



Kinyua v Attorney General; National Health Insurance Fund & 3 others (Interested Parties) (Petition E001 of 2023) [2023] KEELRC 1144 (KLR) (12 May 2023) (Judgment)

Neutral citation: [2023] KEELRC 1144 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E001 OF 2023**

B ONGAYA, J

MAY 12, 2023

IN THE MATTER OF ARTICLES 2, 3, 10, 22, 23, 41, 47, 73, 74, AND 236

OF THE CONSTITUTION OF KENYA

**IN THE MATTER OF RIGHT TO A FAIR
ADMINISTRATIVE ACTION AND A FAIR HEARING**

PROVIDED UNDER ARTICLES 47 AND 50

OF THE CONSTITUTION OF KENYA

**IN THE MATTER OF NATIONAL HEALTH INSURANCE FUND
ACT NO.9 OF 1998 AND THE RIGHT TO FAIR LABOUR PRACTICES**

UNDER ARTICLE 41 OF THE CONSTITUTION

-AND-

**IN THE MATTER OF UNLAWFUL REMOVAL FROM THE
OFFICE OF THE CHAIRPERSON, NHIF MANAGEMENT BOARD**

BETWEEN

PATRICK KINYUA PETITIONER

AND

THE HON. ATTORNEY GENERAL RESPONDENT

AND

THE NATIONAL HEALTH INSURANCE FUND INTERESTED PARTY

LEWIS NGUYAI INTERESTED PARTY

RACHEL M. MONYONCHO (DR) INTERESTED PARTY

RICHARD THUO KAMAU INTERESTED PARTY



JUDGMENT

1. The petitioner is Patrick Kinyua. He filed the petition on 05.01.2023 through Ngonyo Munyua & Company Advocates. He is a male adult of sound mind and a citizen of the Republic of Kenya. He states that he has filed the petition pursuant to Articles 22(1) & (2), 23 and 278 of the Constitution of Kenya. He has sued the Honourable Attorney General in his capacity as the principal legal adviser to the Government per Article 156 of the Constitution. The 1st interested party is a state corporation and a public fund established under the National Health and Insurance Fund (NHIF) Act, 1998. It performs statutory functions as vested in it under the Act.
2. The petitioner has further pleaded as follows. The 2nd interested party was appointed to the office of Chairperson of the NHIF Board per Gazette Notice No. 1709 of 23.02.2021 to serve for a term of three years due to lapse on 23.04.2024. The 3rd and 4th interested parties were appointed as members of the same Board per Gazette Notice No. 8269 of 15.07.2022 to serve for a term of three years from 13.07.2022 to 14.07.2025. The 2nd to 4th interested parties have undertaken their duties with due diligence. However, terms of the 2nd to 4th interested parties were terminated arbitrarily and prematurely by Gazette Notice No. 15799 of 23.12.2022 revoking their respective appointments as Chairperson and Members of the Board. There was no cause or justification for the revocation.
3. The petitioner's case is that the removal of the 2nd to 4th parties from office was unlawful and unconstitutional. In particular, it is pleaded as follows:
 - a. Violation and contravention of Article 10 of the Constitution on national values and principles of governance including the rule of law, equity, inclusiveness, equality, human rights, non-discrimination, good governance, transparency and accountability.
 - b. Violation of the petitioner's right to Fair Labour practices per Article 41 of the Constitution by removing them prematurely disregard their good and diligent performance.
 - c. Violation of their right to fair administrative action per Article 47 of the Constitution as they were not provided due process or provided reasons for their removal.
 - d. Their right to fair hearing under Article 50 of the Constitution was violated. Further Article 236 was violated providing due process in removal of public officers as they were removed from office for real or apparent political reasons.
 - e. Article 259 of the Constitution requires the Court to interpret the Constitution in a manner that contributes to good governance and the rule of law.
4. The petitioner prayed for judgment against the respondent for:
 - a. A declaration that the removal of the 2nd to 4th interested parties from office as Chairperson and Members of the NHIF Management Board before the expiry of their terms is unconstitutional and unlawful and thereby null and void ab initio.
 - b. An order removing to the Court and quashing Gazette Notice No. 15799 of 23.12.2022 together with Gazette Notice No. 15992 of 23.12.2022 for the reason that the same are unconstitutional and unlawful and thereby null and void ab initio.
5. The petition was based on the supporting affidavit of the petitioner sworn on 05.01.2022 and exhibiting the copies of the Gazette Notices in issue.



