



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA
JUDICIAL REVIEW CAUSE NO. 2 OF 2018

PATRICK ANYONYI MUNIALO.....APPLICANT/RESPONDENT

AND

**COUNTY EXECUTIVE COMMITTEE (CEC) MEMBER FOR WATER & NATURAL
RESOURCES BUNGOMA COUNTY.....1ST RESPONDENT**

**COUNTY EXECUTIVE COMMITTEE (CEC) MEMBER FOR WATER & NATURAL
RESOURCES TRANS-NZOIA COUNTY.....2ND RESPONDENT**

COUNTY GOVERNMENT OF BUNGOMA.....3RD RESPONDENT

COUNTY GOVERNMENT OF TRANS-NZOIA.....4TH RESPONDENT

AND

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

AND

KENNEDY KILALI WEKESA.....1ST CONTEMNOR/RESPONDENT

LUSWETI FURAHA B.K.S.....2ND CONTEMNOR/RESPONDENT

DICKSON K. KIRUI.....3RD CONTEMNOR/RESPONDENT

R U L I N G

On 25th January 2018, the exparte applicant PATRICK WANYONYI MUNIALO, sought leave of the court and was granted the following orders by Aroni J.

1. That this application be and is hereby certified urgent and be heard ex-parte in the first instance.
2. That the Applicant be and is hereby granted leave to apply for an order of certiorari to remove into the High Court and quash the decision of the 3rd & 4th Respondents issued through the 1st and 2nd Respondents via their letter dated 8th January, 2018 suspending the Applicant as Managing Director of the Interested Party for no justifiable cause, without the legal authority or mandate to act as such and without giving the Applicant the right to be heard.
3. That the Applicant be and is hereby granted leave to apply for an order of prohibition restraining the Respondents either by themselves or by someone authorized by them from suspending, taking disciplinary action or otherwise terminating the Applicant’s contract without strict compliance with the Memorandum and Article of Association of the Interested Party, the applicable law and the Constitution of Kenya.

4. That the Grant of Leave do operate as stay of implementation of the impugned decision and all subsequent steps arising therefrom and in particular the Applicant to remain in his position pending the hearing and determination of the substantive motion.

On 27th January, 2018 the ex parte applicant filed the substantive Notice of Motion brought under Article 47 of the Constitution of Kenya 2010, Order 53 r 3 (1) Civil Procedure rules, Sec. 8 and 9 of the Law Reform Act and Sec. 4 of the Fair Administrative Action Act seeking the following orders:

a. That this honourable court be pleased to issue an order of certiorari to remove into the High Court and quash the decision of the 3rd & 4th Respondents issued through the 1st & 2nd Respondents via their letter dated 8th January, 2018 suspending the Applicant as Managing Director of the Interested Party for no justifiable cause, without the legal authority or mandate to act as such and without giving the Applicant the right to be heard.

b. That the honourable court be pleased to issue an order of prohibition restraining the Respondents either by themselves or by someone authorized by them from suspending, taking disciplinary action or otherwise terminating the Applicant's contract without strict compliance with the Memorandum and Articles of Association of the Interested Party, the applicable law and the Constitution of Kenya.

The grounds for the application is that the ex parte applicant was employed by Nzoia Water Services Company as a Managing Director on a 5 year contract with effect from 9th April, 2014 to 8th April, 2019. That there is no employer-employee relationship between him and the Respondent who unlawfully and irregularly purported to suspend him with effect from 8.1.2018. This decision was ultra vires their power and was done without authority. He considered the action by the Respondent capricious, malicious and in total disregard to the law and constitution and without legal basis. Applicant further contends that the Respondents letter communicating the suspension dated 8.1.2018 ought to be quashed and Respondents prohibited from suspending or taking any disciplinary action or otherwise terminating the ex parte applicants contract.

The application is supported by the supporting affidavit of the Ex parte applicant sworn on 26.1.2018 reiterating the grounds of the application. The material parts of his 29 paragraph are reproduced here below:

Para 3: That vide a Renewal of Employment Contract dated 18th Februarys, 2014, my contract as Managing Director of the Interested Party was renewed for five years with effect from 9th April, 2014. Annexed hereto and marked PWM-1 is a copy of the Employment contract.

Para 5: That Interested party is a quasi-private limited liability company whose shareholders are the 3rd and 4th Respondents herein. They are the one who nominate two (2) persons each to serve in the Board of Directors alongside four (4) other nominated form among stakeholders, namely, chamber of commerce and manufacturing community (2 members), profession groups (law, accounting and engineering) 1 member and resident organizations (religious organizations, NGOs) (1 member) pursuant to guidelines set by the Water Services Regulatory Board (WARSEB). Annexed hereto and marked PWM-2 is a copy of the company's Memorandum and Articles of Association.

Para 9: That under the Companies Act and the Articles of association of the Interested Party, the Board of Directors is the only body mandated to hire, dismiss and/or otherwise take disciplinary action against any employee or member of Senior Management of the company, I included. I am duly advised that the Respondents notwithstanding being shareholders have no legal mandate to intervene in the running of the affairs of the company save through the ordinary or special meetings of all shareholders by resolution.

