REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

PETITION NO. 4 OF 2014

GEOFFREY MAKANA ASANYO.....PETITIONER

- VERSUS -

NAKURU WATER AND SANITATION SERVICES COMPANY.....1ST RESPONDENT

JOHN CHERUIYOT.....2ND RESPONDENT

RIFT VALLEY WATER SERVICES BOARD..3RD RESPONDENT

JAPHETH MUTAI.....4TH RESPONDENT

THE COUNTY GOVERNMENT OF NAKURU.....5TH RESPONDENT

H.E. KINUTHIA MBUGUA.....6TH RESPONDENT

ATTORNEY GENERAL.....7TH RESPONDENT

(Before Hon. Justice Byram Ongaya on Wednesday 30th April, 2014)

RULING

The petitioner **Geoffrey Makana Asanyo** filed the petition on 6.03.2014 through Gordon Ogola, Kipkoech & Company Advocates and prayed for:

a. A declaration that the decision and process of advertising and intended filling of the positions of 6 directors of the 1st respondent was opaque, egregious, clandestine, capricious, whimsical and contrary to Article 41 and 47 of the Constitution of Kenya hence unconstitutional and consequently null and void.

b. A declaration that the actions above of the 2nd, 4th, and 6th respondents contravened Articles 10, 41, 47, and 73 of the Constitution of Kenya, and the Public Officer Ethics Act of 2003 hence unfit to hold any public office.

c. A declaration that the respondents are escapists and have abdicated their duty to respect and uphold the Constitution of Kenya in their Administrative actions.

d. The petitioner be paid costs of the petition.

The 1st and 2nd respondent filed a notice of preliminary objection on 18.03.2014 through Githui & Company Advocates. The 1st and 2nd respondents urged as follows:

a. There is no employer-employee relationship between the petitioner and the 1st and 2nd respondents but a relationship of a director and a limited company. Thus, the court lacks jurisdiction.

b. The 2nd respondent is an agent of the 1st respondent and the 1st respondent is an agent of the 3rd respondent. An agent of a disclosed principal cannot be sued in the same action and seeking for same remedies.

c. The 5th respondent is the majority shareholder of the 1st respondent and as the shareholder cannot be sued for act of omission and commission by the company in which it is a shareholder.

d. Thus, on the basis of the foregoing, the entire petition and the application ought to be struck out with costs.

The 3rd, 4th, 5th, and 6th respondents filed a notice of preliminary objection on 20.03.2014 through Odhiambo & Odhiambo Advocates urging that the court lacked jurisdiction to entertain the suit because:

a. The court derives its constitutional and statutory jurisdiction from Article 162(2) (a) of the Constitution of Kenya 2010 and section 12 of the Industrial Court Act, 2011 respectively.

b. The Petitioner is not an employee of the 1st respondent company within the meaning of sections 2 and 3 of the Employment Act, 2007 and section 12 of the Industrial Court Act, 2011.

c. The Articles and Memorandum of Association of the 1st respondent company do not confer employee status on the petitioner.

The 4th and 6th respondents also filed a notice of motion under sections 1A, 1B, 3A of the Civil Procedure Act Cap. 21 and Order 2 Rule 15 (a) of the Civil Procedure Rules, 2010 for orders that the petition and notice of motion both dated 6.03.2014 and filed on the same date be struck out with costs as against the 4th and 6th respondents. It was urged that the petition and the notice of motion filed on 6.03.2014 discloses no reasonable cause of action as against the 4th and 6th respondents. A similar application was filed on 4.04.2014 for orders that the petition and notice of motion application both dated on the 6.03.2014 and filed on the same date be struck out with costs against the 3rd and 5th respondents.

On 31.03.2014, the petitioner filed the statement of response to the preliminary objections and opposed the preliminary objections on the following grounds:

a. This is a court of competent jurisdiction in that matters dealing with the right to fair labour practices can only be determined by the Industrial Court.

b. The petitioner is a public officer working for the respondent which is a public company.

c. The individual respondents are personally liable for their actions which were not authorised.

d. The objection is baseless.

On 31.03.2014, the Kenya County Government Workers Union filed a chamber summons through Katunga Mbuvi & Company Advocates. The union applicant invoked section 3A of the Civil Procedure Act, Order 1 rule 10(2) and 22 of the Civil Procedure Rules and section 12 of the Industrial Court Act. The union prayed that it be granted leave to be joined in this suit as an interested party on the grounds that the matter involves union members; the participation of the union shall enable the court to effectually and completely adjudicate the questions involved in the matter; the wrangles between the managing director

and the board of management has left a vacuum in the management of the company; and being the main stakeholders of the company, it is fair that the workers be represented in the suit.

The 3rd, 4th, 5th & 6th respondent's grounds of opposition to the union's application was filed on 04.04.2014 and stated as follows:

a. The application is bad in law, incompetent and an abuse of the court process as is brought *mala fide* to unnecessarily choke the proceedings of the court herein.

b. The intended interested party has no interest or stake whether real or imagined in the water sector as was the finding of the court in, **National Union of Water & Sewerage Employees –Vs- Kericho Water & Sanitation Services Company Limited & Kenya Local Government Workers Union Industrial Cause No. 1142 of 2010**.

c. The joinder of the interested party will obscure the real issues in controversy and impose unnecessary costs on the parties and therefore undermine the objects of Article 159 (2) of the Constitution of Kenya 2010.

d. The applicant has not demonstrated a clear interest in the matter where orders adverse to the interest of the party sought to be joined, are sought; and that the applicant does not have a partisan interest; and the applicant seeks to litigate a bona fide claim.

The 2nd respondent's affidavit was filed on 01.04.2014 to oppose the union's application to be enjoined. The affidavit stated that the union was a busy body without any defined legal character and its recognition and registration status was unknown. That the union had not demonstrated its interest in the matter and its joinder will only be of nuisance value. Further, by court decision, the proper union representing the workers in the water and sewerage sector was the National Union of Water and Sewerage Employees and the applicant had to seek recognition under section 54 of the Labour Relations Act, 2007 if it wished to participate in the sector. The 2nd respondent referred to the declaration to that effect in the Award in **National Union of Water & Sewerage Employees –Vs- Kericho Water & Sanitation Services Company Limited & Kenya Local Government Workers Union Industrial Cause No. 1142 of 2010**. In absence of the recognition agreement, the 2nd respondent submitted that the applicant was not entitled to be enjoined in this suit.

The parties filed their written submissions and the applications and the preliminary objections were heard together on 4.04.2014. The issues for determination are as follows:

1. **Whether the petitioner is an employee in the circumstances of this case.**

2. **Whether the court has jurisdiction to hear and determine the suit.**

3. **Whether the petition and notice of motion application both dated 6.03.2014 should be struck out with costs as against the 1st, 2nd, 3rd 4th, 5th and 6th respondents for disclosing no reasonable cause of action or for being improper parties.**

4. **Whether the Kenya County Government workers Union should be enjoined in the petition as an interested party.**

The court has considered the pleadings, the affidavits and the submissions as made for the parties and makes findings as follows:

Whether the petitioner is an employee in the circumstances of this case

The petitioner has submitted that he is a public officer and the employee of the 1st respondent and which is a public company. It was submitted for the petitioner that he was appointed as a director of the 1st

respondent by the letter of appointment being exhibit **GMA 1** on the petitioner's supporting affidavit filed on 6.03.2014. The appointment was for three years effective 18.12.2012 as a director to perform the common law duties of a director stated in the letter as, to act in the best interest of the company while individually and collectively undertaking the board of director's responsibilities; and to exercise duty of care and skill while discharging responsibility. As director, the letter stated that the petitioner would be required to attend quarterly board meetings, other meetings as may be necessary, and participate in the board's committees. The letter enumerated the responsibilities of the board as including but not limited to implementation of the memorandum and articles of association; provision of guidelines and control function of the company; approval of the organisation structure and maintenance of staff terms and conditions of service; approval of business plan and budget; provision of management guidelines; approval of major contracts or projects; approval of tariff adjustment; prudent investment of funds to ensure continuity of service; and appointment of corporate management team.

For 1st and 2nd respondent it was submitted thus, **"Removal of a director of a company is governed by provisions of section 185 of the Companies Act. Thus, a company may remove any of the directors by way of an ordinary resolution contained in the articles of association. The section sets out an elaborate procedure for the removal of directors. Taking this statute and nothing else, it emerges therefore that removal of directors is a matter which fall perfectly with the confines of company law and which ought to be determined exclusively by the companies' court. The labour relations court has no jurisdiction to hear and determine matter related to removal of a director of a company."** The 1st and 2nd respondents referred to **Lennard's Carrying Company –Versus- Asiatic Petroleum Company Limited (1915) AC 705 at 713**, where the court stated that the corporation is an abstraction, it has no mind of its own and that it is the directors appointed at the general meeting, like the petitioner, that are the mind and will of the corporation. The court was further referred to the opinion of Denning L. J in **H.L Bolton (Engineering) Co. Limited –Versus- T.L Graham & Sons Limited (1957)CA 159 at 172**, thus, **" ...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 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 the law as such."**

The court has considered the rival submissions. First, as submitted for the 1st and 2nd respondents, the Companies Act and as per the articles of association, there is provided an elaborate procedure for appointment and removal of the company's directors. It is the considered opinion of the court that such provisions do not in themselves render the director an employee or not an employee of the company. The court further upholds the opinions in the cited cases that the directors constitute the mind and will of the company. Nevertheless, that in itself does not define the status of the director as an employee or not employee of the company. The court has considered the cited Denning L.J's opinion as quoted above and finds that it suggests that those engaged by the company other than directors but as servants are clearly mere employees. A collateral inference is that those engaged as directors or managers are employees but not merely as such but also, holders of the mind and will of the company.

The Employment Act, 2007 and the Industrial Court Act, in their respective provisions in section 2 states **"employee"** means a person employed for wages or salary and includes an apprentice and indentured learner. The **Black's law dictionary, 9th Edition** defines wage to include every form of remuneration payable for a given period to an individual for personal services including salaries, commissions, vacation pay, bonuses, and the reasonable value of board, lodging, and payments in kind, tips, and any similar advantage received from the employer. **"Remuneration"** is defined in section 2 of the Employment Act, 2007 to mean the total value of all payments in money or in kind, made or owing to an employee arising from the employment of that employee.

The petitioner has submitted that he was remunerated for his services and the respondents have remained silent on this subject. It is not said for the respondents that the petitioner was paid or not paid as a director. The Kenya Audit Office report for year ended 30.06.2012 filed as part of **GMA2** on the

petitioner's supporting affidavit filed together with the petition and at No. 2 states that administrative expenses amounting to Kshs.193,242,442 for the year ended 30.06.2012 had been paid including Kshs.1,116,666.00 for gratuity for non-executive directors. The report states the payments contravened the Water Act, 2002 and the State Corporations Act. A breakdown of the administrative costs at page 14 of the audit report includes personnel costs. In view of that evidence, the court finds that the services of the petitioner as a director must have been paid for one way or the other and the pay can only have been a wage or remuneration within the definitions as set out earlier in this ruling so that the petitioner was therefore an employee.

