



REPUBLIC OF KENYA



**KENYA LAW**  
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**Gikenye & 2 others v Mwaura & 9 others (Petition E001 of 2025)  
[2025] KEELRC 592 (KLR) (27 February 2025) (Ruling)**

Neutral citation: [2025] KEELRC 592 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E001 OF 2025  
B ONGAYA, J  
FEBRUARY 27, 2025**

**BETWEEN**

**DR. MAGARE GIKENYE B ..... 1<sup>ST</sup> PETITIONER  
DISHON KEROTI MOGIRE ..... 2<sup>ND</sup> PETITIONER  
PHILOMEN ABUGA NYAKUNDI ..... 3<sup>RD</sup> PETITIONER**

**AND**

**ANTHONY NG'ANG'A MWAURA ..... 1<sup>ST</sup> RESPONDENT  
KENYA RURAL ROADS AUTHORITY (KERRA ..... 2<sup>ND</sup> RESPONDENT  
MR. NDIRITU MURIIITHI ..... 3<sup>RD</sup> RESPONDENT  
KENYA REVENUE AUTHORITY ..... 4<sup>TH</sup> RESPONDENT  
KEMBI GITURA ..... 5<sup>TH</sup> RESPONDENT  
KENYATTA UNIVERSITY TEACHING, REFERRAL AND RESEARCH  
HOSPITAL ..... 6<sup>TH</sup> RESPONDENT  
MWANGI WA IRIA ..... 7<sup>TH</sup> RESPONDENT  
PUBLIC PROCUREMENT REGULATORY BOARD ..... 8<sup>TH</sup> RESPONDENT  
ATTORNEY GENERAL ..... 9<sup>TH</sup> RESPONDENT  
PUBLIC SERVICE COMMISSION ..... 10<sup>TH</sup> RESPONDENT**

**Board members of State Corporations are public officers in public employment and thus within the jurisdiction of the Employment and Labour Relations Court**

*A preliminary objection was raised on the ground that the court lacked jurisdiction to hear and determine matters on the appointment of State Corporations Board chairpersons and members done under the State Corporations Act. The court found that board members were public officers in public employment. The court also held that*



*the submission that employment existed only where the provisions of the Employment Act (cap 226) applied was a pure misdirection unknown to the world of work. Parties in employment relationships may found their relationships upon several formal provisions. The Employment Act applied as the floor of terms and conditions in an employment or work relationship and the Act did not operate to oust employment or work relationships founded upon such other provisions binding upon parties as may be lawful.*

Reported by Kakai Toili

**Labour Law** – employment – employer-employee relationship - whether an employer-employee relationship existed only where the provisions of the Employment Act applied - whether members appointed to State Corporations Boards were employees and thus subject to the jurisdiction of the Employment and Labour Relations Court – Constitution of Kenya, article 260.

### **Brief facts**

The petitioners challenged the appointment of the 1<sup>st</sup>, 3<sup>rd</sup>, 5<sup>th</sup> and 7<sup>th</sup> respondents into 2<sup>nd</sup>, 4<sup>th</sup>, 6<sup>th</sup>, and 8<sup>th</sup> respondent State Corporations. The 2<sup>nd</sup>, 6<sup>th</sup>, 8<sup>th</sup>, and 9<sup>th</sup> respondents filed a preliminary objection on the ground that the court lacked jurisdiction to hear and grant the orders sought. They claimed that the court lacked jurisdiction to hear and determine matters on the appointment of State Corporations Board Chairpersons and members done under the State Corporations Act because the petitioners were not employees of the respondents and did not fall in the category of employees hence the court had no jurisdiction to hear and determine the issues raised therein.

### **Issues**

- i. Whether members appointed to State Corporations Boards were employees and thus subject to the jurisdiction of the Employment and Labour Relations Court.
- ii. Whether an employer-employee relationship existed only where the provisions of the Employment Act applied.

