



Okumu & 8 others v Badi, Director General Nairobi Metropolitan Services & 15 others; Nairobi City County & 12 others (Interested Parties); Okiiti (Exparte) (Petition 94 of 2020 & Miscellaneous Civil Application 60 of 2020 (Consolidated)) [2022] KEELRC 1 (KLR) (31 January 2022) (Judgment)

Beryl Lilian Okumu & 7 others v Mohammed Abdalla Badi, Director General Nairobi Metropolitan Services & 14 others Ex parte Okiya Omtatah Okiiti; Nairobi City County & 3 others (Interested Parties) [2022] eKLR

Neutral citation: [2022] KEELRC 1 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION 94 OF 2020 & MISCELLANEOUS CIVIL APPLICATION 60 OF 2020 (CONSOLIDATED)

MA ONYANGO, JA

JANUARY 31, 2022

IN THE MATTER OF: ARTICLES 1, 2, 3(1), 10, 19, 20, 21, 23, 27, 28, 41(1) & (2), 48, 165(3)(B), 191, 232 & 258 (1) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: RULES 4,10,11,13 AND 20 OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION

AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES, 2013

AND

IN THE MATTER 77(1) & (3), 78 AND 79

AND

IN THE MATTER OF: THE CORPORATE GOVERNANCE STANDARDS IN WATER SERVICE PROVISIONS

AND

IN THE MATTER OF: THE COMPANIES ACT 2015

AND

IN THE MATTER OF: SECTIONS 4, 6, 7, 10(1) 11 AND 12 OF THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015

AND

IN THE MATTER OF: THE EMPLOYMENT ACT 2007



**IN THE MATTER OF:.....AN APPLICATION FOR JUDICIAL REVIEW
ORDERS OF CERTIORARI, PROHIBITION, AND MANDAMUS**

**IN THE MATTER OF:....ARTICLES 1(1), 2(1-4), 3(1), 10, 22, 24, 27, 23(3)(F), 47(1), 48, 50(1),
73(2)(A), 129, 232, 236, 258, AND 259(1) OF THE CONSTITUTION OF KENYA, 2010**

**IN THE MATTER OF : THE WATER ACT, 2016; THE FAIR ADMINISTRATIVE
ACTION ACT, 2015; THE PUBLIC SERVICE COMMISSION ACT,
2017; AND THE WATER SERVICES REGULATORY BOARD CORPORATE
GOVERNANCE GUIDELINES FOR THE WATER SERVICES SECTOR
2018 (GAZETTE NOTICE NO. 11346 OF 23RD OCTOBER 2019)**

**IN THE MATTER OF:....SECTIONS 8 AND 9 OF
THE LAW REFORM ACT CAP 26 LAWS OF KENYA**

BETWEEN

BERYL LILIAN OKUMU 1ST PETITIONER

TIMOTHY MACERU MURIUKI 2ND PETITIONER

MARTIN MBICHIRE KURUGA 3RD PETITIONER

MICHAEL MUMO MAKAU 4TH PETITIONER

EMMA MUTHONI MUKUHI 5TH PETITIONER

LEONARD MUNYAO KAMBA 6TH PETITIONER

MOHAMMED ABDI ABDULLAHI 7TH PETITIONER

KAREN NJERI NYAMU 8TH PETITIONER

AND

**MOHAMMED ABDALLA BADI, DIRECTOR GENERAL NAIROBI
METROPOLITAN SERVICES 1ST RESPONDENT**

NAIROBI METROPOLITAN SERVICES 2ND RESPONDENT

**PRINCIPAL SECRETARY RESPONSIBLE FOR WATER IN THE NATIONAL
GOVERNMENT OF KENYA 3RD RESPONDENT**

**PRINCIPAL SECRETARY RESPONSIBLE FOR HOUSING IN THE NATIONAL
GOVERNMENT OF KENYA 4TH RESPONDENT**

**PRINCIPAL SECRETARY RESPONSIBLE FOR FINANCE IN THE NATIONAL
GOVERNMENT OF KENYA 5TH RESPONDENT**

**DEPUTY DIRECTOR GENERAL NAIROBI METROPOLITAN
SERVICES 6TH RESPONDENT**

**CHIEF EXECUTIVE OFFICER, ATHI WATER WORKS DEVELOPMENT
AGENCY 7TH RESPONDENT**

**FLORENCE NJAU, CHAIRPERSON (NAIROBI BRANCH), KENYA
ASSOCIATION OF HOTELKEEPERS AND CATERERS 8TH RESPONDENT**



MAJ. GEN. (RTD) PETER IKENYA 9TH RESPONDENT
NICHOLAS NESBIT – CHAIRPERSON, KENYA PRIVATE SECTOR
ALLIANCE 10TH RESPONDENT
DR. WAKAGUYU WA KIBIRU 11TH RESPONDENT
NAIROBI CITY WATER & SEWERAGE COMPANY LTD ... 12TH RESPONDENT
THE REGISTRAR OF COMPANIES 13TH RESPONDENT
WATER SERVICES REGULATORY BOARD (WASREB) 14TH RESPONDENT
THE HON. ATTORNEY GENERAL 15TH RESPONDENT

AND

NAIROBI CITY COUNTY INTERESTED PARTY
COUNTY SECRETARY, NAIROBI CITY COUNTY INTERESTED PARTY
COUNTY EXECUTIVE COMMITTEE MEMBER (CEC) FINANCE NAIROBI
CITY COUNTY INTERESTED PARTY
CHIEF OFFICER FOR WATER – NAIROBI CITY
COUNTY INTERESTED PARTY

AS CONSOLIDATED WITH

MISCELLANEOUS CIVIL APPLICATION 60 OF 2020

BETWEEN

REPUBLIC APPLICANT

AND

MOHAMMED ABDALLA BADI 1ST RESPONDENT
NAIROBI METROPOLITAN SERVICES 2ND RESPONDENT
THE HON. ATTORNEY GENERAL 3RD RESPONDENT

AND

MAJ. GEN (RTD) ANDREW IKENYE INTERESTED PARTY
FLORENCE NJAU INTERESTED PARTY
NICHOLAS NESBITT INTERESTED PARTY
WAKAGUYU WA KIBIRU INTERESTED PARTY
PETRONILLA ASIYO OGUT INTERESTED PARTY
JANE JORAM INTERESTED PARTY
WATER SERVICES REGULATORY BOARD INTERESTED PARTY
THE ATHI WATER SERVICES BOARD INTERESTED PARTY
THE ASSEMBLY OF NAIROBI CITY COUNTY INTERESTED PARTY



**NAIROBI CITY WATER AND SEWERAGE COMPANY
LIMITED INTERESTED PARTY**

AND

OKIYA OMTATAH OKOITI EXPARTE

Nairobi Metropolitan Service did not have power to appoint board members and directors of the Nairobi City Water and Sewerage Company Limited

Reported by Ribia John

Legal Systems - case law - precedent - doctrine of stare decisis – distinguishing precedents - whether the decision of the Court of Appeal which held that the ELRC did not have jurisdiction to determine an issue of appointment and removal from the office of commissioners of independent commissions could be distinguished from the instant matter – whether the doctrine of stare decisis bound courts to agree with the decision of the court of higher jurisdiction.

Jurisdiction - jurisdiction of the Employment and Labour Relations Court – jurisdiction to determine issues relating to the appointment and removal of directors of a statutory corporation - whether the Employment and Labour Relations Court had jurisdiction to hear and determine issues relating to appointment and removal of directors of a statutory corporation – Employment and Labour Relations Court Act, section 12(1); Constitution of Kenya, 2010 articles 162(2)(a) and 165(3)(d).

State Corporations-removal of board members and directors – whether the Nairobi Metropolitan Service had the mandate to appoint and remove board members, directors and corporation secretary of the Nairobi City Water and Sewerage Company Limited – Water Act, No. 43 of 2016, sections 78 & 79; Water Services Regulatory Board Corporate Governance Guidelines for the Water Services Sector, 2018, section 3.4.5; Companies Act, 2015, sections 32 & 139.

Interpretation of Statutes – interpretation of section 12(1) of the Employment and Labour Relations Court Act – whether the use of the word ‘including’ meant that the ELRC could determine disputes related to but not expressly listed under that section - Employment and Labour Relations Court Act, No. 20 of 2011, section 12(1).

Brief facts

The matter related to two consolidated suits; a miscellaneous application and a petition. The miscellaneous application related to Gazette Notice No. 4232 of June 17, 2020 and a letter dated June 19, 2020, in which the 1st respondent allegedly purported to disband the Board of Directors of the Nairobi Water and Sewerage Company.

The petition sought various reliefs including an order of *certiorari* to quash Gazette Notice No. 4233 of June 19, 2020 which appointed new directors for the 12th respondent, together with the 1st respondent’s letter June 17, 2020 addressed to the 13th respondent to effect a change of directors of the 12th respondent.

The 1st, 2nd and 3rd to 8th petitioners were appointed to the Board of Nairobi City Water and Sewerage Company Limited, (the 12th respondent), by letters dated July 22, 2019 for a term of three years as chairperson, vice chairperson and members of the board respectively. The appointments were affected by the County Secretary, Nairobi City County, (the 2nd interested party).

