



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Petition 41 of 2012**

**ROBERT MURIITHI NDEGWA..... PETITIONER**

**-VERSUS-**

**THE MINISTER FOR TOURISM.....RESPONDENT**

**JUDGMENT**

1. This is the judgment in the petition by Robert Muriithi Ndegwa, the petitioner, against the Minister for Tourism currently being the Honourable Danson Mwazo who is also the Member of Parliament for Voi constituency.
2. The petitioner filed the petition on 5.11.2012 represented by Charles Njenga Advocate of Muchoki Kang'ata and Company Advocates. The petition was brought under Articles 2, 3, 41, 47 and 236 of the Constitution Section 37(1) and 123 of the Tourism Act No. 28 of 2011 of the Laws of Kenya. On the same date the petitioner filed under certificate of urgency a notice of motion dated 5.11.2012 seeking interlocutory orders. The court certified the application urgent and ordered that it be served for inter-parte hearing on 13. 11. 2012. On 9.11.2012 the respondent filed the notice of motion dated 9. 11. 2012 seeking to vacate the ex-parte interlocutory orders given by the court on 5.11.2012 that the petitioner continues to hold the position of the chief executive officer and one Jacinta Nzioka's appointment to act in the office of the chief executive officer of the Kenya Tourism Board be stayed pending the inter-parte hearing of the petitioner's application or until further orders by the court. The court certified the respondent's application as urgent, ordered the parties to maintain the status quo until further orders by the court and the respondent's application to be served for hearing together with the petitioner's application on 13. 11. 2012. The respondent was represented by George Kithi Advocate.
3. In view of the urgency, the Advocates of the parties, by consent, argued the main petition instead of the parties' respective applications. The hearing of the petition proceeded on 13.11.2012.
4. By a letter of appointment signed between the Chairman of the Kenya Tourist Board and the petitioner on 9.11.2012 at folio 29 of the petitioner's bundle, the petitioner was appointed to serve as the chief executive officer of the Board. The letter provided that the petitioner was responsible to the Board of Directors, the contract was for three years commencing 19.10.2012 and the Board reserved the right to terminate the contract prematurely depending on the petitioner's performance, that if the petitioner desired to be reappointed he was to make a written request at least six months before the expiry date of the contract, the Board was to review and appraise the petitioner's performance regularly and document the same in its meetings and other terms as set out in the contract.
5. It is not disputed that the petitioner was appointed to the position of chief executive officer of the Board upon successfully going through an open and competitive recruitment process that involved over

132 applicants and who were subjected to various interviews and evaluation in which the petitioner emerged as the best candidate for the position.

6. The record before the court shows that the petitioner's service delivery as the chief executive officer of the Board was exemplary as demonstrated with the certificate of excellence in performance for the financial year 2008-2009 signed by the Prime Minister of the Republic of Kenya as it appears at folio 52 of the petitioner's bundle.

7. By a letter dated 3.04.2012 at folio 53 of the petitioner's bundle, the petitioner wrote to the Board for the renewal of the contract as provided for in clause 6 of the letter of appointment.

8. The Board considered the applicant's request and undertook the petitioner's evaluation appearing at folio 66 of the petitioner's bundle. The evaluation commended the petitioner as a very effective leader both internally and externally with effective dialogue with the Board. The evaluation concluded by recommending the approval of renewal of the petitioner's contract for another three years. The approval was signed on 19.06.2012. The Board approved the renewal of the contract and by the letter dated 31.08.2012 at folio 80 of the petitioner's bundle, the Chairman of the Board one Kitili Mbathi wrote to the Permanent Secretary, Ministry of Tourism conveying the Board's recommendation for renewal of the contract for a further term of three years in compliance with the directives contained in Circular No. OP/CAB.9/1A dated 23.11.2010 by the Permanent Secretary, Secretary to the Cabinet and Head of the Public Service. The Circular at folio 40 of the petitioner's bundle prescribes the procedure to be followed in cases of renewal of the term of service for a chief executive officer of a state corporation. The prescribed procedure is as follows:

- a) The chief executive officer wishing to be reappointed will indicate interest by writing to the Board at least six months before expiry of his or her term.
- b) The Board will evaluate the performance of the chief executive officer 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 chief executive officer will be required to proceed on terminal leave to pave way for the recruitment and appointment of a new chief executive officer. That is important to ensure a smooth transition.
- d) The board will recruit an acting chief executive officer, in consultation with the parent ministry and the State Corporations Advisory Committee (SCAC) as provided for in section 27(1) (c) of CAP. 446, in a care taker position when the process of recruiting a new chief executive officer is on-going.

