



Republic v Deputy County Commissioner Kajiado West Sub County & 4 others; Kileu (Exparte); Timayio & 4 others (Interested Parties) (Judicial Review 13 of 2019) [2022] KEHC 11969 (KLR) (26 April 2022) (Judgment)

Neutral citation: [2022] KEHC 11969 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
JUDICIAL REVIEW 13 OF 2019
SN MUTUKU, J
APRIL 26, 2022**

**IN THE MATTER OF THE APPLICATION BY NJARO OLE KILEU FOR
JUDICIAL REVIEW AND ORDERS OF CERTIORARI AND PROHIBITION**

BETWEEN

REPUBLIC APPLICANT

AND

**DEPUTY COUNTY COMMISSIONER KAJIADO WEST SUB
COUNTY 1ST RESPONDENT
COUNTY COMMISSIONER KAJIADO 2ND RESPONDENT
PRINCIPAL SECRETARY MINISTRY OF INTERIOR 3RD RESPONDENT
CABINET SECRETARY MINISTRY OF INTERIOR AND COORDINATION OF
GOVERNMENT 4TH RESPONDENT
JOSEPH KAYIONI 5TH RESPONDENT**

AND

NJARO OLE KILEU EXPARTE

AND

**SAMSON TUPET TIMAYIO INTERESTED PARTY
ROBERT SEMENGUR SAKAYA INTERESTED PARTY
CHARLES KATEMPA INTERESTED PARTY
LUKAS MELIKI INTERESTED PARTY
SAMUEL REMPEYIAN NCHILALO INTERESTED PARTY**



JUDGMENT

The Application

1. Njaro Ole Kileu, the Applicant, has moved this court through a Notice of Motion dated December 5, 2019 seeking the following orders:
 - (a) That this Honourable Court does issue an order of Certiorari to move into this court and quash any decision and deliberations made by the 1st 2nd 3rd and 4th Respondents appointing the 5th Respondent as the chief of Oldonyonyonkie location in Kajiado West Sub County.
 - (b) That this Honourable Court does issue an order of prohibition restraining the 5th Respondent from conducting the duties of the chief of Oldonyonyonkie location in Kajiado West Sub County.
 - (c) That costs of this application be provided for.
2. The application is supported by a Statement of Facts dated November 25, 2019 and a Verifying Affidavit sworn on the same date by the Applicant. It is the Applicant's case that on August 22, 2018 the Ministry of Interior through the County Commissioner of Kajiado advertised the position of the chief for Oldonyonyonkie Location, a position that fell vacant upon retirement of the previous chief. That the advertisement lacked transparency as it was only made available to a few individuals. That the 1st, 2nd, 3rd and 4th Respondents appointed the 5th Respondent which appointment was marred by irregularities as the 5th Respondent did not meet the criteria for appointment. That the aforementioned appointment lacked transparency and was tainted with corruption as more qualified candidates were left out.
3. Further that the Applicant conducted investigations into the qualifications of the 5th Respondent and found that he is of a primary level of education; that the recruitment process be conducted again to enable the same be done in a transparent manner where all competent persons can apply and compete for the position; that the Respondents have a constitutional duty to have regard to public interest of administration of justice and need to avoid abuse of legal process.
4. The 1st to 4th Respondents filed a Replying affidavit dated 27th October 2020 sworn by William Ngochila Ole Kakimon where he deposed that he is currently the Deputy County Commissioner Moyale sub-county in Marsabit County and was previously holding the same position at Kajiado West Sub County and therefore conversant with this matter. He deposed that vide notice Ref. SR/ST/VOL 1/15 dated August 22, 2018 an advertisement was rolled out for the position of chief Grade 11 Oldonyonyonkie Location which ran for 23 days and closed on September 13, 2018 giving adequate time for public participation. Further that copies of the advertisement were circulated to Rift Valley Regional Commissioner, Kajiado County Commissioner, all assistants County Commissioners offices in Kajiado West Sub County, all noticeboards in Oldonyonyonkie Location and also publicized in churches and public barazas. That the position attracted six candidates as per the list annexed and marked WNK2. That they appeared before the Sub-County interview panel and score sheets are annexed and marked WNK 3. That after the process was completed, the results were submitted to the Regional Commissioner through the office of the County Commissioner vide letter Ref No. SR.ST.1/3/72/VOL/31 dated January 19, 2019.
5. That the Principal Secretary vide letter Ref. No PA/2/19A dated January 28, 2019 granted authority to appoint the 5th Respondent. He averred that the recruitment process was on merit and that the 5th



Respondent was an experienced Assistant Chief who had satisfactory track record of 10 years. Further that there is no proof provided to show that the 5th Respondent lacked integrity. That the Public Service Commission vide letter Ref No. 283/48 dated August 7, 2011 reviewed academic waiver on the requirements of the scheme of service of chiefs and assistant chiefs and granted a minimum of KCPE or its equivalent for applicants in Kajiado County. He deposed that academic qualifications was not the only consideration and that other factors such as interview performance, relevant experience, character, personality and vetting from other government agencies were considered. That the selection decision was guided by transparency, accountability, objectivity, impartiality, integrity, merit and fair competition.

