as a High Court, the Court has Original and unlimited jurisdiction to determine any question properly brought before it and any challenge on its authority to do so must be thoroughly inquired into and resolved.

Article 162 of the Constitution provides as follows:

> (1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts mentioned in clause (2).
>
> (2) Parliament shall establish courts with the status of the High
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> Court to hear and determine disputes relating to—
>
> (a) employment and labour relations; and
>
> (b) the environment and the use and occupation of, and title
>
> to, land.
>
> (3) Parliament shall determine the jurisdiction and functions of

the courts contemplated in clause (2).

Industrial Court as one of the Courts contemplated by article 162(2) is a Superior Court just like its counterpart, Environment and Land Court. Both have the same status as the High Court.

Under article 162(3) of the Constitution, Parliament has been empowered to determine the jurisdiction of and functions of the Industrial Court and Environment and Land Court. This has been done through the enactment of the Industrial Court Act, 2011 and Environment and Land Court Act, 2011.

Under article 165(5) of the Constitution, the High Court has been deprived of jurisdiction to hear any matter reserved for the exclusive jurisdiction of the Supreme Court or falling within the jurisdiction of the Courts contemplated in article 162(2).

The jurisdiction of the Industrial Court is donated by section 12 of the Industrial Court Act, 2011 which provides:

> **12.** (1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including—
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> (*a*) disputes relating to or arising out of employment between an employer and an employee;
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> (*b*) disputes between an employer and a trade union;
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> (*c*) disputes between an employers' organisation and a trade unions organisation;
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> (*d*) disputes between trade unions;
>
> (*e*) disputes between employer organizations;
>
> (*f*) disputes between an employers' organisation and a trade union;
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> (*g*) disputes between a trade union and a member thereof;
>
> (*h*) disputes between an employer's organisation or a federation and a member thereof;
>
> (*i*) disputes concerning the registration and election of trade union officials; and
>
> (*j*) disputes relating to the registration and enforcement of collective agreements.

Both the Constitution (article 162(2)) and Industrial Court Act 2012 use the phrase "...disputes relating to..". A dispute is a disagreement or argument between two or more people. To relate to something is to have a connection. To this extent the Constitution and the Industrial Court Act has given the Industrial Court original and exclusive jurisdiction to hear and determine disputes relating to employment and labour relations. What this means is that any dispute regardless of its nature which arises in the context of employment and labour relations is within the exclusive mandate of the Industrial Court.

A claim that a fundamental right under the Constitution has been violated or fair administrative procedure has not been followed in the course of employer-employee relationship is a dispute relating to employment and labour relations hence within the jurisdiction of the Industrial Court.

Whereas article 165(3) gives the High Court jurisdiction among others to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened, this jurisdiction is subject to sub article 5 of article 165 that states that the High Court shall not have

jurisdiction in respect of matters falling within the jurisdiction of the Courts contemplated under article 162(2).

Justice Majanja in the case of **United States International University v. The AG and 2 Others Petition No. 170 of 2012** stated:

> "...Labour and employment rights are part of the Bill of Rights and are protected under article 41 which is within the province of the Industrial Court. To exclude the jurisdiction of the Industrial Court from dealing with any other rights and fundamental freedoms howsoever arising from relationships defined in section 12 of the Industrial Court Act, 2011 or to interpret the Constitution would lead to a situation where there is parallel jurisdiction between the High Court and the Industrial Court..."

In light of the requirement that the issue of jurisdiction be disposed of *in limine,* I believe I have sufficiently reviewed the law and the Constitution and I am persuaded that this Court has the jurisdiction to entertain the disputes framed by the claimant. The objection by the first respondent on the jurisdiction of the Court therefore fails.

