



Kanjiku v Governor County Government of Meru & another; Clare Regina Kagwaria (Secretary, Meru County Public Service Board) (Interested Party) (Petition E020 of 2021) [2022] KEHC 10546 (KLR) (25 May 2022) (Judgment)

Neutral citation: [2022] KEHC 10546 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
PETITION E020 OF 2021
PJO OTIENO, J
MAY 25, 2022
IN THE MATTER OF ARTICLES 1(1), (2) & (4B), 2(1), 3(1), 10, 22, 23,
27, 47, 50(1), 73, 75, 159, 165(3)(D), 201, 232, 235, 258 & 259 OF
THE CONSTITUTION
AND
IN THE MATTER OF CONTRAVENTION/INFRINGEMENT OR BREACH OF
ARTICLES 10, 27, 47, 73, 75, 174, 201, 232 & 235 OF THE
CONSTITUTION
IN THE MATTER OF SECTIONS 57 & 58 OF THE COUNTY
GOVERNMENTS ACT, 2012
AND
IN THE MATTER OF SECTION 10 OF THE PUBLIC SERVICE (VALUES
AND PRINCIPLES) ACT, 2015
AND
IN THE MATTER OF SECTIONS 4(1), 7, 8, 9, 10, 11 & 52(1) OF THE
LEADERSHIP AND INTEGRITY ACT, 2012

BETWEEN
COSMAS MUKARIA KANJIKU PETITIONER

AND
GOVERNOR COUNTY GOVERNMENT OF MERU 1ST RESPONDENT



**COUNTY SECRETARY, THE COUNTY GOVERNMENT OF
MERU 2ND RESPONDENT**

AND

**CLARE REGINA KAGWARIA (SECRETARY, MERU COUNTY PUBLIC
SERVICE BOARD) INTERESTED PARTY**

JUDGMENT

1. The petitioner approached this court through the petition dated 6/10/2021 seeking for orders that:
 - a) A declaration be issued that the appointment or employment of the interested party as the Secretary of the Meru County Public Service Board on contract after 11th July 2019 by the 1st respondent in collusion with the 2nd respondent is unconstitutional, illegal, ultra vires, null and void ab initio and in contravention of Articles 10,27,47,75,174,201,232 and 235 of *the Constitution*, as well the provisions of Section 58 of the *County Governments Act*; contrary to Sections 4 and 5 of the *Fair Administrative Action Act* and Sections 4(1),7,8,9,10,11 and 52(1) of the *Leadership and Integrity Act*.
 - b) A declaration be issued that the interested party herein is illegally in office after the expiry of her term on 11th July 2019 and consequently all her actions purporting to perform and discharge the functions of the office of the Secretary of Meru County Public Service Board after the said date are null and void ab initio.
 - c) An order of certiorari be issued quashing the appointment of the interested party as the Secretary of the Meru County Public Service Board on contract by the 1st respondent for a second term of office upon the expiry of her term of office on 11th July 2019.
 - d) An order be issued prohibiting and/or directing the interested party to cease forthwith from performing the functions and/or discharging the duties of the office of the Secretary of Meru County Public Service Board.
 - e) An order be issued directing the 1st and 2nd respondents to follow the due process in accordance with the law in sourcing for a suitable candidate to fill the position of the Secretary of Meru County Public Service Board.
 - f) A declaration be issued that all the decisions of the Meru County Public Service Board made with the involvement of the interested party and implemented by the interested party as the Secretary of the County Public Service Board after 11th July 2019 are null and void ab initio since the interested party had no constitutional or legal capacity to do so.
 - g) The interested party be ordered to refund all the money paid to her or for her benefit by the County Government of Meru in the form of salary, remuneration, allowances, professional subscriptions, course training fees and other financial benefits received by her from the county public funds after 11th July 2019.
 - h) Costs of the petition be awarded to the petitioner.
 - i) The honourable court be pleased to make any other orders as it may deem fit and just to grant in the interests of justice and public interest.



