



Rift Valley Water Services Board & 3 others v Asanyo & 2 others (Civil Appeal 60 & 61 of 2015 (Consolidated)) [2022] KECA 778 (KLR) (10 June 2022) (Judgment)

Neutral citation: [2022] KECA 778 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL 60 & 61 OF 2015 (CONSOLIDATED)
DK MUSINGA, AK MURGOR & KI LAIBUTA, JJA
JUNE 10, 2022
(CONSOLIDATED WITH CIVIL APPEAL NO. 61 OF 2015)**

BETWEEN

**RIFT VALLEY WATER SERVICES BOARD 1ST APPELLANT
JAPHETH MUTAI 2ND APPELLANT
COUNTY GOVERNMENT OF NAKURU 3RD APPELLANT
H. E. KINUTHIA MBUGUA 4TH APPELLANT**

AND

**GEOFFREY ASANYO 1ST RESPONDENT
NAKURU WATER & SANITATION SERVICES COMPANY . 2ND RESPONDENT
JOHN CHERUIYOT 3RD RESPONDENT**

(Being an Appeal from the Ruling and Order of the Industrial Court of Kenya at Nakuru (Byram Ongaya, J) Delivered on the 30th day of April 2014 and the Judgment and Decree of the Industrial Court of Kenya at Nakuru (Byram Ongaya, J) delivered on the 30th day of May 2014) in Industrial Cause Petition No. 4 of 2014)

JUDGMENT

1. The promulgation of the Constitution on 27th August 2010 ushered in an array of legislative, institutional, governance and administrative reforms suitably designed to (a) regulate the assignment of functions between national and county governments in accordance with the Fourth Schedule to the Constitution; and (b) operationalise devolution of powers and decentralization of services from the national to the county levels, and to the lowest units of service delivery pursuant to Article 6 of the Constitution. It is under this constitutional framework that decentralization of water services is



managed by the Water Resources Authority established under section 11 of the Water Act, 2016 as a body corporate with perpetual succession. Section 12 of the Act sets out the functions of the Authority, which include (i) regulation of the management and use of water resources; and (ii) coordination with other regional, national and international bodies for the better regulation of the management and use of water resources.

2. Under the Authority is the 1st appellant, Rift Valley Water Services Board, which is a regulatory board established under section 70 of the Water Act, 2016 as a body corporate with perpetual succession, and whose principal object is to protect the interests and rights of consumers in the provision of water services in the Rift Valley region of the Republic. This regulatory board is comprised of –
 - a. a chairperson appointed by the President;
 - b. 4 other members appointed by the Cabinet Secretary; and
 - c. the Chief Executive Officer.
3. In discharge of its functions aimed at the protection of the interests and rights of consumers in the provision of water services, the 1st appellant plays a supervisory role over, among others, the 2nd respondent, Nakuru Water and Sanitation Services Company, which is established pursuant to section 77 of the Water Act as a public limited liability company, and in accordance with the repealed Companies Act (Cap. 486).
4. Section 79(1) of the Act mandates water services providers, such as the 2nd respondent, to establish a board of directors. In the case of a limited liability company (as is the 2nd respondent), the Act requires that members of its board of directors be constituted in accordance with the Companies Act or any other written law. Section 79(1) of the Act requires that the directors be nominated to serve on the board in accordance with the company's memorandum and articles of association. In effect, the Act does not contemplate appointment of such directors as employees of the water services providers within the meaning of the Employment Act, Revised 2021 (2007).
5. It is noteworthy that the 2nd respondent had been established as a private company limited by shares before the promulgation of the 2010 Constitution, devolution of powers and decentralization of services from the national to the county levels. It provided water services to the now defunct Municipal Council of Nakuru established under the repealed Local Government Act (Cap. 265). However, its water services provision transitioned to the devolved system, continuing in operation to this day for the benefit of the Nakuru County Government, which was established pursuant to Article 6(1) of the Constitution read together with the First Schedule to the Constitution.
6. Under clause 69 of the 2nd respondent's Memorandum and Articles of Association, its Board of Directors (to which the 1st respondent was originally appointed) was comprised of –
 - a. the Mayor of the Council;
 - b. the Town Clerk of the Council;
 - c. the Treasurer of the Council;
 - d. the Managing Director of the Company;
 - e. a representative of the business/Finance Sector/the local Kenya National Chamber of Commerce and Industry/the local chapter of the Association of Kenya Manufacturers who shall not be a member of the Council;
 - f. a representative of women who shall not be a member of the Council;