The petitioners averred that before their appointment, they were subjected to a vigorous appointment process in compliance with the provisions of the Water Act No. 43 2016 (Water Act) and the Corporate Governance Standards for Water Service Organizations. Further, that their appointment complied with the Memorandum and Articles of Association of the 12th respondent. They stated that the positions were advertised by interested parties as required by the law.



The *ex parte* applicant in the miscellaneous application contended that the changes effected by the 1st and 2nd respondents on June 17, 2020 were *ultra vires* the Constitution of Kenya, 2010 (the Constitution), the national legislation and the Deed of Transfer of Functions Agreement the Nairobi City County and the National Government. Further, he averred that the 1st and 2nd respondents had no capacity in law to appoint a parallel Board of Directors complete with its own company secretary. He stated they could not appoint the chairperson whose appointment under the law was reserved for Board members. They also did not have the capacity in law to disband the Board of the company and that the claim that the Deed of Transfer of Functions between the Nairobi City County and the National Government granted them the powers to so act was not supported by the law and were therefore null and void. According to the applicant, the 12th respondent's Board was supposed to be autonomous and independent in its operations under the law. That could not be achieved where the 1st and 2nd respondents handpicked and appointed the chair and members of the Board and the Company's corporation secretary.

The respondents opposed both the petition and the application and raised a preliminary objection. They submitted that the instant court lacked jurisdiction to hear the instant suit by virtue of articles 165(3)(a), 162(2)(a) of the Constitution and section 12 of the Employment and Labour Relations Court Act, No. 20 of 2011 (ELRC Act). According to the respondents, the dispute did not fall within the categories of employer/employee set out in section 12 of the ELRC Act.

The respondents further relied on the decision in *Attorney General & 2 others v Okiya Omtata Okoiti & 14 others [2020] eKLR* where the Court of Appeal held that the Employment and Labour Relations Court (ELRC), being a specialized court as per article 162(2) of the Constitution with limited jurisdiction, had no jurisdiction to hear and determine matters relating to appointments and removal of commissioners (and by extension directors as in the instant case) whose appointment procedure was provided for by statute.

Issues

- i. Whether the Employment and Labour Relations Court had jurisdiction to hear and determine issues relating to appointment and removal of directors of a statutory corporation.
- ii. whether the doctrine of stare decisis bound courts to agree with the decision of the court of higher jurisdiction.
- iii. Whether the decision of the Court of Appeal in *Attorney General & 2 others v Okiya Omtata Okoiti & 14 others [2020] eKLR*, which held that the Employment and Labour Relations Court did not have jurisdiction to determine an issue of appointment and removal from office of commissioners of independent commissions could be distinguished from the instant matter
- iv. Whether the use of the word 'including' as used in section 12(1) of the Employment and Labour relations Court Act meant that the ELRC had the jurisdiction to determine disputes related to but not expressly listed under in section 12(1).
- v. What was the meaning and effect of the word 'employment' as used in article 162(2)(a) of the Constitution as read with the definition of 'remuneration' under the Employment Act?
- vi. Whether the Nairobi Metropolitan Service had the mandate to appoint and remove board members, directors and corporation secretary of the Nairobi City Water and Sewerage Company Limited.

Relevant provisions of the Law

Constitution of Kenya, 2010

Article 162(2)(a)

162. System of courts

(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

Article 165(3)(d)



(3) Subject to clause (5), the High Court shall have—

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

(iv) a question relating to conflict of laws under Article 191; and

(e) any other jurisdiction, original or appellate, conferred on it by legislation.

Employment and Labour Relations Court Act No. 20 of 2011

Section 12 (1)

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.

Held

1. The decision of the Court of Appeal in *Attorney General & 2 others v Okiya Omtata Okoiti & 14 others [2020] eKLR* the Court of Appeal held that the ELRC did not have jurisdiction to determine an issue of appointment and removal from office of commissioners of independent commissions. That Court stated that the jurisdiction of the ELRC was precise and limited rather than unlimited. The Court of Appeal was clear that that decision related to independent commissioners only. It did not extend to any other appointment as the respondents urged in the instant matter.
2. Although the court was bound by the decision of the Court of Appeal, it did not have to agree with it. The appointments to public office whether to an independent commission or any other public body, whether of commissioners, or any other office, were governed by the same principles set out in articles 10 and 232 of the Constitution. The instant court could not be convinced that where those principles were being interpreted in respect of commissioners of independent commissions, only judges of the High Court and not the ELRC were best placed to deal with the same. That was not a purposive interpretation of the Constitution.
3. Section 12(1) of the ELRC Act did not limit the court to only disputes set out therein. By the use of the word 'including', the legislature signified that what was set out thereafter was not conclusive or exclusive. That other disputes other than those listed could be heard and determined by the court.



4. Courts ought to interpret the definition of employment as used in article 162(2)(a) of the Constitution 2010 to be inclusive rather than exclusive. Employment included any engagement for personal services from which the employee was remunerated whether by salary, wages or allowances. The definition of remuneration ought to be guided by that in the Employment Act to mean the total value of all payments in money or in kind, made or owing to an employee arising from the employment of that employee.
5. Commissioners and board members of state institutions were employees of the state engaged on part time or full-time basis in terms of piece work or task. The Employment Act defined piece work to mean any work the pay for which was ascertained by the amount of work performed irrespective of the time occupied in its performance. Task meant such amount of work as could, in the opinion of an authorized officer, be performed by an employee in an ordinary working day. They were thus paid sitting allowances and other benefits based on the work performed. The fact that they were paid allowances and not salary did not change the fact they were in the employment of the state.
6. Commissioners' allowances and other benefits were regulated by the Salaries and Remuneration Commission like all other persons engaged in the public service. What they were paid were thus either salaries or remuneration. Article 250 of the Constitution provided for the appointment and terms of office for commissioners of independent officers.
7. As the Court of Appeal did not exclude board members and corporation secretaries, who were the subject of the instant suits, from the jurisdiction of the instant Court, there was no merit in the objections to the jurisdiction of the instant Court to handle the instant matter.
8. In view of the fact that the removal of the petitioners included a corporation secretary who was an employee as opposed to a board member, even if the jurisdiction of the instant court was in doubt, which in it was not, the instant matter was a mixed grill case which included employment issues and the Court would thus have concurrent jurisdiction to hear and determine the case. Further, in view of the fact that the principles in issue were similar for both the appointment of the board members and the corporation secretary to public office and that it would not be in the public interest to split the suits, so that the corporation's secretary was heard and the other petitioners sent packing.
9. The Corporate Governance Guidelines for the Water Services Sector, 2018 made under Water Act provided for governance of water services in detail. It specifically provided for compliance with articles 2, 6, 10, 21, 43, 46, 259 and the Fourth Schedule to the Constitution. It further elaborately provided for public participation, compensation of board members, and board appointments. In the event of removal of board members before expiry of their terms, they were entitled to a hearing under Article 47 and Section 4 of the Fair Administrative Action Act.
10. The Regulations specifically provided that the letter of appointment of a board member ought to contain a termination clause on poor performance and misconduct. That meant before removal, a board member had to be subjected to a hearing to prove poor performance or misconduct. Further Section 139 of the Companies Act provided that a director could be removed from office by ordinary resolution of the company at a meeting before the end of the director's term of office, subject to the director's right to protest against the removal.
11. The Nairobi Metropolitan service was not above the law and was not exempted from compliance with the Constitution, the Water Act and Regulations, the Companies Act or any other legal instrument. The averment that since the City Council of Nairobi was and remained the majority shareholder in the share composition of NCWSC and upon devolution of that entity to NCCG and subsequent transfer to NMS *vide* the Deed of Transfer of Functions, the responsibility of appointing the directors of NCWSC and or the removal of any or all of the directors of NCWSC was an exclusive mandate of NMS as majority shareholder and the 1st respondent's role was merely to communicate the resolutions of the majority shareholder, was in direct conflict with the regulations and the provisions of the Companies Act. Indeed, the Regulations were specific that operations of the Water Services Board should not to



- be affected by the elections cycle, which would also cover the transfer of services from the County Government and vesting of the same in NMS.
12. The averments were an admission by the respondents of violation of the various legal instruments including the Constitution, the Water Act and Regulations, the Companies Act and the Fair Administrative Actions Act. The Regulations provided for shareholders to include Class B shareholders and for public participation in shareholding. Section 3.3.2(3) of the Guidelines provided that public participation, transparency and non-discrimination were inherent in the provision of the right to water by water service providers. Specifically, NMS did not have powers to appoint directors as that was a preserve of a select committee and to be carried out competitively, following advertisement.
 13. In appointing the 3rd to 11th respondents in the petition, the 1st and 2nd respondents acted without authority and the appointments were therefore null and void. The appointments were in violation of the Constitution, the Water Act, and Guidelines for Water Service Sector 2018, the Companies Act, Fair Administrative Actions Act and therefore, unlawful and unconstitutional. The appointments further infringed on the legitimate expectation of the petitioners that they would serve on the Board of NWSC until either their terms lapsed or they were lawfully removed from office after being subjected to a fair hearing as provided by law. Accordingly, for those reasons both the application and the petition succeeded.

Petition allowed.

