



**Simiyu v Cabinet Secretary, Ministry of Energy & another; Rural Electrification
& Renewable Energy Corporation & another (Interested Parties) (Petition
169 of 2022) [2023] KEELRC 718 (KLR) (17 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 718 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION 169 OF 2022
AN MWAURE, J
MARCH 17, 2023**

BETWEEN

DAVID SIMIYU PETITIONER

AND

THE CABINET SECRETARY, MINISTRY OF ENERGY 1ST RESPONDENT

HONOURABLE ATTORNEY GENERAL 2ND RESPONDENT

AND

**RURAL ELECTRIFICATION & RENEWABLE ENERGY
CORPORATION INTERESTED PARTY**

COUNCIL OF GOVERNORS INTERESTED PARTY

JUDGMENT

1. The Petitioner is a male adult Kenyan of sound mind and a resident of Nairobi County.
2. The 1st Respondent is the Cabinet Secretary, Ministry for Energy in the Republic of Kenya. The Office is established under Article 152 of *the Constitution*.
3. The 2nd Respondent is the Attorney General of the Republic of Kenya. The Office of the Attorney General is established by Article 156 of *the Constitution* and is the principal legal advisor to the Government.
4. The 1st interested Party, Rural Electrification & Renewable Energy Corporation is a State Corporation duly established as such under the provisions of the *Energy Act*, No 1 of 2019.
5. The 2nd Interested Party is the Council of County Governors in the Republic of Kenya.



6. The Petitioner avers that vide Gazette Notice Number 4497 dated 14th April, 2022 the President of the Republic of Kenya purported to appoint Wacuka Ikuu as the Chairperson of the Corporation's Board for a period of 3 years, with effect from 14th April, 2022 under section 45 (1) (a) of the [Energy Act](#), 2019.
7. It is averred that the President of the Republic of Kenya failed to take into account relevant considerations prior to purporting to appoint the Chairperson of the Board of Directors and members of the Corporation through the impugned Gazette Notices in that there is in force section 45 (1) (e) of the [Energy Act](#), No 1 of 2019 which provides that the 1st Respondent shall appoint only 3 members of the Corporation's Board of Directors. There is additionally in force section 45 (1) (f) of the [Energy Act](#), 2019 which provides that the Council of Governors shall appoint four members of the Corporation's Board of Directors and [the Constitution](#) demands for a merit based, competitive and transparent requirement in the public service including State Corporations like the 1st interested party herein.
8. The 1st Respondent additionally failed to take into account the fact that the Corporation is not a membership organization in promulgating Gazette Notice No 4497 which purports to appoint members of the Corporation instead of Members of its Board of Directors as well as Gazette Notice Numbers 5539 and 9311 dated 13th May 2022 and 5th August 2022 respectively that purported to amend and or review the illegal and void Gazette Notice Number 4497.
9. The issue in question pertains to the legality of appointing members of the board by the Rural Electrification and Renewable Energy Corporation. The petitioner avers that the 1st respondent failed to follow the legal mandate provided in section 45(1) of the [Energy Act](#) 2019 which provides:

“The management of the Corporation shall vest in the Board of Directors of the Corporation which shall consist of—

 - a. a chairperson appointed by the President; Board of the Corporation.
 - b. The Principal Secretary in the Ministry responsible for energy or his representative;
 - c. The Principal Secretary in the National Treasury or his representative;
 - d. The Chief Executive Officer who shall be the Secretary to the Board;
 - e. three members appointed by the Cabinet Secretary; and
 - f. four other members appointed by the Council of County Governors.
10. The court is at pains to even address the issue of legality of appointing the members of the corporation. The brief background of this matter is that it was initially filed in the high Court. The court sitting there granted the orders sought by the petitioner vide his application dated 15th August 2022. That meant the appointment of the chair and members of the board of the above corporation was stayed pending the mention of the application. At the same time the court pronounced itself that it had no jurisdiction to proceed with the matter and transferred the suit to the Employment and Labour Relations Court.
11. The Employment and Labour Relations court Judge by his orders dated 23rd August 2022 varied the High Court orders issued on the 16th day of August 2022 and actually stayed the said orders.