6. The respondent and the 1st interested party filed the grounds of opposition to the petition dated 27.01.2023 and through learned Senior State Counsel Ernest Kioko, for the Honourable Attorney General. It was stated and urged as follows:
 - a. The petition is an abuse of court process because it is instituted as an abuse of the Court process and has no merits and is based on misconception of law.
 - b. The petitioner lacks locus standi per Article 22 (2) (c) to institute proceedings in the public interest and which does not extend to the petitioner instituting proceedings without express instructions for the benefit of named public officers or servants who cannot act in their own name. The provisions of Article 22 (2) (c) are inapplicable because the 2nd to 4th interested parties are former public or state officers and are not in a certain group or class. Further the Sub Article is inapplicable because the allegations and claims are about revocation of appointments of 2nd to 4th interested parties which are matters in the realm of private law and there is no public interest in such matters. The petitioner is a stranger to the engagement between the 2nd to 4th interested parties and the 1st interested party.
 - c. Under section 51(1) of the *Interpretation and General Provisions Act*, the power to appoint includes the power dismiss.
7. The respondent also filed a notice of preliminary objection dated 03.02.2023. The respondent urged that the suit was an abuse of court process because the court lacks jurisdiction to hear the instant matter as was pronounced in Nakuru Civil Appeal No. 61 of 2015 *Rift Valley Water Services Board & 2 others v Geoffrey Asanyo & 2 others*.
8. The Court directed the petition and the preliminary objection be heard and determined together. The final submissions were filed for the parties. The Court has considered all material on record and returns as follows.
9. To answer the 1st issue the Court returns that the petitioner had the necessary standing to institute the proceedings. It is submitted for the respondent and 1st interested party the petitioner lacked standing because the dispute is about the private appointments of the 2nd to 3rd interested parties and there is no statutory underpinning to place the dispute as alleged in the realm of public interest. However, the Court returns that the petitioner alleges unlawful and unconstitutional revocation of the 2nd to 4th interested parties undisputedly in accordance with the provisions of the *NHIF Act*. To that extent, the Court returns that as submitted for the petitioner, Article 258(1) entitles every person the right to institute court proceedings claiming that the *Constitution* has been contravened, or is threatened with contravention. In view of the appointments and revocation of the appointments being in accordance and exercise of the provisions of the *NHIF Act*, the petitioner has as well, in the Court's opinion, established that he instituted the petition acting in the public interest. Thus, no barring of standing has been established in the findings of the Court.
10. To answer the 2nd issue, the Court finds that the present dispute relates to employer-employee relationship. The respondent relies upon Court of Appeal holding in Nakuru Civil Appeal No. 61 of 2015 *Rift Valley Water Services Board & 2 others v Geoffrey Asanyo & 2 others* to urge that the 2nd to 3rd interested parties being NHIF Management Board Chairperson and Members at the material time, there exists no employment relationship. In that case, the 1st respondent had been appointed to the 2nd respondent's board in accordance with the company's Memorandum and Articles of Association for a term of three years ending on 17.12.2012 and the appointment subsequently extended for three years lapsing on 17.12.2015. The Court of Appeal held thus, "...His functions as a director of the 2nd



