



**Kamwaro v Embu Water and Sanitation Co.Ltd (Constitutional Petition
E008 of 2023) [2023] KEELRC 1213 (KLR) (19 May 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1213 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
CONSTITUTIONAL PETITION E008 OF 2023**

ON MAKAU, J

MAY 19, 2023

BETWEEN

JOSPHAT NTHIGA KAMWARO PETITIONER

AND

EMBU WATER AND SANITATION CO.LTD RESPONDENT

RULING

1. This ruling relates to the petitioner’s Notice of Motion dated 11th April, 2023 and the respondent’s notice of preliminary objection dated 17th April 2023. The petitioner describes himself as a resident of Embu County and a consumer of water and sanitation Services supplied by the respondent. The respondent is a Private Company Limited by Guarantee registered under the *Companies Act* and it is a water service provider within the meaning of section 79 and 154 of the *Water Act* 2016, with the mandate to carry on the business of water, sanitation and sewerage service in Embu County.
2. The genesis of the dispute herein is a job advertisement for the position of Managing Director of the respondent published in the Daily Nation Newspaper on 3rd April, 2023. The advert set out the duties and responsibilities of the Managing Director and the requirements as to academic qualifications and work experience. Apart from a Bachelor’s degree, a candidate was required to have at least 10 years relevant work experience, 5 years of which in a Senior Management position.
3. The petitioner was not amused and brought the instant petition urging the court to quash the job advert because it was discriminatory contrary to Article 27 of the *Constitution* as it raises the requirement of work experience from 5 years to 10 years against express provisions of the respondents Articles of Association. The petitioner, contends that the said enhanced requirement is a ploy to automatically exclude potential applicants within the company who qualified under the Articles of Association by possessing 5 years working experience.



4. Simultaneously with the petition, the petitioner filed the instant motion seeking conservatory order to restrain the respondent or its agents or anybody howsoever from recruiting any person to fill the vacancy of Managing Director of the respondent as advertised on the Daily Newspaper of 3rd April, 2023 pending the hearing and determination of the petition herein. The application has set out the grounds upon which it is premised and it is supported by two affidavits sworn by the petitioner on 11th April, 2023 and 20th April, 2023.
5. The respondent has opposed the application by filing two affidavits sworn by its Acting Managing Director on 17th April, 2023 and 24th April, 2023. In brief the respondent's case is that the impugned job advertisement is proper and in strict compliance with Article 76 of the respondent's Articles of Association which requires 10 years of work experience and 5 years in senior management. Therefore the alleged discrimination has no basis, according to the respondent.
6. The respondent further contended that the suit is premature as the petitioner being a member of the company was bound by Article 117 of the Company's Articles of Association to refer the dispute for arbitration. Therefore it is the respondent's case that the suit offends the exhaustion doctrine which postpones court's jurisdiction. In addition to the affidavits, the respondent filed the Notice of Preliminary objection aforementioned which basically revolves around the issue of the jurisdiction of the court and incompetency of the suit.

Submissions

7. Mr.Gitau argued the application for the petitioner contending that the court has the jurisdiction to determine the dispute since it relates to employment relationship between employer and employees. The dispute arises from job advertisement to fill the position of Managing Director which discriminates against senior managers of the company including the Acting Managing Director. Further that the petition is brought under Article 3, 22 (1), 23 and 258 of the Constitution which entitles a person to petition the court on ground that the Constitution has been violated or there is threat to violate it.
8. In view of the foregoing it was argued that the court has jurisdiction to entertain the suit. Reliance was placed on the case of Ali Jarso Wako & another v Ministry of Interior & Coordination of National Government & others (2020) eKLR and Alfred James Muriuki (suing as the Secretary General of Embu Citizens Oversight Network) v Embu County & 3 others (2019) eKLR where the court held that it had jurisdiction since matters related to recruitment of employee.
9. It was further submitted by Mr.Gitau Advocate that the dispute herein turns on discrimination and the discrepancy in the respondent's Articles of Association relied upon by the two parties in the suit. The respondent's version providing for 10 years work experience while the petitioner's version provides for 5 years work experience to qualify for appointment of the respondent's Managing Director.
10. The petitioner backs his version of the Articles by minutes of the respondent's Extra ordinary meeting held on 12th February 2023 where under Min.EGM 10/2021 the revised Memorandum and Articles of Association was approved in compliance with the Companies Act, Water Act 2016 and the WASREB Corporate Governance Guidelines for Water Sector 2019. It was submitted that without the said amendment to the Memorandum and Articles of Association, the Company would be guilty of non-compliance with the said Guidelines. It was further submitted that the said minutes are authentic because they are signed by the Company Secretary.



