



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

PETITION NO. 2 OF 2019

WAMBEYE KIMWELI MARAKIA.....APPLICANT

VERSUS

BOARD OF DIRECTORS, NZOIA WATER SERVICES CO. LTD.....1ST RESPONDENT

DICKSON KIRUL.....2ND RESPONDENT

LUSWETI FURAHA B.K.S.....3RD RESPONDENT

AND

NZOIA WATER SERVICES CO. LTD.....INTERESTED PARTY

JUDGMENT.

By Petition dated 26.6.2018. The Applicant Wambeye Kimweli Marakia approached this court seeking the following orders;

(a) A declaration to issue that the removal of the Applicant from his position as Chairperson of the Board of Directors of Nzoia Waters Services Co. Ltd was unconstitutional, unlawful, unprocedural and therefore null and void.

(b) An order to issue reinstating the Applicant as the chairperson of the Board of Directors of Nzoia Water Services Company Limited.

(c) An order for Compensation of the Applicant for the total sum of the honoraria lost due to his unlawful ouster.

The facts relied upon by the applicant are that at all material times he was the Chairman of the Board of Directors of Nzoia Water Services Board. On 11.1.2018 he was unlawfully removed from the position by the Respondents. The act of and procedure for removal was unlawful and in contravention of the provisions of the Companies Act and Articles of Association of the 1st Respondent. The Applicant contends in particular that the provisions of Section 139 of the Companies Act was not followed, as no Special notice was issued; he as the Chairperson did not call or convene the meeting; that he was not afforded an opportunity to be heard before action was taken against him. Further the petitioner contends that the 2nd Respondent Dickson Kitui had no capacity to convene a meeting as his contract had expired; that non-members specifically Professor Ndiema who had retired as a director participated in the deliberation which makes the said meeting null and void abinitio. Petitioner averred that the acts of the Respondent violated his fundamental rights to fair administrative action; and breach of natural justice. As a result of the unlawful action, he has lost his Chairman honoraria of Kshs.25,000/= per month.

The 1st and 3rd Respondent filed a Replying Affidavit in reply to the Petition; sworn by Lusweti Furaha B.K.S. the Chairperson of the Board of Directors of 1st Respondent. He deponed that the Board of Directors have mandate to appoint the Chairperson. In paragraph 6 of the affidavit he specifically depones that;

i. The petitioner was appointed as a director and not as the chairperson of the Interested Party's Board of Directors.

ii. The Chairperson of the Interested Party's Board is elected from among the Directors.

iii. The Petitioner was elected by the Board of Director's to serve a one year term with effect from August, 2016 as provided for under the Articles of Association.

iv. *The position of Chairperson is held on a one year rotational basis between the Interested Party's Board of Directors.*

v. *The position of Chairman is not exclusive and/or a property of the petitioner herein.*

vi. *The term of a Director is three years and the same does not apply to the position of Chairperson.*

vii. *The petitioner's notion that he was elected and/or appointed Chair for a term of three years is false, without any basis and is meant to mislead this Honourable Court.*

viii. *The appointment and/or dismissal of the Company Secretary is a prerogative of the 1st Respondent and is not done at the whims and desires of the Petitioner.*

ix. *The 2nd Respondent's contract with the Interested Party was extended by the 1st Respondent's vide its meeting held on 2nd October 2017 which Board Meeting the Petitioner herein presided as the Chairperson.*

x. *The communication of the Chairperson in his letter dated 08/12/2017 (annexture WKM-5) to the 2nd Respondent in respect of the 2nd Respondent letter dated 18th September, 2017 was never approved and/or sanctioned by the 1st Respondent and as such the said letter was initiated illegally and thus its contents are null and void. The Petitioner is invited to strict proof of the same. There is also no proof that 2nd defendant did indeed receive the said letter.*

He further depones that the 2nd Respondent as Company Secretary had his term extended vide a meeting held on 14.10.2017 in which the Petitioner chaired and participated. He further depond that John Mengwa, Chief officer Water and Environment Trans-Nzoia County was a member under clause 66(1) of the Articles of Association and not a stranger as alleged and that the Petitioner was validly removed having absconded to attend three Board Meetings and same was communicated to him.