On the issue of issuance of notice of intention to sue the Government as required by section 13A of the Government Proceedings Act the Court is of view that this section in no longer tenable in context of the new Constitution and the Attorney General and Law Reform Commission need to take cue and propose to Parliament its repeal or amendment to align with the Constitution. The reason I say this is that under article 23(3) of the Constitution injunction lies against the Government and this includes interlocutory injunctions which are traditionally issued in situations of urgency where a right is threatened. To require a party to give a thirty days notice in such circumstances is not only unrealistic but runs against the principle of access to justice enshrined in the Constitution. In any event article 159(1)(d) enjoins the Court while exercising Judicial authority to do so without undue regard to

procedural technicalities. In this context the Court will *"read in"* the waiver of requirement of notice of intention to sue the Government in urgent cases as if it was a proviso to that section especially where the urgency touches on breach of fundamental rights and freedoms as alleged by the applicant.

As stated earlier in this ruling, in order to reach a decision on whether to confirm or discharge the interlocutory injunction the Court will albeit guardedly, attempt an analysis of the case in the context of the now well settled principles in *Giella v. Cassman* Brown and *American Cynamid v. Ethicon.* The merit or otherwise of this claim will be subject of the main trial.

The principles set out in the *Giella v. Cassman Brown* case are that for an applicant to be entitled to an injunction he or she must first of all demonstrate that there is a *prima facie* case with probability of success. Once this is done, the next test is to satisfy the Court that damages would not be an adequate remedy if the claim ultimately succeeds. However in the event that the Court is in doubt concerning the two limbs the Court will decide the matter on a balance of convenience.

In undertaking these tests the Court will look at the pleadings filed and affidavits in support of the application together with the supporting exhibits. The exercise borders on some sort of a mini-trial of the suit. It is a very delicate balancing act where on the one hand the Court must not appear to be making conclusive findings based on untested affidavit evidence at the same time the Court must form a preliminary opinion on the arguability or otherwise of the claim.

In the *American Cyanamid* case Lord Diplock observed as follows:

> "...when an application for an interlocutory injunction to restrain a defendant from doing acts alleged to be in violation of the plaintiff's legal right is made upon contested facts, the decision whether or not to grant an interlocutory injunction has to be taken at a time when *ex hypothesi* the existence of the right or the violation of it, or both, is uncertain and will remain uncertain until final judgment is given in the action. It was to mitigate

> the risk of injustice to the plaintiff during the period before that uncertainty could be resolved that the practice arose of granting him relief by way of interlocutory injunction ; but since the middle of the nineteenth century this has been made subject to his undertaking to pay damages to the defendant for any loss sustained by reason of the injunction if it should be held at the trial that the plaintiff had not been entitled to restrain the defendant from doing what he was threatening to do. The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial. The Court must weigh one need against another and determine where " the balance of " convenience " lies...”

With regard to employment cases, the employee seeking relief will in addition to the general principles for grant of injunction demonstrate that on the evidence the respondent has not shown that the claimant 'has no reasonable prospect of succeeding at trial' in being granted a final injunction , second that injunctions can be granted to restrain dismissals as can declarations that acts of purported dismissal are invalid. Thirdly that sufficient relevant confidence subsists between the employer and the employee and finally that the claimant has not accepted the alleged repudiation of contract.

It is the applicants contention that having evinced her wish to be reappointed upon the expiry of her contract and 1st Respondent's Board having recommended her appointment to the Minister, the advisory by the 3rd Respondent to the effect that having been reappointed three times before, her contract should not be renewed was illegal. The claimant therefore in main suit seeks a declaration of the illegality of the letter by the 3rd Respondent, a declaration that the 1st Respondent's Board contravened section 5(3) of the State Corporation's Act and Regulation 4(2) of State Corporations (Performance Contracting) Regulations, 2004, a declaration that the 1st and 3rd respondent violated articles 10, 27, 47, 73 and 232 of the Constitution in rescinding , terminating or reversing the 1st Respondent's Board decision to renew her contract. She further seeks an order of certiorari to issue and bring the decision of the 3rd respondent contained in a letter dated 2nd May, 2012 and that of the 1st respondent's Board contained in a letter dated 14th May, 2012 to the Court for purposes of quashing. She also seeks an order for specific performance to issue to the Minister for Agriculture to gazette her re-appointment as the Managing Director of the 1st Respondent. She further seeks an order for her reinstatement as the Managing Director of the 1st respondent.