11. In view of the foregoing matters, it was submitted that the respondent is using outdated Articles of Association, 2015 mischievously to discriminate potential applicants within the Company. Therefore the court was urged to dismiss the preliminary objection by the respondent and allow the application.
12. On the other hand Mr.Kigen Advocate opposed the application and urged the court to allow the preliminary objection. He submitted that there is no employer-employee relationship between the parties herein and as such the court lacks jurisdiction to entertain the petition. Reliance was placed on the case of Daniel N.Mugendi v Kenyatta University & 3 others (2013) eKLR where the court held that the alleged violation of rights ought to be within the context of section 12 of the Employment Act for this court to have jurisdiction.
13. Further, he argued that the court lacks jurisdiction over the suit because the petitioner is a member of the company by virtue of being a resident of Embu County which holds the Company in trust for its residents.
14. As regards the merits of the motion, it was submitted that the applicant is required to prove a prima facie case by looking at the case as a whole. For emphasis, reliance was placed on the case of Wilson Kaberia Nkunja v The Magistrates and Judges Vetting Board & another (2016) eKLR where the threshold for granting conservatory orders was discussed.
15. Mr.Kigen, further observed that the respondent's acting Managing Director has produced as evidence the valid Memorandum and Article of Association for the company approved in 2015. He has further produced a special Resolution/Minutes lodged at the Companies registry bearing stamp and receipt from the Registrar of Companies. The counsel distinguished the copies filed by the petitioner as lacking the evidence of a valid special Resolution duly filed in the Company Registry. Further, the minutes dated 12th February 2021 are not signed by the chairman of the Board.
16. It was further submitted that there has been 7 members of the Board in office and 3 new ones were elected into office on 24th April, 2023. In that respect the alleged lack of quorum or proper composition was disputed.
17. It was further submitted that public interest tilts in favour of dismissing the application and filling the vacancy of the company's Managing Director which has been vacant since December, 2021. It was argued that the Managing Director is very crucial in the day to day management of the affairs of the company for the benefit of the residents of Embu.
18. Finally, it was submitted that since the petitioner has failed to prove that the memorandum and Article of Association of the company were amended and Registered at the Company Registry in 2021, the threshold for grant of conservatory order pending the petition herein has not been met.
19. In his rejoinder, Mr.Gitau Advocate maintained that the petitioner has the right to sue on behalf of aggrieved parties like it happened in the case of Kipatia Lekarkar & 9 others v Deputy Commissioner Samburu Central Sub-County & 6 others (2021)eKLR. Further, it was submitted that the application ought to be allowed because there cannot be a lawful appointment if the process followed in the recruitment is erroneous.

Determination

20. The issues for determination are:
 - a. Whether the court lacks jurisdiction to entertain the petition.
 - b. Whether conservatory order sought is merited.



Jurisdiction

21. The respondent contends that the court lacks jurisdiction over the suit because the alleged violation is not in the context of Section 12 of the ELRC Act which extends jurisdiction to the court in disputes between an employee and employer. Secondly, the respondents contend that the dispute ought to be referred to arbitration because it involves a member of the company and the directors.
22. The petitioner is in denial and maintains that the dispute herein relates to employment and it seeks to protect the employees of the company from discrimination and to ensure that the residents of Embu County get better services from the respondent.
23. I have carefully considered the rival contentions by the two sides. The suit arises from a job advertisement published to fill the vacant position of its Managing Director. In my view, the said dispute relates to employment. Secondly, the suit seeks to protect qualified employees of the respondent from discrimination in the recruitment of the Managing Director of the Company. To that extent I am satisfied that the dispute before the court relates to employment and this court has jurisdiction to determine.
24. Article 162 (2) (a) of the Constitution read with Article 165(5) of the Constitution contemplates this court as the proper court to entertain any claim for violation or threatened violation of the Constitution at the work place. In this case the petitioner has the right under Article 22(1) and (2) (b), (c) of the Constitution which provides that a person has the right to institute suit on his own behalf or in the interest of a group or class of persons or in the public interest; claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened.
25. There is no doubt that the respondent is a public organ and it is bound by the constitutional edict as set out under Article 20, 21, 27, 73 and 232 of the Constitution which relate to the obligation to promote the rights and freedoms enshrined in the Bill of Rights and the principles of good governance and public service. Consequently, I find and hold that any person has a right to petition this court seeking to protect the rights of an employee or a group or class of employees including a claim that there is discrimination or threat of discrimination in recruitment or promotion to higher or lucrative positions.
26. As regards the allegation that the petitioner herein is a member of the respondent's company by virtue of being a resident of Embu County and therefore his grievance ought to be referred to an arbitrator under the Articles of Association. I respectively hold a contrary view. To the best of my knowledge members of a Company are the shareholders.
27. Concise Oxford English Dictionary defines a shareholder as "an owner of shares in a company." Black's Law Dictionary, 10th Edition defines shareholder as "someone who owns or holds a share or shares in a company." My interpretation of the foregoing definitions does not point to the petitioner as a member of the respondent company. He does not hold any share in the company. The foregoing view confirms that I respectively differ with the decision of the High Court in the case of Elijah Wambugu Gakinya, supra in as far as the court held that the residents of County are members of the respondent Water Company because the County Government is a stakeholder/member of the Company and therefore any grievance against the company or its directors should go to arbitration by dint of Article 113 of the Company's Articles of Association. I eschew further comments on the said decision because I have already found that I have jurisdiction.



