



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT & LABOUR RELATIONS COURT**  
**AT MOMBASA**

**PETITION NO. 12 OF 2021**

**GENESIS FOR HUMAN RIGHT COMMISSION (GHRC.....PETITIONER**

**VERSUS**

**1. THE COAST WATER WORKS DEVELOPMENT AGENCY & 2 OTHERS.....RESPONDENT**

**AND**

**2. OMAR BOGA & 7 OTHERS.....INTERESTED PARTIES**

**R U L I N G**

1. On 1<sup>st</sup> October 2021, the Petitioner herein filed the petition seeking:

- a. an order quashing Gazette Notice Vol CXXI No. 17 No. 1240 dated 8<sup>th</sup> February 2019 vide which Members of Coast Water Development Agency Board were appointed by the 2<sup>nd</sup> Respondent.
- b. an order quashing Gazette Notice Vol CXXIII No.42 No.1720 dated 26<sup>th</sup> February 2021 vide which the 2<sup>nd</sup> Respondent purported to avoid Omar Boga as the Chairperson of the Board of Coast Water Works Development Agency.
- c. a declaration that the composition of Coast Water Works Development Agency Board violated the one third gender principle, and be and is hereby dissolved.
- d. cost of the petition be borne by the Respondents.
- e. such other orders this Honourable Court shall deem fit pursuant to Article 23(3) of the Constitution of Kenya 2010.

2. On the same date (1<sup>st</sup> October 2021) the petitioner filed an application under a certificate of urgency, also dated 1<sup>st</sup> October 2021 seeking orders:-

- a. that pending hearing and determination of the application inter partes, an interim order of injunction be issued suspending Gazette Notices Vol CXXI No.17 No.1240 of 8<sup>th</sup> February 2019 and Gazette Notice Vol CXXIII No.42 No.1720 of 26<sup>th</sup> February 2021 appointing the interested parties as members of the Board of the Coast Water Works Development Agency for a period of three (3) years effective from the date of the respective Gazette Notices.
- b. that pending determination and final disposal of the petition, a temporary order of injunction be issued prohibiting the Respondents and six interested parties either by themselves, their agents and/or any other person(s) whatsoever from acting and/or giving effect to the said Gazette Notices and restraining the interested parties from acting and discharging the duties of the subject Board.
- c. that costs of the application be provided for.

3. The application was placed before me on 14/10/2021 and I directed that the application be served on all the parties herein.

4. On 14<sup>th</sup> October 2021, the Hon. Attorney General came on record for the Respondents vide a Notice of Appointment dated the said date. The Hon. Attorney General also filed a Notice of Preliminary Objection stating that he would apply that the aforesaid Notice of Motion be

struck off on grounds:-

**a. that this Court has no jurisdiction to determine the issues brought before it as this is not an employment matter.**

**b. that the dispute herein is not based on an employment or Labour relationship but on appointment under the statute law; and that the proper Court for determining the dispute is the High Court under (Article) 165(3)(b) of the Constitution of Kenya and not the Employment and Labour Relations Court as set out under Article 162(2) (c) of the Constitution of Kenya.**

**c. that the petition in its entirety offends Section 121(1) of the Water Act 2016.**

5. It was held in the case of MUKISA BISCUITS CO. LTD –VS- WESTEND DISTRIBUTORS LTD [1969] E.A 696 as follows:-

**“a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is urged on the assumption that all facts pleaded are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”**

6. In the present case, the Respondents, who are yet to file any responses to both the petition and the Notice of Motion dated 1<sup>st</sup> October 2021, have contended that this Court lacks jurisdiction to hear the dispute herein as the same is not an employment and labour relations dispute falling under Article 162(2) (c) of the Constitution of Kenya. Before this Court can determine the foregoing issues, it will have to probe various matters of both law and fact, which include, but not limited to, whether persons appointed to public office under the Statute, in this case the Water Act, become employees/public employees/servants upon such appointment, and whether any dispute arising from their appointment falls under this Court’s jurisdiction. These are matters of both law and fact which must be ascertained.

7. Once an otherwise point of law is clouded with matters of fact, it ceases to be a pure point of law, as matters of fact must be probed in order to ascertain it. This is the position in the present case.

8. I decline to uphold the preliminary objection. The same is hereby dismissed with no orders as to costs.

9. The Respondents and interested parties should file and serve their respective responses to both the petition herein and the Notice of Motion dated 1<sup>st</sup> October 2021 within twenty one (21) days from the date of this ruling, if they wish to do so.

10. The matter shall be mentioned in Court on 22<sup>nd</sup> March 2022 for directions on the Notice of Motion dated 1/10/2021.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 17<sup>TH</sup> DAY OF FEBRUARY, 2022**

**AGNES KITIKU NZEI**

**JUDGE**

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

**AGNES KITIKU NZEI**

**JUDGE**

Appearance:

No Appearance for Petitioner

Mrs. Waswa for Respondent