Kariuki & 3 others v Kiambu Water & Sewerage Co. Ltd & 13 others (Petition E029 of 2022) [2022] KEELRC 12831 (KLR) (12 October 2022) (Ruling)

Neutral citation: [2022] KEELRC 12831 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION E029 OF 2022

JK GAKERI, J

OCTOBER 12, 2022

BETWEEN

JAMES GACHERU KARIUKI ..... 1ST APPLICANT

MOSES MEGA GITHINJI ..... 2ND APPLICANT

LUCY NJOKI KIBUTHU ..... 3RD APPLICANT

RACHEAL NJOKI KARIUKI ..... 4TH APPLICANT

AND

KIAMBU WATER & SEWERAGE CO. LTD ..... 1ST RESPONDENT

KARURI WATER & SANITATION CO. LTD ..... 2ND RESPONDENT

GATUNDU WATER & SANITATION CO. LTD ..... 3RD RESPONDENT

RUIRU JUJA WATER & SEWERAGE CO. LTD ..... 4TH RESPONDENT

GITHUNGURU WASTER & SANITATION CO. LTD ..... 5TH RESPONDENT

KIKUYU WATER CO. LTD ..... 6TH RESPONDENT

KIAMBU PUBLIC SERVICE BOARD ..... 7TH RESPONDENT

KIAMBU COUNTY ASSEMBLY SERVICE BOARD ..... 8TH RESPONDENT

KIAMBU COUNTY EXECUTIVE COMMITTEE ..... 9TH RESPONDENT

KIAMBU COUNTY ASSEMBLY ..... 10TH RESPONDENT

AMEDAN CO. LTD ..... 11TH RESPONDENT

MICHAEL GICHINGA NGANGA ..... 12TH RESPONDENT

LIMURU WATER AND SEWERAGE CO. LTD ..... 13TH RESPONDENT

THIKA WATER & SEWERAGE CO. LTD ..... 14TH RESPONDENT

RULING

1. Before the court for determination is a Notice of Preliminary Objection by the 1st Respondent dated March 3, 2022 seeking orders that:

    1. This court has no jurisdiction to hear and determine this Petition under Articles 165(3) (b) and (d), Article 162(2) of *the Constitution* of Kenya 2010, under section 2 of the *Employment and Labour Relations Act* and under section 2 of the *Employment Act*.

    2. It is in the interest of justice that the Orders issued on February 18, 2022 be set aside in the first instance.

    3. The application and petition dated February 11, 2022 be dismissed and or struck out with costs for want of jurisdiction.

2. In opposition to the Preliminary Objection, the Petitioner Mr. James Gacheru Kariuki swore an affidavit dated July 18, 2022 deponing that the 1st Respondent and other Respondents belief that members of boards of water services providers in Kiambu are not public officers which is misconceived.

3. The affiant states that members of boards of directors of water services providers in Kiambu are further devolved units and are agencies of the County Government of Kiambu under the provisions of section 36 of the *County Government Act, 2012*.

4. That members of water service providers in Kiambu are public officers who hold public office and earn wages in the form of allowances.

5. The affiant states that Article 260 of *the Constitution* defines the phrases "public office" and "public officer" and the allowances payable to members of the board of water service providers in counties are payable directly out of money provided by parliament under section 5 read with section 15 of the 1st Schedule to the *Water Act*.

6. That the WASREB corporate governance guidelines for the water sector, provide for board remuneration.

7. That the Respondents cannot be heard to say that there are public officers who are not employees.

8. That the court deals with employment and labour relations and the suit herein is about employment without public participation.

9. It is the Petitioner's view that the Preliminary Objection by the 1st Respondent dated March 3, 2022 in the current constitutional dispensation and legal regime was wishful thinking of the Respondent, has no merit and should be dismissed with costs.

Submissions

10. The 2nd, 3rd, 4th, 5th, 6th, 7th, 9th and 13th Respondents submitted in support of the 1st Respondent's notice of Preliminary Objection.

