



Kiplagat & 2 others v Eldoret Water and Sanitation Company Limited (ELDOWAS) & 2 others; Uasin Gishu County (Interested Party) (Petition E007 of 2023) [2024] KEELRC 1332 (KLR) (24 May 2024) (Ruling)

Neutral citation: [2024] KEELRC 1332 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
PETITION E007 OF 2023
MA ONYANGO, J
MAY 24, 2024**

BETWEEN

**MAHAMOUD KIPLAGAT 1ST PETITIONER
VICTORIA KUTTO 2ND PETITIONER
JANE TANUI 3RD PETITIONER**

AND

**ELDORET WATER AND SANITATION COMPANY LIMITED (ELDOWAS) 1ST RESPONDENT
THE CHAIRMAN BOARD OF DIRECTORS (ELDOWAS) 2ND RESPONDENT
THE COUNTY EXECUTIVE MEMBER (CECM) WATER, SANITATION, ENERGY, NATURAL RESOURCES, ENVIRONMENT AND CLIMATE CHANGE 3RD RESPONDENT**

AND

UASIN GISHU COUNTY INTERESTED PARTY

RULING

1. This Ruling is in respect of two preliminary objections, the 1st one dated 23rd August 2023 filed by the 1st Respondent and the 2nd one dated 7th September 2023 filed by the 3rd Respondent and the Interested Party.
2. In the preliminary objection dated 23rd August 2023, the 1st Respondent seeks the striking out of the Petition dated 31st July 2023 with costs on the ground that this Court has no jurisdiction to hear and determine the Petition under Articles 165(3)(b) and (d), Article 162(2) of *the Constitution*, section 2 of



- the Employment and Labour Relations Act and under section 2 of the [Employment Act](#) as directors/ board members of an organization are not employees.
3. In the preliminary objection dated 7th September 2023, the 3rd Respondent and the Interested Party seek the striking out and/or dismissal of the Petition dated 31st July 2023 together with the application with costs on the grounds that:
 - a. This court lacks the requisite jurisdiction to determine the instant Petition for the reason that there is no employer-employee relationship between the Petitioners and the 1st, 2nd and 3rd Respondents within the meaning of section 2 and section 3 of the [Employment Act](#) and section 2 of the [Employment and Labour Relations Act](#).
 - b. The County Government of Uasin Gishu is a shareholder in the 1st Respondent. A shareholder cannot be sued for acts of omission and/or by the company in which it is a shareholder
 - c. The 3rd Respondent is an agent of the County Government of Uasin Gishu. Thus, an agent of a disclosed principal cannot be sued in the same action and seeking same remedies.
 4. The preliminary objections were canvassed by way of written submissions. The 1st Respondent's submissions were filed on 28th September 2023, the 3rd Respondent and the Interested Party's submissions were filed on 16th October 2023. The Petitioners' submissions were filed on 11th December 2023.

1st Respondent's Submissions

5. In its submissions, the 1st Respondent framed the issues for determination to be:
 - i. Whether the Petitioners are employees of the 1st Respondent and whether the court has jurisdiction to hear and determine the Petition.
 - ii. Who bears the costs of the preliminary objection and the Petition.
6. The 1st Respondent gave a brief background of the Petition and submitted that the Petitioners are former directors of the 1st Respondent having been appointed to serve in its Board sometime in 2021; that on 16th June 2023, the Interested Party, a majority shareholder of the 1st Respondent terminated the Petitioners' appointments to the 1st Respondent's Board; that the Petitioners have now moved to this court to challenge the termination of their respective appointments to the Board.
7. While addressing the first issue for determination, the 1st Respondent submits that it is a corporate entity governed by its Memorandum and Articles of Association and being a water service provider, it is governed by the [Water Act](#) 2016 and the [Water Services Regulatory Board Corporate Governance Guidelines](#) for the Water Services sector 2018.
8. According to the 1st Respondent, the [Water Act](#) and its Memorandum and Articles of Association do not contemplate appointment of such directors as employees of the water service provider.
9. The 1st Respondent submitted that a board member is not an employee but is a person who sits in the board of an organization to deliberate on the matters of an organization whenever called upon or whenever necessary. It is further submitted that the relationship of a director and an organization are born of the [Companies Act](#) and the Memorandum and Articles of Association and not a contract of employment.
10. It is the 1st Respondent's case that disputes between a board member/director and an organization do not fall within the purview of the disputes to be determined by the Employment and Labour Relations