Merits

28. The threshold for granting conservatory orders was aptly captured by Lenaola, J as the then was, in the case of Wilson Kaberia Nkunja, supra as follows:-
- “(a) An applicant must demonstrate that he has a prima facie case with likelihood of success and that unless the court grants the conservatory order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.
- (b) whether, if a conservatory order is not granted, the petition alleging violation of, or threat of violation of rights will be rendered nugatory; and
- (c) the public interest must be considered before grant of a conservatory order.”
29. With respect to the first principle, it is clear that the failure of the application depends on whether there is proof that the impugned advert wrongfully requires that a candidate should possess 10 years work experience to qualify for appointment as the respondents’ Managing Director. I have carefully considered the material presented by the parties and made the relevant observations. First the copy of the Memorandum and Articles of Association allegedly adopted at an Extra General Meeting of the Company on 12th February 2021 has no stamp from the company or the company secretary, and there is no evidence that it was ever registered at the Company’s Registry. Secondly, the minutes of the said meeting though signed by the company secretary, they bear no signature for the chairman.
30. On the other hand, the respondent has produced copy of Memorandum and Articles of Association bearing stamp of the Company, a copy of Resolution signed by the company secretary, chairman and the managing Director, forms of Annual Returns for the respondent and official receipts from the Registrar-General acknowledging payment of fees for filing of the Amended Memorandum and Articles of Association.
31. My comparison of the two sets of the Amended Memorandum and Articles of Association presented by the parties leads to an irresistible finding that subject to any further evidence to be adduced during the hearing of the petition, the Amended Memorandum and Article of Association filed by the respondent is the valid one. Consequently, without going to the merits of the petition, I find that the employer has not violated the Articles of Association by requiring in the impugned job advertisement, that a candidate must possess 10 years work related experience.
32. I say so because Article 76 of the respondents Articles of Association, 2015 provides that:-
- “No person shall be appointed to office as a managing director unless if such a person;
- a. Has a degree in Engineering (Civil/water), management or law.
- b. Has a minimum of ten (10) years’ experience in utility management of water and sanitation industry and must have been in a management position for not less than five (5) years.
- c. ...”
33. Having found that the impugned advert is in harmony with Article 76 of the registered Memorandum and Articles of Association, I am not satisfied that the rights of the employees of the respondent or any



other qualified person would be suffer any prejudice as a result of the impugned job advertisement if the conservatory order is not granted pending the determination of the petition herein.

34. As regards the issue of public interest, I agree with the respondents that the same tilts in favour of declining the order. It is in the public interest that the court does not interfere with a recruitment exercise which is proceeding in accordance with the respondents' Articles of Association. Further, it is in the public interest that the Managing Director of the Company possesses the best qualifications in line with the Articles of Association of the Company.
35. In conclusion I find that the preliminary objection by the respondent lacks merits and it is dismissed. Likewise the petitioner's notice of motion dated 11th April, 2023 lacks merits and it is dismissed. Each party to bear own costs.

DATED, SIGNED AND DELIVERED AT NYERI THIS 19TH DAY OF MAY, 2023.

ONESMUS N MAKAU

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 April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE

