



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT
AT BUNGOMA
ELRC PET. NO. 4 OF 2018

WAMBEYE KIMWELI MARAKIA.....PETITIONER

VERSUS

BOARD OF DIRECTORS NZOIA WATER SERVICES CO. LTD.....1ST RESPONDENT

DICKSON KIRUI.....2ND RESPONDENT

LUSWETI FURAHAH B.K.S.....3RD RESPONDENT

R U L I N G

Petition was filed on 16th July, 2018 seeking the following reliefs:

- a) A declaration to issue that the removal of the Applicant from his position of Chairperson of the Board of Directors of Nzoia Water Services Co. Ltd was unconstitutional, unlawful, unprocedural and therefore null and void.
- b) An order to issue reinstating the Applicant as the chairperson of the Board of Directors of Nzoia Water Services Co. Ltd.
- c) An order for compensation of the Petitioner for the sum of the honoraria lost due to his unlawful ouster.
- d) Costs of the Petition.

The Petitioner was elected as a Director representing Business/Manufacturing/Professional/Local Residents to the Nzoia Water Services Co. Ltd by members through the company's Annual General Meeting on 21.6.2016.

The Petitioner was later appointed chairperson of the Board of Directors by the Board members and was entitled to earn honoraria of Kshs 25,000 per month.

The Petitioner was ousted of the position of chairman on 11.1.2018 by the Board and subsequently was removed as a Director.

The Petitioner states that meetings convened to oust him were irregularly convened by the 2nd Respondent, the company secretary of the company whose contract had expired in August 2017, and pursuant to the petition written to the 2nd Respondent requesting him to hand over the company's records and assets by 15.12.2017 and not beyond 18.12.2017.

That notwithstanding, the 2nd Respondent convened a general meeting of the Board of Directors by a notice dated 8.1.2018 to be held on 9.1.2018 in violation of the mandatory 7 days notice to convene such a meeting. That the Petitioner advised members not to attend but several meetings were convened thereafter and the Petitioner was ousted as the chairman in a meeting held on 11.1.2018 from position of chairman and from Directorship thereafter.

That the 3rd Respondent Lusweti Furaha B.K S was appointed in the place of the Petitioner as chairperson.

That Professor Ndiema who had resigned as Director prior attended the Board meeting that ousted the Petitioner.

That another person named Mr. John Mengwa, not qualified to be a director attended said meeting.

That the Respondents acted maliciously and capriciously in total disregard of the constitutional rights of the Petitioner and applicable law.

That the decision to oust Petitioner was never communicated to him and only learnt of it from third parties.

That the ouster was a violation of Section 141 of the companies Act as he was denied opportunity to be heard and make representations.

That Section 139 provides for a special notice to be provided for a resolution to remove a director or appoint a person to replace a director.

That Section 255, 256 and 257 provide that decisions by the company be by resolution whereby ordinary resolutions are passed by a simple majority at a general meeting while a special resolution is by at least 75% of members entitled to vote.

That Articles of Association provide that a Board shall have a chairperson who among other duties shall be responsible for convening the meetings of the Board of Directors in consultation with the Managing Director and the Company Secretary.

The Articles also provide for at least 7 days notice in convening general meeting of the Board.

That the meeting convened by the 2nd Respondent was irregular, null and void and so were the resolutions emanating from such an illegally convened meeting.

Wherefore the Petitioner prays for the reliefs sought.

Response:

The 1st & 3rd Respondents filed a Replying Affidavit to the Petition on 23.7.2018 whereas the 2nd Respondent filed a separate Replying Affidavit on the even date.

The thrust of the opposition to the Petition may be summarized as follows:

The Petitioner was appointed Director and elected chairperson.

The Chairperson is elected from among the Directors. The Petitioner was elected by the Board of Directors to serve a one year term with effect from August 2016 as provided in the Articles of Association.

The position of Chairperson is held on a one year rotational basis between the Directors of the Board. The position is not exclusive and property of the Petitioner.

It is therefore false allegation that the Petitioner was elected chairperson for a period of three years.

The dismissal of the company secretary is a prerogative of the Board of Directors but not at the whims of the chairperson. That the 2nd Respondent's contract was extended by the Board at a meeting held on 21.10.2017 and the Petitioner presided over that meeting as chairman.

That the communication by the chairperson in his letter dated 8.12.2017 to the 2nd Respondent and by Letter dated 18.9.2017 was never approved and/or sanctioned by the Board and was null and void therefore.

That the Board has the ultimate powers and mandate to appoint, dismiss and/or extend the contract of persons dealing with the company including the employees such as the company secretary.

That the Petitioner was validly removed as chairman of the board and Mr. Lusweti validly elected to replace the Petitioner at a meeting of the Board held on 11.1.2018.

That the allegation by the Petitioner on alleged breach of procedure was false and baseless.

That Prof. Chrispus Ndiema and Mr. John Mengwa are legitimate Board Members and the Petitioner had presided over meetings in which the two attended. John Mengwa is a Chief officer, Ministry of Water & Environment, Trans Nzoia County and is a member of the Board by virtue of clause 60(1) of the Articles of Association.

That the Petitioner was ousted for failure to attend several Board meetings without explanation. The Petitioner had absconded three board meetings without sufficient cause being shown and was removed in accordance with the company's Articles of Association. The Petitioner was communicated to in terms of Section 141(1) of the Company's Act.

The appointment and removal of a Director to a company is guided by the provisions of Sections 128-139 of the Company's Act 2015 and this matter is outside the jurisdiction of the Employment and Labour Relations Court.

That a Director of a company is not an employee as contemplated under Section 2 of the Employment Act 2007 and therefore the court should down its tools and strike out this suit.

That the Petitioner admits being paid honoraria and not a salary and therefore he is not an employee within the meaning of the Employment Act 2007.

Wherefore the Respondents pray that the Petition be struck out and/or dismissed with costs.

Determination

This petition was initially filed at the High Court Bungoma and Justice S.N Riech on his own motion determined that the Petition was premised on a dispute between Employer and Employee and the matter was transferred to ELRC Kisumu and later to Bungoma on 2.7.2018.

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.

The Petitioner alleges that he was appointed at a General Meeting of the company as a Director of the 1st Respondent and was subsequently elected as the chairman of the Board of Directors of the company. He does not allege that he was an employee of the company nor does he purport to have earned a salary from the Respondents.

The Petitioner was ousted from the Board by his peers.

In my Respectful view, the dispute belongs to the High Court, where it was initially filed and I respectfully remit it back to the High court for hearing and determination of the dispute.

Accordingly, the matter is transferred to the High Court, Bungoma for mention for directions by the presiding Judge, Bungoma High Court.

DATED, SIGNED and DELIVERED at BUNGOMA this 1ST day of FEBRUARY, 2019.

HON. M. N. NDUMA, JUDGE

EMPLOYMENT AND LABOUR RELATIONS COURT

BUNGOMA

Appearances:-

M/s Mumalasi for the Petitioner

Mr. Mogaka for Respondents and Interested Party.

Chrispo: Court Assistant.