



**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.....1<sup>ST</sup> RESPONDENT**

**JOHN CHERUIYOT.....2<sup>ND</sup> RESPONDENT**

**RIFT VALLEY WATER SERVICES BOARD.....3<sup>RD</sup> RESPONDENT**

**JAPHETH MUTAI.....4<sup>TH</sup> RESPONDENT**

**THE COUNTY GOVERNMENT OF NAKURU.....5<sup>TH</sup> RESPONDENT**

**H. E. KINUTHIA MBUGUA.....6<sup>TH</sup> RESPONDENT**

**ATTORNEY GENERAL.....7<sup>TH</sup> RESPONDENT**

**AND**

**NATIONAL UNION OF WATER AND SEWERAGE EMPLOYEES.....INTERESTED PARTY**

(Before Hon. Justice Byram Ongaya on Friday 30<sup>th</sup> May, 2014)

**JUDGMENT**

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

- a. **A declaration that the decision and process of advertising and intended filling of the positions of 6 directors of the 1<sup>st</sup> 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 2<sup>nd</sup>, 4<sup>th</sup>, and 6<sup>th</sup> 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 to be paid costs of the petition.**

The 7<sup>th</sup> respondent filed the memorandum of appearance on 21.3.2014 but did not file any further papers and did not participate by making the submissions. Similarly, after the interested party was enjoined by the order of the court given on 15.04.2014, the interested party did not file any papers and did not participate by making submissions.

The 1<sup>st</sup> and 2<sup>nd</sup> respondents opposed the petition by filing on 19.03.2014, through Githui & Company Advocates, the replying affidavit of John Cheruiyot, the 2<sup>nd</sup> respondent. The 3<sup>rd</sup> and 4<sup>th</sup> respondents opposed the petition by filing on 20.03.2014, the 3<sup>rd</sup> and 4<sup>th</sup> respondents' replying affidavit by Eng. Japheth Mutai. The 5<sup>th</sup> and 6<sup>th</sup> respondents' replying affidavit by Joseph Montari was filed on 20.03.2014. The 5<sup>th</sup> and 6<sup>th</sup> respondents filed on 13.05.2014, the supplementary affidavit of Joseph Montari. The 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, and 6<sup>th</sup> respondents were represented by Odhiambo & Odhiambo Advocates.

By the letter of appointment as director dated 18.12.2012, it was conveyed to the petitioner that at the 1<sup>st</sup> respondent's extra-ordinary general meeting held on 17.12.2012, the petitioner's term was extended as the representative of the business community in the 1<sup>st</sup> respondent's board of directors. The letter informed the petitioner that he was appointed to the position for a period of three years and the appointment took effect with immediate effect (18.12.2012 or thereabout). Accordingly, under that appointment, the petitioner was to serve until on or about 18.12.2015.

The appointment of the petitioner was in accordance with the 1<sup>st</sup> respondent's regulation 69 of the then prevailing articles of association. The regulation provided that unless otherwise determined by the company in general meeting, the number of directors exclusive of alternate directors shall be ten and shall among those listed include a representative of the business or finance sector. It is to that office of the director representing the business sector or community that the petitioner was appointed to hold.

Prior to the Constitution of Kenya, 2010, the Municipal Council of Nakuru was the majority shareholder in the 1<sup>st</sup> respondent company taking 4,997 shares. The other shareholders were the Mayor, the Town Clerk and the treasurer each holding one (1) share.

The Constitution devolved the services of providing water to the county government. Thus, it became necessary to amend the 1<sup>st</sup> respondent's memorandum and articles of association to reflect the changes so that the 1<sup>st</sup> respondent became aligned to the devolved system of Government. The amendments were undertaken at the 1<sup>st</sup> respondent's extra-ordinary general meeting held on 19.02.2014 at Naivasha. Under the amendment, the county government of Nakuru became the majority shareholder with 4,996 shares. The other shareholders were the governor, the county executive member for finance and economic planning, the county secretary and the county executive member for environment, water, energy and natural resources each holding one (1) share.