Orders

- i. *An order of certiorari was hereby issued that quashed the 1st respondent's Kenya Gazette Notice No. 4233 dated June 19, 2020, the 1st respondent's letter dated June 17, 2020 to the 12th respondent and the 1st respondent's letter dated June 19, 2020 to the petitioners and to the 2nd to 4th interested parties.*
- ii. *A declaration was issued that the Kenya Gazette Notice No. 4233 dated June 19, 2020 that appointed new directors for the 12th respondent, together with the 1st respondent's letter dated June 17, 2020 addressed to the 13th respondent to effect a change of directors of the 12th respondent and the 1st respondent's letter dated June 19, 2020 to the petitioners and the 2nd to 4th interested parties removing them from the board of the 12th respondent was an illegality that was null and void ab initio.*
- iii. *Declaration issued that the 1st and 2nd respondents had no locus standi and/or authority to appoint directors and/or directly manage the 12th respondent.*
- iv. *A perpetual mandatory injunction and prerogative order of prohibition was issued restraining the respondents either by themselves or through their agents and/or servants from interfering with the management and operations of the 12th respondent and/or the appointment of its directors.*
- v. *A conservatory order was issued by way of a permanent injunction that restrained the 1st and 2nd respondents from interfering with the operations and/or management of the 12th respondent and by extension the petitioners' operations as directors of the 12th respondent and/or their interference in any other way whatsoever except in the manner authorised by law.*
- vi. *A conservatory order was issued by way of a permanent injunction that restrained the 3rd to 11th respondents from taking over the responsibilities of the management of the 12th respondent as its directors.*
- vii. *A conservatory order was issued by way of a permanent injunction that prohibited and restrained the 13th respondent from making the changes contained in the 1st respondent's letter dated June 17, 2020 and/or any other change in respect to the directorship of the Nairobi Metropolitan Services (the 2nd respondent).*

Citations

Cases

East Africa;

1. *Attorney General & 2 others v Okiya Omtata Okoiti & 14 others* [2020] eKLR — (Mentioned)



2. *Oriaro, Geoffrey v Cabinet Secretary Ministry of Labour Social Security and Services & 4 others* Petition 24 of 2015; [2015] eKLR — (Explained)
3. *Gachibiri, James Waweru & 5 others v County Government of Kirinyaga & another* Civil Case 8 of 2016; [2018] eKLR — (Explained)
4. *Judicial Service Commission v Mbalu Mutava & another* Civil Appeal 52 of 2014; [2014] eKLR — (Mentioned)
5. *Kenya Council of Employment and Migration Agencies & another v Attorney General & 5 others* Petition 327 of 2015; [2015] eKLR — (Explained)
6. *Kenya Game, Hunting & Safaris Workers' Union v Private Safaris (EA) Ltd* Cause 66 of 2000; [2002] eKLR — (Explained)
7. *Kenya Ports Authority v Kenya Power & Lighting Co Ltd* Civil Case 500 of 1991; [2013] eKLR — (Explained)
8. *Ndichu v Clerk, Kiambu County Assembly & another* [2014] 3 KLR 575 — (Explained)
9. *Okoiti, Okiya Omtatah v Nairobi City County & 5 others* Petition 26 of 2015; [2016] eKLR — (Explained)
10. *Okoiti, Okiya Omtatah v Nairobi Metropolitan Service & 3 others; Mohamed Abdala Badi & 9 others (Interested Parties)* Petition 52 of 2020; [2020] eKLR — (Mentioned)
11. *Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited* [1989] KLR 1 — (Explained)
12. *Republic v Clerk County Assembly of Baringo ex parte William Kassait Kamket* Judicial Review Application 1 of 2015; [2015] eKLR — (Explained)
13. *Republic v Karisa Chengo* Petition 5 of 2015; [2017] eKLR — (Followed)
14. *In the Matter of the Interim Independent Electoral Commission* [2011] 2 KLR 209 — (Followed)
15. *Gakuru & others v Governor Kiambu County & 3 others* [2014] 3 KLR 170 — (Explained)
16. *Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] 3 KLR 199 — (Explained)

South Africa;

President of the Republic of South Africa & others v South African Rugby Football Union & others (CCT16/98) 2000 (1) SA 1 — (Mentioned)

Statutes

East Africa;

1. Companies Act, 2015 (Act No 17 of 2015) sections 32, 132, 139 — (Interpreted)
2. Constitution of Kenya, 2010 articles 2(3); 4(2); 10,(2); 19(1); 20(1); 21(1); 24; 27; 40; 47(1); 73(2)(a); 75; 232(g); 129; 162(2)(a); 201; 232— (Interpreted)
3. Employment Act, 2007 (Act No 11 of 2007) sections 5(5), 17 — (Interpreted)
4. Employment And Labour Relations Court Act, 2011 (Act No 20 of 2011) — section 12 — (Interpreted)
5. Industrial Court Act, 2011 (Act No 20 of 2011) section 12 — (Interpreted)
6. Labour Relations Act, 2007 (Act No 14 of 2007) section 2 — (Interpreted)
7. Public Service Commission Act, 2017 (Act No 10 of 2017) sections 36, 37 — (Interpreted)
8. Water Act, 2016 (No 43 of 2016) sections 77, 78, 79, 121 — (Interpreted)

Advocates

None mentioned

JUDGMENT

1. This judgment is in respect of two suits that have been consolidated.



2. The first is the Miscellaneous Application filed by Okiya Omtatah Okoiti, the *ex parte* applicant who seeks the following orders –

- (1) That an order of *certiorari* do issue, to bring to this honourable court for purposes of being quashed, and to be quashed:
 - a. Gazette Notice No 4232 of 17th June, 2020, and any actions and/or omissions subsequent thereto;
 - b. The letter Ref: EOP/NMS/ADM/GEN/1/Vol 1(1), dated 17th June 2020, which the 1st respondent's wrote to the Registrar of Companies, and any actions and/or omissions subsequent thereto;
 - c. The letter REF: EOP/NMS/ADM/GEN/1/Vol 1 (2) dated 19th June 2020, which the 1st respondent wrote the purporting to disband the current Board of Directors of the Nairobi Water and Sewerage Company, and any actions and/or omissions subsequent thereto.
- (2) That an order of prohibition do issue, prohibiting the respondents herein, and any other person howsoever acting, from implementing, giving effect to, or enforcing:
 - a. Gazette Notice No 4232 of 17th June, 2020, and any actions and/or omissions subsequent thereto;
 - b. The letter Ref: EOP/NMS/ADM/GEN/1/Vol 1(1), dated 17th June 2020, which the 1st respondent's wrote to the Registrar of Companies, and any actions and/or omissions subsequent thereto;
 - c. The letter REF: EOP/NMS/ADM/GEN/1/Vol 1(2) dated 19th June 2020, which the 1st respondent wrote the purporting to disband the current Board of Directors of the Nairobi Water and Sewerage Company, and any actions and/or omissions subsequent thereto.
- (3) That an order of *mandamus* do issue, to compel the 1st and 2nd respondents to adhere strictly to the *Constitution*, national legislation and best international practice in the execution of their mandates.
- (4) That consequent to the grant of the prayers above the honourable court be pleased to issue such further directions and orders as may be necessary to give effect to the foregoing orders, and/or favour the cause of justice.
- (5) That costs be in the cause.

3. The second is the petition dated June 23, 2020 in which the petitioners seek the following orders –

- a. An order of judicial review of *certiorari* quashing the 1st respondent's Kenya Gazette Notice No 4233 dated June 19, 2020, the 1st respondent's letter dated



June 17, 2020 to the 12th respondent and the 1st respondent's letter dated June 19, 2020 to the petitioners and to the 2nd to 4th interested parties.

- b. A declaration that the Kenya Gazette Notice No 4233 dated June 19, 2020 appointing new directors for the 12th respondent, together with the 1st respondent's letter dated June 17, 2020 addressed to the 13th respondent to effect a change of directors of the 12th respondent and the 1st respondent's letter dated June 19, 2020 to the petitioners and the 2nd to 4th interested parties removing them from the board of the 12th respondent is an illegality that is null and void *ab initio*.
- c. A declaration that the 1st and 2nd respondents has no *locus standi* and/or authority to appoint directors and/or directly manage the 12th respondent.
- d. That a perpetual mandatory injunction and/or prerogative order of prohibition do issue restraining the respondents either by themselves or through their agents and/or servants from interfering with the management and operations of the 12th respondent and/or the appointment of its directors.
- e. That a conservatory order do issue by way of a permanent injunction restraining the 1st and 2nd respondents from interfering with the operations and/or management of the 12th respondent and by extension the petitioners' operations as directors of the 12th respondent and/or their interference in any other way whatsoever.
- f. That a conservatory order do issue by way of a permanent injunction restraining the 3rd to 11th respondents from taking over the responsibilities of the management of the 12th respondent as its directors.
- g. That the honourable court do issue a conservatory order by way of a permanent injunction prohibiting and restraining the 13th respondent from making the changes contained in the 1st respondent's letter dated June 17, 2020 and/or any other change thereof in respect to the directorship of the 12th respondent.
- h. The respondents be ordered to pay the costs of this petition.

Petitioner's Case

4. The 1st petitioner, the 2nd petitioner and the 3rd to 8th petitioners were appointed to the Board of Nairobi City Water and Sewerage Company Limited, the 12th respondent in the petition, by letters dated July 22, 2019 for a term of three years as chairperson, vice chairperson and members of the board respectively. The appointments were effected by the County Secretary, Nairobi City County, the 2nd interested party.
5. It is the petitioners' averment that before their appointment they were subjected to a vigorous appointment process in compliance with the provisions of the [Water Act, 2016](#) and the Corporate Governance Standards for Water Service Organisations. Further, that their appointment complied with the Memorandum and articles of Association of the 12th respondent. That the positions were advertised by interested parties as required by the law.