respondent's governance body, and the terms on which he was appointed to represent the interests of the business community on the Board, were governed by the *Companies Act* and 2nd respondent's Memorandum and Articles of Association. The *Employment Act* did not apply to that relationship so as to confer on the Industrial Court jurisdiction to determine any claim relating to appointment to the board. 20. We hasten to draw a clear distinction between an employee and a member of a board of directors of a corporate entity, such as the 1st appellant. That distinction lies in our answer to the question as to whether directors are employees of the company to whose board they are appointed. They are not. In *McMillan v Guest* [1942] AC p. 561 it was held that a company director is an office-holder who is not, without more, an employee of the company. That is the position here. In the absence of a contract of service in terms of which a director is engaged as a full-time employee of the company (see *Parsons v Albert J. Parsons and Sons Ltd* [1979] ICR p.271)" The Court has considered that binding holding. However, the holding related to a director being a member of a company registered under the *Companies Act* without more to it. In the instant case, the 2nd to 4th interested parties were chairperson and members of the NHIF Board of Directors, a statutory body governed by the *NHIF Act* and the *State Corporations Act* and it is not said that it was governed by the *Companies Act*. Indeed, by the respondent's and 1st interested party's own assertions, the 2nd to 4th interested parties were at material time public or state officers with private law rights evolving and revolving around their appointment and revocation of the appointments in that regard. In *Narok County Government and Another v Richard Bwogo Birir and Another* [2015] 5JELR 104466 (CA) the Court of appeal held

"39. It is upon consideration of those and other provisions that the trial court reached the following compelling conclusion:

"...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 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 further finds that the string that flows through the constitutional provisions is that removal from public or state office is constitutionally chained with due process of law. In the opinion of the court, at the heart of due process are the rules of natural justice. Thus, the court finds that the pleasure doctrine for removal from a state or public office has been replaced with the doctrine of due process of law. Article 236 is particularly clear on the demise of the pleasure doctrine in Kenya's public or state service... In the new Republic, the court holds that public service by public and state officers is guided by the doctrine of servants of the people and the doctrine of due process and not



by the doctrines of the servants of the crown and the pleasure doctrine. In the opinion of the court, the demise of the pleasure doctrine and the demise of the doctrine of servants of the crown in the new Republic's constitutional framework constitute the very foundation of the Republic, namely, Kenya is a sovereign Republic and all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with the Constitution.”

With respect, we have considerable sympathy for those findings as they accord with the spirit and letter of the Constitution, 2010. Consequently, we find and hold that the pleasure doctrine is not applicable in Kenya under the current Constitution.”

And the Court further stated,

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“40. There is no argument that a member of the executive committee of a county government is a ‘state officer’. Article 260 of the Constitution so defines them and also defines a ‘public officer’ to include any state officer, while Article 236 embodies the protection of public officers through adherence to due process of law in the removal, demotion or disciplinary action. Such due process includes fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair; one where a person is given written reasons for intended action that is likely to adversely affect them (Article 47).”

The Court is guided accordingly and finds that state officers or public officers are servants of the people and are engaged in employment upon relevant constitutional, statutory, and lawful policies and practices in place. Thus, the Court returns that a board member or director in the public service being a public officer or state officer is clearly distinguishable from a board member or director of a company being registered under the Companies Act as governed by the Articles and Memorandum of Association. The Court finds accordingly.

11. To answer the 3rd issue, the Court returns that the petitioner has failed to establish the alleged violation of the cited constitutional provisions, rights and fundamental freedoms. The petitioner has only established that the 2nd to 4th interested parties were appointed and subsequently the appointments revoked per the impugned Gazette Notices duly exhibited. The facts about the alleged procedural improprieties and the related substantive or merit considerations to show and establish the alleged constitutional violations and contraventions have not been established by way of the relevant affidavit or other evidence. The Court returns that the allegations remained empty without supporting and necessary evidence. The affidavit of service of the pleadings by Willis Agayi sworn on 15.01.2023 shows that the 2nd to 4th interested parties were served on 10.01.2023 but they failed to appear or file affidavits. The Court finds that there cannot be presumptive finding in favour of the alleged violations or contraventions without supporting material facts and evidence and in circumstances that the allegedly adversely affected 2nd to 4th respondents opted not to participate in the proceedings and that reinforces the finding that the allegations were indeed vacuous. The petition and the prayers will therefore fail.
12. The proceedings being in the arena of public interest litigation, each party will bear own costs of the petition.

In conclusion judgment is hereby entered for the respondent against the petitioner for the dismissal of the petition with orders each party to bear own costs of the proceedings.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 12TH MAY, 2023.



BYRAM ONGAYA
PRINCIPAL JUDGE