The circular concludes by stating that 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.

9. By an internal memorandum dated 17.10.2012 at folio 82 of the petitioner's bundle, the Permanent Secretary in the Ministry of Tourism wrote to the Respondent drawing the respondent's attention to the provisions of the circular while at the same time repeating her advice to the Honourable Minister to take into account the excellent performance of the petitioner as a chief executive officer of the Board, for the Minister to reconsider his decision and renew the contract of the petitioner. The Permanent Secretary explained that removal of the petitioner in absence of the members of the Board would affect tourism's overall performance. The Permanent Secretary then identified two senior officers including the Corporation Secretary and Head of Legal and Corporate Affairs one Allan Njoroge and the Acting Director of Marketing one Jacinta Nzioka as possible candidates for appointment to the position of acting chief executive officer of the Board if, the Honourable Minister was inclined not to go by his Permanent Secretary's advice.

10. By the letter dated 18.10.2012 by the Permanent Secretary, Secretary to the Cabinet and acting Head of the Public Service at folio 85 of the petitioner's bundle, the Ministry was advised to renew the

petitioner's term of office for three years.

11. The petitioner's initial term of service was due to lapse on 18.10.2012. The respondent by the letter dated 17.10.2012 appearing at folio 86 of the petitioner's bundle, appointed Jacinta Nzioka as the acting chief executive officer of the Kenya Tourism Board with effect from 22.10.2012 until the position is filled by way of competitive process or such other direction as the respondent may give from time to time. By a letter dated 29.10.2012 at folio 87 of the petitioner's bundle, the Board's Chairman conveyed to the said Jacinta Nzioka that the petitioner would continue to serve as the chief executive officer of the Board until a properly constituted Board is put in place. The Chairman of the Board referred to the letter by the Secretary to the Cabinet dated 26.10.2012 at folio 89 of the bundle stating that in view of further consultations, the petitioner be allowed to continue serving as the chief executive officer of the Board until a proper Board is constituted and put in place by the Government.

12. Being prejudiced by the flow and the outcome of the events, the petitioner filed these proceedings. The petitioner is praying for judgment against the respondent for:

- a) A declaration that the respondent's actions in failing to renew the petitioner as chief executive officer of the Kenya Tourism Board for no reasonable cause or at all and as recommended by the Board of Directors, and the Head of Civil Service is unfair, unlawful and constitutes breach of the petitioner's constitutional rights to fair labour practices and fair administrative action.
- b) An order compelling the respondent to renew the petitioner's term for a further term of three years as provided at section 37(3) of the Tourism Act No. 28 of 2011 and other enabling provisions of law.
- c) An order of permanent injunction restraining the respondent from appointing to the office of the chief executive officer, Kenya Tourism Board any person to replace the petitioner, whether permanently or in an acting position.
- d) Damages for unfair dismissal.
- e) General damages.
- f) Costs of the petition.

13. The respondent's affidavit supporting his application filed on 9.11.2012 was relied upon to oppose the petition. The respondent stated that the Tourism Act, 2012 came into operation on 1.9.2012 by Legal Notice No. 92 of 2012. The respondent in his affidavit has at length explained far reaching changes that the Act introduces in the Kenya's Tourism sector which is a key driver of the Kenya Vision 2030. Of particular interest to this case the respondent points out that the Act revoked or repealed Legal Notice No. 9 of 7.02.1997 on the Kenya Tourist Board.

