



**Mwambire v Malindi Water & Sewerage Co Ltd & 3 others (Petition E002 of 2023) [2023] KEELRC 2430 (KLR) (5 October 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2430 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI  
PETITION E002 OF 2023  
AK NZEI, J  
OCTOBER 5, 2023**

**BETWEEN**

**GERALD MWAMBIRE ..... PETITIONER**

**AND**

**MALINDI WATER & SEWERAGE CO LTD ..... 1<sup>ST</sup> RESPONDENT**

**COUNTY SECRETARY & HEAD OF COUNTY PUBLIC SERVICE KILIFI  
COUNTY ..... 2<sup>ND</sup> RESPONDENT**

**ISAAC CHIBULE ..... 3<sup>RD</sup> RESPONDENT**

**COUNTY GOVERNMENT OF KILIFI ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. The application before me is the Petitioner’s Notice of Motion dated 20/4/2023. The following orders are sought:-
  - a. that the Court be pleased to certify the application as urgent due to its nature and circumstances, and direct that the same be heard ex-parte at the first instance.
  - b. that pending inter-partes hearing of the application, the Court be pleased to issue a temporary conservative order against the Respondents, their agents, servants, employees and/or any other person acting on their behalf from terminating, removing, ejecting out of the office and/or interfering in any manner with the Applicant’s employment contract of five years commencing on 1<sup>st</sup> September 2022.
  - c. that pending hearing and determination of this application, the Honourable Court be pleased to issue temporary conservative orders against the Respondents, their agents, servants, employees and/or any other person acting on their behalf from terminating, removing, ejecting



out of office and/or interfering in any manner with the Applicant's employment contract of five years commencing on 1<sup>st</sup> September 2022.

- d. that pending hearing and determination of the petition, the Honourable Court be pleased to issue conservative orders against the Respondents, their agents, employees, servants and/or any other person from terminating, removing, ejecting out of office and/or interfering in any manner with the Applicant's employment contract of five years commencing on 1<sup>st</sup> September 2022.
  - e. that costs of the application be in the course.
2. The application, which is expressed to be brought under Article 159 of *the Constitution* of Kenya, is premised on the Petitioner/Applicant's supporting affidavit sworn on 20/4/2023 and a further affidavit sworn on 2/6/2023. It is deponed in the supporting affidavit, inter alia:-
- a. that the Petitioner/Applicant is the 1<sup>st</sup> Respondent's Managing Director having been appointed as such on 28/8/2017 for a five year term commencing on 25/8/2017.
  - b. that the Petitioner/Applicant served diligently as the Managing Director, and that on 1/3/2022, he (the Petitioner) requested the 1<sup>st</sup> Respondent to renew his contract once it lapsed to avoid the position being declared vacant. That the 1<sup>st</sup> Respondent informed the relevant department of the request and on or about 18/7/2022, the said department's heads were requested to attend an ad hoc Committee meeting on 20<sup>th</sup> to 22<sup>nd</sup> July 2022 for the Petitioner/Applicant's evaluation as Managing Director.
  - c. that the committee met on 27/7/2022 to discuss the evaluation process and that upon deliberations, the committee recommended that the Petitioner/Applicant's contract be renewed for a further period of five (5) years commencing on 1/9/2022 to 31/8/2027.
  - d. that on 5/8/2022, the Petitioner/Applicant was issued with a re-appointment letter as Managing Director which has never been revoked by the 1<sup>st</sup> Respondent or any other person.
  - e. that vide a letter dated 12/9/2022, the 3<sup>rd</sup> Respondent informed the Petitioner/Applicant that the Petitioner/Applicant's contract had been extended for a period of six(6) months.
  - f. that the Petitioner/Applicant has never entered into any contract with the 3<sup>rd</sup> Respondent, and that the Petitioner/Applicant is apprehensive that there is a political instigation against him, aimed at removing him from office.
  - g. the on 14/4/2023, the 3<sup>rd</sup> Respondent wrote to the 1<sup>st</sup> Respondent requesting it to implement the contents of the letter dated 12/9/2022.
  - h. that on 17/4/2023, the 1<sup>st</sup> Respondent informed the Petitioner/Applicant that upon deliberations on 14/4/2023 in a Board Meeting, it had been agreed that the Petitioner/Applicant's contract was not renewable and/or should not be extended; and in the letter congratulated the Petitioner/Applicant for serving the 1<sup>st</sup> Respondent with diligent.
  - i. that the Petitioner/Applicant is in the process of being ejected and/or removed from office unfairly as he has been asked to hand over.
  - j. that the Petitioner/Applicant has a Constitutional right to fair administrative action and process.



