



**Akolo v Board of Directors, Amatsi Water Services Company Limited
& 2 others; Attorney General (Interested Party) (Judicial Review
E002 of 2024) [2024] KEELRC 2120 (KLR) (25 July 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2120 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA
JUDICIAL REVIEW E002 OF 2024**

**JW KELL, J
JULY 25, 2024**

BETWEEN

TOM JOSHUA AKOLO EXPARTE APPLICANT

AND

**BOARD OF DIRECTORS, AMATSI WATER SERVICES COMPANY
LIMITED 1ST RESPONDENT**

**CEC-MEMBER, WATER ENVIRONMENT, ENERGY AND NATURAL
RESOURCES 2ND RESPONDENT**

COUNTY SECRETARY -VIHIGA 3RD RESPONDENT

AND

THE HON ATTORNEY GENERAL INTERESTED PARTY

RULING

1. The ruling is on the Respondents/Applicants’ Notice of Motion application dated 10th June 2024 brought under the provisions of Article 50(1), 159(2)(d) and 234 of *the Constitution*; Section 12 of the *Employment and Labour Relations Court Act*; Section 1& B, 3 and 3A of the *Civil Procedure Act*; Section 85,86 and 87(2) of the *Public Service Commission Act*; and Section 77, 83 and 154 of the *Water Act* seeking the prayers that: -
 - a. Spent
 - b. Requirement for service be temporarily waived as to enable issuance by the Honourable Court of the Interim reliefs sought in prayers No. 3 and 4 of the application Ex-Parte.



- c. Pending inter-partes hearing, the orders of this Honourable Court issued on the 4th Day of June 2024 granting leave to the Respondent to file a motion for Judicial review be stayed.
 - d. The registry of this Honourable Court or any other Court with the relevant jurisdiction for that case, be temporarily barred from receiving, accepting, or acknowledging any motion filed by the Respondent pursuant to leave granted by the Honourable Court until further orders of this Honourable.
 - e. In the main, the Honourable Court do find and declare that the office which the Respondent Tom Akolo was appointed to as the Commercial manager and or designated to as the Corporate Affairs Manager of Amatsi Water Services Company Limited is an office in the County Public Service of Vihiga County in the true meaning and definition of Article 260 of *the Constitution* of Kenya and Sections 55 and 56 of the County Governments and hence subject to the provisions of Article 234 of *the Constitution* of Kenya, Section 77 of the County Government Act, Sections 85, 86 and 87 of the Public Service Commission and the *Public Service Commission (County Public Service Appeals) Rules* which are binding and procedurally mandatory in addressing employment-related grievances arising from decisions made in the County Public Service.
 - f. The Honourable Court do find that by filing the instant Judicial review proceedings before exhausting the mandatory procedure of appealing the decision complained of to the Public Service Commission, the Respondent violated the exhaustion principle thereby rendering the application dated 3rd June 2023 for leave to apply Judicial review orders premature and incompetent.
 - g. The leave granted to the Respondent on the 4th Day of June 2024 to file judicial review motion for orders of Certiorari and Prohibition be is hereby recalled and set aside.
 - h. The Respondents application dated the 4th day of June 2024 be and is hereby struck out.
 - i. Any motion filed pursuant to the impugned leave shall stand expunged.
 - j. Costs of and incidental to these proceedings be recovered from the Respondent.
2. The application was supported by the grounds on the face of the application and the grounds in the affidavit sworn by Edwin Bukweye (Managing Director of Amatsi Water and Sewerage Company Limited (AWSC) on 10th June 2024 to wit:-
- i. That the deponent as the custodian of the company records, affirms that the company is a private company set up pursuant to section 75 of the *Water Act* as a water service provider.
 - ii. That the company took over the infrastructure, human resource management, and resources from the Ministry of Local Government and operates from public premises and uses infrastructure sourced, developed and maintained by the national government originally and currently under the County governments.
 - iii. That provision of water was transferred to counties to wit the AWSC was transferred to the county of Vihiga. AWSC is currently governed under the corporate governance guidelines (“Guidelines”) developed by the Water Services Regulatory Board in 2018 pursuant to section 75(4) of the *Water Act*, 2016(EB-1).
 - iv. That the current directors of the company are appointees of the County Government appointed through the procedure provided under Clause 3.4.5 of the Guidelines.



