



Buchichi & another v Cabinet Secretary Ministry of Water And Sanitation & 7 others (Petition 276 of 2019) [2022] KEHC 13264 (KLR) (Constitutional and Human Rights) (30 September 2022) (Judgment)

Neutral citation: [2022] KEHC 13264 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION 276 OF 2019
HI ONG'UDI, J
SEPTEMBER 30, 2022**

BETWEEN

EMMANUEL ASIBWA BUCHICHI 1ST PETITIONER

RAMADHAN MUKONZO JUMA 2ND PETITIONER

AND

CABINET SECRETARY MINISTRY OF WATER AND SANITATION 1ST RESPONDENT

LAKE VICTORIA NORTH WORKS DEVELOPMENT AGENCY 2ND RESPONDENT

JULIUS KONES 3RD RESPONDENT

JOHN MAIYO 4TH RESPONDENT

MANYALA KEAH 5TH RESPONDENT

MEDIATRICE WANGIRA 6TH RESPONDENT

ALFRED KHANGATI 7TH RESPONDENT

DOUGLAS KIPLIMO TANUI 8TH RESPONDENT

JUDGMENT

1. The petitioners filed petition dated 12th July 2019 seeking the following reliefs: -



- a. A declaration that the appointment of the 3rd to 8th respondents as members of the Board of the 2nd respondent by the 1st respondent vide Legal Notice No. 1242 of 8th February 2019 violates Articles 10, 73, 75 and 47 of the Constitution of Kenya, 2010.
- b. Declaration that the appointment of the 3rd to 8th respondents as members of the Board of the 2nd respondent by the 1st respondent vide Legal Notice No. 1242 of 8th February 2019 is a breach of section 66(1) (a) and (b) of the Water Act, No. 43 of 2016.
- c. Declaration that the appointment of the 3rd to 8th respondents as members of the Board of the 2nd respondent by the 1st respondent vide Legal Notice No. 1242 of 8th February 2019 is unconstitutional, illegal, null and void.
- d. Permanent injunction to restrain the 3rd to 8th respondents from conducting any business for and on behalf of the 2nd respondent.
- e. Order directed at the 1st respondent to constitute the Board of Directors of the 2nd respondent within 90 days of the date of judgment in this Petition in line with section 66(1) (a)(b) of the Water Act, No. 43 of 2016 through a participatory and competitive recruitment process.
- f. Such orders as may be necessary for the ends of justice.

Petitioners' case

2. The petition is filed under the provisions of Articles 10, 22, 23, 27, 47, 73, 75 and 232 of the Constitution; Section 66 of the Water Act No. 43 of 2016; and Sections 3, 7, 8, 9, 10 and 24 of the Leadership and Integrity Act, No. 19 of 2012; and Sections 3 and 4 of the Public Appointments (Parliamentary Approval) Act No. 33 of 2011.
3. A summary of the petitioners' case as set out in the petition and supporting affidavit by Emmanuel Asibwa Buchich sworn on 12th July 2019 is that, on 8th February 2019, the 1st respondent unilaterally handpicked and appointed the 3rd to 8th respondents herein as Board members of the 2nd respondent vide Legal Notice No. 1242 of even date.
4. The 1st respondent appointed 6 persons to the Board of the 2nd respondent instead of five allowed by section 66 of the Water Act. He further appointed the 3rd and 8th respondents who were not residents or inhabitants of the Lake Victoria North Basin Area to the Board of the 2nd respondent.
5. According to them, the jurisdiction and territory to be served by the 2nd respondent was determined by the 1st respondent pursuant to Legal Notice No. 28 dated 26th April 2019 to be Kakamega, Vihiga, Busia, Bungoma, Trans-Nzoia, Uasin Gishu and Nandi Counties. That vide the same Gazette Notice the 1st respondent determined that Bomet County was within the territorial jurisdiction of Lake Victoria South Water Works Development Agency and Baringo County was within the territorial jurisdiction of the Rift Valley Agency. Hence the 3rd and 8th respondents were not eligible for the appointments.
6. They claimed that the 1st respondent purported to appoint members of a state corporation pursuant to the provisions of an Act of Parliament (Water Act) without subjecting the exercise to a competitive recruitment process through advertisement as expected by the Constitution and good governance practices of integrity and without subjecting the names of nominees for such appointment to Parliament for vetting and prior approval.



