



**Republic v Eldoret Water and Sanitation Company & 2 others; Rono & another
(Exparte Applicants); Sing’oei & 8 others (Interested Parties) (Miscellaneous
Application E007 of 2024) [2024] KEHC 15365 (KLR) (4 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15365 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
MISCELLANEOUS APPLICATION E007 OF 2024
E OMINDE, J
DECEMBER 4, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

ELDORET WATER AND SANITATION COMPANY 1ST RESPONDENT

UASIN GISHU COUNTY PUBLIC BOARD 2ND RESPONDENT

WATER SERVICES REGULATORY BOARD 3RD RESPONDENT

AND

GEOFFREY KIPCHUMBA RONO EXPARTE APPLICANT

BELLAT SOSTHEN ROTH EXPARTE APPLICANT

AND

DAVID KIPTOO SING’OEI INTERESTED PARTY

RACHEAL MISOI INTERESTED PARTY

DAVID CHUMBA CHEMWENO INTERESTED PARTY

EDWARD KISAKA NALIANYA INTERESTED PARTY

NATHAN KIPCHIRCHIR TOROREI INTERESTED PARTY

CLIFF KOSGEI MAGUGU INTERESTED PARTY

FRANCIS KIPKOECH CHIRCHIR INTERESTED PARTY

MARY KERICH INTERESTED PARTY

ELIUD KIPKORIR CHEMAGET INTERESTED PARTY



RULING

1. What is pending before this court is the 2nd Respondents' Preliminary Objection dated 12/07/2024. Initially, the Applicant instituted Judicial Review proceedings vide a Chamber Summons dated 29/05/2024 seeking the following orders;
 - i. An Order of Certiorari to quash the decision of appointments of the 1st to 9th interested parties as members of the 1st Respondent's board of directors.
 - ii. An Order of Prohibition to prohibit the 1st to 9th interested parties from drawing further salaries and/or allowances.
 - iii. An Order of Mandamus to compel the 2nd Respondent to initiate proper and legal recruitment of the 1st Respondent's board of directors.
 - iv. The costs of this application be borne by the Respondents.
2. In response, the Respondent then filed the Preliminary Objection dated 12/07/2024 on the following points;
 - i. That this Honourable Court lacks jurisdiction pursuant to Article 162 (2) of *the Constitution* of Kenya, 2010 and Section 12 of the Employment and Labour Relations Court.
 - ii. That the Exparte Applicants lacks locus standi to institute these proceedings pursuant to Section 4 of *Fair Administrative Action Act*, Article 22 and 23 (3) of *the Constitution* of Kenya, 2010 and Order 53 of the Civil Procedure Rules, 2010.
 - iii. That the ex parte applicants have not exhausted internal mechanism set out under Section 82(1) of the *Water Act* No,43 of 2016.
3. The court directed that the Preliminary Objection de canvassed first vide written submissions. The 2nd respondent filed submissions dated 02/10/2024 through the firm of Messrs. Kelvin Bett and Associates whereas the Ex Parte Applicant filed submissions through the firm of Messrs Tirop and Company Advocates. The rest of the Respondents did not file any submissions to the Preliminary Objection.

The Objector's Submissions

4. Learned counsel for the 2nd Respondent cited various decisions on what constitutes a Preliminary Objection including the Supreme Court in the case of Hassan AM Joho & Another-vs- Suleiman Said Shahbal & 2 Others and the Supreme Court case of *Independent Electoral & Boundary Commission -vs- Jane Cheperenger & 2 Others* (2015) eKLR where the court made the following observation as relates to Preliminary Objection:-

“The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection - against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”



5. Counsel additionally cited the case of *Attorney General & Another -vs- Andrew Mwaura Gitbinji & Another* (2016) eKLR on the nature and meaning of a preliminary objection inter alia:-
 - i. A preliminary Objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.
 - ii. A preliminary Objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and
 - iii. The improper raise of points by way of Preliminary Objection does nothing but unnecessary increase of costs and on occasion confuse issue in dispute.

