



**Siele v County Secretary, Kericho County & 3 others (Petition E05 of 2023) [2024] KEELRC 1608 (KLR) (27 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1608 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO  
PETITION E05 OF 2023**

**HS WASILWA, J**

**JUNE 27, 2024**

**IN THE MATTER OF ARTICLES 2, 3,10, 19, 20, 21, 22(1) 23(1),(3), 25, 27(1),28, 29, 41(1) ,47, 48, 159(1)(2)(A) (B) AND (E) &165(3)(A),(B) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 20 21, 22(1), 23(1), 29, 41(1), 47 & 48 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF THE CONSTITUTION AND IN THE MATTER OF EMPLOYMENT ACT,2007**

**BETWEEN**

**KIBII CHEPKWONY SIELE ..... PETITIONER**

**AND**

**THE COUNTY SECRETARY, KERICHO COUNTY ..... 1<sup>ST</sup> RESPONDENT**

**COUNTY EXECUTIVE COMMITTEE MEMBER IN CHARGE OF FINANCE AND ECONOMIC PLANNING ..... 2<sup>ND</sup> RESPONDENT**

**COUNTY EXECUTIVE MEMBER IN CHARGE OF WATER AND ENVIRONMENT ..... 3<sup>RD</sup> RESPONDENT**

**CHAIRPERSON, BOARD OF DIRECTORS 7 ONS KERICHO WATER AND SANITATION COMPANY LTD ..... 4<sup>TH</sup> RESPONDENT**



## JUDGMENT

1. This suit was instituted by a Petition dated 14<sup>th</sup> July, 2023, filed through the firm of the M/s Onesmus Langat and Company Advocates and seeking for the following reliefs; -
  - a. A declaration that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents as representative of the shareholder have no direct powers to interfere with the employment of the petitioner and the intention to replace the petitioner as the managing director of the water via a general meeting and not a resolution of the board of directors is unlawful, unprocedural and unfair and a violation of the Petitioner's right to fair labour practices, right to fair administrative action, right to fair hearing under Article 27(1) &(2), 41(1), 50 and 47 of the Constitution of Kenya.
  - b. An order restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents from interfering with the employment of the petitioner through a general meeting of the company or any other way other than through the board of directors.
  - c. All the necessary and consequential orders and directions be given.
  - d. The cost of this petition be provided for.
2. The Petitioner states that the 1<sup>st</sup> Respondent is the head of public service in the County Government of Kericho, a shareholder of Kericho Water and Sanitation Company Ltd(KEWASCO), a limited liability company incorporated and registered pursuant to the provisions of the Companies Act, whose business is to provide water and sanitation services to the residents of Kericho county. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are members of the County Executive Committee(CEC) responsible for finance and water respectively, who double up as members of the board of directors and represent the county government as majority of shareholders of the water company. The 4<sup>th</sup> Respondent on the other hand presides over meetings for the board of the directors of the water Company amongst other responsibilities.
3. He stated that he was employed as the Managing Director/ Chief Executive Officer(CEO)of the water company by the board of directors on 26/6/2020 for a contract period of five (5) years a job he has diligently performed that he earned a rating of 94%.
4. He avers that he answerable to the board of directors, who are responsible among other things to approve his leave days and to appoint a person to act in his place. That, they are also in charge of commencing and presiding over the disciplinary process against him.
5. He states that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents are new in their offices having come in with the new governor and through their conduct and correspondence, they have their own preferred choice of the person to preside over the water company and have tried several ways to get rid of him.
6. He avers that in an attempt to remove him, on 14/6/2023, when the 1<sup>st</sup> Respondent, was yet to be appointed in writing, he gatecrashed the board meeting and whilst being a stranger introduced the agenda of sending the petitioner on administrative leave, but majority members of the board rejected that proposal. Nonetheless, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents never relented and have lately tried another tact ostensibly calling for a special general meeting with only one agenda to send the petitioner on administrative leave and to replace him with one David Siele, their preferred choice. A further confirmation of the Respondents' intention to get rid of him.