14. The letter dated 18.10.2012 marked DM1 on the respondent's affidavit is the advice by the Honourable Attorney General on reconstitution of the state corporation boards in the Ministry of Tourism. On the appointment of the members of the boards, the respondent relies on the advice in the letter thus, **"... It is settled law that there cannot be a court order barring implementation of a valid law. Accordingly, the Minister is therefore advised to revoke the Gazette Notices by which the appointments were made and proceed to make fresh appointments as provided under the Tourism Act. This will ensure seamless transition and continuity of the operations of the boards until fresh appointments are made as suggested above. Please be advised accordingly."**

15. The respondent stated in his affidavit as follows:

- a) The petitioner's contract was for the fixed period of three years lapsing on 18.10.2012.
- b) That it was true that the petitioner had expressed his desire for renewal of the contract of employment.
- c) There was intense lobbying for renewal of the petitioner's contract but it was the respondent's position that Section 37 of the Tourism Act, 2012 on appointment of the chief executive of the board be

implemented.

d) That the position of the chief executive officer was a public office subject to provisions of Articles 10, 73, 75 and 77 of the Constitution.

e) That the Board's recommendation of the renewal of the petitioner's contract contravened Section 37 of the Act and the spirit of the cited provisions of the Constitution.

f) That the public legitimate expectation was that the position of the chief executive officer of the Kenya Tourism Board would be subjected to competitive process. The respondent, the Board or the Secretary to the Cabinet could not renew the contract because it would be contrary to the law. That section 37 of the Act prescribed the qualifications of the chief executive officer of the Board and the competitive recruitment of the petitioner did not measure the statutory provisions and the provisions of Articles 10, 73, 75 and 77 of the Constitution. That as the appointing authority the respondent would remain steadfast in implementing the law through competitive recruitment and not accede to lobbying and conspiracies envisaged by the lobbyists and the applicant. The law gives a chance and opportunity to all Kenyans and the petitioner was at liberty to participate in the competitive process.

16. The following are the key questions to be answered in the determination of this petition:

a) Did the petitioner comply with the provisions of the contractual renewal clause?

b) What was the effect of the Tourism Act on the claimant's contract of service and in particular the renewal clause?

c) What is the legitimacy and effect of the circular on renewal of contracts of service for chief executive officers of boards of state corporations?

d) What are the constitutional and statutory standards for appointment of the Board's chief executive officer?

e) Was the Minister vested with authority to make an appointment of the acting chief executive officer of the Board?

f) Is the petitioner entitled to the remedies as prayed for in the petition?

17. The first question is: Did the petitioner comply with the provisions of the contractual renewal clause? The contract required the petitioner to, if he wished to be reappointed in the same position, to make a written request at least six months before the expiry date of the contract. The effective date of the Contract was 19.10.2009 running for three years so that the lapsing date was on or about 18.10.2012. The applicant wrote seeking renewal of the contract on 3.04.2012 and the court finds that the petitioner complied with the contract. The court further finds that the Board evaluated the petitioner as agreed in the contract and found him suitable for the renewal of the contract. It was submitted for the respondent that the evaluation for renewal needed to be signed by all members of the evaluation committee and not only the Chairman of the Board. However the court finds that it was sufficient for the Chairman to sign and authenticate the evaluation as the evaluation form provided only for the Chairman's signature and it is not disputed that the full Board approved the evaluation. Paragraph 10 of the respondent's affidavit is clear that the Board recommended the renewal of the petitioner's contract.

18. The second question is: What was the effect of the Tourism Act on the claimant's contract of service and in particular the renewal clause? It was submitted for the respondent that the petitioner's contract lapsed on 18.10.2012 and the office fell vacant to be competitively filled in accordance with Section 37 of the Tourism Act, 2012 which came into effect on 1.9.2012. It is not disputed that at the time the Act came into force, the petitioner's contract of service was subsisting. Under section 123(1) of the Act, the rights, assets and liabilities in respect of the properties of the Kenya Tourist Board were transferred, vested, imposed and enforceable against the Kenya Tourism Board established under the Act.