6. The petitioners aver that they were surprised when through gazette notice dated June 19, 2020, the 1st respondent effected new appointments of directors of the 12th respondent in full breach of the [Water Act, 2016](#), the Corporate Governance Standards for Water Service Organisations and the Memorandum and Articles of Association of the 12th respondent.
7. That on June 17, 2020, the 1st respondent wrote to the 13th respondent, the Registrar of Companies, to effect the changes in the directorship of the 12th respondent. That the 1st respondent further wrote to the petitioners on June 19, 2020 informing them of their removal from the 12th respondent's board.
8. In support of the petition, the petitioners filed the supporting affidavit of Martin Mbichire Kuruga, the 3rd petitioner sworn on June 23, 2020. The other petitioners also filed authority to swear affidavit in favour of the 3rd petitioner, also dated June 23, 2020.
9. In the motion filed by the *ex parte* applicant he objects to the changes by the 1st and 2nd respondents (Mohammed Abdalla Badi and Nairobi Metropolitan Services) to the Board and staff of the Nairobi City Water and Sewerage company Limited.

Ex Parte Applicant's Case

10. It is the *ex parte* applicant's averment that the recruitment of the new chairman and new members of the Board of Directors of the Nairobi City Water and Sewerage Company Limited and the organisation's Company Secretary (Corporation Secretary) by the 1st and 2nd respondents was irregular, unlawful and unconstitutional as was done in direct and blatant disregard of the [Constitution of Kenya, 2010](#), the [Water Act 2020](#), the Corporate Governance Principles under the Water Act 2016 and the Company's Memorandum and Articles of Association.
11. It is further the *ex parte* applicant's averment that the changes effected by the 1st and 2nd respondents on 17th June 2020 were *ultra vires* the Constitution, the national legislation and the Deed of Transfer of Functions Agreement.
12. The *ex parte* applicant further avers that the letter dated 17th June 2020, to the Registrar of Companies terminating the appointment of the sitting Board Chairman and members, replacing them with new members as well as the appointment of Jane Joram as Corporation Secretary were *ultra vires*.
13. The *ex parte* applicant contends that the 1st and 2nd respondents have no capacity in law to appoint a parallel Board of Directors complete with its own Company Secretary. That they cannot appoint the Chairman whose appointment under the law is reserved for Board members. They also do not have the capacity in law to disband the current Board of the company. That the claim that the Deed of Transfer of Functions between the Nairobi City County and the National Government grants them the powers to so act is not supported by the law and are therefore null and void.
14. The *ex parte* applicant posits that the Board is supposed to be autonomous and independent in its operations under the law. That this cannot be achieved where the 1st and 2nd respondents handpick and appoint the chair and members of the Board and the Company's Corporation Secretary.
15. The *ex parte* applicant further posits that the Nairobi City Water and Sewerage Company Limited is a regulated company under sections 77, 78 and 79 of the [Water Act, 2016](#). There is a duly appointed Board and Company Secretary in office which under the law cannot be arbitrarily removed from office and be replaced by persons handpicked and appointed to the public offices by the 1st and 2nd respondents.



16. He states that section 36 of the *Public Service Commission Act, 2017* provides the criteria for appointment and promotion in the public service.
17. That section 37 of the Act requires that vacancies in the public service be announced inviting applications from the public, by advertising the vacancy in the Commission's website, at least one daily newspaper of nationwide coverage, the radio and other modes of communication, so as to reach as wide a population of potential applicants as possible. The section requires that the Commission or an authorised officer shall ensure that an invitation for application does not discriminate against any person. Further, the advertisements have to be conducted in an efficient and effective manner so as to ensure that the applicants, including persons who for any reason have been or may be disadvantaged, have an equal opportunity to apply for the advertised positions.
18. That section 3.4.5 of the *Water Services Regulatory Board Corporate Governance Guidelines for the Water Services Sector 2018* (Gazette Notice No 11346 of 23rd October 2019) (hereinafter, "the guidelines") provides for Board.
19. That contrary to the regulations, the purported vacancy on the Board was not announced, and the purported new chair and members of the Board were not recruited through a competitive process in tandem with the provisions of the law and articles 10, 27, 73(2)(a) and 232(1)(g) of the *Constitution of Kenya, 2010*. Specifically, and in particular:
 - i) There was no notice published in a newspaper of national circulation asking qualified and interested members of the public to express interest to serve on the Board of Directors of the company in a competitive process.
 - ii) There was no selection/recruitment panel for the process.
20. That section 3.4.5 of the Guidelines (page 4680 of the gazette) provides the procedure for the appointment of the Board which was totally ignored by the 1st and 2nd respondents while making their impugned appointments.
21. The *ex parte* applicant avers that section 59 of the template Memorandum and Articles of Association for Water Companies under the Guidelines (page 4690 of the gazette) and article 66 of the company's Articles of Association provide for the appointment of Directors.
22. That section 85 of the template Memorandum and Articles of Association for water companies under the Guidelines (page 4691 of the gazette) and article 82 of the company's Articles of Association provide the grounds upon which a director may be disqualified. None of the grounds therein are in play herein. The directors have simply been removed from office and new ones appointed at the whims of the 1st and 2nd respondents.
23. He posits that article 83 of the company's Articles of Association provides that the Chairman shall be elected by the directors at their first meeting. There is absolutely no way in law that the 1st and 2nd respondents can purport to appoint the Chairman of the company's Board.
24. That both section 88 of the template Memorandum and Articles of Association for water companies under the Guidelines and article 93 of the company's Articles of Association provide that the Company Secretary shall be appointed by the Board of the directors at such terms conditions as shall be agreed. No law, not even the Deed of Transfer, vests the power to appoint the Company Secretary in the 1st and/or 2nd respondents. Hence, in law, the appointment of Jane Joram, the 6th interested party, as the Corporation Secretary is a nullity *ab initio*.



25. According to the *ex parte* applicant, the Directors and staff of the company can only be recruited in a competitive, transparent, fair and open manner that conforms to all other required procedures. Under the law, stakeholders, and the general public in Kenya ought to have been consulted on the impugned changes but they were not.
26. He avers that the impugned actions/omissions of the 1st and 2nd respondents are not in tandem with the orders they were given on 18th day of June, 2020 by this court (Wasilwa J) in ELRC Petition 52 of 2020 - *Okiya Omtatab Okoiti v Nairobi Metropolitan Service & 3 others; Mohamed Abdala Badi & 9 others (Interested Parties)* [2020] eKLR.
27. That under the *Constitution of Kenya, 2010* the Executive does not enjoy *de facto* emergency power, and the government is not entitled to act outside the law on the basis of precaution to achieve anything, including the efficient management of the company.
28. That the *Constitution of Kenya, 2010* contains explicit provisions on emergency rule at article 58 of the Constitution.

Respondent's Case

29. That the 1st respondent is abusing public office by using it to reward his political cronies contrary to articles 73 and 75 of the *Constitution*,
30. The *ex parte* applicant posits that in the circumstances, other than the questionable technical credentials, competence and suitability of the handpicked new directors of the company and the Corporation Secretary, they are likely to be compromised subservient acolytes of the 1st respondent who will be unable to assert their desired operational autonomy.
31. That the impugned actions of the 1st respondent are contrary to the national values and principles of governance in article 10 of the *Constitution*, and in particular violates article 73(2) which expressly provides for the guiding principles of leadership and integrity.
32. The *ex parte* applicant further avers that the respondents have violated articles 27, 129, 10(2) and 47(1) of the *Constitution*.
33. That the 1st and 2nd respondents' impugned actions are contrary to express provisions of the *Constitution* which enjoin it to act in accordance with the *Constitution*. Further, the 1st respondent's impugned actions:
 - (a) Derogate from the doctrine of the Supremacy of this Constitution enshrined in article 2 of the *Constitution*, and in particular the express provisions of the clauses (1) and (2) which provide:
 - (1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.
 - (2) No person may claim or exercise State authority except as authorized under this Constitution.
 - (b) Derogate from the obligation on every person in article 3(1) of the *Constitution* "to respect, uphold and defend this Constitution."
 - (c) Derogate from the national values and principles of governance under articles 4(2) and 10 of the Constitution, including the rule of law, equity, social justice, inclusiveness, equality, human rights, non-discrimination, protection of the marginalized, good governance, integrity, transparency and accountability, and sustainable development.



- (d) Derogate from the provisions of article 19(1) of the Constitution which provides that, “The Bill of Rights is an integral part of Kenya’s democratic state and is the framework for social, economic and cultural policies.”
 - (e) Derogate from the provisions of article 20(1) of the Constitution which provides that, “The Bill of Rights applies to all law and binds all State organs and all persons.”
 - (f) Derogate from the provisions of article 21(1) of the Constitution which “It is a fundamental, duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.”
 - (g) Derogate from the strict criteria set out in article 24 of the Constitution on limiting the rights in the Bill of Rights.
 - (h) Derogate from the prohibition in article 40 of the Constitution on the State to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description.
 - (i) It derogates from the values and principles of public service under article 232 of the Constitution.
34. The *ex parte* applicant avers that he has a right of access to this court to safeguard his rights and those of other members of the public which have been, are being and are in danger of further infringement herein.
 35. That the orders sought in his motion are in the public interest, will advance the cause of justice, but they are not determinative of the main motion.
 36. In conclusion, the *ex parte* applicant avers that this court has unfettered powers and jurisdiction to make the orders sought.
 37. Mohammed Abdalla Badi, Nairobi Metropolitan Services and the Attorney General responded to both the judicial review application and the petition through the replying affidavit of Kang’ethe Thuku, the Deputy Director General and Accounting Officer, Nairobi Metropolitan Services sworn on 5th October 2020.
 38. He deposes that the Nairobi Metropolitan Services (NMS) is a public body established on 18th March 2020 vide Executive Order No 3 of 2020 as the institutional framework under article 7 of the Deed to perform the transferred functions vide the said Deed.
 39. That the legality of the NMS was the subject of judicial determination in Nairobi ELRC Petition No 52 of 2020 *Okiya Omtatah Okoiti v Attorney General & others* where Wasilwa J dispelled the notion that NMS was not a legal entity by holding that NMS was lawfully established to perform the transferred functions by her ruling delivered on 17th September 2020.
 40. That one of the functions that was transferred pursuant to the said Deed and which NMS assumed by virtue of the aforesaid Executive Order is county public works, utilities and ancillary services and that this function encompasses any or all utility companies, actors and agencies wholly owned by the Nairobi City County Government (hereinafter ‘the NCCGO’) undertaking any or all of the county functions which were transferred to National Government vide the said Deed.



41. The Affiant states that the policy and operational decision making, control and restructuring of any and all utility companies, actors and agencies undertaking transferred functions were vested to the National Government to be performed by NMS.
42. The affiant states that one of the utility companies which was vested upon the NMS by virtue of the said Deed is the Nairobi City Water and Sewerage Company Limited (hereinafter 'the NCWSC), a limited company which was incorporated in December, 2013 with the then City Council of Nairobi as the majority shareholder with 4,998 shares out of a total of 5,000 shares.
43. That pursuant to the said shareholding composition and in accordance with section 2 of the Public Finance and Management Act, 2012; NCWSC is a county corporation performing devolved functions of soil and water conservation as well as water and sanitation services under Part 2 section 10(a) and 11(b) of the Fourth Schedule of the Constitution, which functions were transferred to NMS *vide* the said Deed.
44. That since the City Council of Nairobi was and remains the majority shareholder in the share composition of NCWSC and upon devolution of this entity to NCCG and subsequent transfer to NMS *vide* the Deed, the responsibility of appointing the directors of NCWSC and or the removal of any or all of the directors of NCWSC is an exclusive mandate of NMS as majority shareholder and 1st respondent's role is merely to communicate the resolutions of the majority shareholder.
45. The affiant states that in spite of the provisions of sections 78 and 79 of the Water Act, the Board of Directors may be constituted in accordance what the Companies Act, 2015 or any other law and directors may be nominated to serve on the Board in accordance with the Company's memorandum and Articles of Association.
46. That the legislature having used the disjunctive "or" instead of a conjunctive "and" the intention was and remains that the appointing authority needs to comply with either the Companies Act or the other law but not both.
47. That under section 32 of the Companies Act, it is the responsibility of NMS as majority shareholder of the NCWSC, to pass and execute a resolution on appointment of one or more directors. That such a resolution was made on and a copy is attached to the affidavit as Annexure "KT5". No copies of the said resolution was however attached to the affidavit).
48. That it was further the responsibility of the NMS to convey and communicate the resolution to the Registrar of Companies by dint of section 132 of the Companies Act.
49. That contrary to the *ex parte* applicant's and petitioners' assertions, the appointment of Maj. Gen (Rtd) Peter Ikenye as Chairperson of the Board of NCWSC and the appointment of Jane Jorum as Corporation Secretary of the NCWSC was made by the new Board of Directors of NCWSC in its first meeting held on 17th June 2020. The 1st respondent merely communicated the Board's decision to the Registrar of Companies.
50. That the Guidelines notwithstanding, the 1st and 2nd respondents acted within the dictates of section 79 of the Water Act, section 139 of the Companies Act and article 66 of the Memorandum and Articles of Association and that the process undertaken in replacing directors whose term had not expired but whose office had been rendered vacant by operation of the Deed of Transfer was not strictly board appointments as can be discerned from the reading of the Guidelines.
51. That clause 3.4.5 of the Guidelines takes effect where the term of the Board expires and a new Board has to be constituted in which event a proper recruitment exercise has to be undertaken in accordance



- with the Guidelines. On the contrary, the exercise undertaken by 1st and 2nd Respondents was initial restructuring of the Board of NCWSC that was conducted in accordance with article 66 of the Memorandum and Articles of Association, section 79 of the [Water Act](#) and section 139 of the [Companies Act](#).
52. That it was prudent and in the public interest that the replacement of the Board had to be urgently undertaken as the operations of this entity were dwindling due to exorbitant expenditures and or misappropriation of resources on unnecessary and uncalled for activities with no corresponding benefit to the entity.
 53. That it was also in the public interest that majority shareholders restructure the entity post Deed of Transfer, which had rendered the Board vacant, and safeguard and guarantee prudent use of resources and avoid pilferage during transition.
 54. That all public entities including county corporations are bound by principles of public finance set out in article 201 of the [Constitution](#) and provisions of the Public Finance Management Act.
 55. That one of the principles is prudence in management of public resources which is reiterated in the Corporate Governance Guidelines aforesaid at clause 3.4.6 with turn-over limits and capped expenditure.
 56. That contrary to these guidelines, the Board's operation was shrouded in mystery, contrary to principles of public finance management and values and principles of governance and public service under article 10 and 232 of the [Constitution](#).
 57. That the Board also acted in total disregard of the 7th Interested Party's regulatory framework and the 7th Interested Party had even threatened to place NCWSC under special regulatory regime under the [Water Act](#), an exercise that would have led to dissolution of the NCWSC against the majority shareholder's interest.
 58. That the Impact Report 12/2020 was available at www.wasreb.go.ke reveals that general performance of NCWSC in all salient sectors was below par with operational and management costs (O&M) consuming all the company's collected revenues.
 59. That an audit carried out also revealed several anomalies and misappropriation of funds for activities which were not necessary and or planned while in some Board activities were duplicated yet allowances were paid in each instance. That the Board was callous in the manner in which it handled its affairs and this ultimately denied the citizens the right to essential services such as clean water which is a human right as espoused under article 43(1)(d) of the [Constitution](#).
 60. That water management has been a great concern for all residents of Nairobi County as cases of rampant water shortages have been highlighted in the impact report, a situation that was caused by mismanagement at NCWSC.
 61. It is further the averment of the affiant that under section 121 of the [Water Act](#) this court has no jurisdiction to entertain the petition and the miscellaneous application motion.

Case of the 2nd Interested Party/8th Respondent

62. Florence Njau, the 2nd interested party in the Judicial Review motion and 8th respondent in the petition also filed a replying affidavit sworn on 19th October 2020 and a supplementary replying affidavit sworn on 16th February 2020 in which she largely reiterates matters as deposed in the replying affidavit of Kang'ethe Thuku.



Notice of Preliminary Objection

63. The notice of preliminary objection is not in the record of the court and appears to have been served without being filed. I will all the same deal with the issue of jurisdiction of this court as it has been extensively covered in the submissions of the parties.

Determination

64. Having read and considered the pleadings and submissions filed herein, the issues for determination in my view are the following –
- a) Whether the *ex parte* applicant has locus standi to file the judicial review motion;
 - b) Whether this court has jurisdiction to hear the suits herein;
 - c) Whether there was violation of the Constitution 2010, any law or the guidelines in the impugned removal of the old directors (the petitioners) and appointment of the new directors and company secretary of the Nairobi Water and Sanitation services Company Limited *vide* Gazette Notice Number 4232 of the 17th June 2020;
 - d) Whether the *ex parte* applicant and the petitioners are entitled to the remedies sought.

Locus Standi of Ex Parte Applicant

65. The respondents have raised objection to the jurisdiction of this court and the *locus standi* of the *ex parte* applicant. In the submissions, no mention is made in respect of *locus standi* of the *ex parte* applicant. I will assume that this ground of objection has been abandoned.

Jurisdiction of this Court

66. It is submitted for the respondents and interested parties that this court lacks jurisdiction to hear the suit herein by virtue of articles 165(3)(a), article 162(2)(a) of the Constitution and Section 12 of the Employment and Labour Relations Court Act, 2011 as the dispute does not fall within the categories of employer/employee set out in section 12 of the Employment and Labour Relations Court Act.
67. Article 165(3)(d) provides as follows –
- (3) Subject to clause (5), the High Court shall have—
 - (a) ...;
 - (b) ...;
 - (c) ...;
 - (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
 - (i) the question whether any law is inconsistent with or in contravention of this Constitution;
 - (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
 - (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and



(iv) a question relating to conflict of laws under article 191;

68. Article 162(2)(a) provides as follows –

- (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—
 - (a) employment and labour relations;

69. Section 12 of the *Employment and Labour Relations Court Act* provides 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 union's organisation;
 - (d) disputes between trade unions;
 - (e) disputes between employer organisations;
 - (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.
- (2) An application, claim or complaint may be lodged with the court by or against an employee, an employer, a trade union, an employer's organisation, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose.
- (3) In exercise of its jurisdiction under this Act, the court shall have power to make any of the following orders—
 - (i) interim preservation orders including injunctions in cases of urgency;
 - (ii) a prohibitory order;
 - (iii) an order for specific performance;
 - (iv) a declaratory order;
 - (v) an award of compensation in any circumstances contemplated under this Act or any written law;
 - (vi) an award of damages in any circumstances contemplated under this Act or any written law;



- (vii) an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the court thinks fit to impose under circumstances contemplated under any written law; or
 - (viii) any other appropriate relief as the court may deem fit to grant.
- (4) In proceedings under this Act, the court may, subject to the rules, make such orders as to costs as the court considers just.
- (5) The court shall have jurisdiction to hear and determine appeals arising from—
- (a) decisions of the Registrar of Trade Unions; and
 - (b) decisions of any other local tribunal or commission as may be prescribed under any written law.

70. The respondents have relied on the decision of the Supreme Court in the case for *Republic v Karisa Chengo & 2 others* [2017] eKLR where the court held that;

“The three are different and autonomous courts and exercise different and distinct jurisdictions. As article 165(5) precludes the High Court from entertaining matters reserved to the ELC and ELRC, it should, by the same token, be inferred that the ELC and ELRC too cannot hear matters reserved to the jurisdiction of the High Court.”

71. The respondents further rely on the decision in *Attorney General & 2 others v Okiya Omtata Okoiti & 14 others* [2020] eKLR where the court held that the Employment and Labour Relations Court, being a specialized court as per article 162(2) of the *Constitution* with limited jurisdiction, has no Jurisdiction to hear and determine matters relating to appointments and removal of commissioners (and by extension directors as in this case) whose appointment procedure is provided for by statute. The court stated as follows;

“It is common ground that the ELRC is one of the two specialized courts established by article 162(2) of the *Constitution* as superior courts that have equal status to the High Court. The Final Report of the Committee of Experts (CoE) that prepared the draft that ultimately became *the Constitution* of Kenya 2010, leaves no doubt that the ELRC and its twin sibling, the ELC, were intended to be “specialized courts” with certain, specific and precise jurisdiction, in contradistinction to the High Court which enjoys unlimited original jurisdiction in criminal and civil matters and the jurisdiction to interpret and apply the *Constitution*, including enforcement of fundamental rights and freedoms. The report expressly refers to the two courts as “specialised” courts and further explains that the CoE rejected a proposal to remove the two courts from the *Constitution* and leave it to Parliament to establish —other courts” with such jurisdiction as it may determine. The CoE reasoned that to do so would give Parliament an opportunity to establish courts with broad jurisdiction capable of supplanting that of the other superior courts established by *the Constitution*, which —would not signal establishment of specialised courts” on employment and labour and land/environment, and might lead to competing Jurisdiction with the High Court ... From the above provisions of the *Constitution* and the Act, it is obvious that the jurisdiction of the ELRC is precise and limited rather than unlimited. The straight forward Jurisdictional question in this appeal therefore is whether recruitment of members of the National Land Commission falls within the meaning of a dispute relating to employment and labour relations We have already set out the provisions of the *Constitution* regarding



the Commission which indicate that it is an independent constitutional Commission whose members are appointed in accordance with a special procedure provided by *the Constitution* and the Act; upon appointment they are only subject to the *Constitution* and the law and not subject to the direction or control of any person or authority; What all this suggests to us is that the appointment and removal from office of the commissioners of these independent commissions is not a labour and employment issue as the ELRC erroneously held, but a special constitutional innovation, a sui generis devise to address challenging governance needs and gaps. The appointment of the chairperson and members of the Commission did not involve any of the parties or raise any of the employment and labour relations issues contemplated by section 12 of the Act.”

72. It is further the submission of the Respondents that section 2 of the *Employment Act* and section 2 of the *Labour Relations Act* define an “employee” to mean a person employed for wages or a salary and includes “an apprentice and indentured learner” while “employer” has been defined as, 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. That the law is clear that an employee is a person employed for wages or a salary.
73. The respondents also submit that section 5(5) and 17 of the *Employment Act*, 2007 states that the employer should pay the employee remuneration/salary/wages equal to the amount of work done by the employee. Section 7 specifies that there should exist a contract of service whose particulars are outlined in section 10 of the Act which include the commencement of employment, appointment - job title and job scope, hours of work, probation period, if any, remuneration, employee’s benefits.
74. It is submitted that there is a fundamental difference between a salary or wages and remuneration. That in *Kenya Game, Hunting & Safaris Workers’ Union v Private Safaris (EA) Ltd* [2002] eKLR, the court observed that the dictionary meaning of the word “salary” is a periodical payment for service. Salary is the payment made for work done in accordance with given directions. In other words, salary is more certain and does not carry the possibility of a loss; and it is fixed over a period of time and is generally paid at regular intervals. The word “remuneration” means “a reward or pay for service rendered”. It is submitted that appointments to the Board of Directors of the NCWSC are statute based, through gazette notices and the appointees draw an allowance and not salary. This clearly means that the Chairperson and Members of the Board of Directors are not employees of the Company hence the employment and labour laws do not apply to them.
75. The respondent relies for emphasis on the decision in *Nick Githinji Ndichu v Clerk, Kiambu County Assembly & another* [2014] eKLR where Nduma J in reference to section 12 of the Industrial Court Act stated that;
- “... It is clear from the foregoing that the law is not concerned with the method of acquiring an employee. The law does not concern itself with whether the person was appointed or elected. Rather, the person must;
- (i) be having an oral or written contract of service;
 - (ii) be providing a service to a real or legal person;
 - (iii) be receiving a wage/salary for the services rendered.



If such a person has a dispute with the person with whom he/she has a contract of service and to whom he / she provides services for a wage or salary, the court has jurisdiction over such dispute and has available remedies for that purpose.

76. The respondent further relies on the case of *Geoffrey Oriaro v Cabinet Secretary Ministry of Labour Social Security & Services & others* [2015] eKLR where the court held that for there to be an employer-employee relationship, a person must have an oral or written contract of service and must be receiving a wage or salary for services rendered. That for there to exist an employer -employee relationship, there must be a contract of service. The *Employment Act* (section 2) defines a contract of service to mean an agreement, whether entered into orally or in writing, and whether express or implied, to employ or to serve as an employee for a period of time and includes a contract of apprenticeship or indentured learner.
77. It is the submission of the respondents that the relationship between board directors and the company do not constitute an employment relationship. They rely for emphasis on the decision in *Kenya Council of Employment and Migration Agencies & another v Samuel Mwongera Arachi & 2 others* [2015] eKLR where the court held: -
- “Whereas and from the foregoing provisions of the law, the court has jurisdiction to adjudicate constitutional questions, these questions must arise within the broad relationship parameters set out under section 12 of the Act and further they can only be agitated by persons identified under section 12(2) of the Act acting in person or through authorized representative as stated earlier. The Act makes no provision for representation by civil society which the applicant is.”
78. The respondents submit that the court should therefore down its tools as was held by the Court of Appeal in *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] KLR 1 thus;
- “I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
79. The respondents further submit that in *Samuel Kamau Macharia & another v Kenya Commercial Bank and two others* [2012] eKLR the Supreme Court stated:
- “A court’s jurisdiction flows from either the *Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law ... Where the *Constitution* exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.”
80. For the *ex parte* applicant it is submitted that both the motion and petition raise employment related issues that can only be heard in the Employment and Labour Relations Court. He submits that article 1(1) and (3) vest sovereign power in the people of Kenya to be exercised only in accordance with the *Constitution*, and vested in Parliament and legislative assemblies, national government and executive structures in the country governments, and in the Judiciary and Independent Tribunals. Further, that article 159(1) vest judicial authority in the courts and tribunals established by or under the



- Constitution. For emphasis he relies on the decision of the court in In the Matter of Interim Independent Electoral Commission [2011] eKLR and Samuel Kamau Macharia v Kenya Commercial Bank & 2 others [2012] eKLR.
81. He submits that Parliament operationalised the court *vide* the Employment and Labour Relations Court Act and that the long title to the Act states that it is established “to hear and determine disputes relating to employment and labour relations and for connected purposes.”
82. Further that section 12(1) of the Employment and Labour Relations Court Act, 2011, provides that:
- “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...”
83. He submits that under article 162(2)(a) as read together with article 165(5) and section 12 of Employment and Labour Relations Act, the Employment and Labour Relations Court has jurisdiction to hear and determine the instant dispute, which relates to the employment and removal of directors of a public body.
84. He relies on the decision in Republic v Clerk County Assembly of Baringo ex parte William Kassait Kamket [2015] eKLR, where the court found that the definition of employees covers employees in the ordinary sense, servants of the people. He further relies on the decision in Nick Githinji Ndichu v Clerk, Kiambu County Assembly & another [2014] eKLR where the court held that “the law does not concern itself with whether the person was appointed or elected but rather whether they have an oral or written contract and are receiving a wage/salary for services rendered.” He further cites the decision in United States International University (USIU) v Attorney General [2012] eKLR.
85. After citing a long list of authorities, the *ex parte* applicant concludes that it is now a settled issue that this court has jurisdiction to hear and determine motions concerning recruitment, nomination and appointment of the Clerk of the National Assembly.
86. He submits that appointments made under the Water Act or the State Corporations Act are subject to article 41(1) of the Constitution, which decrees that, “Every person has the right to fair labour practices.”
87. Although it has been more than 10 years since the Constitution was passed creating the Employment and Labour Relations Court and the subsequent establishment of the court *vide* Employment and Labour Relations Court Act in 2010 and 2011 respectively, the issue of this court’s jurisdiction appears not to have been finally settled. It keeps coming up now and then, even though there are numerous decisions of both this court and the Court of Appeal where it was presumed that the issue had been settled.
88. In the recent decision of the Court of Appeal in Attorney General & 2 others v Okiya Omtata Okoiti & 14 others [2020] eKLR which the respondents have relied on in disputing the jurisdiction of this court, the Court of Appeal held that the Employment and Labour Relations Court does not have jurisdiction to determine an issue of appointment and removal from office of commissioners of independent commissions. The court was clear that –