Para 12: That I am aware that in the instant case, the 1st and 2nd Respondents purported to convene a meeting in the Bungoma Governor's office away from the company's registered offices in Webuye without the requisite quorum and without notice to all shareholders and purported to deliberated and make a decision to send me and a few other members of staff on suspension for a period of at least three (3) months pending investigation into alleged and unspecified cases of misconduct received against me in my position as Managing Director. Annexed hereto and marked PWM-3 is a copy of the suspension letter.

Para 13: That the said letter is signed by the 1st and 2nd Respondents who are strangers to the company and have no legal authority to take any action in the name of or that will bind the company in any way whatsoever.

Para 18: That I am advised that the 1st and 2nd Respondents not being part of the Board of Directors, had no power to take any action against myself or any member of staff hence they acted ultra vires and thus their decision is null and void ab initio.

Para 19: That I verily believe that the Respondent breached a fundamental principle of law by making a decision with glaring errors of fact and arriving at conclusion that was unsupported by evidence. The material error of fact makes the decision ultra vires hence making the court's intervention inevitable.

The ex parte applicant's case is therefor that there is no employer-employee relationship between the ex parte applicant and the 1st, 2nd, 3rd and 4th Respondent. He contends that his employer is Nzoia Water Services Company Ltd which is a private company; whose Board of Directors have authority to oversight and discipline him. The Respondent who are shareholders of the Nzoia water Services company have no powers to suspend him and the power rests with the Board of Directors of Nzoia Water Services Company and not the Individual or collective shareholders. He therefore contends that the act of suspending him by the 1,2,3,4th Respondents was ultra vires, and done without power or authority.

On application Nzoia Water Service Board was enjoined as interested party by ruling dated 4.2.2019.

Nzoia party filed a Replying affidavit by Lusweti Furahe BKS the Chairman of the board who deponed that since the Respondent were shareholders in the interested party company their action was done in good faith and meant to protect and safeguard the interest, business and welfare of the customers.

By consent application was canvassed by way of written submissions. M/s Mumalasi for the exparte applicant submitted that the Respondent did not have an employer-employee relationship with the exparte applicant and consequently their letter dated 8.01.2010 to jointly suspend the exparte applicant was irregular as they had no capacity to take any disciplinary action against him. Counsel submits that the fact that the respondents were shareholders of the interested party did not make them employees of the exparte applicant.

Counsel for the exparte applicant submitted that the exparte applicant was not given reasons for the suspension and that the procedure adopted and decision arrived at were against the rules of natural justice as he was not given an opportunity to be heard and therefore the action was contrary to Article 47 of the Constitution. Counsel referred this court to the decision in **Kenya Human Rights Commission –vs- NGO Coordination Board (2016) eKLR.**

Finally, counsel submitted that the respondents acted arbitrarily, unlawfully, when they purported to suspend the exparte applicant and the exparte applicant is entitled to the orders sought.

M/s Karangeny & Co. Advocate for the 2nd and 4th Respondent filed their written submissions. Counsel submits that the exparte applicant in his pleadings confirmed that he is an employee of Nzoia water services company. The 3rd interested party & Respondent County Government of Bungoma and 4th Respondent County Government of Trans Nzoia are shareholders and the 1st Respondent CEC member for Water Resources County of Bungoma and 2nd Respondent CEC member of for Water Resources sit in the Board of the Interested party Nzoia water services Board. Counsel submits that the decisions of the 3rd interested party are determined by a Board of Directors. He submits that that is the board that was convened and resolved to suspend the exparte applicant for 3 months. The exparte applicant therefore being a chairman of the Interested Party was an employee of the Interested Party and therefore there existed an employer-employee relationship. That being so, he submits under Sec. 12 of the employment & labour relations court is the proper forum to adjudicate any dispute between the exparte applicant, the Respondent and the Interested party.

Nzoia Water Services Board is the interested party. The articles of association describes the shareholding and constitution of the Board.

Article 66. 1- size of the board:

i. The board of Nzoia water services company Limited shall have a minimum of five (5) and maximum of nine directors with a professional mix of directors appointed from the counties of Trans- Nzoia and Bungoma and directors appointed from the stake holders 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 Tran Nzoia shall be four (4) drawn from the executive arm (professionals) of the government.

Article 66.2 – Background of the directors

ii. Four (4) members/professionals from the executive arm: Departments of water and Finance- County Government of Bungoma and Trans-Nzoia.

iii. Two (2) members form the business/manufacturing community nominated by their bodies.

iv. One (1) member representing the resident organizations nominated by institutions, religious organization, NGO's

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

vi. The managing director.

The counsel submits that the exparte applicant admits that he was employed by the Interested Party and that the Respondents are shareholders. Counsel submits that there exists employer-employee relationship and therefore this is a dispute for the ELCR court.