6. On the issue of the Jurisdiction of the Court, Counsel relied on the oft cited case of *Owners of vessel "Lilians"-vs- Caltex Oi l(Kenya) Limited* (1989) IKLR as well as the case of *County Government of Migori -vs- INB Management IT Consultant Limited* (2019) eKLR. Counsel further submitted that a courts' jurisdiction flows from either *the Constitution* or Legislation or both, urging that this was well stated in the case of *Samuel Kamau Macharia & Another-vs- Kenya Commercial Bank Limited & 2 Others* S.C Application No.2 of 2012 among others

7. Counsel in relying on the case of *Republic -vs- Karisa Chengo & Another* (2017) eKLR, urged that pursuant to Article 162(2) of *the Constitution* of Kenya, parliament enacted the *Employment and Labour Relations Court Act* whose purpose, is to;

“Establish the Employment and Labour Relations Court to hear and determine disputes relating to Employment Labour Relations” By Section 12(1) of the Act, the jurisdiction of the court is to hear disputes "relating to Employment and Labour Relations" including

 - a. Disputes relating to or arising out of Employment between an employer and an employee;
 - (b) Dispute between an employer and a trade union
 - (c) Disputes between an employer's organization and a trade union's Organization
 - (d) Disputes between trade unions
 - (e) Disputes between employer organization and a trade union
 - (f) Disputes between employer organizations
 - (g) Disputes between a trade union and a member thereof
 - (h) Disputes between an employers' organization 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 coif active agreements.



8. He further submitted that the said Act has gone further to specify the parties who may lodge or against whom a suit, applications, claims or complaints; may be lodged before the said court as an employee, an employer, a trade union, an employer's organization, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose.
9. That further, in the case of *Daniel Maingi Muchiri Jubilee Insurance Co. Ltd. CA No.138 of 2016*, the Court of Appeal expressed itself with regard to the jurisdiction of the said court with regard to matters Constitutional as follows:-

“The Environment and land Court and the Employment and Labour Relations Court too have jurisdiction to redress violations of Constitutional rights in matters falling under their jurisdiction”
10. Counsel submitted that the Act at Section 2 defines an employee and an employer as follows;

“Employee to mean a person employed for wages or a salary and includes an apprentice and indentured learner; while an employer has also been defined under the same Section to mean “Any person; public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman manager or factor of such person, public body, firm, corporation or company”.
11. Further, that an employee and an employer may enter into a contract of service as;

An agreement, whether oral or in writing and whether expressed or implied, to employ or to serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership but does not include a foreign contract of service to which part XI of this act applies;
12. It is the respondent’s case that the appointment of the Interested Parties herein is pursuant to the Provisions of Section 79(1) of the *Water Act* No.43 of 2016 and that as such, they are under a Contract of Service as opposed being under a Contract for Service since their role and duties are controlled and is not as they wish and that therefore, the nature of the relationships between the 1st Respondent and that of the Interested Parties is that of employer and employee and the proper Court vested with the jurisdiction to entertain this suit is the Employment and Labour Relations Court (ELRC) and not this Court.
13. On the issue of locus standi, the 2nd respondent cited the case of *Law Society of Kenya -vs- Commissioner of Lands & Others*. Nakuru High Court Civil case No.464 of 2000 which defined locus standi to mean the right to appear before and be heard in a court of law and that without it, even when a party has a case that has merit, the party will not be heard for want of standing.
14. In this regard, Counsel submitted that the exparte applicants, in their Statement and Verifying Affidavit, did not state the capacity in which they were bringing the Judicial Review Proceedings. The application was anchored on Articles 2, 6, 10, 19, 20, 21, 22, 23, 27, 35, 43, 47, 48, 56, 159, 165, 174, 232, 235, 258, 259 and 260 of *the Constitution* of Kenya, 2010.
15. Counsel submitted that Articles 22 and 258 of *the Constitution* are the anchor provisions on locus standi. Article 22 provides the right of every person to institute proceedings whenever a right of fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened. Article 258 roots for every person's right to institute proceedings that *the Constitution* has been contravened or is threatened with contravention.



