



**Kamwaro v Embu Water and Sanitation Co Ltd (Constitutional Petition
E008 of 2023) [2023] KEELRC 2298 (KLR) (29 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2298 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
CONSTITUTIONAL PETITION E008 OF 2023
ON MAKAU, J
SEPTEMBER 29, 2023**

BETWEEN

JOSPHAT NTHIGA KAMWARO PETITIONER

AND

EMBU WATER AND SANITATION CO LTD RESPONDENT

JUDGMENT

1. The petitioner describes himself as a resident of Embu County and 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 in Embu County, within the meaning of section 79 and 154 of the *Water Act*, 2016.
2. The respondent advertised the position of its Managing Director in the Daily Nation Newspaper on April 3, 2023. The advert set out the duties and responsibilities of the Managing Director and the required academic qualifications plus 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 pleased and brought this petition seeking for the quashing of the advert contending that it was discriminatory contrary to article 27 of *the Constitution* as it raised the requirement of work experience from 5 years to 10 years in order to exclude potential applicants within the company staff. The petitioner also filed an interlocutory motion seeking conservatory injunctive orders. The bone of contention in the petition is that the advert was based on an obsolete Memorandum and Articles of Association which had been amended.
4. After hearing the motion interpartes, I dismissed it on grounds that the memorandum and articles filed by the respondent were the correct ones. Thereafter, the respondent completed the recruitment



process and appointed a substantial Managing Director who has sworn an affidavit to supplement the Replying Affidavit that had been filed by his predecessor in title.

5. The petitioner has also filed a further affidavit in support of his petition. Both parties have filed written submissions. The issues for determination in this petition are:
 - a. Whether the petition is moot.
 - b. Whether the petitioner is entitled to the remedy sought by the petition.

Whether the petition is moot

6. In my ruling delivered on May 19, 2023, I held that the petitioner had not made out a prima facie case because on the face value, the Amended Memorandum and Articles of Association relied upon to seek conservatory orders was not authentic and validated by registration at the Company Registry. I further held that subject to further evidence adduced during the hearing of the petition, the copy of memorandum and articles of association filed by the respondent was the valid one.
7. As observed above, the petitioner filed a further supporting Affidavit sworn on June 8, 2023. I have carefully gone through the said Affidavit carefully and I did not see improvement on the evidence filed with the petition in April, 2023. All what I see in the new affidavit is a repeat of the averments in the earlier Affidavit and the petition.
8. In view of the analysis of the contested Memorandum and Articles of Association in my earlier ruling, one would have expected the petitioner to be more diligent. He should have obtained evidence from the companies registry to prove that the Memorandum and articles of association allegedly amended on February 12, 2021 was duly registered in the companies registry.
9. The allegation that the respondent's counsel had used the said Memorandum and Articles of Association in another suit does not render the same to be duly registered. The fact remains as it was in my earlier ruling that there is no evidence adduced to prove that the memorandum and articles of Association allegedly amended on February 12, 2021 was ever registered at the Company Registry. Section 24 (1) of the *Companies Act* provides that:

“If a company amends its articles, the company shall lodge with the Registrar for registration a copy of the articles as amended not later than fourteen days after the resolution containing the amendment is passed.”
10. Without any evidence to prove that the alleged amendment of the Memorandum and articles of association by a resolution passed on February 12, 2021, was duly registered, I find and hold that the petition is just a moot case. The position remains as in my earlier ruling on May 19, 2023 that the version of the Memorandum and Articles of Association filed by the respondent is the correct version since it was duly registered with the registrar of *Companies Act*. In that respect, the case for alleged discrimination fall on its face.

Reliefs

11. In view of the foregoing matters, the petitioner loses his right to any of the remedies sought. Consequently, I dismiss the petition but with no order as to costs because the petition is a public litigation suit.

DATED, SIGNED AND DELIVERED AT NYERI THIS 29TH DAY OF SEPTEMBER, 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 judgment 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

