



**Omao v Gusii Water and Sanitation Co. Ltd & 9 others; Wachira (Interested Party)
(Petition E001 of 2022) [2024] KEELRC 2258 (KLR) (23 September 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2258 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION E001 OF 2022
CN BAARI, J
SEPTEMBER 23, 2024**

BETWEEN

VINCENT MARIITA OMAO PETITIONER

AND

GUSII WATER AND SANITATION CO. LTD 1ST RESPONDENT

**BOARD OF DIRECTORS GUSII WATER & SANITATION CO
LTD 2ND RESPONDENT**

KISII COUNTY GOVERNMENT 3RD RESPONDENT

NYAMIRA COUNTY GOVERNMENT 4TH RESPONDENT

**HON. SAMWEL MAIKO, CECM, WATER ENVIRONMENT & NATIONAL
RESOURCES 5TH RESPONDENT**

**HON CHARLES ONYANCHA, CECM, WATER ENVIRONMENT &
NATIONAL RESOURCES 6TH RESPONDENT**

LAKE VICTORIA SOUTH WATER SERVICES BOARD 7TH RESPONDENT

WATER SERVICE REGULATORY BOARD 8TH RESPONDENT

ROBERT ONGERI 9TH RESPONDENT

SHEM ONCHIRI 10TH RESPONDENT

AND

LUCY WAHITO WACHIRA INTERESTED PARTY



RULING

1. Before Court is the Interested Parties' Motion application dated 6th May, 2024, brought pursuant to Sections 1A, 1B and 3A of the *Civil Procedure Act*. She seeks the following reliefs:
 - i. That this Honourable Court be pleased to dismiss the Petitioner's suit against the Respondents and or mark the same as settled.
 - ii. That the costs of this application be provided for.
2. The Motion is supported by the grounds on the face thereof and the supporting affidavit of Lucy Wahito Wachira, the Interested Party herein.
3. It is the Interested Party's assertion that the orders sought by the Petitioner have been overtaken by events, hence the Petition is purely an academic exercise.
4. She avers that the 1st Respondent is now managed and run in accordance with *the Constitution* and in line with the values and principles of accountability, good governance and transparency espoused under Article 10 of *the Constitution*.
5. It is the Interested Party's further argument that the 1st Respondent is a Body Corporate separate from its members, and is run by the 2nd Respondent without the interference of the 3rd and 4th Respondents. It is her case that the 9th and 10th Respondents are no longer the Acting Managing Director and Deputy Acting Managing Director respectively of the 1st Respondent, and that she is performing her duties without the interference of the 3rd and 4th Respondents.
6. It is her further assertion that Mr. Edward Begi is no longer the interim Company Secretary of the 1st Respondent. It is her prayer that in the view of the foregoing, it is in the interest of justice that the orders sought in this Application be granted.
7. The Petitioner opposed the Interested Party's application through a Replying Affidavit dated 10th June, 2024, arguing that the application is misconceived as the petition has not been overtaken by time, and was filed in the public interest, hence has to be dispensed to its full determination.
8. The 4th and 5th Respondents opposed the Motion vide a replying affidavit dated 14th June, 2024, sworn by their counsel one Damary S. Mukulo.
9. It is the 4th & 5th Respondents' argument that the Interested Party's allegation that the petition has been overtaken by events is baseless, since not all the issues raised by the Petitioner and the prayers sought have been resolved.
10. The 4th & 5th Respondents argue that this is a public interest constitutional petition filed by the Petitioner seeking inter alia, declaratory orders and an order of permanent injunction against the 1st, 2nd, 3rd and 4th Respondents from employing and/or recruiting employees without complying with the due process of the law, and in particular the provisions of Article 10(1) of *the Constitution*.
11. They aver further that public interest litigation is not a party's private suit which he/she may withdraw or discontinue at whims.
12. It is the Respondents' position that the orders sought are not spent and/or determined by this Honourable Court and the petition should proceed to full hearing.



13. The Respondents aver that the discontinuation of this constitutional petition is not automatic since there are massive allegations of malpractice in appointment of the Managing Director and functioning of Gusii Water and Sanitation Company Limited which the court should look into to ensure the enhancement of good governance and call for accountability, otherwise, the people of County government of County Governments of Nyamira and Kisii will suffer prejudice
14. It is their prayer that the application be dismissed with costs.
15. Parties canvassed the motion by way of written submissions, which have been duly considered.