The 2nd Respondent Dickson Kirui filed a Replying Affidavit sworn on 19.6.2018. He deponed that he is the Company Secretary of the Interested party Nzoia Water Services Company Limited; on 18.9.2017 he wrote to the Chairman of Interested Party expressing his wish not to continue providing secretariat services but a resolution was passed to retain him in a meeting held on 25.10.2017 presided over by the Petitioner. He therefore invited the members to attend a meeting. The petitioner despite receiving notices failed to attend meetings without any reason and the members invoked clause 82(h) of the articles of association and removed him as a director.

By consent this petition was canvassed by way of written submissions. Counsel for both parties filed their respective submissions. M/s Mumalasi for the Petitioner submitted that the Petitioner was appointed Chairperson of the Board of Directors of the Interested Party in August 2016 and was to serve for three years; to end in August 2019. On 11.1.2018 without notice or justification the Respondents convened a meeting which removed him from his position as Chairperson. The said meeting was convened by 2nd Respondent whose term had expired. Any notice for a meeting ought to have been given 7 days but in this one only one day's notice was given, the Petition was not given opportunity to be heard. The meeting was therefore irregular as it was convened by a person who was not secretary, no notice was issued to the petitioner, therefore condemning the petitioner unheard and removing the petitioner from the office of chairperson when same was not on the agenda. All these actions infringed on the Petitioner's fundamental rights to fair administrative action and right to be treated with dignity. Counsel cited to court the persuasive decision in **ANN -Vs- ATTORNEY GENERAL NBI Constitutional Petition No. 240/2012 and NBI J.R. Misc. Application No. 36/2016 Republic -Vs- National Police Service** Exparte Daniel Chacha Chacha. Counsel submitted that the Respondent ought to have given the petitioner the opportunity to be heard before he was removed from this position and be given reasons for removal. As a result of the unlawful action, the petitioner was deprived of Kshs.25,000/= per month honoraria and should be paid the same until reinstated or when his term expires in July 2019.

Sineti & Oburu Counsel for the Respondent and Interested Party filed written submissions. Counsel submitted that the procedure of appointment of Director of the Interested Party is governed by Article 64(4). By Article 86 of the articles of Association, the Board elects a Chairman for their meeting and also determines the period for which the director holds office. The position is subject to fresh election after every Annual General Meeting. He submitted that the Petitioner was not elected for 3 years but at the pleasure of the Board and or one year term which expired on 4.1.2018. He submitted that it was only the term of Director which was set for 3 years under Article 7.1.2016 of the Interested Parties Article of Association. He submitted that a director can vacate office if he fails to attend 3 consecutive meetings and the Board resolved that he should cease to be a director. He submitted that the petitioner having failed to attend 3 consecutive meetings, to which he had been served notice to attend, he was served with notice of intended removal as a director and same stated in Agenda of the Board Meeting of 16.4.2018. His removal was therefore legal and in compliance with the Article of Association.

On the issue of removal of the 2nd Respondent as Company Secretary of the Interested Party, Counsel submitted that there was no evidence adduced that 2nd Respondent was illegally acting as the Company Secretary. He submitted that the Petitioner chaired the Board Meeting of 25.10.2017 which requested the 2nd Respondent to continue serving as company secretary and renewed the 2nd Respondent Contract.

Finally Counsel submitted that the Petitioner understood his responsibility as a director which included being accountable to the business and affairs of the company by attending all Board Meeting and act reasonably and in good faith in his dealing with the company. He was a member of the Board of Directors which is the brain of the company and failure to attend meetings was an abdication of the his legal responsibility under Section 145 of the Companies Act.

From the Petition, Responses and submissions the issue that called for determination in the petition can be distilled as the following;

1). *What was the term of the chairperson.*

2). Whether the removal from chairperson was procedurally sound and fair.

3). What orders should this court give?

Nzoia Water Services Company Limited is a private Company Limited by shares incorporated under the Companies Act Cap 486 Laws of Kenya. The objective of the Company are as established in the Memorandum of Association. The Subscribers to the company are (1) The County Government of Trans-Nzoia (238765 shares) (2) County Government of Bungoma (2117350 shares) and the Total number of shares taken was 4505000 shares. Article 66(1)(2) provided for appointment and composition of the Board. It provides;

APPOINTMENT AND COMPOSITION OF THE BOARD

(1) Size of the Board

i. The Board of the Nzoia Water Services Company Limited shall have a Minimum of five (5) and Maximum of nine Directors (9) with a Professional mix of Directors appointed from the counties of Trans Nzoia and Bungoma and Directors appointed from the Stakeholders through a competitive stakeholder participation procedure such that no individual or group of individuals or interests can dominate its decision making. Directors representing the County Governments of Bungoma and Trans Nzoia shall be Four (4) drawn from the Executive Arm (Professionals) of the Government.

