



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

PETITION NO. 85 OF 2017

RAPHAEL M. NZOMO.....1ST PETITIONER
DR. KENNEDY OMOKE.....2ND PETITIONER
LAWRENCE OTIENO OUMA.....3RD PETITIONER
JOANNE MWANGI.....4TH PETITIONER
JOHN KENNEDY WANYAMA.....5TH PETITIONER
ROSEMARY LUGALIA KHAMATI.....6TH PETITIONER
MERCY MUKWA MUTUA.....7TH PETITIONER
SAMUEL ODERO OJANGA.....8TH PETITIONER

VERSUS

NAIROBI COUNTY GOVERNMENT.....1ST RESPONDENT
THE AG. COUNTY SECRETARY, LEBOO OLE MORINTAT.....2ND RESPONDENT
HON. MIKE MBUVI SONKO, GOVERNOR
NAIROBI CITY COUNTY GOVERNMENT.....3RD RESPONDENT

AND

NAIROBI WATER & SEWERAGE CO. LTD.....INTERESTED PARTY

RULING

1. The Claimant filed a Petition and an application under a certificate of urgency on 18th October 2017. After the grant of orders *ex parte* on hearing of the motion, the Respondents filed a preliminary objection dated 18th October 2017. The objection is to the effect that the Petitioners are Directors and Shareholders of the Interested Party and are regulated by Section 2 and Part IX of the Companies Act 2015, Section 79 and 80 of the Water Act and clauses 69-90 of the Company's Memo and Articles of Association. The Claimants were opposed to the preliminary objection taken.

2. The objection was raised on 1st November 2017 and it was submitted by Mr. Litoro for the Respondents that the dispute raised in the petition is purely between directors and shareholders in the interested party. It was submitted that such a dispute is provided for under Part 1X and Section 3 of the Companies Act, 2015 and that the court that is to adjudicate those matters is the High Court as specified in the Act. He was of the view that in the Companies Act, the Employment and Labour Relations Court is not included in the definition of 'court' and that because the Companies Act commenced in 2015 after the Constitution of Kenya was promulgated in 2010 and after the Employment Act was promulgated, if at all Parliament which has been granted legislative powers by the Constitution intended to include this court to adjudicate over such disputes, it would have expressly stated so in the Companies Act. He submitted that the Petitioners are purely directors

in the strict sense in the Interested Party as they are appointed under Section 79 and 80 of the Water Act, the Companies Act, and Clauses 66-90 of the Interested Parties Memorandum and Articles of Association which are produced in the petition and the application. He urged that there is no employer/employee relationship and that in fact the petitioners are only given allowances. This is prescribed in Article 67 of the Memo and Articles and that Clause 70 provides that the Managing Director is entitled to a salary and thus he is different from the Petitioners. He stated that the Petitioners are not controlled, directed or even paid by the Respondents who are shareholders and that their powers emanate from Memo and Articles of Association and the Directors Charter. He submitted that their pay is not remuneration under Section 2 of the Employment Act. He closed by stating that a dispute between the Petitioners should go to arbitration under the Arbitration Act and that the Memo and Articles are very clear on this. He placed reliance on the case of **David Randu v Malindi Sewerage Company Limited [2013] eKLR** and prayed that the Petitioners application be dismissed. He stated that there is no vacuum in the Company as there is a Managing Director who is in charge of day to day running.

