



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
PETITION NO 13 OF 2014

ABEL ODHIAMBO ONYANGO1ST PETITIONER
HOPE DISABILITY FOUNDATION2ND PETITIONER
VERSUS
CABINET SECRETARY MINISTRY OF HEALTH....1ST RESPONDENT
THE HON. ATTORNEY GENERAL2ND RESPONDENT
PROF. ALEX CHEMUTAI3RD RESPONDENT

JUDGMENT

Introduction

1. The petitioners have approached this court seeking orders directed at the respondents for alleged violation of the 1st petitioner’s constitutional rights guaranteed under Articles 10, 27 and 54 of the Constitution. The 1st petitioner, who describes himself as a person with a disability, alleges that by removing him from the position of Chairman of the Board of the Kenya Medical Laboratory Technicians and Technologies Board (KMLTTB) and appointing the 3rd respondent to the position, the Cabinet Secretary offended the rules of natural justice and violated the provisions of Articles 27 and 54 of the Constitution of Kenya.

2. The 2nd petitioner has no claim in the matter and appears to be a party to this case for the purpose of supporting the petitioner’s claim for alleged violation of the provisions of Article 54 pertaining to the rights of persons with disabilities. Reference to the petitioner in this judgment therefore shall be to the 1st petitioner only.

The Petitioner's Case

3. The case for the petitioner is set out in the petition dated 13th January 2014, the affidavit in support sworn by the petitioner on the same date, and a further affidavit also sworn by the petitioner on 14th February 2014. The petitioner has also filed submission dated 3rd February 2014.

4. The petitioner contends that the Cabinet Secretary, in exercise of his power under the **Medical Laboratory Technicians and Technologies Act (the Act)** appointed the 3rd respondent as a Board Member and the Chairman of **KMLTTB** under section 6(2) of the Act. This was done vide Gazette Notice No 15764 of 31st December 2013.

5. At the time of the 3rd respondent's appointment, there was already another Chairperson, the petitioner, who had been appointed to the position by Gazette Notice No 12430 with effect from 6th August 2012 for a term of three (3) which is set to expire in September 2015. The petitioner states that his appointment is still in force and has never been revoked; and that he is a person living with a disability and a member of the Association for the Physically Disabled of Kenya.

6. The petitioner contends that he was appointed to the position in the spirit of Article 54; that the 3rd respondent is not a person with any known disability; and that the 3rd respondent has in any event not qualified under section 6 of the **Medical Laboratory Technicians and Technologists Act (Cap 253A)**. The petitioner maintains that he was not given any notice prior to the appointment of the 3rd respondent nor was his appointment revoked, and it is his case therefore that the appointment of the 3rd respondent was illegal and unprocedural.

7. In his submissions on behalf of the petitioner, Learned Counsel, Mr. Chigiti argued that the appointment of the 3rd respondent was a derogation from the dream of Kenyans of embracing diversity and persons living with disability; that it offends Articles 10 and 27 of the Constitution in that there shall be no public participation of persons living with disabilities; and that the duty under Article 20 to protect the rights of persons with disabilities shall stand defeated as removal of the petitioner from the Chairmanship of the Board was not a fulfilment of that duty. He further relied on the provisions of Article 232(h)(1) which he submitted deals with the values of public service with regard to persons with disabilities.

8. According to the petitioner, the Cabinet Secretary, who purported to revoke his appointment by way of Gazette Notice No 109 of 31st December 2013, does not have power to do so; that the Schedule to the Act does not give the procedure that the Cabinet Secretary is to follow in removing the Chairman from office; and that one has to refer to section 7 of the 6th Schedule to the Constitution, the rules of natural justice, and Article 27, and to give the petitioner a chance to be heard, which has not been done.

9. To the respondent's contention that the petitioner was involved in activities which are illegal hence justifying his removal, Mr. Chigiti submitted that no disciplinary proceeding have been taken against the petitioner; that he has been a person of good conduct; that he and the respondent executed a performance contract on 20th December 2013, and the question was why the Cabinet Secretary would execute a contract with the petitioner if he had issues that would lead to the revocations of his appointment. It is the petitioner's case that the allegations made against him have no basis whatsoever, that the suits relied on by the respondents concern the entire Board and it would therefore be misleading for the respondents to start using the suits against the petitioner while at the same time giving him a performance contract.

10. The petitioner therefore seeks the following orders:

A. A declaration that the 1st Petitioner is a legitimate member of the Board and Chairman of Kenya Medical Laboratory Technicians and technologists Board (KMLTTB)

B. A declaration that the appointment under Gazette Notice No 15764 appointing the 3rd respondent as the Chairman of Kenya Medical laboratory Technicians and Technologists Board (KMLTTB) violates and or offends Articles 27 and 54 of the Constitution.