### **Held**

1. The preliminary objection was based upon a disputed fact about the existence of employer – employee relationship. For example, it was submitted for the respondents that the respondents as appointed to the Boards of State Corporations were not employees as they did not earn a wage or a salary. Whether they earned a wage or a salary was a matter to be determined after full hearing and it invariably not an issue not contested as based upon pleadings before the court.
2. The case was about appointment to boards of State Corporations. Such board members were public officers in public employment within the definition of a public officer in article 260 of the Constitution. The board members were regulated by the public service employment laws including the values and principles of public service in article 232 and Chapter 6 of the Constitution on leadership and integrity. They were bound under the Public Officer Ethics Act, the Official Secrets Act and other laws, codes, policies and practices that applied to public officers and public service. How then could they not be public officers and servants of the people employed as such as provided for in Chapter 6 of the Constitution and all applicable laws?
3. The submission that employment existed only where the provisions of the Employment Act (cap 226) applied was a pure misdirection unknown to the world of work. Parties in employment relationships could found their relationships upon several formal provisions such as provisions of the Constitution, relevant legislation, private contracts and others. For public and State officers, the applicable provisions would be found in the Constitution, relevant statutes, public and State service regulations, policies and applicable practices or usages.
4. The Employment Act (cap 226) applied as the floor of terms and conditions in an employment or work relationship and the Act did not operate to oust employment or work relationships founded upon such other provisions binding upon parties as may be lawful.

*Preliminary objection dismissed.*



## **Orders**

*Costs in the cause; parties to take directions towards the expeditious bearing and determination of the main petition.*

## **Citations**

### **Cases**

1. Benjamin v Ministry of Labour & 5 others; Senate (Interested Party) Petition E001 of 2022; [2023] KEELRC 1439 (KLR) — (Followed)
2. Havi v Judicial Service Commission & another (Petition E039 of 2024; [2024] KEELRC 798 (KLR)) — Followed
3. In the Matter of Interim Independent Electoral Commission Constitutional Application 2 of 2011; [2011] KESC 3 (KLR)- (Explained)
4. Mugendi, Daniel N v Kenyatta University, Benson I Wairegi, Eliud Mathiu & Olive M Mugenda Civil Appeal 6 of 2012; [2013] KECA 41 (KLR) — (Followed)
5. Orogo v Chairman, Board of Directors Kenya Revenue Authority & 2 others Petition E004 of 2023; [2023] KEHC 27054 (KLR)- (Explained)
6. Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd Civil Appeal 50 of 1989; [1989] KECA 48 (KLR);(1989) KLR 1- (Explained)
7. Public Service Commission & 4 others v Cheruiyot & 20 others Civil Appeal 119 & 139 of 2017 (Consolidated); [2022] KECA 15 (KLR)- (Explained)
8. Rift Valley Water Services Board & 3 others v Asanyo & 2 others (Civil Appeal 60 & 61 of 2015 (Consolidated); [2022] KECA 778 (KLR)) — (Followed)
9. Rukaria v Attorney General; Debasso & another (Interested Parties) (Petition 2 of 2023; [2023] KEELRC 1339 (KLR)) — (Explained)

## **Regional Court**

Mukisa Biscuits Manufacturing Company Limited v West End Distributors Limited (1969) EA 696 — (Followed)

## **Statutes**

1. Constitution of Kenya, 2010 — articles 162(2); 232;260; Chapter 6 — (Interpreted)
2. Employment Act (cap 226) — (Cited) In general
3. Employment And Labour Relations Court Act (cap 8E) — section 12(1) — (Interpreted)
4. State Corporations Act (cap 446) — (Cited) In general