“From the above provisions of the Constitution and the Act, it is obvious that the jurisdiction of the ELRC is precise and limited rather than unlimited. The straight forward jurisdictional question in this appeal therefore is whether recruitment of members of the National



Land Commission falls within the meaning of a dispute relating to employment and labour relations. We have already set out the provisions of the Constitution regarding the Commission which indicate that it is an independent constitutional Commission whose members are appointed in accordance with a special procedure provided by the Constitution and the Act; upon appointment they are only subject to the Constitution and the law and not subject to the direction or control of any person or authority; they enjoy security of tenure and cannot be removed from office except for cause and following a specific procedure entailing recommendations of an independent tribunal as is the case with judges; and their terms and benefits cannot be varied to their prejudice, again just like judges.”

89. In my view, the Court of Appeal was very clear that this related to independent commissions only. It did not extend to any other appointment as the Respondents have urged this court to find.

90. I need to add here that although I am bound by the said decision of the Court of Appeal, I do not have to agree with it. With tremendous respect to the Judges of the Court of Appeal, my view is that appointments to public office whether to an independent commission or any other public body, whether of commissioners, or any other office, are governed by the same principles set out in articles 10 and 232 of the Constitution. I am therefore not convinced that where these principles are being interpreted in respect of commissioners of independent commissions, only Judges of the High Court and not the Employment and Labour Relations Court are best placed to deal with the same. In my view this is not a purposive interpretation of the Constitution.

91. Further, section 12(1) of the Employment and Labour Relations Court Act does not limit the Court to only the disputes set out therein under paragraphs (a) to (j). the provision reads –

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 ...”

92. By the use of the word “including”, the legislature signified that what is set out thereafter is not conclusive or exclusive. That other disputes other than those listed can be heard and determined by the court.

93. It is further my view that courts must interpret the definition of “employment” as used in article 162(2) (a) of the Constitution 2010 to be inclusive rather than exclusive. In my view employment includes any engagement for personal services from which “the employee” is remunerated whether by salary, wages or allowances. The definition of remuneration must be guided by that in the Employment Act to mean –

“the total value of all payments in money or in kind, made or owing to an employee arising from the employment of that employee;”

94. In my view, commissioners and board members of state institutions are employees of the state engaged on part time or full time basis in terms of “piece work” or “task” as defined in the Employment Act as follows: –

“piece work” means any work the pay for which is ascertained by the amount of work performed irrespective of the time occupied in its performance;



“task” means such amount of work as can, in the opinion of an authorised officer, be performed by an employee in an ordinary working day;

95. They are thus paid sitting allowances and other benefits based on the work performed. The fact that they are paid allowances and not salary does not change the fact they are in the employment of the state.
96. Commissioners’ allowances and other benefits are regulated by the Salaries and Remuneration Commission like all other persons engaged in the public service. What they are paid are thus either salaries or remuneration.
97. In deed article 250 which provides for appointment and terms of office for commissioners of independent commissions provides –
 250. Composition, appointment and terms of office
 - (1) Each commission shall consist of at least three, but not more than nine, members.
 - (2) The chairperson and each member of a commission, and the holder of an independent office, shall be—
 - (a) identified and recommended for appointment in a manner prescribed by national legislation;
 - (b) approved by the National Assembly; and (c) appointed by the President.
 - (3) To be appointed, a person shall have the specific qualifications required by this Constitution or national legislation.
 - (4) Appointments to commissions and independent offices shall take into account the national values referred to in article 10, and the principle that the composition of the commissions and offices, taken as a whole, shall reflect the regional and ethnic diversity of the people of Kenya.
 - (5) A member of a commission may serve on a part-time basis.
 - (6) A member of a commission, or the holder of an independent office—
 - (a) unless *ex officio*, shall be appointed for a single term of six years and is not eligible for re-appointment; and
 - (b) unless *ex officio* or part-time, shall not hold any other office or employment for profit, whether public or private.
 - (7) The remuneration and benefits payable to or in respect of a commissioner or the holder of an independent office shall be a charge on the Consolidated Fund.
 - (8) The remuneration and benefits payable to, or in respect of, the members of a commission or the holder of an independent office shall not be varied to the disadvantage of that person during their respective terms of office.
 - (9) A member of a commission, or the holder of an independent office, is not liable for anything done in good faith in the performance of a function of office.
 - (10) The members of a commission shall elect a vice-chairperson from among themselves—
 - (a) at the first sitting of the commission; and (b) whenever it is necessary to fill a vacancy in the office of the vice-chairperson.



- (11) The chairperson and vice-chairperson of a commission shall not be of the same gender.
- (12) There shall be a Secretary to each commission who shall be—
- (a) appointed by the commission; and
 - (b) the chief executive officer of the commission.
98. It is my hope that the issue of the jurisdiction of this court finds its way to the apex court of the land so that it is determined with finality. It is further my hope that the apex court will be persuaded by my interpretation as set out herein.
99. Back to this case, as I have already stated above, the Court of Appeal did not exclude board members and corporation secretaries, who are the subject of the suits herein, from the jurisdiction of this court. I therefore find no merit in the objections to the jurisdiction of this court to handle this matter
100. I would add that in view of the fact that the removal of the petitioners included a corporation secretary who is an employee as opposed to a board member, even if the jurisdiction of this court was in doubt, which in my view it is not, my view would be that this is a mixed grill case which includes employment issues and that this court would thus have concurrent jurisdiction to hear and determine the case, in view of the fact that the principles in issue are similar for both the appointment of the board members and the corporation secretary to public office and that it would not be in the public interest to split the suits, so that we hear the corporations secretary and send the other petitioner's packing.
- Whether there was violation of the Constitution, statutes and guidelines in the removal of the Petitioners and appointment of the new board members and corporation secretary
101. The petitioners submit that their removal and the appointment of the 3rd to 11th respondents violated section 139 and 287 of the Companies Act, section 4 of the Fair Administrative Action Act, articles 10, 28, 41 and 232 of the Constitution, sections 79 of the Water Act and the Guidelines for Water Services Sector 2018.
102. The petitioners rely on the case of Okiya Omtatah Okoiti v Nairobi City County & 5 others [2016] eKLR where the court stated –
- “The appointment of directors of the 5th respondent ought, in my view, to be governed both by the provisions of the Companies Act and its articles of Association, as well as the Corporate Governance Guidelines under the Water Act.
- The appointment of the directors of the 5th respondent must therefore be in accordance with, first, the constitutional provisions with regard to appointments to public office, the Articles of Association of the company, and the corporate governance guidelines.”
103. The court further stated that –
- “Sub-clause (13) further provides that:
- The stakeholders have the right to;
- Be provided with adequate information on competencies required on the Board and given options to elect directors from amongst a range of qualified, competent, fit and proper persons in accordance with the eligibility criteria.”



It is therefore apparent from the foregoing that the role of appointing directors to the Board falls squarely within the mandate of shareholders who as can be seen above are all entities within the City Council of Nairobi ...”

104. They further relied on the decision in *James Waweru Gachibiri & 5 others v County Government of Kirinyaga & another* [2018] eKLR where the Judge stated –

“The Articles of Association of a company constitute *the constitution* of any company and play a vital role in defining and distributing powers and functions, and regulate the functioning of the company. It may thus be argued that the articles of association of the 5th Respondent prevail over the provisions of the *Water Act* in relation to the appointment of directors of the 5th respondent.”

105. It is submitted that even if the NMS as majority shareholder had locus to appoint directors, the same had to be done within the framework of the *Constitution* for public appointments and the law, as well as the guidelines and regulations under the *Water Act* which it did not.

106. For the *ex parte* applicant it is submitted that the appointments did not comply with “Mwongozo” and the Water Services Regulatory Board Corporate Governance Guidelines for Water Services Sector 2018. He submits the purported vacancies in the Board were not announced and subjected to a competitive process. He relies on the decision in *Robert N Gakuru & others v Governor Kiambu County & 3 others* [2014] eKLR where the court stated –

“Public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates. It is my view that it behoves the County Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively. It is not just enough in my view to simply “tweet” messages as it were and leave it to those who care to scavenge for it. The County Assemblies ought to do whatever is reasonable to ensure that as many of their constituents in particular and the Kenyans in general are aware of the intention to pass legislation and where the legislation in question involves such important aspect as payment of taxes and levies, the duty is even more onerous. I hold that it is the duty of the County Assembly in such circumstances to exhort its constituents to participate in the process of the enactment of such legislation by making use of as many fora as possible such as churches, mosques, temples, public barazas national and vernacular radio broadcasting stations and other avenues where the public are known to converge to disseminate information with respect to the intended action. Article 196(1)(b) just like the South African position requires just that.”