C. A Judicial review under Article 23 of the Constitution quashing Gazette Notice No 15764 appointing the 3rd respondent as the Chairman of Kenya Medical Laboratory Technicians and Technologists Board (KMLTTB)

D. An injunction under Article 23 restraining the 3rd Respondent from assuming the aforementioned offices of member of the board or chairman of the Chairman of Kenya Medical Laboratory Technicians and technologists Board (KMLTTB).

E. Any other order and or directions that this court may deem fit to grant

The Respondents' Case

11. In presenting the case for the respondents, Ms Irari relied on the grounds of opposition dated 28th January 2014 and a replying affidavit sworn by Mr Fred H Segor, the Principal Secretary, Ministry of Health, on 11th February 2014, as well as written submissions dated 5th February 2014.

12. The respondents' case is that the Act clearly gives the Cabinet Secretary the power to appoint the Chairman from among members of the Board and the petitioner is still a member of the Board but that the Cabinet Secretary has removed him as Chairman due to integrity issues. According to the respondent, the Cabinet Secretary has an obligation under Article 232 to ensure that the public is served with the highest integrity and that the Chairman had a duty to ensure that integrity is maintained in the Board. The respondents further argue that the petition does not disclose any violation of the petitioner's rights, but in any event, his rights under Article 27 and 54 are not absolute and are limited by Article 24.

13. The respondents submit that the petitioner can make the same input as a member of the Board as he would as Chairman. They contend that the Cabinet Secretary has not discriminated against the petitioners and has only tried to ensure that the affairs of the Board are run with the utmost integrity.

Determination

14. The basic facts giving rise to this matter are not in dispute. They revolve around the Chairmanship of the Kenya Medical Laboratory Technicians and Technologists Board, Petition 13 of 2014 | Kenya Law Reports 2015 Page 4 of 14.

established pursuant to the provisions of the **Medical Laboratory Technicians and Technologists Act Cap 253A**. The object of the Act is to provide for the training, registration and licensing of medical laboratory technicians and technologists, to provide for the establishment, powers and functions of the Kenya Medical Laboratory Technicians and Technologists Board, and for connected purposes. Section 3 establishes the Board as a corporate body with perpetual succession and a common seal.

15. At section 3(2), it is provided that the Board is capable of suing and being sued in its corporate name, taking, purchasing or otherwise acquiring, holding, charging or disposing of movable and immovable property; borrowing or lending money; and doing or performing all such other acts necessary for the proper performance of its functions under the Act which may lawfully be done or performed by a body corporate.

16. The composition of the Board is provided for under section 6 of the Act. In addition to five persons who sit on the Board by virtue of their official positions in various institutions of government, the Board also includes three laboratory technicians elected by the Association of Kenya Medical Laboratory Scientific Officers (the Association), three laboratory technologists who are also elected by the Association, the Chairman of the Association, not less than three and not more than five technicians and technologists appointed by the Minister, and not more than two other persons co-opted by the Board whose knowledge and experience are deemed necessary for the better performance of the functions of the Board. Section 6(2) provides that the Minister in charge of health (now the Cabinet Secretary) shall appoint a Chairman from among the 16 or so members of the Board.

17. The evidence before the Court is that the petitioner was appointed a Member of the Board and its Chairman by Gazette Notice No 12430 dated 15th August 2012. The appointment was for a period of 3 years and was to expire on 15th August 2015. However, while the petitioner's appointment was still in force, the Cabinet Secretary, in purported exercise of the powers under the Act, appointed the 3rd respondent as a member and Chairman of the Board through Gazette Notice No 15764 dated 27th December 2013.

18. It appears, however, that upon realizing that the appointment of the petitioner was still in force, the Cabinet Secretary, in **Gazette Notice No. 109** dated 31st December 2013, appointed the 3rd respondent as a member of the Board in exercise of powers under section 6(1)(i) of the Act and revoked the petitioner's appointment.

19. By **Gazette Notice No. 110**, also dated 31st December 2013, the Cabinet Secretary then appointed the 3rd respondent as Chairman of the Board and revoked the appointment of the petitioner as Chairman. In effect therefore, and contrary to the assertions of the respondents in their submissions, the petitioner was removed both as a member of the Board and as its Chairman.

20. The issue that arises is whether the Cabinet Secretary was entitled, in exercise of his discretion under the Act, to remove the petitioner and appoint the 3rd respondent. The petitioner's case is that he was not justified. He views his removal as an act of discrimination against him in violation of Article 27, 54 and 232 of the Constitution, contending that his appointment must have been made with Article 54 of the Constitution in mind given that he is a person living with a disability.