It is not in dispute that the applicant had served three previous terms and her bid to be reappointed upon the expiry of her contract on 18th June, 2012 was if done, be the fourth appointment. It is also undisputed that by the time the claimant had come to court, her contract had expired. The question that arises and which would be delved into deeper at the trial is whether the recommendation for appointment by the 1st respondent's Board was the actual appointment and Minister's and the PS role were merely to gazette the recommendation.

Concerning section 5(3) of the State Corporation's Act which the applicant contends has been breached by the 1st and 3rd Respondent, the section provides that a state corporation may engage and employ such number of staff, including the chief executive, on such terms and conditions of service as the Minister may, in consultation with the Committee, approve.

Regulation 4(2) of the State Corporations (Performance Contracting) Regulations, 2004 gives the Board's of Corporations power to among other things recruit staff including the Chief Executive Officer of the Corporation. The regulations are however silent on the procedure for such recruitment. Section 5(3) of the parent Act may however shed some light on the process. It provides that staff including the CEO shall be recruited by the corporation on such terms and conditions of service as the Minister may in consultation with the Committee approve. This section implies that the hiring and the setting of terms and conditions of service is a consultative process between the Committee (read the Board) and the Minister. It however gives the Minister the power of approval subject to consultation with the Committee.

The letter dated 19th December, 2012 (AKK4) recommending the reappointment of the applicant read in the relevant part as follows:

> "...therefore the purpose of this letter is to inform you and request the Ministry to approve the Board's decision..."

Further Mr. Kipkorir arap Sang who signed the letter in issue deposes at paragraphs 26 of his affidavit sworn on 4th July, 2012 in the material part as follows:

> "...the Board as alleged in paragraph 7, had not reached a conclusive decision on whether to renew the claimant's/applicant's contract or not but was still consulting the Permanent Secretary as a member of the Board of the 1st Respondent..."

It is in the foregoing context that the Court is of the view that the decision to reappoint the applicant or not was not within the exclusive authority of the Board so that the Ministry was bound to accept any recommendation for appointment the Board made. This finding is further buttressed by the provisions of section 4 of the Act which provides that the President shall assign ministerial responsibility for any state corporation and matters relating thereto to the Vice-President and the several Ministers as the President may by directions in writing determine.

An assignment of responsibility is the conferment of authority and overall supervision. Ministers are members of the cabinet which the President chairs. They are accountable to him as the appointing authority over affairs and the running of the Ministries and corporations under their docket. It would therefore be untenable to have a scenario where the Ministers have no role at all on how CEOs and senior officials of the Ministry and parastatals under them are appointed or removed.

Regarding the Guidelines on Terms and Conditions of Service for State Corporations, Executive Officers, Chairmen and Board Members Management Staff and Unionizable Staff, these were issued on 24th November, 2004 during the applicant's first tenure.

Clause 15 provides:

> "...In order to attract persons of sound background with the relevant skills and experience which each State Corporation requires to manage its business efficiently and effectively, Boards are advised that henceforth new appointments of Chief Executives should be competitive. The recruitment process should involve a careful preparation of a job description and job requirements which include job and person specifications. The shortlisting and interview process should be transparent based on a verifiable recruitment procedure approved by the Board.

The provisions of the above Guidelines were reiterated by the letter dated 9th May, 2008, however concerning serving CEO's the this letter stated:

> "...under the guidelines the running contracts for the Chief Executive Officers (CEOs) are renewable on basis of good performance determined through appraisal by the Board. A CEO's position will be declared vacant only if the Board does not intend to renew the contract or the CEO is not interested in the renewal. In the event that there is intention on the part of the CEO to continue then the procedure laid down in item 6 page 50 of the Guidelines will be followed by the Board..."

