



REPUBLIC OF KENYA



KENYA LAW
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**Ondieki v Works Development Agency & 5 others (Petition
E014 of 2021) [2022] KEELRC 1164 (KLR) (7 July 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1164 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
PETITION E014 OF 2021**

HS WASILWA, J

JULY 7, 2022

BETWEEN

JOEL AKINGA ONDIEKI PETITIONER

AND

**CENTRAL RIFT VALLEY WATER WORKS DEVELOPMENT
AGENCY 1ST RESPONDENT
CABINET SECRETARY, MINISTRY OF WATER SANITATION &
IRRIGATION 2ND RESPONDENT
STATE CORPORATION ADVISORY COMMITTEE 3RD RESPONDENT
BONIFACE KAMANGA MUHIA 4TH RESPONDENT
JULIUS KAMAU MUTHANWA 5TH RESPONDENT
CYNTHIA JEROTICH KIPCHILAT 6TH RESPONDENT**

RULING

1. Before me for determination is the Petitioner/ Applicant's Application, Notice of Motion dated 10th May, 2021 under Certificate of Urgency, seeking the following Orders;
 - a. That this Honourable Court be pleased to certify this Notice of Motion as extremely urgent as indicated on the Certificate of Urgency, and service thereof on the Respondents be dispensed with in the first instance.
 - b. That this Honourable Court be pleased to issue the following orders pending the hearing and determination of this Application inter-partes:
 - i. That the implementation of the decision of the 1st Respondent's Board of Management delivered on 30th April 2021 and which was communicated to the Chief



Executive Officer of the 1st Respondent through a Letter Ref:CRVWWDA/CHR/VOL. 11/6 be stayed.

- ii. That the “status quo” ante 30th April 2021 be restored with the results that the Chief Executive Officer (Engineer Hosea Kipyegon Wendot) remains in his office with all his official duties and entitlements.
 - iii. That the operations, sittings and deliberations and or the day to day affairs of the Board of Management of the 1st Respondent (which body is illegally constituted) be frozen.
 - iv. That the Board of Management of the 1st Respondent be restrained from changing or altering the signatories of all the Bank Accounts of the 1st Respondent.
 - v. That the members of the Board of Management of the 1st Respondent be restrained from taking any allowances, per diems, or any drawings from the 1st Respondent’s Bank Accounts.
 - vi. That the Board of Management of the 1st Respondent be restrained from approving or replacing the occupant and office holder of the Chief Executive Officer (Engineer Hosea Kipyegon Wendot).
- c. That pending the hearing and determination of the main Petition filed herewith, this Honourable Court be pleased to suspend or stay the implementation of the decision of the Board of Management of the 1st Respondent herein dated 30th April 2021 with the results that the Chief Executive Officer (Engineer Hosea Kipyegon Wendot) remains in office as the said Chief Executive Officer of the 1st Respondent with full salaries and all allowances and other benefits; and that the Board of Management’s operations be frozen.
- d. That the costs of the motion be awarded to the Petitioner.
2. The Application is supported by the grounds on the face of the Application and the supporting Affidavit sworn on the 10th May, 2021, of Joel Akunga Ondieki, the Petitioner herein. The said application is based on the followings grounds; -
- a. Mr. Hosea Kipyegon Wendot, was appointed as the 1st Respondent’s Chief Executive Officer *vide* a letter of appointment dated 11th April, 2018, after undergoing a competitive process. The contract of employment was to run for 3 years commencing 1st May, 2018 to 30th April, 2021 with provision of renewal.
 - b. When the first contract was about to expire, Mr. Hosea applied for a renewal of his contract vide a letter of 30th October, 2020 which letter was deferred for consideration by the 1st Respondent four times. While the said application was pending for consideration, the 2nd Respondent revoked the Appointment of the chairman of the Board and unilaterally without following the procedure provided for under section 66 of the Water Act as read together with schedule 1 of the said Act, appointed and gazetted, Boniface Kamanga Muhia as the chairman of the board of management of the 1st Respondent, together with Julius Kamau Muthanwa and Cynthia Jerotich Kipchilat as members of the said Board with effect from 9th April, 2021.
 - c. The Petitioner took issue with the way the 2nd Respondent disregarded the provision of the law as to competitive recruitment of chairman of the board and the members thereof. That there was no advertisement of the said posts, nor interviews carried out by the 2nd Respondent.



