



**Munialo v President of Kenya & 4 others; Nzoia Sugar Company Limited (Interested Party) (Employment and Labour Relations Cause E008 of 2023) [2023] KEELRC 1969 (KLR) (27 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1969 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E008 OF 2023**

**JW KELL, J  
JULY 27, 2023**

**BETWEEN**

**JACK MUKHONGO MUNIALO ..... CLAIMANT**

**AND**

**THE PRESIDENT OF KENYA ..... 1<sup>ST</sup> RESPONDENT  
CABINET SECRETARY, MINISTRY OF AGRICULTURE, LIVESTOCK,  
FISHERIES AND IRRIGATION ..... 2<sup>ND</sup> RESPONDENT  
PUBLIC SERVICE COMMISSION ..... 3<sup>RD</sup> RESPONDENT  
STATE CORPORATIONS ADVISORY COMMITTEE ..... 4<sup>TH</sup> RESPONDENT  
THE HON ATTORNEY GENERAL ..... 5<sup>TH</sup> RESPONDENT**

**AND**

**NZOIA SUGAR COMPANY LIMITED ..... INTERESTED PARTY**

**RULING**

1. The Petitioner vide petition dated May 3, 2023 challenged the appointment of the chairperson and board members of Nzoia Sugar Company Limited on ground of having been handpicked by the President of Kenya and the Cabinet secretary Ministry of Agriculture , Livestock , Fisheries and Irrigation without subjecting them to fair, open and competitive recruitment and for failure to involve the Public Service Commission. The petitioner then sought for among orders to quash the appointments and for Order of Mandamus directing the respondents to commence the process of recruitment of the board in accordance with the law and for Order to quash all proceedings by the said Board. The petitioner further among other orders sought for order of judicial review in the nature to



- quash Gazette Notice Vol CXXV No 36 (1903 dated February 16, 2023 and 1906 dated February 13, 2023) of February 17, 2023.
2. In addition under certificate of urgency the petitioner lodged and notice of motion application of even date seeking the following substantive orders:-
    - a. A temporary conservatory order do issue restraining the handpicked chairman and directors from accessing, holding meeting and transacting any business or activities of Nzoia Sugar Company directly , indirectly and through proxy.
    - b. A temporary conservatory order do issue restraining the handpicked chairman and directors proceeding with their duties and activities pending the hearing determination of this application.
    - c. A temporary conservatory order do issue restraining validity of Gazette Notice Vol CXXV- No 36(1903 dated February 16, 2023 and 1906 dated February 13, 2023) dated February 17, 2023.
    - d. Cost of this application be provided for.
  3. The application was premised on the grounds that the 1<sup>st</sup> and 2<sup>nd</sup> respondent handpicked the appointed persons to the Board without subjecting them to fair, open and competitive, merit based and inclusive recruitment process and without involving the 3<sup>rd</sup> respondent. That the 3<sup>rd</sup> respondent had legal mandate to recruit and hand over names to authority to appoint. That in Nairobi ELRC Petition No 19 of 2016 Omtatah v 1<sup>st</sup> and 2<sup>nd</sup> respondents Judgment by lady justice Hellen Wasilwa for appointing persons to Boards of state corporations the court ordered that future appointments should be based on the law and on the Constitution and should be fair, open, competitive merit based and through inclusive process and that the respondents were guilty of gross violations of the rights of the applicant , employees, creditors and farmers of Nzoia Sugar Company Limited .
  4. The Petitioner filed supporting affidavit sworn on the April 25, 2023 to both the petition and application and annexed the said Gazette notices and the Judgment by Lady Justice Hellen Wasilwa in Okiya Omtatah Okoiti v President of Kenya & 4 others (2019)e KLR.
  5. The application was opposed. The interested party (Nzoia Sugar Company Limited) entered appearance and filed grounds of opposition dated May 19, 2023 raising two grounds:-
    - a. The application runs counter to the provisions of section 6(1)(a-e), 2,34 and 7 of the State Corporations Act , Cap 44 of the laws of Kenya.
    - b. The application is misconceived, incompetent and an abuse of the due process of this honourable court.
  6. The interested party further vide replying affidavit of Rita Mukhongo dated May 30, 2023 substantially responded to the application and petition and inter alia stated that the interested party was both a company and a state corporation with the Government holding 98% shares. That the appointments of the chairperson and directors of the Board were done pursuant to that shareholding in compliance with the memorandum and articles of the association of the company which includes the right to appoint and remove directors and in compliance with the provisions of the State Corporations Act. That the appointees had commenced work upon appointment. That the applicant lacks locus as he was neither an employee or farmer. That the applicant was a vexatious litigant with habit of suing the interested party and listed 8 suits.
  7. The 3<sup>rd</sup> respondent entered appearance but did not file response. The rest of the respondents did not enter appearance.