3. Mr. Ogotu for the Petitioners responded and in his response begun by dealing with the issue of reference to arbitration. He submitted that Clause 131 of Memo and Articles of Association refers to matters of construction of the Memo and Articles. He stated that that is what should be taken to arbitration not the dispute that is in issue here. He stated that this court has jurisdiction, a jurisdiction that is unrivaled in matters of labour relations and matters of labour practice. He cited Section 12 of the Employment and Labour Relations Court Act 2012 which donates jurisdiction to this court. He emphasized that the Act uses the word **all** and in his reading the provisions of Section 12 do not limit disputes such as the one before court and includes additional powers under the items from Section 12(1)(a) to (j). He stated that the reading of Article 162(2)(b) and Article 41 of the Constitution grants exclusive jurisdiction to this Court on labour matters and labour relations. He submitted that Article 41 stipulates that every person has a right to fair labour practice and that the Petitioners are persons within the purview of Article 41(1) and that is why they had approached this court upon the infringement of their rights to fair labour practice. He stated that the question we should ask is whether there is an employee-employer relationship. He was of the view that this court has set the test for employer-employee relationship in the case of **Geoffrey Asanyo v Nakuru Water and Sanitation & 6 Others [2014] eKLR** where the court set 4 tests, the first being the control test whereby a servant is a person under command of the company. He submitted that the Petitioners are appointees of the company and work at the behest of the Company, they are not subscribers, or shareholders. He stated that their terms of engagement are given and that the second test is the integration test and that in this case the Petitioners are subject to the command of the employer. He stated that the test is whether they are part of the business or are directed by the employer. He stated that another test is whether they share in the profits of the company and that the mutuality test also applies. He submitted that the letters of employment specify a contractual occupation for 3 years renewable and therefore there is an employee/employer relationship. He also placed reliance on the case **George Maina Kamau v County Assembly Murang'a & 2 Others [2015] eKLR** and sought to distinguish the case of **David Randu v Malindi Water & Sewerage** that, the case was a claim, proceeded to full hearing and the issue was whether the Claimant could be paid damages for his removal as director. He posit that this case is not on all fours with this case. He submitted that contrary to assertions by the Respondents that the Directors were not paid, Clause 67 speaks of remuneration of directors being determined by the company. He also referred to the case of **Geoffrey Asanyo v Nakuru Water and Sanitation Services** and stated that there is definition of what remuneration is per **Black's Law Dictionary** as cited in the decision. He stated that the term wage includes payment and will include payments such as bonuses. He stated that the Petitioners were paid remuneration per Clause 167. He submitted that pursuant to Article 165 (5), it is the High Court that has been denied the exclusivity of jurisdiction given to this court on matters of fair labour practices. He stated that this court has power to enforce the fundamental rights and freedoms and he thus asked the court to guard its jurisdiction jealously and dismiss the Preliminary Objection with costs to the Petitioners.

4. Mr. Omuganda for the Interested Party stated that the Interested Party did not wish to actively participate in the current objection but seeks expeditious resolution of the matter before Court. In his reply, Mr. Litoro submitted that Clause 131 as relates to arbitration should be read in entirety and that the clause speaks for itself. On issue of jurisdiction, he stated that the authority of the court to hear violations of the Constitution is per Article 162(2)(a) and the Respondents do not dispute there is authority of the court to determine constitutional issues. He stated that what the Respondents are saying is that there is no employment relationship per the test set out in the decision in the **David Randu v Malindi Water & Sewerage Co. Ltd** case. He urged the Court to apply the test in that case to determine if the Directors were employees and that the Court should look at the appointment letters of the Petitioners. He submitted that the case of **Geoffrey Makana Asanyo v Nakuru Water and Sanitation Services Co. & 6 Others** cited above was made before the Companies Act, 2015. He urged this court to distinguish the decision. He submitted that the command test is clearly discerned from the Memo and Articles of Association and that the Respondent does not have control over the Petitioners like that of a servant and master. He stated that the Petitioners are the ones in fact exercising command and control of the Interested Party and yet dispute is between Respondent and Petitioners. On issue of the wages, he submitted they are not paid and they only have allowances which are reimbursed expenses. He urged the court to refer the Director's Charter in the Replying Affidavit filed by the Respondent and ascertain that there is no salary at all. He thus urged that the application be dismissed and that the petition together with the application be struck out as sought.

5. The objection taken is principally that this Court lacks jurisdiction to hear the petition before it as the court clothed with requisite jurisdiction is the High Court. In matters where the jurisdiction of the court is challenged, a court is required to determine the issue the moment it is raised as jurisdiction is everything. Without it a court is devoid of any authority to take one more step. The leading case on the issue is the case of **Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited [1984] KLR 1** where the Court of Appeal per Nyarangi JA held as follows:-

I think that 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 downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

6. The challenge was thus one which would have the effect of either stopping the case in its tracks or permitting further litigation if I find I have the requisite jurisdiction. The Respondents allege that the Petitioners do not have an employer/employee relationship. The Respondents assert that the relationship the Petitioners enjoy is one of supervision and control of the Interested Party for which the Petitioners receive allowances as reimbursement for their expenses. The parties have referred the court to the documents annexed to the Petition evincing the appointment of the Petitioners to the positions they hold in the Interested Party. The letters are in material respects the same. They each provide as follows:-

I am pleased to inform you that pursuant to your application and interviews to be considered for appointment to the Board of Directors for **Nairobi City Water and Sewerage Company Limited**, you have been appointed as a Board member for a period of 3 (Three) years renewable.