3. Documents annexed to the Petitioner/Applicant's supporting affidavit reproduced in paragraph 2 herein include copies of the documents mentioned in the said affidavit. Of particular importance to this Court regarding the orders sought herein is the 1<sup>st</sup> Respondent's letter dated 5/8/2022 re-appointing the claimant' as the 1<sup>st</sup> Respondent's Managing Director for a period of five(5) years commencing 1<sup>st</sup> September 2022. The letter, duly executed by the 1<sup>st</sup> Respondent, requested the Petitioner to execute the same and to return a duplicate copy thereof to the 1<sup>st</sup> Respondent on or before 19/8/2022 if he accepted the offer (of appointment) and terms and conditions therein stipulated. The Petitioner/Applicant is shown to have executed the letter/contract of employment on 18/8/2022.
4. I certified the application as urgent on 25/4/2023 and directed that the same be served, and subsequently issued interim orders on 4/5/2023; to subsist pending hearing and determination of the application herein.
5. The application is opposed by the Respondents vide ground of opposition dated 16/5/2023 and the 3<sup>rd</sup> Respondent's replying affidavit sworn on even date. It is deponed in the said replying affidavit, in which the 3<sup>rd</sup> Respondent describes himself as the 1<sup>st</sup> Respondent's Acting Managing Director, inter-alia:-
  - a. that the 1<sup>st</sup> Respondent is a private limited liability company, registered on 24/8/2005, and that the 4<sup>th</sup> Respondent is the majority shareholder in the 1<sup>st</sup> Respondent company.
  - b. that Article 68 of the 1<sup>st</sup> Respondent's Articles of Association provides that "the Board of Directors shall appoint a Managing Director through competitive advertising in the national media to manage the company, for remunerations by way of salary and allowances, subject to such terms as may be agreed upon, and likewise may revoke any such appointment in accordance with the terms and conditions of employment of the company which will have been agreed with the Coast Water Services Board or its successors/assignees."
  - c. that the Applicant was appointed to the position of Managing Director of the 1<sup>st</sup> Respondent for a duration of five(5) years commencing 1/9/2017, that he was appointed by the 1<sup>st</sup> Respondent's Board of Directors following the Boards meeting held on 25/8/2017.
  - d. that the Human Resource Policy and Procedure Manual in Clause 3.5 provides that the 1<sup>st</sup> Respondent's Board of Directors will be responsible for specific roles as provided in the Mwongozo, WASREB'S Corporate Governance Guidelines issued from time to time, and that Clause 1.5 of the Mwongozo Code of Governance for State Corporations on term limits for Board members is two terms of three years each.
  - e. that eight named member of the 1<sup>st</sup> Respondent's Board of Directors were appointed for a three (3) years term at the 1<sup>st</sup> Respondent's 5<sup>th</sup> Annual General Meeting held on 5/3/2019.
  - f. that after 4/3/2022, there was no validly constituted Board of Directors of the 1<sup>st</sup> Respondent as the then directors' term had expired on 4/3/2022; and that no entity could purport to exercise directoral functions, and any action taken on 18/7/2022 and 4/8/2022 by the directors was null and void.
  - g. that the person who purportedly executed the letter dated 5/8/2022 was neither the chairperson of the 1<sup>st</sup> Respondent's Board of Directors nor authorized to bind the Board of Directors.





demonstrated was a culmination of both departmental evaluation of the Applicant as the Managing Director and the 1<sup>st</sup> Respondent's Board of Director's deliberations and resolution, is shown to have been signed by the chairperson of the Board of Directors.