## **Advocates**

None mentioned

## **RULING**

1. The petitioners filed the petition and application dated 01.01.2025 in person. The petitioners challenged the appointment of the 1<sup>st</sup>, 3<sup>rd</sup>, 5<sup>th</sup> and 7<sup>th</sup> respondents into 2<sup>nd</sup>, 4<sup>th</sup>, 6<sup>th</sup>, and 8<sup>th</sup> respondent state corporations.
2. The 2<sup>nd</sup>, 6<sup>th</sup>, 8<sup>th</sup>, and 9<sup>th</sup> respondents filed a preliminary objection through Schola Mbilo, Deputy Chief State Counsel, for Attorney General. It was stated that the the honourable court lacks jurisdiction to hear and grant the orders sought both in the application and petition under section 12(1) of the [\*Employment and Labour Relations Court Act\*](#). Further, court lacks jurisdiction to hear and determine



- matters on the appointment of State Corporations Board Chairpersons and members done under the *State Corporations Act* because the petitioners are not employees of the respondents herein and do not fall in the category of employees hence the honorable court has no Jurisdiction to hear and determine the issues raised herein. It was urged that the position was set out in the Court of Appeal Civil Appeal No 61 of 2015, *Rift Valley Water Services Board & 3 others v Geoffrey Asanyo & 2 others* [2022] eKLR.
3. The 10<sup>th</sup> respondent filed grounds of opposition dated February 10, 2025 through Odukenya Wycliffe, Principal Legal Officer but filed no submissions to oppose or support the preliminary objection.
  4. Parties were directed to file submissions on the preliminary objection. The court has considered the material on record. The court observes as follows:
    - a. The 1<sup>st</sup> respondent filed submissions through Mutua Nyongesa Muthoka Advocates. It was submitted that the 1<sup>st</sup> respondent supported the preliminary objection. That as held in In the matter of *Interim Independent Electoral Commission* [2011] eKLR and citing Nyarangi J in *Owners of Motor Vessel Lillian v Caltex Oil (Kenya) Limited* (1989) KLR 1 at 14, assumption of jurisdiction by courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent. Further a jurisdictional question must be raised very early in the proceedings and without jurisdiction, a court has no power to make one more step. Further, a court may not arrogate to itself jurisdiction through the craft of interpretation or by way of endeavors to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. It was urged that the jurisdiction of the court flows from article 162(2)(a) of the *Constitution* and section 12(1) and (2) of the *Employment and Labour Relations Court (ELRC) Act*, and as interpreted by various precedents. It was submitted that the 1<sup>st</sup>, 3<sup>rd</sup>, 5<sup>th</sup>, and 7<sup>th</sup> respondents are not employees of the 2<sup>nd</sup>, 4<sup>th</sup>, 6<sup>th</sup>, and 8<sup>th</sup> respondents so that a challenge of their appointments to the state corporations' boards is not an employment dispute.
    - b. For 2<sup>nd</sup>, 6<sup>th</sup>, 8<sup>th</sup>, and 9<sup>th</sup> respondents submissions were made as urged for the 1<sup>st</sup> respondent that a court can only exercise jurisdiction if it is conferred by the Constitution or by legislation. It was submitted that the 2<sup>nd</sup>, 6<sup>th</sup> and 8<sup>th</sup> respondents did not employ the 3<sup>rd</sup>, 5<sup>th</sup>, and 7<sup>th</sup> respondents for wages or salary. The employment Act did not apply to them.
    - c. The 3<sup>rd</sup> and 4<sup>th</sup> respondents filed submissions dated 13<sup>th</sup> 02.2025 through Carol Mburugu Advocate. They essentially supported the preliminary objection.
    - d. The 7<sup>th</sup> respondent filed submissions dated January 24, 2025 through Mbugua Ng'ang'a & Company Advocates. *Public Service Commission & 4 others v Cheruiyot & 20 others* [2022] *Chairman Board of Directors Kenya Revenue Authority & 2 others* [2-23] KEHC 24847 KLR were cited for the holding that the Employment and Labour Relations Court enjoys jurisdiction as conferred by article 162(2) of the *Constitution* and section 12 of the *Employment and Labour Relations Court Act* in matters of employment and labour relations. It was urged that the matter did not fall within disputes contemplated under section 12(2) of the *Act* for want of the enumerated parties or employment relationship.
  5. The petitioners submitted that the preliminary objection does not qualify the test because it does not raise a point of law based upon facts or issues not contested between parties and as was held by Sir Newbold, P in *Mukisa Biscuits Manufacturing Company Limited v West End Distributors Limited* (1969) EA 696. The petitioners submitted that in the circumstances the preliminary objection be dismissed as it was calculated increase costs and introduce unnecessary costs. The petitioners cited the holding by Stella Rutto J in *Dr Magare Gikenyi j Benjaminini v Ministry of Labour and others*, ELRC



