



Wachira v Gusii Water & Sanitation Co Ltd & 7 others (Petition E002 of 2022) [2022] KEELRC 1541 (KLR) (18 May 2022) (Judgment)

Neutral citation: [2022] KEELRC 1541 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION E002 OF 2022**

S RADIDO, J

MAY 18, 2022

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010

AND

**IN THE MATTER OF THE VIOLATION OF ARTICLES 1, 2(1),
(4), 10, 19, 20, 21, 22, 232(1)(E), 235(1)(C), 236 AND 258 OF THE**

CONSTITUTION

AND

**IN THE MATTER OF THE VIOLATION OF THE PETITIONER’S BASIC AND
FUNDAMENTAL RIGHTS AS ENSHRINED UNDER ARTICLES 27(1), (5), 28,
29(D) &(F), 36(1), 41, 47 AND 50 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF SECTIONS 4(1), (2), (3) AND (4) OF
THE FAIR ADMINISTRATIVE ACTION ACT, NO. 4 OF 2015**

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS
AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

AND

IN THE MATTER OF THE EMPLOYMENT ACT

BETWEEN

LUCY WAHITO WACHIRA PETITIONER

AND

GUSII WATER & SANITATION CO LTD 1ST RESPONDENT

BOARD OF DIRECTORS OF GUSII WATER & SANITATION CO

LTD 2ND RESPONDENT



KISII COUNTY GOVERNMENT	3RD RESPONDENT
NYAMIRA COUNTY GOVERNMENT	4TH RESPONDENT
SAMWEL MAIKO, CECM, WATER, ENVIRONMENT & NATURAL RESOURCES	5TH RESPONDENT
CHARLES ONYANCHA, CECM, WATER, ENVIRONMENT & NATURAL RESOURCES	6TH RESPONDENT
ROBERT ONGERI	7TH RESPONDENT
SHEM ONCHIRI	8TH RESPONDENT

JUDGMENT

1. The Gusii Water & Sanitation Co Ltd (the company) offered Lucy Wahito Wachira (the petitioner) the position of Commercial Manager effective 1 September 2019 on a 3-years term subject to renewal.
2. On or around 14 October 2021, the company appointed the Petitioner to act as Managing Director for 3-months.
3. On 12 November 2021, Hon Samwel Maiko, and Hon Charles Onyancha issued a circular to the staff of the Company informing them of the appointment of Robert Onger and Shem Onchiri as acting Managing Director and Deputy Managing Director respectively (7th and 8th respondents).
4. The two issued the circular in their capacities as County Executive Committee members for Water for the Counties of Nyamira and Kisii respectively.
5. On 7 January 2022, the Chairman of the Company wrote to the Petitioner advising her that her appointment to act as the Managing Director had been extended pending the appointment of a substantive Managing Director.
6. It appears that the company was now operating under 2 acting Managing Directors.
7. On 26 January 2022, the acting Managing Director appointed by the County Executive Committee members issued a show cause to the petitioner and the allegation was laxity at work.
8. The petitioner was directed to respond to the charge before close of 27 January 2022.
9. The show-cause was followed with a vacancy announcement in the Daily Nation of 28 January 2022, for the position of Commercial Manager (the petitioner’s substantive position).
10. The petitioner was dismayed and on 3 February 2022, filed a petition contending that the appointment or secondment of the 7th and 8th respondents as acting Managing Director and Deputy Managing Director respectively was unlawful because the company had not made a request for the secondment(s) and because they did not hold the qualifications set out in section 72 of the company’s articles of association.
11. The petitioner further pleaded that the advertisement of the office of Commercial Manager was unlawful because her contract had not expired, the vacancy had been made by persons without any authority, and the decision was a usurpation of the mandate of the board of the company.
12. The petitioner asserted that the actions and conduct amounted to constructive dismissal.



