



Tiko v County Secretary, Siaya County Government & 4 others (Petition E011 of 2022) [2022] KEELRC 1494 (KLR) (8 June 2022) (Judgment)

Neutral citation: [2022] KEELRC 1494 (KLR)

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

PETITION E011 OF 2022

S RADIDO, J

JUNE 8, 2022

IN THE MATTER OF THE DECISION BY SIBO

WATER AND SANITATION

COMPANY LIMITED ON

06/12/2021 TO TERMINATE

THE SERVICES OF THE

PETITIONER WITH EFFECT

FROM 3/12/2021 AS THE

DIRECTOR OF THE SIBO

WATER AND SANITATION

COMPANY LIMITED

BETWEEN

CAROLINE ATIENO TIKO PETITIONER

AND

COUNTY SECRETARY, SIAYA COUNTY GOVERNMENT ... 1ST RESPONDENT

GOVERNOR, SIAYA COUNTY GOVERNMENT 2ND RESPONDENT

CHAIRMAN, BOARD OF DIRECTORS, SIBO WATER AND SANITATION CO.

LTD 3RD RESPONDENT

MANAGING DIRECTOR, SIBO WATER AND SANITATION CO.

LTD 4TH RESPONDENT

CHIEF EXECUTIVE OFFICER, WATER SERVICES REGULATORY

BOARD 5TH RESPONDENT



JUDGMENT

1. On or around 12 November 2020, County Secretary notified Caroline Atieno Tiko (the petitioner) of her appointment as a Director of the Sibbo Water and Sanitation Co. Ltd (the Water company). The appointment was to last for 3-years (up to 11 November 2023).
2. On 6 December 2021, the Chair of the Water company wrote to the Petitioner to inform her that her appointment had ended on 3 December 2021.
3. The petitioner was aggrieved and on 22 February 2022, she filed a petition with the Court alleging that her removal as a director of the Water company contravened her rights to fair administrative action, and that the decision was made by a person who was not the appointing authority.
4. At the same time, the petitioner also filed a motion under a certificate of urgency seeking interim conservatory and injunctive orders.
5. When the motion was placed before the court, it directed the petitioner to serve the respondents and further that the respondents file and serve their responses to both the motion and petition within set timelines. The Petitioner was granted liberty to thereafter file and serve any further affidavit ahead of the giving of directions on 24 March 2022.
6. The managing director of the water company filed a replying affidavit in opposition to the motion and petition on 15 March 2022. The County Secretary also filed a replying affidavit on the same day.
7. On 23 March 2022, the 1st to 4th respondents filed a Notice of preliminary objection contending that:
 - i. The petition and Motion have been pleaded and filed as a Constitutional Petition, yet they both fail the test of citing with precision the rights that were violated or threatened to be violated as per the case of Anarita Karimi. The petitioner does not plead any single article of the Constitution and how the said article of the Constitution has been violated or threatened to be violated.
 - ii. The petition offends section 9 of the Fair Administrative Actions Act, 2015 for failing to exhaust all alternative dispute resolution mechanisms before invoking the jurisdiction of the Court.
8. The Chief Executive Officer of the Water Services Regulatory Board (the Board) filed a replying affidavit on 24 March 2022. In the affidavit, the Board appeared to agree with the Petitioner that her removal was unlawful. It was deponed in the affidavit that the process to remove the petitioner were contrary to the Corporate Governance Guidelines for the Water Services Sector, 2018 issued by the Board.
9. When the petition was called out on the same day, parties appeared in court on the same day, the court directed the filing and exchange of further affidavits as well as submissions ahead of judgment today.
10. The petitioner filed her submissions on 7 June 2022 (should have been filed and served on or before 24 April 2022).
11. The County Secretary, Governor, Chair of the Board of the Water company and the Water company filed joint submissions on 24 May 2022
12. The court has considered the Petition, Motion, affidavits, and submissions on record.



Jurisdiction

13. The Water company is incorporated under the *Companies Act* as a special purpose vehicle for the provision of water services within the County of Siaya.
14. The petitioner was recruited and appointed as a director in line with the Memorandum and Articles of Association of the Water company, the *Water Act* and the Corporate Governance Guidelines issued by the Water Services Regulatory Board.
15. The Memorandum and Articles of Association provide for the appointment of directors by stakeholders and the question, therefore, arises whether a director of the Water company is an employee for the purposes of the *Employment Act* or *Water Act* or any other law.
16. The petitioner urged that because she was being remunerated for her services, she not only fell within the category of an employee as defined in section 2 of the *Employment Act*, 2007 but was also a public officer and thus a servant of the people of Kenya.
17. The petitioner further asserted that she worked under the control of the water company.
18. Clause 8 of the petitioner's appointment letter clearly stated that she would not be an employee, nor the appointment constitute a contract of employment.
19. The letter also provided for payment of meeting allowances (and not a salary).
20. The petitioner's own documents acknowledge that she was or is not an employee nor in an employment relationship with any of the respondents.
21. Despite the exclusion that the relationship was not an employment one, the petitioner approached the court on the basis that she had an employer/employee relationship with the respondents.
22. The court will consequently turn to case law to unravel the nature of the relationship to establish whether it has jurisdiction over the dispute.
23. There appear to be inconsistent views by judges of this court on the question of whether a director (of a water company) is an employee for purposes of the court having jurisdiction on removal disputes.
24. In *Geoffrey Makana Asanyo v Nakuru Water and Sanitation Services Company & 6 ors* (2014) eKLR, the court came to the holding that a director of a water company was an employee. The court stated:

The court has applied the multiple tests and finds that in the instant case the petitioner was in employer-employee relationship because:

- a. the performance as director was subject to control as set out in the letter of appointment including attending board meetings and participating in one committee;
- b. in performance, the petitioner was bound by the relevant constitutional and statutory provisions as a public officer;
- c. the petitioner worked for 1st respondent rendering personal services (though as a non-executive director), did not share in profits or losses, did not work for himself and was paid; and
- d. there was a mutual arrangement that the petitioner would serve as a director for 3 years.