8. The applicant in response to the interested party filed further affidavit sworn on the 19<sup>th</sup> June 2023 to state he was a farmer currently owed payments for cane delivery in December 2022 and was active stakeholder who had acted for farmers and relied on letter dated 26<sup>th</sup> April 2021 where the interested party invited him to nominate a person to represent his organisation, the Kenya National Alliance for sugar cane farmers, to stakeholders joint steering committee meeting. That as a former employee wrongly dismissed and a farmer informed his interest in the appointment of the board. That the Constitution did not limit or guide Kenyans on number of constitutional petitions they could file, that the issue of deposit of costs should not arise as he was representing over 70,000 farmers directly depending on the interested party and he had no history of impunity. That the provisions of section 6 (1)a-e of the State Corporations Act read with Article 232 of the Constitution gave power to the 3<sup>rd</sup> respondent to ensure fair, open and competitive and inclusive recruitment process and to forwarding to 1<sup>st</sup> and 2<sup>nd</sup> respondent names to appoint on meritocracy. That since the application was not opposed the court to follow the precedency in Judgment by Lady Justice Hellen Wasilwa in Okiya Omtatah Okoiti v President of Kenya & 4 others (2019 )e KLR and allow the prayers.
9. The interested party further filed supplementary affidavit sworn by Rita Mukhongo, its acting company secretary, in response to the further affidavit of the applicant and stated that the court had no jurisdiction to handle the matter as there was no existence of employer employee relationship as held by courts that directors were not employees and relied on the decision of the Court of Appeal in Nakuru Civil Appeal No 60 of 2015 consolidated with No 61 of 2015 in Rift Valley Water Services Board and 3 others v Geoffrey Osanyo and 2 others . That the 1<sup>st</sup> and 2<sup>nd</sup> respondent were empowered to appoint the chairman and board directors of the interested party pursuant to section 6 (1) a- e of the State Corporations Act and that the applicant had not filed any documents to show he was a farmer.
10. The court directed that the application be canvassed by way of written submissions. Only the applicant and the interested party complied. The applicant acting in person filed his written submissions dated June 19, 2023 and received in court on even date. The interested party's written submissions drawn by M/S Chengasia Murunga & Company advocates were dated June 30, 2023 and received in court on even date.

### **Determination**

11. After carefully considering the application and the entirety of the materials submitted before me and the submissions I was of the considered opinion the issues placed before me for determination were as follows:-
  - a. whether the court had jurisdiction to determine the petition and application.
  - b. If the court had jurisdiction whether the application was merited and orders sought could be granted.

### **Whether the court had jurisdiction to determine the petition and application**

12. It is now settled law that when the jurisdiction of the court is challenged the same must be addressed first. The Supreme court decision in Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR in paragraph 68 held that jurisdiction of the court flows from either the Constitution or legislation or both. If the court then lacks jurisdiction it cannot grant any order in the application and the petition.
13. The Interested party submitted that the court lacked jurisdiction as there was no existence of employee employer relations between the parties. That the applicant was not an employee. That the appointed



chairman and directors were not employees of the interested party. The interested party relied on the decision of the court of appeal in Nakuru Civil Appeal No 60 of 2015 consolidated with No 61 of 2015 in [Rift Valley Water Services Board and 3 others V Geoffrey Osanyo and 2 others](#) .