While making that finding, the court has considered that the petitioner was a public officer by reason of his engagement as director in the 1st respondent's corporation, a public enterprise governed by the provisions of the State Corporations Act, the Water Act, the Public Officer Ethics Act, and the constitutional provisions on public service. In **Richard Birir –Versus- Narok County Government and 2 others [2014] eKLR** this court stated thus, **"The court has carefully considered the enumerated constitutional provisions and holds that all persons holding public or state office in Kenya in the executive, the legislature, the judiciary or any other public body and in national or county government are servants of the people of Kenya. The court holds that despite the level of rank of state or public office as may be held, no public or state officer is a servant of the other but all are servants of the people. Thus, the court holds that the idea of servants of the crown is substituted with the doctrine of servants of the people under the new Republic as nurtured in the Constitution of Kenya, 2010. The hierarchy of state and public officers can be complex, detailed and conceivably very long vertically and horizontally but despite the rank or position held, the court holds that they are each a servant of the people and not of each other as state or public officers. They are all the servants of the people. The court holds that there are no masters and servants within the hierarchies of the ranks of state and public officers in our new Republic."**

The court upholds that opinion and further holds that all persons serving in public bodies are employees of the people of Kenya (through the respective public entity as the employer) under the doctrine of the servants of the people. In any event, the court takes judicial notice that such persons serve the people within defined payments be it salary or allowances or other payments as determined in accordance with the relevant constitutional and statutory provisions; and the pay qualifies for wage or remuneration for their service. The court holds that unless a clear constitutional provision exists to oust the jurisdiction of this court, like in Article 165(3) (c) that vests exclusive jurisdiction in the High Court for appeals from a tribunal's decision as appointed under the Constitution to remove a person from a state office, matters related to the employment of state or public officers would clearly fall within the jurisdiction of this court.

The court has considered the submission that the petitioner was engaged as a director in the 1st respondent's board of directors, the 1st respondent being a company under the Companies Act and the dispute relating to the employment of the petitioner ought to have been filed in the **"Companies' Court."** First, it was not shown that a companies' court exist in our system of courts and indeed, such courts are not established anywhere in our constitutional and statutory provisions. Secondly, it is the opinion of the court that the jurisdiction of this court would not be impaired by reason of legal status of the employer. As submitted for the petitioner and as was held in **Nick Githinji Ndichu –Versus Kiambu County Assembly [2014] eKLR** whether employment was by appointment or by election, the court has jurisdiction where employment relationship is established to exist.

Does a director of a company work for himself as an independent contractor like in the contract for service or is the company's employee? This court considered the issue in the case of **Stanley Mungai Muchai – versus- National Oil Corporation of Kenya, Industrial Court of Kenya at Nairobi Cause No. 447N of 2009 pages 7 to 9** of the court judgment where it was stated, thus:

"**The Industrial Court Act, 2011 in Section 2 defines employee to mean a person employed for wages or a salary and includes an apprentice and indentured learner. The section also defines employer to mean any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company.**

The Employment Act, 2007 in Section 2 defines "Contract of Service" to mean an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership but does not include a foreign contract of service to which Part XI of the Act applies.

The court holds that whether the relationship between parties' amounts to a contract of service or contract for service is an issue both of law and fact but largely, one of fact. There is no doubt that a relationship that is a contract of service, unlike one that is a contract for service, will enjoy the statutory protections accorded by the employment legislation. This is more so in view of the definitions of *"employee", "employer" and "contract of service"* under the Employment Act, 2007 and the Industrial Court Act, 2011.

A contract of service invariably relates to "*dependent*" *or* "*subordinate*" employment and a contract for service relates to "*independent*" or "*autonomous*" employment. Thus, there is a constant line that is drawn between self-employed or independent contractors in a contract for service, and, employees in a contract of service. There is no universal formular for determining existence of a contract of service. *Simon Deakin and Gillian S. Morris, Labour Law, 3rd Edition* pages 146 to 168 have discussed some of the tests used by courts in determining "*employment*" or "*service*". They include the following:

a. **The control test whereby a servant is a person who is subject to the command of the master as to the manner in which he or she shall do the work. However the formal or personal subordination of a worker as a test for existence of a contract of service may not apply for highly specialized workers such as in the case of the doctors, lawyers, and other professionals.**
b. **The integration test in which the worker is subjected to the rules and procedures of the employer rather than personal command. The employee is part of the business and his or her work is primarily part of the business. However, staff of independent contractors may as well perform entries integral or primarily part of the business when in fact, they are not employees.**
c. **The test of economic or business reality which takes into account whether the worker is in business on his or her own account, as an entrepreneur, or works for another person, the employer, who takes the ultimate risk of loss or chance of profit.**
d. **Mutuality of obligation in which the parties make commitments to maintain the employment relationship over a period of time. That a contract of service entails service in return for wages, and, secondly, mutual promises for future performance. The arrangement creates a sense of stability between the parties. The challenge is that where there is absence of mutual promises for stable future performance, the worker thereby ceases to be classified as an employee as may be the case for casual workers.**

Since none of the foregoing tests can resolve the issue decisively on their own, in many cases the issue will be resolved by examining the whole of the various elements which constitute the relationship between the parties; this has been called the multiple test".

The court has applied the multiple tests and finds that in the instant case the petitioner was in employer-employee relationship because:

a. the performance as director was subject to control as set out in the letter of appointment including attending board meetings and participating in one committee;

b. in performance, the petitioner was bound by the relevant constitutional and statutory provisions as a public officer;

c. the petitioner worked for 1st respondent rendering personal services (though as a non-executive director), did not share in profits or losses, did not work for himself and was paid; and

d. there was a mutual arrangement that the petitioner would serve as a director for 3 years.

To answer the 1st issue for determination, the court finds that the petitioner is an employee, he is in employment relationship with the 1st respondent and the 1st respondent being a separate legal person is the clear employer of the petitioner. He is an employee both as an appointed director and as a public officer.

Whether the court has jurisdiction to hear and determine the suit

It was submitted for the respondents that the court lacked jurisdiction for want of employer-employee relationship. The court has found that such relationship existed and the court finds that the court has jurisdiction to hear and determine the petition.

It was an issue during the submissions whether the Industrial Court had jurisdiction to entertain and determine claims of breach of fundamental rights or enforcement of the Constitution as pertains to employment and labour relations matters. The Court of Appeal has resolved the issue in the case of **Prof. Daniel N. Mugendi –Versus- Kenyatta University and 3 Others, Civil Appeal No. 6 of 2012**. The court stated thus,

> **"The question now is whether the appellant should go back and 'sever' the composite petition alleging violation of his fundamental rights and breach of contract of employment. Much as severance would entail time and resources to effect the necessary amendments and make due motions, we are of the view that with necessary amendments, which appear imperative to make out a clear use of breach of rights being effected, the appellant can and should be heard by the Industrial Court on the two claims i.e. violation of rights and breach of contract of employment. The position that the Industrial Court can and should entertain the claim as laid by the appellant, is in line with the decision of Majanja, J. in Petition No. 170 of 2012 – United States International University(USIU) –Versus- The Attorney General & Others."**

The Court of Appeal in the cited case proceeded to conclude and stated thus:

> **"Believing as we do that the approach by *Majanja J* is the correct one, and in endeavouring to meet the ends of justice untrammelled by procedural technicalities, we set aside the order striking out the appellant's petition and direct that the High Court do transfer it to the Industrial Court which also has jurisdiction and authority to consider the claims of breach of fundamental rights as pertain to industrial and labour relations matters. It is only meet and proper that the Industrial Court do exclusively entertain those matters in that context and with regard to Article 165 (5) (b). And in order to do justice, in the event where the High Court, the Industrial Court or the Environment & Land Court comes across a matter that ought to be litigated in any of the other courts, it should be prudent to have the matter transferred to that court for hearing and determination. These three courts with similar/equal status should in the spirit of harmonisation, effect the necessary transfers among themselves until such time as the citizenry is well-acquainted with the appropriate forum for each kind of claim. However, parties should not file 'mixed grill' causes in any court they fancy. This will only delay dispensation of justice."**

This court is well guided by the opinion of the Court of Appeal and upholds that this court enjoys the jurisdiction to hear and determine employment and labour relations matters alongside claims of fundamental rights (and enforcement of constitutional and statutory provisions) ancillary and incident to those matters. In the present petition, the court finds that taking the pleadings on record into consideration, the court is vested with the jurisdiction to hear and determine the petition.