- d. Upon occupying the said office, the chairman of the Board Amb. Boniface Kamanga Muhia, called for a special Board meeting with approval of the 2nd Respondent which was held on the 30th April, 2021 to discuss the renewal of the CEO contract among other issues. And since the said date was the last date of the CEO's first contract, the Board hurriedly discussed the matter in absence of the CEO and decline to renew the contracts without giving reasons for the decline.
 - e. It is contended that the Board that deliberated on the renewal of the CEO's contract was illegal having been constituted of the chairman and 2 members who were appointed without following due procedure and in breach of Article 10 of *the Constitution*. Further that in the Board meeting a stranger known as Engineer Samuel Alima sat in the board yet he was not a member of the Board.
3. Pursuant to leave of Court granted on the 24th May, 2022, the 1st, 4th, 5th and 6th Respondent filed a replying affidavit deposed upon by Julius Kamau Muthanwa, the 5th Respondent and the director of the 1st Respondent.
 4. In the replying affidavit, the affiant avers that, the Petitioner application is incurably defective and crossly incompetent and ought to be struck out by this Honourable Court.
 5. It is averred that the application herein has been overtaken by events for the reason that the board of management of the 1st Respondent decision issued on the 30th April, 2021 was already implemented and there is a substantive holder in the said office of the Chief Executive officer of the 1st Respondent who has been in occupation of the said office for over a year now.
 6. It is stated that the Application herein was filed late when the officer had already been recruited and assumed office and therefore it is now impossible to undo the recruitment and appointed considering that the new office holder has already occupied the said office for over a year now.
 7. He avers that the appointment of the said Chief Executive officer of the 1st Respondent followed a competitive recruitment process as such the Petitioner misdirected this Court when he alleged that the officer holder was handicapped. He added that the advertisement were made in the ministry of water, sanitation and irrigation website, www.water.go.ke and the application were to be received before 15th February, 2021.
 8. Following the said advertisement, the affiant herein applied for the position of member of the board while the 4th and 6th Respondent's applied for the position of the chairperson of the board and member respectively. When shortlisting was done, the 4th Respondent was listed as number 4 in the list. While in the shortlisted members, he together with the 6th Respondent were listed as number 13 and 15 respectively in the short list. Thereafter interviews were carried out and the 4th to 6th Respondents emerged successful and were appointed for the said positions through gazette notice number 3520 and 3519 for position of members and chairperson respectively.
 9. The Respondents maintain that the real person who was entitled to object to the said non-renewal of contract was Eng. Hosea Wendot and not the Petitioner herein. Furthermore, that the said Engineer had served his full term of Three years as such none of his constitutional rights were infringed.
 10. It is also averred that the Petitioner failed to exhaust all the internal dispute resolution mechanisms provided for under section 82, 119 and 124 of the *Water Act* as such the Petition and the Application has been prematurely instituted.



11. It is the Respondent case that the Petition herein has fallen short of the requirement in Mumo Matemu case as it does not raise any constitutional question to warrant the invocation of *the Constitution*.
12. They prayed for the Application herein and by extension in the Petition to be dismissed for lacking merit.
13. The Application was disposed of by way of written submissions with the Petitioner/Applicant filing on the 20th August, 2021, the 1st, 4th, 5th and 6th Respondent filed theirs on the 14th September, 2021 while the 2nd and 3rd Respondents filed theirs on the 7th October, 2021.

Applicant's submissions.

14. The applicant submitted from the onset that under schedule 1 of the *Water Act*, the appointment of all members of the 1st Respondent's Board has to be sourced through a competitive process involving advertisement, interviewing et al, which process was not followed by the Respondent therefore the appointment of the board members was an act of illegality and their decision ought to be void ab initio. The Petitioner cited the case of *Republic V Maitha & Another Ex Parte Waudi* [2004] 1 EA 306 where the Court quashed a decision by the minister of nominating a councilor in the municipal council of Mombasa without following due procedure.

1st, 4th 5th and 6th Respondents' Submissions.

15. The Respondent herein submitted that there is no employment relationship between the Petitioner and the Respondents to clothe the Petitioner with authority to institute this Suit. It was submitted that the issue at hand is on leadership and or membership of the 1st Respondent's Board, which issue is not employment related but an issue of directorship which matter needs to be determined in the High Court and not this Court. In this they cited the case of *Speaker of the National Assembly v James Njenga Karume* [1992] eklr where the Court held that; -

“In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed.”

