



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

ELRC PETITION NO. 61 OF 2018

(Before Hon. Justice Mathews N. Nduma)

PETER JIM MOMANYI.....1ST PETITIONER/APPLICANT

JAMES ACHEI NYABANDO.....2ND PETITIONER/APPLICANT

VERSUS

CEC MEMBERS OF WATER

KISII COUNTY GOVERNMENT.....1ST RESPONDENT

CEC MEMBERS OF WATER NYAMIRA

COUNTY GOVERNMENT.....2ND RESPONDENT

LAKE VICTORIA SOUTH WATER SERVICE BOARD.....3RD RESPONDENT

GUSII WATER & SANITATION

SERVICE COMPANY LIMITED.....4TH RESPONDENT

WATER SERVICES REGULATORY BOARD.....5TH RESPONDENT

GWASCO DIRECTORS RECRUITMENT COMMITTEE....6TH RESPONDENT

DICKSON KIRUI, THE ACTING

MANAGING DIRECTOR, GWASCO.....7TH RESPONDENT

MIRERI N. MONGERI.....8TH RESPONDENT

FREDRICK N. NYAMWEYA.....9TH RESPONDENT

CALEB GICHANA.....INTERESTED PARTY

VINCENT MOSE GEKONE.....INTERESTED PARTY

JUDGMENT

1. The two petitioners are residents of Kisii County. The petitioners seek the following reliefs inter alia:

- (i) Declaration that the recruitment and employment of the 8th and 9th respondents as Directors to the board of Gusii Water and

Sanitation Services Company Limited, the 4th respondent instead of the petitioners herein as per the minutes and/or finding of the Select Recruitment Committee was unlawful, illegal and illegitimate.

(ii) An order of certiorari to issue to remove unto this court, and quash the said recruitment of the 8th and 9th respondents arising from and/or attendant to the unlawful and/or illegal minutes of the Special General Meeting held on the 6th September 2018 who were recruited despite the select Committee having forwarded the names of the petitioners herein according to the eligibility criteria set out.

(iii) Costs of the petition.

Facts

2. The facts in support of the petition are set out under paragraphs 9 to 20 of the petition and may be summarized as follows:

3. On 5th July 2018, Hon. Justice D.S. Majanja ordered the respondents to declare vacant the positions in the Board of Directors of the 4th Respondent and thereafter convene an Annual General Meeting for purposes of recruitment of new Directors.

4. On 14th August 2018, an Annual General Meeting was called in which meeting positions of Directors of 4th respondent were declared vacant.

5. On 29th August 2018, select interviewing panel committee comprising of five (5) people was elected in a stake holder's forum.

6. The positions of Director of the 4th respondent were advertised and the petitioners applied for the positions.

7. On 5th September 2018, the petitioners and others who had been shortlisted for interviews attended the interview.

8. The petitioners emerged the best candidates in their respective category and their names were forwarded to the 4th respondent for ratification in terms of *Section 4.2.4.4 of the Governance guidelines* in the water sector.

9. The 4th respondent upon receiving the names of the successful candidates was mandated to notify the shareholders of the said names for ratification. The successful candidates' names were in a report made by Select Committee. That the 4th respondent unlawfully and fraudulently substituted the names of the petitioners and replaced them with the 8th and 9th respondents.

10. That on 6th September 2018, a special General Meeting was convened at Borabu Hotel within Nyamira County by the 4th respondent in which the names were presented for appointment as Directors of the Board excluding the petitioners.

11. The petitioners allege that the unlawful conduct by the 4th respondent violated *Article 10(1) (c) and 47 of the constitution of Kenya and Sections 4.2.4.4. of the guidelines in the water sector*. Wherefore the petitioners pray for the reliefs sought. The petition is supported by a verifying affidavit of the petitioners and the consent order by Hon. Justice D.S. Majanja dated 28th June 2018 recorded before the High Court at Kisii in petition No. 5 of 2018.

12. That the order had mandated a stake holder conference to be convened within 30 days; An Annual General Meeting to receive a select committee to conduct recruitment of Board of members in accordance with corporate governance guidelines in the water sector and the process of recruitment of Board of Directors be concluded within 30 days of the stake holder conference and that the 4th respondent through its Chairman was not to conduct any business in the absence of County government of Kisii and Nyamira.

Response

13. Various applications and counter applications filed in this matter were compromised by the parties on 24th October 2018 and the parties agreed to deal with the petition together with the preliminary objections filed by the 1st respondent on 24th October 2018 regarding joinder of the interested party and the legal status of the 1st respondent.

14. The 4th respondent filed a replying affidavit to the petition on 26th October 2018 deposed to by one Osborn Nanga Obarigwa, the Managing Director of the 4th respondent. The deponent stated that he had authority to swear the affidavit from one Dickson Kirui, the Company Secretary of the 4th respondent.

15. The deponent further states that following the High court order dated 5th July 2018, by Majanja J. a notice was given in July 2018 for an Annual General Meeting to be held on 7th August 2018.