To answer the 1st issue for determination, the court finds that the petitioner is an employee, he is in employment relationship with the 1st respondent and the 1st respondent being a separate legal person is the clear employer of the petitioner. He is an employee both as an appointed director and as a public officer.

25. In *Wambeye Kimweli Marakia v Board of Directors, Nzoia Water Services Co. Ltd & 2 ors* (2019) eKLR, the court was confronted by a claim by a director of the Nzoia Water Services Co. Ltd. challenging his removal as a director.

26. The court stated:

Upon a careful analysis of the dispute of law and fact raised in the matter, it is my considered opinion that the Petition does not raise a dispute between an Employer and an Employee nor does the dispute itself involve matters relating to Employment and Labour Relations.

To the contrary, it is a commercial dispute involving interpretation of the *Companies Act* with regard to appointment of Board of Directors of a Limited Liability Company and the election and removal of the chairperson of the Board of Directors of a limited liability company.

27. In *David Randu v Malindi Water & Sewerage Company Ltd* (2013) eKLR, the court rendered itself thus:

It is not in dispute that the claimant was a director and the Chairman of the Board of Directors for the claimant. It is also not in dispute that his appointment was pursuant to Section 66 of the respondent's Memorandum and Articles of Association. It is further not in dispute that his remuneration comprised a predetermined automatic honorarium and telephone allowance plus other ad hoc allowance depending on duty.

The claimant has insisted that he was both a director and an employee for a 3 years contract. The respondent has denied that the claimant was her employee within the meaning of the *Employment Act* and contended that he was only a director in the context of the *Companies Act*.

The court was urged to consider the English case of *Eaton v Robert Ltd & Ar* (1988) IRIR 83, which laid down the following tests to be applied while determining whether a director is an employee or not :

- a. did the director have a descriptive title like marketing director, managing director or sales director?
- b. Was there an express contract of employment, or if not, was there a board minute or memorandum consisting an agreement to employ the director as an employee?
- c. Was remuneration paid by way of salary or director's fees?
- d. Was remuneration fixed in advance or paid on an ad hoc basis?
- e. Was remuneration by way of entitlement or, in effect gratuitous (in other words, was the director in a position to sue for it)?
- f. Did the director merely act in his own capacity as a director or, was he under control of the board of directors in respect of the management of his work?



Going by the above tests, I regrettably find that the claimant was not an employee of the respondent. He did not have a descriptive title like Managing Director, Sales Director or at all. He did not also have an express contract of employment or minute or memorandum by the board of directors appointing him as an employee. Although his remuneration was fixed in advance, the same was gratuitous as opposed to an entitlement..... The use of the term honorarium in the letter of appointment was therefore deliberate in order to alert the claimant that the same was not an entitlement and therefore not guaranteed. The court's decision in The Eaton's case is corroborated by section 2 of the Employment Act of Kenya which defines an employee as a person who is employed for wages or salary.

28. This court endorses the view taken in the last two decisions, finds that the petitioner was not an employee and, therefore, and declines jurisdiction in the instant petition.
29. The court notes that it has come to its attention this morning that the Court of Appeal overturned the decision relied on by the Petitioner and mentioned in paragraph 22 herein above last Friday 10 June 2022, and held that a director of a water company is not an employee of the water company – see Nakuru Civil Appeal No. 60 of 2015 consolidated with Nakuru Civil Appeal No. 61 of 2015, Rift Valley Water Services Board & Ors v Geoffrey Asanyo & Ors).

Exhaustion of alternative dispute avenues

30. On the assumption that it is wrong on the above finding on the jurisdiction, the court will now examine an objection raised by the respondents that the petition was premature.
31. The respondents challenged the competency of the petition on the ground that the petitioner had approached the court before exhausting the alternative dispute resolution avenues outlined in article 135 of the articles of Association of the water company.
32. The court has looked at the article. It establishes arbitration as the first instance dispute resolution avenue in respect to any dispute between the Water company and any of its directors. The Arbitration should be guided by the Arbitration Act.
33. The petitioner did not attempt to utilise the arbitration avenue provided for in the instrument under which she was appointed a director and in the circumstances the court finds the Petition was premature.

Conclusion and Orders

34. From the foregoing, the court has no hesitation in declining to entertain the petition. It is struck out with no order on costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 8TH DAY OF JUNE 2022.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Petitioner Mr. Oketch instructed by Felix Oketch & Co. Advocates

For 1st to 4th Respondents Mr. Okanda instructed by the Office of the County Attorney

For 5th Respondent Mr. John Muruka, Advocate, Water Services Regulatory Board



Court Assistant Chrispo Aura