Regulation 69 of the 1<sup>st</sup> respondent's Articles of Association was also amended to provide that unless otherwise determined by the company in general meeting, the number of directors exclusive of alternate directors shall be nine including:

- a. Two representatives from the county government who shall be the county executive committee member in-charge of water and the county executive committee member in-charge of finance and economic planning.**
- b. The managing director of the company.**
- c. One representative from the local business community.**

- d. **One representative from any professional body active within Nakuru Municipality recommended by the body.**
- e. **One representative from any of the residents' or community welfare based organisation within Nakuru Municipality.**
- f. **One representative from the women's organisation that is based within Nakuru Municipality.**

The regulation further provided that without prejudice to the foregoing, not more than two thirds of the directors shall be of the same gender. It further stated that it shall not be possible for the company in a general meeting to reduce the number of directors below 7 or increase above 9 subject to the aforementioned composition being maintained.

It was the petitioner's case that the respondents from nowhere resolved through an advertisement on the Daily Nation of 5.03.2014 to declare the positions of 6 directors vacant including that of the petitioner. The advertisement stated that the respective county governments under the jurisdiction of the 3<sup>rd</sup> respondent intended to fill various vacant positions in the boards of their respective water service providers. With respect to the 1<sup>st</sup> respondent, the advertisement declared 6 vacant positions and the description of the vacant positions was as follows:

- a. **One representative from the manufacturing community within Nakuru Municipality.**
- b. **One representative from the local business community within Nakuru Municipality.**
- c. **One representative from any professional body active within Nakuru Municipality.**
- d. **One representative from any of the resident's or community welfare that is based within Nakuru Municipality.**
- e. **One representative from the women's organisation that is based within Nakuru Municipality.**
- f. **One representative of institutions (schools, colleges, research, universities) within Nakuru Municipality.**

The petitioner was aggrieved by the respondent's action to declare the position he held vacant and to invite applicants to fill the position. He proceeded to file the petition. The issues and questions for determination include:

1. **What was the position held by the petitioner as a director of the 1<sup>st</sup> respondent at all material time?**
2. **Whether the position held by the petitioner as director of the 1<sup>st</sup> respondent was abolished.**
3. **Whether there was a vacancy, at all material time, in the position held by the petitioner as director of the 1<sup>st</sup> respondent.**
4. **Whether the petitioner is entitled to the remedies as prayed for.**

The **1<sup>st</sup> question** is to determine the position held by the petitioner as a director of the 1<sup>st</sup> respondent at all material time. The petitioner's case is that he was appointed as a director at the meeting held on 17.12.2012 at which his term was extended as the representative of the business community as conveyed to him in the letter dated 18.12.2012 and signed by the 1<sup>st</sup> respondent's company secretary one W. M. Maroa. For 1<sup>st</sup> and 2<sup>nd</sup> respondents, it was submitted that the petitioner was a director in the capacity of a representative of a consumer organisation so that the petitioner's service as director could be extended only as a representative of the consumer organisation and not a representative of the business community. The 1<sup>st</sup> and 2<sup>nd</sup> respondents submitted that at the 5<sup>th</sup> annual general meeting of the 1<sup>st</sup> respondent held on 26.02.2010, the petitioner was re-elected to serve as director representing the consumers for 3 years and Ibrahim Osman was elected unopposed to serve as the director representing the business community. For the 5<sup>th</sup> and 6<sup>th</sup> respondents, it was submitted that the petitioner was one of the three directors appointed to represent the business community at the general meeting held on 17.12.2012 as per exhibit **JM6** on the supplementary affidavit of Joseph Montari filed on 13.05.2014. The other two

directors holding the same position and appointed following the same meeting were Joyce A. Oduor and Ibrahim M. Osman. The court has noted that the minutes of the general meeting held on 17.12.2012 have not been filed.

In absence of the minutes of the meeting held on 17.12.2012, the court finds that the letter issued to the petitioner by the 1<sup>st</sup> respondent's company secretary is the credible and conclusive evidence of the position the petitioner held as a director in the 1<sup>st</sup> respondent's board of directors. The court finds that the 2<sup>nd</sup> respondent's action of not filing the record of the proceedings of 17.12.2012 and instead filing belated extracts of other general meetings was suspect and incredible. The court finds that none of the parties disputed the genuineness of the letter as produced and relied upon by the petitioner. Accordingly, the court finds that at all material time to this dispute and before the advertisement in the print media that the petitioner says was offensive, the petitioner held the position of a director representing the business community.