12. This honourable court then proceeded to hear the petition by way of written submissions and gave a date for ruling. Then the court at that point on deeper reflections and studying asked itself this question:

“who is an employee according to *Employment Act* 2007” Section 2 of *Employment Act* defines an employee as person employed for wages or a salary and includes an apprentice and indentured learner.”

13. The next hard question the court reflected on is whether members of the board are employees under the above definition.

14. The *Energy Act* 2019 provide that members shall be paid such remuneration, fees or allowances for expenses as the (corporation) may determine from time to time and in consultation with Salaries and Remuneration Commission.

15. A board member is clearly not an employee but is an individual who sits to deliberate on matters of an organisation whenever called upon or when necessary. Some organisations do not give any allowance to their board members but some especially state corporations give an allowance and especially to cover costs like travel and accommodation and subsistence. In that case a board member is not an employee of the corporation.

16. Section 12 of *Employment and Labour Relations Court Act* cites the jurisdiction of the Employment and Labour Relations Court as follows:

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' organization and a trade unions organization;
- (d) disputes between trade unions;
- (e) disputes between employer organizations;
- (f) disputes between an employers' organization and a trade union;
- (g) disputes between a trade union and a member thereof;
- (h) disputes between an employer's organization 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.

17. Going by the foregoing it is evident a board member does not quality to be an employee even the way they are appointed and the way they perform their roles is clear. They are not employees.



18. The court is persuaded by the Court of Appeal decision in Rift valley Water Services Board and 3 Others vs Geoffrey Asanyo and 2 Others Civil Appeal No 60 of 2015. Where the court held that:

“A director of a company was not an employee. In that case, the 1st respondent who was a director of the 2nd respondent had been left out after a reconstitution of the board by the shareholders. The court expressed itself as follows:-” the question as to whether the 1st respondent was an employee of the 2nd respondent with the right of claim as in the industrial court has a simple answer to it. He was not... in our considered judgment, the 1st respondent was not employed by the 2nd respondent...’ for wage or salary’. Neither was he an apprentice or indentured learner. We find nothing on record to suggest that 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.”

19. It is trite law that jurisdiction is everything in a case. In the often cited case of Owners of Motor Vessel Lillian “S” vs Caltex Oil Kenya Limited [1989] KLR the court expressed itself this: Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings.

20. Further in the case of Constantine Joseph Advocates vs the Hon The Attorney General Petition No 268 of 2021 the court held:

“indeed so determinative is the issue of jurisdiction such that it can be raised at any stage of proceedings.”

The Court of Appeal in Jamal Salim vs Yusuf Abdulaihu Abdi & Another Civil Appeal No 103 of 2016 (2018) eKLR held:

“Jurisdiction either exist or it does not. Neither can it be acquiesced or granted by consent of the parties.”

21. Flowing from the above it is evident this court has no jurisdiction ab initio to hear this case and so this court should down its tools at this point. It is unfortunate a lot of time is wasted in the process but that is how it is.

22. The court is therefore bound by the pronouncements of the Court of Appeal in the Rift Valley Water Services Board & 3 Others vs Geoffrey Asanyo & 2 Others supra as well as the provisions of section 2 of *Employment Act* specifically the definitions of employer and employee. The board members of an organisation are not employees and so this court has no jurisdiction to handle this matter.

23. The petition to be transferred back to the principal Judge in the High Court for further directions and also to give direction as to the orders given by the ELRC court ruling dated 23rd August 2022.

24. Each party will bear their costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 17TH DAY OF MARCH 2023.

ANNA N. MWAURE

JUDGE



ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of **the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2) (d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of **Section 1B** of the *Civil Procedure Act* (**Chapter 21 of the Laws of Kenya**) which impose on this Court the duty of the Court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

ANNA N. MWAURE

JUDGE