7. Consequently, on 10th May 2019 they wrote to the 1st respondent demanding the said irregularities be resolved by revoking the Gazette Notice in question and cancelling any letter of appointment issued which elicited no response. The 1st respondent instead proceeded to confirm the appointments vide letter to the 3rd to the 8th respondents.
8. That by reason of the aforesaid, the 1st respondent violated Articles 10, 27, 73, 75 and 47 of the Constitution and Section 66 of the Water Act.

2nd 8th Respondents Grounds of Opposition

9. The 2nd to 8th respondents filed grounds of opposition dated 14th November 2019. The grounds were that: -
 - i. The petition was not founded in law
 - ii. The process for appointment of the respondents was pursuant to the law and Regulations.
 - iii. That the respondents were serving at the statutory discretion given to the Cabinet Secretary.
 - iv. The respondents were not state officers.
 - v. The Public Appointments (Parliamentary Approval) Act No. 33 of 2011 was not relevant to the applicants' appointments.
 - vi. The petitioners were not entitled to the prayers sought.

2nd 8th Respondents' Notice of Preliminary Objection

10. The 2nd – 8th respondents filed a Notice of Preliminary Objection dated 22nd November 2019 premised on the following grounds: -
 - a. That this Honourable Court lacks Jurisdiction to determine this dispute, pursuant to the provisions of Article 162(2) of the Constitution of Kenya and Section 12 of the Employment and Labour Relations Court Act, 2011.

Petitioner's submissions

11. The petitioners filed submissions dated 21st November 2019. They submitted that the petition is founded in law. They relied on the Water Act, No. 43 of 2016, the Public Appointment (Parliamentary Approval) Act No. 33 of 2011 and the Leadership and Integrity Act, No. 19 of 2012. Further relying on David Gitahi Suing as the Chairman of Othaya Resident's Foundation v attorney General [2014] eKLR, they argued that they cited with precision the sections of the Constitution they were relying on and which were violated by the 1st and 2nd respondents.
12. They submitted that the 2nd respondent as one of the eight Water Works Development Agencies established under section 65(1) of the Water Act 2016 is as a state corporation has a constitutional responsibility to provide water and sanitation services within the Lake basin area and hence ought to apply the national values and principles of governance set out under Article 10 of the Constitution.
13. They argued that contrary to the provisions of section 66 (1) (b) of the Water Act, the 2nd respondent through gazette Notice No. 1242 dated 8th February 2019, appointed 5 instead of 4 members to the agency. Further that contrary to the requirement that the board members shall be from counties within the water basin area. The 3rd respondent is the immediate Member of Parliament for Konoin



Constituency, Bomet County Rift Valley area and the 8th respondent is a resident of Baringo County, Rift Valley.

14. Relying on sections 66(1) of the [Water Act](#) that provides for the mandate of the Cabinet Secretary to appoint members of the agency, Article 153 of [the Constitution](#), section 137 of the [Water Act](#), 2016 on when the acts of the Cabinet Secretary are exempt from liability and section 3(2) (a) (c) (d) of the [Leadership and Integrity Act](#) No. 19 of 2012 on the values and principles to be respected by a state officer, the petitioners argued that the Cabinet Secretary did not act in good faith and as required of his position as a state officer herein and as such is liable.
15. Further relying on Article 260 of the [Constitution](#) and the case of [Fredrick Otieno Outa v Jared Odoyo Okello](#) SCK Petition No. 6 of 2014 [2014] eKLR, they submitted that the 3rd -8th respondents were state officers. Further relying on Section 3 of the [Public Appointment \(Parliamentary Approval\) Act](#) No. 33 of 2011, they argued that the 3rd to 8th respondents were statutory appointees and as such their appointments ought to have been subjected to parliamentary scrutiny and approval.
16. Urging this court to grant the declaratory, injunctive and prohibitory orders sought, they argued that that they had established a prima facie case that the 1st and 2nd respondents unlawfully appointed the 3rd to 8th respondents as members of the board of the 2nd respondent unilaterally and without following due procedure; that there shall be irreparable injury and contravention should the respondent be allowed to act as members of the Agency whilst their appointment is contrary to the laws and that the balance of convenience shifts in their favour. They relied on the cases of [Giella v Cassman Brown & Co Ltd](#) [1973] EA 358; [Mrao v First American Bank\(K\) Ltd](#) [2003] KLR; [John Amena Amendi T/A Amena Amendi J. Co. Advocates v Edith Nyaboke Amoro & 2 others](#) [2008] eKLR; and [Amir Suleiman v Amboseli Resort Limited](#) [2004] eKLR.