Further, under Section 123(2) the persons employed by the former Kenya Tourist Board were transferred to the Kenya Tourism Board established under the Act. The court finds that the petitioner was one such employee of the Board that was so transferred. The petitioner's contract of service and its provisions remained unbroken and only subject to the express provisions of the Act. The relevant provision is Section 37 of the Act which provides, thus **"37. (1) The Minister shall, in consultation with the Board of Directors and subject to subsection (2), through a competitive process, appoint a person to be the Chief Executive Officer of the Tourism Board. (2) A person shall not be qualified for appointment as the Chief Executive Officer under subsection (1) unless that person has an advanced degree in marketing, business administration or related discipline and has at least ten years' experience at senior management level in tourism or hospitality or related sector. (3) The Chief Executive Officer shall hold office for a term of three years but shall be eligible for re-appointment for one further term of three years. (4) The Board of Directors may appoint such officers and other staff as may be necessary for the proper and effective performance of the functions of the Tourism Board."** It is the court's considered opinion that on the effective date of the Act, the Board had an accrued contractual obligation and right to renew the contract of the petitioner subject to compliance with the terms of the contract. The respondent has not pleaded or submitted that the petitioner lacks the qualifications set out in the Act. Indeed throughout the pleadings and the submissions, the claimant's qualification was not an issue and the respondent in his affidavit categorically stated that the issue was about the competitive open process to which the petitioner was entitled to participate. The court finds that the main issue is the manner in which the Act impacted upon the petitioner's on-going process of the renewal of the contract of service.

The renewal process had fallen due and the Act clearly provided for the ongoing renewal process. The court finds that the ongoing renewal process as provided for in the contract was protected under subsection 37(3) of the Act and the court further finds that the renewal clause was not inconsistent with the provisions of the Act. All that the Act did was to codify in the legislation the contractual renewal term. To that extent the court finds that the Act and the contract were not in any conflict and if any conflict were to exist, but which did not, the provisions of the Act would have superseded the Act but with the petitioner's liberty to pursue his contractual rights.

19. The third question is: What is the legitimacy and effect of the circular on renewal of contracts of service for chief executive officers of boards of state corporations? It is the opinion of the court that the circular on renewal of the contracts of service for chief executive officers of the boards for state corporations issued by the Secretary to the Cabinet is founded in the constitutional executive powers of the state. The circular is dated 23.11.2010 and it was issued in the new constitutional dispensation the effective date of the Constitution of Kenya, 2010 being the promulgation date of 27.8. 2010. The court's opinion is that the circular must be construed within the framework of the constitutional provisions of the Constitution of Kenya, 2010. The office of the Secretary to the Cabinet is provided for in Article 154 of the Constitution which provides, thus, **"154. (1) There is established the office of the Secretary to the Cabinet, which is an office in the public service. (2) .... (3) The Secretary to the Cabinet shall – (a) have charge of the Cabinet office; (b) be responsible, subject to the directions of the Cabinet, for arranging the business, and keeping the minutes, of the Cabinet; (c) convey the decisions of the Cabinet to appropriate persons or authorities; and (d) have other functions as directed by the Cabinet. (4)..."** The court finds that it is within the scope of the performance of the constitutional duties that the Secretary to the Cabinet must have issued the circular in issue. In particular, the court holds that in issuing such circulars the Secretary would be, and in this case, was communicating the decisions of the Cabinet. It could be that in future conveyance the Secretary would on the face of the communication specifically express, thus, **"This is to convey the decision of the Cabinet..."** Nevertheless, there is nothing on record to suggest that the circular was not conveying the decisions of the Cabinet and the court finds as much. Ministerial decision making, responsibility and accountability for the members of the Cabinet are provided for in Sub-Article 153 of the Constitution. It provides that members of the Cabinet, like the respondent, are accountable individually and collectively to the President for the exercise of their powers and the performance of their functions. The court finds that the respondent is bound by the provisions of the circular and any dissatisfaction or reservations he may entertain about the circular would be best dealt with in the meetings of the Cabinet and until altered one way or the other, the respondent is bound to comply by reason of the doctrines of collective ownership and responsibility of the cabinet. It

