



REPUBLIC OF KENYA



KENYA LAW
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Mariita v Gusii Water and Sanitation Company Limited & 9 others; Wachira (Interested Party) (Petition E01 of 2022) [2022] KEELRC 1345 (KLR) (30 June 2022) (Ruling)

Neutral citation: [2022] KEELRC 1345 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION E01 OF 2022

CN BAARI, J
JUNE 30, 2022

BETWEEN

VINCENT OMAO MARIITA PETITIONER

AND

GUSII WATER AND SANITATION COMPANY LIMITED ... 1ST RESPONDENT

BOARD OF DIRECTORS OF GUSII WATER AND SANITATION COMPANY LIMITED 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

LAKE VICTORIA SOUTH WATER SERVICE BOARD 7TH RESPONDENT

WATER SERVICES REGULATORY BOARD 8TH RESPONDENT

ROBERT ONGERI 9TH RESPONDENT

SHEM ONCHIRI 10TH RESPONDENT

AND

LUCY WAHITO WACHIRA INTERESTED PARTY



RULING

1. This ruling relates to the Petitioner's Motion dated 31st January, 2022, expressed to be brought pursuant to Articles 2(1), 3(1), 10, 21, 22, 27, 73, 196, 201 and 207 of the Constitution of Kenya, 2010; Sections 1A and 1B of the Civil Procedure Act, Orders 40 and 51 of the Civil Procedure Rules and Section 19 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.
2. The Petitioner seeks the following orders:
 - i. Prayers 1 to 6 of the application are spent.
 - ii. That pending the hearing and determination of this petition, the Honourable Court be pleased to grant an interim order of injunction restraining the Respondents either by themselves, agents and servants from preventing, barring, restricting and interfering with the Interested Party's performance of her duties as the Managing Director, of the 1st Respondent.
 - iii. That pending the hearing and determination of this petition, the 1st Respondent be restrained from admitting into the payroll or expending public funds on the 9th and 10th Respondents whose employment is impugned in this petition.
 - iv. That pending the hearing and determination of this petition the Honourable Court be pleased to issue interim orders restraining the Respondents either by themselves, agents, servants and/or employees from making payments to and/or in favour of the 9th and 10th Respondents, on account of remuneration, allowances and/or salaries.
 - v. That the court be pleased to issue an order of judicial review of certiorari to remove into the honourable court for quashing the decision of the Respondents to hire and/or recruit the 9th and 10th Respondents
 - vi. That pending the hearing and determination of this petition, the Respondents be ordered to provide the Petitioner and file in court copies of all the minutes for the post to be seconded, evaluation report of the identified candidates, letter of regret to unsuccessful candidates, resolutions on the creation of the additional non-vacant posts, the appointment letters and any other document relied on in the decision to hire the 9th and 10th Respondents on secondment.
 - vii. That the costs of the application be provided for.
3. The application is supported by grounds on the face of the motion and an affidavit sworn by the Petitioner. The crux of the application is that the Interested Party herein, was appointed to the position of Acting Managing Director of the 1st Respondent on 14th October, 2021, and that later the Board of the 1st Respondent received a letter dated 12th November, 2021, by the County Executive Committee Members for Nyamira and Kisii Counties appointing Mr. Robert Ongeru to the position of Acting Managing Director and Shem Ondiri to the position of Acting Deputy Managing Director.
4. The Applicant contends that the latter appointees were installed into office, and office locks changed to lock out the Interested Party from her office.
5. The Applicant states that Mr. Robert Ongeru and Mr. Shem Ondiri were seconded from other counties to act in the impugned positions and that their secondment did not comply with the law.