The Petitioner's case

2. The foundation of the grievance is alleged to that on or about 25/4/2019, about 2¹/₂ months before the expiry of the term of office of the Members of Meru County Public Service Board, who were appointed on 12/7/2013, could expire, the 2nd respondent selectively advertised for vacant positions of the Chairperson, 4 members of the County Public Service Board in various media platforms but deliberately omitted to advertise for the position of the Secretary of the County Public Service Board.
3. On 5/7/2019, the 1st respondent purported to extend and/or renew the contract of employment of the interested party for a further period of 3 years contrary to the provisions of Section 58(4)(a) of the County Governments Act. It also alleged that, the 1st respondent, in purporting to renew the said appointment, acted ultra vires and in contravention of the express and mandatory provisions of Section 58(2) of the County Governments Act, which provides that the appointment of the Members of the County Public Service Board shall be through a competitive process. He alleges that the purported re-appointment of the interested party as the Secretary of Meru County Public Service Board was unconstitutional, illegal, unilateral, exclusive, opaque, shrouded in mystery, an act of favoritism, discriminatory, an irregularity which lacked transparency and is against the public interest as it was not subjected to fair competition and merit.
4. It is therefore alleged that the interested party was selectively and preferentially appointed to hold office by the respondents contrary to the provisions of Articles 10 and 232 of the Constitution on the core values and principles of governance and public service. He accuses the 1st respondent of acting with impunity and side stepping public participation when he hand-picked the interested party as the Secretary of Meru County Public Service Board upon the expiry of her term of office on 11th July 2019 and without following the due process of advertising the vacancy, shortlisting of successful candidates, conducting interviews, selection of the most suitable candidate and vetting by the County Assembly of Meru and that the appointment of the interested party for a second term of office was discriminatory, lacked transparency and openness necessary to uphold the rule of law and promote fair administrative action, as it was not through an open, merit-based, inclusive and competitive process, as required by the Constitution and relevant laws.
5. The continued occupation of office by the the interested party is termed unlawful and irregular, because her term of office expired on 11th July 2019 after serving her 6 year term. He alleges that the interested party has illegally been receiving payments from the County Government of Meru in form of salary, remuneration, allowances and other financial benefits, which amount to unlawful payments, misuse and wastage of public funds. The interested party is thus accused of unlawfully and irregularly participating in the sittings/meetings and other activities of Meru County Public Service Board and implementing the decisions of the said Board, thereby compromising the legality of such decisions.

The Respondents' case

6. The respondents filed a replying affidavit sworn by the County Attorney, Mr Kiautha Ariithi in which the extension of the Interested Party's tenure is supported and said to have been informed by two advisory letters from the Transition Authority and the Kenya Law Reform commission dated 24.5.2014 and undated one respectively. The deponent contends that the secretary is not a board member but an ex officio who doubles up as the chief Executive officer whose remuneration structure is totally different from that of the members just as the qualification for both offices are different. It was deponed further that the composition of the board needs to align with that of the Public Service Commission and other boards like the County Assembly Service Board where the secretary is an ex officio member and the facilitator of the board in line with the Mwongozo Guidelines so that there is



succession management for institutional memory. There was a stress that article 235 of the Constitution envisages and commands uniformity of norms and operation. The petition was viewed as falling short of establishing a prima facie case, as overly belated having been brought towards the end of the extended tenure thus portending grave disruption of the operations of the board, for being politically instigated and propelled by the former Acting Chairman of the Board who filed yet another petition, No E031 of 2021. The petition was viewed as meritless and the court asked to dismiss it with costs for being abusive of the court process.