The **2<sup>nd</sup> issue** for determination is whether the position held by the petitioner as director of the 1<sup>st</sup> respondent was abolished. The court has considered the material before the court. It is clear that at the special board meeting of 22.01.2014 and the extra-ordinary general meeting of 19.02.2014, the 1<sup>st</sup> respondent's articles of association were changed and the offices of the directors as resolved at regulation 69 included one representative from the local business community. That is one and the same position the petitioner held on the 1<sup>st</sup> respondent's board of directors and to answer the 2<sup>nd</sup> issue for determination, the court returns that the position held by the petitioner on the board namely the director to represent the business community was not abolished. The court holds that the power to abolish office supersedes the power to appoint a holder of office or the holder to continue in office. Thus, where the office is abolished, the holder of the office will invariably have the employment terminated in what is known as redundancy. Where the office is abolished, the holder cannot be heard to say that despite the valid or lawful abolition, he or she nevertheless is entitled to remain in employment in the same capacity because, in such a situation, there is no vacancy against which such person could continue in employment. The court holds that there cannot be an appointment or continued appointment unless the relevant position or office subject of the employment or appointment is subsisting. The court further holds that a person whose office is abolished is entitled to redundancy payments in accordance with the relevant statutory provisions and the provisions of the contract between the parties. In this case, the court has found that there was no abolition of the office held by the petitioner but the office was retained in the new structure of the composition of the 1<sup>st</sup> respondent's board of directors so that a redundancy situation did not accrue.

The **3<sup>rd</sup> issue** for determination is whether there was a vacancy, at all material time, in the position held by the petitioner as director of the 1<sup>st</sup> respondent and representing the local business community. It is the opinion of the court that a vacancy could occur in an office if the engagement of the holder is terminated; the holder resigns or leaves for any other reason; or a vacancy occurs as provided in the Constitution, legislation or agreement between the parties to the contract of service.

First, there is no decision by the relevant organs of the 1<sup>st</sup> respondent before the court terminating the petitioner's appointment as a director. The court finds that the advertisement pretended to publish a vacancy in the directorship position held by the petitioner but there was no decision by the general meeting of the 1<sup>st</sup> respondent to remove the petitioner as director or to declare a vacancy one way or the other. Secondly, it is not said that the petitioner has resigned from the position he holds as director. Thirdly, there is no constitutional, statutory or contractual provision that is said to have attached and thereby rendering the position held by the petitioner as director vacant. Regulation 87(a) and (b) of the 1<sup>st</sup> respondent's articles of association as amended at the 1<sup>st</sup> respondent's extra-general meeting held on 19.02.2014 is elaborate that the term of directorship shall be three (3) years; and other than directors by reason of other public or state office held, all directors shall retire by rotation at an annual general meeting after serving for a term of 3 years.

Accordingly, to answer the 3<sup>rd</sup> issue for determination whether there was a vacancy, at all material time, in the position held by the petitioner as director of the 1<sup>st</sup> respondent and representing the local business

community, the court returns the finding that there was no such vacancy at all material time. While making that decision, the court holds that abolition of an office, or re-establishment of an office as was the case in the present case, does not by itself terminate the employment of the holder of the office that is abolished or office that is re-established as the case may be, and if termination is desired, the relevant authority must make the relevant termination decision. It is the opinion of the court that without the relevant termination decision, like in the present case, the holder of the office that is re-established, like the petitioner in the present case, continues in employment.

The 4<sup>th</sup> issue for determination is whether the petitioner is entitled to the remedies as prayed for. To oppose the grant of the reliefs as prayed for by the petitioner for 1<sup>st</sup> to 6<sup>th</sup> respondents, it was submitted as follows:

1. That under section 185 of the Companies Act, the law allows removal of a director before expiration of the director's period of office notwithstanding anything in its articles or in any agreement between the company and the director provided the removal is by an ordinary resolution of the company. The court has already found that in this case, there is no decision by resolution of the general meeting or otherwise for removal of the petitioner as a director. Accordingly, the court finds that the section does not apply in the circumstances of this case.
2. That section 47 (h) of the Water Act 2002 mandates the Water Services Regulatory Board to institute guidelines for and provide advice on the cost effective and efficient management and operation of water services. Thus, the Board published the guidelines on 18.06. 2010 under gazette notice No. 7045 of 2010. That the 1<sup>st</sup> respondent had to amend the articles of association (as already done) in compliance with the guidelines. The court finds that there was nothing wrong in the 1<sup>st</sup> respondent undertaking the amendment and complying with the guidelines. Nevertheless, the court further finds that the implementation of the guidelines and the amendments must respect and fairly deal with accrued contractual rights, benefits and obligations like those urged for the petitioner. It is the court's considered opinion that implementation of the guidelines was within the respondents' authority and decisions made in the process must comply with the Constitution, statutory provisions, the 1<sup>st</sup> respondent's memorandum and articles of association, and, proceed in a manner that reckons and respects or provides for prevailing arrangements in a just manner. In the present case, the court finds that in attempting to implement the corporate governance guidelines and aligning the 1<sup>st</sup> respondent's governance to the Constitution of Kenya 2010, the respondents failed to institute elaborate and fair transitional provisions to cater for accrued rights and obligations like those urged for the petitioner as a sitting director representing the business community. The court further observes that it would be discrimination to implement the changes in an unexplained discriminate manner where for example, the petitioner's holding of office as director is adversely affected while the 2<sup>nd</sup> respondent's holding of office as the managing director and director in the 1<sup>st</sup> respondent's board is left intact. Under section 5 of the Employment Act 2007, this court and all employers like the respondents are bound to promote equality of opportunity in employment and to strive to eliminate discrimination in any employment policy or practice. The court holds that the respondents' action to attempt to terminate the petitioner's appointment as director of 1<sup>st</sup> respondent amounted to discrimination as envisaged in section 5 (3) (b) of the Act and was an unfair labour practice in contravention of Article 41 of the Constitution.
3. It was submitted for the 1<sup>st</sup> and 2<sup>nd</sup> respondents that the petitioner cannot invoke the doctrine of legitimate expectation unless he demonstrates that he had in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do and until there has been communication to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or he has received assurance from the decision maker that they will not be withdrawal without giving him first an opportunity of advancing reasons for contending that should not be withdrawn. The 1<sup>st</sup> and 2<sup>nd</sup> respondents relied upon the opinion by Lord Diplock in **Council of Civil Service Unions –Versus- the Minister of Civil**

**Service [1985] AC 374.** It was submitted that the decision maker was therefore required to give reasons if the legitimate expectation was to be taken away at the disadvantage of the affected person. It was further submitted that the legitimate expectation would not be protected if it was against policy considerations or law. It was further submitted that in considering the petitioner's legitimate expectation, there was need to balance the expectation of the petitioner with the interest of other affected parties and stakeholders as held in **Diana Kethi Kilonzo –Versus- the IEBC and Another [2013] eKLR.** In the present case, it was submitted for the respondents that the petitioner was present at the board meeting and the general meeting at which the corporate governance guidelines were adopted and the 1<sup>st</sup> respondent's articles of association amended. There being a fusion of the decision maker and the subject (the petitioner), legitimate expectation could not be urged especially where the expectation was illegitimate as it was against the corporate governance guidelines. It was further submitted that even if the petitioner would establish some kind of legitimate expectation, award of a remedy for breach of legitimate expectation and infraction to fair administrative action (as protected in Article 47 of the Constitution) must be such that there is a balance of private rights and public interest. The court has considered the submissions. First the court has found that there is no decision removing the petitioner from office, there is no decision abolishing the petitioner's office and there is no decision by the general meeting or otherwise declaring the position held by petitioner vacant except the pretended declaration in the advertisement published in the print media. The court finds that the petitioner was not party to the pretended declaration of a vacancy as published in the print media. Accordingly, the court finds that the petitioner as an intended subject of decisions of the board or general assembly of the 1<sup>st</sup> respondent was not party or privy to any adverse decision made against the petitioner. Secondly, the petitioner invoked legitimate expectation at paragraph 10 of his supporting affidavit by stating thus, **“10. That my term was to end in December 2015 unless otherwise and it is my legitimate expectation that that is still the legal position.”** It is the opinion of the court that the legitimate expectation as invoked by the petitioner is that as far as he is concerned, he is entitled to serve his entire term of 3 years and not that he should so serve even if it is in contravention of law and public policy. Finally, it is the opinion of the court that breach of legitimate expectation by itself will not justify the granting of a given remedy as may be urged unless it is shown that complementing the urge for breach of a legitimate expectation, there exist some manifest injustice or jurisdictional impairment as may be visited against the offending decision. In the present case, the offending decision, namely to declare a vacancy in the position held by the petitioner and to advertise the same in the print media was never made by the 1<sup>st</sup> respondent at the general meeting as expected. In the opinion of the court, the advertisement declaring a vacancy was a decision made without any relevant jurisdiction or authority and therefore a valid aid to the petitioner's case for breach of legitimate expectation that he was still in office to serve till the 3 years lapsed.

