



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUNGOMA**

**ELRC PETITION NO. 3 OF 2021**

**IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

**IN THE MATTER OF THE EMPLOYMENT AND LABOUR RELATIONS ACT**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF RIGHTS OR BREACH OF**

**EMPLOYMENT RIGHT PER ARTICLE 10, 41(2) (a) (b), 3 (a) (f) ARTICLE 50, 22, 23, 27**

**IN THE MATTER OF COUNTY GOVERNMENT ACT NO. 17 OF 2021**

**AND**

**IN THE MATTER OF THE COUNTY PUBLIC SERVICE BOARD**

**BETWEEN**

HUSSEIN WANYAMA MULEBO.....1<sup>ST</sup> PETITIONER

JOHN NDAKUYA KUNDU.....2<sup>ND</sup> PETITIONER

PASCAL WITNEY NYONGESA.....3<sup>RD</sup> PETITIONER

MARY GORETTI NAFULA KISIANG'ANI .....4<sup>TH</sup> PETITIONER

ROSELYNE NAFULA SICHURU.....5<sup>TH</sup> PETITIONER

ELIZABETH ETIANG OBUSURU..... 6<sup>TH</sup> PETITIONER

**AND**

THE COUNTY PUBLIC SERVICE BOARD.....1<sup>ST</sup> RESPONDENT

COUNTY GOVERNMENT OF BUNGOMA.....2<sup>ND</sup> RESPONDENT

THE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT

**JUDGMENT**

1. The Petitioners moved this court vide a Petition dated 21<sup>st</sup> November 2017 seeking the following reliefs:-

(a) That a declaration order be issued that the decision by the 1<sup>st</sup> Respondent to appoint the Petitioner vide letter dated 31<sup>st</sup> October 2017 on a reduced salary is null and void the same is inconsistent with the law.

(b) That a declaration order issued that the terms of appointment of their letters dated 31<sup>st</sup> of October 2017 be reviewed and the same

have the same salary scale as previous contract.

(c) A declaration order be issued against the 1<sup>st</sup> and 2<sup>nd</sup> Respondent to absorb the Petitioners on permanent basis and on the same salary scale and terms as offered to all employees of County government in various cadre in Kenya.

(d) That the cost of the Petition be provided for.

2. The 2<sup>nd</sup> Respondent entered appearance and filed Memorandum of appearance through the law firm of Makokha Wattan'ga & Luyali Associates Advocates.

3. On the 29<sup>th</sup> June 2018 the Interested Parties and 2<sup>nd</sup> Respondent filed consent enjoining the 1<sup>st</sup> to 14<sup>th</sup> Applicants as Interested Parties. The said parties having executed acceptance letters of offer of appointment from the 1<sup>st</sup> and 2<sup>nd</sup> Respondents be deemed to have accepted employment and not part of the petition.

4. On the 2<sup>nd</sup> November 2018 the Advocates for the 1<sup>st</sup> to 14<sup>th</sup> interested parties J.B Otsiula & Associates filed Notice of withdraw of their Application dated 1<sup>st</sup> February 2018.

5. On the 7<sup>th</sup> November 2018, the 1<sup>st</sup> Respondent entered appearance through the law firm of Nyikuli Shifwoka & Company Advocates .

6. The Petition is opposed. The 2<sup>nd</sup> Respondent filed grounds of opposition dated 4<sup>th</sup> February 2019 and a replying affidavit sworn by Chrisantus Wamalwa on the 26<sup>th</sup> February 2019 and filed in court on the 17<sup>th</sup> May 2019.

7. The 1<sup>st</sup> Respondent in opposition to the Petition filed Notice of Preliminary Objection dated 8<sup>th</sup> September 2018 and filed in court on the 11<sup>th</sup> March 2020. The 1<sup>st</sup> Respondent further filed Replying Affidavit sworn by Elizabeth Wanyonyi on the 8<sup>th</sup> September 2018 and filed in court on the 11<sup>th</sup> March 2020.

