



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

PETITION NO. 8 OF 2018

IN THE MATTER OF ARTICLES 2(1), 3(1), 10, 159(1), 162, 232, AND 259 OF THE CONSTITUTION OF KENYA IN THE MATTER OF AN ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 19, 20, 21, 22, 23, 27, 28, 35, 41, 43, 46, 47, 48 & 50 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF THE WATER ACT, 2016 AND COMPANIES ACT 2015

IN THE MATTER OF GAZETTE NOTICE NO. 8391 BY HON. MWANGI

WA IRIA, GOVERNOR MURANG'A COUNTY

IN THE MATTER OF THE LEGAL AND CONSTITUTIONAL VALIDITY

OF THE PURPORTED TERMINATION OF DR. PETER KAHARA

MUNGA AS CHAIRPERSON OF MURANG'A WATER AND

SEWERAGE COMPANY

BETWEEN

DR. PETER KAHARA MUNGA.....PETITIONER

AND

HON. WAIRIA MWANGI,

GOVERNOR MURANG'A COUNTY.....RESPONDENT

AND

MURANG'A WATER & SEWERAGE COMPANY.....1ST INTERESTED PARTY

PROF. JOSEPH H. KIMURA.....2ND INTERESTED PARTY

RULING

1. An objection was taken that I do not have jurisdiction to hear and handle the dispute before me. By way of background, the dispute relates to the water services at Murang'a County, a county dear to me in many ways. In the case before me, the Petitioner Dr. Peter Kahara Munga seeks to challenge the Gazette Notice No. 8391 dated 15th August 2018 by the Respondent Hon. Mwangi wa Iria who is the Governor of Murang'a County. In the Petition a slew of reliefs are sought chief of which is the declaration that the Gazette Notice No. 8391 dated 15th August 2018 and published on 17th August 2018 is legally and constitutionally invalid, null and void; an order of *certiorari* to remove to this court and quash the decision and the Gazette Notice No. 8391 aforesaid; and, an order of prohibition restraining the Respondent from interfering with the running of the 1st Interested Party's Board of Directors and the Stakeholders contrary to the provisions of the Companies Act, 2015 and the Water Act 2016 as read together with the Constitution of Kenya.

2. In support and opposition were filed copious documents and pleadings. The Respondent filed a preliminary objection to which there is joinder by the 2nd Interested Party and is opposed naturally, by the Petitioner who is joined by the 1st Interested Party in the opposition.

3. Mr. Ng'ang'a for the Respondent argues that the preliminary objection dated 31st August 2018 and filed on 3rd September 2018 principally raises 2 objections or fundamental questions. He argues that this is not an Employment & Labour Relations matter within the context of Section 12 of the Employment & Labour Relations Court Act. He states that it is not in dispute that the Petitioner is not an employee of the Respondent or the 1st Interested Party and that the grievance emanates from a Gazette Notice where the Respondent acting pursuant to

Rulings and orders in Murang'a High Court JR 5 of 2017 and Articles 186(1) as read with part II of the Fourth Schedule paragraph 11(b) of the Constitution and Section 6(5) 31(1)(i) of the County Government Act 2012 proceeded to issue a Gazette Notice appointing an interim Chair of the Board of Directors of the 1st Interested Party. He submitted that the Petitioner has attached resolutions and the Memo and Articles of the 1st Interested Party and which govern operations and manner of appointment to office and removal from office. He argued that the directors are reimbursed for expenses incurred and are not employees within the meaning of Section 2 of the Employment Act which defines who an employee is. He states that the Petitioner is asking the court to investigate how the business of a private limited company is run. He submits that this court does not have jurisdiction to do so as the grievance is not within the purview of the Employment & Labour Relations Court as the High Court is reposed with jurisdiction to deal with all the disputes that would arise on the issue of a limited company. He submitted that *sub judice* applies and that the matter is issue is *res judicata*. Reliance was placed on the case of **David Randu v Malindi Sewerage & Water Services [2013] eKLR** where O. Makau J. held that the dispute between the Claimant and Respondent was not an employment dispute. The Respondent cited the cases of **Raphael Nzomo & 7 Others v Nairobi County Government & 4 Others [2017]eKLR** and **ET v Attorney General & Another [2012] eKLR** where Majanja J. held that parties should not change the cause of action or adding parties seeking to defeat the doctrine of *res judicata* citing the case of **Omondi v National Bank [2001] EA 177** where it was held that Courts should be vigilant against such abuse of court process by parties. He argued that the Petitioner had merely changed the nomenclature and camouflaged his claim to try and bring it within the ambit of this court. The proposition in the authority of **Prof. Christopher Mwangi Gakuu v Kenya National Highway Authority & 5 Others [2013] eKLR** by Lenaola J. (as he then was) where the learned judge held that it matters not that some parties were not in the previous suit. Mr. Kamau for the 2nd Interested Party associated himself with the submissions and arguments by counsel for the Respondent and urged that the Petition be struck out.

4. Mr. Kabathi for the Petitioner resisted the objection and submitted that the Petition ought to be sustained. First, he argued, the Court should address itself as to who the Petitioner is. He submitted that the Petitioner had been addressed as an isolated individual which was a very narrow view. He was of the considered view that since the Petitioner seeks refuge under Articles 22(2)(b), 128 and 259 among such other provisions, his position is that the Petitioner does not stand in isolation as the Constitution empowers any person to commence an agitation in the form of a constitutional petition on his own behalf or on behalf of another who is unable to approach Court or for a class of persons. He argues that the Petitioner per his averments and prayers in the Petition brings this Petition to champion the interests that are not solely his and these interests are specifically comprised of a class of persons in the 1st Interested Party, a company limited by guarantee with 130 permanent employees on permanent and pensionable terms. He states that the interference and purpose of the cause of action giving rise to Petition seeks to be addressed through the main prayer of the Petitioner where order of prohibition is sought. He submitted that the Petitioner address the unjustified interference by the Respondent in the running by the 1st Interested Party. He asserts that any person may approach a Constitutional Court as provided for in the Constitution under Article 21 seeking remedies against violations and potential violation of human rights of which Article 41 is pertinent. He states that the employees of the 1st Interested Party are cause for the relief sought and that no other court has jurisdiction to grant those rights. He argues that Article 259 is elaborate on the manner of interpretation of the Constitution which is that it should be interpreted in a manner that will advance the rule of law. He urged the court to take a Solomonic view of the matter and sustain it as the objection taken does not fit within the confines of **Mukisa Biscuits**. He argued that where parties are different, *res judicata* does not apply and submitted that in the present case not only are the parties different but even cause of action is different. Mr. Kamwara associated himself with the submissions of Mr. Kabathi and he argued that a matter can only be either *sub judice* or *res judicata* and stated that the Respondent is unsure the direction he should take and was trying to cling to both. He pointed out that the decision being challenged is the Gazette Notice and the Respondent purports to have his cake and eat it too by appointing the 2nd Interested Party. He argued that if the Respondent treats the Petitioner as an employee he cannot remove him in the matter as he did. He argued that there is no bar to bring a second suit where the Petitioner's rights are violated and that the preliminary objection is in essence a non-starter. The Respondent ought to have filed a formal application and as the Court was being referred to proceedings and evidence which are not pure points of law and the objection taken was not a preliminary objection as envisaged in the law. He urged the dismissal of the preliminary objection.

5. The objection in sum is that the matter is a dispute between parties litigating in another forum and whose grouse can be handled competently by the High Court where the dispute is already undergoing resolution by that Court. It is asserted that the matter is *res judicata* and *sub judice*. **Black's Law Dictionary Tenth Edition** defines *res judicata* as follows:- '*a thing adjudicated, an issue that has been definitively settled by judicial decision. An affirmative defense barring the same parties from litigating a second law suit on the same claim, or any other claim arising from the same transaction or series of transactions, and that could have been – but was not – raised in that other suit.*' The dictionary goes on to isolate the three essential elements for *res judicata* to be an earlier decision on the issue, a final judgment on the merits, and the involvement of the same parties, or parties in privity with the original parties. *Sub judice* on the other hand is defined in the **Black's Law Dictionary Tenth Edition** as *before a court or judge for determination*. My reading of the two definitions means that a matter cannot be both at the same time as they are mutually exclusive. One relates to a final determination by a court and the other relates to a matter pending determination.

