



Codo v Jared Odhiambo Opiyo, Chairperson, South Nyanza Sugar Co Ltd & 2 others; Board of Directors South Nyanza Sugar Co Ltd & another (Interested Parties) (Petition E009 of 2024) [2024] KEELRC 1032 (KLR) (8 May 2024) (Judgment)

Neutral citation: [2024] KEELRC 1032 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION E009 OF 2024**

S RADIDO, J

MAY 8, 2024

IN THE MATTER OF ARTICLES 3(1), 22(1) & (2)(C), 48, 50(1), 159(1) AND 258(1) OF [{{>/AKN/KE/ACT/2010/CONSTITUTION THE CONSTITUTION}}](#) OF KENYA 2010

AND

LN THE MATTER OF CONTRAVENTION AND VIOLATION OF ARTICLES 1(1), 2(1-4), 3(1), 10, 24, 73, 75, 29, 131(2)(A), 153(4), 232 OF [{{>/AKN/KE/ACT/2010/CONSTITUTION THE CONSTITUTION}}](#)

AND

LN THE MATTER OF ABUSE OF EXECUTIVE POWERS IN THE IRREGULAR APPOINTMENT OF JARED ODHIAMBO OPIYO, AS THE CHAIRPERSON, BOARD OF DIRECTORS OF SOUTH NYANZA SUGAR COMPANY LIMITED, A STATE CORPORATION

AND

IN THE MATTER OF VIOLATION OF THE PRINCIPLE OF LEGITIMATE EXPECTATION ON THE PART OF AN APPOINTING AUTHORITY TO OBSERVE THE REQUIREMENTS OF CHAPTER 6 IN MAKING PUBLIC APPOINTMENTS

BETWEEN

TOM OUKO CODO PETITIONER

AND

JARED ODHIAMBO OPIYO, CHAIRPERSON, SOUTH NYANZA SUGAR CO LTD 1ST RESPONDENT

STATE CORPORATIONS ADVISORY COMMITTE 2ND RESPONDENT



HON ATTORNEY GENERAL 3RD RESPONDENT

AND

BOARD OF DIRECTORS SOUTH NYANZA SUGAR CO
LTD INTERESTED PARTY

SOUTH NYANZA SUGAR CO LTD INTERESTED PARTY

JUDGMENT

1. Through a Gazette Notice dated 13 April 2023, the President of Kenya gazetted the appointment of Jared Odhiambo Opiyo (1st Respondent) as the Chairman of South Nyanza Sugar Co Ltd (the company).
2. On 26 February 2024, Tom Ouko Codo (the Petitioner) filed a Petition with this Court asserting that the appointment was unlawful because the 1st Respondent had been removed as a member of the County Public Service Board, Migori for having violated *the Constitution* and was therefore not eligible to hold another public office; the President did not involve the State Corporations Advisory Committee in the appointment process; there was no public participation and thus adverse information on the 1st Respondent was not requested for nor considered; the appointment was not transparent, fair, open or competitive and that the appointment was made on the basis of nepotism and favouritism.
3. Filed at the same time was a Motion under a certificate of urgency seeking interim interdicts.
4. When the Motion was placed before the Court, it directed that service be effected and the Court gave directions on 18 March 2024.
5. The 1st Respondent filed a replying affidavit in opposition to the Motion and Petition on 12 April 2024, wherein he deposed that the Petition was fatally defective because the President as the appointing authority was not included as a party; some of the reliefs could not be granted without making the President a party; that he was not an employee nor a public officer and, therefore, the Court lacked jurisdiction.
6. On the merits, the 1st Respondent contended that the appointment was lawful as it was transparent and merit-grounded and adhered to the national values and principles as set out in Articles 10 and 232 of *the Constitution*; the Petition was meant to detract the government from executing the Bottom Up Transformation Economic Agenda; the Petitioner had not specified the provisions of *the Constitution* or statute violated; that he met all the qualifications for appointment; there was no law barring him from holding the office of Chairperson of the company; the question of removal from public office was pending before the Court of Appeal which had ordered for the status quo to be maintained and, therefore, the question of his removal from public office was premature; chapter 6 of *the Constitution* did not bar the appointment; the appointment was protected by Article 27(1),(2) and (3) of *the Constitution* and that the Petition posed a threat to the rule of law.
7. The Petitioner filed his submissions on 20 April 2024 and he identified the Issues in dispute as:
 - i. Whether the 1st Respondent having been lawfully removed by the County Assembly of Migori as the Chairman of the Migori County Public Service Board on the grounds of gross violations of *the Constitution* can be re-appointed by the President to hold the position of the



Chairperson of South Nyanza Sugar Company Limited pursuant to Section 6(1) of the [State Corporations Act](#) (Cap 466)?