(2) Background of the Directors

(ii) Four (4) members/professionals from the Executive Arm:

Departments of Water and Finance - County Governments of Bungoma and Trans Nzoia.

(iii) Two (2) members from the Business/Manufacturing Community nominated by their Bodies.

(iv) One (1) member representing the Resident Organizations, nominated by (1) member representing the Professionals nominated by that body.

(v) One (1) member representing the Professionals nominated by that body.

(vi) The Managing Director.

Articles 71.7(1) provides for the appointment of the Chairperson of the Board and his roles;

71.7(1) I. Chairperson of the Board:

The Board shall be chaired by an independent Director who shall be elected from among the Stakeholder Directors by the other Directors during the 1st Meeting. The Roles of the Chairperson of the Board are;

1. To lead the Board.
2. To Chair meetings of the Board and members, ensuring order, proper conduct of Meetings, affording participants a reasonable opportunity to speak, ensuring decisions are fairly made, and deciding on technicalities and to cast the deciding vote in case of ties.
3. To organize and facilitate a balance of internal and external relationships,
4. To facilitate effective Board management.

(i) The board shall create a schedule of matters reserved for the board and circulate it to management, so as to keep the affairs of the board and management distinct.

(ii) Directors shall be independent of management functions and free from any business or operational relationships with management.

Article 86 provides for the process of election or chairperson. It provides;

86. The Directors shall elect a Chairman for their meetings and determine the period for which he/she will hold office, but if no such chairman is elected, or if at any meeting the chairman is not elected, or if at any meeting the chairman is not present within five minutes may choose one of their number to be chairman of the meeting.

Article 82 provides for disqualification of directors.

DISQUALIFICATION OF DIRECTOR:

82. A Director shall vacate office as such if:-

- (a) He is removed from office pursuant to section 185 of the Act or by a special resolution of the company in general meeting
- (b) He ceases to be a Director by virtue of Section 183 and 186 of the Act
- (c) He ceased to be the officer of the County Government, Chief Officer of the County Government responsible for Water and/or Finance, the Managing Director of the Company, representative or Office bearer of the County or other office(s) represented on the Board of Directors of the Company.
- (d) He is transferred to another County.
- (e) He becomes bankrupt or makes an arrangement or composition with his creditors.
- (f) He becomes prohibited from being a Director by reason of any order under Section 189 of the Act,
- (g) He becomes of unsound mind,
- (h) He fails, without any reasonable cause and without the consent of the Board to attend three consecutive meetings of the Board and the Board resolves that, by reason of such failure, he shall cease to be a Director,
- (i) He resigns his office by notice in writing to the company.

The conduct of a Board meeting or any meeting for it to be fruitful must have notice of the meeting and the agenda for the meeting. This key principle of governance requires that members should receive adequate notice of the meeting and matters to be deliberated. That is the reason why the Memorandum & Articles of Association and the Companies Act imposes this requirement indicating who is to receive notice, content of notice; period of notice and the matters that may be dealt with at the meeting.

Company Board Meetings makes decision regarding the administration and operation of the company. That is the reason why Notice of Board Meeting must be issued together with the agenda of the Meeting. Section 139 of the Companies Act Provides;

1. A Company may by ordinary resolution at a Meeting remove a director before the end of the directors period of office despite anything to the contrary in any agreements between the company and director.
2. A director whether or not a member of the Company may be heard on the discussion of the motion at the meeting.

