



**Rukaria v Attorney General; Debasso & another (Interested Parties)  
(Petition 2 of 2023) [2023] KEELRC 1339 (KLR) (25 May 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1339 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS  
PETITION 2 OF 2023**

**B ONGAYA, J**

**MAY 25, 2023**

**IN THE MATTER OF THE ENFORCEMENT OF ARTICLES 1, 2, 3, 10, 19, 20, 21, 22,  
23, 24, 162(2) (A), 258(1) AND 259(1) OF THE CONSTITUTION OF KENYA, 2010**

**IN THE MATTER OF VIOLATION AND INFRINGERMENT  
OF THE RIGHTS AND FREEDOMS UNDER ARTICLES 27, 28,  
47, 232 AND 236 OF THE CONSTITUTION OF KENYA, 2010**

**IN THE MATTER OF SECTION 6 AND 7 OF THE STATE  
CORPORATIONS ACT CAP 446 OF LAWS OF KENYA**

**IN THE MATTER OF CONTRAVENTION AND INFRINGEMENT OF  
SECTION 4 OF THE FAIR ADMINISTRATIVE ACTIONS ACT NO.4 OF 2015**

**BETWEEN**

**CAPTAIN PAUL RUKARIA ..... PETITIONER**

**AND**

**ATTORNEY GENERAL ..... RESPONDENT**

**AND**

**HUSSEIN TENE DEBASSO ..... INTERESTED PARTY**

**LAW SOCIETY OF KENYA ..... INTERESTED PARTY**

**RULING**

1. The petitioner filed the petition and an application on February 21, 2023 through J W & Frank Advocates LLP. The issues around the dispute are as follows. The petitioner was on August 05, 2022 appointed by the President of the Republic of Kenya as chairperson of the Kenya National Trading Corporation (KNTC), a state corporation for a period of 3 years. On February 10, 2023 the petitioner's



appointment was revoked by the President and at the same time the 1<sup>st</sup> interested party was appointed as chairperson of KNTC. The petitioner challenges the manner by which his appointment as chairperson was revoked by the President.

2. The 1<sup>st</sup> interested party filed a notice of preliminary objection dated April 03, 2023 upon the ground that the Court lacks jurisdiction to hear the matter for want of employer-employee relationship between the petitioner and KNTC or the Republic of Kenya; and, the suit is fatally defective and incompetent. The notice was filed through E K Mutua & Company Advocates. A notice of preliminary objection based upon similar grounds had been filed for the respondent on March 22, 2023 through learned Deputy Chief Litigation Counsel Schola Mbilo for Attorney General.
3. A further ground in the notice of preliminary objection filed for the respondent and dated March 13, 2023 was that the petition and application was fatally defective and incompetent for misjoinder of the 1<sup>st</sup> respondent (then being H E William Samoei Ruto, The President of the Republic of Kenya) which is contrary to Article 143 (2) of the Constitution granting the 1<sup>st</sup> respondent absolute immunity from prosecution. The petitioner cannot commence the proceedings against the 1<sup>st</sup> respondent as was held by the Supreme Court in The Attorney General & Others –Versus- David Ndii and 79 Others [2022]eKLR. The petitioner conceded to that ground of objection on April 28, 2023 when by consent the Court ordered, *inter alia* “3. The 1<sup>st</sup> respondent is struck out as a party to the petition and all pleadings on record deemed amended with the Honourable Attorney General as the only respondent accordingly.”
4. The only issue for determination is whether the petition and the application should be struck out because there is no employer-employee relationship or that a chairperson of a board of a state corporation is not an employee or servant. The Court finds that the present dispute relates to employer-employee relationship. The respondent relies upon Court of Appeal holding in Nakuru Civil Appeal No 61 of 2015 Rift Valley Water Services Board & 2Others –Versus- Geoffrey Asanyo & 2 others to urge that there exists no employment relationship. In that case, the 1<sup>st</sup> respondent had been appointed to the 2<sup>nd</sup> respondent’s board in accordance with the company’s Memorandum and Articles of Association for a term of three years ending on December 17, 2012 and the appointment subsequently extended for three years lapsing on December 17, 2015. The Court of Appeal held thus, “...His functions as a director of the 2<sup>nd</sup> 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 2<sup>nd</sup> 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 1<sup>st</sup> 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 –Versus- 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 the company (see Parsons –V- Albert J. Parsons and Sons Ltd [1979] ICR p.271)” The Court has considered that binding holding. However, the holding related to a director being a member of a company registered under the Companies Act without more to it. In the instant case, the petitioner was the chairperson of a statutory body governed by the State Corporations Act and



it is not said that it was governed by the Companies Act. In Narok County Government and Another–Versus- Richard Bwogo Birir and Another (2015) 5JELR 104466 (CA) the Court of appeal held

“39. It is upon consideration of those and other provisions that the trial court reached the following compelling conclusion:

“...all persons holding public or state office in Kenya in the executive, the legislature, the judiciary or any other public body and in national or county government are servants of the people of Kenya. The court holds that despite the level of rank of state or public office as may be held, no public or state officer is a servant of the other but all are servants of the people. Thus, the court holds that the idea of servants of the crown is substituted with the doctrine of servants of the people under the new Republic as nurtured in the Constitution of Kenya, 2010. The hierarchy of state and public officers can be complex, detailed and conceivably very long vertically and horizontally but despite the rank or position held, the court holds that they are each a servant of the people and not of each other as state or public officers. They are all servants of the people. The court holds that there are no masters and servants within the hierarchies of the ranks of state and public officers in our new Republic.

