

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT BUNGOMA
CAUSE NO. 9 OF 2023

ERICK OJIAMBO NAKITARE CLAIMANT

-VERSUS-

BUSIA WATER & SEWERAGE

SERVICES CO. LTD 1ST RESPONDENT

COUNTY GOVERNMENT OF BUSIA..... 2ND RESPONDENT

(BEFORE HON JUSTICE DAVID NDERITU)

JUDGMENT

I. INTRODUCTION

1. The claimant commenced this cause through Amondi & Co. Advocates by way of a memorandum of claim dated 19th September 2023 filed as Kisumu ELRC E069 of 2023. Subsequently, the cause was transferred to Bungoma and assigned the reference in the header above.
2. In a further amended memorandum of claim dated 27th November 2023 filed through Obwoye Onsongo & Co. Advocates the claimant is seeking for various reliefs -
 - a. THAT the decision by the respondent dated 28/07/2023 but served upon the claimant on 18/09/2023 revoking the claimant's re-appointment as Managing Director of the 1st*

respondent be and is hereby quashed in terms of paragraph 19 D above.

b. THAT the claimant be and is hereby re-instated as the Managing Director of the 1st respondent in terms of paragraph 19 E above.

c. THAT in the alternative the claimant be and is hereby duly compensated for the unexpired term of his contract running up to 30/06/2026 in the sum of Ksh. 17,355,800 in terms of paragraph 19 F above.

d. THAT the claimant be compensated in terms of Damages for the breach of his right to fair labor practices contrary to Article 41 of the Constitution of Kenya.

e. THAT the claimant be compensated in terms of General Damages for loss of expectations, humiliation, embarrassment and defamation.

f. Costs of this suit on (c), (d), (e) & (f) above.

g. Interest on (c), (d), (e) & (f) above.

3. The further amended memorandum of claim was accompanied with a further list of documents and copies of the listed documents.
4. The 1st respondent entered appearance and filed a reply to the further amended memorandum of claim dated 8th February 2024 through J. O. Juma & Company Advocates. The 1st respondent also filed a list and bundle of documents. The claim is denied in its totality.

5. The 2nd respondent entered appearance through the County Attorney and filed a response to the further amended memorandum of claim denying the entire claim against it and praying that the same be dismissed in its totality.
6. The cause came up for hearing on 29th April 2025 when the claimant testified and closed his case. The defence was heard on 21st May 2025 when Franline Okoth Mkando (RW1) testified for the 1st respondent and Kelly Omboko Wafula (RW2) testified for the 2nd respondent and the case was closed.
7. Thereafter, the court directed counsel for the parties to file written submissions. Mr. Onsongo for the claimant filed written submissions dated 30th June 2025. Mr. Gakuya for the 1st respondent filed written submissions dated 28th August 2025 while Mr. Wambura for the 2nd respondent filed written submissions dated 27th June 2025.

II. THE CLAIMANT'S CASE

8. The claimant's case is expressed in the further amended memorandum of claim, the oral and documentary evidence he adduced, and the written submissions by his counsel.
9. In the further amended memorandum of claim, it is pleaded that the claimant was appointed by the 1st respondent as its Managing Director on 30th June 2020 for a term of three years. It is pleaded that claimant applied for renewal of the contract upon expiry of this initial one and the request was accepted on 16th June 2023.

10. However, it is further pleaded that vide a letter dated 28th July 2023 served upon the claimant on 18th September 2023 his reappointment was revoked and he was directed to handover the office to a suitable person and proceed on leave. It is the claimant's case that this revocation of his appointment amounted to constructive dismissal. It is further pleaded that the dismissal was malicious, unfair, and unlawful as the claimant was denied a hearing in accordance with the rules of natural justice.
11. It is the claimant's case that the letter of revocation of his reappointment done by the County Executive Committee Member of the 2nd respondent was without approval of the Board of Directors of the 1st respondent and hence null and void.
12. It is the claimant's case that his renewed contract was to run until 30th June 2026 and he is thus claiming all the earnings in salaries, allowances, and gratuity for the remainder of the term of the contract. He is also seeking the other reliefs as set out in the introductory part of this judgment.