11. The 1<sup>st</sup> and the 3<sup>rd</sup> Respondents challenged the validity and legality of the said letter of appointment dated 5/8/2022, stating that the decision/resolution to re-appoint the Applicant had been made by a Board of Director whose three year term in office had lapsed. To buttress this point, the 1<sup>st</sup> and the 3<sup>rd</sup> Respondents referred to what they called Mwongozo, a document it associated with another organization – WASREB's Corporate Governance Guidelines, and Government Policy Guidelines. It is to be noted that according to the 3<sup>rd</sup> Respondent's depositions herein, the 1<sup>st</sup> Respondent is a private limited liability company.
12. Nothing was presented before the Court to suggest that the 1<sup>st</sup> Respondent's Board of Directors was an illegal outfit as at 4/8/2022 when the resolution to re-appoint the Applicant was made. Indeed, the Applicant demonstrated that the 1<sup>st</sup> Respondent's Board of Directors continued discharging its functions until 24/3/2023 when an Annual General Meeting of the 1<sup>st</sup> Respondent company was convened for 24/3/2023 to elect new directions, among other agenda for the day.
13. It is to be noted that the 3<sup>rd</sup> Respondent did not tell the Court how, when and who appointed him as an "acting Managing Director" if there was no valid Board of Directors as at March 2022. He exhibited a letter he wrote on 6/9/2022 wherein he referred to himself as "Acting Managing Director."
14. It is my finding that the Petitioner/Applicant's five year contract of employment dated 5/8/2022 and duly executed by the Applicant on 18/8/2022; and whose terms are not shown to have been varied, either in consultation with the Applicant pursuant to Section 10(5) of the Employment Act or at all, is, and remains valid until it either lapses by effluxion of time or is terminated in accordance with the terms and conditions therein.
15. The 3<sup>rd</sup> Respondent's allegation that the Applicant's contract of employment was in September 2022 extended for a period of six months cannot hold as facts presented to this Court demonstrated that there was already a five-year running contract of employment between the Applicant and the 1<sup>st</sup> Respondent which commenced on 1/9/2022. Prima facie, the Petitioner/Applicant has established that he has an arguable case that is worthy a day in Court, and has a possibility of success upon full hearing. The Applicant stands to suffer irreparably if orders sought in the application are not granted because, as he puts it, he will be removed and/or ejected out of office and yet he has a subsisting contract of employment.
16. The alleged "invalidity" of the contract of employment shall, in my view, be tested in a full trial upon presentation of evidence by both parties.
17. I say full trial because what the Petitioner/Applicant filed in this Court is an ordinary employment suit clothed and presented as a constitutional petition. In determining the suit herein, the Court will purely be guided by the provisions of the Employment Act 2007, which is the basic law/statute governing employer/employee relationships. As the Court of Appeal stated in the case of Summaya Athman Hassan v Paul Masinde Simidi & another [2019] eKLR:-

"The Article 41 rights are enacted in the Employment Act and Labour Relations Act. The two Acts and the rules made thereunder provide adequate remedy and orderly enforcement mechanisms. The 1<sup>st</sup> Respondent filed a petition directly relying on the provisions of the constitution for enforcement of contractual rights governed by the Employment Act without seeking a declaration of invalidity of the provisions of the Employment Act or alleging that



the remedies provided therein are inadequate. The petition did not raise any question of the interpretation or application of *the Constitution*. We adopt and uphold the general principle in the persuasive authority in *Barbara De Klerk (supra)* that where legislation has been enacted to give effect to a constitutional right, it is not permissible for a litigant to found a cause of action directly on *the constitution* without challenging the legislation in question. That principle has been reinforced by the Supreme Court in the *Communications Commission Case (supra)*.”

18. In my view, the principles governing the grant or denial of the orders sought in the Applicant’s application are those governing the grant of orders of injunction as opposed to those governing the grant of conservatory orders in constitutional petitions, though to some extent the two sets of principles may appear to overlap. It was held in *Giella v Casman Brown & Co. Ltd* [1973] E.A 358 that an applicant seeking injunctive orders must show a *prima facie* with a probability of success, that he might suffer irreparable injury if the order is not granted, and that if the Court is in doubt, it will decide the application in the balance of convenience.
19. As already stated herein, the Applicant has demonstrated that he has a *prima facie* case that has a probability of success, and that he stands to suffer irreparably if orders sought are not granted as he will be removed from and/or ejected out of office. The Respondents have not denied the allegation by the Applicant that they are keen on removing him from office. Indeed, the Respondents have maintained that there is no valid contract of employment between the Applicant and the 1<sup>st</sup> Respondent. This, in my view, confirms and demonstrates the Respondents’ resolve to remove the Applicant from the office of the 1<sup>st</sup> Respondent’s Managing Director. Courts must always lean towards preservation of employment contracts except in exceptional cases where the employer demonstrates an employee’s incompatibility. The 1<sup>st</sup> Respondent did not address the Court on this issue. No amount of damages, in my view, can compensate for lost employment, though an award of compensation for loss of employment may, to some extent, ameliorate and/or make the damage caused by loss of a job more tolerable in monetary terms. It must always be noted that the damage caused by an employee’s loss of employment is multifaceted. It leads to inability by the employee to live a dignified life, and, needless to say, crushes the employee’s self esteem. Such damage can never be adequately quantified in monetary terms and cannot be compensated in damages.
20. Having said that, and having considered written submissions filed by Counsel for the parties herein, I allow the Applicant’s Notice of Motion in the following terms:-
  - a. pending hearing and determination of the petition herein, an order is hereby issued against the Respondents, their agents, employees, servants and/or any other person restraining them from terminating, removing or ejecting the Applicant out of office or in any manner interfering with the Applicant’s five years’ employment contract commencing on 1<sup>st</sup> September 2022.
  - b. posts of the application will be in the petition.
21. The petition shall be fast tracked, and shall be fixed for hearing on priority basis.
22. Orders accordingly

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 5<sup>TH</sup> OCTOBER 2023**

**AGNES KITIKU NZEI**

**JUDGE**

**ORDER**



This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

Appearance:

..... for Petitioner

..... Respondent

