



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAKURU**

**ELRC PETITION NO. E014 OF 2021**

**JOEL AKINGA ONDIEKI.....PETITIONER**

**-VERSUS-**

**CENTRAL RIFT VALLEY WATER WORKS DEVELOPMENT AGENCY....1<sup>ST</sup> RESPONDENT**

**CABINET SECRETARY,**

**MINISTRY OF WATER SANITATION AND IRRIGATION.....2<sup>ND</sup> RESPONDENT**

**STATE CORPORATION ADVISORY COMMITTEE.....3<sup>RD</sup> RESPONDENT**

**BONIFACE KAMANGA MUHIA.....4<sup>TH</sup> RESPONDENT**

**JULIUS KAMAU MUTHANWA.....5<sup>TH</sup> RESPONDENT**

**CYNTHIA JEROTICH KIPCHILAT.....6<sup>TH</sup> RESPONDENT**

**RULING**

1. The Petitioner filed this suit on 10<sup>th</sup> May, 2021 through the firm of Karanja Mbugua and Company Advocates. On the same date, he filed a Notice of Motion application dated 10<sup>th</sup> 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 hereof 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 1<sup>st</sup> Respondent's Board of Management delivered on 30<sup>th</sup> April 2021 and which was communicated to the Chief Executive Officer of the 1<sup>st</sup> Respondent through a Letter Ref:CRVWDA/CHR/VOL. 11/6 be stayed.**

ii. **THAT the "status quo" ante 30<sup>th</sup> 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 1<sup>st</sup> Respondent (which body is illegally constituted) be frozen.**

iv. **THAT the Board of Management of the 1<sup>st</sup> Respondent be restrained from changing or altering the signatories of all the Bank Accounts of the 1<sup>st</sup> Respondent.**

v. **THAT the members of the Board of Management of the 1<sup>st</sup> Respondent be restrained from taking any allowances, per diems, or any drawings from the 1<sup>st</sup> Respondent's Bank Accounts.**

vi. THAT the Board of Management of the 1<sup>st</sup> 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 1<sup>st</sup> Respondent herein dated 30<sup>th</sup> 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 1<sup>st</sup> 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. Before the said application could be heard and determined, the 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondent filed a Notice of Preliminary Objection dated 21<sup>st</sup> May, 2021 on 24<sup>th</sup> May, 2021. The grounds of the Respondents' Preliminary Objection were as follows: -

1) THAT the Petitioner herein JOEL AKUNGA ONDIEKI does not have the requisite locus standi to institute the present petition on behalf of Eng. HOSEA KIPYEGON WENDOT having declared in his "Affidavit in Support of Petition" that he is in this petitioner "in my personal capacity and | am not a proxy of anybody nor am | not suing in the name for and on behalf of anybody else."

2) THAT by dint of Article 258 of the Constitution of Kenya, 2010, the Petitioner does not have the requisite locus standi to institute the present suit having declared by oath that he does not institute the present proceedings on behalf of anyone and/or in the name of anyone and thus does not fall within the contemplated categories under Article 258 (2) (a-d) of the Constitution of Kenya, 2010.

3) THAT a brief scrutiny of Paragraph 26 of the Supporting Affidavit dated 10<sup>th</sup> May, 2021, will reveal that the proceedings herein are principally with regards to renewal of thy Employment Contract of ENG. HOSEA KIPYEGON WENDOT and if at all the Constitutional Petition were to take off, the same ought to have been instituted by the said ENG, HOSEA KIPYEGON WENDOT. The proceedings herein are thus fatally defective and an abuse of the court process.

4) THAT the Petitioner having declared under oath that he does not act for anyone including ENG. HOSEA KIPYEGON WENDOT, he does not therefore have the authority to institute the present employment petition on behalf of ENG. HOSEA KIPYEGON WENDOT.

5) THAT the Petitioner herein was not privy to the employment contract between the 1<sup>st</sup> Respondent and the said ENG. HOSEA KIPYEGON WENDOT and therefore cannot enforce the terms therein whether by use of the contract itself or by judicial intervention.

6) THAT the Petitioner is not a party to the employment contract between the 1<sup>st</sup> Respondent and the said ENG. HOSEA KIPYEGON WENDOT and cannot therefore sue on it as principally decreed in DUNLOP PNEUMATIC TYRE CO LTD V SELFRIDGE & CO LTD [1915] AC 87, Lord Haldane, LC to wit "My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it"

7) THAT the constitution issues if at all, are improperly preferred before this forum (Employment Court) and the issues therein ought to have been preferred in the normal manner as a claim before the Employment Court by ENG. HOSEA KIPYEGON WENDOT.

8) THAT this forum is improperly equipped to determine the employment issues spread out in the Petition and application considering that the dispute in question would require adduction of direct evidence to be adduced and tested through cross-examination of witnesses before the Court can determine whether there exists any employer - employee relationship worth adjudicating upon.

9) THAT the Petition is fatally defective and incurably bad for misjoinder of causes of action in the sense that the issues are mixed up and especially regarding employment of the Chief Executive Officer and the operations of the Board of Directors of the 1<sup>st</sup> Respondent and the reliefs sought therefore cannot be adjudicated upon at once and/or by this Court alone.

10) THAT the Petition is thus not maintainable for reasons that there are different causes of action to wit; an employer ~employee relationship and Directorship and management of the 1<sup>st</sup> Respondent which require different jurisdictional setup to fully adjudicate the issues. Thus, the Employment and Labour Relations Court for the former and the High Court for the latter.

11) THAT the issues concerning the management and directorship of the 1<sup>st</sup> Respondent, framed by the Petitioner in form of reliefs (c), (d), (e), (g) and (i) of the Petition are issues that can only be determined by the High Court and therefore this Employment Court does not have the jurisdiction to adjudicate upon the aforementioned reliefs.

12) THAT further, the scope contemplated by Articles 22 and Article 258 of the Constitution of Kenya have not been clearly illustrated by the Petitioner in the Petition and therefore the present petition and interlocutory application fail the test determinant to lay it down for adjudication before the Constitutional Court.

13) THAT the Petition does not meet the threshold contemplated and reserved for constitutional petitions considering the Petitioner has failed to illustrate the constitutional contraventions of public interest and has only demonstrated an individualistic concern with regards to the legal replacement of the former Chief Executive Officer (Eng. Hosea Kipyegon Wendot)

14) THAT there exists no discernible relief that flows from the Respondents to the Petitioner and therefore the Petitioner has not demonstrated how and in what manner he was affected by the purported constitutional contraventions.

15) THAT the Petition falls short of the three (3) precise principles to wit; (a) specifically set out the provisions in the Constitution that have been allegedly violated; (b) Provide the Particulars of the alleged violations; (c) Provide particulars in which the Respondent has purportedly infringed their rights in respect of the scope and breadth of constitutional petitions adjudged in the locus classicus case Anarita\_Karimi Njeri -vsThe Republic [1976-1980] KLR 1272.

16) THAT there exists a clear procedure provided by the Constitution under Article 162(2)(a) and an Act of Parliament to wit; Employment and Labour Relations Court Act to seek redress regarding employment disputes and that procedure ought to have been followed by the injured party ENG. HOSEA KIPYEGON WENDOT in the ordinary employment claims manner.

17) THAT the Petition offends the principle of Constitutional Avoidance considering the issues spread out in the Petition would have been easily determined in another forum and area of law other than the Constitution.

18) THAT the Petition offends the principle of Constitutional Avoidance which demands that where a dispute is one which can be determined under another area of law other than under the Constitution, then it is best that it be so determined and pure constitutional issues left to be determined as such.

19) THAT the remedies sought in the Petition are defective, non-existent and do not solely depend on the Constitution and therefore the employment proceedings contemplated in the Petition necessarily do not have to be adjudged in Constitutional proceedings.

20) THAT the doctrine of constitutional avoidance requires courts to resolve disputes on a constitutional basis only when a remedy depends on the constitution.

21) THAT the suit offends the doctrine of exhaustion which is sacrosanct in the administration of justice which requires a party to exhaust all available internal dispute resolution mechanisms provided by the employer and/or the law before filing a dispute in court.

22) THAT the Petition and Application offend the provisions of Article 159 (2) (c) and the exhaustion doctrine which provision and principle soundly contemplate postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. Article 159 of the Constitution Commands Courts to encourage alternative means of dispute.

23) THAT the Petition and application are an omnibus and a mongrel of different prayers governed by different rules and parameters and thus the said pleadings are incapable of any proper response, adjudication and that any further continuance with the same defeats the sacred and sacrosanct principles of reasonableness and rules of procedure.

3. The Ruling herein is therefore in respect of the said Preliminary Objection which the court found ought to be heard before the aforementioned Notice of Motion.

#### **1<sup>ST</sup>, 4<sup>TH</sup> 5<sup>TH</sup> AND 6<sup>TH</sup> RESPONDENTS' SUBMISSIONS**

4. The Respondents herein through their advocate submitted that the petitioner herein lack locus standi to institute this suit as there is no relationship between the Petitioner and the respondent in the meaning of Section 12 of the Employment Act.

5. He argued that locus standi is an issue that can be determined in a preliminary objection as was held in **Kiluwa Limited & another –v- Commissioner of lands & 3 others [ 2015] eklr** and the case of **Sisilia Nyakoe & Another –v-v Attorney Gneral & 4 others [2021] eklr** as it has the end effect of disposing the entire suit in the preliminary stage.

6. Accordingly, it was submitted that the Petitioner has not demonstrated any interest it has or how the constitution has been infringed to affect his personal rights under the constitution so as to clothe him with authority to institute this suit. Further that no issue of public interest has been raised by the petitioner to clothe him with authority to litigate the same therefore the suit ought to be dismissed.

7. Counsel submitted that the petitioner has failed to exhaust the internal mechanism provided under sections 82,119 and 124 of the Water Act, 2016 to ventilate the issue raised herein before filing this suit in court, therefore he has breached the doctrine of exhaustion.

8. On whether thus Court has jurisdiction to hear and determine this Petition, it was submitted that the predominant issue in this petition is the constitution of the members of the Board of the 1<sup>st</sup> Respondent which issue ought to have been litigated at the Water Tribunal with an Appeal preferred to the Environment and Land Court. It was argued that the issue of renewal of the contract of the CEO, was a decoy employed by the Petitioner to force this suit to be seen as an employment matter when the maid issue for litigation was the composition of the Board.

9. He thus submitted that this Court does not have jurisdiction to entertain this Suit even on the re-appointment of Eng Hosea Kipyegon Wendot as the reappointment involve state agency which jurisdiction is a preserve of the High Court as was held in the Court of Appeal case of **Attorney General & 2 others –v- Okiya Omtata Okoiti & 14 others[2020] eklr**. Further that the fact that the said Eng. Hosea Kipyegon Wendot is not a party to this suit denies this Court any jurisdiction to entertain this Suit.

10. It was further submitted that the petition as filed has failed the test of what amount to a constitutional petition as was held in **Anarita Karimi Njeru –v- Republic [1979] eklr** in that the Petitioner has failed to demonstrate with precision the specific Articles of the Constitution that the Respondents have infringed to warrant the issuance of the constitutional reliefs sought.

11. He also argued that the Petition is fatally defective and incurable bad in law for misjoinder of causes of action and contends that the issue of composition of the 1<sup>st</sup> Respondent's board is an issue that ought to be dealt with by the Water Tribunal and that any violation of the Constitution due to the actions of the Respondent if any ought to be dealt with in the High Court and not this Court since there is no employee-employer relationship to donate jurisdiction to this Court.

12. The Respondent thus prayed that the preliminary objection be upheld.

#### **Hon. Attorney Generals Submissions**

13. The Honourable Attorney General on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent filed submissions on the 9<sup>th</sup> June, 2021 in support of the Preliminary Objection and submitted that the petitioner lack Locus standi to litigate on behalf of any employee who has been denied renewal of his contract since the petitioner has not demonstrated the capacity in which he is bringing this Suit and cited the case of **Rift valley Railways Workers Union (K) –V- Kenya Railways Staff retirement benefits scheme & 3 others [2018] eklr**.

14. Counsel submitted that for this Court to have jurisdiction to entertain constitutional matters the same has to emanate from broad parameter set under section 12 of the Employment Act and cited the case of **Kenya Council of Employment and Migration Agencies & Another –v- Samuel Mwangera Arachi & 2 others [2015] eklr**.

15. It was further submitted that this Court lack jurisdiction to hear and determine the constitutional issue raised by the Petitioner since the same do not arise out of employment relationship, therefore any infringement of the constitution by the Respondents outside the Employment relationship ought to be handled by the High Court. Accordingly, he submitted that since this Court lack jurisdiction to handle the issues herein, it ought to down its tools as was held in the locus classicus case of **Owners of Motor vessel ‘Lillian S’ –V- Caltex Oil Kenya Limited [1989] eklr**.

16. The Attorney General prayed that the preliminary Objection be allowed and the application and the entire Petition be dismissed.

#### **Petitioners Submissions**

17. The petitioner on the other hand submitted that the issue raised in the preliminary Objection by the Respondent are not on pure points of law but will require this Court to interrogate the facts therefore the same cannot be decided on summary basis but with each party given an opportunity to adduce evidence which can only be done during hearing of the main suit and cited the case of **Kenya Union of Commercial, food and Allied Workers –v- Galot Estate Kiambu & 2 Others [2019] eklr**.

18. It was submitted that Article 22 of the Constitution affords any individual an opportunity to institute Court proceedings in protecting of their fundamental rights against infringement. Further that under Article 258(1) of the Constitution every person has a right to institute Court proceedings in protection of the Constitution from being contravened or when it is threatened with contravention. He submitted that the petitioner instituted these proceedings on strength of Article 258 of the Constitution and cited the case of **solo Nzuki- v- salaries and remuneration Commission & 2 Others [2019] eklr**.

19. He submitted that Article 22 (1) &(2) of the Constitution has expanded the doctrine of locus standi beyond the traditional understating of the concept, more so where there are allegations of violations of Constitutional Rights and freedoms. He contends that under the current constitutional dispensation, the Courts have to interpret the rule relating to locus standi liberally so as not to lock out persons with genuine grievances from accessing the seat of justice and cited the case of **Mureithi & 2 others(for Mbari ya Murathimi Clan) –v- Attorney General & 5 others [2006] IKLR 443**.

20. He thus submitted that the current suit is a public law suit instituted for the general good of the public which in effect clothes the Petitioner with the requisite locus to institute this suit against the illegal actions of the Respondents of filling the position of the 1<sup>st</sup> Respondent board without following procedure and cited the case of **Okiya omtatah Okoiti and another –v- Kemri Board of Management & 4 others ; saalties and remuneration commission (Interested party) [2019] eklr**.

21. He therefore submitted that the Petitioner has locus standi to institute these proceedings having been empowered by the Constitution and urged this Court to disallow the Preliminary Objection as lacking merit.

22. I have examined the averments of the parties herein. The gist of this preliminary objection is that the petitioner lacks locus having instituted this petition on his own behalf and not on behalf of anyone including the grievant Engineer Hosea Kipyegon Wendot.

23. This is the contention of the respondents as per the affidavit of the petitioner.

24. From the affidavit in support of this petition, the applicant aver that he is a consumer of water within the respondent's jurisdiction.

25. He avers that he filed this petition because there was breach of Article (10) of the constitution on national value and principles of governance in the appointment of the Respondent's CEO and in the manner in which the renewal of appointment of one Engineer Hosea Kipyegon Wendot was treated.

26. In this court's view Act 22 of the constitution is clear. Article 22 (1) & (2) states as follows;

**22. Enforcement of Bill of Rights**  
**(1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.**  
**(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—**  
**(a) a person acting on behalf of another person who cannot act in their own name;**  
**(b) a person acting as a member of, or in the interest of, a group or class of persons;**  
**(c) a person acting in the public interest; or**  
**(d) an association acting in the interest of one or more of its members.**

27. My reading of this provision is that anyone has a right to institute court proceedings claiming a right or fundamental freedom of the constitution is denied, threatened or infringed.

28. This right extends to anyone filing on his behalf or on behalf of another as is in this case.

29. That in my view is clear that the petitioner has a right to file for himself or another and in that case he has locus as opposed to the submissions by the applicants.

30. I find this preliminary objection has no merit and I dismiss it accordingly and direct the main application on petition to proceed.

31. Costs in the case.

**RULING DELIVERED VIRTUALLY THIS 29TH DAY OF JULY, 2021.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:-**

Karanja for petitioner present

Wanjeri holding brief for AG for 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> respondents

present

Court Assistants – Fred and Wanyoike