III. THE RESPONDENTS' CASE

13. In the filed response to the further amended memorandum of claim, the 1st respondent pleaded that the claimant did not apply for the renewal of his contract at least six months prior to the expiry of the initial contract, he failed to meet set targets, was not appraised by the Board of Directors which was not in place as to

assess and recommend him, and that the appointment was thus done in an inadvertent error in violation of due process.

14. It is pleaded that the revocation of the reappointment was done in good faith in correction of an obviously wrong, erroneous, and unlawful process. Consequently, it is pleaded that the claimant was not lawfully reappointed and there was no valid and lawful contract of employment between the parties as the initially valid contract expired on 30th June 2023.
15. The 2nd respondent in its response to the claim pleaded that it is a legal entity independent of and from the 1st respondent.
16. It is pleaded that the claimant propagated his own reappointment in absence of a Board of Directors of the 2nd respondent in contravention of the law. It is further pleaded that the reappointment of the claimant had to be revoked as it was null and void. It is pleaded that the revocation of the appointment was made in good faith pursuant to the letter and spirit of the law and as such the particulars of malice as pleaded by the claimant and indeed the entire claim is denied in its totality.

IV. THE EVIDENCE

17. In his evidence in court, the claimant relied on his two filed written statements and the contents of the further amended memorandum of claim as summarized above. The claimant further produced the filed documents. He stated that he was neither notified nor invited for a hearing before he was terminated through the revocation of his reappointment.

18. In cross-examination by Mr. Gakuya for the 1st respondent, the claimant stated that he was on a basic salary of Kshs170,000/=. He further stated that he was initially appointed by the 2nd respondent's Board of Directors. He admitted that he was not appraised by the Board before the purported reappointment and that he did not apply for renewal of his contract at least six months prior to the expiry of the initial contract as demanded in that contract. He further admitted that the Board exited in June 2021 and the same was not reconstituted until September 2023. He thus admitted that his reappointment was not competitively carried out by the Board as required by the law.
19. In cross-examination by Mr. Wambura for the 2nd respondent, the claimant stated that he was an employee of the 1st respondent, a body corporate. He stated that his initial contract expired on 30th June 2023 and that for that initial contract he was interviewed and hired by the Board of Directors of the 1st respondent. He admitted that he was not appraised by the Board prior to renewal of his contract and reappointment and that there was no Board in place as at the material time and that the same was revoked for lack of due process. He admitted that he did not return a duly signed copy of the letter accepting his reappointment.
20. He stated that the 2nd respondent fully owns the 1st respondent and that two County Executives Committee Members of the 2nd respondent, for water and finance, sit in the Board. He stated that

since the term of the Board expired in 2021 while he was in office, he remained therein until he was kicked out on 18th September 2023.

21. In re-examination by his counsel Mr. Onsongo, the claimant stated that in absence of the Board his contract was renewed by the 2nd respondent's CEC for water and that he was in any event qualified and fit for the job.
22. In the defence hearing, RW1 for the 1st respondent, a clerk, relied on his filed statement and produced the filed documents as exhibits 1 to 12.
23. In cross-examination by counsel for the claimant, RW1 stated that the reappointment of the claimant was revoked due to substantive and procedural defects and illegalities. He stated that the claimant was not invited for a hearing before the revocation. He further stated that while the claimant was not responsible for reconstituting the Board, there was no Board in place as at the time of the purported renewal of his contract. He stated that the Governor of the 2nd respondent was responsible for appointing the Board.
24. He stated that the revocation of the reappointment was communicated vide a letter dated 28th July but delivered to the claimant on 18th September, 2023.
25. In cross-examination by counsel for the 2nd respondent, RW1 stated that the claimant was an employee of the 1st respondent and the letter reappointing him which was in the letterhead of the

2nd respondent was invalid and unlawful. He added that there was no Board in place to interview and reappoint the claimant as such. He stated that the reappointment of the claimant was not automatic and the same was subject to competitive interviewing and evaluation by the Board which was not in place as at the time of the unlawful renewal. He stated that the Board was reconstituted after the claimant's appointment had been revoked and the new Board did not endorse the reappointment.