8. On the 4<sup>th</sup> October 2021 the court gave directions for the petition to be canvassed by way of written submissions. On the 6<sup>th</sup> December 2021 the court was informed the parties had not complied and extended time to file their submissions. Time was further extended on the 20<sup>th</sup> January 2022 for the 2<sup>nd</sup> Respondent to comply. On 9<sup>th</sup> February 2022 all parties confirmed their filing of written submissions and the court issued a date for delivery of judgment. Only the Petitioner and 2<sup>nd</sup> Respondent filed written submissions.

9. The 1<sup>st</sup> to 6<sup>th</sup> Petitioners state that:- *"we are working as employees of County Government of Bungoma deployed in Health Department in various positions in different stations from 2015"* and they bring the Petition on their behalf and on behalf of other 50 colleagues having been with them in various stations they had been posted from the year 2015 and are affected by the outcome. The court notes there was an application by 14 of the said persons who sought to have their names excluded from the Petition. The said application was later withdrawn. In brief the petitioners, applying affidavit of 1<sup>st</sup> Petitioner, allege that on the 4<sup>th</sup> January 2016 they were employed as Clinical Officers and other cadre of officers for the 2<sup>nd</sup> Respondent after having been interviewed with the 1<sup>st</sup> Respondent and posted to various stations ( CHWM-1" is copy of employment letter dated 28<sup>th</sup> December 2015 ). That upon expiry of their contract in December 2016, the 1<sup>st</sup> Respondent extended their contract to September 2017 with a view to absorb them on permanent basis( annexure CHWM2). That on the 17<sup>th</sup> November 2017, they received letters indicating that their contracts had been renewed on appointment effective 31<sup>st</sup> October 2017 with a consolidated package of Kshs. 25,000 for clinical officers (HWM3). That further they were required to sign the said acceptance letters and return to the 1<sup>st</sup> Respondent within 2 days which they allege was not enough time for them to internalize the terms of employment.

10. That according to the Memorandum of Understanding (MoU) the County Government of Bungoma had with PATH (Non-Government Organization which was funding their salary) it was agreed that payment should be done per Government scale and as per their agreement ( copy of MoU marked HWM4).

11. That the new terms are in breach of the MoU, the Constitution , Labour laws and Employment and County Government laws ( HWMS – the MOU). That the new contracts discriminate the Petitioners from employment and further denies them the opportunity to progress as employees of County Government in terms of promotions salary increment and security of tenure. That from October they have never received any salary yet they are working for the 2<sup>nd</sup> Respondent.

12. The said Petitioners all swore supporting affidavits similar to the above by the 1<sup>st</sup> Petitioner save for positions and salary amount. The subject matter of the dispute is the same.

### **1<sup>st</sup> Respondent's case**

13. The 1<sup>st</sup> Respondent is Bungoma County Public Service Board. The 1<sup>st</sup> Respondent vide Notice of Preliminary Objection dated 8<sup>th</sup> September 2018 raises the following points of law:-

(a) That the court lacks jurisdiction to hear and or determine the Petition in view of provisions of Article 162 (2) (a) and 165 (5) (b) of the Constitution and Section 12 of the Industrial Court Act as well as Judicial Precedent. On this issue the point was dispensed with by order of Justice Riechi transferring the Petition to this court on 11<sup>th</sup> March 2020.

(b) The 2<sup>nd</sup> point, the Petition and application herein are in view of Article 234 (2) (i) of the Constitution and Section 77 of the County Government Act, an abuse of the due and court process of law and ought to be struck out and or dismissed with costs.

(c) On third point, that the Petition is bad in law for want of certainty existence and or capacity of the 1<sup>st</sup> Respondent herein presented and consequently adversely comprising further on the jurisdiction of the court to proceed and determine the Petition and or said application and ought to be struck out and dismissed with cost.

(d) On 4<sup>th</sup> ground, the said Petition and Application are non starters, misconceived defective in substance and improperly presented.