The Court did not have the benefit of perusing item 6 page 50 referred in this letter since it was not among the bundle of documents before the Court. However a further letter dated 23rd November, 2010 shed more light on the possible content of item 6 page 50 of the Guidelines. This letter provides in the relevant part that:

> a) the CEO wishing to be reappointed will indicate interest by writing to the Board at least six

months before expiry of his/her term.

b) The Board will evaluate the performance of the CEO and make a report to the appointing authority with a recommendation on either renewal or termination of the contract upon expiry.

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

d) ….....

For avoidance of doubt, the position of Chief Executive Officers shall be declared vacant only when the Board of Directors has no intention to renew the appointment of the incumbent for a further term.

The 1st Respondent's Board had recommended the renewal of the claimant's contract however the appointing authority declined to accede to the recommendation for the reason that the applicant had already served three consecutive terms as the Corporation's Managing Director and in accordance with good corporate management practice the Board was advised against renewing her contract.

The directions contained in the letters dated 9th May, 2008 and 23rd November, 2011 regarding the renewal of terms of service for sitting CEO's seem to imply that once the Board recommends the renewal it cannot rescind or vary its recommendation as happened in this case. But the Board of the 1st respondent through its Chair has deposed that the communication under his hand on behalf of the Board dated 19th December, 2011 was not a recommendation but part of the consultation process that culminated in the letter dated 14th May, 2012 informing the claimant that her contract will not be renewed. The correct position and the circumstances under which the recommendation was made are issues to be explored further at the trial. At this point the Court having come to the conclusion that section 5(3) of the State Corporation's Act gives the Minister power over hiring and setting the terms and conditions of service for staff of State Corporations including CEOs, is of the view that the construction of the two letters will be subject to the provisions of the statute.

Regarding the power of the President under section 7(1) of the State Corporation's Act, the Court is of the view that this does not extend to directing that a particular person should be appointed or employed by a State Corporation. The section provides that the President may give directions of a general or specific nature to a Board with regard to the better exercise and performance of the functions of the state corporation and the Board shall give effect to those directions. The directions envisaged by the provisions of this section are those concerning better exercise and performance of functions of the state corporation. Directing that a particular individual be appointed by the Board may amount to interference with the autonomy of State Corporation and their Boards. The closest the President gets to the internal affairs of state corporation and their Boards is provided for under section 7(3) where the head of state has power to dissolve Boards for non-performance.

In this regard the letter by the Acting Head of Public Service dated 13th June, 2012 (AKK 11) if at all was written on behalf the President ought to be construed in the foregoing context. In any event, although Counsel for the applicant submitted strongly that failure by the 1st and 3rd respondent to renew the applicant's contract amounted to insubordination of the Head of State, the letter on the face of it did not indicate that it is written on behalf of the President. The letter merely stated that it was the Government's position that the applicant's contract be renewed which position is quite curious because the Minister for Agriculture is a member of the Cabinet hence at the upper echelons of the Government and yet she declined to have the applicant's contract renewed.

The claimant's contract expired on 19th June, 2012. She was informed by a letter dated 14th May, 2012 that her contract will not be renewed contrary to the recommendation by the Board that it be done since the Ministry thought that having served three previous terms it was in keeping with good corporate management not to renew her term. She was therefore asked to handover her duties to a Mr. Mucheke and proceed on terminal leave. At paragraph 11 of her affidavit she states that the 1st respondent's Board

proceeded to advertise her position in the Daily Nation of 22nd and 25th May, 2012. She further states at paragraph 12 that the Board pursuant to the advertisement carried out shortlisting exercise on 6th, 7th, 8th and 11th June, 2012. The applicant's came to Court 21st June, 2012.

From the events adumbrated above it is reasonably clear that the applicant was aware that her contract was expiring and as required she indicated her wish to have the same renewed. Her wish was granted by the Board and a recommendation made to the appointing authority. However for reasons already stated, the appointing authority recommend its non-renewal and asked for competitive recruitment for the post.