26. RW2 for the 2nd respondent relied on his filed statement and stated that the claimant was an employee of the 1st respondent as the Managing Director. He stated that the contract lapsed on 30th June 2023 and the same was not renewed as there was no Board of Directors to execute that role. He stated that any purported renewal of the contract or reappointment was thus null and void. He further stated that the claimant was neither terminated nor constructively dismissed. He hence stated that the claimant is to blame for failing to advise the Board on the issue before its term expired in June 2021.
27. He further stated that the claimant did not apply for the renewal of his contract at least six months prior to expiry as provided in the contract but only did so 60 days to its lapse. In any event, he added, the said letter was not served upon the employer. He further stated that a duly signed copy of the letter of reappointment was not served upon the 1st respondent as required. Further, he stated that the claimant was not assessed and

evaluated by the Board prior to the purported reappointment as it had not been reconstituted.

28. In cross-examination by counsel for the claimant, RW1 stated that the applicable law provides that it is the Board that recommends and the appointment is done by the CEC water. He stated that the CEC could not appoint the claimant to the position in absence of the Board. He insisted that the revocation was the proper decision as the alleged reappointment was null and void.
29. RW2 held onto the foregoing in cross-examination by counsel for the 1st respondent and upon re-examination by counsel for the 2nd respondent. He maintained that the claimant could not be lawfully reappointed without a properly constituted Board in place.

V. SUBMISSIONS

30. Mr. Onsongo for the claimant submitted that the following issues were not contested—
 - i. *That the claimant was competitively recruited and employed by the 1st respondent as its Managing Director ON 30.06.2020 for a term of three years renewable.*
 - ii. *That the claimant, after the expiry of the said first 3 years sought for renewal of his term for another term of 3 years which was accepted on 16.06.2023. the 2nd term of his employment was expected to expire on 16.06.2026.*

- iii. *That the line County Executive Committee Member of the 2nd respondent, in charge of water terminated the claimant's services vide a letter dated 28.07.2023.*
- iv. *Paramount to all the above, the claimant was not given Notice of Termination or chance to be heard before he was dismissed.*

31. It is submitted that the claimant was dismissed without notice and without a hearing yet he was not found guilty of any misconduct. It is submitted that the evidence on record confirms that no substantive appointee is holding the position and the same remains vacant and hence reinstatement of the claimant shall cause no prejudice to either party.
32. It is further submitted that the claimant was summarily dismissed yet he was not found guilty of gross misconduct as envisaged under **Section 44 of the Employment Act (the Act)**. It is further submitted that **Section 11 of the Busia County Water and Sewerage Act (the constitutive Act)** provides for the reasons and manner of removal of the Managing Director of the 1st respondent and yet the respondents failed to comply therewith.
33. In the circumstances, counsel for the claimant argued that the claimant was denied both substantive and procedural fairness. It is submitted that the dismissal was contrary to **Section 45(2) of the Act**. Counsel cited ***Njuguna V Times U Sacco Limited (2024) KEELRC 1249 (KLR)*** in support of the foregoing argument.

34. Further, counsel cited *Joshua Rodney Malimbah V Kenya Revenue Authority (2021) eKLR* in support of the claimant's reinstatement in view of the alleged blatant breach and violation of the above cited provisions of the law by the respondents. It is submitted that the claimant was eligible for reappointment under **Section 10(3) of the constitutive Act**. It is submitted that the reappointment neither needed to be carried out by the Board nor competitive. Counsel cited *William Ateka V Kisii University V Cabinet Secretary for Education Ex parte Naftaly Rugara Muiga* wherein it was held that in circumstances where renewal or reappointment is provided for, the same does not amount to a new recruitment or fresh appointment. Counsel further cited *Wilfrida Itondolo & 4 Others V President & 7 Others (2015) eKLR*.
35. Counsel emphasized that the claimant was neither heard nor found guilty of misconduct in terms of **Sections 43 & 44 of the Act, Section 11 of the Constitutive Act, or paragraph 8 of the contract** of employment between the parties. It is re-emphasized that the claimant did not reappoint himself as the same was done by the CEC of the 2nd respondent as required by the requisite provisions of the applicable law.
36. It is submitted that the claimant was not the legal advisor to the respondents as that is in the realm and purview of the County Attorney. It is thus submitted that if any mistakes were committed in the reappointment of the claimant the same cannot and should

not be visited upon him. It is submitted that while the 1st respondent had no Board of Directors duly appointed from November 2021 to September 2023, such an omission cannot and should not be attributed to the claimant as he had no role to play in such appointments and reconstitution of the Board.