11. It is submitted that the court has no jurisdiction to hear and determine the petition as posited by the 1st Respondent.

12. That the directors whose appointment is being challenged are not employees of the 1st, 2nd, 3rd, 4th, 5th, 6th, 13th, and 14th Respondents in the context of section 2 of the *Employment and Labour Relations Act* and the *Employment Act*. That the two statutes do not apply to directors.

13. Reliance is made of the decision in Civil Appeal No. 60 of 2015, *Rift Valley Water Service Board and others v Geoffrey Asanyo and others* where the Court of Appeal held that a director was not an employee of the company within the meaning of the *Employment Act* and the court has no jurisdiction to entertain the petition.

14. The Respondents submit that the directors whose appointment is being challenged by the Petitioners are not employees.

15. That the jurisdiction of the court is outlined in section 12 of the *Employment and Labour Relations Court Act, 2011*.

11th and 12th Respondent's submissions

16. In support of the Preliminary Objection, the 11th and 12th Respondents submit that the court had no jurisdiction to grant the orders sought in the petition and the orders would be a nullity.

17. It is submitted that the jurisdiction of the court is defined by section 12 of the *Employment and Labour Relations Court Act, 2011* and the *Employment Act*. That no employment relationship exists in the appointment of directors as in this case.

18. It is submitted that based on the law, the court lacks jurisdiction to handle the petition as explained in *Kagenyi v Musirambo* (1968) EA 43 as well as *Owners of the Motor Vessel "Lilian S" v Caltex Oil (Kenya) Ltd* (1989).

Petitioner's submissions

19. The Petitioner urges that the Respondents were initially established as Private Limited Companies under the *Companies Act*, Cap 486, Laws of Kenya. That Legal Notice No. 60 of 2017 the Respondents converted them to Public Limited Companies under the *Companies Act, 2015*.

Analysis and determination

20. The issues for determination are;

    i. Whether the 1st Respondent's notice of Preliminary Objection is a proper preliminary objection.

    ii. Whether the court has jurisdiction to hear and determine the petition herein.

21. As to whether there is a proper preliminary objection before the court, the court relies on the sentiments of the Court of Appeal in *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd*, where Law JA expressed himself as follows.

> "So far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection on the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer dispute arbitration."

22. Newbold P stated 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 argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion . . ."

23. These articulations of the Court of Appeal in the Mukisa Case have been applied in countless decisions and has been affirmed by the Supreme Court.

24. The Notice of Preliminary Objection by the 1st Respondent raises the issue of jurisdiction of the court which is a legal issue as exemplified by Law JA above and thus meets the threshold of a preliminary objection.

25. Needless to emphasize, a preliminary objection raises a threshold issue which runs to the root of the case and may dispose of the entire suit and must thus be disposed of at the earliest possible instance.

26. Finally, disposal of the preliminary objection must be done with caution so as not to deny parties the right to be heard on merit.

27. As regards the jurisdiction of the court, the starting point is the law on the jurisdiction of this court.

28. The concept of jurisdiction was elaborately explained by Nyarangi J. in his celebrated sentiments in the *Owners of the Motor Vessel "Lilian S" v Caltex Oil (Kenya) Ltd* (1989) eKLR as follows

> " By jurisdiction is meant the authority which a court had to decide matters that are litigated before it or to make cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the court is constituted . . . Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."

29. The Judge was emphatic that

> " Jurisdiction is everything. Without it, a court has no power to make one more step. A court of law down its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction"

30. It is trite that a court of law derives its jurisdiction from *the constitution* or legislation or both and can only exercise the jurisdiction conferred by *the constitution* or other written law. (See *Samuel Kamau Macharia and another v Kenya Commercial Bank and others* (2011).

31. The Employment and Labour Relations Court derives its jurisdiction from *the Constitution* of Kenya 2010, and the *Employment and Labour Relations Court Act , 2011*.

32. Article 162 of *the Constitution* Provides that;

    (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes

        (a) relating to employment and labour relations;

        (b) .....