- g. a representative of the Ministry of Local Government;
 - h. a representative of the Ministry of Water Resources Management Development; and
 - i. a representative of the Ministry of Finance;
7. It is to this board that the 1st respondent was originally appointed to represent the business community for a term of 3 years, which was subsequently extended for a further term of 3 years by resolution of the 2nd respondent's extraordinary general meeting held on 17th December 2012. The extension of the 1st respondent's term of appointment to the 2nd respondent's board was notified by its letter dated 18th December 2012, which set out "the common law duties of a director" and the responsibilities of the board. In particular, the 1st respondent was required to "... attend quarterly board meetings and other meetings scheduled as and when it is found necessary." In addition, he was expected to serve as "... a member of one of the committees of the board".
 8. By a notice given on 25th January 2014, the 2nd respondent convened an extraordinary general meeting held on 19th February 2014 to, among other things, "... pass a special resolution to propose amendment to the Memorandum and Articles of Association to comply with the Constitution, current laws on devolved government and water regulations." The proposed resolution was passed and changes made to the Memorandum and Articles of Association of the 2nd respondent pursuant to which its board was reconstituted. The 1st respondent was not appointed to the new board thereby terminating his membership to the board in March 2014 before the end of his extended term.
 9. These changes were necessitated by the enactment of the County Government Act, 2012. Under the 2012 Act, the administration of the 2nd respondent shifted from the local authority (the Municipal Council of Nakuru) to the 3rd appellant, the County Government of Nakuru. The majority shareholding of the 3rd appellant necessitated the removal and appointment of various directors of the 2nd respondent's board, including the removal of the 1st respondent. The new board had only 1 instead of 3 representatives of the business community. The 1st respondent was not appointed, prompting his petition leading to the impugned Ruling, judgment and decree
 10. On 6th March 2014, the 1st respondent filed a petition in the Industrial Court at Nakuru, being Industrial Court Petition No. 4 of 2014, against the appellants, the 2nd and 3rd respondents herein, and the Attorney-General, seeking -
 - a. a declaration that the decision and process of advertising and intended filling of the positions of 6 directors of the 2nd respondent

herein was "opaque, egregious, clandestine, capricious, whimsical and contrary to Articles 41 and 47 of the Constitution of Kenya, hence unconstitutional and consequently null and void";
 - b. a declaration that the actions of the 3rd respondent, the 2nd and the 4th appellants contravened the provisions of Articles 10,41, 47 and 73 of the Constitution of Kenya, and the Public Officer Ethics Act, 2003 and hence unfit to hold any public office;
 - c. a declaration that the appellants, the 2nd and 3rd respondents, and the Attorney-General "are escapists and have abdicated their duties to respect and uphold the Constitution of Kenya in their administrative actions"; and
 - d. that the petitioner be paid costs of the petition.



11. The 1st respondent's petition was supported by his affidavit sworn on 6th March 2014, whose contents we need not reproduce here. Suffice it to observe that he recited the changes in the governance of the 2nd respondent as mentioned above. According to him, his term of office was to end in December 2015. He claimed to be an employee of the 2nd respondent and faulted what he viewed as dismissal from employment. In his petition, he claimed against the 1st appellant, the 2nd (the then Chief Executive Officer of the 1st appellant), the 3rd appellant, the 4th appellant (the then Governor of Nakuru County Government), the 2nd respondent, the 3rd respondent (the then Managing Director of the 2nd respondent), and the Attorney-General.
12. By a Notice of Objection dated 18th March 2014, the appellants raised a preliminary objection to the petition on the grounds that –
 - a. Article 162(2) (a) of the *Constitution* and section 12 of the Industrial Court Act did not confer jurisdiction on the court to entertain the 1st respondent's claim in the petition;
 - b. the 1st respondent was not an employee of the 2nd respondent within the meaning of sections 2 and 3 of the *Employment Act*, 2007 and section 12 of the Industrial Court Act, 2011; and
 - c. the 2nd respondent's Memorandum and Articles of Association did not confer employee status on the 1st respondent.
13. On 28th March 2014, the 1st respondent filed a Statement of Response to the Preliminary Objection raised by the appellants. He contended that the Industrial Court had jurisdiction to determine his claim. According to him, he was "a public officer working for the 2nd respondent which is a public company". He stated that the respondents to the petition were "personally liable for their actions which were not authorised".
14. By a Ruling and Order given on 30th April 2014, the learned Judge dismissed the appellants' preliminary objection. According to him, the 1st respondent was an employee of the 2nd respondent "both as an appointed director and as a public officer," and that the Industrial Court had jurisdiction to hear and determine the 1st respondent's petition. In his view –

"...this court enjoys the jurisdiction to hear and determine employment and labour relations matters alongside claims of fundamental rights (and enforcement of constitutional and statutory provisions) ancillary and incidental to those matters."
15. Aggrieved by the Ruling and Order of the Industrial Court (Byram Ongaya, J.) given on 30th April 2014, the appellants lodged an appeal to this Court, being Civil Appeal No. 60 of 2015. In their Memorandum of Appeal dated 26th February 2015, the appellants contended that the learned Judge misdirected himself on the law by holding that executive directors of a company are employees of the company within the meaning of section 2 of the *Employment Act* and thereby holding that the Industrial Court had jurisdiction to hear and determine the petition.
16. Pending hearing and determination of the appeal aforesaid, the appellants actively defended the 1st respondent's petition, which was heard and determined on 30th May 2014. In his judgment and decree, the learned Judge entered judgment for the 1st respondent against the appellants, the 2nd and 3rd respondents as prayed in the petition together with costs. Dissatisfied by the judgment and decree of the Industrial Court (Byram Ongaya, J) given on 30th May 2014, the appellants lodged an appeal to this Court, being Civil Appeal No. 61 of 2015. In their Memorandum of Appeal dated 26th February