Petition E001 of 2022 at Nairobi citing *Daniel N Mugendi v Kenyatta University & 3 others* [2013] eKLR that a preliminary objection must satisfy three elements namely it should raise a pure point of law; it is argued on the assumption that all facts pleaded by other side are correct, and, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

6. The court has considered the rival submissions. As urged for the petitioners, it appears to the court that the preliminary objection is based upon disputed fact of existence of employer –employee relationship. For example it is submitted for the respondents that the respondents as appointed to the Boards of State Corporations are not employees as they do not earn a wage or a salary. The Court finds that whether they earn a wage or a salary is a matter to be determined after full hearing and it invariably not an issue not contested as based upon pleadings before the court.
7. It is however not disputed that the case is about appointment to boards of state corporations. In that reflection the court considers that such board members are indeed public officers in public employment within the definition of a public officer in article 260 of the *Constitution*. The board members are regulated by the public service employment laws including the values and principles of public service in article 232 and chapter 6 of the Constitution on leadership and integrity. They are bound with the Public Officer Ethics Act, the Official Secrets Act, and other laws, codes, policies and practices that apply to public officers and public service. How then could they not be public officers and servants of the people employed as such as provided for in chapter 6 of the Constitution and all applicable laws?
8. In *Havi v Judicial Service Commission & another* (Petition E039 of 2024) [2024] KEELRC 798 (KLR) (8 April 2024) (Ruling) Neutral citation: [2024] KEELRC 798 (KLR) the court held and found as follows:

“ 10. While making the finding, the Court has considered that in *Narok County Government and Another v Richard Bwogo Birir and Another* (2015) 5JELR 104466 (CA) the Court of Appeal has found that state and public officers are all servants of the people when the court upheld the trial court’s findings thus, “39. It is upon consideration of those and other provisions that the trial court reached the following compelling conclusion:“ ...all persons holding public or state office in Kenya in the executive, the legislature, the judiciary or any other public body and in national or county government are servants of the people of Kenya. The court holds that despite the level of rank of state or public office as may be held, no public or state officer is a servant of the other but all are servants of the people. Thus, the court holds that the idea of servants of the crown is substituted with the doctrine of servants of the people under the new Republic as nurtured in the Constitution of Kenya, 2010. The hierarchy of state and public officers can be complex, detailed and conceivably very long vertically and horizontally but despite the rank or position held, the court holds that they are each a servant of the people and not of each other as state or public officers. They are all servants of the people. The court holds that there are no masters and servants within the hierarchies of the ranks of state and public officers in our new Republic. The court further finds that the string that flows through the constitutional provisions is that removal from public or state office is constitutionally chained with due process of law. In the opinion of the court, at the heart of due process are the rules of natural justice. Thus, the court finds that the pleasure doctrine for removal from a state or public office has been replaced with the doctrine of due process of law. Article 236



is particularly clear on the demise of the pleasure doctrine in Kenya's public or state service... In the new Republic, the court holds that public service by public and state officers is guided by the doctrine of servants of the people and the doctrine of due process and not by the doctrines of the servants of the crown and the pleasure doctrine. In the opinion of the court, the demise of the pleasure doctrine and the demise of the doctrine of servants of the crown in the new Republic's constitutional framework constitute the very foundation of the Republic, namely, Kenya is a sovereign Republic and all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with the Constitution.”