16. He further submitted that in both instances, such proceedings may be instituted by the aggrieved party on its own interest, by a person acting on behalf of another person, on behalf of a class of people, in public interest or by an association acting on behalf of its members or members. Counsel cited the decision of the Court of Appeal in Nairobi Civil Appeal No.290 of 2012 Mumo Matemo —vs-Trusted Society of Human Rights Alliance & 5 Others (2013) eKLR and urged that under Rule 3(1) of the Constitution of Kenya (Protection of Rights and Fundamental freedoms) practice and produce rules (Mutunga Rules) it provide as follows:-

“ These rules shall apply to all proceedings made under Article 22 of the Constitution”
17. That further, a reading of Rule 4 to Rule 10 of the Rules on the Procedure of instituting such suits it is abundantly clear that any person moving the court seeking to enforce fundamental rights and freedom under the Bill of Rights pursuant to Article 22 and 258 of can only do that through a Constitutional Petition and not in any other form. Counsel therefore submitted that Judicial Review being part of the orders that can be granted under Article 23 of the Constitution in a Constitutional Petition can therefore not be the modus of moving the Court in seeking for reliefs under the Bill of Rights.
18. Additionally, Counsel submitted that for one to move the court under Judicial Review, they must have been personally and directly affected and therefore aggrieved by the decision for which the review is sought. Counsel cited Order 53 Rule (1) (2) of the Civil Procedure Rules 2010 and Section 4 of the Fair Administrative Action No. 4 of 2015 in support of this submission and urged that the ex-parte Applicants have not shown any administrative action that was taken against them. Counsel therefore maintained that by these submissions he has sufficiently demonstrated to Court that the applicants lack the requisite locus standi to institute this judicial review.
19. On the issue of whether the Applicants have sufficiently exhausted the available remedies under the relevant statutory provisions, Counsel submitted that under Section 82 (1) of the Water Act No. 43 of 2016, A party aggrieved by the decision of a water service provide may appeal against the decision to the regulatory board on the prescribed manner within fourteen days from the date the decision was made. That the ex-parte Applicants did not and have not appealed as required under Section 82 of the Water Act and therefore, the court is yet to be seized with jurisdiction. He cited the case of Speaker of the National Assembly vs James Njenga Karume (1992) in support of this submission.
20. Additionally, counsel cited the case of *Republic vs National Environment management Authority ex-parte Sound Experiment Ltd*, (2011) eKLR in support of these submissions and urged that the Court finds that their Preliminary Objection has merit and strike out the Applicant’s suit with costs to the Respondents.

The Ex-Parte Applicants’ Submissions

21. The ex parte applicant relied on the definition of a Preliminary Objection as set out in the case of *Mukisa Biscuits Manufacturing Ltd Vs West End Distributors Ltd* (1969) E.A. in response to the 2nd Respondent’s Preliminary Objection that this Court lacks the jurisdiction to entertain this suit. He urged that courts have pronounced themselves extensively on the issue of the consequence of having or lacking jurisdiction and referred to the case of Owners of the Motor Vessel Lillian S v Caltex Kenya [1989] KLR1, and the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR on the issue of jurisdiction.
22. He cited Article 162 (2) of the Constitution of Kenya and Section 12 of the Employment and Labour Relations Court Act which collectively set out the Jurisdiction of the Employment and Labour relations Court



23. Counsel submitted that Section 3 of the *Employment and Labour Relations Court Act* denotes the Principal Objectives of the Act and it restricts the said Court to the hearing and determination of disputes relating to employment and labour relations and for connected purposes which position he stated was reiterated by the court in the Court of Appeal in the case of Odongo *v Clerk, Nakuru County Assembly & Others, Civil Appeal E001 of 2023*. Counsel therefore urged that it is the ex parte applicant's case that in light of the above provisions of the law and decisions of the courts it is evident that the jurisdiction of the ELRC is limited to disputes where there is/was an employer/employee relationship.
24. Counsel submitted that under Section 2 of *Employment Act, 2007* an "employee" is defined as a person employed for wages or a salary and includes an apprentice and indentured learner. He urged that it is their case that the interested parties are not remotely close to that definition and they cannot therefore be described as employees of the 1st Respondent.
25. That further, whereas the authorities cited by the 2nd Respondent make reference to the jurisdiction of the ELRC generally, the authority that is directly relevant to the case at hand is the judgment of the Employment and Labour Relations Court in Petition E007 OF 2023 *Mahamoud Kiplagat & 3 Others vs Eldoret Water Sanitation Company & 3 others* where the court stated thus;-
- “From the above definition as well as Section 12 of the Employment and Labour Relations Court, it is clear that the Petitioners were not employees of the 1st Respondent (ELDOWAS). Their appointment was as Directors of the 1st Respondent under the Memorandum and Articles of the 1st Respondent under the *Companies Act*”
26. Counsel submitted therefore that the issue of whether the Interested Parties who were appointed as Directors of the 1st 2nd & 3rd Respondents are employees of the said Respondents was succinctly put the case of *Rift Valley Water Services Board & 3 Others v Asanyo & 2 Others* (2022) KECA 778 (KLR) where the Court of Appeal was confronted with the question of whether a director of a water services board established under the *Water Act, 2016* was an employee for purposes of the *Employment Act* and the Industrial Court Act (repealed by the *Employment and Labour Relations Court Act*).
27. In answering the question, the Court of Appeal held:

“The question as to whether the 1st Respondent was an employee of the 2nd Respondent with the right of claim as such in the Industrial Court has a simple answer to it. He was not Section 2 of the *Employment Act* defines an 'employee' in no uncertain terms as “a person employed for wages or a salary, and includes an apprentice and indentured learner.” Conversely an "employer" is defined as "any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company.” In our considered judgment, the 1st Respondent was not employed by the 2nd Respondent ...” for wages or a salary....”We

We find nothing on record to suggest that the 2nd Respondent had entered into a contract of service to employ the 1st Respondent as its employee within the meaning of the act....

We hasten to draw a distinction between an employee and a member of a board of directors of a corporate entity, such as the 1st Appellant. That distinction lies on our answer to the question as to whether directors are employees of the company to whose board they are appointed. They are not. In *McMillan v Guest* (1942) AC p 561, it was held that a company



director is an office holder who is not, without more, an employee of the company. (See *Parsons v Albert J. Parsons and Sons Ltd* [1979] ICR P.271.

28. Counsel further submitted that the appointment of the Interested Parties and the subsequent extension of appointment for a further term did not by any means constitute them as employees within the meaning of the *Employment Act*. Their functions as directors of the 1st respondent's Governance Body, and the terms on which they were appointed to represent the interests of the Consumer groups and other stakeholders on the Board, were governed by the *Companies Act*, WASREB Regulations 2024, and the 1st respondent's Memorandum and Articles of Association. The *Employment Act*, 2007 does not apply to that relationship so as to confer on the ELRC jurisdiction to determine any claim relating to appointment to the board.
29. Counsel submitted that a "contract of service" is defined in Section 2 of the *Employment Act* as "an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time" and that the Interested parties' appointment letters did not constitute "a contract of service to employ" the said Interested parties. Additionally, he stated that ELDOWAS is a State Corporation established under the *Water Act*, 2016 and stands in pari materia with the Rift Valley Water Services Board similarly established under the *Water Act* and so the finding of the Court of Appeal in the above cited case is applicable to this case.
30. Counsel in citing Article 165 of *the Constitution* of Kenya stated that evidently, this cause relates to a question relating to rights and fundamental freedoms in the Bill of Rights and acts done in contravention of *the constitution* and other laws and submitted that this Court is therefore the Court that is clothed with jurisdiction under the said article to hear and determine the instant Application.
31. On the issue of locus standi, Counsel relied on the definition of locus standi in *Black's Law Dictionary, 9th Edition (page 1026)* which is as follows;

"the right to bring an action or to be heard in a given forum".
32. That further, the issue of locus standi raises a point of law that touches on the capacity of the ex-parte applicants to institute this suit a matter which various courts have held should be resolved at the earliest opportunity. Counsel also cited the case of *Law Society of Kenya v Commissioner of Lands & Others*, Nakuru High Court Civil Case No 464 of 2000 and the case of *Alfred Njau & others v City Council of Nairobi* (1982) KAR 229 on the definition of locus standi.
33. He submitted that the ex-parte applicants are consumers of the water and sanitation services offered by the 1st Respondent by virtue of being residents of Uasin Gishu County and are greatly affected by the arbitrary illegal decision of appointment of the Interested parties to the Board of the 1st Respondent.
34. Counsel submitted that the irregular and illegal appointments of the interested parties hinder and curtail the enjoyment of rights guaranteed under Article 143 of *the Constitution* and therefore, with resolute commitment to fight for the rule of law, the Ex-parte applicants filed this suit seeking a fair administrative action as provided under Article 47 of *the Constitution* in a manner that is expeditious, efficient, lawful, reasonable and procedurally fair manner as they and the rest of the people of Uasin Gishu County will likely to be adversely affected by unfair administrative action of the 1st Respondent.
35. He therefore urged that the ex-parte applicants have the requisite locus standi under Article 2 of *the Constitution* as read with Section 5 (2) of the *Fair Administrative Action Act*.
36. On whether there are internal mechanisms of dispute resolution, counsel cited the provisions of Section 82 and 121 of the *Water Act*, urging that it is essential to consider the provisions of Section