The first issue this court has been asked to deal with is whether it has Jurisdiction to entertain this matter. The locus classicus on jurisdiction of the court is the Owners of Motor Vessels 'Lilian S' vs Calterx Oil (k) Ltd (1989) KLR 1653 (CA) where the Court of Appeal stated thus:

“ Jurisdiction is everything. Without it, a court has no power to make one more steps. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law down its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

Emukule J (as he then was) in John Kipngeno Koech & 2 Others –vs- Nakuru County Assembly & 5 others (2013) eKLR stated thus on jurisdiction:

“Jurisdiction is the practical authority granted to a formally constituted legal body to deal with and make pronouncements on legal matters and by implication to administer justice within a defined area of responsibility. It is the scope, validity,

legitimacy, or authority to preside or adjudicate upon a matter.”

The Supreme court in Samuel Kamau Macharia and Another –vs- Kenya Commercial Bank and 2 others (2012) eKLR the Supreme Court held that:

“ A court’s jurisdiction flow from either the Constitution or legislation or both. Thus a court of law can only exercise its jurisdiction as conferred by the Constitution or other written laws. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the 1st and 2nd Respondents in his submissions that the issues as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality, it goes to the heart of the matter, for without jurisdiction, the court cannot entertain any proceedings....where the Constitution exhaustively provides for jurisdiction of a court of law, the law must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.”

The cardinal issue in this application is whether the exparte applicant was an employee of the Interested party Nzoia Water Services Co. The employment Act 2007 defines an employee as:

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

The act goes further to define an employer as follows:

“ employer” means 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;

Infact the simplest way to determine who is the employee is to answer the question who has the power to hire and fire you.

The exparte applicant readily admits that he is an employee of Nzoia Water Services Board. He indeed produced a letter dated 18.2.2014 signed by Bernard Bifwoli Chairman Board of director of Nzoia Water Services Company Ltd Titled Renewal of Employment Contract.

That letter is addressed to him and is on the letter head of the Interested Party. He signed acceptance of that contract on 18.2.2014 is the basis of his claim.

The exparte applicant as a basis of this dispute annexed the letter dated 8.1.2018. I reproduce the said letter in file.

NZIOA WATER SERVICES LIMITED

KITALE WATER SUPPLY

KITALE

Ref: NZOWASCO/MD/PF/00097/167

8th January 2018

Eng. Patrick Wanyonyi Munialo

P/No. 0097

Managing Director

Nzoia Water Services Company Ltd.

WEBUYE

Dear Eng. Munialo,

RE: SUSPENSION PENDING INVESTIGATION.

This is to inform you that following a special shareholder directors’ meeting held on 8th January 2018 at Governors Boardroom in Bungoma, it was resolved that you be suspended forthwith pending investigations into cases of misconduct received against yourself as the Managing Director NZOWASCO.

You are therefore required to immediately hand over to the undersigned all the company assets and documents within your custody. While on suspension you will be entered to your full monthly salary.

Please note that you may also be required to appear before the investigating team and/or make any clarification wherever

called upon on matters relating to your suspension.

It is expected that the process of investigation and final determination by the Board will take three months.

Please comply

Yours sincerely,

CE member

CEC Member

Water and Natural Resources Water and natural Resources

Bungoma County

Trans-Nzoia County

The letter subject of this dispute is signed by the 1st and 2nd Respondent and purports to be a resolution of the Board. The exparte applicant's contention is that they had no powers to act on and that it is only the Board of Interested party that had such powers. He readily admits in his pleadings that he was serving as a Managing Director of the Interested Party based in Webuye. Having deponed so, he cannot in the same vein allege that there is no employer-employee relation with Nzoia Water Services Board which the 1st and 2nd Respondent purported to act for. It is my finding that there was an employer-employee relationship.

Once a court has determined that there exists an employer-employee relationship, and that there is a dispute between or among them, then Section 12 of the Employment and Labour relations act NO. 20 of 2021 crystalizes in terms of jurisdiction. Section 12 provides...

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 employers' organisation and a trade unions organisation;
- d. disputes between trade unions;
- e. disputes between employer organizations;
- 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.

2. An application, claim or complaint may be lodged with the Court by or against an employee, an employer, a trade union, an employer's organisation, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose.

3. In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders

- i. interim preservation orders including injunctions in cases of urgency; 8 [Rev. 2020] Employment and Labour Relations Court No. 20 of 2011
- ii. a prohibitory order;
- iii. an order for specific performance;
- iv. a declaratory order;
- v. an award of compensation in any circumstances contemplated under this Act or any written law;

vi. an award of damages in any circumstances contemplated under this Act or any written law;

vii. an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law; or

viii. any other appropriate relief as the Court may deem fit to grant.

4. In proceedings under this Act, the Court may, subject to the rules, make such orders as to costs as the Court considers just.

5. The Court shall have jurisdiction to hear and determine appeals arising from –

a. decisions of the Registrar of Trade Unions; and

b. decisions of any other local tribunal or commission as may be prescribed under any written law

Having found as above I find this court has no jurisdiction and in the words of Nyarangi JA down I my tools as there is no basis for continuation of proceedings pending other evidence.

I therefore transfer this file to be placed before the ELRC court Bungoma for hearing and determination. Mention before Bungoma ELRC court on 17.11.2021 for directions.

DATED AT BUNGOMA THIS 17TH DAY OF NOVEMBER, 2021

S. N RIECHI

JUDGE