The court further finds that the string that flows through the constitutional provisions is that removal from public or state office is constitutionally chained with due process of law. In the opinion of the court, at the heart of due process are the rules of natural justice. Thus, the court finds that the pleasure doctrine for removal from a state or public office has been replaced with the doctrine of due process of law. Article 236 is particularly clear on the demise of the pleasure doctrine in Kenya's public or state service... In the new Republic, the court holds that public service by public and state officers is guided by the doctrine of servants of the people and the doctrine of due process and not by the doctrines of the servants of the crown and the pleasure doctrine. In the opinion of the court, the demise of the pleasure doctrine and the demise of the doctrine of servants of the crown in the new Republic's constitutional framework constitute the very foundation of the Republic, namely, Kenya is a sovereign Republic and all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with the Constitution.”

With respect, we have considerable sympathy for those findings as they accord with the spirit and letter of the Constitution, 2010. Consequently, we find and hold that the pleasure doctrine is not applicable in Kenya under the current Constitution.”

And the Court of Appeal further stated,

“40. There is no argument that a member of the executive committee of a county government is a ‘state officer’. Article 260 of the Constitution so defines them and also defines a ‘public



officer’ to include any state officer, while Article 236 embodies the protection of public officers through adherence to due process of law in the removal, demotion or disciplinary action. Such due process includes fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair; one where a person is given written reasons for intended action that is likely to adversely affect them (Article 47).”

5. The Court is guided accordingly and finds that state officers or public officers are servants of the people and are engaged in employment upon relevant constitutional, statutory, and lawful policies and practices in place. Thus, the Court returns that a board member or director in the public service being a public officer or state officer is clearly distinguishable from a board member or director of a company being registered under the Companies Act as governed by the Articles and Memorandum of Association.
6. As submitted for the petitioner, in Okiya Omtatah Okoiti –Versus- Attorney General & 2 Others, Francis K. Mutbaura (AMB) & 5 Others (Interested Parties) [2019]eKLR the Court stated thus, “The Court finds that the dispute is about employment in the public service. The Court finds that the chairperson and the members of the Board of the KRA (just like the chairpersons and members of other state corporations or boards of other public bodies) are public officers bound by applicable constitutional and statutory provisions and lawful policies and practices that govern public employment. The Court holds that in the constitutional framework under the Constitution of Kenya 2010, the public officers despite their designation or position held in the service, they are all in public or state service and governed by specific applicable constitutional and statutory provisions and lawful policies and practices – so that the variance in positions held or designation does not render any of the public or state officers to escape their being servants of the people, employed by the people, within such applicable constitutional and statutory provisions, and, lawful policies and practices. Thus the provisions of Article 73 as read with Article 80 (c), and, Article 232 apply accordingly. In view of that finding, the dispute in the present petition is about employment within the complex framework of public service or public sector employment. The substantive law applicable to such employment ranging from declaration of vacancy, recruitment and selection procedures, appointment procedure, and termination procedure would be the applicable public service constitutional and statutory provisions and such other lawful policies and practices to the extent that they prescribe minimum or better terms and conditions of service than those envisaged in the Employment Act, 2007.”
7. Further, the Court considers that whether there exists employer-employee relationship is a disputed point of fact to be resolved after full hearing of the petition and the 2<sup>nd</sup> respondent’s submissions are upheld in that regard. As urged for the petitioner, in view of the principle that the objection be based upon undisputed or assumption of the correctness of the facts parties have pleaded, the preliminary objection fails to pass that test as held in Mukisa Biscuit Manufacturing Co. Ltd –Versus- West End Distributors Ltd (1969) EA 696. Thus the preliminary objection does not raise a pure point of law based on undisputed facts or assumption that the pleaded facts are correct.
8. In particular, it is submitted for the 1<sup>st</sup> interested party that the petitioner earned a monthly taxable honorarium per prevailing Government rates. That he further earned allowances. Further that in Black’s Law Dictionary 8<sup>th</sup> Edition Honorarium means a payment of money or anything else of value made to a person for services rendered for which fees cannot legally be or are not traditionally paid; or, a voluntary reward for that for which no remuneration could be collected by law; or a voluntary donation in consideration of services that admit of no compensation in money. Further that the petitioner was paid allowances including sitting allowance, accommodation allowance, lunch and telephone where applicable in line with the Government guidelines. The Court considers that the payments may qualify the petitioner as an employee on piece work rates with allowances payable with respect of specified



assignments or circumstances such as sittings at meetings – arrangements well known to employment relationships in appropriate agreements. In any event such are matters to be argued at the full hearing of the petition after considering all the evidence. In his further affidavit, the petitioner has exhibited his payslips to urge that he was employed and duly paid. Thus, the need for a full hearing to resolve the dispute one way or the other – the matter being of mixed fact and law and not pure law founded upon assumption of correctly pleaded facts or facts free from dispute between parties.

9. *Attorney General & Others –Versus- Okiya Omtata Okoiti & 14Others* (2020)eKLR related to recruitment for appointment of chairperson and members of the National Land Commission. The Court of Appeal stated that such appointment did not involve any of the parties in section 12 of the *Employment and Labour Relations Court Act*, 2011 and it was not employment merely because they would be remunerated from the consolidated fund. It appears that in that case, the parties before the Court failed to meet the said section 12 enumeration. Further it appears to have been pre-employment dispute. In the instant case the petitioner has exhibited his pay slips and urges that his contract of service has been unfairly revoked.

In conclusion, the preliminary objections are hereby dismissed with costs in the cause, and, parties to take directions for the expeditious hearing and determination of the petitioner’s application or the main petition as directions may issue.

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

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