To answer **the 4<sup>th</sup> issue** for determination, the court makes the following specific findings:

- a. The petitioner prayed for a declaration that the decision and process of advertising and intended filling of the positions of 6 directors of the 1<sup>st</sup> respondent was opaque, egregious, clandestine, capricious, whimsical, and contrary to Articles 41 and 47 of the Constitution of Kenya hence unconstitutional and consequently null and void. The court has found that there was no decision by the relevant organs of the 1<sup>st</sup> respondent to remove the petitioner as director, to create a vacancy or to abolish the office of directorship held by the petitioner. The declaration of the vacancies in the advertisement published in the print media must have been a secondary decision conveyed in the newspaper based on official decision by the relevant authority and in particular, the 1<sup>st</sup> respondent's board and general meeting but which official decision has not been shown to have been made. The court finds that the decision to declare the vacancies as advertised cannot therefore be said to have been accountable, transparent and as against the petitioner was an unfair administrative action and an unfair labour practice in contravention of Articles 47 and 41 of the Constitution respectively. There is no material before the court to show that any of the 6 vacancies as advertised were handled in any different and proper manner characterised with the making of the relevant official decisions by the lawful authority. In the circumstances, the court

finds that the petitioner is entitled to the remedy as prayed for.

- b. The petitioner prayed for a declaration that the actions in (a) above of the 2<sup>nd</sup>, 4<sup>th</sup>, and 6<sup>th</sup> 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. The court has carefully considered the material on record. The petitioner has not specifically showed the role played by the 2<sup>nd</sup>, 4<sup>th</sup>, and 6<sup>th</sup> respondents in the publishing of the advertisement that declared the vacancies. As the particulars of the actions by the named respondents were not established and the advertisement was not directly attributable to the cited respondents, the court finds that the prayer as made will fail. While making the finding, the court finds that the letter that triggered the advertisement is dated 27.02.2014 being **JM18** on the affidavit of Joseph Motari filed on 20.03.2014. It was authored and signed by the said Joseph Montari, addressed to 3<sup>rd</sup> respondent's Chief Executive Officer and referred to consultations at the county government. The parties that consulted over the matter are not stated in the letter. The letter further states that it had been decided that all stakeholders' directorship positions be advertised and be filled through open competition. The letter does not state the maker of the decision to advertise. In the circumstances, the court finds that it would be remote to implicate the named respondents as prayed for.
- c. The petitioner has prayed for a declaration that the respondents are escapists and have abdicated their duty to respect and uphold the Constitution of Kenya in their administrative actions. The material on record showed that the respondents made certain decisions towards aligning the 1<sup>st</sup> respondent to the provisions of the Constitution. It was not established for the petitioner the manner in which the respondents were escapists and had abdicated their duty to respect and uphold the Constitution. What was established was that the petitioner was entitled to fair administrative action in his continued holding of the position of the 1<sup>st</sup> respondent's director representing the local business community and the court finds that the petitioner was entitled accordingly.
- d. As the petitioner has substantially succeeded, the court finds that the respondents are liable to pay costs of the petition.

The question of the jurisdiction of the court to hear and determine the petition was determined in the ruling delivered by the court on 30.04.2014. The court upholds its opinion as delivered in the ruling and will not revisit the issue in this judgment.

In conclusion, judgment is entered for the petitioner against the respondents for:

1. A declaration that the pretentious decision and process of advertising and intended filling of the positions of 6 directors of the 1<sup>st</sup> respondent was opaque, egregious, clandestine, capricious, whimsical, and contrary to Articles 41 and 47 of the Constitution of Kenya hence unconstitutional, and, the decision and process of advertising and consequential processes are null and void.
2. A declaration that in realigning the organisation and operations of the 1<sup>st</sup> respondent to the Constitution of Kenya, 2010 and to good corporate governance, the 1<sup>st</sup> to 6<sup>th</sup> respondents by themselves and their respective agents shall institute just transitional measures that respect the petitioner's accrued constitutional and other rights and obligations as the appointed serving director of the 1<sup>st</sup> respondent representing the local business community.
3. The respondents to pay the petitioner's costs of the petition.

**Signed, dated and delivered** in court at **Nakuru** this **Friday 30<sup>th</sup> May, 2014**.

**BYRAM ONGAYA**

**JUDGE**