



**Siele v County Secretary, Kericho County & 3 others (Employment and Labour Relations  
Petition E005 of 2023) [2023] KEELRC 3379 (KLR) (19 December 2023) (Ruling)**

Neutral citation: [2023] KEELRC 3379 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO  
EMPLOYMENT AND LABOUR RELATIONS PETITION E005 OF 2023**

**HS WASILWA, J**

**DECEMBER 19, 2023**

**IN THE MATTER OF ARTICLES 2, 3,10, 19, 20, 21, 22(1)  
23(1)(3), 25 27(1) AND (2) 28, 29, 41(1),47,48, 159 (1)&(2)  
(A),(B) AND (E) &165(3)(A)&(B) OF THE CONSTITUTION OF  
KENYA, 2010**

**AND**

**IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL  
RIGHTS AND FREEDOMS UNDER ARTICLES 20, 21, 22(1),  
23(1)&(3),25, 27(1)&(2), 28, 29, 41(1), 47, 48, OF THE  
CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA AND IN  
THE MATTER OF THE ALLEGED CONTRAVENTION OF THE  
CONSTITUTION AND IN THE MATTER OF EMPLOYMENT ACT  
2007**

**BETWEEN**

**KIBII CHEPKWONY SIELE ..... PETITIONER**

**AND**

**THE COUNTY SECRETARY, KERICHO COUNTY ..... 1<sup>ST</sup> RESPONDENT  
COUNTY EXECUTIVE COMMITTEE MEMBER IN CHARGE OF FINANCE  
AND ECONOMIC PLANNING ..... 2<sup>ND</sup> RESPONDENT**



**COUNTY EXECUTIVE MEMBER IN CHARGE OF WATER AND ENVIRONMENT ..... 3<sup>RD</sup> RESPONDENT**

**CHAIRPERSON, BOARD OF DIRECTORS KERICHO WATER AND SANITATION COMPANY LTD ..... 4<sup>TH</sup> RESPONDENT**

### **RULING**

1. The petitioner/Applicant sued the Respondent by a petition dated 14<sup>th</sup> July, 2023 seeking interalia to restrain the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondent from interfering with his employment. Contemporaneously, he filed a Notice of motion date 14<sup>th</sup> July, 2023, seeking for the following orders; -
  1. Spent
  2. This Honourable court be pleased to issue a conservatory order restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents from interfering with the employment of the petitioner through a general meeting of the company or any other way than through a resolution of the board of directors pending the inter partes hearing of this Application.
  3. This Honourable court be pleased to issue a conservatory order restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents from interfering with the employment of the petitioner through a general meeting of the company or any other way than through a resolution of the board of directors pending the hearing and determination of this Application.
  4. This Honourable court be placed to issue a conservatory order restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents from interfering with the employment of the petitioner through a general meeting of the company or any other way than through a resolution of the board of directors pending the hearing and determination of this petition.
  5. The OCS Kericho do assist in the enforcement of this court's orders.
  6. This court be pleased to issue any other necessary orders it deems fit to issue.
  7. That cost of this application be provided for.
2. The Application is premised on the grounds on the face of the application and the Affidavit of Applicant deposed upon on the 14<sup>th</sup> July, 2023.
3. The Applicant stated that he was employed as the Managing Director of the water company by the board of directors on 26/6/2020 for a contract period of five (9) years.
4. That even though he faced several challenges bedevilling many water companies he did his job diligently earning him a rating of 94%.
5. He stated that he was under direction and answerable to the board of directors whose powers include to approve his leave and appointing a person to act in his place. He added that it is the same Board of directors that is empowered to commence and preside over the disciplinary process against him.
6. He states that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are new in their offices, having come in with the new governor and from their conduct and correspondence, they have their own preferred choice of the person to preside over the water company and have tried severally to get rid of him.



