



Njiru v The Governor, Embu County & 3 others; Mubothi (Interested Party) (Constitutional Petition E001 of 2023) [2024] KEHC 1689 (KLR) (23 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1689 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CONSTITUTIONAL PETITION E001 OF 2023**

LM NJUGUNA, J

FEBRUARY 23, 2024

IN THE MATTER ARTICLES 2(1), 3(1), 10, 19, 20, 21, 22,23, 25, 27, 28, 33(1), 35(3), 43, 46, 47, 48, 55, 159(1), 165(1)(D), 232 AND 259 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLES 10, 20, 21, 27(1), 35, 43, 46 AND 47 OF THE CONSTITUTION OF KENYA 2010

AND

**IN THE MATTER OF THE WATER ACT 2016 AND THE COMPANIES ACT 2015
AND IN THE MATTER THE FAIR ADMINISTRATIVE ACTION ACT (NO. 4 OF 2015)**

BETWEEN

CATHERINE WAWIRA NJIRU PETITIONER

AND

THE GOVERNOR, EMBU COUNTY 1ST RESPONDENT

**COUNTY EXECUTIVE COMMITTEE MEMBER, WATER, IRRIGATION,
ENVIRONMENT AND NATURAL RESOURCES EMBU COUNTY ... 2ND
RESPONDENT**

EMBU WATER AND SANITATION CO. LTD 3RD RESPONDENT

WATER SERVICES AND REGULATION BOARD 4TH RESPONDENT

AND

JAMES NJERU MUBOTHI INTERESTED PARTY



RULING

1. A notice of motion dated 29th May 2023 was filed by the 1st - 3rd respondents/applicants and the interested party/applicant seeking the following orders:
 - a. Spent;
 - b. Spent;
 - c. That this honourable court be pleased to refer the dispute herein to arbitration in accordance with article 113 of the memorandum and articles of association of the 3rd respondent's constitution, and stay any/all proceedings in this suit pending the conclusion of arbitration proceedings;
 - d. That this court be pleased to strike out the petition and application dated 02nd May 2023 for want of jurisdiction as the suit offends the principle of exhaustion; and
 - e. Costs be provided for.

The application is premised on grounds on its face and in the supporting affidavit thereof.

2. The petitioner/respondent herein filed a petition dated 02nd May 2023 challenging the appointment of the interested party as the director of the 3rd respondent/applicant. It was her averment that the same was unprocedural, discriminatory and unconstitutional and was a ploy to reward the interested party/applicant's political loyalty to the 1st and 2nd respondents/applicants. Further, that the said appointment contravened the guidelines set by the 4th respondent on how the 3rd respondent/applicant ought to operate its affairs. Alongside the petition, the petitioner/respondent also filed a notice of motion of even date seeking, inter alia, conservatory orders pending hearing and determination of the petition.
3. In opposition of the application herein, the petitioner/respondent filed grounds of opposition, stating that the High Court bears jurisdiction on the matter and that the same cannot be referred to arbitration as it concerns infringement of the bill of rights. She underscored the supremacy of the Constitution and stated that arbitration can only be compelled where there is a dispute between parties and not where the constitutional rights have been infringed. She urged the court to dismiss the application with costs.
4. The 4th respondent did not participate in the proceedings.
5. The application was canvassed by way of written submissions.
6. In their submissions, the 1st -3rd respondents/applicants and the interested party/applicant, stated that the real issue in the petition is being disguised as a constitutional petition but it can be resolved through arbitration as prescribed under article 113 of 3rd respondent/applicant's memorandum and articles of association. That in the spirit of upholding the doctrine of exhaustion, this court ought to refer the matter to arbitration as provided under the said memorandum and articles of association. It was their case that the petitioner did not have capacity to bring the petition on behalf of the people of Embu County and consumer of the 3rd respondent/applicant's services. That the 2nd respondent/applicant represents the people of Embu County and is a director in the 3rd respondent/applicant and therefore, all the members of the county are bound by the memorandum and articles of association.
7. Reliance was placed on this court's decision in the case of *Elijah Wambugu Gakinya v Governor Embu County & others*, HC Petition No E002 of 2022 where the court was faced with similar facts and it



dismissed the petition for lack of jurisdiction. It was their argument that in the said case, this court dwelt on the doctrine of exhaustion and it was its view that the matter should have been the subject of arbitration proceedings before the petition was filed. That the articles of association dictate that the issues be subject to arbitration proceedings as this court does not have jurisdiction to determine the petition.