(3) Parliament shall determine the jurisdiction and functions of the court contemplated by clause (2).

33. In exercise of the power conferred by Article 162 (2) of *the Constitution* of Kenya, 2010, Parliament established the Employment and Labour Relations Court under the *Employment and Labour Relations Court Act, 2011* and clothed it with jurisdiction under section 12 (1) of the Act which provides that

> The court shall have exclusive original and appellate jurisdiction to hear and determined all disputes referred to it in accordance with Article 162(2) of *the constitution* and the provisions of this Act or any other written law which extends jurisdiction to the court relating to employment and labour relations including –
>
> a. disputes relating to or arising out of employment between an employer and an employee;
>
> b. disputes between an employer and a trade union;
>
> c. disputes between an employer's organization and a trade union organisations;
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> d. disputes between trade unions;
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> e. disputes between employers or organisations;
>
> f. disputes between an employers organisation and a trade union
>
> g. disputes between a trade union and a member thereof;
>
> h. disputes between an employer's organisation or a federation and a member thereof;
>
> i. disputes concerning the registration and election of trade union officials;
>
> j. disputes relating to the registration and enforcement of collective agreements.

34. The foregoing list though inexhaustive is restricted by the opening paragraph of section 12 (1) of the Act which are explicit that the jurisdiction relates to disputes/referred to it in accordance with Article 162(2) of *the Constitution* and other written laws relating to employment and labour relations.

35. As regards the enforcement of rights and fundamental freedoms, the sentiments of Majaja J. in *United States International University (USIU) v Attorney General* (2012) eKLR.

> " In the final analysis, I would adopt the position of the Constitutional Court of South Africa in *Gcaba v Minister of Safety and Security*. The Industrial Court is a specialist court to deal with employment and labour relations matters. By virtue of Article 162 (3), and section 12 of the *Industrial Court Act, 2011* has set out matters within the exclusive domain of that court. Since the court is of the status of the High Court, it must have jurisdiction to enforce labour rights in Article 41 and the jurisdiction to interpret *the constitution* and fundamental rights and freedoms is incidental to the exercise of jurisdiction over matters within its domain. In any matter falling within the provisions of section 12 of the *Industrial Court Act* then the Industrial Court has jurisdiction to enforce not only Article 41 rights but all fundamental rights ancillary and incidental to the employment and labour relations including interpretation of *the constitution* within a matter before it. The Industrial Court as constituted under the *Industrial Court Act, 2011* as court with the status of the High

Court is competent to interpret *the constitution* and enforce matters relating to breach of fundamental rights and freedoms in matters arising from disputes falling within the provisions of section 12 of the *Industrial Court Act, 2011*."

36. These sentiments were adopted with approval by the Court of Appeal in *Daniel N. Mugendi v Kenyatta University and 3 others* (2013) eKLR.

37. Section 2 of the *Employment Act*, 2007 provides employee means

> A person employed for Wages or Salary and includes an apprentice and indentured learner".

38. Employer on the other hand means

> Any person, public body, firm, corporation or 'company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person 'public body, firm, corporation or company.'

39. Finally, section 2 of the *Employment Act* defines contract of service to mean an agreement whether oral or in writing and whether expressed or implied to employ or to serve as an employee for a period of time and includes a contract of apprenticeship and indentured learnership . . .

40. I will now proceed to apply the foregoing provisions and propositions of law to the facts of the instant case.

41. The critical issue for determination is whether the directors of the Respondent companies including those pending appointment are employees of the respective companies.

42. Documents on record reveal that by an advertisement in the Daily Nation published on December 7, 2021, the County Government of Kiambu invited application from qualified members of the public for purposes of filling vacant positions in the Boards of Directors of seven (7) water services providers as follows;

    1. Karuri Water and Sanitation Company Limited (4 posts)
    2. Kiambu County Water and Sewerage Co. Limited (2 posts)
    3. Gatundu Water and Sanitation Company Limited (4 posts)
    4. Ruiru Juja Water and Sewerage Co. Limited (4 posts)
    5. Limuru Water and Sewerage Co. Limited (4 posts)
    6. Githunguri Water and Sewerage Co. Limited (4 posts)
    7. Kikuyu Water Company Limited (4 posts)

43. Applicants were directed to various websites for application details. The applicants had to be nominated by either the Business Community, Farmers Organization, Community Water Project, Learning Institution, Professional Organization, Consumers, Industry/Manufacturing Sector, resident associations, other recognised registered bodies or youth, men and special interest groups among others operating within the respective company's service area.

44. Subsequently, documents on record show that by letters dated February 14, 2022, the office of the County Executive, County Government of Kiambu wrote to the following persons as having been appointed directors of the respective companies.

    Ruiru Juja Water and Sewerage Company

1. Emma Waithira Ng'ang'a
2. Erastus K. Njoroge Ruiru – Juja Water and
3. Dominic Ichugu Gachanja Sewerage Company Limited
4. Rev. Dr. Samuel T. Mwangi

Githunguri Water Sanitation Limited

1. Bishop Solomon Wairiri Waweru
2. James Gichanga Mburu Githunguri Water and
3. Sanitation Company
4. Limited

Kikuyu Water

1. Esther W. Gacheru
2. Ndung'u wa Munywe Kikuyu Water Company Limited
3. Richard N. Ndungu
4. Eng. Kamunyu Kahenya

Karuri Water and Sanitation Company Limited

1. Andrew G. Muigai
2. Joram Kamau Ngunyo Company Limited

Gatundu Water Company Limited

1. Samuel G. Njuguna
2. Stephen Karau Kangethe Gatundu Water and Sanitation
3. Rev. Martin Ndung'u Kahura Company Limited
4. Joyce Wanjiku Kang'ara

Limuru Water and Company Limited

1. Steven G. Njuguna
2. Peter Mbugua Kimani Company Limited
3. Joseph Ng'ang'a Mbugua

Kiambu County Water and Sewerage Company

1. James Githu Muiruri Limited

45. The standardized letters stated in part

> " . . . I am pleased to convey to you the decision of the County Government of Kiambu to appoint you a member of the Board of directors for . . ."

46. The letter further stated;

> " As a member of the Board of Directors, you shall be expected to:
>
> a. provide oversight to the company in all its operations and governance
>
> b. advice the office of the CECM . . . on the best strategies to ensure effective and efficient service delivery
>
> c. advice and work together . . ."

47. Finally, the letter reproduces the duties of directors enumerated in the provisions of section 143, 145 and 146 of the *Companies Act, 2015*. Other pages of the letter including the signature pages were not on record.

48. These are the appointments being contested by the Petitioners.

49. When the matter came up before the court on February 18, 2022, the Hon. Justice Nduma Nderi certified the application urgent and granted a conservatory order staying and/or suspending, and/or halting the recruitment of directors of the 1st, 2nd, 3rd, 4th, 5th, 6th and 13th Respondents pending the hearing and determination of the Petition.

50. From the evidence on record, it is unclear whether the appointees had received their appointment letters by February 18, 2022 when the conservatory order was made.

51. It is not in dispute that the 1st, 2nd, 3rd, 4th, 5th, 6th, 13th and 14th Respondent companies were incorporated pursuant to the provisions of the *Companies Act* and their internal affairs are governed by the Articles of Association which are supplemented by the more detailed *Water Services Regulatory Board (WASREB) Corporate Governance Guidelines* for the Water Services Sector, 2018.

52. These Guidelines provide for appointment, obligations, size and composition of boards, remuneration and term of office.

53. Paragraph 3.4.6 of the Guidelines provide for payment of sitting allowance and other expenses of the board and committees. The amount expended on the board is dependent on the annual turnover of the company.

54. Paragraph 3.4.8 prescribe the size of the board. For small companies, a maximum of 5 members, medium and large companies 7 members and large companies 9 members. In all cases 2 members must come from the County Government Executive.