6. The Applicant further asserts that Mr. Robert Ongeru and Mr. Shem Ondiri do not possess the necessary qualifications to act in the position of Managing Director.
7. Save for the 4th and 5th Respondents, the rest of the Respondents did not oppose the application.
8. The 4th and 5th Respondents aver that the application is not brought in the public interest, but that of the Applicant's. The Respondents further state that similar suits were previously filed in relation to the issues subject of this application, one being Kisumu ELRC Petition No. E002 OF 2020 filed by the Interested Party herein and Kericho ELRC Petition No. E00 OF 2021 by Thompson Keronga & Rigena Human Rights Watchdog.
9. The Respondents further state that the 1st Respondent is not a State Organ but a private company registered under the Companies Act.
10. The Respondent states that the appointment of the Interested Party as Acting Managing Director was not procedural for reason that the Board did not make a unanimous decision.
11. The Respondents state that the Interested Party was appointed, albeit unprocedurally, but which appointment was only for 3 months and which period has since ended. The Respondents further aver that the Interested Party upon the lapse of her 3 months' appointment resumed her substantive position of Commercial Manager.
12. The Petitioner and the 4th and 5th Respondents filed submissions and which have been duly considered.

Analysis and Determination

13. I have considered the application, the grounds and affidavit in support and the replying affidavit in opposition by the 4th and 5th Respondents. The issue for determination is whether the application meets the threshold for grant of injunctive orders.
14. The test for granting of an interlocutory injunction was considered in the case of *American Cyanamid Co. v Ethicon Limited* (1975) A AER 504, where three elements were noted to be of great importance namely: -
 - i. There must be a serious/fair issue to be tried,
 - ii. are not an adequate remedy,
 - iii. The balance of convenience lies in favour of granting or refusing the application.
15. Closer home, the court in the case of *Nguruman Limited v. Jan Bonde Nielsen & 2 Others*, CA No. 77 OF 2012, expressed itself on the importance of satisfying all the three requirements for an order of injunction as follows: -

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

 - (a) establish his case only at a prima facie level,
 - (b) demonstrate irreparable injury if a temporary injunction is not granted, and
 - (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.”



16. Guided by the court decisions cited herein, the question for this court is whether the Applicant herein has established a prima facie case to warrant the grant of interim orders sought. In *Mrao Ltd v First American Bank of Kenya and 2 others*, (2003) KLR 125, cited with approval in *Moses C. Mubia Njoroge & 2 others v Jane W Lesaloi and 5 others*, (2014) eKLR, the Court of Appeal defined a prima facie case thus:

“ A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later”.

17. The Petitioner’s application is premised on an appointment by the Board of the 1st Respondent that was seemingly revoked by representatives of the 3rd and 4th Respondents.

18. The Respondents response is that the Interested Party’s appointment by the Board of the 1st Respondent was not procedural and that in any event, the appointment was for a term of three months’ and which period has since lapsed.

19. The Respondents’ response to the application aforesaid, is an admission that indeed the Interested Party was appointed to the position of Acting Managing Director. The 4th and 5th Respondents’ assertion that the Board of the 1st Respondent made the decision unprocedurally for reason only that the decision was not unanimous, in my opinion does not hold. A valid decision is one made by a majority of the Board, and it follows, that it does not have to be a unanimous decision.

20. In light of the foregoing, and guided by the Court of Appeal’s decision in *Moses C. Muhia Njoroge & 2 others v Jane W Lesaloi and 5 others* (Suppra), I find the application merited and I grant orders as follows:

- i. That pending the hearing and determination of the petition herein, an interim order of injunction be and is hereby granted restraining the Respondents by themselves, agents and servants from preventing, barring, restricting and interfering with the Interested Party’s performance of her duties as the Acting Managing Director of the 1st Respondent.
- ii. That pending the hearing and determination of this petition, an interim order be and is hereby issued restraining the Respondents either by themselves, agents, servants and/or employees from making payments to and/or in favour of the 9th and 10th Respondents, on account of remuneration, allowances and/or salaries.
- iii. The costs of the application shall abide the petition.

17. Orders accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 30TH DAY OF JUNE, 2022.

CHRISTINE N. BAARI

JUDGE

Appearance:

Ms. Moguche h/b for Mr. Bunde for the Applicant/Petitioner

Mr. Oribo h/b for Mr. Omwenga for the 4th and 5th Respondents



N/A for the 1st, 2nd, 3rd, 6th, 7th, 8th, 9th and 10th Respondents

N/A for the Interested Party.

Ms. Christine Omollo -C/A