37. On another note, it is submitted that in an earlier ruling by Keli J it was determined that the 2nd respondent was properly joined in this cause. It is submitted that it is the 2nd respondent who reappointed the claimant through its CEC member and equally dismissed him. It is further submitted that in any event the 2nd respondent fully owns the 1st respondent.
38. It is submitted that the respondents were malicious in the dismissal of the claimant as the letter of revocation of reappointment dated 28th July 2023 was not served upon the claimant until 18th September 2023 after the new Board had been reconstituted and installed on 11th September 2023. It is submitted that the evidence on record confirms that the claimant worked after 28th July 2023, when he was allegedly dismissed or his reappointment revoked, as he even attended the 1st respondent's meeting held on 18th August 2023. It is submitted that this attendance confirms that the claimant attended in his capacity as the Managing Director. There is on record in evidence the claimant's pay-slips for August and September, 2023 confirming that the claimant indeed worked after he had been allegedly disappointed on 28th July 2023.

39. It is submitted that the 2nd respondent unlawfully and without cause dismissed or terminated the claimant. It is further submitted that this is an appropriate case for reinstatement as it has been demonstrated that the dismissal was unfair both in form/substance and procedure and the position remains vacant as per the evidence of RW1 and RW2 for the respondents. The court is urged to quash the dismissal and reinstate the claimant.
40. The court is further urged to find and hold that the labour rights of the claimant under **Article 41 of the Constitution** have been violated and breached and award to him all the reliefs as sought.
41. Counsel for the 1st respondent identified the following three issues for determination –
- i. *Whether the claimant has proved on balance of probabilities that his alleged termination/dismissal was not based on reasonable grounds.*
 - ii. *Whether the claimant’s extension of contract for a further term of three years was legitimate.*
 - iii. *Whether the claimant is entitled to the reliefs sought.*
42. On the first issue, it is submitted that the claimant failed to prove or to **prima facie** establish and demonstrate that indeed the revocation of his reappointment was unfair, unjustified, and unlawful under **Sections 43, 45, & 47 of the Act** and **Sections 107 & 108 of the Evidence Act**. Counsel cited **Josephine M. Ndung’u & Others V Plan International Inc (2019) eKLR** and **Muthaiga Country Club V KUDHEIHA Workers (2017) eKLR**

in support of this argument. Further, counsel cited *Kenya Revenue Authority V Reuwel Waithaka Gitahi & 2 Others (2019) eKLR* in support of the argument that the respondents had reasonable and justified grounds for revoking the reappointment of the claimant.

43. On the second issue, it is submitted that the claimant did not apply for reappointment as provided for in the initial contract that run from 29th June 2020 to 29th June 2023 by submitting his intention/application for renewal or extension six months prior to lapse of the same. It is further submitted that as confirmed by the evidence on record, there was no Board in place to recommend the renewal of the claimant's contract. It is submitted that the purported reappointment of the claimant was in error and the respondents acted promptly upon becoming aware of the same as per the letter to the claimant dated 28th July 2023.
44. It is submitted that the purported reappointment or renewal of contract was null and void and hence the issue of constructive dismissal or termination did not and does not arise. It is submitted that without a duly constituted Board there is no way the claimant could have been so reappointed.
45. It is further submitted that the respondents were not obligated to renew the contract or to reappoint the claimant and such a move was at the discretion of the employer. It is submitted that the contract that lapsed created no legitimate expectation on the part of the claimant as to the renewal of the same or reappointment.

Counsel cited *Mbatia V Kirinyaga Water & Sewerage Sanitation Company (2023) KEELRC 3364 (KLR)* in support of that argument.