16. It was then argued that the procedure of objecting to leadership of members of the 1st Respondents board can be done by a director and a shareholder of the said company, which matter can only be instituted in the high Court as a commercial issue and not as a constitutional issue. It was also argued that the doctrine of constitutional avoidance requires Court to resolve dispute on a constitutional basis only when a remedy depends on *the Constitution*. In this they cited the case of *Communication Commission of Kenya & 5 Others v Royal Media Services Limited & 5 others* [2014] eklr.

“The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in *S v. Mhlungu*, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:

“I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”

(257) Similarly the U.S. Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some



other basis upon which the case could have been disposed of (Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936)).

(258) From the foundation of principle well developed in the comparative practice, we hold that the 1st, 2nd and 3rd Respondents' claim in the High Court, regarding infringement of intellectual property rights, was a plain copyright-infringement claim, and it was not properly laid before that Court as a constitutional issue. This was, therefore, not a proper question falling to the jurisdiction of the Appellate Court."

17. Accordingly, it was submitted that, the applicant has not made out a case to warrant the issuance of the Orders sought since there are no private reliefs that can flow directly to the Petitioner, in any case that the Applicant had failed to satisfy the conditions for grant of an injunction envisaged in the *locus classicus* case of *Giella v Cassman Brown*.
18. They therefore submitted that the application and the entire suit is misplaced and the same ought to be struck out.

2nd and 3rd Respondents submissions.

19. The Respondents herein submitted that the Petitioner lacks locus standi to bring this Suit and cited the case of *Law Society of Kenya v Commissioner of Lands & 2 others* [2001] eKLR, where the Court held that; -

“Locus standi signifies a right to be heard, a person must have sufficient interest to sustain his standing to sue in a Court of law.”

20. It was further submitted that the Petitioner instituted this suit as a consumer of water and not under any employment relationship contemplated under section 12 (2) of the *Employment Act*, therefore stripping the Petitioner of any authority to sue in this Court.

21. The Respondent cited the case of *Kenya Council of Employment and Migration Agencies & Another v Samuel Mwongera Arachi & 2 others* [2015] Eklr where the Court held that; -

“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.”

22. The Respondent in conclusion, submitted that since there is no employment relationship between the Petitioner and the Respondents, the Petitioner lack *locus standi* to institute this Suit in this Court and the same ought to be struck out.
23. I have examined the evidence and submissions of the parties herein.
24. The Respondents have submitted that this Court has no jurisdiction to handle this matter being a non-employment issue.
25. This matter falling directly under the issue of competence or jurisdiction of this Court is to be settled at the onset as held in the “Lilian S” case.



26. The Respondents further submitted that the issues before Court are primarily presented without following the prescribed law. Section 82 of the Water Act 2016 states as follows;
- "82. Appeals to the Regulatory Board
- (1) A party aggrieved by the decision of a water services provider may appeal against the decision to the Regulatory Board in the prescribed manner within fourteen days from the date the decision was made.
 - (2) The Regulatory Board may on appeal either vary, reverse or confirm the decision of the water service provider, and the Regulatory Board shall communicate its decision to the parties concerned within fourteen days from the time the decision is made".
27. Section 119 of the Water Act establishes the Water Tribunal and Section 124 of the Water Act provides that Appeals on decision of the Water Tribunal lie to the ELC Court.
28. It is true that matters pertaining to appointments of directors of the Water Agency are not employment matters per se. These are matters which fall under the ELC.
29. The other issue is whether directors of Water agency are employees of the agency. The answer to this question is No. Directors are not employees of a company.
30. The issue herein relates to Directors of the Respondents board which issue is not employment related and therefore this Court has no jurisdiction to handle the matter.
31. The Court that has jurisdiction on the matter of Directors is the High Court.
32. On this note, I find I have no jurisdiction to handle the application before me and I dismiss the application and by extension the petition accordingly.
33. Each party to bear its own costs.

RULING DELIVERED VIRTUALLY THIS 7TH DAY OF JULY, 2022.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Karanja Mbugua for Petitioner – present

Respondents – absent

Court Assistant - Fred