8. The petitioner/respondent submitted that the issues raised in the petition involve violation of constitutional rights and that they cannot be resolved through arbitration. As regards the application for conservatory orders pending hearing and determination of the petition, reliance was placed on the case of *UAP Provincial Insurance Company Ltd v Michael John Beckett* (2013) eKLR and Section 6 of the *Arbitration Act*. It was her argument that where the issues have been crafted as constitutional issues, the High Court must determine the issues as constitutional petitions as it bears jurisdiction to do so.
9. Further reliance was placed on Article 165(3) of the *Constitution* which gives the High Court unlimited jurisdiction in criminal and civil matters. That article 113 of the 3rd respondent/applicant's articles of association limits arbitration to issues arising internally between, inter alia, the company and its directors against member representatives. That the petition is brought on the strength of Article 22 of the *Constitution* by the petitioner/respondent as a consumer of water from the 3rd respondent/applicant and not a member of the company.
10. The issue arising for determination herein is whether this court is clothed with jurisdiction to determine the petition dated 02nd May, 2023.
11. Before determining any matter before it, any court must satisfy itself that it bears jurisdiction to do so. The importance of this sentiment was underscored in the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR where the court stated:

“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 its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction....Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”

12. Article 113 of the 3rd respondent/applicant's articles of association provides thus:

“whenever any difference shall arise between the company and the directors on the one hand, and any other members or representatives on the other hand, or between any members or classes of members or between the directors with regard to the true construction of these presents or with regard to anything done, executed, omitted and suffered in pursuance of these presents or the *Companies Act* or with regards to any breach or alleged breach or otherwise relating to the premises or to these presents or to any affairs of the company, every such difference shall be referred to the decision of a mediator or arbitrator to be appointed by the parties or if they cannot agree on a single arbitrator, to the decision of two arbitrators of whom one shall be appointed by each of the parties in difference, and any such reference shall be made subject to all the provisions of the *Arbitration Act* and any statutory modification thereof for the time being in force.”

13. The above cited article limits the scope of conflict to amongst the members of the company, directors or otherwise. In order to determine whether the petition is properly before this court, it is important to discuss what it means to be a member in a company and whether the petitioner/respondent can be held



as such. According to section 3 of the [Companies Act](#) 2015, “member” means a member in a company, while “eligible member”, in relation a resolution of a company, means a member who, under the articles of the company, is entitled to vote on the resolution. According to Article 2 of the 3rd respondent/ applicant’s articles of association, the company is a public limited liability company. Sub-article (b) provides that invitations may be made to the public to subscribe for shares in the company to achieve the company’s objectives.

14. According to section 96 of the [Companies Act](#), a public company is required to keep a register of its members in its registered office. The gist of my analysis is that even though the applicants stated that the petitioner/respondent is represented in the company by the 2nd respondent/applicant in the company, there is no provision for this in the memorandum and articles of association and they have not demonstrated that the petitioner/respondent is indeed a member of the public company, which has the option of inviting her to subscribe to the company’s shares. In my view, the petitioner/respondent is a member of the public, within Embu County, and she is not a member of the company. This is a fact that has not been disputed. She is also a consumer of the 3rd respondent/applicant’s services.
15. It then follows that the petitioner/respondent is not subject to the proceedings intended under article 113 of the company’s articles of association. She is therefore welcome to pursue her petition in this court, through invoking her right to institute proceedings as enshrined under Article 22 of the [Constitution](#). On this finding, I place reliance on the case of [Alfred James Muriuki \(Suing as the Secretary General of Embu Citizens Oversight Network\) v Governor Embu County & 2 others; Water Services and Regulation Board \(Interested Party\)](#) [2019] eKLR.
16. From the reading of article 113 of the company’s articles of association, I understand the same to mean that the conflicts subjected to mediation or arbitration should arise from amongst members of the company. Having determined that the petitioner/respondent is not a member of the company, it is my view that she has rightly brought the petition before this court which bears jurisdiction to determine the issues raised. The jurisdiction of the High Court to hear and determine this petition is established under Article 165(3) of the [Constitution](#) which provides thus:
 - (3) Subject to clause (5), the High Court shall have—
 - (a) unlimited original jurisdiction in criminal and civil matters;
 - (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
 - (c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
 - (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
 - (i) the question whether any law is inconsistent with or in contravention of this Constitution;
 - (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;



- (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government;
and
- (iv) a question relating to conflict of laws under Article 191; and
- (e) any other jurisdiction, original or appellate, conferred on it by legislation.

17. I find it important to also note that the applicants, in their submissions, relied on the decision by this court in the case of *Elijah Wambugu Gakinya v Governor Embu County & others*, HC Petition No E002 of 2022 where the court found itself lacking jurisdiction to determine the petition based on article 113 of the 3rd respondent/applicant’s articles of association. Every case is usually determined on its own unique set of facts and circumstances. In the said case, the preliminary objection was allowed because the petitioner was a member of a select committee and therefore a member/ representative of the company. This court found that the petition offended the doctrine of exhaustion and referred the matter to arbitration. Therefore, the said case is not a reliable authority in the present matter.
18. In the end, I find that this court is clothed with the relevant jurisdiction to determine the petition. Consequently, the application herein is hereby dismissed with costs to the petitioner/respondent.
19. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 23RD DAY OF FEBRUARY, 2024.

L. NJUGUNA

JUDGE

-for the Petitioner/Respondent
-for the 1st Respondent/Applicant
-for the 2nd Respondent/Applicant
-for the 3rd Respondent/Applicant
-for the 4th Respondent
-for the Interested Party/Applicant