2015, the appellants advance 9 grounds, which we need not reproduce here. In summary, they contend that the learned Judge erred in –

- a. failing to consider the provisions of the 2nd respondent’s amended Memorandum and Articles of Association and of the [Water Act](#), the Guidelines on Corporate Governance, and holding that the 1st respondent was a serving director of the 2nd respondent;
 - b. holding that the amended Memorandum and Articles did not abolish the position held by the 1st respondent;
 - c. holding that directors of a company are its employees;
 - d. disregarding the provisions of section 22 of the repealed [Companies Act](#) in relation to the binding effect of registered Memorandum and Articles of Association;
 - e. holding that the 1st respondent was an employee of the 2nd respondent;
 - f. holding that exclusion of the 1st respondent from the reconstituted board of the 2nd respondent amounted to “discrimination in employment” contrary to section 5 of the [Employment Act, 2007](#); and
 - g. holding that the 1st respondent had “correctly invoked the constitutional jurisdiction of the Industrial Court”.
1. The two appeals having been consolidated for hearing before us, they stand or fall on account of three main issues:
 - a. whether the 1st respondent was at all material times an employee of the 1st appellant within the meaning of the [Employment Act, 2014](#);
 - b. whether the Industrial Court at Nakuru (Byram Ongaya, J) had jurisdiction to hear and determine the 1st respondent’s claim in Industrial Cause Petition No. 4 of 2014; and
 - c. what orders should this Court make in determination of the appeal, including orders as to costs?
18. 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, Revised 2021 \(2007\)](#) 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.” Neither was he an apprentice or indentured learner. 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. Accordingly, the [Employment Act](#) did not apply to him. What then was the nature of the relationship between the 1st respondent and the 2nd respondent?
19. It was not in dispute that the 1st respondent was originally appointed to the 2nd respondent’s board in accordance with the company’s Memorandum and Articles of Association for a term of 3 years ending on the 17th December 2012. His appointment was subsequently extended for a further term of 3 years ending on or about 17th December 2015. His initial appointment and the subsequent extension of appointment for a further term did not by any mean constitute him an employee within the meaning



of the *Employment Act*. His functions as a director of the 2nd respondent's governance body, and the terms on which he was appointed to represent the interests of the business community on the Board, were governed by the *Companies Act* and the 2nd respondent's Memorandum and Articles of Association. The *Employment Act* did not apply to that relationship so as to confer on the Industrial Court jurisdiction to determine any claim relating to appointment to the board.

20. We hasten to draw a clear 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. That is the position here. In the absence of a contract of service in terms of which a director is engaged as a full-time employee of a company, it cannot be presumed that such a director is an employee of the company (see *Parsons v Albert J. Parsons and Sons Ltd* [1979] ICR p.271).
21. Apart from the letter dated 18th December 2012 by which the 1st respondent's term of service as a member of the 2nd respondent's board of directors was extended, we find nothing on record to suggest that the 1st respondent had a contract of service to constitute him an employee of the 2nd respondent. A "contract of service" is defined in section 2 of the *Employment Act*, Revised 2021 (2007) as "an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time" Neither can it be said that the 2nd respondent's letter of 18th December 2012 aforesaid constituted "a contract of service to employ" the 1st respondent.
22. Having considered the records of the two appeals as consolidated, the impugned Ruling and Order of the trial court delivered on 30th April 2014, the judgment and decree of the Industrial Court (Byram Ongaya, J.) delivered on 30th May 2014, the grounds on which the two appeals were preferred, the written submissions of learned counsel for the appellants and learned counsel for the 1st respondent, relevant statute law and the authorities cited before us, we find and hold that the 1st respondent was not an employee of the 2nd respondent within the meaning of the *Employment Act*, 2007. Consequently, the Industrial Court at Nakuru had no jurisdiction to entertain his petition. Accordingly –
 - a. the appellants' appeal in Civil Appeal No. 60 of 2015 and in Civil Appeal No. 61 of 2015 (consolidated) are hereby allowed;
 - b. the Ruling and Order of the Nakuru Industrial Court (Byram Ongaya, J.) delivered on 30th April 2014 in Industrial Court Petition No. 4 of 2014 are hereby set aside;
 - c. the judgment and decree of Nakuru Industrial Court (Byram Ongaya, J) delivered on 30th May 2014 in Industrial Petition No. 4 of 2014 are hereby set aside;
 - d. the 1st respondent do bear the costs of the appeals as consolidated.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 10TH DAY OF JUNE, 2022

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