46. On the reliefs sought by the claimant, it is submitted that in view of all the foregoing submissions the claimant is not entitled to any of the reliefs claimed. It is submitted that no particulars of defamation were pleaded and proved. It is further pleaded that the claimant's alleged reappointment was clearly unlawful, null, and void and as such he cannot be compensated for an illegal contract. In any event, it is further submitted, there was no guarantee that the claimant would have served the new term contract in full. It is submitted that the claimant cannot and should not be paid for services not rendered and counsel cited several decisions on this including *D. K. Njagi Marete V Teachers Service Commission (2020) eKLR*.
47. Counsel for the 2nd respondent submitted that the two respondents are separate and distinct legal entities. It is submitted that the claimant was an employee of the 1st respondent and that the 2nd respondent is improperly joined in the cause.
48. It is submitted that the evidence on record, from both sides, confirms that there was no Board of Directors as at the time of the purported renewal and or reappointment of the claimant into the position of the Managing Director of the 1st respondent. It is submitted that under *Section 10 of the constitutive Act* it is the Board that recommends the appointment of the Managing

Director and since the Board was not in place the alleged reappointment was illegal, null, and void.

49. It is further submitted that the claimant failed to apply for the renewal of the contract six months in advance and also failed to return a duly signed copy of the letter of reappointment in acceptance thereof.
50. It is further submitted that the manner and the style of the purported reappointment of the claimant was in clear violation of the guiding principles of leadership and integrity as provided for in **Article 73 of the Constitution**. It is submitted that the reappointment was devoid of merits and was in clear violation of the law and the respondents' only available option was to revoke the same. It is submitted that a court of law cannot and should not enforce an illegal or unlawful contract and counsel cited **Patel V Singh (1987) KLR** in support of that argument.
51. It is submitted that the revocation of the illegal, null, and void reappointment of the claimant was the only right and lawful option available to the respondents and it was executed in good faith and without malice. It is further submitted that the claimant is not entitled to any of the reliefs sought.

VI. ISSUES FOR DETERMINATION

52. The court has carefully and dutifully gone through the pleadings filed, the oral and documentary evidence tendered from all the parties, and the written submissions by counsel. The following issues commend themselves to the court for determination -

- a) Whether the 2nd respondent is properly joined in this cause.*
- b) Whether the claimant was properly reappointed as the managing director of the 1st respondent.*
- c) Whether the claimant was unlawfully terminated or constructively dismissed or at all.*
- d) Whether the claimant is entitled to the reliefs sought; and,*
- e) Who should bear the costs of the cause?*

VI. MERITS OF THE CAUSE

53. The dispute between the parties is rather straightforward as summarized in the foregoing paragraphs. The 1st respondent is a limited liability company wholly owned by the 2nd respondent, a County Government. The Board of Directors of the 1st respondent is constituted by the 2nd respondent and the appointments thereto made by the Governor of the 2nd respondent. The 2nd respondent is represented in the Board by at least two County Executive Committee Members (CEC), that of water and that of finance.
54. In the foregoing circumstances, it is clear that the management and operations of the 1st respondent, though a separate and distinct legal entity, are intrinsically connected to the 1st respondent. Another example of this symbiosis is that the Managing Director of the 1st respondent is appointed by the

Board on the recommendation of the Governor of the 2nd respondent as per the *constitutive Act*.

55. It is no wonder that Keli J in two earlier rulings denied a plea by the 2nd respondent to be enjoined from the cause and directed that the cause proceeds for determination on the issues as between all the parties on merits. The two rulings were neither appealed nor reviewed or the orders thereof set aside.
56. This court thus proceeded to hear the matter as between all the parties and shall issue orders accordingly.
57. On the second issue, there are a number of uncontested facts that should form the basis for the determination of the cause. The claimant was competitively and lawfully appointed the Managing Director of the 1st respondent on a three-year contract that run from 30th June 2020 to 30th June 2023. All the three parties agree that that contract was valid and binding on the parties. The 1st respondent was the employer and the 2nd respondent was in that regard not privy to that contract.
58. It is not in dispute that sometimes in June 2021 the term of the Board of Directors expired and the Board was not reconstituted until sometimes in September 2023. It is not in dispute that the claimant's initial contract expired in June 2023 when there was no Board of Directors in place.
59. ***Section 10(1) of the constitutive Act*** provides as follows –
“There shall be a Managing Director who shall be appointed by the Executive Member on recommendation of the Board and

recruited through a competitive process.” Further, Section 10(3) of the same provides that – “The Managing Director shall hold office for a period of three years on such terms and conditions of employment as the Board may determine, and shall be eligible for reappointment.”