14. On merit response found in affidavit of Elizabeth Wanyonyi, Secretary of 1<sup>st</sup> Respondent sworn on the 8<sup>th</sup> September 2018. She states that the Petition is filed in wrong forum in view of want of jurisdiction of this court, she avers that the MoU filed in court executed by the Chief Officer Health and Director of Department of Health, purportedly on behalf of the County Government of Bungoma and PATH representatives cannot be enforced for want of substantive and procedural legality that the 1<sup>st</sup> respondent was not a party to nor involved in the negotiation and or processes leading thereto and cannot consequently be bound by the terms thereof on account of privity of contracts that neither the Chief officer of Health or Director Department of Health of the County Government of Bungoma are recognized officers to enter into contract for the county with third parties, that she is aware of the fact that APHIA PLUS a development partner and implanting body of PATH requested the 1st Respondent to competitively source for suitable health workers including clinical officers on their behalf which they did. The 1<sup>st</sup> Respondent says the absorption of workers including the Petitioners engaged under the MOU were to be absorbed into the County payroll subject to availability of funds.

15. That much later, on the lapse of the specified period of 12 months, the Chief officer of Health wrote to the 1<sup>st</sup> Respondent requesting for review and renewal of engagement of petitioners for a further period of 12 months pending the Department of Health's sourcing funds.

16. That the 1<sup>st</sup> Respondent, the mandated employer of County Government of Bungoma is still waiting for the Department of Health's confirmation that funds are available for engagement of the Petitioners for the contemplated period and or total absorption and regularization of their employment to permanent and pensionable status. That upon withdrawal of donor the 1<sup>st</sup> Respondent as demonstrated by the Petitioners attempted to offer the petitioners employment at its affordably sustainable rates which they have rejected. That it is not possible to restore the Petitioner's salary at the rates previously enjoyed as at the time, their pay was funded by a donor, APHIA PLUS through PATH who has since ended the project and exhausted their funding. That the 1<sup>st</sup> Respondent has no control, contribution or role in management of the County pay roll and treasury and cannot pay the Petitioner salaries claimed or engage them without first a county Executive Committee approval on the basis of existent budget.

17. The Petitioners are aware of the nature of their respective engagements and cannot claim that any of their rights have been violated. That if there is a legitimate claim, the proper cause, would be to appeal to the Public Service Commission of Kenya as provided for under Article 23 (2) (i) of the Constitution and Sec. 77 of the County Governments Act and or a cause at the Employment and Labour Relations Court. That the order sought if granted would comprise the principle of Separation of powers purview under the Constitution and comprise one independence of the County Public Service Boards across the Country and contrary to Public Interest as it is bound to promote inequitable salary scales and engagement avenues within the County which is outright recipe for anarchy, dissatisfaction and disaster in service delivery.

#### **18. The 2<sup>nd</sup> Respondent's Case**

The 2<sup>nd</sup> Respondent, the County Government of Bungoma filed grounds of opposition and notice of preliminary objection dated 4<sup>th</sup> February 2019, stating that the court has no jurisdiction, that the Petitioners have not followed the due process in bringing the Petition before the court, the Petitioners are guilty of non-disclosure of material particulars and hence do not deserve conservatory orders sought, the Petitioners cannot force the Respondents to employ them on terms outside public Service which is contrary to Public Policy and interest. The Respondents complied with the provisions of the Constitution to wit: They did not victimize petitioners, followed due process, afforded adequate and equal opportunity to the Petitioners through offering them contracts which they refused to execute, and that they adhered to professional ethics.

19. On merit of the case, the 2<sup>nd</sup> Respondent filed affidavit sworn by Chrisantus Wamalwa on the 26<sup>th</sup> February 2018 who states he is the acting County Secretary and Head of Public Service of the County Government of Bungoma, and has authority of 2<sup>nd</sup> Respondent to swear affidavit. He avers that he is aware that the County Government of Bungoma entered into MOU with PATH, a non-profit corporation and development partner registered in Washington of United States of America for purposes of implementing the APHIA plus project with Western Kenya. That the MOU was to outline the specific name of the collaboration between the parties in respect to donor contracting of Health workers for deployment to County Health facilities or project sites. In paragraph 10, he outlines the objectives of the MOU. That the Petitioners were contracted by PATH as health workers of Bungoma County effective October 2015 subject to availability of funds under the donor project, that the Petitioners' contracts were for one year and expressly 30<sup>th</sup> September 2017. That the 2<sup>nd</sup> Respondent never terminated the Petitioners' contracts as they came to an end based on the appointment letters dated 30<sup>th</sup> December 2016. That to cushion the petitioners they were each given 1 year contract which they rejected to sign. That signing of contracts was optional and the Petitioners chose not to sign there is no binding contracts between the parties. The Petitioner's were not paid for October 2017 since they chose not to sign the contracts and could not be placed in payroll of the County Government.

