



Adan & 2 others (Suing on their behalf and on behalf of 76 other aggrieved employees of the respondent) v Wajir Wasco Limited alias Wajir Water & Sewerage Company Limited & another (Petition E076 of 2023) [2023] KEELRC 1243 (KLR) (25 May 2023) (Ruling)

Neutral citation: [2023] KEELRC 1243 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E076 OF 2023**

B ONGAYA, J

MAY 25, 2023

**IN THE MATTER OF THE CONTRAVENTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS
IN THE MATTER OF ARTICLES 1, 2, 10, 19, 20, 21,
22, 23(3), 27, 28, 29, 30, 41, 47, AND 258 OF THE
CONSTITUTION OF KENYA**

**IN THE MATTER OF CONTRAVENTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER
ARTICLES 10, 19, 21, 22, 23, 27, 28, 29, 30, 41,
AND 47 OF THE CONSTITUTION OF KENYA 2010
IN THE MATTER OF SECTION 4 OF THE FAIR
ADMINISTRATIVE ACTION ACT NO. 4 OF 2015
IN THE MATTER OF SECTIONS 5 AND 17 OF THE
EMPLOYMENT ACT**

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AND

**IN THE MATTER OF THE UNCONSTITUTIONAL AND
UNLAWFUL WITHHOLDING OR STOPPAGE OF
SALARY AND BENEFITS OF THE EMPLOYEES OF
WAJIR WASCO LIMITED**

-BETWEEN-



BETWEEN

SAFI ABDULLAHI ADAN 1ST PETITIONER

ABDI JIKRE MOHAMED 2ND PETITIONER

MARYAN FARAH SALAH 3RD PETITIONER

**SUING ON THEIR BEHALF AND ON BEHALF OF 76 OTHER AGGRIEVED
EMPLOYEES OF THE RESPONDENT**

AND

**WAJIR WASCO LIMITED ALIAS WAJIR WATER & SEWAGE COMPANY
LIMITED 1ST RESPONDENT**

COUNTY GOVERNMENT OF WAJIR 2ND RESPONDENT

RULING

1. The petitioners filed on 24.04.2023 the petition and the application by the notice of motion dated 17.04.2023 and through Kusow & Company Advocates. The application was brought under Articles 10, 22, 27, 28, 30, 41, 47, 50 and 258 of the Constitution of Kenya, sections 5 and 7 of the Employment Axt, section 4 of the Fair Administrative Action Act, section 3, 12(1) (a), 12(2) and 12(3) of the Employment and Labour Relations Act and the inherent jurisdiction of the Court and all other enabling provisions of the law. The petitioners prayed for orders:
 - a. (spent).
 - b. (spent).
 - c. (spent).
 - d. (spent).
 - e. That pending the hearing and determination of the petition, a conservatory order to issue directing the 1st respondent and its agents to pay the petitioners together with other aggrieved employees all withheld salaries from the month of October 2022 to date and further directing the 1st respondent to continue paying the petitioners and the aggrieved employees their salaries as and when they fall due without any further delay.
 - f. That pending the hearing and determination of the petition, a conservatory order to issue staying or suspending the implementation of the unpublished purported audit reports resulting from the memo of the 1st respondent dated 13.12.2022 and the 2nd respondent's communication dated 18.01.2023.
 - g. That pending the hearing and determination of the petition the Honourable Court be pleased to order the respondent to give the petitioners access to the respondent's payroll for the months of August, September 2022 and March 2023.
 - h. That costs of the application be provided for.
2. The application was based on the application of Safi Abdullahi Adan and upon the following grounds:



- a. The petitioners are employees of the 1st respondent having been employed on diverse dates in 2008 to 2020. The petitioners have filed the petition and application on their own behalf and on behalf of 76 other colleagues. The authority to plead, appear and act has been duly exhibited, signed and dated 17.04.2023. the petitioners have discharged their duties as appointed and assigned with monthly salaries of between Kshs 20, 000.00 to 60, 000.00.
 - b. The petitioners worked in October 2022 but were surprised that their respective monthly payments did not hit their respective bank accounts. As at filing the present proceedings, each had not earned monthly salary for the six months since the said October 2022.
 - c. The petitioners suspect that their salaries were stopped following the human resource audit exercise on 15.12.2022 by the 1st respondent and 28th to 30th January by the respondents (being more than three months from stoppage of their salaries) in which they were required to avail their respective appointment letters and other requisite documents. They were never accorded fair hearing nor informed that they were adversely affected by the audit.
 - d. The sudden stoppage of salary without notice, consultation, or other engagement amounts to the 1st respondent's violation of the petitioners' right to fair labour practices, fair remuneration and reasonable working conditions under Article 41(1) (2) Constitution.
 - e. Effective appointment the petitioners have received salaries in exchange for work done thus creating a legitimate expectation and by stopping the salaries without any reasonable justification, the respondents have breached the applicants' legitimate expectation.
 - f. Article 50 of the *Constitution* guarantees the applicants inviolable right to fair hearing and natural justice. The stoppage of their salaries without a prior hearing opportunity or due disciplinary process was arbitrary and the respondent has acted as the judge, the jury and the executioner.
 - g. The petitioners have been subjected to emotional and psychological torture. The application be allowed as it is in the interest of justice.
 - h. Despite the stoppage of the salaries in October 2022, the petitioners have continued to work in discharge of their respective appointment.
 - i. 90% of the petitioners herein come from the Fair Sub-clan of Dagodia which has not backed the election of the incumbent governor in the August 2022 general elections. The stoppage of the salaries aimed to profile and target them for their political position and belief – amounting to discrimination based on ethnic or social origin, and, political belief which is contrary to Article 27(1) and (4) of the *Constitution*.
3. The respondents appointed Nchogu, Omwanza & Nyasimi Advocates to act in the matter. They opposed the application and the petition by filing the Notice of Preliminary Objection for dismissal of the proceedings with costs upon the following grounds:
- a. The present proceedings have been instituted in violation of section 77 of the County Government Act as the jurisdiction to hear the complaints raised by the petitioners vests in the Public Service Commission.
 - b. The present proceedings have been instituted in violation of section 82 of the *Water Act* which provides that any person aggrieved by the decisions of a water Services Provider (eg. Wajwasco) may appeal to the Water Services Regulatory Board.



- c. The present proceedings have been instituted in violation of section 9(2) of the *Fair Administrative Action Act* which provides requires parties to exhaust alternative remedies available to them before approaching the Honourable Court.
 - d. Accordingly, the Court lacks jurisdiction and the proceedings be terminated in limine with costs to respondents.
4. The 2nd respondent filed on 05.05.2023 the replying affidavit of Hillow Issack Mumin, the Wajir County Secretary. It was stated and urged as follows:
- a. The County Government wholly owns Wajir Water & Sanitation Company Limited (WajWASCO) which is a water service provider (WSP) providing water and sanitation services to the residents of Wajir pursuant to a service provider agreement (SPA) in force between the County and WajWASCO.
 - b. Section 6(5) of the *County Government Act* grants the County Government the power to establish any company or contract any person, company or firm to ensure efficiency in service delivery.
 - c. The 1st respondent being wholly owned by the Wajir County Government its employees are public servants. They are paid out of County Government's funds and are in the County Public Service by operation of Article 260 of the *Constitution* of Kenya. The 1st respondent is wholly owned and controlled by the County Government of Wajir by dint of section 2(1) of the *Public Financial Management Act* Cap.412 (c), a county corporation.
 - d. In absence of county legislation governing the relationship between the respondents, the provisions of section 55 of the *Water Act* apply. The County Public Service Board is independent and not subject to control and of any other person or authority per section 59 of the County Governments Act. The Board establishes and abolishes offices in the County Public Service per section 63 of the *County Governments Act*.
 - e. The 1st respondent is under a constitutional duty to observe principles and values of public service per Article 232(2) of the *Constitution*. The petitioners have not demonstrated the recruitment process undertaken by the County Public Service Board and they have not exhibited letters of appointment by the Board. The petitioners have not shown the recruitment undertaken in accordance with the *Constitution* that may have resulted in their appointment.
 - f. By dint of section 77 and 83 of the *Water Act*, the assets of the 1st respondent are held on behalf of the benefit of the public. Being subscribed shareholders of the 1st respondent the County Executive led by the County Governor is under duty to safeguard the 1st respondent's assets for the benefit of the public and to ensure that it meets the mandate of guaranteeing residents their rights of access to water and sanitation.
 - g. The 2nd respondent is aware of the audit reports by the Auditor General singling out the 1st respondent's staffing and payroll as an area of audit concern. Part of the concern is the outdated Memorandum and Articles of Association which threaten the delivery of water services in Wajir County. The 2nd respondent must ensure that the persons working for the 1st respondent are bona fide employees.
 - h. The 1st respondent conducted a head count through internal human resource audit and discovered that several persons had fraudulently got on the payroll, forged appointment letters