Whereas the question of the finality or otherwise of the Board's recommendation will be resolved at full trial, the applicant has not provided any convincing reasons why she did not move the Court earlier and before her contract expired and yet she was adequately aware that the 1st respondent's Board and the PS had taken a position not to renew her contract and had set in motion the process of her replacement. By the time the claimant moved to Court she had no contract and was a former employee of the 1st respondent. The issue of her reinstatement therefore becomes problematic since as at the time of moving the Court there was no continuing employer-employee relationship between the applicant's and the 1st Respondent. Besides the Court does not think an order of reinstatement can issue in respect of an expired appointive-fixed-term contract. The applicant's position would have been better preserved if she came to Court immediately she received the 1st respondent's Board letter dated 14th May, 2012 communicating to her the advice against renewal of her contract contrary to recommendation of the Board and sought a declaration that she continues in office pending the determination of the legality or otherwise of the Ministry's decision not to renew her contract. Reinstatement was an inappropriate remedy as she was not removed during the currency of her contract.

Injunction is an equitable remedy and will be granted to a party who exercises due diligence. The circumstances of this matter made it incumbent on the applicant to act with speed to preserve her rights if any that she feared were being infringed or threatened with infringement. The ripe moment therefore to move that Court would have been immediately after 14th May, 2012 when she received communication from the 1st respondent's Board that her contract will not be renewed.

Concerning other prayers (c), (d), (e), (f) and (d) in the Memorandum of Claim, even if the Court were to ultimately proceed and issue the declarations and orders of certiorari sought they would not be of any help as the applicant's contract had by the time she moved to Court, expired. That is to say issuing of the certiorari and declaratory orders sought would not as a corollary restore the applicant to office. She would have to be reappointed afresh her contract having expired on 19th June, 2012. This brings me to prayer (h) of the Memorandum of Claim which states:

> "... an order of specific performance be issued to direct the Minister of Agriculture to gazette the reappointment of the claimant's as the Managing Director of the First Respondent..."

By the letter dated 14th May, 2012, the applicant was informed that contrary to the recommendation of the Board, the Ministry would not be renewing her contract and consequently asked her to handover her duties to a Mr. Mucheke as she proceeded on terminal leave. Further, the applicant's contract as already pointed out had expired by the time she came to court. The sum total of this scenario is that the applicant had no appointment capable of being enforced by the Court as prayed above. All she had was a recommendation for renewal of appointment by the 1st respondent's Board which according to her was illegally overruled by the PS and *ipso facto* the Minister for Agriculture.

Historically the Courts have been averse to granting injunction and specific performance in disputes concerning employer-employee relationship but this is not to say it cannot be done in exceptional cases. The traditional objections to the specific performance of an employment contract were first, that it would be wrong to enforce a contract requiring personal services and, secondly, that damages could provide an adequate remedy to an employee seeking to enforce their contract.

> In England where Kenyan Courts have for long referred to for precedent where local ones are missing or inadequate, the first indication that the courts would not be prepared to force people to

remain in an employment relationship arose in restraint of trade cases. As early as 1853 an opera singer in the UK was restricted to singing in one theatre only . Lord Denning M.R. used this authority in the historic decision of the UK Court of Appeal in ***Hill v Parsons (1972) ChD 305*** in arguing that the common law rule against the specific performance of an employment contract was not inflexible and permitted of exceptions: He stated and I quote "It may be said that, by granting an injunction in such a case, the court is indirectly enforcing specifically a contract for personal services. So be it. Lord St. Leonards did something like it in *Lumley v Wagner*. And I see no reason why we should not do it here."

In granting the injunction, Lord Denning M.R. however accepted that to award such a remedy the court would have to be satisfied that trust and confidence still existed between the parties and that damages would not be an adequate remedy.

Further section 49(3) of the Employment Act, 2007 read together with section 50 of the Act provides in the relevant part that:

49.....

(3) Where in the opinion of a labour officer (read the Court by dint of section 50) an employee's summary dismissal or termination of employment was unfair, the labour officer may recommend to the employer to—

a. reinstate the employee and treat the employee in all respects as if the employees employment had not been terminated; or

b. re-engage the employee in work comparable to that in which the employee was employed prior to his dismissal, or other reasonably suitable work, at the same wage.