20. That to pay the Petitioners without contracts would be against Public Policy and would attract audit queries that cannot be explained by the 2<sup>nd</sup> Respondent. The 2<sup>nd</sup> Respondent avers that the Petitioners have not discharged burden of setting out with reasonable degree of precision, the constitutional provision said to be violated and demonstrated the manner in which they are alleged infringed. The Petitioners are abusing court process as they have refused to sign employment contract.

## **DETERMINATION**

### **Issues for determination.**

22. The Petitioners in their submissions Identified the following issues for determination:-

- (a) whether the court is seized with jurisdiction to entertain the matter.
- (b) whether the proper procedure was followed to lodge this suit
- ( c ) Whether the Petition meets the threshold for the orders sought.

On the other hand the 2<sup>nd</sup> Respondent identifies the following as the issues for determination

- (a) Whether the Petition is competently before the Honourable court and whether the Honourable court has jurisdiction to entertain the matter.
- (b) Whether the Petitioners are entitled to the reliefs sought in the petition
- (c) Who should pay the costs of the Application.

23. Having considered the case by the Petitioners and the Respondents and the issues identified by the Petitioner and 2<sup>nd</sup> Respondent for determination, the court is of the considered opinion the issues placed before the court for determination by the parties are as follows:-

- (a) Whether the court has jurisdiction to entertain the Petition
- (b) Whether the proper procedure was followed to lodge petition and whether the Petition is competent.
- (c) Whether the Petitioners are entitled to reliefs sought.
- (d) Who should pay costs of the petition.

### **Whether the court has jurisdiction to entertain the Petition**

The 2<sup>nd</sup> Respondent submits that the court lacks jurisdiction to entertain the Petition a position also held by the 1<sup>st</sup> Respondent. To buttress this position the 2<sup>nd</sup> Respondent relies on the court of Appeal decision in the case of *Owners of Motor Vessel "Lillian S" -vs- Caltex Oil (Kenya) Ltd (1989) eKLR at page 10 by saying:*

*"By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal ( including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given".*

(b) Section 74 of the County Government Act, gives the power and authority to the County Public Service Board to regulate the engagement of persons on contract, volunteer and casual workers, staff of joint ventures and attachment of interns it is Public Board and offices.

(c) Section 77 of the County government Act Provides as follows:-

*"(1) Any person dissatisfied or affected by a decision made by the County Public Service Board or a person in exercise or purported exercise of disciplinary control against any County Public Officer may appeal to the Public Service Commission ( in this part referred to as the "Commission ") against the decision".*

(2) The Commission shall entertain appeals on any decision relating to employment of a person in a County Government including a decision in respect of:-

- (a) Recruitment, selection, appointment and qualifications attached to any office;
- (b) Remuneration and terms and conditions of service;

(c) Disciplinary control;

(d) National values and principles of governance, under Article 10, and values and principles of Public Service under Article 232 of the Constitution:

i. Retirement and other removal from service;

ii. Pension benefits, gratuity and any other terminal benefits, or

iii. Any other decision the Commission considers to fall within its constitutional competence to hear and determine on appeal in that regard.

(3) An appeal under subsection (1) shall be in writing and made within ninety days after the date of the decision, but the Commission may entertain an appeal later if, in the opinion of the Commission, the circumstances warrant it.

(4) The Commission shall not entertain an appeal more than once in respect to the same decision.