- v. That the Respondent/Ex Parte applicant was equally appointed to his initial position as Commercial Manager by the board of AWSC which further re-designated him as Corporate Affairs manager.
- vi. That the operations of the company are not independent from the County government as the county is responsible for the financing of some of the operations of the company such as payment of electricity bills pursuant to sections 77, 83, and 154 of the Water Act.
- vii. That the company is answerable in its operations to the senate through audit queries and to that end the Respondent also falls within the County Public service and cannot therefore run away from that position.
- viii. That the application is meant to seek orders to set aside the leave that was granted to the respondent(EB-2) as the respondent should have appealed to the Public Service Commission against his dismissal by dint of Sections 56 and 77 of the County Governments Act.
- ix. That the Court did not have jurisdiction to grant the Exparte orders granting the Respondent leave to file judicial review proceedings.

Written Submissions

3. The Court directed that the Notice of Motion application be canvassed by way of written submissions. The parties complied. The Respondents/Applicants' written submissions dated 2nd July 2024 were filed by Aggrey B. L. Musiega, County Attorney, Vihiga County on an even date. The Ex Parte Applicant's written submissions dated 10th July 2024 were filed by M.Kiveu Advocates.

Determination

Issues for determination.

4. The Respondents/Applicants addressed the following issues in their submissions for determination:-
 - a. Whether the principle of exhaustion ought to apply to these proceedings
 - b. Whether this Honourable Court has jurisdiction to hear the judicial review application.
 - c. Who should pay costs of the application herein.
5. The Ex Parte Applicant /Respondent addressed the following issues in his submissions:-
 - a. Whether Amatsi Water Services Company Ltd decision was an exercise of the County Service Board or a person in exercise or purported exercise of disciplinary control against any County Public Officer.
 - b. Whether even if the said sections applied to the Respondent -the jurisdiction of the Court is ousted.
6. The Court having perused the pleadings by the parties and their submissions was of the considered opinion that the issues placed before the Court by the parties for determination of the application are:-
 - i. Whether the Exparte Applicant was a county public officer and whether the principle of exhaustion under section 77 of the County Government Act ought to apply to these proceedings.



Whether the Ex parte Applicant was a county public officer and whether the principle of exhaustion under section 77 of the County Government Act ought to apply to these proceedings.