The 2nd to 8th respondents' submissions

17. The 2nd to 8th respondents filed submissions dated 10th March 2020 in response to both the preliminary objection and the petition. Relying on Articles 162(2) and 165(5) (b) of [the Constitution](#), Section 12 of the [Employment and Labour Relations Act](#) and the cases of the [Owners of Motor Vessel "Lillian S" v Caltex Oil Kenya Limited](#) (1989) KLR 1653 (C.A) and [Samuel Kamau Macharia and another v Kenya Commercial Bank Ltd & Another](#), they argued that this court lacks jurisdiction being that the issues raised herein fall within the precinct of the Employment and Labour Relations Court.
18. They submitted that the 2nd respondent is not a necessary party in these proceedings as there is no cause of action against it. To buttress this argument, they relied on [Black's Law dictionary, 9th Edition at page 1644](#) for the definition of triable issue, sections 66, and 68 of the [Water Act](#) on the functions of the 2nd respondent and, the cases of [Elijah Sikona & George Pariken Narok on Behalf of Trusted Society of Human Rights Alliance v Mara Conservancy & 5 others](#) Civil Case No. 37 of 2013[2014] eKLR and [Werrot & Co. Ltd & 3 others v. Andrew Douglas Gregory & 2 others](#) [1998] eKLR.
19. According to them, the petition as pleaded has not met the threshold in the [Anarita Karimi](#) case. Relying on Nairobi Constitutional Petition No. 491 of 2016 [Japheth Ododa Origa v Vice Chancellor University of Nairobi & 2 others](#) [2018] eKLR and [Communication Commission of Kenya & 5 others v Royal Media Services Limited & 5 others](#) [2014] eKLR, they argued that the petitioner accused the respondents of violating Articles 10, 27, 73 and 75 of the [Constitution](#) without showing how they have been violated. The petitioners did not also plead any statutory or constitutional violation by the 2nd to 8th respondent.



20. It was their case that the petitioners did not question the respondents' professional qualifications; not accused the 3rd to 8th respondents of failing their responsibilities or conducting themselves in a manner contrary to the provision of Articles 73 and 75 of *the Constitution*.
21. Further that Pursuant to section 66 of the *Water Act* the Cabinet Secretary has power to appoint the Chairperson and members of the Water Works Development Agency's Board and that not all public appointments are subject to the provisions of the *Public Appointments (Parliamentary Approval) Act*. That is the case herein.

Analysis and determination

22. Having carefully considered the parties' pleadings and submissions and authorities cited I have found a number of issues arising for determination. However before I move to those issues I would wish to tackle the question of jurisdiction which was raised as a preliminary objection.
23. The 2nd to 8th respondents argued that the issues raised herein are for the Employment and Labour Relations Court (ELRC) to determine pursuant to Article 162(2) of the *Constitution* and Section 12 of the Employment and Labour Relations Court (ELRC) Act.
24. Article 162 of the *Constitution* states as follows:
 - 162(1) The Superior Courts are the Supreme Courts, 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 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 Court as contemplated in clause (2).
 - (4) The subordinate courts are the courts established under Article 169, or by Parliament in accordance with that Article.
25. Article 165(5) of the *Constitution* states-
 - (5) The High Court shall not have jurisdiction in respect of matters-
 - (a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or
 - (b) falling within the jurisdiction of the courts contemplated in Article 162(2).
26. It is pursuant to Article 162(2) of the *Constitution* that the Employment and Labour Relations Act, 2011 was enacted. The preamble of the said Act provides "An Act of Parliament to establish the Employment and Labour Relations Court to hear and determine disputes relating to employment and labour relations and for connected purposes"
27. Section 12 (1) of the Employment and Labour Relations Court Act (ELRC Act) provides for the Court's jurisdiction as follows-

12. Jurisdiction of the Court



- (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—
- (a) disputes relating to or arising out of employment between an employer and an employee;
 - (b) disputes between an employer and a trade union;
 - (c) disputes between an employer's organisation and a trade union's organisation;
 - (d) disputes between trade unions;
 - (e) disputes between employer organisations;
 - (f) disputes between an employers' organisation and a trade union;
 - (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.

28. The locus classicus on jurisdiction is the case of Owners of the Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Ltd [1989] KLR 1. Nyarangi, JA. held as follows:

...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 a 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.

29. The Supreme Court in the Matter of Interim Independent Electoral Commission [2011] eKLR, Constitutional Application No. 2 of 2011 held in part as follows:

...a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavors to discern or interpret the intentions of Parliament, where the wording of Legislation is clear and there is no ambiguity.

30. In Samuel Kamau Macharia and Another v. Kenya Commercial Bank Limited & 2 others [2012] eKLR, Application No. 2 of 2011, the Supreme Court held as follows:

(68). A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by



the Constitution or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law.