was submitted for the claimant that the circular is merely administrative and subject to the law. The court agrees to that submission but also finds that the circular did not contravene any legislative or constitutional provisions. The court's considerations go as follows. Subsection 37 (3) of the Act provides that the chief executive officer shall hold office for a term of three years but shall be eligible for reappointment for one term of three years. The Act does not prescribe the step by step procedure to be followed in the event of undertaking the renewal. Whatever the circular then does is to provide for that process to achieve an objective criterion for the renewal. The circular shares out the power to renew the contract of a chief executive officer between the respective boards and the concerned ministers. It also makes the process ascertainable on the part of the affected officer, prescribes performance evaluation as the basis of the renewal and spells out the management of the succession during the renewal and especially if the renewal is to be denied. The court finds that the circular is lawful and does not deviate or offend any statutory or constitutional provision.

20. The fourth question is: What are the constitutional and statutory standards for appointment of the Board's chief executive officer? It was submitted for the respondent that renewal of the petitioner's contract of service would contravene Section 37 of the Tourism Act, 2012 and Articles 10 prescribing democracy and participation of the people, 73 on responsibilities of leadership, 75 on conduct of public officers and 77 on restriction on activities of state officers. The court has considered these provisions and is of the opinion that the main issue for determination is whether the renewal of the contract would undermine or derogate from any constitutional or statutory provisions governing recruitment, appointment, promotion or retention in public service. Article 232 of the Constitution provides for the values and principles of public service to 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 paragraph (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 men and women; the members of all ethnic groups; and persons with disabilities.

Section 22 of the Public Officer Ethics Act, 2003 provides that public officers shall practice and promote the principle that public officers are selected on the basis of integrity, competence and suitability or elected in fair elections. Thus by the Constitution and by statute, the standards for undertaking public employment have been determined. In the instant case, the petitioner was recruited competitively and it is not said that he lacks qualifications. The court holds that there would be no suitability or merit in public employment in event of presence of bribery, cronyism, nepotism, tribalism, and in absence of qualifications, competence, competition, integrity and respect for inclusion and diversity. The court finds that the petitioner's initial appointment has not been shown to have offended any of the salient ingredients of a suitable and meritorious appointment. The court further finds that the petitioner's performance for the initial three years has not been shown to have breached any of the constitutional values and principles of public service.

21. The fifth question is: Was the Minister vested with authority to make an appointment of the

acting chief executive officer of the Board? To this question, counsel for the respondent conceded that the Minister did not have such power. The court agrees to that submission. The genesis of that position is rooted in the Constitution. Sub-Article 132 (3) of the Constitution vests in the President the function of directing and coordinating the functions of ministries and government departments. Further, the president shall, by a decision published in the Gazette, assign responsibility for the implementation and administration of any Act of Parliament to a Cabinet Secretary, to the extent not inconsistent with any Act of Parliament. Accordingly, the court holds that exercise of any ministerial function is constitutionally chained to statutory provisions and every ministerial decision must point to the enabling statutory source or authority. Any ministerial decision that is not rooted in such statutory source or authority would be null and void. Under subsection 37(1) of the Tourism Act, 2012, the respondent is vested with the authority to appoint the Board's chief executive officer and not the acting chief executive officer. However, Subsection 37(4) authorizes the Board of Directors to appoint such officers and other staff of the Board as may be necessary for the proper and effective performance of the functions of the Board. Thus, the court finds that if an acting chief executive officer were to be appointed, the authority to appoint would vest in the Board which is vested with the statutory authority to do so and not the Minister. While making this finding, it is the opinion of the court that a succession management regime like the one prescribed in the circular when efficiently and effectively implemented will ensure that the need for an acting chief executive officer is diminished or the acting appointments are for negligible periods. It is therefore the court's finding that the Minister is not vested with any authority to make an appointment of an acting chief executive officer of the Board.

22. The final question for determination is: Is the petitioner entitled to the remedies as prayed for in the petition?

The petitioner has prayed for a declaration that the respondent's actions in failing to renew the petitioner's contract as chief executive officer of the Kenya Tourism Board for no reasonable cause or at all and as recommended by the Board of Directors, and the Head of Civil Service is unfair, unlawful and constitutes breach of the petitioner's constitutional rights to fair labour practices and fair administrative action. Article 47 of the Constitution entitled the petitioner to administrative action that was expeditious, efficient, lawful, reasonable and procedurally fair. Further, for any adverse decision by the respondent, the petitioner was entitled to receive written reasons from the respondent for the refusal to renew the contract. Despite making a unilateral decision not to renew the contract, the respondent failed to convey his position and the reasons before and after the due date for the renewal. The court finds that the respondent acted in contravention of the Article. The court has considered the evaluation report by the Board and the awards for excellent performance accorded to the petitioner and finds that failure to renew the petitioner's contract amounted to victimization for having performed the functions of office in accordance with the values and principles of public service provided for in Article 232 of the Constitution. The court further finds that refusal to renew the contract also amounted to the respondent's attempt to remove the petitioner from public office without due process of law. The court holds that such respondent's actions and omissions did not only contravene Article 236 of the Constitution that protects public officers, but also amounted to unfair labour practices as protected in Article 41 of the Constitution. Accordingly, the court finds that the petitioner is entitled to the declaration as prayed.

The petitioner has prayed that the respondent be ordered to renew the contract as provided for in section 37(3) of the Tourism Act, 2012. The court has found the circular to bind the respondent. The circular prescribes a procedure that applies to renewal of the petitioner's contract before and after the coming into effect of the Act. The court has found that the circular supports and does not derogate from the provisions of section 37 of the Act. The court has considered the provisions of the circular and finds that once the Board approved the renewal of the contract, the respondent had no discretion in the matter but to appoint the petitioner as approved. The petitioner is entitled to the order as prayed.

The court has also carefully considered the circumstances of this case and its wide jurisdiction to make any other appropriate relief as the court may deem fit to grant as provided for in section 12 (3) (viii) of the Industrial Court Act, 2011. It is the court's considered opinion that an appointment takes place in circumstances where the employee is entitled to the appointment by reason of the employer's conduct. In the instant case, the petitioner was entitled to deem the contract renewed in view of the provisions of the

circular, failure of the respondent to convey his refusal to renew and the entitlement to renew as per the terms of the contract. The court considers that in the employment relationship there exist a reciprocal duty of cooperation and the employer must respect express provisions of the contract, the personal dignity of the employee and the legitimate expectation that consultative framework that underpin the relationship shall be respected. Thus, in the special circumstances of this case, the court finds that the petitioner's contract of service was constructively renewed for three years with effect from 18.10.2012.

The court has found that the respondent is not vested with any authority to make acting appointments. Accordingly, the court finds that the petitioner is entitled to an order restraining the respondent from appointing any person to act in the office of the chief executive officer of the Kenya Tourism Board.

There were no submissions made on the prayers for damages for unfair dismissal and general damages and the court considers that the petitioner abandoned those prayers.

23. In conclusion, judgment is entered for the petitioner against the respondent for

- a) a declaration that the respondent's actions in failing to renew the petitioner's contract as chief executive officer of the Kenya Tourism Board for no reasonable cause or at all and as recommended by the Board of Directors, and the Head of Civil Service is unfair, unlawful and constitutes breach of the petitioner's constitutional rights to fair labour practices and fair administrative action;
- b) an order compelling the respondent to renew the petitioner's term for a further term of three years as provided at section 37(3) of the Tourism Act No. 28 of 2011 and other enabling provisions of law; or alternatively, an order that the petitioner's contract of service was constructively renewed for three years with effect from 18.10. 2012;
- c) an order restraining the respondent from appointing any person to act in the office of the chief executive officer of the Kenya Tourism Board; and
- d) the respondent to pay costs of this cause.

**Signed, dated and delivered in court at Nairobi this 16<sup>th</sup> November, 2012.**

**Byram Ongaya**  
**JUDGE**