The Interested Party's case

7. The interested party opposed the petition through her replying affidavit sworn on 4/11/2021 in which she shares same views as that by the respondent then avers that she was duly appointed as the Secretary of Meru County Public Service Board vide Gazette Notice No. 9799. it was asserted that upon the expiry of her tenure, the 1st respondent by a letter dated 27/6/2019, extended her contract of service for a further period of three (3) years. The extension was advised and informed by an advisory opinion on the role and responsibilities of the Secretary Meru County Public Service Board by the Transition Authority dated 23/5/2014 and another one from the Kenya Law Reform Commission, which is undated, on the office of the Secretary of the County Public Service Board. She avers that the Secretary to Meru County Public Service Board is an ex-officio member to the Meru County Public Service Board whose nature of work is administrative with terms and conditions of employment which are separate from those of other members of the Board.
8. She takes the position that the Secretary to the Board is not entitled to the same Remuneration and Benefits as those of a sitting board member as set out by the Salaries and Remuneration Commission's Remuneration Structure and that Section 58 of the County Governments Act provides for the qualifications of the Chairperson and Board members but not those of the Secretary to the Board. She avers that for succession management of the County Public Service Board, her retention was paramount in order to ensure a smooth transition of the Board. It is then added that that the petition has not met the required threshold as it has not set out with a degree of precision the petitioners' complaint, the provisions complained to have been violated and the manner in which they are alleged to have been infringed.
9. It is further alleged that if the orders sought are granted, the County Public Service Board will suffer great prejudice as it will be unable to perform its functions and core mandate as stipulated in the County Governments Act. She avers that the petition is politically instigated and out to cripple the good work of the County Public Service Board and the County Government of Meru in general. She accuses the former acting chairperson of the County Public Service, Christine Kawira Ungu, of being the mover of this petition, which she terms as an afterthought commenced as a personal vendetta, filled with malice and bad intentions, as it has been filed one year after her reappointment. She urges the court to dismiss the petition with costs as the same is an abuse of the court process.
10. The petitioner in his supplementary affidavit sworn on 3/1/2022 avers that the 1st respondent had no legal powers to extend the interested party's contract of service for a further period of 3 years. He avers that respondents contravened the constitutional and statutory provisions cited on the face of the petition by purportedly reappointing the interested party to unlawfully and irregularly hold office and that there is no timeline prescribed for filing a constitutional petition to protect the public interest and safeguard the Constitution and the law. He then alleges that the involvement of the interested party in the decision making process of the Board has compromised the legality and validity of such decisions and that he instructed Ms. Christine Kawira Ungu Advocate to represent him alongside Benjamin Mwikya Musyoki in this petition in their professional capacities and no more.



11. The matter was directed to be canvassed by way of written submissions which were duly filed by the petitioner and the interested party on different dates.

The Petitioner's submissions

12. In the filed submissions, the petitioner avers that the purported appointment of the interested party by the 1st respondent is unconstitutional, illegal, unilateral, exclusive, opaque and shrouded in mystery and therefore contrary to public interest and legitimate expectation of the general public particularly the residents of Meru County. He submitted that the provisions of Sections 57 and 58 of the [County Governments Act](#) are clear that the Secretary of the County Public Service Board is a distinct member of the County Public Service Board. That in purporting to extend and/or renew the interested party's term of office, the 1st respondent acted ultra vires in contravention of the express mandatory provisions of Section 58(4)(a) of the [County Governments Act](#). He submitted that the purported re-appointment of the interested party as the Secretary of Meru County Public Service Board was not subjected to fair competition and merit on the basis of affording adequate and equal opportunities for appointment at all levels of the public service, further that the purported reappointment of the interested party by the respondents is an act of favoritism and preferential treatment which is discriminatory contrary to Article 27 of [the Constitution](#), lacks transparency, is an irregularity, undermines public confidence and is against the public interest.
13. The 1st respondent was additionally faulted for acting with impunity and side stepping the principle of public participation. He submitted that it is a constitutional and legal requirement that appointments to public office must be through an open, merit-based, inclusive and competitive process. He submitted that the Secretary of the County Public Service Board is not an ex-officio member of the Board, but a member of the Board and supported that argument with *Shukuri Alawso Muhamed v Wajir County Secretary & 2 others*(2018)eKLR.
14. On his standing to bring and maintain the petition, it was submitted that there is in every person the locus standi to file a petition in the public interest pursuant to Articles 3(1), 22, 23 and 258 of [the Constitution](#) and supported his argument with the decision in *Okiya Omtatah Okoiti v The Public Service Commission and 4 others*(2020)eKLR and *Anarita Karimi Njeru v Republic*(1979)eKLR and asserts that the petitioner is a public spirited Kenyan who has an undoubted constitutional right to institute the petition in the public interest. Christine Kawira Ungu is said to be representing the petitioner in her capacity as an Advocate of the High Court of Kenya and no more.
15. It was then reiterated that 1st respondent has no legal capacity or powers to extend the interested party's contract of service for a further period of 3 years, contrary to Section 58(4) of the [County Governments Act](#) which expressly provides in mandatory terms that a member of the County Public Service Board shall hold office for a non-renewable term of 6 years.
16. According to the petitioner, the activities undertaken by the interested while being illegally in office ought to be declared null and void ab initio, as was done in *Mundia Njeru Gateria v Embu County Government & 5 others*(2015)eKLR, where the court declared that all the decisions, actions and proceedings of the Embu County Public Service Board made, taken or undertaken during the purported interdiction of the petitioner as the Chairman of Embu County Public Service Board were null and void ab initio adding that the respondents and the interested party have contravened and/or violated the provisions of Articles 10, 22, 73 and 75 of [the Constitution](#), Sections 4(1), 7, 8, 9, 10, 11 and 52(1) of the [Leadership and Integrity Act](#) and have flagrantly disregarded Section 58 of the [County Governments Act](#) with impunity. He urged the court to allow the petition as prayed and grant the orders sought.