13. Simultaneously with the petition was a motion under a certificate of urgency seeking interim interdicts (the petitioner contended that she had been locked out of office).
14. When the motion was placed before the court, it directed that both it and the petition would be taken together, and that responses and submissions be filed and exchanged within set timelines ahead of further directions on 17 February 2022.
15. The petitioner filed skeleton submissions on 11 February 2022.
16. The parties did not comply within the set timelines and on 17 February 2022, the court directed the County Labour Officer, Kisii to visit the petitioner's workplace and verify whether she had been locked out of her offices.
17. The County Labour Officer filed a report with the court on 22 February 2022. The report confirmed that the petitioner's office had been locked on the orders of the 7th respondent.
18. On 24 February 2022, the court issued further directions with judgment reserved for 18 May 2022. At the same time, the court issued an interim injunction restraining the respondents from interfering with the petitioner's employment or recruiting a replacement pending determination of the petition.
19. Pursuant to the further directions, the following were filed:
 - i. A replying affidavit by 5th respondent on 7 March 2022.
 - ii. Further affidavits and submissions by the petitioner on 11 April 2022.
 - iii. Submissions by the 4th and 5th respondents on 12 April 2022.
20. The petitioner identified one primary reason as arising for the court's determination in her submissions:
 - (i) Whether the advertisement for the position of Commercial Manager was legal?
21. The 4th and 5th respondents on their part identified the issues for the court's examination as:
 - i. Whether this petition has met the threshold of a constitutional petition?
 - ii. Whether the petitioner was illegally dismissed as the 2nd respondent's acting Managing Director and constructively dismissed as a Commercial Manager?
 - iii. Whether the petition is sub judice?
 - iv. Whether the petitioner is entitled to the reliefs sought?
 - v. To whom should the costs be awarded?
22. The court has considered the petition, motion, affidavits, and submissions.

Sub Judice

23. The decision of the 5th and 6th respondents to appoint the 7th and 8th respondents as acting Managing Director and Deputy Managing Director was challenged through an amended petition before the Employment and Labour Relations Court in Kericho Petition No E009 of 2021, Thomson Kerongo & Ar v County Government of Kisii & Ors and on 1 February 2022, the Court issued an order restraining the 7th respondent from assuming the office of acting Managing Director pending the hearing of the Petition.



24. The court also ordered that the instant petitioner should continue serving as acting Managing Director.
25. Since the petition before the court in Kericho was filed prior to this petition, and in consideration of section 6 of the *Civil Procedure Act*, this court declines to examine the question of the lawfulness of the appointment of the 7th and 8th respondents through the circular dated 12 November 2021 on the ground of *sub judice*.

Lawfulness of the Advertisement of Petitioner's Job

26. The respondents caused to be published in the Daily Nation of 28 January 2022, an advertisement of vacant positions including that of Commercial Manager (held by the petitioner).
27. The respondents explained the declaration of vacancy on the need for early transition (avoidance of a vacuum) or planning before the expiry of the petitioner's contract in August 2022.
28. The Gusii Water & Sanitation Co Ltd is a juristic person with its legal existence, distinct and separate from its shareholders.
29. The articles of association of the company provide for a board of directors vested with the function of recruiting staff for and on behalf of the company.
30. The respondents did not put before the court any resolution by the board authorising or approving the recruitment of a Commercial Manager.
31. The 4th and 5th respondents did not deny that they were the persons behind the vacancy advertisement. They were not members of the board, but mere shareholders or were representing the interests of the respective shareholders.
32. The court therefore finds that it was not within their legal province to cause a vacancy to be published whether a board was in place or not.

Constructive Dismissal

33. A constructive dismissal occurs when the employee makes the decision to resign or leave with or without notice on the ground that the employer has created a hostile work environment or has repudiated a fundamental obligation under the contract.
34. The petitioner's position was unlawfully advertised. The 5th and 6th respondents also caused her to be locked out of office. These actions, in the court's view, were orchestrated to hound her out of office.
35. However, the petitioner never took the positive step of leaving and therefore asserting constructive dismissal is premature.
36. Without that essential positive step, the court concludes that this was not a case of constructive dismissal.

Conclusion and Orders

37. From the foregoing, the court finds and orders:
 - i. A declaration be and is hereby issued that the advertisement in the Daily Nation newspaper of 28 January 2022 in respect to the position of Commercial Manager was null and void.
 - ii. An order be and is hereby issued quashing the advertisement in the Daily Nation newspaper of 28 January 2022 in respect to the position of Commercial Manager



38. The decision of the 4th and 5th respondents was capricious and without any foundation and they are condemned to pay the costs of the petition.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 18TH DAY OF MAY 2022.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For petitioner Sam N Mainga & Co Advocates.

For 1st & 2nd respondents SM Sagwe & Co Advocates.

For 4th & 5th respondents Omwenga & Co Advocates.

Court Assistant Chrispo Aura