6. The issue of jurisdiction is one that must be determined at the onset. I think the law on this is quite well settled. In the case of the **Owners and Masters of the Motor Vessel "Joey" v Owners and Masters of the Motor Tugs "Barbara" and "Steve B" [2007] eKLR** per Omolo, Tunoi and Githinji JJA on 27th April 2007 the learned judges of the Court of Appeal held that:-

...the question of jurisdiction, raised in the circumstances such as those existing in the present appeal, is a threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. Nyarangi, J.A graphically put it thus:-

“..... I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down (sic) tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

The learned Judge of Appeal then referred to certain passages in the text “Words & Phrases Legally Defined.” – Vol. 3: I – N at pg. 113 and then continued:-

“It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined. I can see no grounds why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado.”

And in concluding his judgment, Masime, J.A, said at pg. 26 of the Report:-**“The evidence placed before the court in support of the claim as well as the motion has been analyzed above and I have also, as I said before, had the advantage of reading in draft the comments of my brothers, Nyarangi and Kwach, J.J.A on it with which I respectfully agree that evidence so far as it was adduced by the respondent fell foul of the requirements of rule 5 of Order 75; it failed to establish that the appellant was “the relevant person.” The upshot of that is that the High Court did not have the admiralty jurisdiction and that the respondent was not entitled to invoke that jurisdiction.”**

7. The Court is well guided by judicial precedent and the treatises by Garner *et al*. The authorities cited have been considered and though some may not be expressly referenced they have been of help in determining the matters before me. This Court is the Employment & Labour Relations Court established pursuant to Article 162(2) of the Constitution. In the Court of Appeal decision in the matter of **County Assembly of Kisumu & 2 Others v Kisumu County Assembly Service Board & 6 Others [2015] eKLR**, the learned Judges of Appeal while determining a question as to whether the Employment & Labour

Relations Court has jurisdiction to determine Constitutional questions held that:-

..since the court is of the same status as 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 exclusive 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 also all fundamental rights ancillary and incidental to the employment and labour relations including the interpretation of the Constitution within the matter before it.

8. The Petition before me raised Constitutional questions. The relief the Petitioner seeks from this Court is as follows:-

- i. A declaration that the Gazette Notice No. 8391 dated 15th August 2018 and published on 17th August 2018 is legally and constitutionally invalid, null and void;
- ii. An order of *Certiorari* to remove to this court and quash the decision and the Gazette Notice No. 8391 aforesaid; and,
- iii. An order of prohibition restraining the Respondent from interfering with the running of the 1st Interested Party’s Board of Directors and the Stakeholders contrary to the provisions of the Companies Act, 2015 and the Water Act 2016 as read together with the Constitution of Kenya.

9. The reliefs sought in the Petition can be granted in a matter that rightly comes before the Court as an employment issue. The Petitioner has not sought relief as an employee of the 1st Interested Party. His reliefs hobble me as it is clear the proper forum for his prayers would be best before the court that deals with matters under the Companies Act – the High Court. It was pointed out that there is an action pending before the High Court at Murang’a. In keeping with precedent, I will down my tools as I hold the opinion that I have no jurisdiction to deal with the manner and mode of appointment and removal from office of directors in a limited liability company as those matters are the province of the High Court. The cases of **David Randu v Malindi Sewerage & Water Services Co.** and **Raphael Nzomo & 7 Others v Nairobi County Government & 4 Others** (citations above) are pertinent on jurisdiction. The Petitioner prayed that like Pontious Pilate, when I wash my hands off, I point out which way to go if I am of the view that this is the incorrect forum. Unfortunately I cannot transfer the matter to my learned brother H. Waweru J. as I respectfully cannot place a matter that was filed in a court without jurisdiction to be dealt with by the court that is imbued with jurisdiction. I will strike out the Petition before me and order that each party bears their own costs for the reasons given above. Parties to contemplate the provisions of Article 28 of the Constitution for the people of Murang’a County in dire need of water.

It is so ordered.

Dated and delivered at Meru this 4th day of October 2018

Nzioki wa Makau

JUDGE