The Respondents' and Interested Party's submissions

17. The joint position taken by the respondents and they submitted that the petition has not met the required threshold of a Constitutional petition as it has not set out with degree of precision the petitioner's complaint, the provisions complained about and the manner in which they are alleged to be infringed, as enunciated in the celebrated case of *Anarita Karimi Njeru v Republic*(1979)eKLR.
18. On the merits, it was submitted that the secretary of the Board is distinct from the members of the Board, and thus an ex-officio member with distinct terms of service. They submitted that the interested party was subjected to a vigorous, regular and valid process of being interviewed and selection, before being appointed as the secretary to the board and that the interested party does not make decisions at the board members meetings as her work is only limited to implementing the said decisions.
19. They submitted additionally that the petition was politically instigated and out to cripple the good work of the County Public Service Board and the County Government of Meru. They beseeched the court to dismiss the petition, as the renewal of the interested party's contract for a further 3 years was within the law and regular.

Analysis and Determination

20. Having carefully considered the petition, the responses together with the written submissions offered, I find the issues that isolate themselves for the merit determination by the court to be whether the term of the secretary, County Public service Board, is limited to no more than six years and whether there is power on the 1st respondent to extend such tenure. Preliminary to such merit determination are two questions whether the petition as crafted and filed, meet the threshold imposed by law in the decision of *Anarita Kirimi's* case (supra) and whether the timing of the petition when filed, was too late to defeat it.
21. On the first preliminary issue whether the petition is succinct and pleads with precision the alleged violated, I find that the draftsmanship cannot be faulted for lack of clarity or precision. I determine that the petition sets out with sufficient clarity the complaint that the allegations against the respondent that in extending the tenure of the interested party for a period of three years, they violated or failed to observe and respect the requirements of 10,27,47,73,75,174,201,232 and 235 of *the Constitution* of Kenya, 2010. That fault lacks merit and cannot be sustained.
22. The second preliminary issue questioning the delay in bringing the petition and alleging lack of mala fides presents an important consideration that speaks to the constitutional dictate that justice shall not be delayed. It is common ground that the term of the board which coincided with the tenure of the Interested party expired on the 11.07.2019 and that one of the advocates in this matter, Ms Christine Kawira Ungu served in that board as the acting Chair. The extension of the of the Interested Party's term was for a period of three years from the 12.7.2019 and is thus bound to terminate by effluxion on the 11.07.2017. The petition was however not presented till the 06.10.2021. I discern that the complaint against the respondents, as a cause of action, accrued on the date the letter extending the tenure was authored and when the petition was filed the cause was some 27 months old and its target had just nine months to lapse.
23. While there is no statutory law that limits time within which a constitutional petition must be brought, it is also an ingrained doctrine of the law enshrined in *the constitution* that justice shall not be delayed. The court of appeal in *Daniel Kibet Mutai & 9 others v Attorney General* [2019] eKLR while addressing the doctrine of laches in relation to constitutional petitions upheld the decision of the high Court dismissing a petition and observed: -