7. He stated that the attempt to get rid of him was seen when the 1<sup>st</sup> Respondent, having not been formally appointed by the County, gate-crashed the board meeting held on 14/6/2023 and introduced the agenda of sending the petitioner on administrative leave. However, majority members of the board rejected his proposal.
8. A second attempt was seen when the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> called for a special general meeting with only one agenda to send the petitioner on administrative leave and to replace him with one David Siele.
9. He avers that the purported administrative leave is not known in the *employment Act* and the proper process is to suspend him pending any investigation but all this must be through the resolution of the board of directors and not a general meeting. He added that even if the general meeting of shareholders were to make any resolution, they will still have to revert back to the board of directors for their own majority resolution.
10. He stated that he is currently on annual leave and his duties are being undertaken by another person in acting capacity as such the need to place him on leave was not warranted.
11. He stated that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondent represent the shareholders, while the day to day running of the company is in the hands of the directors.
12. Based on the foregoing the applicant urged this court to declare the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents as representative of the shareholders and that they have no direct powers to interfere with the employment of the petitioner. Thus the intention to replace the petitioner as the managing director of the water via a general meeting and not a resolution of the board of directors is unlawful, unprocedural and unfair.
13. He stated that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are bound to observe and practice good governance as envisaged in Article 10 of *the Constitution* and comply with the relevant provisions of the *Employment Act*, 2007 with regard to fair procedure, while he is entitled to fair administrative action and fair labour practices as envisaged in Articles 47 and 41 of the Kenya Constitution 2010.
14. He contends that the manner in which the Respondents intends to proceed in removing him is illegal and in contravention of his fundamental rights, *the Constitution* and the basic tenets of the rules of natural justice. He thus urged this Court to allow the application as prayed.
15. The Application is opposed by the Respondent who filed a replying affidavit and raise a Notice of preliminary Objection dated 27<sup>th</sup> July, 2023 based on the following grounds; -
  1. The Petition is sub judice there being another Petition filed at the High Court of Kenya at Kericho, to wit Constitutional Petition No. E010 of 2023, over the same subject-matter.
  2. This Honourable Court lacks the requisite jurisdiction to interfere with the internal affairs of the 4<sup>th</sup> Respondent.
  3. The instant Petition offends the mandatory provisions of Sections 82 and 121 of the *Water Act*, 2016.
  4. The Petition is premature, bad in law, incompetent, fatally defective in limine, frivolous, vexatious and an abuse of Court process.
16. Directions were taken on the 12<sup>th</sup> October, 2023, for the preliminary objection to be disposed first, as such the parties filed written submission on the Preliminary objection with the Respondent filling on the 25<sup>th</sup> September, 2023 and the Petitioner filling submissions on 4<sup>th</sup> October, 2023 and some further submissions on the 12<sup>th</sup> October, 2023.



## Respondents' Submissions.

17. The Respondents submitted from the onset that it is trite law that a preliminary objection can be raised by a party at any stage of the proceedings and should be based on pure point of law that can dispose of the entire case. This position was espoused in the celebrated case of *Mukisa Biscuits Manufacturing Co. Ltd –Vs- West End Distributors* (1969) E.A. 696 where Law JA stated;  

“...preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or plea of limitation or submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”
18. On the Issue of subjudice, it was submitted that on or about 5<sup>th</sup> July, 2023, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, being the representatives of the County Government of Kericho, a shareholder of the 4<sup>th</sup> Respondent, issued a special notice under Section 139 (2) of the *Companies Act*, 2015 to the Board of Directors of the 4<sup>th</sup> Respondent to convene a Special General Meeting in line with Article 42 of its Articles of Association for the purpose of placing its Managing Director, the Petitioner herein, on administrative leave for a period of 90 days to pave way for investigation into the management of the Interested Party as recommended by the Senate and the Water Services Regulatory Board.
19. Pursuant to the said notice, a party named Eric Kipkurui Ngeny instituted Constitutional Petition No. E010 of 2023 on 13 July, 2023, on behalf of the petitioner herein, at the High Court of Kenya at Kericho, seeking to restrain the Respondents from proceedings with the suspension of the Petitioner herein.
20. Despite having a suit seeking for similar prayers instituted in Kericho High Court, the petitioner herein instituted this suit on 14<sup>th</sup> July, 2023 seeking similar prayers to restrain the Respondents from interfering with his employment, which subsequent suit is in violation of Section 6 of the *Civil Procedure Act*.
21. He argued that the matter in issue in this Petition is directly and substantially in issue in the High Court Constitutional Petition No. E010 of 2023 and the reliefs sought in this Petition are essentially similar to the reliefs sought in the High Court Constitutional Petition No. E010 of 2023, therefore this petition is subjudice. To support this, the Respondent relied on the case of *Kenya National Commission on Human Rights Vs Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)* [2020] eKLR, as quoted by Hon. S. N. Mutuku, J in *A. N. N. v R. M. K.* [2021] eKLR, the Supreme Court of Kenya stated as follows:

“The term ‘sub-judice’ is defined in Black’s Law Dictionary 9<sup>th</sup> Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other: that both suits are



pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives."