Also see: Alex Mrefu v Rural Electrification & 3 others [2022] eKLR where the ELRC found that it had jurisdiction in a similar matter.

31. Section 5(7) of the Employment Act, 2007 defines the employee and employer as follows-
- (7) For the purposes of this section——
 - (a) “employee” includes an applicant for employment;
 - (b) “employer” includes an employment agency;
32. A reading of Article 162(2) of the Constitution, the preamble of the ELRC Act and section 12(1) of the ELRC Act is clear on the jurisdiction the ELRC. For avoidance of doubt, Article 162(2) of the Constitution provides the ELRC shall hear and determine disputes relating to employment and labour relations; the Preamble provides “An Act of Parliament to establish the Employment and Labour Relations Court to hear and determine disputes relating to employment and labour relations and for connected purposes; and, section 12(1) of the ELRC Act provides (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—
33. What cuts across is that the jurisdiction is with regards to disputes relating to employment and labour relations. There has to be a relationship in existence. The question for this court to determine is whether there is an employer- employee relationship. Does this case revolve around employment and labour relations issues? Before delving into this question, it is important to note that section 5(7) of the Employment Act defines an employee to include an applicant for employment and an employer to include an employment agency (see the case of Alex Mrefu v Rural Electrification & 3 others (*supra*). This therefore means that a prospective employee falls under the jurisdiction of the ELRC. The petitioners herein are neither employees, prospective employees nor have they applied for the position of the chairperson or Members of the 2nd respondent. They have brought this suit under Article 22 of the Constitution in public interest and are challenging the appointment and/or recruitment process of the chairperson and members of the Board of the 2nd respondent on the premise that the 1st respondent disregarded the provisions of section 66 of the Water Act, 2016, the provisions of the Leadership and Integrity Act and the provisions of the Constitution in making the appointments.
34. The petitioners’ complaint is premised on the failure by the 1st & 2nd respondents to adhere to the laid down processes under the public, service commission Act in the impugned appointments.
- The dispute herein relates to employment of public officers as defined in the Constitution and further relates to applicable constitutional and statutory provisions or lawful policies and practices in that regard. The petitioners may not be employees or prospective employees of the 1st and 2nd respondents but the reason they give for challenging this is that the 1st and 2nd respondents failed to follow the process of recruitment and employment of the 3rd to 8th respondents which is against the policies, regulations in the public service. The petitioners are therefore questioning the manner in which the recruitment of the said respondent was undertaken.
35. I agree with Byran Ongaya J in ELRC Richard Bwogo v. Narok County [2014] where he stated:
- “Thus to answer the preliminary issue the court returns that it has jurisdiction to entertain the present petition. The court adds that whether it is about employment law or policy or



about individual public officers grievances, the jurisdiction of the court would properly be available in that regard.”

36. Further in ELRC Petition No. 47 of 2018 – *Okiya Omtatah Okiiti v. Attorney General & Others* [2019] eKLR, B. Ongaya J similarly stated:

“The court finds that the dispute is about employment in the public service. The court finds that the chair person and the members of the Board of the KRA (just like the chair persons and members of other state corporations or boards of other public bodies) are public bodies and are bound by applicable constitutional and statutory provisions and lawful policies and practices that govern public employment.”

37. I therefore find that the 3rd to 8th respondents being the chairperson and members of the 2nd respondent’s board respectively receive a wage/allowance and hence qualify as persons employed in the public service. Any challenge on their manner of recruitment which is the case here should be heard before the Employment and Labour Relations Court, and not filed as a Constitutional Petition before this Court. Any constitutional issues arising therefrom will be addressed by the ELRC.
38. Upon perusal of the record herein I note that a similar matter ELRC No. 11/2020 was filed before the Kisumu ELRC which was in any event the proper Court to hear the matter. From the Gazette Notice dated 7th February 2019 appointing the 3rd to 8th Respondents, the appointment was to last 3 years which lapsed on 6th February 2022. There were no stay orders issued herein and therefore the 3 years have lapsed. The 3rd – 8th Respondents are no longer chairperson and / or members of the 2nd respondent under that specific Gazette Notice. Since constitutional rights don’t lapse I find that the matter ought to be heard to its conclusion. Following my above findings I hereby transfer this file to the ELRC Kisumu for hearing alongside Kisumu ELRC No. 11/2020.

Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 30TH DAY OF SEPTEMBER, 2022 IN OPEN COURT AT NAIROBI.

H. I. ONG’UDI

JUDGE OF THE HIGH COURT