Per Mohamed j, JA

“The appellants have not given any explanation at all for the delay in bringing their action. As was stated by this Court in *Wellington Nzioka Kioko vs. Attorney General* [2018] eKLR, although there is no time limit in respect of constitutional petitions, and such a petition would ordinarily not be defeated by the doctrine of laches. However, an unexplained delay of almost 30 years in bringing the action, makes it impracticable for the court to properly administer justice and renders the action an abuse of the court process. For this reason I would uphold the dismissal of the appellants’ suit”.

Per Okwengu, JA

“We reiterate the position that where there has been inordinate delay in bringing an action for violation of fundamental rights, appropriate facts must be placed before the court to enable the court exercise its discretion judicially, in accepting or rejecting the explanation for the delay, with the benefit of all information regarding the particular circumstances before it...

Delay is an anathema to fair trial which is one of the key fundamental rights provided to all litigants under Article 50 of *the Constitution*. Furthermore, it would be an abuse of the court process and contrary to the constitutional principles espoused in Article 159 that requires justice to be administered without delay, to allow a party who alleges violation of constitutional rights, to bring their action after undue inordinate delay, without any justifiable reason. For this reason we find that the appellants’ action was properly dismissed.”

24. In this petition, even though the question of delay was raised in the two Replying Affidavits, no attempt was made to give an explanation. In fact in the Supplementary Affidavit, the petitioner was content to assert, without more, that there are no time limits for presentation and prosecution of petitions. The court finds that when the fact that the extension was not a new recruitment and limited for a period of 36 months, it was unreasonable to wait for some 27 months before presenting the petition and to fail to give any explanation for such delay. This is therefore one of those cases that laches defeats the object of the petition.
25. On the merits, both parties made submissions on whether or not the office of the Secretary, County Public Service board is public office and the holder thereof a public officer. It is to this court immaterial to answer that obvious question with an obvious answer. I say it, is an obvious question because the office is indeed created by a statute within public service in the county government and remuneration and benefits thereof mandated to be from the public funds provided by parliament. That question fell for determination by the Supreme Court in *Frederick Otieno Outa v Jared Odoyo Okello & 4 others* [2014] eKLR when the court determined it and held as follows: -

“... the proper meaning of “public officer” currently is: (i) the person concerned is a State officer; or (ii) any other person who holds “public office” – an office within the national government, county government, or public service; (iii) a person holding such an office, being sustained in terms of remuneration and benefits from the public exchequer.”
26. On the twin issues of the 1st respondent power to extend the tenure and whether the extension was tenable, it is asserted by the respondent and the Interested Party that he was exercising his powers under Section 58(1)(c) of the *County Governments Act* when he extended the interested party’s contract of service as the Secretary of the County Public Service Board in the County Government of Meru for a period of 3 years, upon expiry of her then tenure. On the other hand the petitioner’s position is that no



such power or liberty resides on the 1st respondent. While there should be no difficulty in discerning the intention of the legislature in enacting section 57 and 58 of the County Government Act, and in making the Secretary a member of the Board, a valid question has been raised by the respondent on how that sits with comparable situations in other Boards and commissions created under *the constitution*¹ and other statutes². A perusal of the two statutes creating the Public Service Commission and the Higher Education Loans Board, for example show that, unlike Section 58, County Government Act, stipulating for the County Public Service Board, there is a deliberate effort to define and determine the functions of the secretary. In the two statutes, there is no tie of the tenure of the secretary to that of the Board. That is the architecture I get the advisory by the Law Reform Commission to recommend based on global best practices. May it is time for the legislature to relook the statute as it regards the Board and its secretary.