2 of the Water Act which defines "Authority", "Cabinet Secretary" and "Regulatory Board". Counsel pointed out that the 2nd Respondent referred the court to the provisions of Section 82 of the Water Act and have argued that the ex-parte applicants ought to have filed an appeal before the Regulatory Board (3rd Respondent); opposing the same and urging that, to the contrary, the provisions of Section 82 of the Water Act do not relate to the cause of action in this matter.

37. Counsel referred the court to the case of *Murang'a County Government v Murang'a South Water & Sanitation Co. Ltd & another* [2019] eKLR where the court was faced with a similar situation and stated as follows:-

“The key question here is whether the correct forum is the Water Tribunal. Section 121 (1) and (2) of the Water Act 2016 clearly spells out the jurisdiction of the Tribunal as follows:

- (1) The Tribunal shall exercise the powers and functions set out in this Act and in particular shall hear and determine appeals at the instance of any person or institution directly affected by the decision or order of the Cabinet Secretary, the Authority and Regulatory Board or of any person acting under the authority of the Cabinet Secretary, the Authority and Regulatory Board.
- (2) In addition to the powers set out in subsection (1), the Tribunal shall have the power to hear and determine any dispute concerning water resources or water services where there is a business contract, unless the parties have otherwise agreed to an alternative dispute resolution mechanism.

Clearly, the present proceedings are not in the nature of an appeal against the decision or order of the Cabinet Secretary, the Authority and Regulatory Board or of any person acting under their authority. Secondly, the dispute does not stem from a business contract. Thirdly, the petitioner seeks interpretation of the Constitution and some reliefs that can only be granted by this Court. I accordingly find that the Water Tribunal is not seized of jurisdiction; and, that the dispute is properly before the court.

38. Counsel urged that the genesis of the dispute is the illegal process of appointment of Board members of the 1st Respondent. Further, that the case for the ex-parte applicants is that water and sanitation services are distinct functions devolved fully to the county government under Article 186 of the Constitution as read with Section 11(b) of part 2 of the Fourth Schedule to the Constitution, 2010. Counsel urged that the Preliminary objection fails on all limbs and the same should suffer the fate of dismissal with costs to the ex-parte Applicants.

Analysis & Determination

39. As already stated above, the nature of preliminary objections was discussed and determined in the case of *Mukisa Biscuit Manufacturers Ltd -vs- Westend Distributors Ltd*, (1969) E.A. 696 page 700 to be as follows:

...so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit, to refer the dispute to arbitration.

...A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot



be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop.

40. In this regard then the only issue that the Court needs to determine is whether the three aspects that comprise the Preliminary Objection raised by the 2nd Respondent fit into the definition of the same as set out in the Mukisa Biscuit case above.

Jurisdiction

41. The locus classicus on the issue of the jurisdiction of a Court and or Tribunal to handle any matter before it is the case of *Owners of Motor Vessel "Lilian S" v Caltex Oil* (K) Ltd [1989] KLR1 where the court held thus;

“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.”

42. It goes without saying therefore that the issue of jurisdiction is so key, so primarily and so fundamental that if indeed a Court is to find that it has no jurisdiction to handle any matter before it at the preliminary stage, then that finding will indeed determine the case in limine.

43. With regard to the issue of the jurisdiction of the equal status Court relative to one another, the Provisions of Article 165(5) of *the Constitution* of Kenya is relevant and it provides as hereunder;

(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)

44. The Courts contemplated under Article 162 of *the Constitution* are as hereunder provided

1. The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to 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 courts contemplated in clause (2).
4. The subordinate courts are the courts established under Article 169, or by Parliament in accordance with that Article.