(5) Any person dissatisfied or affected by a decision made by the Commission on appeal in a decision made in a disciplinary case may apply for review and the Commission may admit the application if:-

(a) The Commission is satisfied that there appear in the application new and material facts which might have affected its earlier decision, and if adequate reasons for the non-disclosure of such facts at an earlier date are given; or

(b) there is an error apparent on record of either decision.

(6) An application for review under subsection (5) shall be in writing and made within the time prescribed by the Commission in regulations governing disciplinary proceedings, but the commission may entertain an application for review later if, in the opinion of the Commission, the circumstances warrant it”.

24. Section 87 (2) of the Public Service Commission Act provides as follows:-

“ A person shall not file any legal proceedings in any court of law with respect to matters within the jurisdiction of the Commission to hear and determine appeal from County Government Public Service unless the procedure provided for under this part has been exhausted”.

25. The 2<sup>nd</sup> Respondent submits, that based on the foregoing, the Respondent did not breach any law and or provision of the Constitution but followed the law to the letter when they offered the Petitioners herein the contracts of employment. That if the Petitioners were not satisfied with the decision of the 1<sup>st</sup> Respondent, they ought to have appealed to the Public Service Commission within a period of ninety (90) days as per requirement of Section 77 of the County Government Act and Section 87 (2) of the Public Service Commission Act and not rush to the Court seeking the orders herein. That accordingly the court lacks jurisdiction to entertain the Petition as currently presented. That Article 234 (2) (i) of the Constitution of Kenya 2010 mandates the Public Service Commission the power and authority to hear and determine appeals in respect of County Governments Public Service.

26. In response to this point of law the Petitioner submits that the matter was transferred to this court by the High court and the matter is before the proper court for determination and relies on the “*Owners of Motor Vessel “Lillian S”*” case also cited by the Respondents and further on Supreme court in *Samuel Kamau Macharia and Another -vs- Kenya commercial Bank Ltd and 2 others (20212) eKLR* that:-

“ A court’s jurisdiction flows either from the constitution or legislation or both thus a court of law can only exercise jurisdiction as confirmed by constitution or other written law. It cannot allocate to itself jurisdiction exceeding that much is conferred upon it by law. Where a court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing, jurisdiction must be acquired before Judgement is given”.

27. The Petitioner submits that they appreciate Article 234 (2) (1) of the constitution of Kenya as read together with Section 79 (2) (a) of the County Government Act and Section 87 (2) of the Public Service Commission provided from the jurisdiction of appeal against the decision of the Public Service Board. That however according to their facts the Respondents came up with a counter offer to the terms of the MoU that calls for the interpretation in line with the Constitution and principle governing contracts that falls within the purview of this court under Articles 16 2 (2) (2) 169 (5) (b) of the Constitution of Kenya 2010 read mutandis . Section 12 of the Industrial Court Act 2011 Laws of Kenya. That in the meaning of the said MoU under Article 6, the Petitioners are the employees of the 1<sup>st</sup> Respondent. That the Respondents have come up, with nothing but a written offer to the Petitioner’s bargain under the MoU which the court needs to investigate by interpreting the two documents in line with the provision of the Constitution and see which one prevails in the circumstances.

28. The Petitioner further submits that the Petition and the Notice of Motion presented was in the 1<sup>st</sup> instant made to protect the status quo given the short notice the petitioners were given to take up the offer by the Respondent. That the appeal process before the Public Service Commission is long and tedious. The Public Service Commission (County Government Public Services) Appeals Procedure Regulations 2016 do not provide for timelines to the Public Service Commission within which to conclude appeal emanating from the County Government. It also does not provide for interim relief pending determination of the appeal lodged with the Commission. The effect of this is that the actions forcing the subject matter of appeals before the Commission could become entrenched and irreversible.

29. The court having considered the law is of the opinion that jurisdiction is everything and without it, then the court must down its tools and uphold the decision of the court of Appeal in *Owners of the Motor Vessel "Lillian S"* cited by both parties and in particular the decision of *Njarangi JA* decision on jurisdiction. The court also upholds the decision of the Supreme Court in *Samuel Kamau Macharia & Another* case cited above and in particular that jurisdiction flows from the Constitution and or other written laws. It is true the court has unlimited original jurisdiction in all employment and Labour disputes including Constitutional Petitions pursuant to Article 162 (2) of the Constitution of Kenya 2010. The same constitution under Article 234 (2) (i) grants the Public Service Commission the mandate to hear and determine appeals in respect of County Governments Public Service. This provision is implemented under Section 77 of the County Government Act as follows:-

*" (i) Any person dissatisfied or affected by a decision made by the County Public Service Board or a person in exercise of purported exercise of disciplinary control against any County Public officer may appeal to the Public Service Commission against the decision".*

30. Section 74 of the County Government Act gives the power and authority to the County Public Service Board to regulate the engagement of persons on contract, volunteer and casual workers, staff of joint ventures and attachment of interns to its Public bodies and offices.

31. The decision of the Respondents challenged in the instant case is the contracts offered to the petitioners on 31<sup>st</sup> October 2017 which they allege offered consolidated salaries reduced to half from expired contracts and with time line to sign acceptance letter within a short period of 2 days ( example annexure HWM3 under affidavit of Hussein Wanyama Malebo 1<sup>st</sup> petitioner sworn on 21<sup>st</sup> November 2017). The court finds that the impugned new contract is a decision within the meaning of Section 77 of the County Governments Act. Section 87 of the Public Service Commission Act provides as follows:-

*" A person shall not file any legal proceedings in any court of law with respect to matters within the jurisdiction of the Commission to hear and determine appeals for County Government Public Service unless the procedure provided for under this party has been exhausted".*

32. There is no evidence placed before the court that the Petitioners exhausted the procedures under Section 77 of County Government Act of filing appeal before the Public Service Commission. Indeed from the submissions by Petitioners submitting that there are no timelines of hearing at Public Service Commission it is clear they brought dispute to court directly. The court finds the reasoning by Petitioners as to why they did not follow the laid down procedure of appealing against the decision of the Respondent to the Public Service Commission to be speculative.

29. The Court of Appeal has pronounced itself on the provisions of Section 77 of the County Government Act in the case of *Secretary County Public Service Board and Another -vs- Hulbhai Gedi Abdulla ( 2017 ) eKLR ( Malihndiary Ouko & Minoti JJA )* allowed the appeal on basis that the Respondent had failed to utilize the process under Section 77 of the County Government Act as follows:-

*"There is no doubt that the Respondent initiated the Judicial review proceedings in matter disregard to dispute resolution mechanism availed under Section 77 of the Act".* The court of Appeal authority is binding on this court.

30. On whether the new contracts amounted to a counter offer hence requiring interpretation of the court, the court finds what is in contention is the terms under the new contract which is a decision of the 1<sup>st</sup> Respondent. This court finds that it is the decision of the 1<sup>st</sup> Respondent which is the substance of the instant petition which is an issue under jurisdiction of the Public Service Commission pursuant to Article 234 (2) (i) of the Constitution, Service public Commission and Section 77 of the County Government Act. This is also demonstrated by the prayers sought.

Consequently, as jurisdiction flows from the Constitution and the written law, the court finds the instant petition is premature the petitioners having not exhausted remedy under Section 77 of the County Government Act. The court finds it has no jurisdiction and as a consequence downs its tools.

Whether the proper procedure was followed to lodge Petition and whether the Petition is competent.

31. The court has already found that instant Petition was filed without regard to the procedure under Section 77 of the County Government Act in challenge the decision of the 1<sup>st</sup> Respondent. The Instant Petition is thus incompetent.

32. In conclusion the Petition dated 21<sup>st</sup> November 2017 is incompetent for want of jurisdiction and is dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

**DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 31<sup>ST</sup> DAY OF MARCH, 2022.**

**J. W KELI**

**JUDGE**

**In the presence of:-**

**Court Assistant : Wesonga Brenda**

**Petitioners: Absent**

**Respondents:-Absent**