7. He stated that administrative leave is not known in the *employment Act*, rather that the correct procedure ought to have been to suspend him pending any investigation but all this must be through the resolution of the board of directors and not a general meeting. That even if the general meeting of shareholders were to make any resolution, they would still have to revert back to the board of directors for their own majority resolution.
8. He stated that he is currently on his annual leave and there is a person performing his duties, hence the push to have him on administrative leave was no warranted.
9. He avers that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents represent the shareholder but the day to day running of the affairs of the water company is the preserve of the board of directors. Hence they have no direct powers to interfere with the employment of the petitioner and the intention to replace the petitioner as the managing director of the water via a general meeting and not a resolution of the board of directors is unlawful, unprocedural and unfair.
10. He contends that the Respondents are duty bound to observe and practice good governance as envisaged in article 10 of the *Constitution* because the petitioner is entitled to fair administrative action and fair labour practices as envisaged in Articles 417 and 47 of the Kenya *Constitution*.
11. He stated that the manner in which the respondents intend to proceed against the petitioner is patently illegal, tainted with procedural impropriety, abstraction of justice, impunity, gross incompetence, gross abuse of the Respondent's powers as a shareholder in contravention of his fundamental rights, the *Constitution*, all applicable laws and procedures and the basic tenets of the rules of natural justice.
12. He prayed for the reliefs to be allowed as prayed in the petition.
13. The firm of Ken Ochieng and Company Advocates entered appearance for all the Respondent via the Memorandum of appearance dated 27<sup>th</sup> July, 2023. On 31<sup>st</sup> July, 2023, the firm of Nchogu, Omwanza and Nyasimi Advocate came on record for the 4<sup>th</sup> Respondent by the memorandum of appearance dated 31<sup>st</sup> July, 2023. The Respondents then filed a replying affidavit sworn on the 14<sup>th</sup> September, 2023 by Dr. Wesley K. Bor, the holder of the 1<sup>st</sup> Respondent office.
14. In the affidavit, the deponent stated that the Petition is premature, bad in law, non-starter, frivolous, vexatious and an abuse of the Court process. Further that it is sub judice there being another Petition filed at the High Court of Kenya at Kericho, being Constitutional Petition No. E010 of 2023, over the same subject-matter.
15. He stated that the County Government is mandated under Article 186 (1) and the Fourth Schedule, Part 2, Paragraph 11 (b) of the *Constitution* of Kenya to provide water and sanitation services and pursuant to this mandate, Section 77(1) of the *Water Act*, 2016 mandates the County Government to establish water services providers. In compliance with that role, the County Government of Kericho established the Kericho Water and Sanitation Company (KEWASCO), a public limited ability company incorporated under the *Companies Act*, 2015 as provided for by Section 77 (3) of the *Water Act*, to provide water and sanitation services within Kericho County.
16. He stated that, the water company being a limited liability company, its internal affairs, cannot be interfere with by this Court.
17. He stated that according to the Memorandum of Association, the County Government of Kericho is the majority shareholder holding 404,997 shares out of 405,000 shares, comprising 99.99% of the shares. Also that, in KEWASCO board, the County is represented by the County secretary, the County



Executive Committee Members in charge of Finance and Economic Planning and the one in charge of Water, Energy, Forestry, Environment and Natural Resources.

18. He stated that on 17<sup>th</sup> April, 2023, the County Government of Kericho received a letter from the Senate of the Republic of Kenya directing a raft of changes to be undertaken in KEWASCO pursuant to their investigations so as to salvage the deteriorating performance of the water services provider.
19. The next month on 8<sup>th</sup> May, 2023, the County Government of Kericho received a report from the Water Services Regulatory Board (WASREB) conveying their recommendations to be undertaken in KEWASCO pursuant to their independent inspection of the performance of the company. This was received on the backdrop of section 106 (1) of the [Water Act](#) that obligates the County Government to enforce any directives of WASREB.
20. A month later, on 22<sup>nd</sup> June, 2023, they received an advisory from the Ethics and Anti-Corruption Commission (EACC) recommending and requiring action to be taken to mitigate extensive malpractices rampant in the management of KEWASCO.
21. Pursuant to the above recommendations, directives and advisory from three (3) different independent institutions, the County Government of Kericho, obligated by section 106(1) of the [Water Act](#), commenced independent investigations into the alleged mismanagement of the KEWASCO. To carry out this investigations, it was imperative for the Petitioner who was the Managing Director and CEO of the KEWASCO to step aside to enable proper investigations.
22. Consequently, the Board held a meeting on 14<sup>th</sup> June, 2023, and resolved to suspend the Petitioner to pave way for independent investigations into the management of the company. However, the Chairperson together with some other members of the Board excluding the shareholders declined to sign the minutes of the meeting.
23. Subsequently, the County Government of Kericho issued a notice to the Board of Directors, in line with Section 139 (2) of the [Companies Act](#) and Article 42 of the Articles of Association, to convene a Special General Meeting for the purposes of passing a resolution to suspend the Petitioner so as to pave way for investigations.
24. It is stated that the notice was for the Petitioner to step aside for a limited period of 90 days so as to pave way for investigations into the management of KEWASCO, which investigation could not be undertaken while the Petitioner is in office.
25. He stated that the decision-making organ of any company is its shareholders vide a general meeting convened in accordance with its Articles of Association and the board of directors merely implement the decisions of the shareholders. The Board of Directors of KEWASCO are therefore answerable to its shareholders.
26. On that premise, the notice issued by the County Government of Kericho to the Board of Directors of KEWASCO on 5<sup>th</sup> July, 2023 is the initial administrative step in the decision-making process of the Company and thus the decision as to whether the Petitioner will undergo any disciplinary action will be made after an independent investigation into the management of KEWASCO has been concluded.
27. On that basis, he stated that the Petition is premature and urged this Court not to interfere with administrative procedure of the KEWASCO company.
28. He stated that the request by the County Government for KEWASCO to surrender unutilized public land was arrived at after consultation with major stakeholders with intent to serve public good in construction of the County Assembly Office Complex and the Court of Appeal which will serve the



- County at large, which the Petitioner should not be allowed to personalize and trivialize this immense public development.
29. He stated further that the Petition is an abuse of the Court process as the Petitioner seeks protection of the Court to stop the County Government of Kericho from undertaking its constitutional and statutory mandate and from complying with recommendations, directives and advisories of three (3) different constitutional and statutory institutions which have good intentions to improve the functionality of KEWASCO and salvage it from further recording losses of public funds.
  30. On that note, the Affiant stated that the Petition simply lacks merit and it should be dismissed with costs to the Respondents.
  31. Directions were taken for the Petition to be canvassed by written submission, however only the Respondent's filed their submissions.

### **Respondents' Submissions.**

32. The Respondents submitted on five issues; whether the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents as representatives of the County Government of Kericho, have any powers in the running of the affairs of KEWASCO, whether the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, as representatives of the County Government of Kericho, are justified in calling for a special general meeting to send the petitioner on administrative leave, whether any rights of the petitioner have been violated, whether this Court can/should interfere in the internal affairs of KEWASCO and who should bear costs of the Petition.
33. On the first issue, it was argued that the County Government is mandated under Article 186(1) and the fourth schedule, Part 2, Paragraph 11 (b) of the Constitution of Kenya to provide water and sanitation services. Pursuant to the said constitutional mandate, Section 77 (1) of the Water Act, 2016 mandates the County Government to establish water services providers and in compliance with the said constitutional and legal mandate, the County Government of Kericho established the Kericho Water and Sanitation Company (KEWASCO), a public limited liability company incorporated under the Companies Act, 2015 as provided for by Section 77 (3) of the Water Act, to provide water and sanitation services within Kericho County.
34. It was argued that Kericho County controls 99.99% of KEWASCO shareholding as such is the majority shareholder with three representatives in the Board being the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents as the voice of the County Government of Kericho in the affairs of KEWASCO.
35. It was submitted that the duties, rights and obligations of the County Government in provision of water services is clearly provided for in the Water Act and the Guidelines of the Water Services Regulatory Board (WASREB). While its obligations in respect to KEWASCO are spelt out under Articles 71.6.3 and 71.6.4 of the Articles of Association, which include interalia to ensure efficient and effective governance of the company.
36. It was submitted that the County Government rights and duties as a shareholder of KEWASCO is exercised through a general meeting, which the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondent sit as board members and hence, they have the power to exercise its duties and rights over KEWASCO pursuant to the provisions of the Water Act, the Companies Act, 2015 and the Memorandum and Articles of Association dated 2<sup>nd</sup> November, 2018.
37. On justification to send the Petitioner on administrative Leave, it was submitted that on 17<sup>th</sup> April, 2023, the County Government of Kericho received a letter from the Senate of the Republic of Kenya directing a raft of changes to be undertaken in KEWASCO pursuant to their investigations so as to



- salvage the deteriorating performance of the water services provider. This emanated from the Auditor-General's Report on the Financial Statements of KEWASCO for the years 2018/19, 2019/20 and 2020/21. Among the recommendation made was for total restructuring of the Kericho Water and Sanitation Company Limited including the reconstitution of the Board of Directors, and recruitment of new Managing Director. These were done way before the Respondents herein were appointed in office, as such the allegations of bias and being target is not true. On the contrary, that it was purely based on the Senate recommendations.
38. Secondly, that on or about 8<sup>th</sup> May, 2023, the County Government of Kericho received a report from the Water Services Regulatory Board (WASREB) conveying their recommendations to be undertaken in KEWASCO pursuant to their independent inspection of the performance of the company. That the County Government is obligated under section 106 (1) of the *Water Act* to enforce any directives of WASREB.
  39. Thirdly, that on or about 22<sup>nd</sup> June, 2023, the County Government of Kericho received an advisory from the Ethics and Anti-Corruption Commission recommending and requiring action to be taken to mitigate extensive malpractices rampant in the management of KEWASCO. In the premises and pursuant to the above recommendations, directives and advisories from three (3) different independent institutions, the County Government of Kericho is legally obligated under Section 106 (1) of the *Water Act* and as a majority shareholder to commence its own investigation into the allegations and take the necessary action and that could only be done after the CEO, has stepped aside, therefore that placing the CEO on leave was necessary to ensure the Investigations were conducted properly without any interference.
  40. It was submitted that the County Government in its mandate as the majority shareholder of KEWASCO, issued a Notice to the Board of Directors in line with Section 139 (2) of the *Companies Act* and Article 42 of the Articles of Association, to convene a Special General Meeting for the purposes of passing a resolution to suspend the Petitioner for a limited period of 90 days so as to pave way for an internal investigation into the management of KEWASCO. Moreover, that the County Government is mandated to protect public resources considering that KEWASCO has been making losses and there are three damning reports concerning the operations of KEWASCO and being that the petitioner is the chief accounting officer, he is answerable to all its shortfalls.
  41. It was reiterated that the decision making organ of any company is its shareholders vide general meeting convened in accordance with its Articles of association and the board of directors merely implement the decisions of the shareholders. Therefore, that the notice issued by the County Government of Kericho to the Board of Directors of KEWASCO on 5<sup>th</sup> July, 2023 is a justified initial administrative step in the decision-making process of the company before a decision can be made whether the Petitioner will undergo any disciplinary action.
  42. On whether the petitioner rights have been violated, it was submitted that special notice dated 5<sup>th</sup> July, 2023 issued under Section 139 (2) of the *Companies Act*, 2015 to the Board of Directors of KEWASCO to convene a Special General Meeting in line with Article 42 of its Articles of Association was for the purpose of placing the Petitioner on administrative leave for a period of 90 days to pave way for internal investigation into the management of KEWASCO as recommended by the Senate, WASREB and EACC. Hence, sending the petitioner on leave, does not violate any provision of the law. On the contrary, that it was an initial step that may lead to a disciplinary process. Therefore, that this Petition is premature and has been brought merely to frustrate the efforts of the County Government of Kericho to provide quality water services to the residents of Kericho County.



43. On whether the Court can interfere with a company's internal affairs, it was submitted that the operations and management of the affairs of KEWASCO are governed by its Memorandum and Articles of Association dated 2<sup>nd</sup> November, 2018. It was argued that the reports by EACC, WASREB and Senate, necessitated the investigations, which the County Government was undertaking in order to establish the veracity of the allegations in the report, which could only be done if the petitioner steps aside. All these being internal processes, it is trite law that courts do not interfere in the internal affairs of a company unless the Petitioner can show fraud on the part of the County Government of Kericho. In support of this, they relied on the case of *Paolo Murri v Gian Battista Murri & Another* [2000] eKLR, where the Court of Appeal held as follows:-

“Upon a careful consideration of the petition it is plain and obvious that basically this is a dispute about the internal management of the company and a court does not interfere with the internal management of the company acting within its powers-see the rule in *Foss v Harbottle* (1843) 2 Hare 261,. Facts necessary to support intervention by the court, e.g. ultra vires or fraud have not been pleaded.”