Analysis and Determination

16. I have considered the Motion, the grounds and affidavit in support and the replying affidavits in opposition by both the Petitioner and the 4th & 5th Respondents. The issue that arise for determination is whether the motion is merited, and if so, whether the petition herein should be dismissed.
17. The Applicant's argument is that the orders sought under the petition are overtaken by events and to continue with the petition is an academic exercise. The Petitioner and the 4th & 5th Respondents on their part, argue that not all the issues under the petition have been resolved. The Court notes however that neither the Petitioner nor the 4th & 5th Respondents have picked out the specific issues that have yet to be settled.
18. In a nutshell, the Petitioner herein sought to bar the Respondents from interfering with the Interested Party's performance of her duties as the Acting Managing Director/CEO of the 1st Respondent. It is not disputed that the Interested Party has since been substantially appointed to the position of Managing Director of the 1st Respondent, effectively resolving the management wrangles subject of the petition herein.
19. On 24th January, 2023, the court referred this suit to court annexed mediation on the request of the parties. When the matter was mentioned on 27th June, 2023 to confirm settlement, counsel for the Interested Party and counsel for the 4th & 5th Respondents, informed court that no settlement had been reached, and further that the petition had been overtaken by events since the Petitioner sought the appointment of the Interested Party, and which appointment had since been effected leaving nothing for the court to determine.
20. The 4th & 5th Respondents then sought time to file a formal application to have the petition marked as settled. Although the 4th & 5th Respondents did not file the application they sought to file, the record confirms that parties were in agreement that the petition was settled save for the issue of costs.
21. On 15th November, 2023, parties attempted a consent whose terms were as follows:
 - i. That the petition herein be marked as withdrawn with costs to the 4th & 5th Respondents.
 - ii. That the costs awarded to the 4th & 5th Respondents to cover costs awarded in Kisumu ELRC Petition [*No. E002 of 2022*](#) between Lucy Wahito Wachira and Gusii Water & Sanitation Co.Ltd & 7 others.
 - iii. That both this petition and Kisumu ELRC Petition [*No. E002 of 2022*](#) be marked as fully settled.
22. The Petitioner told court that he confirms the terms of the consent save that costs were to be awarded to the 3rd and 5th Respondents.



23. With the division and/or disagreement on the terms of the consent, this court did not adopt the said consent. It instead directed parties to file their consent and take a date for its adoption. No such consent was filed and the 1st 2nd Respondents and the Interested Party filed the instant motion.
24. By the foregoing chronology of events, it is clear that the parties were all in agreement that the issues subject of the petition were moot and the only borne of contention was the issue of costs. The costs awarded in Petition E002/2022 were actually the issue, which the Petitioner and the 4th & 5th Respondents wanted paid off with an award of costs under this petition.
25. The Supreme Court of Kenya in the case of *Okoiti & 2 Others v. Attorney General & 14 Others (2023) KESC 31 (KLR)* held that in public interest litigation, no party should benefit from an award of costs.
26. By parties' own indication, the petition as drawn serves no useful purpose and its continuation is an abuse of the Court process and a waste of judicial time.
27. Convinced that the petition herein is moot, the fact that parties disagree on who should have costs, does not in my view breath live into this petition. If costs were awarded elsewhere, let the party in whose favour the award was made pursue payment in the particular file where they were awarded. This petition is separate and distinct from any other suit between the parties herein.
28. I proceed to allow the Interested Party's motion and dismiss the Petitioner's petition dated 31st January, 2022 with no orders on costs.
29. I equally make no award of costs in respect of this application.
30. It is so ordered.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 23RD DAY OF SEPTEMBER, 2024.

C. N. BAARI

JUDGE

Appearance:

Mr. Marita h/b for Mr. Mainga for the Petitioner

Mr. Omwenga present for the 4th & 5th Respondents

Ms. Achola h/b for Mr. Nyasimi for the 1st & 2nd Respondents and Interested Party.

Ms. Anjeline Wanjofu - CA.