22. Accordingly, that there is an extremely high likelihood of conflicting decisions being rendered in this petition and the High Court Constitutional Petition No. E10 of 2023.
23. The Respondent also submitted that the 4<sup>th</sup> Respondent is a limited liability company incorporated by the County Government of Kericho under the [Companies Act](#), 2015 pursuant to the provisions of Section 77 (1) of the [Water Act](#), 2016, where the County Government of Kericho holds - 99.99% of all the shares of the 4<sup>th</sup> Respondent. Therefore, that the operations and management of the affairs of the 4<sup>th</sup> Respondent are governed by its Memorandum and Articles of Association dated 2<sup>nd</sup> November, 2018.
24. Having said that, the Respondent argued that the Petition has been precipitated by a notice issued by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, as representatives of the County Government of Kericho which is a shareholder of the 4<sup>th</sup> Respondent, seeking to requisition a Special General Meeting for the purposes of placing the Petitioner on administrative leave for a period of 90 days to pave way for investigations into the management of the 4<sup>th</sup> Respondent. These, he argued, are internal processes of the 4<sup>th</sup> Respondent which this Court is being asked to restrain, when the court does not have powers to interfere with the internal affairs of a company.
25. He argued that all allegations of political interference alleged by the Petitioner are only meant to cloud the mind of the court and muddy the real issues. He added that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have adhered to the legal principles of company law espoused under Section 139 of the [Companies Act](#), therefore that Respondents have not acted in excess of their powers. To support this argument, they relied on the case of *Paolo Muni v Gian Battista Murri & Another* [2000] eKLR, the Court of Appeal held as follows:

“Upon a careful consideration of the petition it is plain and obvious that basically this is a dispute about the internal management of the company and a court does not interfere with the internal management of the company acting within its powers: see the rule in *Foss v Harbottle* (1843) 2 Hare 261, Facts necessary to support intervention by the court, e.g. ultra vires or fraud have not been pleaded.”
26. The Respondent also relied on the decision by F. Tuiyott, J [Samuel Gutu Macharia & 4 others v Patrick G. Mwangi & 7 others](#) [2017] eKLR, where the learned Judge held that:-

“The decision in [Re K Boat Service](#) [1998] eKLR cited by the plaintiffs is reminder that as a general rule Courts will not interfere with the internal affairs of a company. The decision however sets out when an intervention is necessary and Kuloba J. renders himself as follows; “Courts will interfere only where the act complained of is ultra vires or is of a fraudulent character or not rectifiable by ordinary resolution. It is really very important to companies and to the economy of the Country in general, that the Court should not, unless a very strong case is made out on the facts pleaded and proved or admitted, take upon itself to interfere with the domestic forum which has been established for the management of the affairs of a company. Accordingly, acts by or on behalf of a company which requires the authority of a resolution of the company are done without it, or are otherwise irregular but which can be regularized by the Company at a general meeting and without a special resolution and are neither ultra vires nor of a fraudulent character are not a ground for the Court’s interference upon a winding up petition(which is not this case) or a petition



to remove a director by a minority shareholder(as in the present case) under the “just and equitable rule”. If the various acts which have been irregularly carried out by the company are not acts which are ultra vires the Company, nor are they acts which require special resolutions of the Company, or no fraud has been disclosed with regard to those irregularities, those irregularities should be regularized or nullified by the Company at a General Meeting as established in the rule in *Foss v Harboftile*, (1843X 2 Hare 461, and also explained by James, LJ, in *In re Lemgham Skating Rink Co*, (1877), 5 Ch D685: *Cole v RC Irving & Co Ltd and others*, 1970(2) AL R Comm 422”.

27. Accordingly, that this Petition is a non-starter as the Petitioner seeks for this Honourable Court to prevent the County Government of Kericho, a shareholder of the 4<sup>th</sup> Respondent, from requisitioning a Special General Meeting to investigate the management of the 4<sup>th</sup> Respondent. Additionally, that the County Government of Kericho is constitutionally and statutorily mandated to provide water services under Article 186 (1) and the Fourth Schedule, Part 2, Paragraph 11 (b) of *the Constitution* of Kenya and Section 77 (1) of the *Water Act*, which it exercises that mandated through the 4<sup>th</sup> Respondent.
28. The Respondent also questioned the jurisdiction of this Court to handle this petition and submitted that these proceedings have been commenced pursuant to the *Water Act*, 2016 as can be gleaned from the facts herein. The *Water Act* provides for a procedure of resolving disputes thereunder. Section 70 of the Act establishes the Water Services Regulatory Board (WASREB) which is mandated under section 82 to hear disputes under the Act. Therefore, that since the interested Party herein is a ‘water services provider’ within the meaning of the Act. Any party aggrieved with its decisions ought to appeal to WASREB in the first instance. To support this view, the Respondent relied on the case of *Augustin Michael Murandi & 2 Others v Nolturesh Loitoktok Water and Sanitation Co. Ltd (Successor in Title of National Water Conservation and Pipeline Conservation)* [2017] Eklr.
29. Similarly, that the issues in this Petition are properly within the jurisdiction of WASREB and the Water Tribunal and the allegations of constitutional infringement does not oust the jurisdiction of either WASREB or the Water Tribunal
30. In light of the foregoing, the Respondent submitted that preliminary objection is merited and urged this Court to uphold it and dismiss the suit with costs to the Respondent.