21. In his written submissions, Mr. Chigiti contends on behalf of the petitioner that Article 27 (1), (2) and (4) guarantees the petitioner equality and equal protection before the law, while Article 27(4) bars the state from discriminating, directly or indirectly, against any person on any ground, including disability. He also relies on various international instruments in support of the principle of non-discrimination and equality before the law.

22. According to Mr. Chigiti, the appointment of the 3rd respondent during the tenure of the petitioner is a blatant disregard of Article 27(4) as well as Article 10 of the Constitution on the national values and principles of governance. On their part, the respondents maintain that the petitioner was not removed on account of his disability, but because of integrity issues related to the petitioner. I shall revert to the question of integrity later in the judgment.

23. I have considered the conflicting arguments of the parties with regard to the removal of the petitioner as the Chairman of the Board. I agree that the Constitution and the international conventions relied on by the petitioner do protect the rights of persons with disabilities. Indeed, there can be no disputing the express provisions of Article 10 on inclusiveness of marginalised groups, including persons with disabilities; the express prohibition of discrimination under Article 27; the protection of the rights of persons with disabilities under Article 54, and their right to employment in the public service under Article 232.

24. I cannot, however, on the material before me, see any basis for alleging discrimination on the part of the Cabinet Secretary in removing the petitioner. Indeed, there is nothing presented to the Court that suggests that his appointment as Chairman was, as submitted by Mr. Chigiti, on the basis of his being a person with a disability; or that his removal was in any way related to his disability. I am therefore unable to find that there was a violation of Articles 27, 54 and 232 on account of the petitioner being a person with a disability.

25. Mr. Chigiti has also urged the Court to find that the removal of the petitioner as Chairman of the KMLTTB is a derogation from the obligation of the state to ensure participation of persons with disabilities in public affairs, and progressive realization of the principle that 5% of persons holding elective or appointive office are persons with disabilities. The respondent counters that meeting the obligations under Article 54 does not mean that persons with disabilities should be given special recognition but that they should be given equal opportunity as every other Kenyan.

26. I agree with the respondent that realization of the rights of persons with disabilities to participate in public affairs does not mean that every time a person with a disability is removed from an office, he must be replaced with another person with disability. I believe that such an approach would have the effect of limiting the participation of persons with disabilities, and in a sense, stereotyping certain jobs or positions as the only ones which persons with disabilities can handle.

27. In my view, the proper approach should be to consider the entire spectrum of public appointive and elective positions on the basis of clear evidence and assess the participation of persons with disabilities holistically. As Majanja J observed at paragraph 57 of his judgment in **High Court Petition No. 373 of 2012 John Waweru Wanjohi & Others vs The Attorney General & Another** where the claim was that certain ethnic groups and regions had not been considered:

“The petitioners’ argument is that certain regions should have been represented. The petitioners in Petition 426 No. of 2012 state that the Kalenjin community was not represented. The petitioners in Petition No. 373 of 2012 contend that certain regions which should have been represented were excluded. In my view this argument is inconsistent with the Constitution. What the Constitution requires is diversity not cut-outs, curve-

outs or quotas for particular groups or regions. There is no requirement that there be reserved seats for specific ethnic groups or communities based on their respective populations or that certain ethnic groups be excluded from consideration.
(Emphasis added)

28. Similarly, it cannot be proper to assert that certain jobs or positions should be curved out or limited to persons with disabilities. What is important is to ensure that in the public service and other state organs, there is representation of persons with disabilities to meet or surpass the 5% provided for under the Constitution.

Removal on Allegations of Lack of Integrity

29. A matter of greater concern to the Court, which was addressed in passing by Mr. Chigiti, is the removal of the petitioner on the basis that there had been allegations or complaints relating to the operations of the Board, which lack of integrity has been attributed to the petitioner and which the respondents argue was the reason for his removal. The allegations of lack of integrity on the part of the petitioner are set out at paragraphs 15-28 of the affidavit of Mr. Segor as follows:

14. That the appointment of a chairperson was important to ensure that the Board was able to meet its objectives and functions in line with section 5 of the Act.

15. That the revocation of the petitioner's appointment was in line with the Ministry compliance with Article 232 of the Constitution on the values and principles of public service.

16. That the ministry received complaints, accusations from members of the public regarding the conduct of the Board

17. That vide a letter dated 22nd October 2013 the Ministry received a letter from the Public Service Commission regarding the misuse of public funds by one Wanga Abala Michael. The letter dated 26th March 2013 was from an anonymous person who complained of an officer by the name of Wanga Abala Michael and it related to the illegal constitution of the Kenya Medical Laboratory Technician and Technology Board.