14. On other hand the Applicant submitted the court had jurisdiction to handle his application and relied on the judgment by Lady Justice Hellen Wasilwa in [Okiya Omtatab Okoiti v President of Kenya & 4 others](#) (2019) e KLR where the judge found the directors in state corporations were employees hence the court had jurisdiction over the directors recruitment.
15. The applicant annexed the decision of Lady Justice Wasilwa in [Okiya Omtatab Okoiti v President of Kenya & 4 others](#) (2019) e KLR at page 32 of his petition documents. In that case the petitioner therein challenged the appointment of the chairman and Board members of the Kenya Trade Network Agency by the 1<sup>st</sup> respondent and the Cabinet Secretary National Treasury and the other respondents therein on ground that the recruitment lacked openness and fairness like the instant case. In that case just like the instant case the jurisdiction of the court was challenged for lack of employer employee relations. The trial judge relying on the definition of employee under the [Employment Act](#) to effect an employee is a person employed for wages and salaries noted that the members appointed as chairpersons and members of the board earn some sort of wages and retainer fees and in that respect they can be referred to as employees of government. The trial judge held the court had jurisdiction to deal with issues surrounding their appointment under section 12 of the Employment and [Labour Relations Act](#) (see paragraphs 40,41 and 42 of the judgment).
16. The interested party on the other hand relied on the decision by court of Appeal in Nakuru Civil Appeal No 60 of 2015 Consolidated with Civil Appeal No 61 of 2015 [Rift Valley Water Services Board and others v Geoffrey Asanyo and others](#) (delivered on the June 10, 2022 UR). This was an appeal where the trial court had held to have jurisdiction stating there was employer employee relationship. The 1<sup>st</sup> respondent at the appeal had been appointed to the Board as a director and had been removed. He had viewed his removal as a director as dismissal from employment. The Judge of the court held the 1<sup>st</sup> respondent was both an appointed director and a public officer and that the court had jurisdiction. The court of Appeal considered the issue and held that the 1<sup>st</sup> respondent was not an employee, that he was not employed by the company as an employee as there was no contract of service as envisaged under the definition of Employer under the [Employment Act](#) to wit:-

"employer means any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company;"

On the basis that there was no contract of service the court of Appeal held he was not an employee. The Court of Appeal held that the director had been appointed to the Board which was governed by the [Companies Act](#) and the company's memorandum and a articles of association and that the [Employment Act](#) did not apply to that relationship to confer the court jurisdiction. The court of Appeal held that directors are not employees of the company into whose board they are appointed and upheld the decision in *Mc Millan v Guest* (1942)AC p. 561 where it was held that:-

"the company director is an office holder who is not , without more, an employee of the company."

The Court of Appeal held that in absence of a contract of service in terms of which a director is engaged as full time employee of the company, it is not presumed that such a director is an employee of the company (paragraph 18, 19 and 20). The court of Appeal proceeded to find the court had no jurisdiction for lack of contract of service and allowed the appeal setting aside the decision of the court.



## Decision

17. The 1<sup>st</sup> respondent vide Gazette notice Vol CXXV-No 36 190 dated February 16, 2023 appointed the Chairman of the Board of the interested party one Alfred Khang'ati pursuant to section 6(1)(a) of the [State Corporations Act](#). By the same Gazette No 1906 dated February 13, 2023 the 2<sup>nd</sup> respondent appointed 7 persons as board members of the interested party pursuant to section 6(1)(e) of the [State Corporations Act](#) which states:-

- ‘6. Composition of Boards (1) Unless the written law by or under which a state corporation is established or the articles of association of a state corporation otherwise require, a Board shall, subject to subsection (4), consist of—
- (a) a chairman appointed by the President who shall be non-executive unless the President otherwise directs;
  - (e) not more than eleven other members not being employees of the state corporation, of whom not more than three shall be public officers, appointed by the Minister.’

18. The applicant /petitioner challenged the appointments before the court lack of openness, fairness, competitiveness and inclusivity in the recruitment by the 1<sup>st</sup> and 2<sup>nd</sup> respondents to the exclusion of the 3<sup>rd</sup> Respondent who he said had the role to recruit and forward the names for appointment. The interested party vide replying affidavit of Rita Mukhongo the acting company secretary stated it was a limited company and State corporation as provided in the memorandum and articles of association in which the government had 98% shareholding while FCB and Industrial Development Bank share the remaining 2%. That the shareholders enjoy certain rights and responsibilities under the memorandum and articles of association as well as the [Companies Act](#) including right to appoint and remove directors. That section 6 of the [State Corporations Act](#) governs how the board is to be appointed.