Submissions

6. The matter was canvassed through written submissions. The applicant filed his submissions dated October 8, 2020. He has submitted that the qualifications placed on the advertisement dated August 22, 2018 for the position of chief II were:
 - (a) Be in possession of the Kenya Certificate of Secondary Education (KCSE) mean grade C+ or its equivalent with C+ in English or Kiswahili.
 - (b) Be in possession of Diploma in public Administration/Management, Social work, community development, Teaching, disaster management or an equivalent qualification from a recognized institution.
 - c. Have served at least six (6) years in public service.
7. It was the Applicant's argument that for one to qualify for the said position these 3 requirements needed to be satisfied. That the 5th Respondent did not qualify as he had not gone past primary school and did not have a diploma in any discipline. Further that, the government should be transparent when it comes to recruitment into public offices and that if the requirements herein were not required the same should have been communicated as it blocked other candidates with the same qualifications as the 5th Respondent. It was his assertion that the actions and conduct of the appointing authority must have been unprocedural and ultravires and the question that follows is where the Respondents got their powers from without following procedure. They also submitted that the integrity of the 5th Respondent was questionable as he squandered an amount of Kshs. 1,050,000/- from Oldonyonyoike Group Ranch.
8. In addition, the location which was recruiting a chief had several qualified people who merited the job hence no justification can be given to excuse the actions of the Respondents in hiring the 5th Respondent.
9. The Applicant relied on the case of *Pastoli v Kabale District Local Government County and others* [2008] EA 300 which is cited in Judicial Review No. 7 of 2018 at Kiambu where the court held that "in order to succeed in an application for judicial review, one has to show that the decision is tainted with illegality, irrationality and procedural impropriety."
10. The applicant argued that he appealed to the Respondents about picking the 5th Respondent however the same has not been heard to date. That failure to handle the appeal amounts to arrogance, acting with impunity and injustice. It was his argument that the Respondents' actions and failure to act accordingly has affected his legitimate expectation as a resident of Oldonyonyoike location. That the rules of natural justice require that the decision making should be done with due regard to the affected parties interest and accordingly be reached without bias.



11. The Applicant also relied on [Republic v Chief Magistrate Naivasha](#) [2011] eKLR and [Republic v Chief Magistrate's Court at Milimani Law Court](#) where Mativo J cited [Republic v Attorney General and 4 others exparte Diamond Hashim Lalji and Ahmed Hashem Lalji](#) [2014] eKLR in support of his case.
12. The 1st to 4th Respondents filed their submissions on May 19, 2021. They submitted on 3 issues for consideration:
 - (a) Whether the recruitment of the 5th Respondent was done procedurally?
 - (b) Whether the 5th Respondent possesses the qualifications required for the position of chief?
 - (c) Whether there was any impropriety in the appointment of the 5th Respondent?
13. On the first issue, it was submitted that the disputed appointment herein was done through a competitive recruitment and selection process conducted in accordance with the laid down regulations. That the requirements for the advertisement was done according to the requirements as per section 37 (4) of the [Public Service Commission Act](#). The contents of the Replying Affidavit was reiterated with regards to the advertisement notice which was circulated and publicized in churches and public barazas. Further that the notice ran for 23 days. On this they relied on the case of [Republic v Isaack Kipyegon Koech & 4 others Exparte Kipkirui Koech](#) [2020] eKLR where the court found that publication of notice amounts to due process.
14. On the second issue they submitted that the applicants are inviting the court to engage in a merit review in seeking to question whether the 5th Respondent possessed the qualifications required for the position of chief. They relied on the case of [Republic v Isaack Kipyegon Koech & 4 others Exparte Kipkirui Koech](#) [2020] eKLR [*supra*] where it was held that judicial review examines the evidence to determine whether there was compliance with the applicable constitutional, statutory and procedural requirements. They also quoted an array of cases in support of this position. It was their submissions that the application should fail on the ground that it invites the judicial review court to make determinations based on the merits of the case which issue was discussed in the case of [Owners of Motor vessels "Lilian S" v Caltex Oil \(Kenya\) Ltd](#) [1989] KLR 1.
15. They reiterated the facts as was in their Replying affidavit on the qualifications of the 5th Respondent including his CPE qualifications and the satisfactory track record performance of 10 years as an assistant chief. They also stated that the Public Service Commission waived the requirements for chiefs and assistant chiefs and granted minimum of KCPE or its equivalent in Kajiado county. They also reiterated the fact that academic qualification was just one of the parameters they considered. It was also their submission that the applicant has not proved that the 5th Respondent lacked integrity and that he embezzled funds therefore their claim lacks basis and thus warrants dismissal. That he who alleges must prove as per sections 107, 108 and 112 of the [Evidence Act](#).
16. On their last issue they relied on the case of [Republic v Betting Control and Licensing Board & another Ex Parte Outdoor Advertising Association of Kenya](#) [2019] eKLR where it was held that a decision suffers from procedural impropriety if in the process of its making the procedures prescribed by statute are not followed or if the "rules of natural justice" are not adhered to. That decision makers must act fairly in reaching their decisions and that this principle applies solely to matters of procedure, as opposed to considering the substance of the decision reached.
17. It was their submission that the Applicant has not shown that the procedure prescribed by the statute was not followed. That in no way did they suggest that academic qualification would be of primary importance. They quoted section 37(4) of the [Public Service Commission Act](#) and especially sub section 4(f) The prescribed qualifications applicable, including any desired previous achievements.



18. They stated further that the advertisement asked candidates to not only attach their academic qualifications but also their testimonials and therefore other grounds for appointment was within their mandate.

Determination

19. I have very carefully considered the application, the affidavits filed in support of it and in opposition together with the annexures as well as the submissions filed and cited authorities.
20. The parameters of judicial review were set out by the court of appeal in *Municipal Council of Mombasa v Republic & Umoja Consultants Ltd* Civil Appeal No. 185 of 2001 [2002] eKLR as:

“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself- such as whether there was or there was not sufficient evidence to support the decision.”

21. The grounds on which the Court exercises its judicial review jurisdiction were restated in the Uganda case of *Pastoli v Kabale District Local Government Council and others* [2008] 2 EA 300. In that case the Court cited with approval *Council of Civil Unions v Minister for the Civil Service* [1985] AC 2 and *An Application by Bukoba Gymkhana Club* [1963] EA 478 at 479 and held:

“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.”

22. On addressing the issue of whether the application has merit, the Applicant submitted that the 5th Respondent was not qualified to be appointed as chief as he did not meet the criteria set out in the advertisement. In this matter it is true that there was a vacancy for the position of chief II due to the office falling vacant after retirement by the previous chief. That the advertisement set out the requirement to be met by the candidates from which 6 candidates applied. That from the six candidates who applied the 5th Respondent scored the highest as annexed and marked WNK 3 showing the interview score sheet. The 1st Respondents stated in their Replying Affidavit that the interview



results were submitted to the Regional Commissioner through the office of the County Commissioner vide letter Ref No. SR.ST 1/3/72/VOL/ dated January, 2019. That the principal Secretary granted authority to appoint the 5th Respondent as Chief.

23. The Question then is whether the Applicant was qualified to be appointed as a Chief. Both parties made their submissions on this. The Applicants submitted that the 5th Respondent had only primary level education contrary to the requirements whose minimum requirement was KCSE mean grade of C+ or its equivalent with C+ in English or Kiswahili, be in possession of Diploma in public Administration/Management, Social work, community development, Teaching, disaster management or an equivalent qualification from a recognized institution and have served at least six (6) years in public service. They contended that the 3 requirements needed to be met for qualification to the position. The Respondents contended however that the academic qualification was not the only criteria and that they also considered other requirements such as overall interview performance, relevant experience, character and personality and vetting from other government agencies among others.
24. I have analyzed the documents marked as WKN3, being copies of interview score sheets. The documents show that none of the 6 candidates who did the interview had the minimum academic qualifications of a mean grade C+ in KCSE or its equivalent of C+ in English or Kiswahili. That from the said documentation I do note that another candidate (the 5th Interested party) also had primary level education as the 5th Respondent. It is therefore not true that the advertisement for the position of chief blocked out others with the same qualifications as the 5th Respondent as alleged by the applicants herein. The Respondents brought to the attention of this Court a letter by the Public Service Commission dated August 7, 2011 that reviewed academic waiver on the requirements of the scheme of service for chiefs and assistant chiefs to that of a minimum requirement of KCPE.
25. The Applicant submitted that the 5th Respondent lacks integrity and that he squandered Kshs. 1,050,000/- from Oldonyonyoike Group Ranch and that he is therefore not fit to hold public office. This was opposed by the Respondents who submitted that no proof has been furnished to show that the 5th Respondent did not meet the integrity test and that he embezzled funds. They stated that the evidence Act under sections 107, 108 and 112 is clear that he who alleges must prove. The Applicant only annexed a demand letter dated January 6, 2010 to show that the 5th Respondent embezzled funds.
26. Was the decision of appointing the 5th Respondent tainted with illegality, irrationality and procedural impropriety? In this matter an advertisement vide Notice Ref No. SR/ST/VOL.1/15 dated 22nd August, 2018 for the position of Chief Grade II Oldonyonyoike location was issued. That the said Notice closed on 13th September, 2018 hence running for a period of 23 days which was adequate for public participation. It was the Respondents averment that the said notice was circulated to Rift Valley Regional Commissioner, Kajiado County Commissioner, all assistant county commissioners' offices in Kajiado West sub- county and all noticeboards in Oldonyonyoike Location. Further that the same was also publicized in churches and public barazas. From the evidence given herein it is true that the advertisement attracted 6 candidates.
27. The 6 candidates were interviewed and their scores given as per the annexed interview score sheet. That out of that exercise the 5th Respondent scored highly and was appointed on that basis. That the authority to appoint the 5th Respondent was by the Principal Secretary as shown in the annexed letter marked WKN 5. As provided under section 38 of the Public Service Commission Act

Any appointment, acting appointment, promotion, re-designation, transfer, deployment, delegation or assignment of a duty in the public service shall be in writing.



28. The Applicant submitted that there was impropriety being that the Respondents failed to act fairly in the process of taking a decision and considered facts which were irrelevant being that the qualifications placed for the job were not considered. The Respondents on the other hand contended that the recruitment of the 5th Respondent was done through a competitive recruitment and selection process conducted in accordance with laid down regulations. It was their submissions that they adhered to section 37(4) of the [Public Service Commission Act](#). This section provides that:

- (4) An advertisement inviting applications to fill any vacancy in a public office shall provide for—
- (a) the title and rank of the public office;
 - (b) the public body in which the office is tenable;
 - (c) the background and context of the work, where necessary
 - (d) the terms of employment;
 - (e) the applicable remuneration including salary, allowances and other benefits;
 - (f) the prescribed qualifications applicable, including any desired previous achievements;
 - (g) the core duties of the office;
 - (h) the expected deliverables of the office;
 - (i) the supervision, accountability and reporting arrangements;
 - (j) any added advantage applicable;
 - (k) the mode and deadline of transmitting the application;
 - (l) any consideration that may occasion disqualification; and
 - (m) any consideration of equity or affirmative action.

27. Having given this matter due consideration, it is my view that the procedure prescribed by statute was followed. The Applicant argued that procedure was not followed due to the fact that the 5th Respondent did not meet the minimum requirements for the academic qualifications. It is clear from my analysis that none of the 6 candidates had the minimum requirements as per the advertisement. It is therefore correct as submitted by the Respondent that academic qualifications were not their primary consideration as they considered other factors already mentioned herein.

28. Section 37(1) of the [Public Service Commission Act](#) it provides that:

Where a vacancy in a public office is to be filled, the Commission or authorized officer shall invite applications by advertising the vacancy in the Commission's website, at least one daily newspaper of nationwide coverage, the radio and other modes of communication, so as to reach as wide a population of potential applicants as possible.

29. That it is through the publication of the advertisement notice that the Applicant had access and placed his application and thereafter invited to attend interviews. This is evident that due process was followed and the Respondents adhered to the law. From this, there is therefore no illegality, irrationality and procedural impropriety on the part of the Respondents in the appointment of the 5th Respondent



as the Chief of Oldonyonyoike Location. In *Republic v Isaack Kipyegon Koech & 4 others Ex Parte Kipkirui Koech* [2020] eKLR, it was held that:

“Judicial review is different from ordinary adversarial litigation between private parties as it does not entail examination of the evidence with a view to making a decision about the substantial merits of a case, but rather an examination as to whether there was compliance with the applicable constitutional, statutory and procedural requirements.”

30. After careful consideration of the issues canvassed before me in this application, it is my considered view that the Applicant has not satisfied the court that he deserves the orders he is seeking. The Applicant has not satisfied this court that the decision of the Respondents to appoint the 5th Respondent is irregular and unprocedural. He has failed to prove any irregularity, illegality, irrationality and procedure impropriety on the part of the Respondents. On the contrary, the exercise was transparently carried out and the 5th Respondent was properly appointed.
31. Consequently, the Applicant’s application dated December 5, 2019 lacks merit and must fail. The Application is hereby dismissed with costs to the Respondents
32. Orders to issue accordingly.

DATED, SIGNED AND DELIVERED THIS 26TH APRIL 2022.

S. N. MUTUKU

JUDGE