45. In light of the demarcation of the jurisdiction of the Courts of Equal status as provided under Article 165(5), the Supreme Court in delineating the boundaries of these three Courts vis-a-vis each other SCOK Petition Number 5 of 2015 *Republic -vs- Karisa Chengo & Another* (2017) eKLR, held as follows;



The Constitution, the Environment and Land Court Act and the Employment and Labour Relations Court Act revealed that a special cadre of courts with sui generis jurisdiction were provided for. Such parity of hierarchical stature did not imply that either Environment and Land Court or the Employment and Labour Relations Court was the High Court or vice versa. The three were different and autonomous courts and exercised different and distinct jurisdictions. As article 165(5) of the Constitution precluded the High Court from entertaining matters reserved for the Environment and Land Court or the Employment or the Labour Relations Court, it was to be inferred, by the same token, that the Environment and Land Court and Employment and Labour Relations Court too could not hear matters reserved to the jurisdiction of the High Court.

46. Given my above analysis of the Constitution, Case Law and Statute, it is clear that each of the Equal Status Courts have their jurisdiction specifically spelt out and each Court is obligated therefore to act within their mandate as demarcated. The question the Court then needs to answer in this case is whether the Interested Parties are employees of the Water Company.

47. Section 12 of the Employment and Labour Relations Court Act enacted by Parliament under the mandate provided under Article 162(2) above and the said Act provides the jurisdiction of the Court as follows:-

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.

48. Of special significance is that the Act at Section 2 defines the term employee to mean;

“an employee means a person employed for wages or a salary and includes an apprentice and indentured learner;”

49. And an "employer" is defined to mean:-

‘any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company.’”

50. The guiding light on whether the Interested Parties herein who are Directors of the Water Company Established under the Water Act are employees and are therefore subject to the jurisdiction of the ELRC and not the High Court is the decision the Court of Appeal in the case of *Rift Valley Water Services Board & 3 Others v Asanyo & 2 Others* (2022) KECA 778 (KLR) herein above cited.

51. In this case, the Court held that Directors in the Water Company therein viz the Rift Valley Water Services Board, that were appointed under the same Statute that the Interested Parties herein have been appointed, and which appointment is the subject matter of this Application, are not employees and so the Employment Act did not apply to them. This being the case, the Court is satisfied that it has the requisite jurisdiction to deal with the matter and the Preliminary Objection in this regard is therefore misconceived and is accordingly dismissed.

Locus Standi

52. The issue of the Locus standi of a party to institute proceedings is also a pure point of law and does therefore qualify to be raised as an objection at the earliest as envisaged in the Mukisa Biscuit case and if such an objection is upheld it would dispose of the case in its entirety at the preliminary stage.



53. The Court of Appeal in Mombasa Civil Appeal No. 75 of 2016, *Juletabi African Adventure Limited & another -vs- Christopher Michael Lockley* [2017] eKLR described locus standi as follows: -

The term locus standi means a right to appear in Court and, conversely, as is stated in Jowitt's Dictionary of English Law, to say that a person has no locus standi means that he has no right to appear or be heard in such and such a proceeding....

54. The Court went further to state;

Articles 22 and 258 of *the Constitution* are the anchor provisions on locus standi. Article 22 provides the right of every person to institute proceedings whenever a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened. Article 258 roots for every person's right to institute proceedings that *the Constitution* has been contravened or is threatened with contravention. In both instances, such proceedings may be instituted by the aggrieved party on its own interest, by a person acting on behalf of another person, on behalf of a class of people, in public interest or by an association acting on behalf of its member or members.

55. In the case of *Otolo Margaret Kanini & 16 others v Attorney General & 4 others* [2022] eKLR Mrima J sated as follows;

The Supreme Court in Advisory Opinion Reference 1 of 2017, Kenya National Commission on Human Rights -vs- Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) [2020] eKLR discussed the dynamics of locus standi. It referred to its earlier decisions in Reference No. 1 of 2013, in the Matter of the National Gender and Equality Commission and Constitutional Application Number 2 of 2011, Re the Matter of the Interim Independent Electoral Commission. Although the Court dealt with the factors to be considered regarding who may commence a suit before the Supreme Court in seeking an advisory opinion pursuant to Article 163(6) of *the Constitution*, I find that the principles therein remain largely applicable to the aspect of locus standi under Articles 22 and 258 of *the Constitution*.

The Court stated as follows: -

... the Court must always consider whether the party seeking to move it, falls within the categories of parties decreed as having such standi by *the Constitution*.....

56. Pursuant to Article 22(3) of *the Constitution*, the Chief Justice made rules contained in Legal Notice No. 117 of 28th June 2013 commonly referred to as “the Mutunga Rules” to inter alia, facilitate the application of the right of standing. The rules reiterate that any person other than a person whose right or fundamental freedom under *the Constitution* is allegedly denied, violated or threatened has a right of standing and can institute proceedings as envisaged under Article 22(2) and 258 of *the Constitution*.