107. The Court of Appeal affirmed the decision in *Kiambu County Government & 3 others v Robert N Gakuru & others* [2017] eKLR stating –

“The issue of public participation is of immense significance considering the primacy it has been given in the supreme law of this country and in relevant statutes relating to institutions that touch on the lives of the people. The *Constitution* in article 10 which binds all state organs, state officers, public officers and all persons in the discharge of public functions, highlights public participation as one of the ideals and aspirations of our democratic nation ...”



108. The *ex parte* applicant submits that article 2(1) of *the Constitution* provides that the *Constitution* binds all persons including the respondents, and under article 2(4) of the *Constitution*, any act or omission in contravention of *the Constitution* is invalid.
109. That submits that the NMS violated national values and principles of governance enshrined in articles 1, 2, 3(1), 10, 22, 24, 27, 23(3), 47, 48, 50, 73, 129, 232, 236, 258 and 259 of the *Constitution* and acted *ultra vires*.
110. He submits that the respondents violated article 47 of the *Constitution*. To fortify this position, he relies on the decisions in *Republic v Kenya Power & Lighting Co Ltd & another* [2013] eKLR, *Judicial Service Commission v Mbalu Mutava & another* [2015] eKLR and *President of the Republic of South Africa & others v South African Rugby Football Union & others* (CCT16/98) 2000 (1) SA 1.
111. The *ex parte* applicant further submits that article 73 and 75 of the *Constitution* were violated in that the 1st respondent was abusing public office by using it to reward his political cronies and supporters. That this resulted to discrimination of non-supporters, contrary to article 27 of the *Constitution* of Kenya 2010.
112. Additionally, the *ex parte* applicant submits that the 1st and 2nd respondent's decision to violate the law is contrary to article 129 of the *Constitution* which provides that,
- (1) Executive authority derives from the people of Kenya and shall be exercised in accordance with this Constitution.
 - (2) Executive authority shall be exercised in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit.
113. The *ex parte* applicant Asserts that, the 1st and 2nd respondents' decision to violated the law which is contrary to article 10(2) which entrench the Rule of Law in the *Constitution*.
114. It is further the *ex parte* applicant's submissions that actions of the respondents were *ultra vires* their statutory mandate and violated the legitimate expectation of the Kenyans and the *ex parte* applicant.
115. The Corporate Governance Guidelines for the Water Services section 2018 made under *Water Act* provides for governance of water services in detail. It specifically provides for compliance with articles 2, 6, 10, 21, 43, 46, 259 and the Fourth Schedule of the *Constitution*. It further elaborately provides for public participation, compensation of board members, and board appointments.
116. Appointment of board members is provided for as follows –
- 3.4.5 Board appointments
1. Board appointments shall be transparent and competitive so as to ensure the public served has an opportunity to participate in decision making in service delivery that affects them.
 2. Vacant positions shall be advertised in the media and on the website of the WSP and the criteria set out by WASREB nationally shall be used.
 3. An *ad hoc* nominating committee of the board of directors comprising county and select committee from two or three primary/key stakeholders shall assess applications and ensure that not only is the Leadership and Integrity criteria met but shall perform a background check to ensure the candidates add value to the entity.



4. The select committee shall receive the applications, vet them to ensure that they comply to the Fit and Proper Test plus the eligibility criteria and where necessary conduct interviews.
 5. The Report of the selection committee shall be submitted to the shareholder who is required as shareholder and function owner to ensure that only persons who add value to the company are appointed.
 6. The Fit and Proper Test Form is annex 2 to this Guideline and must be filled by all applicants and appointees.
 7. The copy of the Fit and Proper Test Forms of each of the appointed directors shall be sent to WASREB.
 8. A letter of appointment issued by the county secretary that adheres to the articles of association of the WSP shall be given after ratification of names of the accepted directors at annual general meeting by the shareholder.
 9. The letter must contain a termination clause on poor performance and misconduct and ensure that it captures that unless the board is retired due to poor performance a third of the members shall retire every year from the third year.
 10. Board members shall serve a maximum of six (6) years based on the approval of the shareholder and on performance issues.
 11. Before a board member begins to serve he must be inducted in governance training customized for the water services sector and sign a code of ethics based on the Leadership and Integrity Act, 2012 and the Public Officer Ethics Act, 2003.
 12. The list of ratified board members and the stakeholder group they represent shall be maintained on the website of the WSP and shall be communicated to WASREB.
 13. It is important that board service is not disrupted by the election cycle and independent oversight must not be compromised by the election cycle.”
117. In the event of removal of board members before expiry of their terms, they are entitled to a hearing under article 47 and section 4 of the [Fair Administrative Action Act](#).
 118. The Regulations specifically provide that the letter of appointment of a board member must contain a termination clause on poor performance and misconduct. This means the before removal a board member must be subjected to a hearing to prove poor performance or misconduct.
 119. Further section 139 of the [Companies Act](#) provides that a director may be removed from office by ordinary resolution of the company at a meeting before the end of the director’s term of office, subject to the director’s right to protest against the removal.
 120. The NMS is not above the law and is not exempted from compliance with the [Constitution](#), the [Water Act](#) and Regulations, the [Companies Act](#) or any other legal instrument.
 121. In the replying affidavits of both Kang’ethe Thuku and Florence Njau, they aver that since the City Council of Nairobi was and remains the majority shareholder in the share composition of NCWSC



- and upon devolution of this entity to NCCG and subsequent transfer to NMS *vide* the Deed, the responsibility of appointing the directors of NCWSC and or the removal of any or all of the directors of NCWSC is an exclusive mandate of NMS as majority shareholder and the 1st respondent's role is merely to communicate the resolutions of the majority shareholder.
122. This is in direct conflict with the regulations and the provisions of the *Companies Act*. Indeed, the Regulations are specific that operations of the Water Services Board should not be affected by the elections cycle, which would also cover the transfer of services from the County Government and vesting of the same in NMS.
 123. The averments are an admission by the respondents of violation of the various legal instruments cited above including the *Constitution*, the *Water Act* and Regulations, the *Companies Act* and the *Fair Administrative Actions Act*. The regulations provide for shareholders to include Class B shareholders and for public participation in shareholding. Section 3.3.2(3) of the Guidelines provide that provide that public participation, transparency and non-discrimination are inherent in the provision of the right to water by water service providers.
 124. Specifically, NMS did not have powers to appoint directors as this is a preserve of a select committee and to be carried out competitively, following advertisement.
 125. I therefore find that in appointing the 3rd to 11th respondents in the petition, the 1st and 2nd respondents acted without authority and the appointments are therefore null and void.
 126. I further find that the appointments were in violation of the *Constitution*, the *Water Act*, and Guidelines for Water Service Sector 2018, the *Companies Act*, Fair Administrative Actions Act. The appointments were thus unlawful and unconstitutional.
 127. The appointments further infringed on the legitimate expectation of the petitioners that they would serve on the Board of NWSC until either their terms lapsed or they are lawfully removed from office after being subjected to a fair hearing as provided by law.
 128. For these reasons both the judicial review motion and the petition succeed. I accordingly make the following orders:
 - a. An order of *certiorari* do and is hereby issued quashing the 1st respondent's Kenya Gazette Notice No 4233 dated 19th June 2020, the 1st respondent's letter dated 17th June 2020 to the 12th respondent and the 1st respondent's letter dated 19th June 2020 to the petitioners and to the 2nd to 4th interested parties.
 - b. A declaration do and is hereby issued that the Kenya Gazette Notice No 4233 dated 19th June 2020 appointing new directors for the 12th respondent, together with the 1st respondent's letter dated 17th June 2020 addressed to the 13th respondent to effect a change of directors of the 12th respondent and the 1st respondent's letter dated 19th June 2020 to the petitioners and the 2nd to 4th interested parties removing them from the board of the 12 respondent was an illegality that is null and void ab initio.
 - c. A declaration do and hereby issue that the 1st and 2nd respondents has no locus standi and/or authority to appoint directors and/or directly manage the 12th respondent.
 - d. A perpetual mandatory injunction and prerogative order of prohibition do and is hereby issued restraining the respondents either by themselves or through their agents and/or servants from interfering with the management and operations of the 12th respondent and/or the appointment of its directors.



- e. A conservatory order do and is hereby issued by way of a permanent injunction restraining the 1st and 2nd respondents from interfering with the operations and/or management of the 12th respondent and by extension the petitioners' operations as directors of the 12th respondent and/or their interference in any other way whatsoever except in the manner authorised by law.
- f. A conservatory order do and is hereby issued by way of a permanent injunction restraining the 3rd to 11th respondents from taking over the responsibilities of the management of the 12th respondent as its directors.
- g. A conservatory order do and is hereby issued by way of a permanent injunction prohibiting and restraining the 13th respondent from making the changes contained in the 1st respondent's letter dated June 17, 2020 and/or any other change in respect to the directorship of the Nairobi Metropolitan Services (the 2nd respondent).

129. The 1st and 2nd respondents shall bear the costs of the petitioners. There shall be no order for costs in the Miscellaneous Judicial Review Application as it was filed in the public interest.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 31ST DAY OF JANUARY 2022

MAUREEN ONYANGO

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 March 15, 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with order 21 rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under article 48 of the Constitution and the provisions of section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE

