



REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
PETITION NO. 25 OF 2017

BETWEEN

FRANCIS ASUNAHPETITIONER

AND

KISUMU WATER AND

SEWERAGE COMPANY LIMITED1ST RESPONDENT

THE GOVERNOR KISUMU COUNTY

PROF. PETER ANYANG' NYONG'O2ND RESPONDENT

JUDGMENT

Introduction

1. The petitioner has brought the petition dated 3rd November 2017 on his own behalf seeking a declaration that the 2nd respondent's decision to change the directorship of the 1st respondent ("the Company") before the terms of the current directors expire is not founded on good faith and fair reason and is *ultra-vires* the Memorandum and Articles of Association of the Company. He contends that this action violates his fundamental rights under **Articles 27, 28, 33, 41, 43** and **47** of the Constitution and is therefore null and void.

The Petitioner's Case

2. At all material times the petitioner was a director of the Company representing the Non-Governmental Organisations in the water sector. He pleaded that he received a letter from the Company secretary dated 20th September 2017, demanding his immediate resignation to enable the 2nd respondent ("the Governor") reconstitute the Board of Directors of the Company. The petitioner contended that the Governor's action of demanding, by force, to replace him as a director was discriminatory, violated his right to equality and equal protection of the law. The petitioner averred that the Governor expressed the desire not to work with the current directors including the petitioner was not in good faith or fair reason and amounted to advocacy for hatred based on vilification, clan profiling and contradicted the standards of expressions set out in **Article 33** of the Constitution which protects freedom of expression.

3. The petitioner contended that the powers of reconstituting and restructuring the County Government upon assumption of power by the Governor were restricted to reconstituting the County Executive Committee and not other entities like the Company. The petitioner stated that the Company's action of

calling for an extraordinary general meeting contrary to the published written opinion of the Water Services Regulatory Board (WASREB) and the Minister in Charge of Water amounted to an abuse of power and was contrary to the Constitution.

4. Mr Nyamweya, counsel for the petitioner, argued that Governor's actions were *ultra vires* the Articles of Association by demanding resignation of its directors. He argued that the Company is a public entity and as such the national values and principles in **Article 10** of the Constitution are applicable and must be adhered to. He was of the view that Governor abused the people's trust and power as a board member can only be removed by due process.

The Respondents' Case

5. The Company did not respond to the petition while the Governor opposed the petition through the replying affidavit by Dr Olango Onudi, the acting County Secretary. He deposed that the 2nd respondent being the County Executive, the Governor enjoys executive authority in accordance with **Articles 1, 179 and 180** of the Constitution. That part of the Governor's functions under **Schedule 4, Part 2** of the Constitution include provision of water and sanitation services through the Company in which the Governor's office is the majority shareholder on behalf of the County. He further deposed that in performing his functions, the Governor is represented in the Board of Directors by four nominees who are amongst the other directors representing stakeholders in the water and sanitation sector.

6. Dr Olango denied that the Governor demanded the petitioner's immediate resignation. He stated that after the other directors resigned, it was necessary to requisition an Extraordinary General Meeting ("EGM") to appoint new directors. Dr Olango further deposed that the petitioner resigned voluntarily and expressed the hope that he would be paid his terminal benefits.

7. The respondent case is that any Director may be removed before the expiry of his term so long as a special notice for resolution to remove the director is issued in accordance to **section 139(1)** of the **Companies Act No. 17 of 2015**. Accordingly, the requisition for the Extra Ordinary General Meeting was lawful. The Governor also contends that according to **section 46(2)** of the **County Government Act**, he has the power to determine the organisation of the County and its various departments and to this end he can establish, continue or vary any department and determine its object. In line with his authority, the Governor sought to address some issues that formed the basis of his manifesto such as accountability and the local needs. Further that the County Government Executive Structure adopts the 'pleasure doctrine' when it comes to Governor's appointees such as the petitioner.

8. Mr Amondi, counsel for the Governor, submitted that the 2nd respondent is the majority shareholder of the 1st respondent and he acted within his mandate under the County Government Act and the Article of Association of the Company.

Determination

9. From the pleadings and submissions of the parties the issue for determination is whether the removal of the petitioner from his post as director was contrary to the Articles of Association of the Company and in breach of his fundamental rights enumerated in the petition.

10. The resolution of this case depends on the uncontested facts which have been presented to the court. According to the evidence, the Office of Governor requisitioned an EGM by a letter dated 20th September 2017 whose object was to elect directors of the Company. The contents of the letters were placed before the Board and at a meeting held on 22nd September 2017, the Board resolved that, "*it was important to seek clarification from the Governor on which positions were to be filled at the EGM. Members resolved that a letter explaining the situation be dispatched to the Governor and a follow-up be made with a meeting if necessary In the meantime, the Notice convening the meeting be prepared and released only after consultation is held with the Governor.*"

11. Following the resolution, the Board of Directors, under the hand of the Chairman, dispatched a letter dated 22nd September 2017 to the Governor setting out the number of directors, the basis of their representation and the dates of expiry of their respective terms. They also proposed to the Governor that a meeting be held on 26th September 2017 or a date convenient to him.

12. Thereafter the Board issued a notice dated 18th October 2017 requisitioning the EGM to be held on 10th November 2017. The notice proposed that the EGM note the resignation of three directors representing the hotel and hospitality Industry, interests of women and Non-Governmental organisations in the water sector.

13. Although the petitioner pleaded in the petition that the Governor demanded his immediate resignation, he did not disclose that he had in fact written a resignation letter dated 11th October 2017 in which he addressed the Secretary of Board as follows;

This is to tender my resignation as a Director of the Company with effect from the date of the planned Extra-Ordinary General Meeting.

The resignation is consequent to our deliberations at the Emergency Board Meeting of Sept. 22, 2017 and the Board Meeting of Oct. 5, 2017.

My request is therefore to request the Company to kindly prepare my benefits due to predetermination of service, so as to allow for my honourable exit from the Board and entry into other aspects of nation building.

14. It is also clear from the notice dated 18th October 2017, all the other directors, including the petitioner, had resigned. The effect of the petitioner's resignation is that in fact, the petition lacks any substratum. Although the petitioner submits that he was forced to resign, there is no evidence to show that he was coerced in resigning. If anything, his more immediate concern was his terminal dues as evidenced by his supplementary affidavit sworn on 26th January 2018.

15. Notwithstanding, what I have stated, a company may remove its directors under the provisions of the **Companies Act** before the end of his or her term in office. **Section 139** of the **Companies Act** dealing with removal of directors provides as follows:

139 (1) A company may, by ordinary resolution at a meeting, remove a director before the end of the director's period of office, despite anything to the contrary in any agreement between the company and the director.

(2) However, a special notice is required for a resolution to remove a director under this section or to appoint a person to replace the director so removed at the meeting at which the director is removed.

(3) A person appointed to replace a director who is removed under this section is, for the purpose of determining the time at which the person is to retire from office, taken to have become a director on the day on which the director in whose place the person is appointed was last appointed as a director.

(4) A vacancy created by the removal of a director under this section, if not filled at the meeting at which the director is removed, can be filled as a casual vacancy.

(5) A person who ceases to be a director continues to be subject to the duty—

(a) to avoid conflicts of interest with regard to the exploitation of any property, information or opportunity that the person became aware of while a director; and

(b) not to accept benefits from third parties with regard to things done or omitted to be done by that person before ceasing to be a director.

(6) This section does not—

(a) deprive a person removed under it of compensation or damages payable in respect of the termination of the person's appointment as director; or

(b) limit any power to remove a director that may exist apart from this section.

16. From the provisions I have cited, a director may be removed from office before his term expires provided a special notice is issued. In this case, the Governor requisitioned an EGM. The notice clearly indicated that the purpose of the meeting was to elect directors after the directors representing various stakeholders resigned. By the time the notice dated 18th October 2017 was issued, the petitioner had already resigned hence this petition lacks merits. **Section 139(6)** of the **Companies Act** provides that a director removed from office before his term of service has expired has the right to seek damages. Such a claim may be pursued in another forum.

17. Since the petitioner resigned, it is not necessary to consider how and to what extent the appellant's fundamental rights were violated and the relationship between the **Companies Act** and the **County Government Act** in relation to the power of the Governor in relation to Companies controlled by a County Government. I would also mention that the petitioner cited several constitutional provisions which under the principle in **Anarita Karimi Njeru v Republic (No.1) [1978] KLR 154** as affirmed by the Court of Appeal in **Mumo Matemu v Trusted Society for Human Rights alliance & 5 Others NRB CA Civil Appeal 290 of 2012 [2013]eKLR** he was obliged to set out his claim in respect of each provision of the Bill of rights violated and elucidate how the provision was violated in respect to him.

18. The petition is dismissed with no order as to costs. The interim orders in force are discharged forthwith.

DATED and DELIVERED at KISUMU this 19th day of March 2018.

D.S. MAJANJA

JUDGE

Mr Nyamweya instructed by N. E. Mogusu and Associates Advocates for the petitioner.

Ms Omboto instructed by Ogejo, Olendo and Company Advocates for the 1st respondent.

Mr Amondi instructed by Amondi and Company Advocates for the 2nd respondent.