7. The Ex parte Applicant filed in Court his letter of employment dated 28th March 2022 as a Commercial Manager of Amatsi Water Services Company Ltd. Clause C of the letter stated the employer to be Amatsi Water Services Company Ltd. The letter was signed by the Managing Director on behalf of the Board of Directors of Amatsi Water Services Company. There was no dispute on the letter of employment terms.
8. The Applicant in the application states that Amatsi Water Services Company Ltd is a water service provider under the Water Act and registered under section 75 of the Act. That by application of section 75(3) of the Water Act, the company is regulated by the guidelines developed and published by the Water Services Regulatory Authority and in this case, ‘WASREB Corporate Governance Guidelines for the Water Sector, 2018.’”
9. That further by application of sections 77 to 83 and 154 of the Water Act, the company is a County Government entity managed by the said government and that the property it holds is public property. The applicant relied on regulation 3.3 of the WASREB Corporate Governance Guidelines for the Water Sector, 2018 on the shareholding of the company being the County Government as the directors are appointed by the County Secretary who is the head of county public service under section 45 and 56 of the County Government Act.
10. As stated above the application was supported by the affidavit of Edwin Bukweye, managing director of the Company who in addition to the foregoing stated in paragraphs 12 to 14 of the affidavit that to his understanding the company is an entity of the County Government of Vihiga and as officers of the company they could not claim independence from the county government, that they are answerable to the oversight role of senate and have been routinely summoned to answer audit queries and hence are under county public service.
11. In reply, the Ex parte Applicant reiterated that he was employed by the Water Company which had elaborate procedures for dismissal of employees under its human resources policy and procedure manual of September 2022 which he stated to have exhausted. The Ex parte Applicant cited clause 13.5(ii) of the said manual which had staff disciplinary clause 13.5.iii on appeals to the Board of Directors and clause 13(7)(1) on the right of appeal for review. The Ex parte Applicant stated that he exhausted all the steps unsuccessfully.
12. The Ex parte Applicant submits that the water company autonomously hiring own staff and has its code of conduct and discipline, he could not be treated as a county public officer but as an employee of the Company thus, the provisions of section 77 of County Government Act and section 85 Band 87 of the Public Service Commission did not apply to him.
13. In written submissions on this issue the applicant relied on the provisions of the law section 77 of the County Government Act to submit that the Board of the company having been appointed by CECM Water and being answerable to the County Government of Vihiga falls under the description of a person in exercise or purported exercise of disciplinary control against any county public officer under appeal mechanism of the Public Service Commission hence section 77 applied to the Ex parte Applicant and his appeal ought to be to Public Service Commission under the doctrine of exhaustion(emphasis was given by the Applicant).
14. To buttress the submission on the doctrine of exhaustion, the applicant relied on the definition of the doctrine of exhaustion in the Black’s Law Dictionary 10th Edition as follows:- ‘exhaustion of remedies.



The doctrine that, if an administrative remedy is provided by statute, a claimant must seek relief first from the administrative body before judicial relief is available. The Doctrine's purpose is to maintain comity between the courts and administrative agencies and to ensure that courts will not be burdened by cases in which juridical relief is unnecessary."

15. The Applicant further relied on the decision of Justice Odunga (as he then was at the High Court) in the Independent Electoral and Boundaries Commission & 2 others Exparte Shaileshkumarnata Verbai Patel (2013)e KLR where the Judge upheld the restriction of jurisdiction of the Court where alternative remedy exists by dint of Article 159 of *the constitution*.
16. On other hand, the Exparte applicant relied on the decision of Justice Ongaya in Abdikadir Suleiman v County Government of Isiolo (Nyeri ELRC Cause No. 76 of 2015) where the Court held that the Public Service Commission was empowered under section 77 of the *County Governments Act* to hear appeals in respect of the county public service and applies same facts and law as the primary authority thus the appeal process before Public Service Commission deals with merits or substance and not procedural or legal propriety of the case.

Decision

17. The finding of whether or not the Exparte applicant was a county public officer was germane to the determination of the application.
18. It was not in dispute that the Exparte Applicant was vide letter of employment dated 28th March 2022 engaged as a commercial manager of Amatsi Water Services Company Ltd(TA-1). That he was later redesignated as Head of Corporate Services of the company vide letter dated 22nd September 2022(TA-2).On the 9th of August, 2023 he received a show cause letter from the Company Ag. Managing Director, Mr. Luvusi(TA-4). He responded and was suspended by the said Mr. Luvusi vide letter dated 23rd August 2023(TA-6). He was vide letter dated 25th August 2023 invited to appear before the Board of the company on the suspension(TA-7). Vide letter dated 5th september 2023 he was requested to hand over the company property. Vide letter dated 31st October 2023 he was invited by the Chair of AWASCO Board for disciplinary hearing and later dismissed by the same Board vide a letter dated 22nd January 2024. He requested for review and the outcome was communicated by the Chair of the Board vide letter dated 17th May 2024(TA-12). The Exparte Applicant annexed the extract of the policy manual on dismissal and appeal. The foregoing were the undisputed facts before the Court.
19. From the foregoing facts, the Court returns that the water company is autonomous in dealing with the employment, disciplinary, and termination of employment of its staff including the Exparte Applicant.
20. The issue of sharing holding of the company was brought up. Whereas that was not in dispute the Court from the documents produced before it found the company was a legal entity separate from its owners.
21. Section 56 of the *County Governments Act* was relied on by the Applicant on the role of the county secretary to wit:- '56. County to have county public service (1) Each county shall, in accordance with Article 235 of *the Constitution*, have its own public service to be known as county public service. (2) The county public service shall be headed by a county secretary appointed under section 44. (3) For purposes of subsection (1), the designation county public officer shall be restricted to an officer appointed by the county government.'
22. The Court holds that Section 56 (3) *County Governments Act* is authoritative that the designation of county public officer shall be restricted to an officer appointed by the county government. The Exparte Applicant was appointed and fired by the Board of a legal entity called Amatsi Water Services