(4) A labour officer shall, in deciding whether to recommend the remedies specified in subsections (1) and (3), take into account any or all of the following—

(a) the wishes of the employee;

(b) the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and

c. the practicability of recommending reinstatement or re-engagement.

(d) the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;

(emphasis supplied)

(e) the employee's length of service with the employer;

(f) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;

(g) the opportunities available to the employee for securing comparable or suitable employment with another employer;

(h) the value of any severance payable by law;

(i) the right to press claims or any unpaid wages, expenses or other claims owing to the employee;

(j) any expenses reasonable incurred by the employee as a consequence of the termination;

(k) any conduct of the employee which to any extent caused or contributed to the termination;

(l) any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and

(m) any compensation, including ex-gratia payment, in respect of termination of employment paid by the employer and received by the employee.

The applicant had been on a three year contract which had been renewed three times previously. She had the expectation that her contract would be renewed for the fourth time after showing interest to have it renewed as required by the Guidelines and the 1st respondent's Board agreed with her and made the recommendation to the appointing authority. However the appointing authority declined the renewal citing the fact that the applicant had had three previous renewals and in keeping with good corporate management her contract should not be renewed.

From the foregoing the applicant has not demonstrated the exceptional circumstance of her claim to persuade the Court to circumnavigate the provisions of section 49(4)(d) which enjoins the court that in making an order for specific performance the Court must bear in mind the common law principle that it should not be made except in exceptional cases. The Court further finds that the measure of damages payable to the applicant if successful are determinable. These would be at the most, payment of salary and allowances for the period of the contract she was unfairly deprived of by the act of the 1st and 3rd respondent in declining the renewal and no more. In the circumstance the Court is of the view that damages would be an adequate remedy in the event that the applicant is successful at the trial.

Concerning her rights under the Constitution, the applicant will at the trial be seeking a declaration by the Court at the conclusion of the trial that the 1st and 3rd respondent violated articles 10, 27, 47, 73 and 232 of the Constitution in so far as they affect her in rescinding , terminating or reversing the 1st Respondent's Board decision to renew her contract.

Article 10 provides: 10. (1) The national values and principles of governance. This article binds all State organs, State officers, public officers and all persons whenever any of them—

(a) applies or interprets this Constitution; (b) enacts, applies or interprets any law; or

(c) makes or implements public policy decisions.

Article 10(2) provides that the national values and principles of governance include—

(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; good governance, integrity, transparency and accountability; and sustainable development.

Article 27 provides: 27 (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law and sub-article (2) provides equality includes the full and equal enjoyment of all rights and fundamental freedoms. Sub-article (3) provides that women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

Article 27(4) provides that the State shall not discriminate directly or indirectly against

any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth and sub-article (5) provides that a person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in

clause (4). Sub-article (6) provides that 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 and under sub-article (7), any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need. Under sub-article 8 it is provided that in addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.

Article 47(1) provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair and under sub-article (2) it is provided that if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

Sub-article (3) provides that Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall (a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and (b) promote efficient administration

Article 73 (1) provides that authority assigned to a State officer (a) is a public trust to be exercised in a manner that (i) is consistent with the purposes and objects of this Constitution; (ii) demonstrates respect for the people; (iii) brings honour to the nation and dignity to the office; and (iv) promotes public confidence in the integrity of the office; and (b) vests in the State officer the responsibility to serve the people, rather than the power to rule them.

Article 73(2) further provides that the guiding principles of leadership and integrity include (a) selection on the basis of personal integrity, competence and suitability, or election in free and fair elections; (b) objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism, favouritism, other improper motives or corrupt practices; (c) selfless service based solely on the public interest, demonstrated by (i) honesty in the execution of public duties; and (ii) the declaration of any personal interest that may conflict with public duties; (d) accountability to the public for decisions and actions; and (e) discipline and commitment in service to the people.

Finally article 232 (1) stipulates that the values and principles of public service include (a) high standards of professional ethics; (b) efficient, effective and economic use of resources; (c) responsive, prompt, effective, impartial and equitable provision of services; (d) involvement of the people in the process of policy making; (e) accountability for administrative acts; (f) transparency and provision to the public of timely, accurate

information; (g) subject to paragraphs (h) and (i), fair competition and merit as the basis of appointments and promotions; (h) representation of Kenya’s diverse communities; and

(i) affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service, of (i) men and women; (ii) the members of all ethnic groups; and (iii) persons with disabilities.

Sub-article (2) provides that the values and principles of public service apply to public service in (a) all State organs in both levels of government; and (b) all State corporations.

Sub-article (3) provides that Parliament shall enact legislation to give full effect to this Article.

I have made an effort to reproduce the forgoing articles of the Constitution in order to be able to place them in the context of the claimant's contention that they have been violated with reference to her and in order to understand in what way and to what extent. In other words this Court is called upon at this point attempt preliminary interpretation of these articles of the Constitution and if persuaded come to the conclusion that the applicant's rights have been violated to such an extent that it warrants grant of interlocutory injunction pending the full trial of the action.

In interpretation of the Constitution, opinions are divided between textualism, that is to say the belief in the text of the Constitution and insistence that nothing outside the text of the Constitution should be relied on for its interpretation on one hand, and intentionalism on the other. That is to say, in interpretation of the Constitution one needs to look beyond its text.

In Kenya going by a few judicial pronouncements and the Constitution itself it may be safely said that intentionalism has gained ground and has in fact been embodied in the Constitution. For instance article 10 talks about our national values to **include** and not **mean** (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; good governance, integrity, transparency and accountability; and sustainable development. These are broad principles whose understanding may require reliance on socio-political as well economic circumstance of Kenya in order to unbundle what they may mean in a given case.

Further in the case of ***Njogu-v-The AG Criminal Application No. 39 of 2000*** Lady Justice Rawal held that:

> "…We do not accept that a Constitution ought to be read and interpreted in the same way as an Act of Parliament. It exists separately in our statutes. It is supreme… it is our considered view that, Constitutional provisions ought to be interpreted broadly or liberally, and not in a pedantic way, that is restrictive. Constitutional provisions must be read to give values and aspirations of the people. The Court must appreciate throughout that the constitution, of necessity, has principles and values embodied in it; that a constitution is a living piece of legislation."

This decision and the Tanzanian case of ***Ndyanabo-v- The AG*** were heavily relied on in the ***Njoya's case*** when Rev. Timothy Njoya & others questioned the capacity of Parliament to repeal the old constitution and replace it with the so called "Bomas Draft. In answering this question the Court stated:

> "…the constituent power is reposed in the people by virtue of their sovereignty and the hallmark thereof is the power to constitute or reconstitute the framework of the government; or in other words, make a constitution that being so, it follows *ipso facto* that parliament being one of the creatures of the constitution it cannot make a new constitution. Its power is limited to the alteration of the existing Constitution only….Constitutionalism betokens limited powers on the part of any organ of Government…it follows therefore that the power vested in Parliament by sections 30 and 47 of the Constitution is a limited power to make ordinary laws and amend the constitution, no more no less…"

The sum total of the ruling in these cases is that courts in determining Constitutional questions ought to adopt a more robust and purposive approach. The ***Njogu*** and ***Njoya*** cases effectively overturned the prevailing principle set in ***El Manns*** case where the Court held that the Constitution ought to be interpreted as any ordinary statute especially where the words used are unambiguous.

This position has been encapsuled and basically entrenched in the Constitution under article 259(1) which provides:

> This Constitution shall be interpreted in a manner that—
>
> (*a*) promotes its purposes, values and principles;
>
> (*b*) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
>
> (*c*) permits the development of the law; and
>
> d. contributes to good governance.

In the context of the foregoing the Court will seek to understand the articles of the Constitution that the applicant claims have been violated in relation to her and seek to arrive at a finding that the nature and extent of their breach if at all warrants confirmation of the interlocutory injunction herein.

Article 27 binds state organs, officers and public officers to observe national values when making decisions. These national values and of relevance to this case are equity, equality and good governance. This article further provides that women and men have the right to equal treatment including the right to equal opportunities in political economic and cultural spheres. Article 47 is on fair administrative action. This in the Court's view is usually with regard to disciplinary processes which is not the case here. Therefore nothing turns on this. Article 73 on principles of leadership reiterates the issue of good governance and accountability which is already outlined in article 27. Article 232 stipulates that the values and principles of public service include fair competition and merit as the basis of appointments and promotions and affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service. This article further provides that the values and principles of public service apply to public service, all State organs in both levels of government; and all State corporations.

The discernible fundamental principles that run throughout these articles of the Constitution are: merit equity, equality of opportunities, fair competition, integrity and accountability. These may all be summed up as principles of good governance.

The concept of governance simply put means the process of decision-making and the process by which decisions are implemented (or not implemented). According to scholars in this field, good governance has 8 major characteristics. It is participatory, consensus oriented, accountable, transparent, responsive, effective and efficient, equitable and inclusive and follows the rule of law. It assures that corruption is minimized, the views of minorities are taken into account and that the voices of the most vulnerable in society are heard in decision-making. It is also responsive to the present and future needs of society.

These pillars of good governance appear to underpin Kenya's Constitution, 2010. The Court is alive to the fact that in clamouring for a new Constitutional dispensation Kenyans were dissatisfied by the manner in which they were being governed under the old Constitution. They felt the old Constitution was open to abuse and did not offer enough safeguards for good governance, accountability and human rights protection.

In the context of this application, clause 15 of the Guidelines required competitive sourcing of Chief Executives in order to attract person's of sound background with relevant skills and experience. The applicant was no doubt the best at the time of her appointment and her track record earned her two subsequent renewals however, in the light of the new Constitutional dispensation, the renewal or non renewal of her contract ought to be looked at in the context of the pillars of good governance referred to above and found in several articles of Kenya's Constitution 2010, some of which have been referred to in this ruling.

The Court cannot feign blindness to the practice currently gaining ground especially in public sector appointments where every attempt is being made to implement the values and principles of public service as encapsuled in article 232 of the Constitution. In this regard the letters dated 9th May, 2008 and 23rd November, 2010 written by the former Permanent Secretary/Secretary to the Cabinet and Head of Public Service Amb. Francis K. Muthaura which required that CEO positions in Public Service be declared vacant only if the respective Boards of public bodies concerned did not intend to renew such contracts or the CEO was not interested in the renewal are not in consonance with the letter and spirit of the Constitution as promulgated in 2010.

The import of the two letters is that once the CEO has declared an interest in the renewal of his or her contract all the Board was left to do was to evaluate the performance of such CEO and make a report to the appointing authority recommending reappointment or not.

The Board in a sense is hamstrung by these letters and cannot do more than evaluate the performance of the CEO and report to the appointing authority with recommendation whether to renew the contract or

not. For instance, the letters do not allow the Boards to question the number of renewals the CEO has had and to take into account the values and principles of public service as contained mainly in article 232 of the Constitution and echoed in other articles dotted across the Constitution some of which have been considered in this ruling.

The Court does not prohibit a competent and hard working CEO as applicant appears to have demonstrated by securing the appointment and getting her contract renewed two other times by the Board, however in the light of the new Constitutional dispensation such renewal ought to be in line with values and principles of public service as enshrined in the Constitution. In this respect and to the extent that these letters are inconsistent with the provisions of the Constitution the same are invalid.

In conclusion, having undertaken the analysis of the applicants suit and application in the context of the principles governing the grant of interlocutory injunction and especially in employment matters, the Court has come to the conclusion that the applicant has failed to demonstrate that she has a *prima facie* case with probability of success and even if the Court were to err in so finding, she has failed to demonstrate that damages would not be an adequate remedy in the event that she is successful after full trial. In the circumstances the injunction issued 22nd June, 2012 is hereby discharged.

And it is so ordered

Jo Abuodha

Judge.

Delivered in open Court this 18th day of October 2012

..... For Claimant/Applicant

..... For respondent