Further, in the same case the court held as follows:

15. The court considers that it should be obvious that the jurisdiction of the court extends to disputes relating to employment and labour relations. Article 41 as the constitutional anchoring provides for the right of every person to fair labour practices and the wording is about a worker and an employer. The court has already found that it has jurisdiction in the subject matter of discharge of human resource functions. That a given person performing work is not expressly put under the *Employment Act* or is expressly excluded from application of the Act does not by itself eliminate the court's jurisdiction. The court is alert that the world of work is replete with many diverse work arrangements. Thus, that the 2<sup>nd</sup> respondent holds a constitutional office as member of the commission and that his appointment and exercise of removal or disciplinary control is provided in the Constitution does not by itself eliminate the court's jurisdiction in the ensuing service as a servant of the people contemplated in chapter 6 of the Constitution. Employment relationships or work engagements can take diverse arrangements. It can be temporary and time bound like in fixed term contracts, casual service, or piece rate work arrangements. It can be part-time as alleged for the 2<sup>nd</sup> respondent. It may also be triangular where the owner of the work does not directly employ the worker as it happens in outsourcing. It can also be disguised employment where the owner of the work treats the worker not as one to escape the legal implications and protections of undisguised and regular employment. In Kenya's constitutional and statutory design, all public and state officers are servants of the people, the sovereign power of the people having been vested in the people per article 1 of the *Constitution*. The court is alert that some state officers or public officers may want to disguise themselves as not being servants of the people in an emergent strange scheme to escape the constitutional, statutory or regulatory exercise of the ultimate employer prerogatives vested in the people collectively, as groups or individuals in the exercise of the legitimate sovereign power over the state or public officers. The court returns that arguments such as part timing, piece rate work, designation and naming of a public or state office held shall not disguise the true status of the officers, they are all servants of the people, employed by the people, to serve the people.”



9. In *Rukaria v Attorney General; Debasso & another (Interested Parties)* (Petition 2 of 2023) [2023] KEELRC 2824 (KLR) (10 November 2023) (Judgment) Neutral citation: [2023] KEELRC 2824 (KLR) in a similar preliminary objection the court held as follows:

“ 11. The court further returns that the petitioner was a public officer and a servant of the people and not merely a director in a company registered under the Companies Act as was the case in Nakuru Civil Appeal No 61 of 2015 *Rift Valley Water Services Board & 2 others v Geoffrey Asanyo & 2 others* Civil Appeal No 61 of 2015. The Court of Appeal held thus, “...His functions as a director of the 2<sup>nd</sup> 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 2<sup>nd</sup> 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 1<sup>st</sup> 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 the company (see *Parsons v Albert J Parsons and Sons Ltd* [1979] ICR p 271)” The court has considered that binding holding. However, the holding related to a director being a member of a company registered under the Companies Act without more to it.”

10. It appears to the court that the submission that employment exists only where the provisions of the *Employment Act*, 2007 apply is a pure misdirection unknown to the world of work. The court considers that parties in employment relationships may found their relationships upon several formal provisions such as provisions of the Constitution, relevant legislation, private contracts and others. For public and state officers, the applicable provisions will be found in the Constitution, relevant statutes, public and state service regulations, policies and applicable practices or usages. The *Employment Act*, 2007 applies as the floor of terms and conditions in an employment or work relationship and the Act does not operate to oust employment or work relationships founded upon such other provisions binding upon parties as may be lawful.

In view of the forgoing findings the court determines the preliminary objection dated January 15, 2025 with orders as follows:

- a. The preliminary objection is dismissed with costs in the cause.
- b. Parties to take directions towards the expeditious hearing and determination of the main petition.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS THURSDAY 27<sup>TH</sup> FEBRUARY, 2025.**

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