The Board Meeting held on 11.1.2018 was to be held pursuant to a notice to convene a special Board Meeting dated 8th January 2017 for the meeting to be held on 9th January 2018. The meeting was not held on 9th January 2018, as per the notice. The meeting subject of this petition was held on 11th January 2018. No notice for special Board meeting was issued for the Meeting held on 11.1.2018. Indeed minutes No. 01/2018, state;

Board Minutes	Agenda	Description	Action by
01/01/2018	Preliminaries	<p>The meeting was called to order at 10.22a.m. Members unanimously nominated Director Situma to chair the meeting. Mr. Isaac Ruto gave the opening prayer.</p> <p>The chairman noted the following challenges which the company has been facing over the last month.</p> <ol style="list-style-type: none"> 1. The Board was barred from sitting. 2. Senior Management staffs were suspended making the operations almost come to a halt. <p>The chairman noted that there was need to move with speed to restore the company to its feet. He also noted that yesterday 10th January 2018 the Court Order No. CMCC 386/2017 was withdrawn in its entirety therefore the Meeting was legitimate.</p>	ALL

The board was aware that the meeting did not have adequate notice and the attendant defect in holding the Meeting. In minute BOD/03/01/2018 it shows:-

Board Minutes	Agenda	Description	Action by
BOD/ 03/01/2018	Reading and confirmation of the notice, Agenda and Quorum	<p>The CS Confirmed that the notice for the Meeting was short. However, the board resolved that the requirements for the notice be waived accordingly. It was proposed by Director Ndiema and seconded by Director Furaha.</p> <p>The meeting further resolved to waive all the requirements for a special board meeting due to the nature of the work occasioned by the suspension of the board. It was proposed by Director Rebecca Nafula and seconded by Director Meng'wa.</p> <p>The secretary also read the Court order to the members - Court order No. CMCC No. 386 of 2017. The order confirmed the withdrawal of the case in its entirety.</p> <p>The Agenda was adopted with item number 5 reduced to reconstitute the board. It was proposed by Director Ndiema and Seconded by Director Millicent Wafula respectively.</p>	ALL

In Minute BOD/64/01/2018 the minutes show the allegation they had against the chairperson, the petitioner. It records;

Board Minutes	Agenda	Description	Action by
BOD/ 04/01/2018	Reconstitution of the Board	<p>The CS informed the meeting that after every AGM, the first meeting was to reconstitute the Board and Committees which was not done here.</p> <p>Members also noted that the office of the chair had issues:-</p> <ol style="list-style-type: none"> 1. Has no interest of the company for example today's meeting the chair failed to attend. It demonstrated that the chair does not have the company's interest at heart. 	ALL

These were the allegations against the chairperson. There is no record that he had been notified of the allegations against him. These were indeed serious allegation which from the proceedings informed the Board to take action against him. In the same meeting they resolved to elect the chairperson, and directors offered themselves, notes taken and Director Lusweti Furaha was elected.

From the minutes the reason why the petitioner was removed was that he was alleged to have lost interest in the affairs of the company. This is a serious allegation which formed the basis of the need to reconstitute the Board. However, though serious as the allegation was, he was not notified of the same, given opportunity to respond and thereafter a decision is made by the board. This is indeed what is required in the concept of natural justice, rules of natural justice contemplate and includes the tenets of or fair hearing, stipulated under Article 47 of the Constitution which provides;

“(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall -

(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

(b) promote efficient administration.”

Under Article 47 the right to be heard is no longer a rule of natural justice but a Constitutional principle which must be embraced by all bodies that make decisions or administrative actions affecting an individual.

From the proceedings of the meeting held on 11th January 2018, it is clear that no notice of the meeting was issued convening the meeting. The meeting identified allegations against the Chairperson for which he was not notified; a decision was made to replace him as the chairperson premised on the allegation without being heard;

A board of Directors is the central body of a company that provides not only strategic direction but also directs and monitors management. The meeting of the 1st Respondent Nzoia Water Services Co. Ltd. Held on 11.1.2018 was not properly convened to discuss and reconstitute the Board to remove the petitioner from the position of chairperson; Even if it was properly constituted, (which I do not find) proceedings infringed on the petitioners fundamental rights of being heard before a decision affecting him is arrived at.

I therefore find that the removal of the petitioner from his position as chairperson of the Board of Directors of Nzoia Water Services Company Limited was unlawful and therefore null and void. I therefore order that petitioner is entitled to the sum of honoraria he would have earned to the end of his term as director/chairperson to which he is entitled to.

1) The Respondent to pay cost of the Petition.

DATED AND DELIVERED AT BUNGOMA THIS 3RD DAY OF JUNE, 2021.

S.N. RIECHI

JUDGE