18. That further it has been known that the said Wanga Abala Michael was not even qualified as per the provisions of section 6 of the said Act, information all within the knowledge of the petitioner.

19. *That further the said Wanga Abala Michael who was the CEO of the board was sued in Misc Civil Application No JR 316 of 2010 in which the Board had been sued for contempt. The said CEO was fined Kshs100,000.*

20. *That the petitioner has also been involved in a court case involving breach of contract from the media house: the Board was sued by one Prime Communication Ltd in Milimani commercial court civil case No 498 of 2012 where the Board sought advertisement services from the complainant. That the said Wanga Abala Michael who was he C.E.O of the Board entered into an agreement upon which the Board was to pay Ksh 7937,750 in unclear circumstances.*

21. *That the petitioner as the chairman of the Board was aware about the said HCCC Case No 498 of 2012 and went ahead and proposed to settle the decretal amount without investigations regarding the contract with Prime Communications.*

22. *That even so the petitioner authorized Ksh3,000,000 which was transferred from the Boards' account paying Ransley, Mcvicker & Shaw Advocates in regard to the Nairobi HCCC No 498 of 2012.*

23. *That the petitioner having been entrusted with the office of the chairman of the Board had a duty to ensure that the affairs of the Board were run with outmost honesty and integrity.*

24. *That the petitioner herein never reported to the Ministry regarding the conduct of one Mr Wanga Michael who was found guilty of contempt of court Orders for appropriate measures to be taken against him.*

25. *That the petitioner in his capacity as the chair of the Board, allowed one Mr. Wanga Michael to draw a salary both from the Board and from the Ministry. Annexed and marked "FHA10" is the true copy of the copy of the extract of the staff salaries dated march 2012 from the ministry and 23rd June 2011.*

26. *That the said Board acting under the chairmanship of the first petitioner proposed development of a non-existent parcel of land which they sought the approval of expenditure of Kshs13,000,000 by a letter dated 22nd November 2013 to the principal Secretary.*

27. *That the Ministry came to know about this position regarding the non-existent project upon receiving a letter from Kenyatta Hospital explaining the position of the hospital and that the board did not have any parcel that was allocated to them.*

28. *That the petitioner as a chairman of the Board was obligated to exercise due care in running of the affairs of the board and being the chair of the Board was to ensure that the affairs of the Board are run with integrity.* (Emphasis added.)

30. The petitioner has responded to the above averments in his further affidavit dated 14th February 2014. While the Court is not here concerned with the veracity or otherwise of the allegations, several questions do arise. First, the allegations are mostly directed at the conduct of one Wanga Abala Michael, an officer who appears to have been seconded to the Board by the Ministry of Health. Can the petitioner properly be held personally responsible for the acts of the said Wanga Abala Michael? Further, a perusal of the court orders and pleadings relied on by the respondents shows that the petitioner was not found guilty of contempt, and that the payment of the monies in HCCC No. 489 of 2012 was pursuant to orders of the Court made on 23rd January 2013 arising out of a contract entered into by the Board in 2010 and invoices delivered in 2011. Could the petitioner be held responsible for these acts?

31. Which leads to a more important question with regard to the alleged lack of integrity on the part of the petitioner: did the petitioner, as the Chairman of the Board, have the sole responsibility of making the decisions at issue, or were the decisions made by the entire Board? Section 8 of the Act provides that the affairs of the Board shall be conducted in accordance with the Schedule to the Act. In the Schedule, it is provided that decisions of the Board shall be by a majority, with the Chairman having a casting vote. The quorum for meetings of the Board is eleven.

32. That being the case, can the alleged lack of integrity in the manner of running the affairs of the Board be visited solely on the petitioner? It is worth observing from the averments made on behalf of the respondent set out above that the complaints and integrity issues concerned the entire Board, rather than just the petitioner. Given that Board decisions are collective in nature, can the failings of the Board properly and fairly be attributed to one person?

33. I agree with the respondents that the Cabinet Secretary, in exercise of powers under the Act, also has power to remove members or the Chairman of the Board. While the Schedule to the Act provides the manner of removal of members of the Board, there is no provision with regard to removal of the Chairman. However, as submitted by the respondents, the Cabinet Secretary has the power to remove the Chairperson of the Board. This interpretation accords

with the provisions of the **Interpretation and General Provisions Act**. Section 51(1) provides that:

“ Where by or under a written law, a power or duty is conferred or imposed upon a person to make an appointment or to constitute or establish a board, commission, committee or similar body, then, unless a contrary intention appears, the person having that power or duty shall also have the power to remove, suspend, dismiss or revoke the appointment of, and to reappoint or reinstate, a person appointed in the exercise of the power or duty, or to revoke the appointment, constitution or establishment of, or dissolve, a board, commission, committee or similar body appointed constituted or established, in exercise of the power or duty, and to reappoint, reconstitute or re-establish it.”