44. Similarly, they relied on the decision by Hon. F. Tuiyott, J in the case of *Samuel Gutu Macharia & 4 others v Patrick G. Mwangi & 7 others* [2017] eKLR as follows:-

“The decision in *Re K Boat Service* [1998] eKLR cited by the Plaintiffs is a reminder that as a general rule courts will not interfere with the Internal affairs of a Company. The decision however sets out when an intervention is necessary and Kuloba J. renders himself as follows: “Courts will Interfere only where the act complained of is ultra vires or is of a fraudulent character or not rectifiable by ordinary resolution. It is realty very important to companies and to the economy of the Country in general, that the Court should not, unless a very strong case is made out on the facts pleaded and proved or admitted, take upon itself to interfere with the domestic forum which has been established for the management of the affairs of a company. Accordingly, acts by or on behalf of a company which requires the authority of a resolution of a company but which can be regularized by the company at a general meeting without a special resolution, and are neither ultra vires not fraudulent, are not grounds for a court's interference upon a winding up petition, or a petition to remove a director by a majority shareholder under the just equitable rule.”

45. Accordingly, that the decision-making organ of any company is its shareholders vide a general meeting and the directors of a company are bound to implement decisions of its shareholders. This Petition is therefore a non-starter as the Petitioner seeks for this Honourable Court to prevent the County Government of Kericho, a shareholder of KEWASCO, from requisitioning a Special General Meeting to investigate the management of the company.

46. In Conclusion, it was submitted that this Petition is unmerited and urged this Court to dismiss it with costs to the Respondents.

47. I have considered all the averments and submissions of the parties herein. The Petitioner's contention was that there were outside forces hellbent on interfering with his employment as CEO of 4<sup>th</sup> Respondent and replace him with another through a resolution of a general meeting and not a resolution of the board which he avers was unlawful, unprocedural and unfair and in violation of his rights to fair administrative action and a right to fair hearing.

48. In determining this petition, it is indeed true that the petitioner was employed as CEO of the 4<sup>th</sup> Respondent on 26/6/2020 on a contract period of 5 years.



49. From the appointment letter, the decision to employ him was made by the Board of Directors of Kericho Water and Sanitation Company (KEWASCO).
50. The Petitioner thereafter through the 4<sup>th</sup> Respondent was subjected to performance review by the Board of Directors as per his appendix 2.
51. The petitioner in essence was employed by the Board of Directors of the 4<sup>th</sup> Respondent and if there is any non-performance of his contract, the Board is the one to institute disciplinary action against him.
52. It is however evident that the 1<sup>st</sup> Respondent though a shareholder of the water company attempted to usurp the powers of the board by calling a special general meeting to remove the Petitioner as Managing Director of 4<sup>th</sup> Respondent.
53. The Respondents in my view acted in breach of fair administrative procedure in sending the Petitioner on administrative leave and appointing an Ag. MD in his place through a general meeting of the Company.
54. Indeed it is true that the manner in which the Respondents intend to proceed against the Petitioner is unfair, illegal and tainted with unprocedural impropriety in contravention of the Petitioner's fundamental rights to a fair hearing and must not be allowed to proceed.
55. The Respondent submitted that the 1<sup>st</sup> Respondent as main share holder of the water company has a right to run the company and make decision for its better management.
56. That is indeed true. It is true that the main holder can call meetings and give direction on the running of the company. This must however be managed through the Board of Directors who are mandated to run the water company on a day to day basis and employ, discipline and dismiss staff.
57. I do find that the Petition as set has merit and I allow it and make a declaration as follows:-
  - a) A declaration that the 1st, 2nd and 3rd Respondents as representative of the shareholder have no direct powers to interfere with the employment of the petitioner and the intention to replace the petitioner as the managing director of the water company via a general meeting and not a resolution of the board of directors is unlawful, unprocedural and unfair and a violation of the Petitioner's right to fair labour practices, right to fair administrative action, right to fair hearing under Article 27(1) &(2), 41(1), 50 and 47 of the Constitution of Kenya.
  - b) An order restraining the 1st, 2nd and 3rd Respondents from interfering with the employment of the petitioner through a general meeting of the company or any other way other than through the board of directors.
58. The Respondent will pay costs of this Petition.

**DELIVERED VIRTUALLY THIS 27<sup>TH</sup> DAY OF JUNE, 2024.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

In the presence of: -

N/A for parties

Court Assistant - Fred