27. This court while respecting the duty of the legislature in making the law, takes the view that for the sake of protecting the desired institutional memory and succession, *the constitution* of the Board, as an independent body with perpetual succession, needs to be staggered and the tenure of the secretary delinked from that of the Board.
28. The record in this file reveals that the interested party together with other members of Meru County Public Service Board were appointed on 12/7/2013. They served until 11/7/2019 when their term of office lawfully expired. At the expiry of that term, the 2nd respondent advertised for the positions of Chairperson and 4 other members of the County Public Service Board in various media platforms but without an advert for the position of the county secretary. The justification and rational for such action as put forth by the respondents and the interested party is that for the sake of continuity and institutional memory, the Transition Authority and the Law Reform Commission had separately advised that the Secretary, is better designated as the chief executive office and the accounting office when properly appointed under the Finance Act and therefore only an ex officio member of the board as its secretary without the right to participate in decision making nor a vote.
29. While the position of the respondent and the interested party may be the most logically attractive position to take, this is a court of law applying the law as it is and not necessarily as it ought to be. The reading of the law creating the Board is clear that the secretary is a member of the board whose term of office is equated with that of the Board and limited to a non-renewable term of six (6) years.
30. As a member of the Board, the procedure for appointment is stipulated in a fashion I find equivocal by sections 58 and 58A of the Act. I find the two provisions equivocal in that while 58 provides that the secretary shall be appointed by the Governor with approval of the Assembly, section 58A in seeking to provide the procedure for nomination does not direct the Governor to send the names of the persons nominated as secretary to the Assembly as it commands for the Chairman and the members. That is an anomaly that requires legislative action for clarity. Maybe it is the need for such clarity that informed the County Assembly of Bomet, to enact the Bomet County Public Service Act, 2019, which notably, among other things, designates the secretary as the secretary to the Board, head of the secretariat and caps the term of the secretary to seven years. I see that as a deliberate move to clarify the position of the secretary and to delink the term from that of the board so that every time there is at least one person to carry the institutional memory
31. That notwithstanding, however, the law on the term of the secretary caps it at six year and I see no liberty or power upon the 1st respondent to extend that statutorily fixed term. This is the interpretation

¹ Section 15, Public Service Commission Act

² Section 5, Higher Education loans Board Act



that a plain reading of the statute yields. For that reason, the conclusion the court must draw is that the extension of the term was not in line with the law and thus should not be left to stand. I declare that a governor has no mandate to extend a term fixed by statute.

32. Having come to the foregoing conclusions on delay in bringing the petition and on its merit, I must now decide if the remedies sought by the petitions are indeed the appropriate remedies to make. Some of the prayers seek to nullify the actions and decisions of the board and therefore undo all that has happened for the entire period including the period of the unexplained delay. That has the undesired effect of a blanket order incapable of identifying the ramifications of actions targeted for nullification and without identifying the persons capable of being affected adversely and who may not be parties to this case. Such would run affront the rules of natural justice and result in an undesirable outcome of this judgment. On the same score, I have found no impropriety to have been proved against the interested party to justify an order that her occupation of the office was illegal and therefore that she refunds all the sums paid to her and for her benefit by virtue of her tenure now impugned
33. Having given due regard to the prayers as crafted I do order as follows; -
- a. The 1st and 2nd respondents shall forthwith and within 45 days from the date of this judgment, initiate the due process, under the law, of nominating and appointing a suitable Kenyan to the office of the Secretary, County Public Service Board, Meru.
 - b. The process once initiated be concluded within 90 days from the date hereof.
 - c. In order that the Board is not crippled or its operations jolted, the Interested party shall remain in office pending the appointment of the secretary as ordered.
 - d. Being a public interest litigation and not accentuated by personal interests, I direct that each party shall bear own costs.

DATED, SIGNED AND DELIVERED AT KAKAMEGA, ONLINE, THIS 25TH DAY OF MAY 2022.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

No appearance for the Petitioner

Mr. Materi for the Respondents

Mr. Materi for the Interested Party

Court Assistant: Mwenda