34. The power to appoint and remove must, however, be exercised in accordance with the provisions of the Constitution, and must not be exercised in a manner that violates a person’s rights.

35. Of concern also is the averment at paragraph 29 of the affidavit of Fred H. Segor that the petitioner has only been removed from his position as Chairman but remains a member of the Board. As observed earlier, however, the Cabinet Secretary did revoke the appointment of the petitioner as a member of the Board by Gazette Notice No. 109 of 31st December 2013. However, even assuming that the respondents are correct and the petitioner’s appointment as a member of the Board had not been revoked, the question remains: if the petitioner is of such doubtful integrity that he needs to be removed from his position as Chairman of the Board, should he remain a member of the Board at all?

36. The totality of the material before me suggests a level of discrimination against the petitioner which is a violation of the provisions of Article 27. If the entire Board has a duty to act with integrity, and there are allegations of misuse of public resources by the Board, then the entire Board bears collective responsibility. It cannot be proper to say that the Cabinet Secretary has the discretion to remove the petitioner for lack of integrity on the part of an entire Board, and leave him as a member of the Board, as well as leaving in place the other members of a Board whose integrity and use of public funds is in question.

37. In my view, to remove the Chairman of a Board on the basis that complaints of lack of integrity have been made against the entire Board, and to lay the blame for such acts solely on one person, is discriminatory and in violation of the provisions of the Constitution. Indeed, it seems to me to defeat the entire purpose of having a Board as the decision-making organ of any entity if decision which are collective in nature are laid at the feet of an individual.

38. It is also noteworthy that no process was initiated at which the petitioner could be heard on the allegations of lack of integrity. If indeed there was a basis for his removal on the basis of integrity, then Article 50 requires that he be given a hearing.

39. The petitioner has also asked the Court to consider the suitability of the 3rd respondent for appointment as a member and Chairman of the Board. Mr. Chigiti submits that the 3rd respondent is neither a technician nor a technologist eligible for appointment under 6(1)(i) of the Act which relates to the appointment of ***“not less than three but not more than five laboratory technicians and technologists appointed by the Minister”***.

40. The respondents have not addressed themselves to this issue, arguing only that the petitioner has not been removed as a member of the Board. If the 3rd respondent is indeed neither a laboratory technician nor technologist, then he would not be eligible for appointment to the Board under section 6(1)(i).

41. However, I believe I need not get into an inquiry on the suitability or otherwise of the 3rd respondent as a member and Chairman of the Board. Given the analysis on the allegations of lack of integrity set out above, I find that the removal of the petitioner from his position as a member and Chairman of the Kenya Medical Laboratory Technicians and Technologists Board on the basis that he had integrity issues while the issues of integrity were raised in respect of the entire Board was discriminatory and in violation of his rights under Article 27 to equal treatment before the law and therefore null and void. It also violated his right to be heard under Article 50.

42. I therefore make the following orders and declarations:

i. I declare that the purported removal of the petitioner as a member and Chairman of the Medical Laboratory Technicians and Technologists Board by Gazette Notice No 15764 of 27th December 2013 and or Gazette Notice Nos. 109 and 110 of 31st December 2013 violates and or offends the provisions of Article 27 and 50 of the Constitution and is therefore null and void.

ii. I declare that the purported appointment of the 3rd respondent as a member and the Chairman of the Medical Laboratory Technicians and Technologists Board by Gazette Notice No 15764 of 27th December 2013 and or Gazette Notice Nos. 109 and 110 of 31st December 2013 was therefore unlawful and unconstitutional;

iii. I direct that the petitioner serves out the remainder of his term as a member and Chairman of the Medical Laboratory Technicians and Technologists Board unless removed therefrom for lawful cause and in accordance with the Constitution.

iv. I direct that each party bears its own costs.

43. I am grateful to the parties to this matter for their respective submissions and authorities. If I did not refer to them in the judgment, it is not because they were not useful to the Court.

Dated Delivered and signed at Nairobi this 7th day of May 2014

Mumbi Ngugi

Judge

Mr. John Chigiti instructed by the firm of Chigiti & Chigiti & Co. Advocates for the petitioners

Ms. Irari, Litigation Counsel, instructed by the State Law Office for the respondents



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