#### **Petitioner Submissions.**

31. The petitioner narrated background of representation of the Respondents and stated that when the Respondents were served with the pleadings herein, the firm of Ken Ochieng & Co. Advocates filed a memorandum of appearance ostensibly on behalf of all the respondents and raised this preliminary objection purporting to have been instructed by all the respondents. However, when the matter came up before court on 31<sup>st</sup> July, 2022, it became apparent that the firm of Ken Ochieng & Co. Advocates was not seized with instructions to represent the 4<sup>th</sup> Respondent herein, a fact which was confirmed when the firm of Nchogu, Omwanza and Nyasimi Advocates, filed a memorandum of appearance on behalf of the 4<sup>th</sup> Respondent.
32. He argued that the import of the issue of representation means that the firm of Ken Ochieng & Co. Advocates have no instructions to raise the issue of whether the 4<sup>th</sup> Respondent have the capacity to be sued.
33. On the substance of the preliminary objection, it was submitted that the right forum to litigate on the issue raised in this petition and the High Court petition is in this Court. He added that the petitioners in the suits are different and therefore in case this court finds the issues are similar, then the High Court



- file is the one that ought to be transferred to this Court, because the main issue is the removal of the Petitioner which is an employment matter.
34. The petitioner maintained that the firm of Ken Ochieng & Co. Advocates have no instructions to litigate on behalf of the 4<sup>th</sup> Respondent. Nonetheless, that the 4<sup>th</sup> Respondent is a legal person and is being sued herein as an employer.
  35. He argued that contrary to the arguments by the Respondents, it is apparent that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are the ones who are hell-bent to interfere with the affairs of the 4<sup>th</sup> respondent by unlawfully trying to replace the petitioner as the MD.
  36. He also submitted that the Reference to sections 82 and 121 of the Water Act 2016 and relevance to this petition is generally misplaced and completely irrelevant because the said Act and particular sections apply to customers who have been aggrieved by water service providers in provision of water services to appeal to the Water Tribunal. He maintained that the current petition is purely a labour dispute and is specifically focused on the abuse of powers by the majority shareholders of the petitioner's employer. Therefore, the whole point raised herein is irrelevant as the water tribunal has no jurisdiction over employment disputes.
  37. Based on the foregoing, the petitioner submitted that the preliminary objection falls way below the standard provided by law as it raises issues of facts and not substantive points of law. Thus it lacks merit and should be dismissed with costs to the petitioner.
  38. In the further submissions, the Petitioner submitted that upon perusal of the High Court Petition Number E 010 of 2023 filed by Eric Kipkurui Ngeny, it was noted that the same is a constitutional petition raising a raft of issues including; ownership of public properties, running of a public limited company, governance issues, national values amongst other issues. Thus, it has no bearing to the instant employment and labour relations case save that the respondents have been sued though in different capacities.
  39. Moreover, that the Respondents have mischievously raised a P.O. in the High Court Petition claiming that the high court petition is subjudice because of the instant petition.
  40. Based on this, the Petitioner urged this Court to dismiss the P.O. and allow the Application and the petition to be heard and determined on merit.
  41. I have considered the averments of the parties herein.
  42. The preliminary objection has been raised by the respondents herein arguing that this court lacks jurisdiction to handle this matter.
  43. Mischievously however the same respondents have raised another preliminary objection before the High Court in Kericho that the same court also lacks jurisdiction to handle this matter.
  44. The issue raised herein however relates to the employment status of the claimant and it matters not whether the employment is by a private entity, the state or a company. This court assumes jurisdiction where the issue is between an employee and an employer as provided for under article 162 (2) of the constitution of Kenya and Section 12 of the ELRC Act.
  45. It is my finding that the preliminary objection raised lacks merit and I dismiss it accordingly and direct the hearing to proceed.

**RULING DELIVERED VIRTUALLY THIS 19<sup>TH</sup> DAY OF DECEMBER, 2023.**

**HON. LADY JUSTICE HELLEN WASILWA**



**JUDGE**