- ii. Whether the Appointment of the 1st Respondent by the President was in violation of Articles 10, 232, and Chapter Six of [the Constitution](#) of Kenya as well as the provisions of the [Public Officer Ethics Act](#) No. 4 of 2003, the [Leadership and Integrity Act](#). No. 19 of 2012 and the [County Governments Act](#). No. 17 of 2012, Section 5(2) of the [Employment Act](#), 2007, and other statutes relating to the recruitment and appointment of persons into public service?
8. When the parties appeared in Court for directions on 20 March 2024, the Court directed the Respondents and Interested Parties who had not responded to file and serve their responses before 1 April 2024, and further that the parties file and exchange submissions.
 9. The 1st Respondent filed his submissions on 1 May 2024 and set out the Issues for the Court's adjudication as:
 - i. Whether the Hon Employment and Labor Relations Court, is divested of jurisdiction to admit, and determine the instant Petition lodged before it?
 - ii. Whether the administrative decision undertaken by His Excellency Dr William S. Ruto, EGH and C-in-C, President of the Republic of Kenya to appoint Hon Jared Odhiambo K'Opiyo as the Chairperson, of the Board of Directors of South Nyanza Sugar Company Limited vide Gazette Vol. No.4842 of 13th April, 2023, is lawful?
 10. The Court has considered the Petition, Motion, affidavits and submissions.

Jurisdiction

11. The 1st Respondent took the view that since the Petition primarily challenged the powers of the President under Article 132(4)(a) of [the Constitution](#) as read with section 6(1)(a) of the [State Corporations Act](#) to appoint a chairperson of the Board of a state corporation, then by dint of Article 165(3)(d)(ii) of [the Constitution](#), exclusive jurisdiction rested with the High Court.
12. According to the 1st Respondent, he was not an employee within the definition of an employee in section 2 of the [Employment Act](#) because he was not employed for salary or wages.
13. In his submissions, the 1st Respondent urged that the Court did not have jurisdiction because the dispute or action presented did not fall within the umbrage of a dispute relating to employment or labour dispute as contemplated by section 12 of the [Employment and Labour Relations Court Act](#).
14. To support the position, the 1st Respondent referred the Court to the Court of Appeal judgment in Attorney General & 2 Ors v Okiya Omtata Okoiti & 14 Ors (2020) eKLR where the Court stated:

The Act further specifies the parties who may lodge or against whom may be lodged before the court, applications, claims, or complaints, to be 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.

.....

A burning and well-founded desire to remedy what are perceived to be violations of [the Constitution](#) does not justify seeking redress from a forum in which [the Constitution](#) has not vested the power to issue a remedy. It is a sad case of assuming that a wrong can be made right by another wrong. There is no fidelity to [the Constitution](#) in seeking to enforce [the constitution](#) through unconstitutional means. The issues raised in the petitions were weighty but were misdirected to the wrong forum.



The Constitution has granted the High Court the requisite jurisdiction to hear and determine those issues and that is where they ought to have been raised ... the jurisdiction of those specialized courts to interpret and apply the Constitution is not original or unlimited like that of the High Court. It is limited to constitutional issues that arise in the context of disputes on employment and labour relations or environment and land matters (see also CoA Daniel Maingi Muchiri Jubilee Insurance Co Ltd, CA No 138 of 2016 for the holding that 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.

15. The 1st Respondent further relied on a passage from the Supreme Court judgment in Kenya Tea Growers Association & 2 Ors v The National Social Security Fund Board of Trustees & 13 Ors (Petition E004 & E002 of 2023) (Consolidated) [2024] KESC 3 (KLR) that:

What it (ELRC) cannot do, is to sit as if it were the High Court under Article 165 of the Constitution and declare a statute unconstitutional in circumstances where the dispute in question has nothing or little to do with employment and labour relations within the context of the ELRC Act.

16. The Petitioner attempted to address the challenge to the Court’s jurisdiction by urging that the Court was called upon to exercise its jurisdiction under Article 165 of the Constitution by considering whether the appointment of the 1st Respondent was lawful but steered clear of making an address on whether there was an employer/employee relationship to bestow the Court with jurisdiction.
17. While the authorities cited by the 1st Respondent talk to the jurisdiction of the Court generally, the more directly relevant authority is the judgment of the Court of Appeal in Rift Valley Water Services Board & 3 Ors v Asanyo & 2 Ors (2022) KECA 778 (KLR).
18. In the aforesaid authority, 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).
19. 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 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 in 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.



20. The South Nyanza Sugar Co Ltd is a state corporation established under the [State Corporations Act](#) and stands in pari materia with the Rift Valley Water Services Board albeit the Board was established under the [Water Act](#).
21. The Asanyo case is binding upon this Court, though the Court may not agree with its ratio decidendi because the Court of Appeal did not consider whether the doctrine of putative employer which has been given statutory recognition in the definition of an employer in section 2 of the [Employment and Labour Relations Court Act](#) applied in the circumstances of the case.

Conclusion and Order

22. In light of the above, the Court declines to assume jurisdiction and strikes out the Petition with no order on costs as the Petition was in the public interest.

DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 8TH DAY OF MAY 2024.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Petitioner Nyinguro & Associates Advocates

For 1st Respondent CM Advocates, LLP

For 2nd Respondent did not participate

For 3rd Respondent did not participate

For Interested Parties did not participate

Court Assistant Chemwolo