You will be expected to work dedicatedly for the benefit of the company while applying the principles of participative decision making process, inclusivity, integrity, transparency and accountability.

Please indicate the acceptance of your appointment by signing the copy of this letter and returning it to the undersigned.

7. The letter did not indicate the remuneration payable to the board members. Under the Companies Act the members of the board of directors holds positions in the corporation. One can be nominated or appointed to the board as were the Petitioners herein. Their letters of appointment took the format above. They have indicated that they received remuneration as board members and as such assert that they have an employee-employer relationship with the Interested Party hence their petition which seeks remedies for the infringement of their rights under the Constitution, the Companies Act, the Employment Act among others. The Petitioners place reliance on the case of **Geoffrey Asanyo v Nakuru Water and Sanitation Services & 6 Others** as well as the case of **George Maina Kamau v County Assembly of Murang'a & 2 Others** where Ongaya J. held that this court possess jurisdiction to entertain a petition for the enforcement of fundamental rights under the Constitution between the persons in an employee-employer relationship. This argument is stated to be distinguishable by the Respondent who relies on the case of **David Randu v Malindi Water & Sewerage Company Limited** where it was held that the Claimant was not an employee of the Respondent. The two rival positions are diametrically opposed and as a court I must determine what the correct position is. It is argued that the decision in the **Geoffrey Asanyo** case was decided in the pre-2015 Companies Act era. It is therefore argued that the decision is not apt with the present law obtaining. I am urged to consider it to be distinguishable from the present circumstances. In the cases cited, the decision of Denning L.J. in **H.L Bolton Engineering Co. Limited v T.L Graham & Sons Ltd (1957) CA 159** at 172 was adverted to. In that case, Lord Denning held that "A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than the hands to do the work and cannot be said to represent the mind or the will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by law as such. In the decision of **Eaton v Robert Eaton Ltd & Another [1988] IRIR 83** the test for determining whether a director is an employee is set out. The test is as follows:-

- a) Did the director have a descriptive title like marketing director, managing director or sales director?
- b) Was there an express contract of employment, or if not, was there a board minute or memorandum consisting of an agreement to employ the director as an employee
- c) Was remuneration paid by way of salary or directors fees
- d) Was remuneration fixed in advance or paid on an *ad hoc* basis
- e) Was remuneration by way of entitlement, or in effect gratuitous (in other words was the director in a position to sue for it)
- f) Did the director merely act in his own capacity as director or, was he under the control of the board of directors in respect of the management of his work.

8. The Employment Act under Section 2 defines an employee as a person employed for wages or a salary and includes an apprentice and indentured learner. The **Black's Law Dictionary Ninth Edition** defines employee as *a person who works in the service of another person (the employer) under an express or implied contract of hire, under which the employer has a right to control the details of work performance*. The **Concise Oxford English Dictionary** defines employee as *a person employed for wages or salary*. Section 79(1) of the Water Act makes provision as follows:-

79. (1) A water services provider shall have a board of directors and in the case of a company, the members of its board of directors shall be constituted in accordance with the Companies Act, 2015 or any other written law and the directors shall be nominated to serve on the board in accordance with the company's memorandum and articles of association.

The memorandum and articles of association of the Interested Party provides under clause 67 of the Articles of Association that the remuneration of directors shall from time to time be determined by the Company in a General Meeting and such remuneration shall be by way of sitting allowances. The Articles also provide that the directors may also be paid travelling expenses from their ordinary place of residence to the place where the meeting is held, hotel and other expenses properly incurred by them in attending and returning from meetings of the directors or any committee of the directors or general meetings of the Company or in connection with the business of the company. Read together with the Companies Act, 2015 as well as the five-fold test in the **Eaton** case above cited with approval in the **David Randu** case, the Petitioners herein are not employees of the Interested Party and as such the Petition before me is in the wrong forum. The decisions of Ongaya J. in the cases of **Geoffrey Makana Asanyo v Nakuru Water and Sanitation Services Company & 6 Others** and **George Maina Kamau v County Assembly of Murang'a & Others** are distinguishable from this case. This Court lacks jurisdiction to determine disputes between directors of companies, other than the Managing Director and other salaried directors, and the company over which the directors exercise authority over. They are the mind of the company and represent the directing mind and will of the company as Denning L.J. held. I have to down my tools as I lack jurisdiction. The Petition is struck out with costs as it is in the wrong forum.

It is so ordered.

Dated and delivered at Nairobi this 2nd day of November 2017

Nzioki wa Makau

JUDGE