57. Article 22 of *the Constitution* provided for the right of standing in the enforcement of the Bill of Rights as hereunder;

22. (1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

(a) a person acting on behalf of another person who cannot act in their own name;

(b) a person acting as a member of, or in the interest of, a group or class of persons;



- (c) a person acting in the public interest; or
- (d) an association acting in the interest of one or more of its members.

58. Whereas this provisions provides for and recognizes every persons right of standing before any Court, by virtue of the fact that it gives different categories of standing means that a party must demonstrate under which category of standing they are moving the Court. This in my view is the import of the principle set by the Supreme Court in the decisions cited by Mrima J in the above quoted Otolo Margaret Kanini Case simply because a party cannot move the Court under all the provisions of Article 22 of *the Constitution*.
59. A party must elect which one of the categories listed under Article 22(2)(a)-(d) to move the Court under and then demonstrate to Court how he fits into the selected category. See Humphrey Makokha Nyongesa & Another v Communications Authority of Kenya & 2 Others [2018] eKLR. In the instant case, the Applicants in their Statement and Verifying Affidavit have simply described themselves as “...Male Adults of Sound mind and residents of Uasin Gishu County within the Republic of Kenya carrying on business within Eldoret Town...”
60. Nothing has been stated as to which of the provisions of Article 22 they have moved the Court under and even that aside, no attempt at all has been made whatsoever in any part of their pleadings to demonstrate their standing even under the larger provisions of Articles 22 and 258 of *the Constitution*. Counsel in his submissions defined their locus as already herein above summarised. However it should be noted that submissions are not pleadings and parties are bound by their pleadings. The belated attempt by Counsel to fill the gap on behalf of the Applicants is of no consequence therefore.
61. Further to the above, the Applicants have not also demonstrated how their cause fits into a judicial review application. This is because even assuming they were able to demonstrate standing under Article 22 and 258, then they ought to have filed a Constitutional Petition in their capacity as citizens seeking to defend *the Constitution* for reasons that proceedings under judicial review are the preserve of persons who have been directly affected by the decision of an Administrative Body and/or Tribunal as the case may be.
62. Given all the above, I am very well satisfied that not only have the Applicants moved the Court by way of the wrong procedure which defect is not curable, I also find that the objection to the effect that the Applicants lack the requisite locus standi in this case has merit and the same is accordingly upheld.

Doctrine of Exhaustion

63. The Applicants in their pleadings state that the ELDOWAS Board of Directors whose appointment they challenge were recruited by the Respondents though the Chairperson, Selection Committee as envisaged under the *Water Act* 2016 and subsequently appointed in December 2023.
64. Section 121 of the *Water Act* 2016 provides for the Jurisdiction of the Tribunal set up under the Act as a dispute resolution mechanism as follows;
- 1. The Tribunal shall exercise the powers and functions set out in this Act and in particular shall hear and determine appeals at the instance of any person or institution directly affected by the decision or order of the Cabinet Secretary, the Authority and Regulatory Board or of any person acting under the authority of the Cabinet Secretary, the Authority and Regulatory Board.
65. In light of this clear provision of the law the Applicants being aggrieved by the decision of the Selection Committee ought to have moved to the Tribunal first and aired their grievances before it before coming



to Court. It is not denied as stated by the Respondents that they did not explore this channel first and the have also not averred that they did. In this regard I am satisfied that they did not exhaust all the legal avenues of redress available to them before moving to Court and objection raised based on the doctrine of exhaustion therefore has merit and the same is upheld.

66. The upshot then is that I am satisfied that the Preliminary Objection raised by the 2nd Respondent has merit in the following three areas which each by themselves warrant the striking of the suit at these preliminary stage
- a. That the applicants have no locus standi to institute these proceedings
 - b. That the Applicants have moved the Court through the wrong procedure which defect is incurable in law
 - c. The Applicants have not exhausted all the legal avenues of redress available before filing this suit.
67. I therefore find merit in the 2nd Respondent's Preliminary Objection, I uphold the same and strike out the Applicant's suit in its entirety with costs to the Respondents.

READ DATED AND SIGNED AT ELDORET ON 4TH DECEMBER 2024

E. OMINDE

JUDGE