60. A plain reading of the above provisions informs that the Board plays a central role in the recruitment, appointment, and or reappointment of a Managing Director. The facts of this cause are distinguishable from those obtaining in the decisions cited by counsel for the claimant whereby all the players in the recruitment and appointment processes were in in place at the material time.
61. It is the finding and holding of the court that there is no way that the claimant’s lapsed contract could have been extended, renewed, and or the claimant reappointed in absence of a properly constituted Board of Directors of the 1st respondent. Any contract arising in such absence was null, void, and illegal and the court cannot enforce an illegal contract as the same is a mere nullity.
62. The initial contract between the parties did not provide for an automatic renewal or extension of the same. In the relevant part the contract provided as follows –

Your employment may be extended upon expiry of the period stated in (d) above provided;

- ***You have met the performance targets as agreed with the Board***

- *The Company considers that you are in every respect suitable to continue in the position of Managing Director*
- *You wish to continue serving the Company and apply to the BOD Six Months prior to the expiry of your contract.*

63. The purported reappointment of the claimant by the CEC in the absence of a recommendation of a duly constituted Board was of no legal effect, null, and void. In fact, the letter of revocation was a formality as there was no proper appointment or reappointment in the first place.
64. Consequently, there was no lawfully valid appointment or reappointment of the claimant from which the claimant was capable of being terminated or dismissed. The respondents, albeit late, did the right thing by simply informing the claimant that the purported reappointment was a nullity and void and as such he needed to handover and leave. As at that time there was no lawful employer-employee relationship between the parties and the issue of due process, both in substance and procedure, did not and does not arise.
65. What the claimant ought to have done, if he was so inclined, was to reapply for the job or reappointment as soon as the Board was reconstituted. In any event, he did not follow the laid down procedure in obtaining the purported reappointment. He did not apply six months prior to the lapse of his contract; he was not assessed and recommended by the Board; no new terms were agreed by the parties; no new contract was properly offered by the

employer, the 1st respondent; and, no duly signed copy of a valid contract was returned to the employer for records.

66. In terms of the reliefs sought, the court notes that the claimant was paid for services rendered in the period he served beyond his contract. There is also no claim that any dues are pending in regard to the initial contract. There are no particulars of defamation and the court detects no malice in the manner that the employer corrected the error apparent in the purported reappointment of the claimant. For the many reasons stated above, the claimant is not entitled to an order for reinstatement or any of the other reliefs sought.

67. The court has this far demonstrated that this cause is without merits and the same is for dismissal and is hereby so dismissed.

68. Obiter, the court has to state that this cause demonstrates the casual approach with which most public institutions and companies are managed and operated. There is no reason or explanation that was offered as to why the 1st respondent was without a properly constituted Board of Directors for the period from June 2021 to September 2023. The court is aware that 2022 was an election year but that is not a reason for such serious failure on the part of the concerned parties to do the right and lawful thing.

69. The resultant vacuum created the confusion leading to the unlawful reappointment of the claimant and the subsequent revocation of the same. That is not the way that public affairs and

governance should be managed. It is about time that our Great Nation and Republic stopped tying everything to the politics of the day. It is the high time that public affairs and governance were insulated against the political jockeying that comes about every five years.

70. The mess so created by the respondents has rendered the 1st respondent to be without a substantive Managing Director from September 2023 to this day. Sadly, the claimant was rendered jobless in artificially created circumstances that ought not to have occurred. Let me leave it at that.

XI. ORDERS

71. The court issues orders that -

- a) The claimant's cause be and is hereby dismissed in its entirety for lack of merits.***
- b) Each party shall meet own costs.***

**DELIVERED VIRTUALLY, DATED, AND SIGNED AT
KAKAMEGA THIS 22ND DAY OF JANUARY, 2026.**

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**DAVID NDERITU
JUDGE**