55. Finally, paragraph 3.5 identifies the duties of the directors such as approval of 5 years strategic plan, approval of annual budget and procurement plan and ensure that there is an annual work plan.

56. It is trite that neither the appointment process explained above or the foregoing guidelines, nor the provisions of the *Companies Act, 2015* or the *State Corporation Act*, Cap 446, Laws of Kenya envisage or contemplate members of boards of companies or state bodies as employees.

57. Needless to emphasize, typically, members of boards of registered companies and state corporations are paid sitting allowances determined by shareholders at general meeting in the case of registered companies and by the State Corporations Advisory Committee in the case of state corporations. This is because they are not full-time employees and perform their functions at board and committee meetings.

58. The sitting or other allowance paid to members of boards does not constitute a salary or wage in the context of section 2 of the *Employment Act, 2007*. Similarly, the allowance does not make directors of boards employees as there is no contract of service between them and the company or state body or agency.

59. In addition, whereas directors formulate policy and provide the overall directions, employees operationalise the policies and participate in day to day operations of the company or state body or agency. The latter are full-time employees engaged under a contract of service.

60. In sum, the petitioners have not furnished evidence to establish that the directors of the Respondent companies are engaged under contracts of service or those pending appointment will be engaged as such. The letters of appointment on record are unambiguous that the appointees are directors and their duties are those exercisable by directors of registered companies. There is nothing to remotely suggest that the directors of the Respondent companies in question are employees. This court so finds and holds.

61. It is the finding of the court that the appointments, the subject matter of the petition, relates to persons other than employees.

62. This position finds support in the Court of Appeal decision in *Rift valley Water Services Board & 3 others v Geoffrey Asanyo & 2 others* (*Supra*) where the court held that a director of a company was not an employee. In that case, the 1st Respondent who was a director of the 2nd Respondent had been left out after a reconstitution of the board by the shareholders. The court expressed itself as follows;

> " The question as to whether the 1st Respondent was an employee of the 2nd Respondent with the right of claim as such in the Industrial Court has a simple to it. He was not . . . In our considered judgement, the 1st Respondent was not employed by the 2nd Respondent . . ." for wage or salary". Neither was he an apprentice or indentured learner. We find nothing on record to suggest that the 2nd Respondent had entered into a contract of service to employ the 1st Respondent as its employee within the meaning of the Act. Accordingly, the *Employment Act* did not apply to him."

63. Similarly, in *Katiba Institute & another v Attorney General & another; Julius Waweru Karangi and 128 other (Interested Party)* (2021) eKLR the court held that

> " . . . Positions or chairpersons and members of boards of state corporations and parastatals are not office in the Public Service. In arriving at this conclusion, we are further guided by the decision of the Supreme Court in *Fredrick Otieno Outa v Jared Odoyo Okello & 4 others* (2014) eKLR where the court stated that the proper meaning of public officer is that the person concerned is either a state officer or any other person who holds public office within the national government, county government or public service or a person holding such an office is sustained in terms of remuneration and benefits from the public exchequer."

64. The court is guided and bound by these pronouncements.

65. The court relied exclusively on the provisions of section 2 of the *Employment Act*, specifically, the definitions of employer, employee and contract of service.

66. In conclusion, it is clear that the Petitioners have not established a basis to justify invocation of the jurisdiction of this court. There is nothing on record to demonstrate the existence of an employment

relationship between the directors in question and the water service providers sued as respondents herein.

67. It is the finding and holding of this court that it has no jurisdiction to hear and determine the application and petition herein and hereby downs its tools.

68. In the upshot, the Notice of Preliminary Objection dated March 3, 2022 is merited and granted as follows:

    a. This Court has no jurisdiction to hear and determine the Petition herein and it is accordingly dismissed.

    b. The orders issued on 18th February, 2022 are hereby set aside.

    c. Granted that the Petitioners are acting in person, it is only fair that parties bear own costs.

69. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 12TH DAY OF OCTOBER 2022

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of **the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

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