19. On jurisdiction the court derives its jurisdiction under section 12 of the [Employment and Labour Relations Court Act](#) legislated pursuant to Article 162(2)(b) of the [Constitution](#) as follows:-

‘Article 162. System of courts

- (1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2).
- (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—
  - (a) employment and labour relations; and
  - (b) the environment and the use and occupation of, and title to, land.
- (3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2)’

20. Section 12 of the [Employment and Labour Relations Court Act](#) delineates the jurisdiction of the court as follows:-

‘12. Jurisdiction of the Court



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

21. The court opines that the existence of employee employer relations is primal to the jurisdiction of the court. The Employment Act defines the term employee,

“an employee means a person employed for wages or a salary and includes an apprentice and indentured learner;”

and the term “employer” to mean:-

“any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company;”

The court then finds that from the definition of employee and employer other than earning wages and salary this employee ought to have a contract of service with the employer. The contract can be oral or written. The Employment Act defines “contract of service” to mean:-

“an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership but does not include a foreign contract of service to which Part XI of this Act applies;”



22. The applicant relied on the decision by Lady Justice Hellen Wasilwa who found that since the directors were on some wages and retainer fees they were employees in *Okiya Omtatab Okoiti v President of Kenya & 4 others* (2019) e KLR holding the court had jurisdiction.
23. The interested party relied on a recent decision by the Court of Appeal where it overturned decision of the court on account of lack of jurisdiction citing the lack of contract of service between the company with the director hence lack of employer employee relationship in Nakuru Civil Appeal No 60 of 2015 Consolidated with Civil Appeal No 61 of 2015 *Rift Valley Water Services Board and others v Geoffrey Asanyo and others* (delivered on the June 10, 2022 UR). The court of Appeal held that directors are not employees of the company into whose board they are appointed and relied the decision in *Mc Millan v Guest* (1942)AC p. 561 where it was held that,

‘the company director it is an office holder who is not , without more, an employee of the company’.

The court of Appeal held that in absence of a contract of service in terms of which a director is engaged as full time employee of the company, it is not presumed that such a director is an employee of the company(paragraph 18, 19 and 20).

24. I find the decision in *Omtatab* case(*supra*) did not factor in the definition of employer where there is a requirement of contract of service. Under the doctrine of stare decisis the court of Appeal decision is superior. I find the Court of Appeal in Nakuru Civil Appeal No 60 of 2015 Consolidated with Civil Appeal No 61 of 2015 *Rift Valley Water Services Board and others v Geoffrey Asanyo and others* (delivered on the June 10, 2022 UR) outlined the reasons why the court had no jurisdiction over directors of the board for lack of contract of service to serve as employees of the company and further relied on the decision in *Mc Millan v Guest* (1942)AC p. 561 where it was held that the company director is an office holder who is not, without more, an employee of the company. The court of Appeal proceeded to allow the appeal setting aside the decision of the court for lack of jurisdiction by dint of lack of employer employee relationship. I uphold to apply in the instant case the Court of Appeal decision for the foregoing reasons.
25. In the instant case the appointment challenged are of chairman and the directors of the interested party which is both a company and a state corporation. The court applying the court of Appeal decision in Nakuru Civil Appeal No 60 of 2015 Consolidated with Civil Appeal No 61 of 2015 *Rift Valley Water Services Board and others v Geoffrey Asanyo and others* (delivered on the June 10, 2022 UR) holds that the chairman and the directors of the board are not employees of the interested party in whose Board they have been appointed to serve by the 1<sup>st</sup> and 2<sup>nd</sup> respondents hence the court lacks jurisdiction to handle determine the petition for lack of employer employee relationship. Consequently the court also lacks jurisdiction to grant the temporary conservatory orders sought in the application.
26. Without jurisdiction the court cannot take any more step as held by Nyarangi A in *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] eKLR,

‘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 pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.’

Now I have no choice but to down my pen, which I hereby do, at this instance for lack of existence of employer employee relationship in the challenged appointments to the position of chairman and directors and the interested party.



26. Consequently, the application dated May 3, 2023 is dismissed for lack of jurisdiction and the petition of even date struck out for want of jurisdiction.
27. I have considered that the applicant/ petitioner brought the petition in public interest and did not find any evidence of impunity on his part and for that reason I order each party to bear own costs in the application and the petition.
28. Right of appeal in 30 days.
29. It is so Ordered.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 27<sup>TH</sup> DAY OF JULY 2023.**

**JEMIMAH KELI**

**JUDGE**

In the presence of: -

Petitioner /Applicant :- in person present

Respondent: Murunga Advocate