16. That on 7th August 2018, the Annual General Meeting was held in which five positions of Director of the 4th respondent were declared vacant and selection panel of five people was elected by the stakeholders.

17. That the panel had the duty to open application letters of the intended candidates, short list them, interview them and hand over their recommendations to the stakeholders of the 4th respondent for them to appoint the five directors.

18. That the selection panel discharged its mandate by 5th September 2018.

19. That the company secretary then gave a notice of a special general meeting to be held on 6th September 2018 for purposes of appointment by the shareholders of the new Directors pursuant to the report of the interview panel.

20. That on 6th September 2018, the stakeholders at the Special Annual General Meeting appointed:

(i) Mongeri Mirieri Nyangunyegena.

(ii) Fredrick Nyamwea Nyangweso

(iii) Jackline Kerubo Mireri

(iv) Joseph Tirimba Onserio and

(v) Justus Nyabwengi Omari as the new Directors of the 4th respondent. That to the knowledge of the deponent all the above five persons had undergone the interview. That from his knowledge the five names were among the candidates who had been interviewed and graded. That he did not have personal knowledge of the criteria used by the shareholders to arrive at the names that they had selected.

21. The 8th respondent filed preliminary objection dated 17th December 2018 and replying affidavit of the same date. The preliminary objection is to the effect that the court lacks jurisdiction to hear and determine the matter. That the petition is incurably defective in form and substance and bad in law as it violates the *Constitution and The Employment and Labour Relations Court Act, 2011 and the Employment Act, 2007*.

22. The 8th respondent in his replying affidavit sworn on 16th December 2018 deposes that he applied for appointment as Director of 4th respondent upon seeing the advertisement. That he was one of the 35 applicants for the positions advertised who were listed for interview by the select interview committee on 5th September 2018. That he attended the interview at Kisii Sports club with all required documents which he attached to the affidavit.

23. That on 6th September 2018, the deponent received a telephone call from the company secretary Mr. Kirui that he was successfully nominated as a GWASCO Director representing professionals from Kisii County and that he was to appear before a special stakeholders meeting at 10.00 am on the day. That his appointment was confirmed by the stakeholders and he has attached copies of the minutes of 4th and 5th September 2018 of the interviewing panel marked MMN '2' and '3'.

24. The 8th respondent deposes that the minutes attached by the petitioners are doctored for purposes of misleading the court and they be disregarded.

25. That the 1st petitioner has admitted that out of the 12 shortlisted candidates in their category, the 1st petitioner was graded number one out of twelve with 89.2% whilst the 8th respondent was graded number two out of twelve with 85.2%. That the 1st petitioner was not appointed because he had not fully complied with chapter six requirements in the constitution of Kenya and ought not to have been interviewed in the first place. That the interviewing panel minutes show clearly that the 1st petitioner did not have a clearance certificate from the Credit Reference Bureau (CRB) as per the set criteria (see number 29 candidate S/No. 7 of the minutes)

26. The 8th respondent deposes therefore that he was the legitimate number one candidate out of 12 since the 1st petitioner ought not to have been interviewed in the first place.

27. The 8th respondent deposes that he had satisfied all the requirements for appointment as a Director and there is no basis in law or fact of nullifying his appointment.

28. That the petition be dismissed with costs

Submissions

29. The petitioners, 1st, 2nd, 6th, 8th respondents and interested party filed written submissions and authorities on the preliminary objection on jurisdiction of the court and the petition in this matter.

Determination

30. Upon a careful consideration of the petition and supporting documents, the replying affidavits and notices of objection filed by the respondents and the interested party. And upon a careful consideration of the written submissions filed as stated above, the court has delineated the following issues for determination.

(i) Whether the court has jurisdiction to entertain this matter.

(ii) Whether the petitioners have proved their case on a balance of probabilities.

(iii) What reliefs, if any should be granted in this matter.

Issue (a)

31. The dispute before court is one of appointment to the position of Director of 4th respondent following a competitive process mandated by **Hon. Justice Majanja – J. in petition No. 5 of 2018 on 28th June 2018.**

32. The nub of the dispute is whether the 8th and 9th respondents were lawfully and procedurally appointed as Director and or the two petitioners ought to have been appointed in their places.

33. What is challenged by the petitioners is the process of recruitment followed by the 4th respondent for the purposes of ratification and appointment of selected candidates by the stakeholders at a duly convened Annual General Meeting.

34. This was a process distinct from the normal election of Board of Directors of a limited liability company in terms of the Companies Act.