Company Ltd(the 1st Respondent). He was not appointed by the County Government hence not a County Public Officer.

23. Faced with a similar argument on whether the employee of a water company established under the Water Act was subject of the county government in Abdi v Governor, Kakamega County Government & 2 others (Employment and Labour Relations Petition E004 of 2022) [2023] KEELRC 433 (KLR) (16 February 2023) (Judgment) Neutral citation: [2023] KEELRC 433 (KLR) this Court observed in paragraph 50 as follows:- ‘50.The Court finds that the employment letter dated 23rd March 2020 was explicit that it was a contract of employment between the petitioner and the 2nd respondent. The 1st and 3rd respondents were not mentioned as employers of the petitioner. The 2nd Respondent is a registered private company limited by shares. Under company law it is a legal entity. The argument that it is wholly owned by the 3rd Respondent with 100% shareholding does not give it powers to act outside the board. The Court finds that the argument by the 1st and 3rd respondents that they had disciplinary control over petitioner does not hold water in view of the 2nd respondent being a legal entity and the employment letter expressly stating the letter of appointment was an employment contract between the petitioner and the 2nd Respondent company. The Court is guided by the decision on corporate entities being *Salomon V Salomon & Co Ltd* which is a landmark case under company law decided in 1897 in the UK jurisdiction. The case established that a Limited Liability Company wears an independent legal identity from its shareholders. Therefore, shareholders cannot be held responsible for the debt and liabilities of the company. ‘Either the limited company was a legal entity or it was not. If it was, the business belonged to it and not to Mr. Salomon... If it was not, there was no person and no thing to be an agent at all; and it is impossible to say at the same time that there is a company and there is not.’(Lord Halsbury LC at page 22). Applying the landmark UK jurisdiction decision in *Salomon V Salomon & Co Ltd* I find and determine that the petitioner was an employee of the 2nd respondent a corporate entity and thus the 1st and 3 respondents were intruders/strangers into the petitioner’s employment in purporting to issue the suspension letter dated 7th February 2022 and summon him for disciplinary hearing vide the County Public Service Board. (CA-11). Only the employer has disciplinary control and powers over the employee.’ I uphold my said decision to apply in the determination of this instant application to hold that by dint of section 56 of the County Governments Act the Ex parte Applicant is not a county public officer and according to his employment contract and the AMATSI Water Service Company Limited Human Resources Manual and Policies he was not a subject of the County Government of Vihiga or by stretch of imagination its public officer. Consequently, the Ex parte Applicant was not subject to the appeals process of the Public Service Commission by dint of section 77 of the County Governments Act.
24. In the upshot, for the foregoing reasons, the Application dated 10th June 2024 is dismissed for lack of merit with costs to the Ex parte Applicant in the cause.
25. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 25TH DAY OF JULY 2024.

J.W KELI

JUDGE

In the presence of:

Court Assistant: Macheso

Ex Parte Applicant: - Mondia

Respondents/Applicants: Aresa h/b Shijenje _____