Whether the petition and notice of motion application both dated 6.03.2014 should be struck out with costs against the 3rd , 4th, 5th and 6th respondents for disclosing no reasonable cause of action against the 3rd , 4th , 5th and 6th respondents and whether the 1st and 2nd respondents as agents of disclosed principal are improper parties

It has been submitted for the 3rd, 4th, 5th and 6th respondents that the petition does not disclose a reasonable cause of action against them and they are not proper parties to the proceedings. Thus, the petition should be struck out as against the 3rd, 4th, 5th, and 6th respondents. It was also submitted that the 2nd respondent was an agent of the 1st respondent and the 1st respondent was the agent of the 3rd respondent and the agents ought not to have been sued.

The court has considered the facts as disclosed in the petition as the primary pleading. The question is whether the petition discloses a reasonable cause of action against the respondents. First, it is clear that the petitioner has made prayers against the respondents. At paragraph 14 of the petition it is stated that the respondents from nowhere resolved vide an advertisement on the Daily Nation of 5.03.2014 to declare the positions of six directors vacant including that of the petitioner. At paragraph 17, it is stated that the decision to sack the petitioner is politically motivated by the 2nd, 4th and 6th respondents' personal interests and at paragraph 21 it is alleged that the three individuals, the 2nd, 4th and 6th respondents want to plant their cronies in the 1st respondent. The court has considered the petition as drafted and finds that it cannot be said, on its face, that it does not disclose a reasonable cause of action against the stated respondents. As submitted for the petitioner, an agent may be sued for his actions that may have gone beyond the principal's authority in furtherance of the agent's private benefit as was not agreed with the principal. Whether that is the position in the present petition is an issue to be determined after full hearing of all the parties in the proceedings. As at this stage, the material on record appear to establish a reasonable cause of action and until the respondents fully respond and all evidence is considered at the hearing, it would be unfounded to strike out the proceedings as against the respondents and as applied for. The court finds that the applications to strike out the petition as against the stated respondents therefore lack merits.

Whether the Kenya County Government Workers Union should be enjoined in the petition as an interested party

The reason for seeking to be enjoined in the suit as an interested party is that the Kenya County Government Workers Union says it is seeking to protect the interest of its members who are employees of the 1st respondent. The union has not filed the relevant recognition agreement. The court finds that the interest of the union, if any, is remote to the dispute as filed for the petitioner and it has not been shown how the union will assist the court to effectually and completely determine the petition. The grounds of opposition filed for the 1st, 2nd, 3rd, 4th, 5th, and 6th respondent are found valid and pertinent. In the circumstances, the court finds that no valid ground to enjoin the union has been established and the application will fail.

In conclusion, the court makes the following orders:

1. the notice of preliminary objection filed on 18.03.2014 for the 1st and 2nd respondents is dismissed with costs;

2. the notices of preliminary objection filed for the 3rd, 4th, 5th, and 6th respondents on 20.03.2014 and on 25.03.2014 are dismissed with costs;

3. the notice of motion filed for 4th and 6th respondents on 20.03.2014 is dismissed with costs;

4. the notice of motion filed for 3rd and 5th respondents on 04.04.2014 is dismissed with costs;

5. the application filed for the Kenya County Government Workers Union on 31.03.2014 is

dismissed with costs; and

6. parties are invited to submit on directions for further steps towards the hearing of the petition.

Signed, dated and **delivered** in court at **Nakuru** this **Wednesday, 30th April, 2014.**

BYRAM ONGAYA

JUDGE