Court. The 1st Respondent therefore submitted that the Petitioners are not its employees and that the court has no jurisdiction to hear the Petition. In support of this position, the following cases were cited: [*Kariuki & 3 Others v Kiambu Water & Sewerage Co. Ltd & 13 Others*](#) (2022) KEELRC 12831(KLR); [*Rift Valley Water Services Board and 3 Others v Geoffrey Asanyo & 2 others*](#), Civil Appeal No. 60 of 2015 and [*Simiyu v Cabinet Secretary; Ministry of Energy & Another; Rural Electrification and Renewable Energy Corporation & Another*](#) (2023) KEELRC 718 (KLR)

11. The 1st Respondent prayed that the petition be struck out with costs of the Petition, the notice of motion application and the preliminary objection.

The 3rd Respondent and Interested Party's Submissions

12. The 3rd Respondent and the Interested Party identified the issues for determination as:
 - i. Whether there is an employer-employee relationship between the Petitioners and the Respondent,
 - ii. Whether the court has jurisdiction to hear and determine the suit,
 - iii. Whether the County Government of Uasin Gishu could be sued in its capacity as a shareholder.
13. On the 1st issue, it is submitted that the Petitioners were directors of the 1st Respondent and were receiving allowances as opposed to wages or salaries. It is contended that the Petitioners as directors of the 1st Respondent are not employees but office holders since their appointments as members of the Board of Directors did not emanate from an employment contract but rather from the Company's Memorandum and Articles of Association.
14. On the second issue, counsel relied on the cases of [*Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & others*](#) (2012) eKLR and [*National Social Security Fund Board of Trustees v Kenya Tea Growers Association & Others*](#) (Civil Appeal No. 656 of 2022) (2023) KECA 80 (KLR) to argue that jurisdiction is a threshold matter which goes to the competence of a court to hear and determine a suit. The Objectors contended that Article 162(a) of [*the Constitution*](#) and section 12 (1)(a)-(j) of the [*Employment and Labour Relations Court Act*](#) provides a clear-cut jurisdictional demarcation of the ELRC to hear and determine disputes relating to employment and labour relations and for connected purposes.
15. The 3rd Respondent and the Interested Party submit that the germane issue in the instant petition is the legality of the removal of the Petitioners as directors of the 1st Respondent. That since the Petitioners are office holders and not employees of the 1st Respondent, there exists no employer-employee relationship capable of conferring this court jurisdiction.
16. Lastly, on whether the County Government of Uasin Gishu could be sued in its capacity as a shareholder, counsel has submitted that the general rule is that an agent of a disclosed principal cannot be held personally liable except where fraud, misrepresentation or deceit is alleged. It is the case of the Interested Party that the 1st Respondent being a corporate entity established under the [*Companies Act*](#), it has separate existence from its members and the Interested Party cannot be faulted for the acts of the company as it is a mere shareholder who cannot be enjoined as a party to this petition. With regard to the 3rd Respondent, it is submitted that he was wrongly joined in this suit as he was merely acting as the duly authorized agent representing the interest of the County.



Petitioners Submissions

17. On their part, the Petitioners through their Counsel, Mr. Kaira submitted on one issue whether the preliminary objections dated 23rd August 2023 and 7th September 2023 on point of law qualify as preliminary objections.
18. While citing the cases of *Mukisa Biscuits Manufacturing Ltd v West End Distributors* (1969) EA 696 and *Orao v Mbaja* (2005)1 KLR 141, the Petitioners submit that the preliminary objections herein cannot stand the test of law on what constitutes a preliminary objection.
19. The Petitioners submit that Article 162(2) and 165(3)(b) of *the Constitution*, sections 2 of the *Employment and Labour Relations Court Act* and section 2 of the *Employment Act* as relied upon by the 1st Respondent merely establish the Employment and Labour Relations Court to the extent of defining its jurisdiction. The Petitioners submit that the Employment and Labour Relations court has the status of the High Court which has original jurisdiction in both civil and criminal matters.
20. It is the Petitioners' case that the Employment and Labour Relations Court has jurisdiction to deliberate on matters relating to violation and infringement of constitutional rights as envisaged under Article 165(3)(b) of *the Constitution*. It is submitted that the issues presented in the instant Petition relate to violation and infringements of the Petitioners rights which violation or infringement can only be determined based on facts pleaded and a determination made after hearing the parties concerned.
21. On the issue raised by the Respondents and the Interested Party that the Petitioners were not employees as defined by section 2 of the *Employment Act*, the Petitioners submitted that the contestation as to whether they are employees or not is factual and evidence must be led to that effect and hence is not a pure point of law that can be determined by a preliminary objection. To buttress this position, the cases of *AKN v JNM* (2014) eKLR and *Wilson Kiarie Kimani (Suing as the personal legal representatives of Margaret Wangui Kimani v Aberdere Investment Limited & 3 others* [2019] eKLR were cited.
22. On the preliminary objection raised in respect of the Interested Party, the Petitioners submitted that the issues raised therein do not raise a pure point of law but are disputed facts which can be deliberated upon at the hearing.
23. In conclusion, the Petitioners submit that the purported preliminary objections as filed do not qualify as such and are only meant to terminate this matter prematurely without giving the Petitioners an opportunity to prosecute their case on merit. It is submitted that the Respondents are seeking technical justice as opposed to substantive justice.
24. The court was urged to dismiss the preliminary objections with costs and allow the instant petition to be heard and determined on merit.

Determination

25. After carefully considering the preliminary objections and the submissions of the Parties, the only issue that arises for determination is whether the preliminary objections challenging the jurisdiction of this court to handle the Petition dated 31st July 2023 are merited.
26. The key issue raised in both preliminary objections is the jurisdiction of this court to entertain this dispute. The issue of jurisdiction has substantially been dealt with by the Court of Appeal in *Owners*



of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR where it was stated as follows on the question of jurisdiction of a Court:

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

27. The question before this court is whether the dispute in this suit falls outside this court’s jurisdictional purview as donated by Article 162(2) of *the Constitution* and Section 12 of the *Employment and Labour Relations Court Act*.

28. Article 162 of *the Constitution* provides:

System of courts

1. The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2).
2. Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—
 - (a) employment and labour relations; and
 - (b) the environment and the use and occupation of, and title to, land.
 - (3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2)”

29. Section 12 of the *Employment and Labour Relations Court Act* delineates the jurisdiction of the court as follows:-

“ 12. Jurisdiction of the Court

- (1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of *the Constitution* and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including —
 - (a) disputes relating to or arising out of employment between an employer and an employee;
 - (b) disputes between an employer and a trade union;
 - (c) disputes between an employers' organisation and a trade unions organisation;
 - (d) disputes between trade unions;
 - (e) disputes between employer organizations;
 - (f) disputes between an employers' organisation and a trade union;



- (g) disputes between a trade union and a member thereof;
- (h) disputes between an employer's organisation or a federation and a member thereof;
- (i) disputes concerning the registration and election of trade union officials; and
- (j) disputes relating to the registration and enforcement of collective agreements.”

30. Section 2 of the [Employment Act](#) defines the term employee as,

“an employee means a person employed for wages or a salary and includes an apprentice and indentured learner;”

“ a. The "employer" is defined to mean:-‘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.’”

31. From the above definition as well as section 12 of the [Employment and Labour Relations Court](#), it is clear that the Petitioners were not employees of the 1st Respondent. Their appointment was as directors of the 1st Respondent under the Memorandum and Articles of the 1st Respondent under the [Companies Act](#).
32. In the decision cited by the 1st Respondent, Civil Appeal No 60 of 2015 Consolidated with Civil Appeal No 61 of 2015 [Rift Valley Water Services Board and others v Geoffrey Asanyo and others](#), the Court of Appeal dealt with the issue whether a board member of a water company as is the case in the instant petition, is an employee. The court held as follows:

“ 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 means 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."
33. From the above precedent which is binding on this court, it is clear that this court has no jurisdiction to hear and determine the petition dated 31st July 2023 as there exists no employer employee relationship between the parties in this dispute.



34. Consequently, the Preliminary Objections dated 23rd August 2023 and 7th September 2023 are upheld and the Petition dated 31st July 2023 is therefore struck out for want of jurisdiction.
35. There shall be no orders for costs.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 24TH DAY OF MAY, 2024

MAUREEN ONYANGO

JUDGE