and some drew salaries as ghost workers. The employees were invited to provide evidence of their employment. Thus it is not true that the petitioners were not given a chance to be heard.

- i. The petitioners petitioned the County Assembly to compel the respondents to fulfil the obligation of paying the company staff; not to engage in further violation of the of rights of company staff; to remit the statutory dues foe company’s staff; investigate legality of appointment of the 1st respondent’s managing director; and to pass legislation that will protect the company from interference of County Government Executive resulting from regime change and informed by changes in political priorities. The petition was committed to the relevant committee of the Assembly and awaits prosecution and hearing pursuant to Standing Order 212 of the Wajir County Assembly Standing Orders.
 - j. The application is therefore an abuse of Court process and the application be disallowed.
5. The 1st respondent filed the replying affidavit of Roble Ahmed, the Managing Director and sworn on 03.05.2023. it was stated and urged as follows:
- a. The 1st respondent is a limited company registered under the [companies Act](#), cap. 486 laws of Kenya. It is regulated by its Articles and Memorandum of Association, the [County Governments Act](#), the [Water Act](#), the Water Resources Regulatory Board (WASREB), WASREB Guidelines, the Mwongozo Code, the Public Fince Act and Regulations thereunder and, principles of good governance and fiscal prudence. It is a water service provider per provisions of the [Water Act](#) and is wholly owned by the County Government of Wajir which has appointed it as the water service provider for Wajir County. Thus, it is a county corporation per section 2(1) of the Public Finance Management Act cap 412C. The County Governor, County Secretary, CEC for Water and CEC Finance are the County Executive Members and subscribed shareholders of the company. They collectively hold the Board of Directors accountable for achieving the corporation objectives and per section 77 and 83 of the [Water Act](#), the Assets of the 1st respondent are held on behalf and benefit of the public.
 - b. Paragraph 3.3.3 of the *WASREB corporate Guidelines 2018*, shareholders of the company shall jointly and severally protect, preserve and actively exercise the supreme authority of the company in ensuring conformity to the national standards in the water sector in maintaining a commercially viable water service provider. The petitioners’ allegation that the 2nd respondent has unlawfully exceeded its mandate and conducted an audit of the company employees is spurious and an overreach.
 - c. The 1st respondent is required to run as commercial enterprise per sound business principles. It should recruit its employees competitively from qualified persons and on productivity-based contracts. Collective and recognition agreements are negotiated ensuring they are consistent with the labour standards and county public service regulations.
 - d. The appointments were on probationary basis to be confirmed subject to performance and not automatic.
 - e. In 2018 to 2020 there was massive fraudulent inclusion of people in the county payroll as ghost workers. The employment was done without advertisement and involvement of the County Public Service Board. Employees of the 1st respondent are county public servants requiring the Board’s involvement in their appointment. The petitioners and respondents have forged letters of appointment. Audits have been undertaken on 15.12.2022 and 10.01.2022 and thereafter externally and employees were informed to avail themselves together with the individual original and copy of appointment letter, acceptance letter, original and copy of ID,



original and copy of academic testimonials, copy of birth certificate, copy of KRA, NHIF and NSSF cards. The county government undertook a similar audit on diverse dates per the letter dated 18.08.2023 duly exhibited.