35. The issues before court therefore fall within the ambit of the *Employment and Labour Relations Court Act*, which derives its jurisdiction from *Article 162 (2) of the constitution of Kenya 2010 as read with Section 12 of the Employment and Labour Relations Court Act, Cap 234 B laws of Kenya. See United States International (USIN) vs Attorney General (2012) eKLR. Per Majanja – J. and Daniel N. Mugendi (2013) vs Kenyatta University and 3 others eKLR on the jurisdiction of the Employment and Labour Relations Court per R. Nambuye J. W. Mwera and P. Kiage JA.*

36. I find that the court has jurisdiction to hear and determine this matter and the preliminary objection is dismissed.

Issue (b)

37. The next issue for determination is whether from the facts placed before court by the petitioners vis a vis the evidence placed before court by the 4th and 8th respondents in particular, the petitioners have satisfied the onus of proof on a balance of probabilities as mandated under *Sections 107 and 108 of the evidence Act, Cap 80 laws of Kenya.*

38. The petitioners presented copies of the minutes of the recruitment committee meeting held at Borabu Hotel Nyamira on 6th September 2018 in which the committee selected two Directors from Nyamira County and three Directors from Kisii County as follows:

(i) Onserio Tirimba Joseph representing business interest for Nyamira County and

(ii) Chepkemei Patroba representing institutions.

(iii) Nyabado Achei James, the 2nd petitioner representing Manufacturing and industry in Kisii County.

(iv) Peter Jim Momanyi, representing institution and professional bodies in Kisii County, 1st petitioner; and

(v) Jackline Kerubo Mireri representing women organizations in Kisii County.

39. The minutes are signed by the Chairman, Mr. Shem Migosi, Mr. Boniface Ongena, member and Mr. Peter Omari Binani, member. The Committee members, Dr. Mokuia Igendi and Agnes Obare did not append their signatures to the copies of the minutes.

40. The petitioners did not disclose in the petition where, how and when they obtained the copies of the minutes. There was no deposition before court attesting to the authenticity of these minutes presented by the petitioners. The 4th respondent did not comment at all regarding the authenticity of the said minutes. The managing Director swore a replying affidavit on behalf of the Company Secretary. In the Affidavit, the minutes presented by the panel of 6th September 2018 presented by the petitioners are not challenged at all.

41. The 8th respondent on the other hand filed a replying affidavit sworn by himself stating that he was a candidate, shortlisted, interviewed and selected by the selection committee and the stakeholders in place of the 1st petitioner who had been ranked higher than him (no. 1 and 2 respectively) by the selection committee. The 8th respondent presented his certificate before court and copy of minutes of the Selection Committee meeting held on 5th September 2018. The minutes do not disclose the venue of the meeting. The meeting is said to have selected all the five candidates for appointment and ended its business at 9.05 pm on 5th September 2018. Even though page one of the said minutes show that there were five (5) named panelists who conducted the interview and four named officers in attendance who included the Company Secretary Mr. C.S Dickson Kirui, Reuben Masese, advocate, Engineer Jeremia Oteng Lusuz and Samuel Maiko – CECM Nyamira. The minutes appear to have been signed by only two panelists one Dr. George Ogondi and Agnes Obare and then by one Osborn Manga, the Managing Director who was neither a panelist present nor in attendance at the meeting on 5th September 2018. Other signatories were Reuben Masese, Samuel Maiko and Dickson Kirui, The Company Secretary.

42. The replying affidavit by the managing director of the 4th respondent at paragraph 8 states that the selection panel conducted the interview and completed the exercise on 5th September 2018 and a Special General Meeting of stakeholders to appoint Directors was

convened on 6th September 2018. The 6th respondent, the recruitment committee in their written submissions state that the recruitment exercise concluded on 5th September 2018 and the Special Annual General Meeting was held on 6th September 2018 to do the actual appointment. The petitioners on the other hand allege that the minutes presented by the 8th respondent were not authentic and were doctored.

43. It is the court's considered view and finding that the contradictions in the purported minutes of 5th September 2018 produced by the 8th respondent coupled with the failure by the company secretary of the 4th respondent to present to the court duly signed and sealed minutes of the company render the document an unreliable record of events that took place on the 5th September 2018.

44. The minutes relied upon by the petitioners are equally unreliable as they are not fully executed by the members of the select committee and do not bear the seal of the company.

45. The court cannot therefore rely on either of the documents as the true record of the events that took place on the 5th and 6th September 2018.

46. Having said that the petitioners bear the onus of proving their case on a balance of probabilities. The court is not satisfied on the evidence before it that the selection committee nominated the petitioners for the positions of Director of the 4th respondent instead of the 8th and 9th respondents.

47. What is clear however is that the Special Annual General Meeting appointed the 8th and 9th respondents as the Directors of the 4th respondent. In the absence of any tangible evidence that would warrant revocation of those appointments, it is my considered finding that the petitioners have failed to prove their case on a balance of probabilities.

48. In the final analysis the petition fails on the merits and the reliefs sought by the petitioners cannot be granted.

49. The manner in which the respondents have conducted their case and especially, failure by the 4th respondent to provide authentic company records render this an appropriate case for the parties to bear their costs of the petition.

Judgment Dated, Signed and delivered this 30th day of July, 2019

Mathews N. Nduma

Judge

Appearances

Muchoki for petitioners

Reuben Masesa for 4th and 7th respondents

Mrs. Asatch for 2nd respondent.

Mr. Kinyanjui for 8th respondent.

Mr. Oirere for 1st respondent.

Mr. Shem Mageto for 6th respondent.

Mr. Gichana for interested party.

Chrispo – Court Clerk