- f. The 1st respondent examined the documents and its records to determine if the employees were its staff. For three employees (Petitioners) namely Safi Abdullahi Adan, Abdi Jikre Mohamed and Maryan Farah Salah there was no County Public Service Board recruitment process or appointment letter. For the other 76 petitioners the appointments had been fraudulent with fake letters of appointment and without Board's recruitment and appointment.
 - g. The petitioners' rights were not violated as alleged as they were given an opportunity to present their documents during the audit process. The petitioners failed to show the constitutional competitive and merit-based recruitment process undertaken by the County Public Service Board or the 1st respondent resulting in their respective employment. There was no ethnic or clan discrimination as the petitioners have not provided the evidence of belonging to the alleged clan. the Constitution does not prescribe clan patronage as a criterion for recruitment and appointment which is to be competitive and merit-based.
 - h. Following the audit outcome, the petitioners cannot hold out themselves as employees of the 1st respondent.
 - i. The petitioners presented their petition to the Wajir County Assembly and the same has not been prosecuted by the relevant Assembly Committee.
 - j. No case has therefore been made out for grant of the interlocutory reliefs as prayed for.
6. The Court has considered the parties' respective submissions on the application and the notice of preliminary objection. The Court returns as follows.
7. To answer the 1st issue and as submitted for the petitioners, the employees of the 1st respondent are not subject to the powers of the County Public Service Board or other county authority because the 1st respondent is a Company registered under the Companies Act and regulated by its memorandum and articles of association. The respondents have not provided anything to show that while admitting that the 1st respondent is a limited company registered under the Companies Act, nevertheless, under the constituting memorandum and articles of association the 1st respondent has ceded to the County Public Service Board the 1st respondent's otherwise autonomous human resource powers and functions as an autonomous person in law. As cited for the petitioners the Court is guided by the holding of Onesmus Makau J in Kenya County Workers Union v Bomet Water & Sanitation Company Limited [2022] eKLR thus:

“ 34. The basis upon which the respondent seeks to compel the claimant to exhaust internal dispute resolution mechanism is *section 77 of the County Government Act* and *section 85 and 86 of the Public Service Commission Act*. My reading of both Acts cited by the Respondent provides for Appeals from decision of person in authority in the County Public Service Board or the board itself.

35. The grievants in this case were employed by the Respondent who is a company Limited by shares and was incorporated on 18th June 2013 under the *Companies Act Cap 486*, Laws of Kenya. The respondent is an independent company and is not the County Public Service Board. Accordingly, it is obvious that the claimant's members cannot be governed by *section 77 of the County Governments Act* and the *Public Service Commission Act*. Consequently,



the appeals from the grievances herein cannot be preferred to the Public Service Commission as argued by the Respondent.

36. In light of the foregoing I therefore, hold that the Court has jurisdiction to determine the suit before it and the preliminary objection by the Respondent fail on its face.”
8. In any event and as submitted for the petitioners, even if appeal were available to the Commission but which the Court has found for the petitioners that it was not so available, the respondents have not exhibited any decision that would be subject of such appeal.
 9. The 2nd issue is whether section 82 of the Water Act is alternative procedure that the petitioners failed to exhaust and therefore rendering the jurisdiction of the Court diminished on account that the suit is premature for want of exhaustion of that provision. The section provides as follows:
 1. A party aggrieved by the decision of a water services provider may appeal against the decision to the Regulatory Board in the prescribed manner within fourteen days from the date the decision was made.
 2. The Regulatory Board may on appeal either vary, reverse or confirm the decision of the water service provider, and the Regulatory Board shall communicate its decision to the parties concerned within fourteen days from the time the decision is made.
 10. As submitted for the petitioners the appealable decisions of the water service provider relate to its core functions under section 72 of the Water Act. The decisions relate to water resources or services where there is a business contract and the decisions of issuance or denial of water licence, revocation of water licence, disconnection of water supply and such other decisions. Under section 124 of the Act subsequent appeals go to the Environment and Land Court and not the Employment and Labour Relations Court.
 11. As submitted for the petitioners, there is no established provision or principle that where a petition about the dispute is pending before the County Assembly like in the instant case, then the Court’s jurisdiction is thereby ousted or barred.
 12. By reason of the findings on issues 1 and 2, the Court returns that the preliminary objection is liable to dismissal with costs in the cause.
 13. The 3rd issue is whether the petitioners have established a case for grant of an interim conservatory order as prayed for. As submitted for the petitioners in Board of Management of Uhuru Secondary School v City County Director of Education & 2Others [2015]eKLR, the Court summarized the principles for grant of an interim conservatory order to include the need for the applicant to demonstrate an arguable *prima facie* case with a likelihood of success and to show that in absence of the conservatory orders, he is likely to suffer prejudice; whether the grant or denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights; whether, if an interim conservatory order is not granted the petition or its substratum will be rendered nugatory; and whether public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order.
 14. The petitioners have exhibited their respective letters of appointment showing that each was appointed by the 1st respondent’s board of directors. By those exhibits, the Court finds that the petitioners are duly employed by the 1st respondent at all material time. While alleging that their employment was irregular, the respondents have not provided any evidence to show that any one of the petitioners was so employed irregularly. Further, while alleging fraud and fake letters of appointment, the respondents



have not exhibited the evidence of the alleged fraud or forgery. Instead the respondents attempt to shift their own burden of proof to the petitioners to show the procedure of their appointment was regular. While the established employment relationships between the petitioners and the 1st respondent are subsisting, the 1st respondent has stopped the payment of the salaries of the petitioners without due procedure. While the 1st respondent's replying affidavit states that there were audit and head count reports, such reports appear to have been investigative and no disciplinary or other proceedings have been initiated for removal of the petitioners as employed. Thus, the Court returns that the petitioners are in employment and continue to discharge their duties. They are entitled to the conservatory order that the 1st respondent is bound to perform the contracts of service until lawfully terminated.

15. While making that finding the Court finds that as urged for the respondents the employees of the 1st respondent are public officers especially that the 2nd respondent is a company fully funded by public money or fund – especially in view of the provisions of the *Public Service Commission Act, 2017* on the public bodies or companies whose employees are public servants or officers. However, the Court has found that the employees of the 1st respondent being public officers are employees of the 1st respondent company as an autonomous artificial person. Further, no provision of written law has been shown to bring such employees under the disciplinary or other control of the 2nd respondent or the County Public Service Board. The petitioners being public officers, they enjoy the constitutional protections including due process prior to their removal as envisaged in Article 236 of the *Constitution*. There is nothing on record to show the due process initiated by the respondents and particularly the 2nd respondent leading to establishment of misconduct against the petitioners about the alleged irregular employment, fake letters of appointment or fraud and, culminating in a communicated termination decision. The Court considers that until the 1st respondent has by due process accorded to each and every petitioner resulting into a lawful or fair termination, there is established good reason to issue the interim conservatory order protecting the prevailing contracts of service and their performance by the petitioners discharging the agreed work assignments and the 1st respondent paying the salary and benefits per the contracts.
16. The Court has considered the management letter dated 24.02.2023 on audit of the 1st respondent for the year ended 30.06.2023. The letter makes findings and recommendations that may entitle the 1st respondent to undertake specific disciplinary or other proceedings within tenets of due process for such concerned employees as may be just and in the public interest. Thus in the circumstances of the case, the petitioners have not established material ground why the 1st respondent should be barred from proceeding within its prerogative human resource functions and powers.
- 170 In conclusion the preliminary objection and the application are hereby determined with orders:
 - a. The preliminary objection is dismissed with costs in the cause.
 - b. That pending the hearing and determination of the petition, a conservatory order is hereby issued directing the 1st respondent and its agents to pay the petitioners together with other aggrieved employees all withheld salaries from the month of October 2022 to date and further directing the 1st respondent to continue paying the petitioners and the aggrieved employees their salaries as and when they fall due without any further delay for as long as the respective contracts of service are in place.
 - c. Parties to set down the petition for mention for directions for the expeditious hearing and determination.
 - d. The costs of the application in the cause.



**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS
THURSDAY 25TH MAY, 2023.**

BYRAM ONGAYA

PRINCIPAL JUDGE

